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Editorial: **A New Decade for *European Papers***

*Ramses A. Wessel**

This is the first issue of the 10th volume of *European Papers: A Journal on Law and Integration*. Established a decade ago, *European Papers* was founded with the aim of providing insights into the state of European integration. It is no coincidence that the journal's name may remind readers of the *Federalist Papers*, which articulated the legal and philosophical foundations behind the establishment of the United States of America.

In the editorial of the journal's inaugural issue, written by 'E.C.', the following statement was made:

'This is certainly not the most propitious time to publish a journal 'on Law and Integration'. [...] It is disintegration, not integration, that seems to be the dominant motive behind contemporary events in Europe; it is the panacea offered to soothe the fears raised by the multiple crises that hold the present state of Europe in a tight grip; it is the invisible thread binding together the anxieties underlying scholarly discussions about its future. It is not our task to determine the multifarious factors – social, political, or cultural – that have led to the current state of affairs. But the analysis of law as a possible disintegration factor clearly falls within our purview.'

This statement remains as relevant today as it was then. However, in recent weeks, we have witnessed a new wave of integration rather than disintegration. Additionally, the role of law as a potential integrating force has resurfaced on the agenda, driven less by internal crises and more by global shifts in events.

European Papers is truly a European project. It is not based in any single country or city but is transnational in its structure. Nonetheless, without the strong support

* Editor-in-Chief. This Editorial is also written on behalf of the entire Executive Editorial Board, which also consists of Dr. Justin Lindeboom and Prof. Dr. Nicola Napoletano (Deputy Editors-in-Chief). EP's Managing Editor is Dr. Marco Fiscaro.



of the dedicated teams at Sapienza University and UnitelmaSapienza University in Rome, the journal would not have achieved the status it holds today. Many younger (and a few more senior) colleagues have devoted weeks, months, and even years to reviewing and editing submissions, shaping *European Papers* into one of the leading journals on European law.

Celebrating ten years of existence is also a great opportunity to reflect on some impressive statistics. Between 19 April 2016 and 11 March 2025, our journal's website attracted a total of 7.470.000 visitors. During this period, 70.850 PDFs were downloaded, and 406.270 articles were viewed. We currently have 179.294 active users worldwide, with at least 50 active users in 100 different countries. Over the years, we have published 27 issues, featuring 820 contributions from 680 authors.

The founding of *European Papers* was driven by a sense of idealism. We believed that the academic community itself should control what it publishes, from inception to dissemination. Furthermore, we held the conviction that scholarship on European integration should be freely accessible to all. Thus, instead of relying on a commercial publisher, we built the journal through the dedication and hard work of academics, ensuring that three solid issues are published online each year.

In a way, *European Papers* has become a victim of its own success. Its global reach, ease of access without the need for an account, and capacity to publish more content per issue than most journals quickly made it a highly attractive platform for diverse analyses of European integration. The journal has also become a preferred outlet for *Special Sections* – dedicated thematic parts of issues. In many cases, these *Special Sections* have comprised entire issues, and it is not uncommon for an issue to contain more than one.

Although journal issues continue to form the backbone of our publication structure, individual articles are published online as soon as their final edited versions are available. As we enter a new decade, we do so with a slightly revised team and an updated layout.

Regarding the editorial team, most of our founding members remain, but we have also welcomed new Editorial Board members. The most significant change is that our 'founding father', Professor Enzo Cannizzaro, has decided to shift his focus to other endeavours. Enzo's dedication to the journal has been extraordinary. He has likely read most of what has been published in *European Papers*, spending countless hours reviewing and refining articles. Although he never wished to be seen as the Editor-in-Chief ('*European Papers* is a collective effort'), his leadership has been essential in shaping and advancing the journal. Fortunately, Enzo will continue to be involved as an *Honorary Editor*.

As for the journal's layout and author guidelines, we initially introduced a distinctive and visually appealing format, accompanied by detailed submission guidelines that set *European Papers* apart. Thanks to Nicola Napoletano's boundless creativity and commitment, the journal has maintained its strong aesthetic and editorial standards. However, we have also taken note of feedback from authors suggesting that our formatting requirements were overly complex. Moving forward, articles will align more closely with the conventions of other legal journals, and our submission guidelines will reflect the standard practices familiar to scholars in the field. We remain open to further suggestions for improvement.

The *Forum* was a key feature of our first decade, designed to facilitate the rapid publication of shorter *Highlights* and *Insights*. However, with this issue, we bid farewell to the *Forum*. Several online platforms now provide even faster publication options for short, topical contributions. Additionally, our rigorous review process often resulted in delays that undermined the original purpose of the *Forum*. Moreover, the ambiguous status of *Forum* contributions – neither full articles nor informal pieces – created uncertainty for authors regarding their academic recognition. Going forward, all contributions will be categorised as *Articles*, though there will still be variations in length.

We extend our sincere gratitude to the early-career colleagues who have now left the editorial support team. We hope they take pride in having contributed to this project over the years.

Finally, this issue also marks the last *Editorial*. One reason is that nearly all past editorials were written by Enzo Cannizzaro, whose high standards would be difficult to match. Additionally, alternative platforms now exist for timely analyses of current events in European law. However, *European Papers* remains committed to providing in-depth assessments that collectively capture the state of European integration. The present moment offers no shortage of reasons to continue this important work.

‘Concretised’, ‘Flanked’, or ‘Standalone’? Some Reflections on the Application of Article 2 TEU

Lucia Serena Rossi*

TABLE OF CONTENTS: 1. The pending case *Commission v Hungary* (C-769/22) – 2. Respect for Article 2 TEU as a duty inherent to the EU membership – 3. A system of interconnected values and principles – 4. The relationships between Article 2 TEU and the Charter of Fundamental Rights – 5. The Hungarian overall challenge to Article 2 TEU – 6. Applying Article 2 TEU: ‘concretised’, ‘flanked’, or ‘standalone’?.

ABSTRACT: The present article aims to assess some delicate constitutional issues raised by the pending case *Commission v Hungary* (C-769/22). It first explains the general duty for Member States to respect the values of Article 2 TEU as an essential requirement of their EU Membership, within the meaning of the judgment *Repubblika*. Then, it dwells upon the model provided by Article 2 TEU, the interconnection among its values and principles, and the connections of those values with other principles affirmed by the Treaties and analyses the extraordinarily comprehensive violation of that model by the Hungarian legislation. Finally, it argues that there are three different potential dimensions for applying Article 2 TEU.

KEYWORDS: Article 2 TEU – self-standing application – non-regression – model of EU values – Hungary – infringement action.

1. The pending case *Commission v Hungary* (C-769/22)

The pending case *Commission v Hungary*,¹ whose hearing was broadcast on 19 November 2024,² provides an opportunity to elaborate more general reflections on the

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¹ Case C-769/22 *Commission v Hungary* (action brought on 19 December 2022, pending).

² For first comments and reports on the hearing, see S Okunrobo, ‘Case C-769/22: A Further Step in the Protection of the Fundamental Rights within the European Union’ (European Law Blog, 17 May 2023), at www.europeanlawblog.eu; T Chopin and E Leclerc, *The Legal Case against Hungary’s Anti-LGBTIQ+ Law: A Shift in the Protection of the Fundamental Rights of the European Union* (Notre Europe Jacques Delors Institute Policy Brief, October 2023), at institutdelors.eu; W Bruno, ‘Three Questions to Rule (On) Them All: The Full Court Hearing in the Case Commission v. Hungary on the

use of Article 2 TEU. This case concerns a challenge to the values of Article 2 TEU so new and unparalleled in gravity that it required the Court to sit in full session. The Commission brought an infringement action against Hungary for issuing in 2021 Law LXXIX, adopting stricter measures supposedly against paedophilia and amending certain laws for the protection of children.

According to the Commission, Hungary has failed to fulfil its obligations under EU law by prohibiting children from accessing content portraying gender identities that do not correspond to the sex assigned at birth, sex reassignment or homosexuality; by imposing on media service providers an obligation to classify under a particular category and between 22.00 and 05.00, all programmes the essential element of which is the promotion or portrayal of gender identities that do not correspond to the sex assigned at birth, sex reassignment or homosexuality, and by excluding such programmes from classification as public interest media or as socially beneficial advertising; by imposing on the Media Council an obligation to request that the Member State having jurisdiction over the media service provider take effective measures and take action to put an end to infringements detected by the Media Council; by prohibiting professions related to sexual culture, sexual life, sexual orientation and sexual development from being aimed at the promotion of gender identities that do not correspond to the sex assigned at birth, sex reassignment or homosexuality and by imposing on the body with direct access to the registered data an obligation to make available, to persons entitled to access them, the registered data of persons who have committed, against children, offences against sexual freedom and sexual morality.

The Hungarian legislation applies to different subjects: all children or young adults on the Hungarian territory, their parents, churches, schools, media services and electronic commerce providers. Claiming to fight paedophilia, the new legislation imposes on those subjects different restrictions or obligations, with the declared objective to prevent children and young adults from accessing any content that is pornographic, pictures sexuality, represents or promotes gender identities not corresponding to sex at birth, sex reassignment, or homosexuality. That legislation received very critical opinions from the Venice Commission³ and at the EU institutional level.⁴

Justiciability of EU Values against Member States (C-769/22)' (EU Law Live, 25 November 2024); L Kaiser, A Knecht and LD Spieker, 'European Society Strikes Back: The Member States Embrace Article 2 TEU in *Commission v Hungary*' (Verfassungsblog, 26 November 2024), at verfassungsblog.de.

³ Venice Commission, 'Opinion 1059/2021 on the compatibility with international human rights standards of Act LXXIX amending certain Acts for the protection of children' (10–11 December 2021).

⁴ See, in particular, European Parliament, 'Resolution of 8 July 2021 on breaches of EU law and of the rights of LGBTIQ citizens in Hungary as a result of the legal changes adopted by the Hungarian Parliament' (2021/2780(RSP)). On the reactions of the EU institutions, see M Bonelli and M Claes, 'Crossing the Rubicon? The Commission's Use of Article 2 TEU in the Infringement Action on LGBTIQ+ Rights in Hungary' (2023) 30 *Maastricht Journal of European and Comparative Law* 3.

The Commission’s action is based on several pleas concerning the violation of different sources of EU law. Some alleged violations regard internal market rules, notably the freedom to provide services, such as Article 56 TFEU, the Audiovisual Media Services Directive,⁵ the E-Commerce Directive⁶ and the general Service Directive.⁷ Others concern fundamental rights, as protected by the General Data Protection Regulation (GDPR)⁸ and the Charter of Fundamental Rights (notably by Articles 1, 7, 8, 11 and 21). Moreover, the Commission also charges Hungary of violating Article 2 TEU, not in combination with other EU rules, but as an autonomous plea. While the other pleas, as serious as they can be, are ‘classical’, the one concerning the use in an infringement action of Article 2 TEU as a self-standing provision is new. It is precisely on that plea that the parties intervening at the hearing were requested to focus and to concert their pleadings (*‘concentration et concertation des plaidoiries’*).

The present article aims to assess some delicate constitutional issues raised by that plea, whose importance stretches far beyond the pending case, arguing that there are three different potential dimensions for applying Article 2 TEU. It will first explain the general duty for Member States to respect the values of Article 2 TEU as an essential requirement of their EU membership, within the meaning of the judgment *Repubblika* (section 2); it will then dwell upon the model provided by Article 2 TEU, the interconnection among its values and principles, and the connections of those values with other principles affirmed by the Treaties (section 3) and with the Charter of Fundamental Rights (section 4); it will subsequently analyse the extraordinarily comprehensive violation of that model by the Hungarian legislation (section 5). Finally, the article will try to answer three important questions concerning the different uses of Article 2 TEU in relation to the powers of the Union (section 6).

2. Respect for Article 2 TEU as a duty inherent to the EU membership

In *Achmea*, the Court of Justice affirmed that EU law is based ‘on the fundamental premiss that each Member State shares with all the other Member States and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU’.⁹

⁵ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services.

⁶ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

⁷ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.

⁸ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.

⁹ Case C-284/16 *Slovak Republic v Achmea BV*, EU:C:2018:158, para 34 and the case law cited.

According to the Court,

‘Member States are obliged, by reason inter alia of the principle of sincere cooperation set out in the first subparagraph of Article 4(3) TEU, to ensure in their respective territories the application of and respect for EU law, and to take for those purposes any appropriate measure, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the EU’.¹⁰

Respecting the values and principles of Article 2 TEU is an essential requirement of the EU membership, as it results from a joint reading of Article 2 TEU and Article 49 TEU.¹¹

The inherent connection between Article 2 TEU and the EU membership emerged for the first time in *Wightman*,¹² with reference to the values of liberty and democracy. The Court noted that:

‘[a]s is apparent from Article 49 TEU, which provides the possibility for any European State to apply to become a member of the European Union [...] the European Union is composed of States which have freely and voluntarily committed themselves to those values, and EU law is thus based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that those Member States share with it, those same values’.¹³

In *Repubblica*¹⁴ the Court made a step forward.¹⁵ First, it noted that the European Union is composed of states that, according to Article 49, have freely and voluntarily committed themselves to respect the common values referred to in Article 2 TEU and to ‘undertake to promote them’.¹⁶ Then the Court added that ‘compliance by a Member State with the values enshrined in Article 2 TEU is *a condition for the en-*

¹⁰ Ibid.

¹¹ LS Rossi, ‘2, 4, 6 (TUE)...l’interpretazione dell’“Identity Clause” alla luce dei valori fondamentali dell’UE’ in R Adam, V Cannizzaro and M Condanzi (eds), *Liber Amicorum Antonio Tizzano. De la Cour CECA à la Cour de l’Union: le long parcours de la justice européenne* (Giappichelli 2018) 858; LS Rossi, ‘La valeur juridique des valeurs, L’article 2 TUE: relations avec d’autres dispositions de droit primaire de l’UE et remèdes juridictionnels’ (2020) 56 *Revue trimestrielle de droit européen* 640.

¹² Case C-621/18 *Andy Wightman and Others v Secretary of State for Exiting the European Union*, EU:C:2018:999.

¹³ Ibid para 63.

¹⁴ Case C-896/19 *Repubblica v Il-Prim Ministru*, EU:C:2021:311, paras 63–64.

¹⁵ As noted by A von Bogdandy and LD Spieker, ‘Transformative Constitutionalism in Luxembourg: How the Court Can Support Democratic Transitions’ (2023) 29 *Columbia Journal of European Law* 74, the Court in this judgment, still combining Art 2 with Art 19 TEU, put the former at the centre of the reasoning.

¹⁶ *Repubblica* (n 14) paras 61–62.

joyment of all of the rights deriving from the application of the Treaties to that Member State’.¹⁷ On these grounds the Court affirmed the so-called ‘principle of non-regression’:¹⁸

‘A Member State cannot therefore amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law. [...] The Member States are thus required to ensure that, in the light of that value, any regression of their laws on the organisation of justice is prevented, by refraining from adopting rules which would undermine the independence of the judiciary’.¹⁹

The line of reasoning developed in *Repubblika* was confirmed by *Asociația Forumul Judecătorilor*,²⁰ *Eurobox*,²¹ and by the twin judgments on conditionality *Hungary v European Parliament and Council*²² and *Poland v European Parliament and Council*²³ (insofar as they are coincident, only the former will be quoted hereinafter). Reference to a regression in the legislation of Member States can also be found in the Opinions of some Advocates General.²⁴

Moreover, after this judgment, the old ‘Copenhagen Criteria’²⁵ and their assessment²⁶ should be read in the light of Article 2 TEU and the relevant case law of the

¹⁷ Ibid para 63 (emphasis added).

¹⁸ On this principle see M Leloup, D Kochenov and A Dimitrovs, ‘Opening the Door to Solving the “Copenhagen Dilemma”? All Eyes on *Repubblika v Il-Prim Ministru*’ (2021) 46 *European Law Review* 692.

¹⁹ *Repubblika* (n 14) paras 63–64.

²⁰ 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’ and Others*, EU:C:2021:393.

²¹ Sometimes the Court uses the term ‘precondition’. See Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19 *Euro Box Promotion and Others*, EU:C:2021:1034, para 161 and the case law cited therein.

²² Case C-156/21 *Hungary v European Parliament and Council*, EU:C:2022:97.

²³ Case C-157/21 *Poland v European Parliament and Council*, EU:C:2022:98.

²⁴ See the Opinion of AG Campos Sánchez-Bordona in Case C-156/21 *Hungary v European Parliament and Council*, EU:C:2021:974, para 214; the Opinions of AG Collins in Joined Cases C-181/21 and C-269/21 *G and Others v MS and X*, EU:C:2022:990, paras 54–55, and in Case C-817/21 *RI v Inspeccia Judicială and NL*, EU:C:2023:55, para 51; the Opinion of AG Rantos in Case C-718/21 *LG v Krajowa Rada Sądownictwa*, EU:C:2023:150, para 32; and the Opinion of AG Pikamäe in Joined Cases C-554/21, C-622/21 and C-727/21 *Financijska agencija v Hann-Invest d.o.o. and Others*, EU:C:2023:816, paras 5 and 69.

²⁵ See C Hillion ‘The Copenhagen Criteria and their Progeny’ in C Hillion (ed), *EU Enlargement: A Legal Approach* (Hart Publishing 2004).

²⁶ For a critical analysis of the pre-accession procedures see D Kochenov, ‘Behind the Copenhagen Facade. The Meaning and Structure of the Copenhagen Political Criterion of Democracy and the Rule of Law’ (2004) 8 *European Integration Online Papers* 1; and D Kochenov, *EU Enlargement and the Failure of Conditionality* (Wolters Kluwer 2008). According to I Jarukaitis, *The European Union as a Community of Values: The Importance of the Dialogue between the Court of Justice of the European Union and National Courts* (Vilnius University Press 2024) 25, ‘there was no separate negotiating chapter on the “protection of fundamental rights” or the “rule of law”, although the reading of the European Commission’s

CJEU, requiring the European Commission to watch, with particular attention in the pre-accession negotiations and in post-accession, the respect for the values of Article 2 TEU.²⁷ That induced the Commission to include also the candidate countries in its annual report on the rule of law situation in the EU.²⁸

Regression is a litmus test that EU institutions can use as a warning sign to detect and a tool to assess the gravity of a violation of the values contained in Article 2 TEU. In this regard, it can be said that the rule applies to all the values enshrined therein, independently of the fact that the case law of the Court has so far dealt solely with the rule of law element.

However, considering some doubts raised in legal literature,²⁹ certain aspects must be clarified. First, there can be no automatism: non-regression does not mean that national legislation can never change. Not every regression should be relevant, but only serious, persistent, and systemic ones.³⁰ In other words, only regressions having a significant negative impact on the values of Article 2 TEU may be relevant. Non-regression means no ‘backsliding’, which is a systemic concept.³¹ Second, a regression in

opinions on the candidate countries’ applications for accession and of the annual progress reports on accession to the EU shows that the Commission always included in its assessment of the candidate countries their conformity with the Copenhagen political criteria, including compliance with the principles of democracy, the rule of law and respect for fundamental rights. However, the overall analysis of this criterion was visually overshadowed by a detailed assessment of the capacity to assume the obligations arising from the membership in specific negotiating chapters [...] It is interesting to note in retrospect that at the time it was the economic issues that were more of a concern than the questions related to the values of the EU’.

²⁷ In this light, Jarukaitis (n 26) suggests that a separate negotiating chapter devoted to the Copenhagen Criteria directly related to Art 2 TEU could increase the awareness of the candidate States and their citizens. On the effects of the judgment on the pre-accession, see also A Łazowski, ‘Strengthening the Rule of Law and the EU Pre-Accession Policy: *Repubblika v. Il-Prim Ministru*’ (2022) 59 *Common Market Law Review* 1803.

²⁸ European Commission, ‘Communication: 2024 Rule of Law Report: The rule of law situation in the European Union’, COM(2024) 800 final.

²⁹ See LD Spieker, ‘The Conflict over the Polish Disciplinary Regime for Judges – An Acid Test for Judicial Independence, Union Values and the Primacy of EU Law: *Commission v. Poland*’ (2022) 59 *Common Market Law Review* 777; and J Scholtes, ‘Constitutionalising the End of History? Pitfalls of a Non-Regression Principle for Article 2’ (2023) 19 *European Constitutional Law Review* 59.

³⁰ On the concept of systemic violations, see M Ioannidis and A von Bogdandy, ‘Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done’ (2014) 51 *Common Market Law Review* 59; KL Scheppele, D Kochenov and B Grabowska-Moroz, ‘EU Values Are Law, After All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union’ (2020) 39 *Yearbook of European Law* 3; A von Bogdandy, ‘Principles of a Systemic Deficiencies Doctrine: How to Protect Checks and Balances in the Member States’ (2020) 57 *Common Market Law Review* 705.

³¹ The concept of ‘backsliding’ has been introduced by L Pech and KL Scheppele, ‘Illiberalism Within: Rule of Law Backsliding in the EU’ (2017) 19 *Cambridge Yearbook of European Legal Studies* 3. According to those authors, ‘[t]hese are states where the rule of law had in fact been achieved and is now being systematically dismantled, which is a different sort of problem from not being able to achieve the rule of law in the first place. Backsliding implies that a country was once better, and then regressed’ (at 12).

the legislation or administrative practices in the concerned Member State should be evaluated, not in abstract terms but by carrying out an overarching analysis of the broader context and by taking into account its actual impact on society. Third, even if in *Repubblica* the comparison of the Maltese legal situation pre- and post-accession was crucial for the Court to adjudicate the matter,³² the condition of compliance with the values of Article 2 TEU, in light of Article 49 TEU, can be confined neither in time nor in space.

On the one hand, respect for these values is not limited to the time of accession, as, according to Article 49 TEU, the Member State must not only respect – at the time of accession – the values referred to in Article 2 TEU but must also be ‘*committed to promoting*’ those values.³³ This general commitment pertains to post-accession periods and mirrors the parallel obligation imposed on the Union by Article 3(1) TEU to promote its values. The Court clarified that ‘compliance with those values cannot be reduced to an obligation which a candidate State must meet to accede to the European Union and which it may disregard after its accession’.³⁴ It is precisely this commitment to promoting EU values that reinforces non-regression in relation to the principles of classic standstill³⁵ and *a fortiori* of the *rebus sic stantibus* rule under international law.³⁶ Moreover, this commitment implies that if, during the initial period of accession, some flexibility could be tolerated for new members in adjusting their systems, different levels of compliance with the values of Article 2 TEU at the time of accession cannot justify ongoing asymmetries among the Member States regarding those values.

On the other hand, the condition of respecting those values cannot be limited only to acceding States but concerns all Member States, including the founding ones. That necessarily stems from the general principles of EU law, notably from Article 4 TEU, which establishes the equality of Member States before the Treaties (paragraph 2)³⁷ and the principle of sincere cooperation (paragraph 3), which requires the

³² *Repubblica* (n 14) paras 59–60.

³³ See in this sense *Hungary v European Parliament and Council* (n 22) para 234.

³⁴ Ibid para 126. According to K Lenaerts, ‘On Checks and Balances: The Rule of Law within the EU’ (2023) 29 *Columbia Journal of European Law* 25, 63, ‘the level of value protection of the EU values within a Member State existing at the moment of acquiring that status is not the finish line but rather the starting point’.

³⁵ See Rossi, ‘2,4,6 (TUE)...’ (n 11).

³⁶ See Vienna Convention on the Law of Treaties [1969], Art 62.

³⁷ See on this principle LS Rossi, ‘The Principle of Equality Among Member States of the European Union’ in LS Rossi and F Casolari (eds), *The Principle of Equality in EU Law* (Springer 2017) 1; LS Rossi, ‘Article 4 TEU on the Relationship between the EU and the Member States’ in C Campbell, P Herzog and G Zagel (eds), *Smit & Herzog on the Law of the European Union* (LexisNexis/Matthew Bender 2023). On the principle of sincere cooperation, see F Casolari, *Leale cooperazione tra Stati membri e Unione europea. Studio sulla partecipazione dell’Unione al tempo della crisi* (Editoriale Scientifica 2020).

Member States to refrain from any measure that could jeopardise attaining the Union's objectives.³⁸ Since, according to Article 3(1) TEU, the first of the Union's objectives is to promote its values, the interdiction of significative regression can also be seen as a qualified specification of the latter principle.

Respecting the values of Article 2 TEU is, therefore, the condition not only for becoming a 'Member of the Club', but also for fully 'staying in the Club'. That is confirmed by the procedures of Article 7 TEU and, more recently, by the adoption of the Regulation on Conditionality,³⁹ linking solidarity to the respect of the values of Article 2 TEU.⁴⁰ EU membership could also be seen as an 'inclusive package', where the costs in terms of sovereignty and the benefits of being part of a common system go hand in hand.

Furthermore, respecting the values of Article 2 TEU is a duty of each Member State towards both the Union and the other Members. The Court of Justice has constantly affirmed that respect for the values of Article 2 TEU is also the foundation of the mutual trust between the Member States.⁴¹

It is important to point out that the values and principles contained in Article 2 TEU do not come out of the blue with the Treaty of Lisbon, nor have they been 'invented' by the Court of Justice. They are the result of a slow and cautious process of constitutionalisation at the level of primary law of the European Union. This process started with the Treaty of Maastricht (that created the Union), notably with its Preamble,⁴² passing through the introduction by the Treaty of Amsterdam of a new first paragraph in Article F TEU⁴³ and a new Article F1, later transformed into Article 7 TEU by the Treaty of Nice, until Article I.2 of the Constitutional Treaty, whose text has been transferred into what is currently Article 2 TEU.

³⁸ See Opinion 2/13 on EU accession to the ECHR, EU:C:2014:2454, para 173: 'The Member States are obliged, by reason, inter alia, of the principle of sincere cooperation set out in the first subparagraph of Article 4(3) TEU, to ensure, in their respective territories, the application of and respect for EU law. In addition, pursuant to the second subparagraph of Article 4(3) TEU, the Member States are to take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties'.

³⁹ Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.

⁴⁰ See *Hungary v European Parliament and Council* (n 22) para 129: 'the Union budget is one of the principal instruments for giving practical effect, in the Union's policies and activities, to the principle of solidarity, mentioned in Article 2 TEU, which is itself one of the fundamental principles of EU law'.

⁴¹ See Opinion 2/13 (n 38) para 168: 'EU law is thus based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised, and therefore that the law of the EU that implements them will be respected'.

⁴² The Preamble affirmed that the Members States were 'confirming their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law'.

⁴³ Art F: 'The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States'.

This evolution confirms that the choice of the values on whom the European Union is founded has been pondered and deliberated. As the Court noted, the values contained in Article 2 TEU ‘have been identified by the Member States’.⁴⁴ The duty of respecting the values of Article 2 TEU has undoubtedly not been imposed on Member States against their will since, by ratifying the Treaty of Lisbon (or successive accession Treaties), they accepted Articles 2 and 49, thus freely and voluntarily committing themselves to respect and promote those values. Consequently, similarly to what happens for the concept of ‘common constitutional traditions’,⁴⁵ once those values have been identified and accepted by the Member States, they become ‘common’, so that they cannot be unilaterally waved by a single State.

3. A system of interconnected values and principles

According to Koen Lenaerts, the values of Article 2 TEU ‘are embedded in the very DNA of the European integration project. Those values are the soul of the EU that enables the Member States to grow together whilst preserving their national identity’.⁴⁶ They are part of the European ‘constitutional framework’ that the Court explicitly mentioned in Opinion 1/17.⁴⁷ As the Court of Justice clarified in the twin judgments on conditionality, Article 2 TEU enshrines the founding values and principles that ‘define the very identity of the European Union as a common legal order’, an identity that the European Union ‘must be able to defend’. According to those judgments, ‘Article 2 TEU is not merely a statement of guidelines or intentions, but contains values, [...] which are given concrete expression in principles containing legally binding obligations for the Member States’.⁴⁸

Moreover, Article 2 TEU is not just a list of disconnected values and principles but, as the Court stated in *Opinion 2/13*, ‘a set of common values on which the Union is founded’.⁴⁹ In other words, a system of interconnected values that provides a model for EU membership. That model entails a wide margin of appreciation for each Member State in deciding the national ‘value-mix’ and its practical implementation in society in the light of its Constitution. Although in academic literature there are many different

⁴⁴ *Hungary v European Parliament and Council* (n 22) para 127.

⁴⁵ See LS Rossi, ‘Autonomie constitutionnelle de l’Union européenne, droits fondamentaux et méthodes d’intégration des valeurs “externes”’ in A Iliopoulou and L Xenou (eds), *La Charte des droits fondamentaux, source de renouveau constitutionnel européen* (Bruylant 2020) 57.

⁴⁶ Lenaerts (n 34) 61.

⁴⁷ Opinion 1/17 on the EU–Canada CETA, EU:C:2019:341, para 110.

⁴⁸ *Hungary v European Parliament and Council* (n 22) para 232.

⁴⁹ Opinion 2/13 (n 38) para 168: ‘This legal structure is based on the fundamental premise that each Member State shares with all the other Member States and recognises that they share with it a set of common values on which the EU is founded, as stated in Article 2 TEU’.

takes on this point,⁵⁰ *RS*⁵¹ indicates that Article 2 TEU could neither ‘harmonise’ national constitutions nor confer new competence to the Union. Still, Article 2 TEU expresses the essential features of the European identity ‘as a common legal order’ and, at the same time, the essence of the EU membership, and, as has been highlighted above, no unilateral derogation to this model could be accepted.

In *RS* the Court struck the delicate balance between national identity and European identity, in respect to Articles 2 and 19 TEU. On the one hand,

‘neither Article 2 TEU nor the second subparagraph of Article 19(1) TEU, nor any other provision of EU law, requires Member States to adopt a particular constitutional model governing the relationships and interaction between the various branches of the State, in particular as regards the definition and delimitation of their competences. Indeed, under Article 4(2) TEU, the European Union must respect the national identities of the Member States, inherent in their fundamental political and constitutional structures’.⁵²

On the other hand, the same judgment affirms that: ‘in choosing their respective constitutional model, the Member States are required to comply, *inter alia*, with the requirement that the courts be independent stemming from the abovementioned provisions of EU law’.⁵³ If Article 4(2) TEU recognises that the Union must respect the national identities of the Member States, the same Article also affirms the principle of equality of those States before the Treaties. The formula ‘United in diversity’ resumes the balance between national constitutional identities and a European identity⁵⁴ based on the essential requirements inherent to membership, which, as affirmed in *Repubblica*, are grounded on Articles 2 and 49 TEU.

⁵⁰ According to Lenaerts (n 34) 53: ‘Article 2 TEU requires an “alignment”, but not a “constitutional modelling”, which would be contrary to the respect of national identity by the Union prescribed by Article 4 (2) TEU’. In the same sense, see P Mori, ‘Identità nazionale, valori comuni e condizionalità’ [2024] *Rivista Quaderni AISDUE* 218. According to von Bogdandy (n 30), that article only establishes ‘red lines’. See also A von Bogdandy and LD Spieker, ‘EU Values as Constraints and Facilitators in Democratic Transitions’ in M Bobek et al (eds), *Transition 2.0: Re-establishing Constitutional Democracy in EU Member States* (Nomos 2021) 119. See, however, W Schroeder, ‘Transition 2.0 and the Rule of Law Mainstreaming in the European Union’ in *ibid* 544, speaking of ‘minimum constitutional harmonisation’. According to LD Spieker, *EU Values Before the Court of Justice: Foundations, Potential, Risks* (Oxford University Press 2023) 278, ‘similarly to directives, Article 2 only contains an obligation of result’. The same author (*ibid* 171) speaks of ‘constitutional homogeneity’.

⁵¹ Case C-430/21 *RS* (*Effect of the decisions of a constitutional court*), EU:C:2022:99.

⁵² *Ibid* para 43.

⁵³ *Ibid*.

⁵⁴ On the concept of national identity, see G Di Federico, *L’identità nazionale degli stati membri nel diritto dell’Unione europea* (Editoriale Scientifica 2017). On the relationship between European identity and national identities, see Rossi, ‘Article 4 TEU’ (n 37). See also F Casolari, ‘Il processo di europeizzazione delle identità nazionali degli Stati membri: riflessioni sulle traiettorie del costituzionalismo europeo’ (2024) *Rivista Quaderni AISDUE* 267, who speaks of a ‘Europeanization of national identities’.

The model of values of Article 2, albeit very broad, is clear. In connection with the two first paragraphs of Article 10 TEU, it describes representative and participative democracies,⁵⁵ where the rule of law and human rights traditionally connected to democratic societies are granted. As the Court recently affirmed, ‘under Article 10(1) TEU, the functioning of the European Union is to be founded on representative democracy, which gives concrete expression to democracy as a value. Democracy is, under Article 2 TEU, one of the values on which the European Union is founded’.⁵⁶

This model, on the one hand, certainly draws on the constitutional traditions of the Member States⁵⁷ and international sources, notably the Council of Europe ecosystem, representing common constitutional choices and tracing the path for a common future. On the other hand, it is strongly anchored to the idea that a direct link exists between the Union and its citizens, creating rights that can be invoked against their States under the control of a strong, capillary and unitarian judicial system composed by the CJEU and the national judges. An idea that was born long before the introduction by the Treaty of Maastricht of the citizenship of the European Union, finding its first roots in the theory of direct effect, affirmed by *Van Gend & Loos* of 1963: in the logic of that judgment, the ‘newness’ of the EU legal order precisely consists in that direct link. From this perspective, the obligation to respect the values mentioned in Article 2 TEU is not only a duty of each Member State towards the Union and the other EU countries, it is also a duty towards the EU citizens and all other individuals falling in the scope of EU law.⁵⁸

As Article 2 TEU is a system of interdependent values,⁵⁹ it is important to consider the interconnections among the different parts of this article and the connections between the latter and other primary law provisions. Article 2 TEU is composed

⁵⁵ Case C-418/18 *Puppinck and Others v Commission*, EU:C:2019:1113, paras 64–65, and Case C-502/19 *Junqueras Vies*, EU:C:2019:1115, para 158. On Art 10 TEU and the principle of democracy, see J Cotter ‘To Everything There is a Season: Instrumentalising Article 10 TEU to Exclude Undemocratic Member State Representatives from the European Council and the Council’ (2022) 47 *European Law Review* 69, T Verellen, ‘Hungary’s Lesson for Europe: Democracy is Part of Europe’s Constitutional Identity. It Should be Justiciable’ (Verfassungsblog, 8 April 2022), at verfassungsblog.de; YL Bouzora, ‘The Value of Democracy in EU Law and Its Enforcement: A Legal Analysis’ (2023) 8 *European Papers* 809.

⁵⁶ Case C-808/21 *Commission v Czech Republic*, EU:C:2024:962, para 114. See, for first comments M Schuler, ‘Paving the Way for an Enforcement of Democracy under Article 10 TEU? The Court’s Judgments in Cases C-808/21 *Commission v Czechia* and C-814/21 *Commission v Poland*’ (European Law Blog, 20 November 2024), at www.europeanlawblog.eu.

⁵⁷ According to Casolari (n 54) 267, this has been a ‘bottom up’ process.

⁵⁸ As pointed out by Pech and Scheppele (n 31) 11, ‘Rule of law backsliding is a decisive issue for the whole EU because it not only affects the citizens of the country where this phenomenon is happening, but it also affects other EU citizens residing in any such ‘illiberal regime’ as well as, indirectly, all residents in the EU through these regimes’ participation in the EU’s decision-making processes and in the adoption of norms that bind all in the EU’.

⁵⁹ See in this sense K Lenaerts and JA Gutierrez-Fons, ‘High Hopes: Autonomy and the Identity of the EU’ (2021) 8 *European Papers* 1495, 1500.

of two paragraphs. The first paragraph enumerates the founding values: respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. The second paragraph mentions the principles⁶⁰ of pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men, referring to society. While the CJEU has already recognised the binding force of some of the values enshrined in the first paragraph, it seems more difficult to argue that each principle of the second paragraph has the same force and even more delicate would be the issue of their justiciability, if an analogy can be drawn with Article 52(5) of the Charter. However, being part of the same model, all the values and principles of Article 2 TEU are interconnected and operate in synergy.

The Court clarified the connection between the rule of law and other values and principles of Article 2 TEU:

‘While there is no hierarchy among Union values, respect for the rule of law is essential for the protection of the other fundamental values on which the Union is founded, such as freedom, democracy, equality and respect for human rights. Respect for the rule of law is intrinsically linked to respect for democracy and for fundamental rights. There can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa’.⁶¹

Furthermore, the principle of pluralism is strictly related to the value of democracy, which in turn is connected to the fundamental right to freedom of expression.⁶²

An interesting question arises about the meaning of the reference to ‘a society’ in the second paragraph of Article 2 TEU. Certainly, as highlighted in legal scholarship, Article 2 TEU establishes the values for the entire European society, which can be seen as a ‘singular collective’.⁶³ However, a Member State can only be found responsible for breaches of Article 2 in the national society, i.e. the part of the European society under its control. It can be argued that the second paragraph of Article 2 TEU indicates the principles to be implemented in society as a consequence of the duty to respect the values affirmed in the first paragraph both by the Member States and the European institutions. Therefore, the effects on society can be a benchmark for assessing the

⁶⁰ For an analysis of different theories on the relationships between principles and values see Spieker (n 50) 37–41.

⁶¹ *Hungary v European Parliament and Council* (n 22) para 6.

⁶² Case C-633/22 *Real Madrid Club de Fútbol and AE v EE and Société Éditrice du Monde SA*, EU:C:2024:843; and Case C-140/20 *Commissioner of An Garda Síochána and Others*, EU:C:2022:258 para 43.

⁶³ This concept has been introduced by A von Bogdandy, *The Emergence of European Society, through Public Law: A Hegelian and Anti-Schmittian Approach* (Oxford University Press 2024) 40. For a perspective of European society as an empirical entity, see L Azoulay, ‘The Law of European Society’ (2022) 59 *Common Market Law Review* 203; L Azoulay, ‘Reconnecting EU Legal Studies to European Societies’ (Verfassungsblog, 19 March 2024), at verfassungsblog.de.

State’s breach of the principles and values of Article 2 TEU, notably the systemic dimension, seriousness and persistence of the violation, and a significant regression. The EU membership requires not only formal respect for the values of Article 2 TEU but also their concrete application in society. NGOs, and civil society can all contribute to monitoring the impact on society of the violations of Article 2 TEU.⁶⁴

The fact that the effects on society can be regarded as a benchmark of the respect of the EU values is confirmed in the conditionality case *Hungary v European Parliament and Council*, where the Court affirmed that ‘a Member State whose society is characterised by discrimination cannot be regarded as ensuring respect for the rule of law, within the meaning of that common value’.⁶⁵ This statement also shows how the interconnection between values and principles in Article 2 TEU works: the violation in society of one of the principles of the second paragraph (discrimination) is symptomatic of the breach of one of the values affirmed in the first paragraph (the rule of law).

Besides the ‘internal’ connections among values and principles of Article 2, the model of this provision reflects – and is reflected by – other provisions of the Treaties and the Charter of Fundamental Rights. The Court has so far decided many cases relating to *single values* contained in Article 2 TEU, always *in connection* with other EU law provisions. It is interesting to consider the nature of such connections and their reach.

The Court started developing its case law on Article 2 TEU from the rule of law. Several judgments based on Articles 2 TEU, 19 TEU, and sometimes also Article 47 of the Charter, focused on the breaches of the rule of law, notably on the threats to judicial independence⁶⁶ or fair trial.⁶⁷ Such threats are particularly dangerous for the EU legal order. The judicial dialogue between the Court of Justice and the national judiciary is, in fact, essential to the functioning of the preliminary ruling mechanism, which allows the Court to grant uniform application of the EU law, as well as to guarantee the equality of the Member States and the citizens before that law.

The Court has always underlined that Article 19 TEU⁶⁸ expressly refers to the ‘fields covered by Union law’, ‘irrespective of whether the Member States are implementing Union law within the meaning of Article 51 of the Charter’.⁶⁹ A new

⁶⁴ Some theoretical instruments have been proposed concerning the rule of law, such as the Venice Commission’s Rule of Law Check List, adopted in Venice, 11–12 March 2016, at www.venice.coe.int; the studies of the UN International Law Development Organisation, ‘Measuring the Rule of Law: It Works When It Creates a Culture of Justice’, at www.idlo.int; or the OECD, ‘Strengthening the Rule of Law: Making the Case’, at commission.europa.eu. See also T Ginsburg and M Versteeg, ‘Rule of Law Measurement’ in J Meierhenrich and M Loughlin (eds), *The Cambridge Companion to the Rule of Law* (Cambridge University Press 2021) 494.

⁶⁵ *Hungary v European Parliament and Council* (n 22) para 229.

⁶⁶ See, recently, Case C-197/23 *S.S.A. v C sp. z o.o.*, EU:C:2024:956, and the case law cited therein.

⁶⁷ Case C-819/21 *Staatsanwaltschaft Aachen v MD*, EU:C:2023:841.

⁶⁸ On the use of Art 19 TEU in infringement actions and in preliminary references, see Lenaerts (n 34) 36.

⁶⁹ See Case C-192/18 *Commission v Poland (Independence of the ordinary courts)*, EU:C:2019:924, para 101 and the case law cited.

action against Poland is now pending before the Court, concerning the violation of Articles 2, 4(3) and 19 TEU.⁷⁰ As regards the nature of the connection between Articles 2 and 19 TEU, the Court, starting from *Associação Sindical dos Juízes Portugueses*, has often repeated that the latter ‘concretise’⁷¹ (*‘concrétise’* in the original French text), i.e. ‘gives concrete expression to the value of the rule of law affirmed in Article 2 TEU’.⁷² Different wording (but in the French version, it is always *‘concrétiser’*) has been used by the Court to define the relationship between Article 2 and Article 10 TEU: ‘Article 10(1) TEU provides that the functioning of the Union is to be founded on the principle of representative democracy, which gives concrete form to the value of democracy referred to in Article 2 TEU’.⁷³

Even if other languages use different terms (in Italian is *‘incarna’*, i.e. ‘embodies’), this formula seems to imply that Article 2 TEU need to be operationalised by other provisions of the Treaties, as it had no value *per se*. But what does this formula exactly mean? Article 19 TEU could have hardly been interpreted as in *Associação Sindical dos Juízes Portugueses* without the anchorage to the values of Article 2 TEU. In this case, the *concrétisation* is, at least, reciprocal and Article 2 TEU does not seem to be the ‘weak’ partner of the couple.⁷⁴ That is even more so regarding the relationship between Article 2 and the first paragraph of Article 10 TEU, which qualifies democracy as ‘representative’ when referring to the ‘functioning of the Union’: in this case, it is Article 2 TEU that calls Member States into play. The two provisions belong to the same model of EU values and work in synergy. As we will see in the last section of this article, Article 4(3) TEU could be added to this relationship in some cases.⁷⁵

⁷⁰ Case C-448/23 *Commission v Poland* (action brought on 17 July 2023, pending).

⁷¹ I use this Gallicism instead of the formula used in the English version of the CJEU judgments, which is ‘gives concrete expression’.

⁷² Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*, EU:C:2018:117, para 32. See also *Commission v Poland* (n 69) para 98 and the case law cited therein, and Case C-119/23 *Virgilijus Valančius v Lietuvos Respublikos Vyriausybė*, EU:C:2024:653.

⁷³ See Case C-207/21 P *Commission v Poland*, EU:C:2022:560; Case C-502/19 *Criminal proceedings against Oriol Junqueras Vies*, EU:C:2019:1115, para 63; and Case C-418/18 P *Patrick Grégor Puppink and Others v Commission*, EU:C:2019:1113, para 64.

⁷⁴ Rossi, ‘La valeur juridique des valeurs’ (n 11) 650. In addition, see LD Spieker, ‘Breathing Life into the Union’s Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis’ (2019) 20 *German Law Journal* 1182, 1206, speaking of ‘mutual amplification’, which seems to imply an equal-foot relationship between Art 2 TEU and other provisions of the Treaty.

⁷⁵ On the principle of sincere cooperation see F Casolari, ‘EU Loyalty after Lisbon: An Expectation Gap to Be Filled?’ in LS Rossi and F Casolari (eds), *The EU After Lisbon: Amending or Coping with the Existing Treaties* (Springer 2014); M Klamert, *The Principle of Loyalty in EU Law* (Oxford University Press 2014); T Roes, ‘Limits to Loyalty: The Relevance of Article 4(3) TEU’ (2016) 52 *Cahiers de droit européen* 253.

4. The relationships between Article 2 TEU and the Charter of Fundamental Rights

As the breaches of human rights in Article 2 TEU and of the fundamental rights of the Charter can be conceptually different, also in light of variable intensity and potential justifications, it is correct to represent them distinctly. In fact, the Court sometimes refers to human rights in Article 2 without leaning on the Charter.⁷⁶ That being said, massive violations of the Charter can indeed strengthen the plea based on serious and systemic violations of Article 2 TEU.

However, Article 2 TEU often appears in the case law of the Court in connection with the Charter of Fundamental Rights. In those cases, the ‘concretisation’ is not mentioned, and the Charter seems to flank Article 2 TEU on an equal footing. Beyond the cases concerning judicial independence, where Article 2 TEU and Article 47 Charter are considered with Article 19 TEU, the Court has examined other values affirmed by Article 2 TEU through the lens of the Charter.

In *Wightman*, the Court underlined the importance of the values of liberty and democracy, as referred to ‘in the second and fourth recitals of the preamble to the TEU, which are among the common values referred to in Article 2 of that Treaty and in the preamble to the Charter of Fundamental Rights of the European Union, and which thus form part of the very foundations of the European Union legal order’.⁷⁷ In *Patriciello*, the Court affirmed that ‘freedom of expression, as an essential foundation of a pluralist, democratic society reflecting the values on which the Union, in accordance with Article 2 TEU, is based, constitutes a fundamental right guaranteed by Article 11 of the Charter of Fundamental Rights of the European Union’.⁷⁸ Then, in *Tele2 Sverige* the Court underlined the particular importance of the right to freedom of expression in any democratic society, specifying that ‘that fundamental right, guaranteed in Article 11 of the Charter, constitutes one of the essential foundations of a pluralist, democratic society, and is one of the values on which, under Article 2 TEU, the Union is founded’.⁷⁹ Recently, in *Real Madrid*, the Court recalled that Article 11 of the Charter constitutes one of the essential foundations of a pluralist, democratic society and is one of the values on which, under Article 2 TEU, the European

⁷⁶ Joined Cases C-228/21, C-254/21, C-297/21, C-315/21 and C-328/21 *Ministero dell’Interno and Others (Common leaflet – Indirect refoulement)*, EU:C:2023:934, para 130 and the case law cited; Joined Cases C-331/16 and C-366/16 *K v Staatssecretaris van Veiligheid en Justitie and HF v Belgische Staat*, EU:C:2018:296 para 46: ‘Further, it must be emphasised that the crimes and acts that are the subject of Article 1F of the Geneva Convention or Article 12(2) of Directive 2011/95 seriously undermine both fundamental values such as respect for human dignity and human rights, on which, as stated in Article 2 TEU, the European Union is founded, and the peace which it is the Union’s aim to promote, under Article 3 TEU’.

⁷⁷ *Wightman* (n 12) para 62.

⁷⁸ Case C-163/10 *Criminal proceedings against Aldo Patriciello*, EU:C:2011:543, para 31.

⁷⁹ Joined Cases C-203/15 and C-698/15 *Tele2 Sverige*, EU:C:2016:970, para 93.

Union is founded, and interferences with the rights and freedoms guaranteed by Article 11 must be limited to what is strictly necessary, particularly the interferences concerning journalists and also publishers and press organisations, given the importance of the press in a democratic society governed by the rule of law'.⁸⁰

In the abundant case law on the European Arrest Warrant,⁸¹ asylum, migration,⁸² and judicial cooperation in criminal matters,⁸³ the Court underlined that systemic deficiencies in the rule of law can result in a lack of effective judicial protection or a real risk of inhuman or degrading treatment, which can undermine the mutual trust between the Member States, which is particularly indispensable in these fields.

However, it is important to clarify the peculiar relationship between Article 2 TEU and the Charter, which, according to Article 51, can only be applied when the situation is caught by a substantive provision of EU law to be activated.⁸⁴ As a consequence, the Charter cannot concretise Article 2 TEU alone.

But it also seems difficult to maintain that Article 2 TEU could, alone, bring the situation within the scope of EU law, activating the Charter.⁸⁵ As it will be seen in the last section of this article, Article 2 TEU can apply within the limits of the competence of the Union, not establishing itself any competence of the latter. In particular, it does not seem possible to extend to Article 2 TEU the reasoning that was developed by the Court in *Max Planck*⁸⁶ and *Bauer*⁸⁷ to bypass the lack of horizontal direct effect of directives, according to which the directive brings the case into the scope of the Charter under Article 51 of the latter, and it is the Charter itself (notably Article 31) that has direct effect also in horizontal situations.⁸⁸

The idea of flanking Article 2 with the Charter presupposes, therefore, that the situation falls in the fields of competence of the EU law, not that the scope for the Charter is provided by Article 2 itself. In the pending Hungarian case, the possibility to apply both Article 2 and the Charter is abundantly provided for by the directives, the GDPR and the provision of free movement of services.

⁸⁰ *Real Madrid* (n 62) paras 49–50.

⁸¹ Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru*, EU:C:2016:198; Case C-216/18 PPU *Minister for Justice and Equality (Deficiencies in the System of Justice)*, EU:C:2018:586, para 35.

⁸² Case C-392/22 *Staatssecretaris van Justitie en Veiligheid*, EU:C:2022:913.

⁸³ Joined Cases C-562/21 PPU and C-563/21 PPU *X and Y v Openbaar Ministerie*, EU:C:2022:100.

⁸⁴ According to K Lenaerts and JA Gutiérrez-Fons, 'The Place of the Charter in the EU Constitutional Edifice' in S Peers et al (eds), *The EU Charter of Fundamental Rights* (Hart Publishing 2014) 1567–68, 'the Charter is the shadow of EU Law'.

⁸⁵ For a different opinion, see Spieker (n 74).

⁸⁶ Case C-684/16 *Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v Tetsuji Shimizu*, EU:C:2018:874.

⁸⁷ Joined Cases C-569/16 and C-570/16 *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn*, EU:C:2018:871.

⁸⁸ LS Rossi, 'The Relationship between the EU Charter of Fundamental Rights and Directives in Horizontal Situations' (EU Law Analysis, 25 February 2019), at eulawanalysis.blogspot.com.

5. The Hungarian overall challenge to the values of Article 2 TEU

As seen in the previous section, the Court has so far examined single values of Article 2 TEU. But what if a Member State rejects the entire model of values of that Article? The pending case *Commission v Hungary* raises precisely this question.⁸⁹ The new Hungarian legislation, which can be read in the context of the alarming rule of law backsliding in Hungary, reveals, under the pretext of fighting paedophilia, a deliberated strategy aiming to gain political consensus and strengthen national identity at the expense of vulnerable minority groups.

These strategies, as pointed out by Nadia Urbinati,⁹⁰ are typical of populist democracies, where the leader often establishes a direct and emotional relationship with those in society whom he/she defines as the ‘right’ (or good) people.⁹¹ Once elected, the leader’s declared intent is to represent not ‘the People’, but only the ‘right’ people, i.e., his/her electoral majority. That may bring populists in power to adopt measures against the ‘wrong’ minorities, aimed at ‘purifying’ society. Such practice can also lead to a claim of declared anti-European identity: the leader affirms to protect the ‘pure’ national identity against the morally ‘impure’ Europe and its values. These measures, avowedly adopted to defend the national interest and often also the national identity,⁹² may seriously jeopardise almost all the values of Article 2 TEU. In fact, on the one hand, those measures can affect the rule of law, notably, the traditional democratic checks, such as the judiciary, free media, and opposition, which are accused of hampering the plans of the leader, ergo ‘the will of the People’ (the ‘right’ people of course).

In the pending case against Hungary, even if the rule of law seems to remain in the background, the freedom of the press is questioned, as well as the elements that, according to the Court are integral parts of the rule of law, the Venice Commission

⁸⁹ Another overall challenge to the values of Art 2 TEU could probably be the Polish legislation on Russian influence (the so called ‘anti-Tusk’ law), which is currently the object of a pending infringement action: European Commission, ‘Rule of Law: Commission launches infringement procedure against Poland for violating EU law with the new law establishing a special committee’ (Brussels, 8 June 2023), at ec.europa.eu.

⁹⁰ N Urbinati, *Me the People. How Populism Transforms Democracy* (Harvard University Press 2019).

⁹¹ For similar considerations, see X Groussot, ‘Illiberal Democracy and Rule by Law from an EU Perspective’ in A Rosas, J Raitio and P Pohjankoski (eds), *The Rule of Law’s Anatomy in the EU: Foundations and Protections* (Hart Publishing 2023); J Přibáň, ‘The Liberation of Illiberal Democracy: On Limits of Democratization after the Authoritarian Backlash’ in Bobek et al (eds) (n 50) 47–50.

⁹² For the historical reasons that led Populists to govern Hungary and other Member States, see D Adamski, ‘The Social Contract of Democratic Backsliding in the “New EU” Countries’ (2019) 56 *Common Market Law Review* 623. See also T Drinóczi and A Bień-Kacała, *Illiberal Constitutionalism in Poland and Hungary: The Deterioration of Democracy, Misuse of Human Rights and Abuse of the Rule of Law* (Routledge 2021).

Moreover, the challenge to the rule of law in that State is a general concern⁹³ that has already led to a suspension of the EU grants in the application of Regulation 2020/2092.⁹⁴ The Commission has recently referred Hungary⁹⁵ to the Court for its Sovereignty Protection Act, which established the Sovereignty Protection Office, whose task is to investigate activities carried out, supposedly in the interest of foreign bodies, by a wide range of entities, such as civil society organisations, media and journalists. As indicated in a report by five NGOs,⁹⁶ this legislation has a stigmatising and chilling effect on the concerned entities, creating an environment where even receiving EU funds can be considered a threat.

On the other hand, the need to strengthen the identity of the majority as ‘the right people’ – and therefore the emotional connection with the leader⁹⁷ – may drive the latter and his/her establishment to look for ‘wrong’ (or bad) people inside the domestic society, targeting and ostracising specific groups or minorities. Moral, religious, or simply ‘good old-fashioned’ considerations are usually used to legitimise the leader’s authority as the defender of the ‘right’ part of society against the ‘wrong’ one. That is the case with the new Hungarian legislation on paedophilia.

Unlike the cases decided by the Court so far, this legislation, composed of several measures of different gravity and intensity, seems to violate not one of the values or principles of Article 2 TEU, but almost all of them, overall challenging the very model of values – and the common identity – of the Union.

First of all, human dignity is being violated. This legislation stigmatises as ‘wrong’ children and teenagers in a delicate phase of their lives, when sexual identity is forming, humiliating them and exposing them to public contempt, with a particularly disruptive psychological effect. In addition, freedom is being violated: free access to objective and serene information on sexual and gender identities is denied,

⁹³ According to the 2024 Rule of Law Report, on January 2024 Hungary had 45 leading judgments of the European Court of Human Rights pending implementation. See European Commission, ‘Commission Staff Working Document: 2024 Rule of Law Report: Country Chapter on the rule of law situation in Hungary’, SWD(2024) 817 final, 36.

⁹⁴ See European Commission, ‘Commission considers that Hungary has not sufficiently addressed breaches of the principles of the rule of law and therefore maintains measures to protect the Union budget’ (Brussels, 16 December 2024). On the application of financial instruments in case of violations of the rule of law, see M Coli, ‘Stato di diritto e condizionalità finanziaria: un binomio ormai inscindibile per la tutela dei valori dell’Unione europea?’ (May 2024) *Questione Giustizia* (Speciale Democrazia e Rule of Law in Europa) 43.

⁹⁵ European Commission, ‘The Commission decides to refer Hungary to the Court of Justice of the European Union considering its national law on the Defence of Sovereignty to be in breach of EU law’ (Brussels, 3 October 2024).

⁹⁶ Amnesty International Hungary, Hungarian Civil Liberties Union, Hungarian Helsinki Committee, K-Monitor and Transparency International Hungary, *Assessment of Hungary’s Compliance with Conditions to Access European Union Funds* (27 November 2024) 55–57, at helsinki.hu.

⁹⁷ Urbinati (n 90).

just when young adults desperately need to understand themselves and their place in the world. But, above all, what is violated is the fundamental freedom to be oneself.

Human rights are being violated, not only in the evolute meaning of the ‘modern’ individual rights protected by the Charter and by the ECHR, but also in the basic meaning of the 1942 UN Universal Declaration of Human Rights, which affirms the essential universal rights of each human being as such. The Hungarian legislation notably challenges Articles 19,⁹⁸ 22,⁹⁹ 26(2),¹⁰⁰ and 26(3)¹⁰¹ of that Declaration. Most notably, the rights of people belonging to the LGBTIQ+ minority group are being violated by the Hungarian legislation that equates them to paedophiles, suggests that they are dangerous, and severely restricts the possibility of defending their ideas and identity.

Furthermore, all the principles of pluralism, non-discrimination, tolerance, justice and solidarity are being violated. Pluralism would require that all ideas can be expressed,¹⁰² which is severely limited by the new Hungarian rules on the media. Moreover, there is no tolerance, justice, solidarity and equality in legislation that points to an ‘impure’ part of society to get rid of and that openly and directly discriminates against vulnerable individuals on grounds of sexual orientation and gender identity.

As to the effects on society, this legislation is deeply divisive; it feeds contempt, hatred and potential violence against the ‘wrong’ ones, and it creates inside European society a black spot, where the same essential rights and values aren’t granted to everyone as everywhere else. That is a very high price to pay as a tribute to the idol of the national identity. But, even admitting (*quod non*) that some of the reasons invoked by Hungary in this essentially ‘identarian’ dispute can be traced to national

⁹⁸ ‘Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers’.

⁹⁹ ‘Everyone, as a member of society, has the right to social security and is entitled to realisation, through national effort and international cooperation and in accordance with the organisation and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality’.

¹⁰⁰ ‘Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace’.

¹⁰¹ ‘Parents have a prior right to choose the kind of education that shall be given to their children’.

¹⁰² See Case C-274/99 P *Bernard Connolly v Commission*, EU:C:2001:127, para 39: ‘As the Court of Human Rights has held, “Freedom of expression constitutes one of the essential foundations of [a democratic society], one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 [of the ECHR], it applies not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference but also to those that offend, shock or disturb; such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society”’ (Eur. Court H. R. *Handyside v United Kingdom* judgment of December 7 1976, Series A no. 24, § 49; *Müller and Others* judgment of May 24 1988, Series A no. 133, § 33; and *Vogt v Germany* judgment of September 26 1995, Series A no. 323, § 52)’.

identity under Article 4(2) TEU, it is still true that such identity can prevail on the values of Article 2 TEU, as explained in *RS*, only if the related measures passed the proportionality test,¹⁰³ which doesn't seem the case in this instance.

Regression within the meaning of *Repubblika* is blatant. The Hungarian legislation constitutes an extraordinarily serious and systemic violation of Article 2 TEU, not only because it severely affects a large number of individuals in many different fields of society but also because it does not just violate one single value of Article 2 TEU; it questions the entire model of values of the Union.

None of the twelve Member States that intervened, even if with different arguments, at the hearing¹⁰⁴ supported Hungary, while other traditional 'friends' of the latter just chose to stay away from the hearing.

6. Applying Article 2 TEU: 'concretised', 'flanked', or 'standalone'?

As the Court affirmed in relation to the values contained in Article 2 TEU, the Union must be able to defend those values '*within the limits of its powers*'.¹⁰⁵

Three questions arise concerning the powers of the Union: 1) Does an action for breach of Article 2 TEU circumvent the procedures laid down in Articles 7 and 269 TFEU, by creating a parallel procedure not envisaged by the Treaties?; 2) Can Article 2 TEU stand alone as a plea in infringement actions, or should it always be concretised by other provisions?; 3) Could Article 2 be applied, neither as concretised nor flanked by other provisions, but just alone, i.e. in the absence of other violations of EU law?

As to the first question, it must be recalled that in the previous twin cases on conditionality Hungary and Poland argued that the regulation on conditionality circumvented both Article 7 TEU and Article 269 TFEU.¹⁰⁶ The Court answered that several provisions in the Treaty and the Charter embody the values of Article 2 TEU, which 'grant the EU institutions the power to examine, determine the existence of and, where appropriate, to impose penalties for breaches of the values contained in Article 2 TEU committed in a Member State'.¹⁰⁷ Thus, Article 7 TEU is not the only way to protect those values.

The Court recognised that:

¹⁰³ See, e.g., Case C-742/19 *BK v Republika Slovenija (Ministrstvo za obrambo)*, EU:C:2021:597. On this topic, see LS Rossi, 'Regole dell'Unione europea ed eccezioni nazionali: la questione "identitaria"' in Constitutional Court of the Italian Republic and Court of Justice of the European Union, *Study Meeting: Member States' National Identity, Primacy of European Union Law, Rule of Law and Independence of National Judges* (Rome, 5 September 2022), at cortecostituzionale.it.

¹⁰⁴ They were, notably, Belgium, Denmark, Finland, Germany, Greece, Ireland, Luxembourg, Malta, the Netherlands, Portugal, Spain, Sweden.

¹⁰⁵ *Hungary v European Parliament and Council* (n 22) para 27.

¹⁰⁶ *Ibid* paras 94–96.

¹⁰⁷ *Ibid* para 159.

‘the EU legislature cannot establish, without infringing Article 7 TEU, a procedure parallel to that laid down by that provision, having, in essence, the same subject matter, pursuing the same objective and allowing the adoption of identical measures, while providing for the involvement of different institutions or for different material and procedural conditions from those laid down by that provision. However, it is permissible for the EU legislature, where it has a legal basis for doing so, to establish, by an act of secondary legislation, other procedures relating to the values contained in Article 2 TEU, which include the rule of law, provided that those procedures are different, in terms of both their aim and their subject matter, from the procedure laid down in Article 7 TEU’.¹⁰⁸

Then, the Court explained that, indeed, those procedures are different in purpose, scope, conditions and nature.¹⁰⁹ It must be noted that this passage refers to a potential conflict between the procedures provided for by Article 7 and Article 269 TFEU with those established by EU secondary legislation (in that case, the regulation on conditionality). The pending case against Hungary raises a different question: does the use of Article 258 TFEU to promote an infringement action for breach of Article 2 TEU create a parallel procedure in conflict with Articles 7 TEU and 269 TFEU? The potential conflict would be among different norms of the same rank in the Treaties. The idea of Article 7 TEU as a *lex specialis* with respect to Article 258 TFEU precluding the use of the latter cannot be accepted. Those remedies indeed operate at different levels, political or legal. The object of an infringement action is to condemn a Member State for failure to fulfil whatever obligation under the Treaties, not to suspend that State from the rights deriving from the Treaties. Moreover, while the infringement action may only lead to economic sanctions, Article 7 can also entail political sanctions, such as the suspension of voting rights. The two procedures, therefore, are distinct and disconnected: if that based on Article 7 is more serious in consequences, it remains, however, merely hypothetical in practice. As to Article 269 TFEU, its difference from Article 258 TFEU is apparent and excludes any circumvention. The first is limited only to the procedural aspects of Article 7 and is conceived ‘in favour’ of the State accused of breaching Article 2 TEU: the latter procedure, instead, is ‘against’ the State accused of breaching the treaties.

The second question is whether Article 2 TEU; can act alone or, rather, as some Member States affirmed at the hearing, must it always be concretised by other provisions. Those States affirmed that adding Article 2 TEU as an autonomous ground for action would exceed the competence of the Union, and, moreover, would have no practical added value.¹¹⁰ One can recognise that Hungary could be declared to have breached EU law, even without resorting to Article 2 TEU, for violating the EU legislation on the internal market, non-discrimination, and data protection. That legislation brings the Hungarian law within the scope of the Charter pursuant to Article

¹⁰⁸ Ibid paras 167–68.

¹⁰⁹ Ibid paras 169–79.

¹¹⁰ See Bonelli and Claes (n 4) 4.

51. It would be simple to submit the abstractly legitimate objective of fighting paedophilia to the classic test of proportionality, finding that the Hungarian legislation is widely disproportionate both in respect of the EU legislation and the Charter. Moreover, in this case, referring to Article 2 TEU is not capable of triggering, the application of the Regulation on conditionality, as there are here no consequences on the EU budget stemming from breaches of the rule of law.¹¹¹ Nor would that reference allow to raise the amount of Article 260 TFEU penalties imposed in accordance with Article 260 TFEU: as the recent case *Commission v Hungary* on international protection¹¹² shows, even when Article 2 is not at stake, penalties can be very high; and, in any case, to the discretion of the Court, much higher than the Commission's request. Also, the amount of damage compensations in *Francovich* actions would not be affected by the addition of Article 2 TEU, since that amount is limited to the damage suffered *in concreto* as a consequence of the violation of a norm of the Union conferring individual rights.

However, in the case under consideration, vis-à-vis an attack on the very model of Union values, an autonomous reference to Article 2 appears necessary. On the one hand, the overall violation of Article 2 TEU in the pending case is clear and total and cannot be resumed – and reduced – to any of the other alleged breaches of EU primary and secondary law. On the other hand, it is only by referring to the comprehensive framework of Article 2 TEU that all the single Hungarian measures violating different EU norms are revealed as parts of a unique deliberate strategy against a vulnerable group. It is precisely because they belong to the same design, whose overall aim challenges the values of Article 2 TEU, that even apparently innocent or low-intensity measures¹¹³ represent serious threats to those values.

It can be argued, therefore, that Article 2 TEU does not always need to be concretised by other provisions, following the scheme of Articles 2 and 19 TEU. In certain cases, such as the pending case against Hungary, Article 2 TEU can constitute, within the scope of the Treaties, an autonomous plea *flanked* by other provisions.

A different issue is whether Article 2 TEU can be concretised by Article 4(3) TEU. It can be argued that it would rather be the opposite. One could imagine solutions involving the duty of sincere cooperation, which could be seen as a sort of general ‘enhancer’ of the duty to respect every obligation stemming from the Treaties (and derived legislation). Accordingly, Hungary should be condemned for the joint breach of Articles 2 and 4(3) TEU, which requires Member States to refrain

¹¹¹ See Regulation (EU, Euratom) 2020/2092 (n 39), Art 4.

¹¹² See Case C-123/22 *Commission v Hungary*, EU:C:2024:493, para 107: ‘It should be noted that the deliberate evasion by a Member State of the application of a common policy as a whole constitutes an unprecedented and exceptionally serious infringement of EU law, which represents a significant threat to the unity of EU law and to the principle of equality of the Member States, referred to in Article 4(2) TEU’.

¹¹³ Such, for instance, the time limitation for broadcasting certain advertising.

from any measure that could jeopardise attaining the Union’s objectives. In its turn, the principle of sincere cooperation is usually – even if not necessarily – ‘concretised’ by other provisions.¹¹⁴ In the Hungarian case, the inclusion into this scheme of Article 3(3) TEU – on the need to combat social exclusion and discrimination – and Article 10 TFEU – requiring the Union to fight discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation – could be, in the abstract, envisaged. Accordingly, by violating Article 2 TEU, Hungary would also breach the duty of sincere cooperation in that it hampers the Union in pursuing the objectives set out in Articles 3(3) and 10 TEU.

However, one can doubt the usefulness of such a reasoning. Would it be so different, in terms of the competence of the Union, to rely on Article 2 plus Article 4(3) TEU instead of Article 2 TEU *tout court*? Indeed, summing Articles 2, 4(3), 3(3) and 10 TEU, and mixing State duties and EU objectives would probably increase – instead of solving – the problems in the interpretation of Article 2 TEU. Rather, it seems more straightforward, and less acrobatic, to recognise that in case of an overall challenge to the very model of Article 2 TEU, this Article can act alone, not in splendid isolation, but alongside other pleas concerning different breaches of EU law. That would not amount to a banalisation of Article 2 TEU – something that should be avoided for preserving its foundational meaning – on the contrary, it would entail a high political and symbolic value.

That leads us to the last question: could Article 2 be applied, neither ‘concretised’, nor ‘flanked’ by another provision of EU law, but just alone? Wouldn’t this mean applying Article 2 TEU beyond the scope of the Treaties and the powers of the Union? This question is at the moment merely hypothetical. Regarding the pending case, there are so many breaches of EU law that one could hardly doubt that it falls within the scope of that law. Moreover, considering the comprehensive strategies of populist democracies, it seems really difficult to imagine serious, persistent, and, above all, systemic violations of the values of Article 2 that have no impact on any other provision of EU law.¹¹⁵

However, generally speaking, some values, such as the rule of law and democracy, could also be violated outside the scope of EU law. Venturing into the domain of nightmares, one cannot exclude extreme situations of a Member State’s regression towards a non-democratic regime, such as a suspension or flagrant violation of electoral procedures or a *coup d’état*, which would affect the essence of EU membership. On the one hand, if outside the scope of the Treaties, Article 7 would certainly still apply, infringement actions can only cover ‘obligations under the Treaties’ and, in principle, the Court, in the conditionality case, ruled out the idea of a parallel procedure circumventing Article 7 TEU.

¹¹⁴ See on this point Casolari (n 37) 95.

¹¹⁵ See in this sense, T Tridimas, ‘Wreaking the Wrongs. Balancing Rights and the Public Interest the EU Way’ (2023) 29 *Columbia Journal of European Law* 188.

On the other hand, however, as we have seen, Articles 49 TEU and 2 TEU impose obligations, albeit broad, on the Member States. The question that remains, therefore, open is whether these two provisions alone or, according to some authors,¹¹⁶ in combination with – or in the light of – Article 4(3), could provide a sufficient legal basis for infringement actions in circumstances of persistent paralysis of the mechanisms of Article 7 TEU and serious and extreme challenge to democracy.

In such particular and extreme circumstances, it cannot perhaps be excluded that the Court, albeit facing serious conceptual challenges, could give an affirmative answer to that question. However, since that question is abstract at the moment, the Court does not need to answer it in the pending Hungarian case.

¹¹⁶ See Casolari (n 37) 125; Scheppele, Kochenov and Grabowska-Moroz (n 30) 72, suggesting a combination of arts 2 TEU and 4(3) TEU.

National E-Systems for Combating VAT Evasion and Intra-EU Trade. Hungary's 'EAKER' and Romania's 'RO e-Transport'

Szilárd Gáspár-Szilágyi and Vasile Ianovici***

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ABSTRACT: The purpose of this paper is to critically look at two recent E-Systems – one introduced in Hungary (EKAER and more recently BIREG) and the other in Romania (RO e-Transport) – that apply or have until recently applied, among others, to the intra-EU transportation of goods to and from the countries in question. These E-Systems are meant to combat Value Added Tax (VAT) evasion. Whilst they pursue a worthy public goal, on a closer look they pose significant legal and practical challenges. From a legal perspective, these E-Systems and the compliance checks at the border that arise from their implementation amount to measures having an equivalent effect to quantitative restrictions, prohibited under Article 34 TFEU. Furthermore, they contravene secondary EU legislation, such as Regulation 1100/2008 on the prohibition of internal frontier checks, and the VAT Directive and its implementing regulations. The E-Systems also pose numerous practical challenges, such as increased direct and indirect costs for businesses and frequent technical problems. Furthermore, the introduction of national E-Systems increases the administrative burden that the transportation of goods entails and risks further fragmenting the Internal Market. Besides Romania and Bulgaria's impending full accession to the Schengen Area and the need to increase awareness around EU law, a possible solution could be to set

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up an EU-wide E-System, managed by public authorities, for combating VAT evasion for the intra-EU transport of goods. Furthermore, instead of systematic border checks, compliance checks should be carried out in a country's interior, using a multi-filter approach and cross-checks.

KEYWORDS: internal market – free movement of goods – border checks – VAT evasion – EKAER – e-Transport.

1. Introduction

Traditionally, countries and regional economic integration organizations (REIOs) impose physical checks at the border on goods and people. Checks on goods are usually carried out by a country's customs and internal revenue authorities for the purposes of imposing customs duties/tariffs, examining the origin of products, their type, volume, and value, as well as ensuring compliance with various sanitary and phytosanitary (SPS) standards. People, on the other hand, are checked for travel documents (national IDs, passports, visas) usually by the border police.¹

However, there are a range of 'additional' checks that different state authorities perform at the border, such as checks for the imposition of or compliance with rules on internal taxes and duties (VAT, excise duties), road taxes and vignettes, the driver's documents, various permits and transport documents (e.g. waybills), as well as the weight, size, and road worthiness of lorries.² Whilst one might think that such additional checks are not carried out between members of the EU internal market, some EU countries impose them at their intra-EU borders, or very close to them due to border infrastructures already being in place and a longstanding habit of implementing controls, often side-stepping their obligations under EU law. Thus, such checks at intra-EU borders challenge our assumption that the EU is a borderless, single market. For some EU states, their intra EU-borders are genuine borders that rather divide than unite.

Whilst state-of-the-art electronic or E-Systems can be used to strengthen the EU's external borders, to improve the functioning of the Internal Market, or to lower VAT evasion, some E-Systems can amount to barriers to intra-EU trade, fragmenting the EU Internal Market. Thus, the purpose of this paper is to critically look at two recent E-Systems³ – one introduced in Hungary ('EKAER' and more recently 'BIREG') and the other in Romania ('RO e-Transport') – that apply or have applied until recently, among others, to the intra-EU transportation of goods, to and from the

¹ S Gáspár-Szilágyi, 'Border Checks and Regional Economic Integration. Curious Examples from and Around the EU' (2024) 58 *Journal of World Trade* 597, 603–608.

² Ibid 607–608.

³ Similar electronic systems for the monitoring of freight transport include Poland's SENT for the transportation of 'sensitive goods' (puesc.gov.pl/), Italy's SISTRI for the transportation of waste (tuttoambiente.it), Greece's ICSISnet (eurodyn.com), and France's TrackDéchets for the transportation of hazardous waste (beta.gouv.fr).

countries in question. These E-Systems are meant to combat intra-EU tax and VAT evasion. Whilst they pursue a worthy public goal, on a closer look, many issues arise following their introduction and implementation. For example, to check whether the goods were properly declared in RO e-Transport, a state like Romania carries out systematic, physical checks at its intra-EU borders with Hungary and Bulgaria. Furthermore, there is a risk of such systems spreading, since the Hungarian EKAER had an influence on the Polish and Romanian authorities to introduce similar systems.⁴ Contrary to this, Austria, which neighbours Hungary and is close to Romania, does not implement systems like EKAER or e-Transport since Austrian authorities perform numerous internal checks at fixed inspection points or on-the-spot checks by the police.⁵

Given the multiple interests and objectives at play, the two E-Systems pose significant legal and practical challenges. On the one hand, one of the pillars of the EU is its Internal Market that ensures the free movement of the various factors of production, such as goods.⁶ On the other hand, it is also important to bear in mind that there is a significant problem with VAT evasion resulting from intra-EU trade.⁷ Thus, from a Member State's perspective, a 'smart' system like EKAER or e-Transport can be used to increase tax revenue and 'coerce' those involved in the transportation of goods to be truthful about their transactions. Such measures, however, should be in line with the EU's aim to create a well-functioning internal market,⁸ and should take into account the interests of traders and freight hauliers, who are at the receiving end of such measures.

In light of this, following a brief discussion of border checks in Section 2 and the description of the two E-Systems in Section 3, the paper argues in Section 4 that from a legal perspective, these E-Systems and the compliance checks at the border that arise from their implementation amount to measures having an equivalent effect to quantitative restrictions, prohibited under art. 34 TFEU. Furthermore, they contravene secondary EU legislation, such as Regulation 1100/2008 on the elimination of internal frontier checks,⁹ as well as the Value Added Tax (VAT) Directive¹⁰ and its implementing measures. For the purposes of this paper, the Schengen *acquis* will

⁴ K Lik, 'The EKAER System as an Effect of Digitalisation in the Hungarian Tax System' (2021) *The Review of European Affairs* 63; Sabian International Logistics, 'Transport Marfă: ROI sau EKAER' (2017), at <https://www.sabian.ro/transport-marfa-comunitar-roi-sau-ekaer/>.

⁵ Federal Ministry for Innovation Mobility and Infrastructure of the Republic of Austria, 'Permits for Road Haulage Consignments' at bm.kg.at.

⁶ Art 26 TFEU.

⁷ European Commission, 'VAT Gap' (2024), at taxation-customs.ec.europa.eu.

⁸ Art 3(3) TEU and Art 26 TFEU.

⁹ Regulation (EC) No 1100/2008 of the European Parliament and of the Council of 22 October 2008 on the elimination of controls performed at the frontiers of Member States in the field of road and inland waterway transport.

¹⁰ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax.

only be touched upon tangentially because the article is primarily concerned with checks on goods and not on people. It must also be mentioned that since 1 January 2025, Romania and Bulgaria have become full members of the Schengen Area.¹¹

In Section 5, the paper looks at several practical challenges, such as increased direct and indirect costs for businesses and frequent technical problems. Furthermore, the introduction of national E-Systems increases the administrative burden for the intra-EU transportation of goods and risks further fragmenting the Internal Market. In Section 6, we argue that, besides Romania and Bulgaria's very recent full accession to the Schengen Area and the need to increase awareness around EU law, a possible solution could be an EU-wide E-System for combating VAT evasion for the intra-EU transport of goods. Furthermore, instead of systematic border checks, compliance checks should be carried out in a country's interior, using a multi-filter approach.

The paper, thus, challenges several existing assumptions. The first one, often mentioned in EU law literature, is that the Internal Market (at least for the free movement of goods) is a 'done deal', 'one of the success stories of the European project'.¹² As we shall see, new impediments to the free movement of goods ('FMG') continue to arise. According to the second assumption, the introduction of new E-Systems in a world of 'smart' technologies is necessarily beneficial. We will argue that such systems can create significant legal and practical impediments that can lead to the fragmentation of the Internal Market, if implemented at the national level, in a haphazard way, instead of pursuing some harmonised solution at the EU level.

2. A quick look at border and other types of checks

Before presenting the two E-Systems, let us quickly discuss the types of border and other checks that exist in and around the EU. This will help frame the analysis. For this discussion, we will rely on one of the authors' recent publications in the *Journal of World Trade*.¹³

The checks that states carry out at their borders can be of several types: checks on goods, checks on people, and other checks. There are further checks that can be carried out after the border, in a country's interior. Checks *at the border on goods* can be carried out for several reasons. First, *because* goods enter or exit the domestic market. Such checks normally include checks for the imposition of customs duties/tariffs (tariff barriers), as well as checks that constitute non-tariff barriers, such

¹¹ See Council Decision (EU) 2024/210 of 30 December 2023 on the full application of the provisions of the Schengen acquis in the Republic of Bulgaria and Romania, Art 1, second sentence; Council, 'Schengen: Council decides to lift land border controls with Bulgaria and Romania', Press Release (Brussels, 12 December 2024), at www.consilium.europa.eu.

¹² C Barnard, 'The Substantive Law of the EU' (4th edn, Oxford University Press 2019) 39.

¹³ Gáspár-Szilágyi (n 1).

as checking the origin of goods,¹⁴ imposing quotas or other types of quantitative restrictions, and to check compliance with various regulatory standards (e.g. SPS standards).¹⁵ These checks also require documentation and documentary evidence,¹⁶ which – depending on how well the parties are economically integrated – can include pre-notification requirements, customs declarations, and preferential origins certificates (e.g. EUR1 and EUR-MED).¹⁷ In the broader trade literature, authors have noted that the phasing out of tariff barriers raises concerns about the role of non-tariff measures as tariff substitutes to protect domestic production and their effects on trade.¹⁸

When it comes to the EU, the various tariff and non-tariff barriers within the EU are prohibited under Articles 28, 30, 34, and 35 of the TFEU, as well as by the Court of Justice's case law, such as *Dassonville*¹⁹ and *Cassis de Dijon*.²⁰ However, at its external borders with third countries, the EU applies all or some of these checks, depending on the preferential relationship with the third states (e.g. at the EU-Norway, the Turkey-EU, or the EU-Ukraine borders).

There can also be checks on goods at the border for *other reasons* and *not because* the goods enter/exit the domestic market, such as the payment of an internal tax (VAT and various excise duties),²¹ or the payment of anti-dumping duties²² and duties pursuant to safeguard measures.²³ In the EU's Internal Market domestic taxes

¹⁴ Knowing the origin of goods is very important for preferential trade agreements, as the benefits of the arrangement are only given to goods originating in one of the contracting parties. See D Kniahin and J de Melo, 'A Primer on Rules of Origin as Non-Tariff Barriers' (2022) 15 *Journal of Risk and Financial Management* 286.

¹⁵ Not passing the relevant Sanitary and Phytosanitary (SPS) checks at the EU's external borders can result in the products being rejected at the border. See J-M Garcia Alvarez-Coque, I Taghouti and V Martinez-Gomez, 'Changes in Aflatoxin Standards: Implications for EU Border Controls of Nut Imports' (2020) 42 *Applied Economic Perspectives and Policy* 524, 528.

¹⁶ A Jerzewska, 'There is No Such Thing as Completely Frictionless Trade Across a Border', (LSE Blog, 6 February 2019), at <https://blogs.lse.ac.uk/brexit/2019/02/06/long-read-there-is-no-such-thing-as-completely-frictionless-trade-across-a-border/>.

¹⁷ UK Gov, 'EUR1 and EUR-MED Movement Certificate' (20 December 2020), at www.gov.uk.

¹⁸ Garcia Alvarez-Coque, Taghouti and Martinez-Gomez (n 15).

¹⁹ Case 8/74 *Procureur du Roi v Benoît and Gustave Dassonville*, EU:C:1974:82.

²⁰ Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, EU:C:1979:42.

²¹ 'Excise duties are indirect taxes on the sale or use of specific products such as alcohol, tobacco, energy products and electricity': see European Commission, 'Excise Taxes', at taxation-customs.ec.europa.eu.

²² 'Dumping is, in general, a situation of international price discrimination, where the price of a product when sold in the importing country is less than the price of that product in the market of the exporting country'. See WTO, 'Technical Information on Anti-Dumping', at www.wto.org.

²³ Gáspár-Szilágyi (n 1) 606. Safeguard measures are taken in order to 'protect a specific domestic industry from an increase in imports of any product which is causing, or which is threatening to cause, serious injury to the industry.' See WTO, 'Safeguard Measures', at www.wto.org.

are not imposed at the intra-EU borders but in the Member States' territory, following a complex set of rules laid down in secondary EU law.²⁴

States also carry out checks at the border on *people*. These can be for multiple reasons, such as checks on returning citizens, checks on people who permanently want to settle in the country, checks on temporary visitors who might or might not need to hold a valid visa, checks carried out on persons carrying goods, checks on refugees and asylum seekers, etc. When it comes to the EU, one should not confuse the EU *acquis* on the free movement of people with the Schengen *acquis*. Only the latter guarantees *borderless* travel for people. When we started writing this article, physical checks on people were still carried out at the Hungary-Romania and Romania-Bulgaria borders. As we shall see, the presence of physical borders in the EU's interior invites domestic authorities to carry out various checks at these crossing points.²⁵

Lastly, there are a host of *other checks* at a country's border that are often not mentioned in standard textbooks on EU or international trade law. International transporters of freight will often need to be checked for a waybill, one of the most frequently used one being the 'CMR note', based on the Convention on the Contract for the International Carriage of Goods by Road (CMR Convention).²⁶

'In addition to CMR notes there can be checks on whether the lorry driver has a special license or permit to haul commercial goods, whether the trader has notified the domestic tax authorities in order to prevent VAT fraud, whether special approvals were given for the transport of dangerous or perishable goods, whether the vehicle is roadworthy and has all the required documents (insurance, country sticker, etc), and even some checks that under EU rules should be carried out randomly and inland, but some EU countries choose to impose them at the border'.²⁷

Checking compliance with the two E-Systems presented in this paper will fall in the category of *other checks* as they are most often carried out at or very close to the Hungary-Romania and Romania-Bulgaria, intra-EU borders. It is also important to note that the various checks are carried out by different domestic authorities (see Figure 1). Checks on goods are usually carried out by the customs and internal revenue authorities, while checks on people are mostly conducted by the border police. Other checks, such as the size and weight of lorries, is often carried out by a third type of authority, such as a domestic highway authority.

²⁴ European Commission, 'Taxation and Customs Union. Where to Tax?', at taxation-customs.ec.europa.eu. See also Barnard (n 12) 50-67. In literature, see D Chalmers, G Davies and G Monti, 'European Union Law' (5th edn, Cambridge University Press 2024) 676.

²⁵ Gáspár-Szilágyi (n 1).

²⁶ UN Convention on the Contract for the International Carriage of Goods by Road (CMR, 1956).

²⁷ Gáspár-Szilágyi (n 1) 607-608.

What/Who is checked?	Why?	Who checks?
<i>Goods</i>	- customs duties + other border charges - rules of origin - compliance with SPS/other regulatory requirements - imposition of anti-dumping, countervailing or safeguard duties; rarely quotas - imposition of internal charges (VAT, excise duties)	- customs/ internal revenue authorities - specialist SPS/regulatory bodies
<i>People</i>	- tourist, short term visitor, lorry driver - returning citizen - economic migrant - asylum seeker - smuggling of goods/people - passport, ID, visa	- border police
<i>Other</i>	- CMR note/another waybill - freight hauler's qualifications (driving license, permit for special goods, transport license) - road tax/vignette - road worthiness of the lorry, including length, weight - compliance with various E-Systems.	- the above or another authority (e.g. roads & highway authority)

Figure 1. Border Checks in General²⁸

3. An overview of the two systems

This part provides an overview of the two E-Systems. The analysis begins with EKAER, since this system is the older of the two and its conformity with EU law has been successfully challenged. While presenting it, we shall also shortly discuss a newer Hungarian system, called BIREG, which some authors argue is just another way of reviving the old EKAER rules through the back door.²⁹ This is then followed by RO e-Transport.

3.1. Hungary's EKAER. The old and the new versions

Driven by the aim to reduce VAT fraud for freight transport, the Hungarian legislator³⁰ in 2015 introduced the Electronic Public Road Trade Control System (*Elektronikus Közútiárúforgalom Ellenőrző Rendszer*, 'EKAER') that allows the Hungarian Tax and Customs Authority (NÁV) to control in real time the movement of

²⁸ Ibid 608.

²⁹ LeitnerLeitner Tax Audit Advisory, 'EKAER Helyett BIREG?' (Adózásról Blog, 22 February 2021), at adozasrolerthetoen.blog.hu.

³⁰ For an updated list of the various rules setting up the system, see EKAER, 'Legal Documents', at ekaer.nav.gov.hu.

freight within Hungary, to Hungary from an EU Member, and from Hungary to another EU Member State.³¹

The original system provided an obligation to notify in advance *all* freight transport, more specifically, details about the transport (the name and company identifiers of the sender and receiver, the number plate of the transport vehicle), the goods (weight, monetary value, customs codes, brief description), the arrival time at the pick-up address, as well any changes to the transport (see Figure 2). The information had to be uploaded via the EKAER website, and the persons required to notify, or the freight forwarder, had to obtain an EKAER number.³² Only those who had obtained a valid EKAER number could be engaged in freight transport. Transporting goods without this number or the erroneous entry of information would be sanctioned with the imposition of fines. In the case of the latter, NÁV would be more lenient and only impose a lower fine, ‘independent of the value of the goods’.³³ However, in case of systematic errors, a fine of up to 40% of the value of the goods could be imposed, with a typical fine ranging between 4–5% of the value of the goods.³⁴

Whilst the system was and still is operated by NÁV, the latter also cooperates with other authorities, such as the National Food Safety Office, the office in charge of operating the road camera system, and the HU–GO road toll system.³⁵ For risky products (see below), a guarantee/deposit of at least 15% of the net value of the risky goods still needs to be paid, unless the taxpayers qualify as ‘reliable’.³⁶ Furthermore, NÁV officers can carry out both on-the-ground inspections, for e.g. at the site of unloading, and ex-post audits for up to five years.³⁷

The original version of EKAER has received both praise and criticism. Varga, writing from the perspective of ensuring a more efficient VAT collection and ‘cleaning’ up the underground economy, concludes that for the period of 2015–2020, the system, albeit not perfect, had functioned well and decreased the VAT gap in the five-year period by 12 percentage points.³⁸ Furthermore, compliance with the system was ensured via tens of thousands of actual, on-the-ground checks and a considerable amount of money collected by the Hungarian authorities as fines. However, Varga

³¹ Act CLI of 2017 on Tax Administration and Regulation, Section 7.14. Strangely, neither the old nor the new EKAER apply to trade with third countries. This is probably because, as discussed in Part 2, countries can impose VAT at their borders (but not inside the EU). In case of the EU’s external borders with third countries, VAT is imposed at the border when customs clearance procedures take place, unless the goods are destined for another EU country, then the one where they first entered EU territory. See European Commission, ‘Value Added Tax’, at trade.ec.europa.eu.

³² EKAER (n 30).

³³ Z Varga, ‘On the Experience of the First Five Years of the Electronic Road Traffic Control System’ (2022) 12 *Multidiszciplináris tudományok* 144, 148.

³⁴ *Ibid* 149.

³⁵ HU–GO Electronic Toll System, at <https://www.hu-go.hu/articles/category/news>.

³⁶ EKAER, ‘Kockázati Biztosíték Fizetése’ (2024), at ekaer.nav.gov.hu.

³⁷ Varga (n 33) 147.

³⁸ *Ibid* 151.

also notes that the original system did have several issues, such as the inability of users to amend the information after introducing it into the system.³⁹ Thus, simple clerical errors resulted in fines.

According to Lik, whilst the system had a positive influence on VAT revenue and met the requirements of a modern system of tax administration, significant criticism came from members of the freight and transport industries. Among others, stakeholders and transport organisations argued that the introduction of the system had caused chaos in the transport industry, had a negative impact on the logistics industry, imposed new administrative burdens that resulted in additional costs (new IT systems, new employees needed to operate the systems), and the sanctions imposed were disproportionate.⁴⁰

Figure 2. Example of an EKAER number⁴¹

Commentators, such as Pajor, also argued that the system gave extensive powers to NÁV officials to carry out on-site investigations, which *de facto* resulted in ‘police and law enforcement’ powers granted to customs and tax officials.⁴² Having spoken to several freight hauliers⁴³ between Romania and Hungary, we were told that the Hungarian authorities would check the EKAER numbers right after the border-crossing between the two countries, on the Hungarian side of the border.

³⁹ Ibid 148.

⁴⁰ Lik (n 4) 61.

⁴¹ Retrieved from the EKAER User Guide published by the Hungarian authorities, at ekaer.nav.gov.hu.

⁴² A Pajor, ‘Az EKÁER-ellenőrzések rendészeti jellege’ (2020) 1 Magyar Rendészet 107.

⁴³ During June–December 2024.

The original EKAER soon came under scrutiny, and significant amendments followed once the EU institutions and the Hungarian judiciary got involved. Firstly, in 2017 the Commission began the administrative stage of infringement proceedings against Hungary and in a Letter of Formal Notice (LFN) – followed by a complementary LFN in 2019 – called upon Hungary to change EKAER. According to the Commission, the system did not comply with Council Directive 2006/112/EC (the VAT Directive). ‘Moreover, the Commission consider[ed] that the Hungarian legislation breache[d] the principles of neutrality and proportionality, as well as the freedom to conduct a business guaranteed by the Charter of Fundamental Rights of the EU’.⁴⁴

Secondly, on 6 November 2020, the Hungarian Supreme Court (*Kúria*) sent a preliminary reference to the Court of Justice in *Eurochem Agro Hungary Kft v. NÁV* on whether the penalty system envisaged by EKAER was in line with several provisions of the VAT Directive, with the principle of proportionality, and Article 26(2) TFEU.⁴⁵ The Court in its Order of 21 October 2021 only focused on the first two questions and held that EKAER’s penalty system contravened the VAT Directive and the principle of proportionality.⁴⁶

Following these legal challenges, EKAER was amended in 2021 and now only applies in a very narrow set of circumstance. Thus, since 1 January 2021 ‘only those products must be reported, which are listed in the Schedule to the Decree 51/2014 of the Minister for the National Economy on the determination of risky products in association with the operation of the Electronic Public Road Transportation Control System’.⁴⁷ The term ‘risky products’ (*kockázatos termékek*) is not defined in the Decree. Instead, it includes a limited list of products with their customs codes, including – besides the more obvious chemicals and pesticides – various frozen food products, as well as men and women’s garments and other clothing products.⁴⁸ Thus, it seems that the Hungarian legislator uses a broad understanding of ‘risky products’ to include products which one might consider ‘hazardous’, as well as those which are at a higher risk of VAT avoidance, such as clothing items and garments. Furthermore, since 17 April 2023, most probably due to the pushback of several Central & Eastern EU Member States against the importation of various grains from Ukraine,⁴⁹ the following products have also been added to the list: wheat, rye, barley, maize, rapeseed, and sunflower seeds.⁵⁰

⁴⁴ European Commission, ‘January infringements package: key decisions’ (Brussels, 24 January 2019), at ec.europa.eu.

⁴⁵ Case C-583/20 *EuroChem Agro Hungary Kft. v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága*, EU:C:2021:919.

⁴⁶ *Ibid* para 43.

⁴⁷ Emphasis added. See EKAER (n 30).

⁴⁸ 51/2014. (XII. 31.) NGM rendelet az Elektronikus Közúti Áruforgalom Ellenőrző Rendszer működésével összefüggésben a kockázatos termékek meghatározásáról.

⁴⁹ J Lepiarz and B Riegert, ‘Ukrainian Grain: Why Are Eastern EU Members Banning Imports?’ (Deutsche Welle, 20 September 2023), at www.dw.com.

⁵⁰ EKAER (n 30).

However, as EKAER was narrowed down on 1 January 2021 to apply only to ‘risky products’, a new electronic system was introduced on the same day, the so-called Prior Electronic Permission registration System (BIREG) operated by the transportation authority.⁵¹ Whilst very similar to EKAER, the objective of BIREG is not to tackle VAT fraud, but to tackle freight transports that do not use the proper permits (whether bilateral or pursuant to the European Conference of Transport Ministers, the so-called CEMT/ECTM permits). In its original form, BIREG applied to cabotage⁵² within Hungary, and to intra and extra-EU trade when one of the off loadings happened in Hungary. It did not apply to intra-EU transits (for e.g. when goods would be sent from Romania to Austria, via Hungary).

However, in early 2021, the original rules were narrowed down. Thus, the new BIREG rules only apply to vehicles above 3.5 tonnes, carrying out freight transport with third states. The system does not apply to intra-EU transports operating under a Community/EU license, unless carrying out cabotage operations within Hungary.⁵³ The types of events that must be recorded include: the entering of the territory of Hungary, unloading and loading in the territory of Hungary, and leaving the territory of Hungary.⁵⁴

3.2. Romania’s e-Transport

The recent RO e-Transport system has its origins in several prior attempts by the Romanian authorities to supervise intra-EU trade and transport, following Romania’s accession to the EU. Thus, in 2010, three years after Romania’s accession, at the initiative of the Romanian National Agency for Fiscal Administration (ANAF), the Register for Intra-Community Operators (ROI) was introduced.⁵⁵ This was a register for companies, legal entities and private individuals who had a VAT number and made sales to or procured goods from other EU Member States.⁵⁶

However, in 2016, Government Emergency Ordinance No 84/2016 repealed the ROI ‘[i]n order to reduce the administrative burdens on economic operators [...] given that there [were] other more effective levers for preventing tax evasion, including for

⁵¹ A Fülöp, ‘EKAER Goes – BIREG Comes: Obligations of Taxpayers are Extended’ (Ernst & Young News Flash, 2021), at ey.com.

⁵² Cabotage refers to the transport of goods and passengers within the same country.

⁵³ See BIREG, at bireg.gov.hu.

⁵⁴ Ibid.

⁵⁵ CFNET Finante Taxe, ‘Registrul Operatorilor Intracomunitari’ (Revista de Actualitate Fiscală, 30 December 2011), at codfiscal.net.

⁵⁶ Ibid.

intra-Community operations'.⁵⁷ Then, in 2020, Government Decision⁵⁸ No 497/2020⁵⁹ introduced the SUMAL system, which is meant to supervise the transport of wooden materials within Romania and also the transport of such materials from Romania to the EU. However, this system does not cover the transport of wooden materials from the rest of the EU to Romania. SUMAL also supervises the import and export of wooden materials from and to Romania from outside the EU. The system became operational in 2021.⁶⁰

In 2022, Government Emergency Ordinance No 41/2022 introduced RO e-Transport, an E-System which, in its original form, was meant to supervise the transport of 'high fiscal risk' goods, regardless of whether the transaction happened in Romania, between Romania and the rest of the EU, or with non-EU countries. Similarly to the Hungarian Decree No 51/2014, the legal text implementing RO e-Transport contains no definition of 'high fiscal risk goods'. Furthermore, the guide⁶¹ issued by the Romanian Minister of Finance also does not provide any definition. Instead, there is a list approved by ANAF that stipulates the goods that are classified as being of a high fiscal risk, such as vegetables, plants, edible fruit, beverages, salt, clothing and clothing accessories, footwear, cast iron, iron and steel.⁶² This is not a definitive list, and the Romanian State can change it whenever necessary. Just as in the case of the Hungarian measures, it seems that the Romanian legislator chose a wide understanding of goods with a 'high fiscal risk', to include goods which can easily perish (fruits, vegetables) and goods which are at an increased risk of VAT avoidance (clothing and clothing accessories).

From 2024, however, the scope of RO e-Transport was significantly broadened. For transactions within Romania, it continues to only apply to high fiscal risk goods. However, for all other transactions, whether the intra-EU supply and acquisition of goods or transactions (import and export) with third countries, the system now applies to *all* goods, not just to those of a high fiscal risk, with several small exceptions, such as goods destined for consular/diplomatic missions, and NATO's armed forces, among others.⁶³

⁵⁷ Ordonanță de Urgență Nr. 84/2016 din 16 noiembrie 2016 pentru modificarea și completarea unor acte normative din domeniul financiar-fiscal. A more effective measure is the EU-wide VIES system for VAT number validation, see European Commission, 'VIES VAT Number Validation', at ec.europa.eu.

⁵⁸ In Romania, Government decisions rank below legislation passed by Parliament, government ordinances, or government emergency ordinances.

⁵⁹ Hotărâre nr. 497 din 25 iunie 2020, at legislatie.just.ro.

⁶⁰ SUMAL has a public website (at inspectorulpadurii.ro) through which civil society, and anyone from inside or outside of Romania can see in real time the transports of wooden materials registered in SUMAL. However, SUMAL is strongly criticised because it has led to an increase in transport costs and is helping companies see where their competitors buy or sell goods, affecting commercial secrets.

⁶¹ ANAF, 'Sistemul Național e-Transport pentru monitorizarea transporturilor pe teritoriul României' (2024), at mfinanze.gov.ro.

⁶² Ordin nr. 802 din 29 aprilie 2022, at legislatie.just.ro.

⁶³ Art. 16 Ordonanță de Urgență nr. 41 din 8 aprilie 2022 (actualizată).

Officially, RO e-Transport was introduced to increase the collection of taxes and to fight against the illicit trade in goods. Thus, it was deemed necessary to have an E-System which would supervise the transport of goods and could be interconnected with other Romanian E-Systems (existing or planned). The system contains a database where ‘subjects’ (companies/natural persons) need to register in advance before the goods leave the warehouse from Romania or enter Romania. They need to declare the name, characteristics, quantity and value of the goods transported, the places of loading and unloading, details of the means of transport used, and the Unique Identification Transport (UIT) number generated.⁶⁴ The latter number identifies the goods that are delivered. Furthermore, the carrier is required to share their location while making the transport.⁶⁵

It is also planned that road cameras will be used to further help supervise the transport of goods. Thus, the Romanian authorities aim to have a real-time electronic system for transporting goods on Romanian territory. Whether this will be achieved is still a matter of debate, since e-Transport is plagued by many technical problems. A social media group has already been created in which professionals, accountants, and other stakeholders post images and information about ANAF’s various E-Systems not working.⁶⁶ As Figure 3 illustrates, on 17 December 2024, when one of the authors tried to access the e-Transport system, the website was not operational.



Figure 3. Errors message on ANAF’s RO e-Transport website (17 December 2024).

⁶⁴ Art 4(1)(a) Ordonanță de Urgență nr. 41 din 8 aprilie 2022 (actualizată).

⁶⁵ Ibid, Art 8(2)(1).

⁶⁶ See www.facebook.com.

The law on RO e-Transport is also meant to regulate situations when the online system fails to work.⁶⁷ In such cases, the transport can proceed and the obligation to register in e-Transport will be suspended until the system is once again functional. In practice, this requires the subjects to continuously monitor ANAF's website until the website is operational; otherwise, they risk the payment of fines and the confiscation of the transported products (see Case Study 2 in the Annex).

Before we move on to the legal challenges posed by the two E-Systems, we should highlight some of the key differences between them. Firstly, the current version of EKAER only applies to risky products transported within Hungary or from the EU to Hungary, and vice versa. Thus, it has a narrower scope than its original version, which covered all goods. Contrary to this, the new RO e-Transport has a much wider scope than the original one. For intra-EU transactions and transactions with third states it covers all goods, with minor exceptions, while transactions within Romania are only covered if they present a high fiscal risk. Secondly, e-Transport will require the carriers to share their location while making the transport.

4. Legal challenges

In this Part we will assess the two E-Systems' conformity with international and EU law, more specifically the UN Convention on the Contract for the International Carriage of Goods by Road ('CMR Convention'), and three areas of EU law, including EU free movement of goods law, EU VAT law, and some provisions adopted pursuant to the EU's Common Transport Policy. Part of the assessment for e-Transport is based on one of the authors' prior publications in the Romanian language.⁶⁸

4.1. The CMR Convention

International freight hauliers are usually checked for a waybill.⁶⁹ One of the most frequently used ones is the CMR note, based on the CMR Convention⁷⁰ to which 58 States (including all EU Member States) are a party.⁷¹ A CMR note is a standard contract which 'confirms that the haulage company has received the goods and has a contract from the supplier to carry them'.⁷²

Pursuant to Article 1(1) of the CMR Convention, the latter applies to 'every contract for the carriage of goods by road in vehicles for reward, when the place of taking

⁶⁷ Art 8(2) Ordonanță de Urgență nr. 41 din 8 aprilie 2022 (actualizată).

⁶⁸ V Ianovici, 'Aspecte juridice privind RO E-transport și dreptul Uniunii Europene' (Juridice.ro, 8 April 2024), at www.juridice.ro.

⁶⁹ A 'waybill' is a 'document that shows the details of and instructions relating to goods that are being transported by a company'. See Cambridge Dictionary, 'Waybill', at dictionary.cambridge.org.

⁷⁰ UN Convention on the Contract for the International Carriage of Goods by Road (CMR, 1956).

⁷¹ Gáspár-Szilágyi (n 1) 607.

⁷² UK Gov, 'Guidance. Carry Out International Road Haulage' (31 December 2020), at www.gov.uk.

over of the goods and the place designated for delivery, as specified in the contract, are situated in two different countries, of which at least one is a Contracting country'. Since all EU Member States are also parties to the CMR Convention, a CMR consignment note is used in all intra-EU supply of goods by road. The CMR note is 'made out in three original copies signed by the sender and by the carrier' and needs to include the following information: the date and place at which the CMR note is made out; the identifying information of the sender, the carrier, and the consignee; the place designated for the delivery; the description of the goods, their quantity and weight; and the charges relating to the carriage.⁷³

If we look at the information that needs/needed to be introduced in the old and new versions of EKAER and RO e-Transport, we notice a significant overlap between CMR notes and the two E-Systems. Thus, instead of these systems helping the smooth operation of the intra-EU carriage of goods, based on the provisions of an international agreement concluded by all EU Member States, in practice they require the multiplication of information. Whilst one could argue that the added benefit of EKAER and e-Transport is the availability of information in electronic format, currently, 34 countries (including 20 EU Members) have acceded to a protocol to the CMR Convention that allows for the usage of electronic CMRs. Such e-CMRs have the added benefit of reducing costs, faster invoicing, and real-time access to information.⁷⁴

Furthermore, pursuant to Article 12 of the Convention, until the second copy of the CMR note is handed to the consignee '[t]he sender has the right to dispose of the goods, in particular by asking the carrier to *stop* the goods in transit, to *change* the place at which delivery is to take place or to deliver the goods to a consignee *other* than the consignee indicated in the consignment note (emphasis added)'. In other words, the sender can change the transport of the goods before they reach the acquirer. Contrary to this, neither the old and new EKAER systems, nor RO e-Transport allow for modifications to be entered into the system following the original entry. Moreover, they impose fines even in cases when clerical errors occur. Thus, the two E-Systems not only duplicate information, but they also create restrictions for the sender, which are clearly incompatible with the CMR Convention.

The two E-Systems create a third burden for intra-EU traders. According to Article 9(1) of the Convention, the CMR note 'shall be *prima facie* evidence of the making of the contract of carriage, the conditions of the contract and the receipt of the goods by the carrier'. Thus, the existence of the CMR note in the three copies required by the Convention or the e-CMR should be sufficient *prima facie* evidence for the existence of the transportation of goods, without the need to enter the trans-

⁷³ CMR Convention, Arts 5–6.

⁷⁴ The International Road Transport Union (IRU), 'Making Freight Truly Paperless: e-CMR', at www.iru.org.

action into an E-System. According to a 2021 report of Romania's ANAF, the monitoring of intra-EU transport of goods, through the scanning of waybills and transport documents, such as CMR notes, has already been taking place at 12 border crossings.⁷⁵ Thus, if Romanian authorities had already been scanning CMR notes at Romania's intra-EU borders prior to the establishment of RO e-Transport, why was there a need to set up an E-System, requiring roughly the same information?

In conclusion, the universal usage of the CMR note in the Member States and the possibility to use e-CMRs makes the existence of EKAER and e-Transport superfluous, and results in the duplication of information.

4.2. Conformity with EU free movement of goods law

One of the core achievements of the EU is the creation of an internal market in which all factors of production, including goods, people, services, and capital can move freely in an area 'without internal frontiers'.⁷⁶ This latter phrase is problematic as in practice it is the Schengen Area that guarantees truly 'borderless' movement without 'internal frontiers'. EU free movement law removes the various market access barriers and ensures non-discrimination when it comes to the movement of the various factors of production. However, it does not fully guarantee borderless movement.

When it comes to the free movement of goods (FMG), it is well known that Article 28 TFEU creates a customs union in which all customs duties on imports and exports, as well as charges having an equivalent effect, are prohibited. The customs union was gradually set up in the decade following the entry into force of the Rome Treaty (1958),⁷⁷ and the EU uses a common customs tariff (CCT) with third countries.⁷⁸ These provisions are reiterated and strengthened in Article 30 TFEU. However, because fiscal barriers can also be of an internal nature, the drafters of the Rome Treaty (inspired by Article III of the General Agreement on Tariffs and Trade 1947)⁷⁹ have also included provisions (currently enshrined in Article 110 TFEU) setting out the conditions under which Member States can impose internal taxes on domestic goods and products coming from other EU countries. However, internal charges cannot be imposed at the EU's internal borders. Instead, they have to be imposed internally following the rules laid down in EU secondary law.⁸⁰

⁷⁵ ANAF, 'Raport de Performanță' (2021), at static.anaf.ro.

⁷⁶ Art 26(2) TFEU.

⁷⁷ Luxembourg Centre for Contemporary and Digital History, 'The Setting Up of the Customs Union – Historical Events in the European Integration Process (1945–2009)', at www.cvce.eu.

⁷⁸ In practice, it does not matter through which EU Member State a good from a third country enters EU territory, the same import charges/customs duties will be levied on the good.

⁷⁹ R Schütze, 'Tax Barriers to Intra-Union Trade: American 'Federalism', European 'Internationalism'?' (2016) 35 *Yearbook of European Law* 382, fn 87.

⁸⁰ European Commission (n 24).

For the purposes of our discussion, Article 34 TFEU prohibits quantitative restrictions and measures having an equivalent effect to quantitative restrictions (MEEQRs). This provision applies ‘where a given product is not covered by EU harmonising legislation or is only partially covered’.⁸¹ Article 34 TFEU is addressed to the Member States, including the local and regional authorities⁸² as well as to private law certification bodies, vested with *de facto* regulatory powers.⁸³ It covers both actions and *inactions*, such as in the *Spanish Strawberries* case when the French authorities failed to protect products arriving from Spain against the actions of protesting French farmers.⁸⁴ Furthermore, Article 34 TFEU requires a cross-border element to be present and does not apply to wholly internal situations.

As many other important terms, MEEQRs were not defined in the Treaty of Rome, the Court of Justice famously defining them in *Dassonville* as ‘[a]ll trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade’.⁸⁵ As Schütze argues, while according to conventional wisdom, *Dassonville* represents the substantive equivalent to *Van Gend en Loos* and it shows a Court that was driven by the ideal to create a transnational market place that is identical to a national market-place, in reality *Dassonville* represents an effort from the Court to create a doctrinal bridge between the FMG and competition law.⁸⁶

In later years the *Dassonville* definition was expanded to include ‘all rules’ enacted by Member States and not just trading rules,⁸⁷ and is not limited to any legal measure.⁸⁸ Very importantly, there is no need for a discriminatory element to be proven for Article 34 to apply.⁸⁹ It applies to both *distinctly* and *indistinctly* applicable measures, and the Court favours a market access reading of Article 34 TFEU, ‘rather than a discrimination approach’.⁹⁰ In the case of indistinctly applicable measures⁹¹ and those that hinder market access, the state can justify them by using a

⁸¹ European Commission, ‘Commission Notice – Guide on Articles 34-36 of the Treaty on the Functioning of the European Union (TFEU)’, 2021/C 100/3, 42.

⁸² Case C-1/90 *Aragonesa de Publicidad v Departamento de sanidad*, EU:C:1991:327.

⁸³ Case C-171/11 *Fra.bo Spa v Deutsche Vereinigung des Gas und Wasserfaches eV (DVGW)* — *Technisch Wissenschaftlicher Verein*, EU:C:2012:453, paras 31-32

⁸⁴ Case C-265/95 *Commission v France*, EU:C:1997:595, para. 31.

⁸⁵ *Dassonville* (n 19) para. 5.

⁸⁶ R Schütze, ‘Re-reading’ *Dassonville*: Meaning and understanding in the history of European law’ (2018) 26 *European Law Journal* 376. The *Dassonville* formula is also not entirely ‘original’ as noted by Schütze, as it is inspired from *Consten & Grundig* in which the Court referred to Art 101 TFEU, private agreements which had an influence ‘direct or indirect, actual or potential, to freedom of trade between Member States’.

⁸⁷ Barnard (n 12) 72.

⁸⁸ Chalmers, Davies and Monti (n 24) 676.

⁸⁹ Commission Notice (n 81) 46.

⁹⁰ Barnard (n 12) 72.

⁹¹ These are measures which apply to both domestic and foreign goods in the same way, but detrimentally affect the foreign goods.

non-exhaustive list of so-called ‘mandatory requirements’ (introduced in *Cassis de Dijon*) in addition to the closed list of justifications found in Article 36 TFEU, provided they are proportionate.⁹²

However, given *Dassonville*’s very wide interpretation that resulted in traders challenging any legitimate rules enacted by Member States, the Court introduced the concept of ‘certain selling arrangements’ in *Keck and Mithouard*.⁹³ Thus, selling arrangements are Member State measures that do not fall within the scope of the *Dassonville* formula (and are thus legal), provided they apply to all relevant traders operating in the national territory *and* they affect in a similar manner (in law and in fact) the marketing of domestic and EU products.

The Court’s case-law on MEEQRs is extensive and over the years it has ended up including a long list of measures. For the purposes of our discussion, the following measures are important:

- ‘Inspections and controls, such as veterinary, sanitary, phytosanitary and other controls, including customs checks on imports and exports’.⁹⁴ Such measures will make it more difficult and costly to import and transport goods within the EU.

- Systematic inspections of imported products, regardless of whether they occur at the border or elsewhere.⁹⁵ Such measures can only be justified in exceptional circumstances.⁹⁶

Before checking the compatibility of the two E-Systems with the aforementioned rules, we should bear in mind that not only the legal text of the domestic measure is important, but also the ways in which conformity with the E-Systems is checked on the ground.

The original EKAER rules would have clearly met the *Dassonville* conditions as they were rules enacted by the Hungarian authorities that had a direct and actual effect on freight transport. As Lik mentioned, Hungarian transporters and transport associations lamented that EKAER had a negative impact on the logistics industry, imposed new administrative burdens which resulted in additional costs, and the sanctions imposed were disproportionate.⁹⁷ Furthermore, the authorities would systematically check compliance with the EKAER system soon after the Hungary-Romania border crossing, thus constituting a systematic inspection on imported products.

As the measure was indistinctly applicable – applying equally to domestic and intra-EU transports – it could have been saved by one of the limited justifications

⁹² Barnard (n 12) 88-91. There are signs, however, that the Court is ‘diluting’ this distinction between the justification of distinctly and indistinctly applicable measures. See *ibid*, 82.

⁹³ Joined Cases C-267/91 and C-268/91, *Criminal proceedings against Bernard Keck and Daniel Mithouard*, EU:C:1993:905.

⁹⁴ Commission Notice (n 81) 51, with reference to Case 4/75 *Rewe Zentralfinanz v Landwirtschaftskammer Bonn*, EU:C:1975:98.

⁹⁵ Case C-272/95 *Dt. Milchkontor II*, EU:C:1997:191.

⁹⁶ Case C-28/09 *Commission v Austria*, EU:C:2011:854, para 119.

⁹⁷ Lik (n 4) 61.

under Article 36 TFEU or one of the ‘mandatory requirements’ pursuant to the *Cassis de Dijon* line of jurisprudence. Since the original intent of the authorities was to tackle VAT evasion, such an aim could be considered a legitimate policy objective under the *Cassis* jurisprudence, which among others includes the ‘effectiveness of fiscal supervision’.⁹⁸

However, just like in the case of Article 36 TFEU, the state must show that the measures are proportionate to the objectives pursued. Using the two-legged proportionality test (the Court sometimes uses a three-legged test), the Member State needs to prove that the measure is suitable/appropriate to achieve the objective pursued and it is ‘necessary’,⁹⁹ meaning that there is no less restrictive alternative. The latter part of the proportionality test is quite difficult to prove, since less restrictive alternatives exist to control VAT fraud, such as random checks on the side of the road using the existing CMR waybills, instead of systematic compliance checks with E-Systems at the/close to the border. Furthermore, less intrusive measures to combat VAT fraud are already in place, such as administrative cooperation measures between EU Member States in the field of taxation under Council Directive 2011/16/EU or the pan-European Fiscalis programme that ‘enables participating countries, their tax administrations, and their officials to work together in the fight against tax fraud, tax evasion’.¹⁰⁰

What about the new EKAER system and the amended version of BIREG? Since the amended version of BIREG does not apply to intra-EU transport, only to internal cabotage in Hungary and to trade with third states, the intra-EU element is not satisfied, and the *Dassonville* formula does not apply. Thus, the amended version of BIREG does not breach EU FMG law. The new EKAER system is somewhat trickier. It has a much narrower application compared to the old one, applying only to certain ‘risky products’ and to certain grains since 2023. For ‘risky products’, the *Dassonville* formula would be satisfied, following the same logic as we used for the original EKAER system’s non-conformity assessment. However, given the higher risks associated with risky products for human health and tax evasion, one could argue that the Hungarian State would have an easier task proving the proportionality requirement. Nevertheless, much would depend on how the controls are carried out. If every lorry is stopped to check whether it carries risky products and thus needs to have obtained an EKAER number, then even the new system would breach EU FMG law.

The Romanian system in its current form is very similar to the old version of EKAER, which was found to be incompatible with EU law. The first problem with RO e-Transport is that it openly discriminates between the delivery of goods from the rest of the EU to Romania, or from Romania to the EU, and the delivery of goods

⁹⁸ *Rewe Zentralfinanz v Landwirtschaftskammer Bonn* (n 94) para 8; Case 456-/10 *ANETT*, EU:C:2012:241, para 50.

⁹⁹ Case C-320/03 *Commission v Austria* EU:C:2005:684, para 85.

¹⁰⁰ European Commission, ‘Fiscalis Programme’, at taxation-customs.ec.europa.eu.

within Romania. The new system creates a special/narrow procedure for a list of goods considered to be of a high fiscal risk that are delivered inside of Romania. However, for the intra-EU transportation of goods the application is much broader as the measure applies to *all* goods, with small exceptions. Since the *Cassis* type of mandatory requirements can only justify indistinctly applicable measures, they cannot be used to justify the overt distinction applied by RO e-Transport between intra-EU transports and transports within Romania. Thus, the only justifications that can be used are the ones found in the Article 36 TFEU exhaustive list.

From the limited grounds included in Article 36 TFEU, justifications on grounds of public policy could potentially be used, but only if Romania could successfully prove that fighting VAT evasion is a measure of public policy. However, the chances for this are slim because the Court takes a very narrow view of what constitutes ‘public policy’, to include cases of civil unrest and public protests.¹⁰¹

Furthermore, the measures should not constitute a ‘means of arbitrary discrimination or a disguised restriction on trade between Member States’. Given the overtly discriminatory character of the measure, it is hard to think that these conditions would be satisfied. Furthermore, the measure should be proportionate to the aim to be pursued, in this case, fighting tax evasion. However, less restrictive measures are already in place to check the veracity of the intra-EU transportation of goods: the aforementioned CMR note pursuant to the CMR Convention (see Section 4.1), the evidentiary documents mentioned in Article 45a of Council Implementing Regulation (EU) 2018/1912 (see Section 4.4), as well as the previously mentioned EU-wide cooperation mechanisms for the fight against tax evasion, such as *Fiscalis*.

Furthermore, RO e-Transport can also be considered an obstacle to the intra-EU transport of goods for two reasons under *Dassonville*. Firstly, the measure splits the Internal Market into two (Romania v the rest of the EU) as compliance with the system is ensured by the imposition of checks at Romania’s intra-EU borders with Hungary and Bulgaria. Secondly, EU operators will be less inclined to work with Romanian operators, since RO e-Transport creates additional administrative burdens, not applied in the rest of the EU. EU operators will need to spend money and time to adapt to the RO e-Transport rules, and the emergence of additional costs makes the commercialisation of products more difficult.¹⁰²

In conclusion, RO e-Transport in its current form breaches FMG law, while the old version of Hungary’s EKAER was also in clear breach of it. The new EKAER has a much narrower application, but could still contradict EU FMG law.

¹⁰¹ Barnard (n 12) 147–148.

¹⁰² Commission Notice (n 81) Section 6.2.

4.3. Conformity with the VAT Directive

Besides their implications for the Internal Market, the two E-Systems also touch upon the EU's VAT rules. This section provides a legal conformity assessment with Directive 2006/112/EC (the VAT Directive).

The VAT Directive is a mammoth piece of secondary legislation that contains 414 articles, a number of annexes, and has as its main aim the creation of a common system of VAT in the EU.¹⁰³ It covers the supply of goods and services within the territory of a Member State, the intra-EU acquisition of goods, and the importation of goods into the EU from non-EU countries.¹⁰⁴ The Directive then goes on to define the taxable persons and transactions, the place of taxation, the chargeable events, the taxable amount, the standard and reduced rates of VAT, the exemptions, the deductions, the obligations of the taxable person, derogations, and other miscellaneous issues.¹⁰⁵ Given the length and complexity of these rules, for the purposes of our discussion, we will focus on those provisions of the VAT Directive that formed the basis of the legal challenges against the initial EKAER system.

The Commission's Communications that refer to the 2017 and 2019 Letters of Formal Notice (LFN)¹⁰⁶ sent out to Hungary for its alleged infringement of EU rules only mention that the EKAER system (in its original form) did not comply with the VAT Directive, as the system primarily affected intra-EU transactions and introduced administrative formalities connected with the crossing of a border. The Communication, however, does not refer to a specific provision of the Directive. Unfortunately, LFNs are not public, so we cannot check which exact provisions were mentioned in it. If we look at the Court of Justice's 2021 preliminary order in *Eurochem v NÁV*,¹⁰⁷ Article 273 of the VAT Directive is mentioned. Pursuant to this article:

'Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, subject to the requirement of equal treatment as between domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers (emphasis added)'.

Thus, this provision allows Member States some margin of discretion in adopting further measures they deem necessary to prevent VAT evasion. However, Member

¹⁰³ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('VAT Directive'), Art 1. For a commentary see B Terra and J Kajus, *A Guide to the European VAT Directives – 2021* (IBFD 2021).

¹⁰⁴ VAT Directive, Art 2.

¹⁰⁵ EUR-Lex, 'The European Union's common system of value added tax (VAT)', at eur-lex.europa.eu.

¹⁰⁶ LFNs and Reasoned Opinions are not publicly available, and one needs to rely on Commission Communications for limited information concerning them.

¹⁰⁷ Case C-583/20 *EuroChem Agro Hungary Kft. v NÁV*, EU:C:2021:919.

States can only adopt such measures if there is equal treatment between domestic and intra-EU transactions, *and* the new measures do not lead to new border formalities. This textual reading does not provide the full picture of the obligations, as the provisions were further clarified by the Court of Justice in *Eurochem*, following the reference from the Hungarian Supreme Court.

In this case, EuroChem – a Hungarian commercial transportation company – omitted to submit a simple tax form and according to the Hungarian rules it was designated as a ‘risky tax contributor’. Thus, NÁV decided to review the company’s EKAER submissions and found several inconsistencies. For instance, the company did not upload the exact times for the start of the transport and the product’s unloading, and there were several irregularities concerning the weight of the product.¹⁰⁸ Following NÁV’s investigations, under the old EKAER rules, the company was fined a HUF penalty equivalent of EUR 300,000. Given the size of this fine, the Hungarian Supreme Court asked the Court of Justice whether the margin of discretion enjoyed by Member States under Article 273 of the Directive included the adoption of extra measures that resulted in such high penalties (between 30-40% of the value of the transported goods) and whether these penalties were in line with the principle of proportionality.

Not surprisingly, the Court of Justice concluded that Article 273 and the principle of proportionality precluded the adoption of such excessive penalties. Thus, in order for an additional E-System – introduced by a Member State to combat VAT evasion – to be in line with Article 273 of the VAT Directive, the following cumulative conditions must be met:

- The system should not discriminate between domestic and intra-EU transactions,
- The system should not result in formalities relating to the crossing of borders,
- Any penalties for non-compliance should not be excessive, and
- Any penalties for non-compliance should be proportionate.

As we have seen, the original version of EKAER was heavily amended due to its non-compliance with the latter two conditions. Having spoken to several traders who have used the EKAER system for the transportation of goods from Romania to Hungary, they informed us that compliance with the EKAER system used to be checked on the Hungarian side of the Hungary–Romania border. Such checks would clearly contradict the wording of Article 273 TFEU, which prohibits the setting up of any new formalities relating to the crossing of borders. Furthermore, one could argue that any prior notification of the transportation of goods in an electronic system, in an intra-EU situation, would result in ‘formalities connected with the crossing of frontiers’. However, what about the new, and narrowed-down version of EKAER and BIREG?

¹⁰⁸ Ibid, paras 7–8.

In its current and truncated form, EKAER only applies to various risky products. Whilst it does not seem that the system discriminates between domestic and intra-EU transactions, as in the case of both types of transactions, information must be submitted to the EKAER system. If the excessive penalties are still applied, then those penalties would go against the Court's interpretation of Article 273 of the Directive. Furthermore, if compliance with the system for the products in question is still systematically checked at intra-EU borders, then Hungary is still in breach of Article 273 TFEU as even the narrowed-down version of EKAER would result in 'formalities connected with the crossing of frontiers'.¹⁰⁹

BIREG, as we have seen in Section 3.1, has also been amended a month after its entry into force in 2021. In its current form it does not apply to intra-EU transactions. Furthermore, the measure does not have the aim of combatting VAT evasion, but to ensure conformity with the international/bilateral system of transport permits. Thus, one can conclude that the modified BIREG system does not contravene Article 273 of the VAT Directive, either because it has a different subject matter or because intra-EU transactions are not affected.

Analysing RO e-Transport through the lens of the afore-mentioned four cumulative conditions, the following can be concluded. Firstly, the system overtly discriminates between domestic and intra-EU transactions. Secondly, RO e-Transport results in formalities relating to the crossing of borders. Registration in the system results in a UIT number, which needs to be checked at Romania's intra-EU borders with Hungary and Bulgaria. Thirdly, the penalties for non-compliance for intra-EU deliveries are excessive. Currently, for private individuals the fines are between EUR 2000-10,000, while for companies, fines range from EUR 4000 to 20,000 euros (these might be modified by the time the article is published). There are further sanctions in the form of asset seizures or criminal sanctions in some special cases when domestic criminal laws are broken. Lastly, given the size of sanctions, one can argue that they are clearly not proportionate.

In conclusion, whilst both EKAER and e-Transport are meant to combat VAT evasion, EKAER in its original form was found to breach Article 273 of the VAT Directive. Moreover, the excessive penalties applied by the Romanian authorities pursuant to e-Transport would most certainly also breach Article 273 of the VAT Directive, as interpreted by the Court of Justice in *Eurochem*.

4.3. Proving intra-EU transactions for VAT purposes

The VAT Directive includes a very important general exemption, which by now can be considered more as a rule than an exemption for the intra-EU transport of goods. Indeed, under Article 138(1) of the Directive, the intra-EU supply of goods for taxable persons is exempted from the payment of VAT in the country of origin, when

¹⁰⁹ Having spoken to traders that operate between Romanian and Hungary, we were informed that the Hungarian NAV conducts checks both at the border and in the country's interior.

ownership of the goods has been transferred from the vendor to the purchaser, the goods have been dispatched/transported to another Member State, and the goods have physically left the territory of the Member State of supply.¹¹⁰

Even though the VAT number of a company registered in an EU Member State can be easily checked using the EU-wide VAT Information Exchange System (VIES),¹¹¹ Member States adopted different approaches when it came to the application of the Article 138 exemptions for cross-border transactions, creating difficulty and legal uncertainty for businesses involved in intra-EU transactions.¹¹² Therefore, the Council considered that it was important to:

‘specify and harmonise the conditions under which the exemptions can apply. [...] As cross-border VAT fraud is primarily linked to the exemption for intra-Community supplies, it [was] necessary to specify certain circumstances in which goods should be considered as having been dispatched or transported from the territory of the Member State of supply’.¹¹³

To achieve this aim, Council Regulation 2018/1912 was adopted, which amended the VAT Directive’s implementing regulation, namely, Council Implementing Regulation 282/2011. The latter’s new Article 45a¹¹⁴ provides that for the purposes of applying the exemption under Article 138 of the VAT Directive, a presumption is made for the existence of an intra-EU transaction if the vendor is in possession of ‘two items of non-contradictory’ evidence, issued by two parties independent of each other, such as a signed CMR note, a bill of lading,¹¹⁵ an invoice from the carrier of the goods, or an insurance policy for the transport of goods, among others. The evidentiary strength of these documents is showcased by the presumption created in favour of the existence of an intra-EU transaction, which the tax authorities can rebut with further evidence. In other words, we do not consider that the Romanian and Hungarian E-Systems provide stronger evidence for the existence of intra-EU transactions, then the ones already introduced by Council Regulation 2018/1912.

¹¹⁰ Terra and Kajus (n 103) Section 15.4.

¹¹¹ European Commission, ‘VIES VAT Number Validation’, at ec.europa.eu.

¹¹² Council Implementing Regulation (EU) 2018/1912 of 4 December 2018 amending Implementing Regulation (EU) No 282/2011 as regards certain exemptions for intra-Community transactions, recital 3. This justification was also used by the Romanian Minister of Finance in a 2020 Note. It is said that divergent approaches by Member States in applying VAT exemptions for intra-Community supplies of goods have created difficulties and a lack of legal certainty for both economic operators conducting such transactions and for tax administrations.

¹¹³ Council Implementing Regulation (EU) 2018/1912 (n 112) recitals 3–4.

¹¹⁴ For a commentary see Terra and Kajus (n 103) Section 15.4.4.

¹¹⁵ A bill of lading is a two-sided document, produced by the carrier of the goods. On one side, it contains a description of the goods, when they were loaded, and to whom the goods are to be delivered to. On the other side, it details the terms of the contract of carriage. See E Bakind, G Osborne, and L Roach, *Commercial Law* (2nd edn, Oxford University Press 2015) 490.

Having spoken to traders in Romania involved in the intra-EU supply of goods, the most common form of evidence is the CMR note signed by the acquirer, which can then be sent to the domestic tax authorities. Thus, if there are already EU rules in place that harmonise the evidence needed to prove intra-EU transactions and thus help fight VAT avoidance, why did the Romanian and Hungarian authorities require extra evidence of such transactions in the form of entries into the two E-Systems? In the case of Hungary, one might argue that the original EKAER that became operational in 2015 was adopted prior to amending Regulation 2018/1912 (which came into force in 2020), when no harmonized EU rules existed. However, why would then Romania go ahead with e-Transport, several years after the entry into force of Amending Regulation 2018/1912? This is puzzling, since Regulation 2018/1912 was adopted to assist tax authorities. Thus, it has a similar purpose and is an alternative to e-Transport.

One might argue that it is more convenient for states to have the traders fill out the information concerning the intra-EU supply of goods into an online system, because the burden of entering the proof of the intra-EU transaction is shifted from the domestic tax authorities to the traders. When traders use a signed CMR note as evidence before the tax authorities, the latter still have to enter the data from the CMR note into their databases, unless an e-CMR is used. However, obliging the traders to enter such details into E-Systems, shifts the burden of entering the information to the traders.

In conclusion, the rules that implement the VAT Directive and that apply to intra-EU transactions already provide for several ways of evidencing intra-EU transactions, and the entry of information into EKAER or e-Transport seems superfluous.

4.4. Conformity with Regulation 1100/2008 on the elimination of internal frontier checks

So far, the two E-Systems touch upon the EU's FMG and VAT rules. However, their conformity should also be checked with rules adopted under the EU's Common Transport Policy. For instance, Regulation 1100/2008 applies to 'controls performed by Member States', pursuant to EU or national law, on means of road or inland waterways transport.¹¹⁶ Pursuant to recital 3, 'Member States perform checks, verifications and inspections relating to technical characteristics, authorisations and other documentation that vehicles and inland waterway vessels must comply with'.

Article 3 of the Regulation imposes a negative obligation on Member States, *not* to perform the checks listed in Annex I as 'frontier controls'. Instead, they should be applied 'throughout the territory of the Member State', in a non-discriminatory fashion. The Annex then includes a list of checks pursuant to both EU (Part 1) and national law (Part 2), among which one can mention: the maximum authorized dimensions, weight, and road worthiness of the transport vehicles, the driver's employment

¹¹⁶ Regulation (EC) No 1100/2008 (n 9) Art 1.

contract, transport tickets, recording equipment, the EU authorization for the road transport of goods, driving licenses, controls relating to the transportation of dangerous goods, and controls relating to the means of transport for perishable foodstuffs.

The list included in Annex I is exhaustive. Firstly, the controls included in Part 1 (Section 1, Directives and Section 2, Regulations) and Part 2 of Annex I are clearly numbered and there is no permissive language present that would allow Member States to carry out ‘other’ types of checks, not included in the Annex, as frontier checks. Secondly, pursuant to Article 4 of the Regulation, Annex I can only be amended pursuant to the proposal of the Commission, taking account of ‘technological developments in the field covered’ by the Regulation.¹¹⁷ This exhaustive list, however, does not in any way include controls to check the compliance with various E-Systems meant to combat intra-EU VAT evasion for the transport of goods.

Thus, we can analyse the conformity of the Romanian and Hungarian systems with Regulation 1100/2008 in two ways. The first one follows a *per a contrario* style of reasoning. If the checks are not included in the exhaustive list found in Annex I to the Regulation, then they cannot be allowed. Following this type of reasoning, neither the new version of the EKAER for risky products, nor the e-Transport systems are compliant with the Regulation. According to the second reading, even if one could argue that the checks should somehow be included in the exhaustive list, they cannot be performed as frontier checks. Thus, if conformity with the new EKAER is still conducted by the Hungarian authorities at the border with Romania, such checks are not in line with the directly applicable Regulation. As discussed above, compliance with RO e-Transport for intra-EU transports results in physical checks carried out at the EU’s internal borders, namely between Hungary and Romania, and Bulgaria and Romania. Thus, the Romanian system is not in line with the Regulation. As argued in Section 6, instead of carrying out such checks at the border, domestic authorities should introduce random, multi-filter checks carried out in the countries’ interiors and cross-checks for the sellers and buyers.

In conclusion, one of the most important breaches that result from the two E-Systems, concerns the breach of Regulation 1100/2008 that includes an exhaustive list of checks pursuant to EU and national law, which can only be done in the interior of EU Member States, in a non-discriminatory fashion, and not as systematic checks at their intra-EU borders.

5. Practical challenges

In this Section, let us focus on the practical challenges caused by the two E-Systems. First and foremost, it is important that amid the hype to create ‘smart’ cities, education, and taxation with the help of various E-Systems, we also recognise that just because something is labelled as ‘smart’ or ‘E-’ does not necessarily result in more

¹¹⁷ Ibid Art 4.

efficient outcomes. On the contrary, given the multiple interests that are at play in the intra-EU trade in goods and the fight against VAT evasion, significant practical hurdles can arise. Thus, from a Member State's perspective, a 'smart' system like EKAER or RO e-Transport can be used to increase tax revenue and 'coerce' those involved in the transportation of goods to be truthful about their transactions and increase on-the-ground and *ex post* controls, under the threat of heavy fines. However, such measures should be in line with the EU's aim to create an internal market and should take into account the interests of traders and freight hauliers, who are at the receiving end.

In order to give a more accurate picture of the practical challenges, we sent out a questionnaire with seven questions to three businesses based in Romania (for the questions and the more detailed presentation of the case studies, see Annex 1). We selected a business that imports and exports lumber and other wooden products to and from Romania, primarily through the Hungary-Romania border (Case Study 1); a business that imports olive oil and other products to Romania, from Greece, the goods having to cross the Romania-Bulgaria border (Case Study 2); and a business whose merchandise was confiscated by the Romanian authorities for not filling out e-Transport and which is currently in a legal battle with ANAF (Case Study 3). Based on the three case studies, as well as various reports and media articles, we group the practical challenges into four categories: (a) increased costs; (b) increased bureaucracy; (c) user friendliness and technical problem; and (d) the fragmentation of the Internal Market. It must also be noted that the practical challenges cannot be neatly separated, as they often overlap.

5.1. Increased costs

E-Systems, such as the ones discussed in this paper, are often intended to increase efficiency and revenue. Nevertheless, 'they also impose a significant one-off amount of cost on the taxpayer during the course of their introduction'.¹¹⁸ For instance, the Hungarian authorities had intensively published information, made presentations, and issued press releases before the adoption of the original EKAER in 2015.¹¹⁹ Nevertheless, even with the presence of such domestic measures to popularise EKAER, stakeholders and transporters have lamented that the original system caused a lot of chaos.¹²⁰ This is understandable. As legal professionals, used to reading national, EU, and international legal texts, we found both the old and new versions of EKAER, BIREG, and RO e-Transport difficult to read and comprehend. After having spoken to the businesses in the three case studies, we identified a set of direct and indirect costs associated with the operation of such E-Systems.

¹¹⁸ P Bordás, 'Smart Taxation in the Hungarian Tax System' (2021) 24 *Curentul Juridic* 62, 66.

¹¹⁹ Lik (n 4) 56.

¹²⁰ Ibid 61.

Firstly, there is the initial cost in time needed to learn how to operate a newly introduced E-System and to understand how the rules are implemented. In Case Study 1, the respondent indicated that an employee needs 4-5 working days to fully learn how to use e-Transport, to ensure that not only the workings of the system are properly understood, but also that mock tests are conducted.

Following this initial learning period, the actual time needed to fill out the electronic forms for an individual transport/transaction also needs to be factored in. This, we were told, can vary. If the websites are operating well and, for example, a Romanian business is exporting goods to another EU Member State, then the actual filling out of e-Transport can take 15-30 minutes per transaction when the goods leave the seller and another 10-20 minutes when the goods arrive at the seller. However, this time significantly increases when the websites (quite frequently in the case of e-Transport) are not operational, or when the business imports goods from EU Member States. Thus, if a Romanian business is importing goods from another EU country, the EU business partner must send all the information needed for e-Transport to the Romanian business in advance, so that the latter can fill out RO e-Transport before the shipment occurs. Factoring in different time zones, working hours, weekends, or changing the lorry used for the delivery, such a simple task can take longer than expected. The company (with 2 permanent employees) in Case Study 2 estimated that e-Transport results in 14-15 lost working days/year, amounting to 1000-1500 euros of indirect costs.

One must also factor in the frequent changes to the E-Systems. For example, in 2024, RO-Transport has been amended thrice so far,¹²¹ while EKAER has been significantly amended since 2015 due to the pressure from the Commission and the Court of Justice (see Section 3.1). Frequent amendments often result in extra costs to retrain staff. Small and medium-sized enterprises (SMEs) often do not have the financial resources to employ compliance experts and have to outsource these tasks, increasing their costs. Larger enterprises, with much larger volumes of intra-EU trade (which also means more E-Systems to fill out), either need to train several employees in-house or hire new employees.

Furthermore, following recent amendments to RO e-Transport, businesses are also required to acquire various GPS terminals for the vehicles, so that their real-life geographic position can be communicated to the E-System.¹²² However, besides the costs in time, staff, and extra equipment, there are also costs in time that arise from the compliance checks, when national authorities stop lorries to check whether they have filled out RO e-Transport or EKAER. According to Case Study 2, even if a company fills out e-Transport well, the freight haulier can encounter problems if other companies using the same lorry have not filled out the E-System.

¹²¹ Ministerul Finanțelor, 'Legislație e-Transport', at etransport.mfinante.gov.ro. When we checked the website on 18–19 December 2024, none of the links worked.

¹²² T Tomescu, 'Ghid Complet Pentru Conformitatea cu RO e-Transport' (Softnet Consulting, 27 October 2024), at softnetconsulting.ro.

Lastly, EKAER in its original format imposed very hefty fines. These disproportionate fines were successfully challenged before the Court of Justice in the aforementioned *Eurochem*. However, Romania – at the moment of writing – still imposes significant penalties that can include the confiscation of the merchandise when e-Transport is missing. Case Study 3 describes such a situation that resulted in a fine and the sequestration of goods worth EUR 20,000. Challenging the fines and confiscation results in lengthy court proceedings and legal costs.

In conclusion, national E-Systems meant to combat VAT evasion generate increased direct and indirect costs to businesses, such as costs in time, staff training or the hiring of new staff, the acquisition of geolocation equipment, costs incurred during the compliance checks, and the potential fines and legal costs to challenge such fines.

5.2. Increased bureaucracy

Besides increased direct and indirect costs, such E-Systems also create administrative burdens for those involved in the intra-EU transportation and sale of goods.

As EKAER has been operational since 2015, more studies show that its introduction had a negative impact on the logistics industry and imposed new administrative burdens.¹²³ RO e-Transport, in its current form, is in its relative infancy. Nevertheless, some preliminary information is already available on the administrative burdens it creates. Firstly, the rules come with a 26-page guidebook issued by the Romanian Ministry of Finance.¹²⁴ This guidebook, however, needs constant updating due to the ongoing amendments to the system. Moreover, due to the efforts of the National Union of Road Hauliers from Romania (*Uniunea Națională a Transportatorilor Rutieri din România*, UNTRR), some aspects of e-Transport have been postponed, such as the fines for not using GPS equipment to geolocate the lorries.¹²⁵ Thus, businesses need to spend considerable time to ensure that they are up to date with the fast-changing rules. Secondly, the rules and their implementation cause a lot of uncertainty and raise many practical questions. On the website of UNTRR, we have come across very frequent questions on whether samples, free goods, packaging and goods transiting the country should be declared.¹²⁶ The company in Case Study 2 did not understand what the reasons for setting up e-Transport were, since it just resulted in more cumbersome bureaucracy.

Beyond these issues, we have discussed in Sections 4.1 and 4.3 how these E-Systems result in the duplication of information. Furthermore, they come on top of other systems that stakeholders have to comply with, be it recent electronic invoicing

¹²³ Lik (n 4) 61.

¹²⁴ Ministerul Finanțelor and ANAF, 'Sistemul Național e-Transport Pentru Monitorizarea Transporturilor pe Teritoriul României' (2024), at mfinante.gov.ro.

¹²⁵ UNTRR, 'Oficial, amenzile pentru neutilizarea sistemelor GPS amânate până pe 31 martie 2025' (7 November 2024), at untrr.ro.

¹²⁶ See UNTRR, at untrr.ro.

systems or special systems for the transportation of certain goods, like wood and lumber (e.g. the SUMAL system and E-Factura).

To sum up, national E-Systems for the combatting of VAT evasion, are often subject to multiple amendments, which creates uncertainty and results in extra administrative burdens for businesses, atop of existing burdens. Furthermore, they result in pushback from various stakeholders, such as transport associations.

5.3. User ‘friendliness’ and technical problems

As with many E-Systems, there are also issues that concern the user friendliness of the web interface and frequent reports of the websites crashing, time during which no e-numbers can be requested. Without such numbers the traders are liable to pay fines and even the sequestration of their goods.

In the case of EKAER, a practical difficulty that was noted concerned the inability to subsequently change small administrative or clerical errors.¹²⁷ Thus, the simple misspelling of the lorry’s number plate could result in a fine. As mentioned, in Romania, a social media group has already been created in which professionals, accountants, and other stakeholders post images and information about ANAF’s various E-Systems not working.¹²⁸ At the moment of writing, the social media group has counted over 500 instances of ANAF’s E-Systems not working or crashing. Even the website of the Romanian Ministry of Finance, which includes the legal rules and amendments to RO e-Transport, was frequently not operational.

In sum, Member States need to ensure that if they do go down the path of using E-Systems to combat VAT evasion, that such systems are user-friendly, stable, and allow for the correction of clerical errors.

5.4. Fragmentation of the internal market

There are further practical problems one might mention that concern the operation of the Internal Market. Firstly, if each EU Member State introduces its own E-System, the Internal Market risks being fragmented. For instance, scouring various online platforms on which intra-EU traders shared their experiences with RO e-Transport and EKAER, we came across a case¹²⁹ where a Hungarian company sent goods to Romania. The Hungarian company organised the transport of the goods but was not aware that the Romanian party had to be informed in advance to upload the transaction into RO e-Transport. Since the transaction did not appear in the system, when the goods arrived in Romania, they were seized by the Romanian authorities for not having been entered into the E-System (see also Case Study 3). Secondly, different national requirements – the non-observance of which results in hefty fines – can result in trade diversion towards EU Member States that do not have such

¹²⁷ Varga (n 33) 148.

¹²⁸ See facebook.com.

¹²⁹ See facebook.com.

systems or some intra-EU transactions might simply be called off due to the excess bureaucracy.

In conclusion, Member States must be mindful of the (obvious) fact that they are members of the EU, the aim of which is to create an ‘ever-closer’ Union¹³⁰ premised, among others, on the creation of the Internal Market.¹³¹ Thus, any national measures aimed at combating VAT evasion should avoid fragmenting the Internal Market.

6. Ways forward

From the perspective of EU law, the way forward is relatively simple. Member States must comply with their obligations mentioned in Section 4, including the EU FMG provisions, the VAT Directive, Implementing Regulation 282/2011, and Regulation 1100/2008. However, there are multiple interests and objectives at stake, including those of the EU, the traders/transporters, and the Member States. Furthermore, one needs to reconcile, on the one hand, the need to ensure the well-functioning of the Internal Market, with the aim of combating VAT evasion, on the other. Thus, the way forward needs to consider these competing interests and objectives. In the following sections, we put forward four steps that can help reconcile these competing interests and objectives: (a) Romania and Bulgaria’s full accession to the Schengen Area; (b) better awareness and enforcement of EU Law; (c) an EU-wide E-System; and (d) a multi-filter system for checking compliance combined with cross-checks.

6.1. Is Romania and Bulgaria’s full accession to the Schengen Area enough?

The Romania-Hungary and the Romania-Bulgaria borders are special cases. The two countries had joined the Schengen Area in 31 March 2024, but only with their maritime and air borders.¹³² Then, on 12 December 2024, the Justice and Home Affairs Council decided that Romania and Bulgaria can join the Schengen Area also with their land borders from 1 January 2025.¹³³ The situation in Cyprus is unique due to it being a divided island, and Ireland is in the Common Travel Area with the UK.

The presence of a physical border invites domestic authorities to use it as an easy choke point where numerous other checks can be carried out, even when EU law prohibits such checks from being carried out at the EU’s internal frontiers. The entry of Romania and Bulgaria into the Schengen Area at least dismantles checks carried out on persons at the countries’ intra-EU borders, which have become bottlenecks for freight transport. According to a 2023 Report by UNTRR, Romanian freight

¹³⁰ Art 2 TEU.

¹³¹ Art 3 TEU.

¹³² Council Decision (EU) 2024/210 (n 11), Art 1, second sentence 2; Council of the EU, ‘Press Release – Schengen: Council decides to lift land border controls with Bulgaria and Romania’ (Brussels, 12 December 2024), at www.consilium.europa.eu.

¹³³ Council of the EU (n 132).

hauliers suffered an estimated loss of 2.4 billion euros annually due to Romania not being part of the Schengen Area, and some lorry queues at the Romania-Hungary border were up to 20km long (!).¹³⁴ Thus, eliminating such choke points is crucial for the smooth operation of the Internal Market.

However, unlike the recent media hype around Romania and Bulgaria's full accession to the Schengen Area,¹³⁵ we are somewhat reserved about whether, from 1 January 2025, the changes for freight hauliers will truly be drastic. Firstly, compliance checks with RO e-Transport are done systematically at Romania's intra-EU borders, combined with other checks, imposed by Romania's Highways Authority (CNAIR) that systematically measures the weight of lorries on special scales.¹³⁶ The Romanian Ministry of Finance has very recently declared that, close to Romania's borders, the UIT number for e-Transport will continue being checked even after Romania's full entry into the Schengen Area. However, such checks will only be done pursuant to a risk assessment.¹³⁷ Representatives of UNTRR expressed their concern that the Romanian authorities will continue checking compliance with e-Transport and the weights of lorries at Romania's borders with Hungary and Bulgaria, even after 1 January 2025.¹³⁸

Secondly, Hungary has already announced that it will continue checking every lorry and its documents for at least 6 months following Romania's full entry into the Schengen Area, while Bulgaria will be charging 25 euros/lorry at the Romania-Bulgaria crossing at Ruse.¹³⁹ Lastly, there are an unprecedented number of 'temporary' controls between 'old' members of the Schengen Area,¹⁴⁰ which will result in temporary border checks still being in place following Romania's and Bulgaria's full accession to the Schengen Area.

In conclusion, even following Romania and Bulgaria's full accession to the Schengen Area, much will depend on the willingness of national authorities not to perform certain checks (other than those on persons) systematically at, or very close to intra-EU borders.

¹³⁴ I Tudorică, 'Aderarea României la Schengen: Impactul în Economie După 13 de întârzieri' (Profit.ro, 13 December 2024), at www.profit.ro.

¹³⁵ K Jochecová, 'Romania and Bulgaria get the Schengen Green Light' (Politico, 12 December 2024), at politico.eu; A Mitran, 'România intră în spațiul Schengen la 17 ani de la aderarea Uniunea Europeană. Care au fost piedicile' (Adevărul, 23 November 2024), at adevarul.ro.

¹³⁶ Gáspár-Szilágyi (n 1) 624.

¹³⁷ A Vasilache and D Popa, 'România a intrat și terestru în Schengen. Ce spun transportatorii despre asta' (Hotnews.ro, 12 December 2024), at hotnews.ro.

¹³⁸ D Comache, 'Care sunt beneficiile aderării la spațiul Schengen. România intră în elita europeană. Noul statut aduce avantaje pe termen lung' (Digi24.ro, 12 December 2024), at www.digi24.ro.

¹³⁹ Tudorică (n 134).

¹⁴⁰ European Commission, 'Temporary Reintroduction of Border Control', at home-affairs.ec.europa.eu; the list includes Germany, Slovenia, Italy, Austria, the Netherlands, Norway, Denmark, France, Sweden.

6.2. Better awareness and enforcement of EU law

There also needs to be better awareness of EU law among domestic and local authorities, as well as stakeholders in the trade/transport industries and even in academic circles. It is quite evident that the Hungarian and Romanian authorities neglected to check the conformity of their measures with EU law, focusing on their own objectives to tackle tax evasion. Some of the authors we read for our research also praised the efficiency of EKAER in fighting VAT evasion but failed to mention the many inconsistencies that exist between these national measures and EU law. It goes without saying that EU law has primacy over inconsistent national law,¹⁴¹ and Member States have an obligation to remove such inconsistencies. Thus, whilst it is important for Member States to fight VAT evasion, the individual means chosen to reach this objective must be in compliance with EU law.

Furthermore, the Commission also needs to be more vigilant when Member States adopt E-Systems that breach or have the potential to breach EU law. A recent study commissioned by the European Parliament on the re-introduction of temporary border controls in members of the Schengen Area during the Covid-19 pandemic found that there has been an ‘EU enforcement and evaluation gap’ in an area where the ‘EU has a clear legal competence’.¹⁴² As the Commission can initiate investigations under art. 258 TFEU on its own initiative or following a complaint from the public,¹⁴³ we decided to send a complaint form to the Commission on 21 October 2024, describing in detail the inconsistencies between RO e-Transport and EU Law. On 15 November 2024, the Commission responded that they will decide ‘whether further action should be taken’.¹⁴⁴

Lastly, ever since the Court of Justice had co-opted private parties in the enforcement of EU law in *Van Gend en Loos*,¹⁴⁵ the various transport associations and other stakeholders/interest groups need to put pressure on their domestic authorities, as seen by recent protests organized by freight hauliers in Romania.¹⁴⁶ Furthermore, they should also be willing to inform the Commission about new state measures that are incompatible with EU law or pursue legal action before the domestic courts.

However, it is also important to bear in mind that there is a problem with VAT evasion resulting from intra-EU trade. According to the Commission’s 2023 VAT Gap Report, there is a ‘VAT Gap’ – the difference between expected VAT revenue

¹⁴¹ Case 6-66 *Flaminio Xosta v E.N.E.L.*, EU:C:1964:66.

¹⁴² S Carrera and N Chun Luk, ‘In the Name of Covid 19: An Assessment of the Schengen Internal Border Controls and Travel Restrictions in the EU – Study Requested by the European Parliament’s LIBE Committee’ (2020) PE 659.506, 10.

¹⁴³ Chalmers, Davies and Monti (n 24) 322.

¹⁴⁴ European Commission, Taxation and Customs Union, ‘Answer to Szilard Gaspar-Szilagy’, 15 November 2024.

¹⁴⁵ Chalmers, Davies and Monti (n 24) 272–73.

¹⁴⁶ C Mihai and S Rotaru, ‘Romanian transporters, farmers block roads over expensive civil liability policies’ (Euractiv, 11 January 2024), at euractiv.com.

and the actual amount collected – in the EU of EUR 61 billion.¹⁴⁷ Whilst some common rules at the EU level exist, the enforcement of those rules is still primarily left to the Member States, which must work with limited information and have their own interests in mind. As Lik notes, the original EKAER system resulted in a significant increase in VAT revenue, and the shadow economy's GDP ratio in Hungary fell from 22% in 2015 to 11% in 2019. Thus, there is a legitimate interest to fight VAT evasion, while also protecting the interests of genuine traders/transporters and ensuring the cohesion of the Internal Market.

Consequently, instead of piecemeal measures by individual Member States, an EU-level solution would be advisable. In the next section, let us look into the feasibility of creating an EU-wide E-System for combating VAT evasion.

6.3. Would an EU-wide E-System be feasible?

Some EU-level solutions for the combating of tax evasion are already in place, such as the Fiscalis Programme established by Regulation (EU) 2021/847 for cooperation between Member States in the field of taxation, covering the period of 2021-2027. However, such measures do not harmonize electronic invoices (e-invoices) or create EU-wide databases for various intra-EU transactions. The Commission, since 2022, has been considering an EU-wide solution for e-invoices, in the form of an EU-wide 'continuous transaction controls' (CTC) e-invoicing system that would cover both intra-EU and domestic transactions.¹⁴⁸ During the writing of the paper, the Council (following a special legislative procedure) has agreed on a set of new rules on digital VAT reporting that would create a 'real-time digital reporting system' for VAT purposes through e-invoices and which would allow the sharing of data via a new IT system.¹⁴⁹ It is expected that the system will be operational by 2030 and that existing national systems will be interoperable with the EU system by 2035.¹⁵⁰

There are two facets to such a pan-European solution: the creation of the actual EU-wide E-system that can track the intra-EU transportation of goods and the correct payment of VAT, *as well as* how/where compliance checks are conducted. Having EU-wide systems of data sharing is not novel, as exemplified by the second-generation Schengen Information System (SIS II),¹⁵¹ the Visa Information System (VIS),

¹⁴⁷ European Commission (n 7).

¹⁴⁸ S Adler Ring, 'VAT in the Digital Age: Mandatory E-Invoicing in the EU' (Sovos, 16 August 2022), at [sovos.com](https://www.sovos.com).

¹⁴⁹ Council of the EU, 'Press Release – Taxation: Council Agrees on VAT in the Digital Age Package' (Brussels, 5 November 2024), at www.consilium.europa.eu.

¹⁵⁰ Ibid.

¹⁵¹ EUR-Lex, 'Second generation Schengen Information System (SIS II)', at eur-lex.europa.eu.

the European Asylum Dactyloscopy Database (EURODAC),¹⁵² or the EU Commission's TRACES platform for live animals and certain foodstuffs.¹⁵³

However, there are a myriad of questions the setting up of such a system raises. What type of information should it contain? Who enters the information into the system: the domestic authorities or the intra-EU traders/transporters? Should it only focus on e-invoicing or also act as a database that stores all intra-EU transactions in goods (also services)? Which domestic authorities would have access to it? Would it have various functions allowing for cross-border collaboration and cooperation between the national authorities? In the following paragraphs, let us discuss some of these questions, noting that in real life, such EU-wide solutions require very thorough impact assessments (usually commissioned by the EU Commission) and the input of numerous stakeholders.

Firstly, we need to identify the *aim and main purpose* of an EU-wide system to combat VAT evasion in the intra-EU transportation of goods. In a purely domestic setting, national tax and revenue authorities can easily cross-check information that concerns the transaction, the parties to the transaction, and the invoices, since they are only dealing with domestic participants and businesses have to periodically provide documentation, such as invoices, to the domestic authorities. However, an intra-EU transaction implies that the domestic authorities will have *incomplete information* on one of the parties to the transaction. Thus, one of the primary functions of an EU-wide E-System would be to provide a platform and repository for information that domestic authorities can easily consult.

SIS II can provide some guidance. The system, in its initial form, has been operational since 1995 and provides access to border police, immigration, customs, and judicial authorities from EU countries and Schengen associated countries.¹⁵⁴ Besides the numerous national authorities that have access to it, the system also acts as a repository of information (fingerprints, photographs, identification data, DNA profiles, etc.) and as a system in which alerts can be placed.¹⁵⁵ Thus, an EU-wide E-System for combatting VAT evasion, could grant access to a variety of national authorities (border police, revenue and tax authorities, judicial authorities, etc.) and could serve as a data repository, as well as a system in which alerts could be sent out in case of suspicious transactions.

Secondly, what *type of information* should be entered into the EU-wide E-System? Both EKAER and RO e-Transport require extensive information, such as the parties to the transaction, the goods being transported (type, value, weight), the freight haulier being used (name, number plates, etc.), as well as the place of loading

¹⁵² On the information systems used to enforce the Schengen Area's External Borders, see European Court of Auditors, 'Special Report No 20/2019 – EU Information Systems Supporting Border Control: A Strong Tool, But More Focus Needed on Timely and Complete Data', at eca.europa.eu, 4.

¹⁵³ European Commission, 'TRACES', at food.ec.europa.eu.

¹⁵⁴ European Commission, 'Schengen Information System', at home-affairs.ec.europa.eu.

¹⁵⁵ European Commission, 'Alerts and Data in SIS', at home-affairs.ec.europa.eu.

and unloading. An EU-wide system could also include such information. As we have seen, SIS II includes several types of data, and the system is periodically reviewed to add new categories of data. Such flexibility should be a part of an EU-wide E-System as well. Furthermore, unlike SIS II, which includes very sensitive data, such as fingerprints, DNA profiles for missing persons, and photographs, an E-System for combatting VAT evasion would include fewer sensitive data, thus ensuring easier compliance with the EU's data protection rules.¹⁵⁶

Thirdly, and very importantly, *who should enter the data?* Both EKAER (in its original and revised version) and e-Transport shift the burden of data entry from the state to the businesses. In the case of RO e-Transport, there is clear discrimination between wholly internal transactions and intra-EU transactions, since RO e-Transport applies to the former under very limited grounds. Thus, it is important that the EU-wide E-System should not discriminate between intra-EU and wholly internal transactions, by obliging intra-EU traders to enter information into it, without doing the same for wholly internal transactions. It follows that the data into the EU-wide system should be entered by the domestic authorities. As mentioned, all businesses must, periodically send their invoices and other documents to the domestic revenue and tax authorities. Thus, the authorities are already in possession of such information, which they can upload into the system. Furthermore, e-invoices and e-CMRs could be directly connected to the system and with the help of artificial intelligence, finding discrepancies should become much easier.

Nonetheless, there are costs when setting up such a system. For instance, according to the European Court of Auditors, setting up the various E-Systems for the monitoring of the Schengen Area's external borders cost 600 million euros.¹⁵⁷ Furthermore, even in a small country like Hungary, EKAER received millions of notifications yearly. An EU-wide system would potentially include tens of millions of transactions per year. Thus, the system would need to be robust enough to handle large volumes of data. It should also allow the various national authorities to conduct *ex post* audits, and entries into the system should be amendable. However, it is to be expected that the efficiency of such a system will also greatly depend on whether the data entries are complete and entered in a timely manner.¹⁵⁸

The second aspect concerns the checking of compliance with the system. This would not result in major modifications to the existing legal framework. Annex I to Regulation 1100/2008 could be amended to include internal checks for compliance with the EU-wide E-System. Such checks, as the Regulation very clearly says, should be done internally, throughout the territory of the Member States, and not systematically as frontier checks. Similar checks, for instance, on the road worthiness of commercial vehicles, are already conducted in EU Member States internally,

¹⁵⁶ European Data Protection Supervisor, 'Schengen Information System', at www.edps.europa.eu.

¹⁵⁷ European Commission (n 7).

¹⁵⁸ Ibid 4.

but the number of checks differs significantly. According to a 2020 Report of the European Commission to the European Parliament, some Member States make more roadside controls than others, Germany having led the way with 1.620.465 vehicle checks in 2015-2016 while countries such as Italy only checked 5514 vehicles in the same period.¹⁵⁹

To conclude, an EU-wide system for combating VAT evasion for intra-EU transactions could be feasible. However, the design of such a system would need to have a clear aim and define the information that needs to be entered, domestic authorities should enter the information, it should be robust and with reasonable costs. In the next section we propose a multi-filter system and cross checks that could help domestic authorities carry out compliance checks with E-Systems, whether national or EU-wide.

6.4. A multi-filter system and cross check for checking compliance

In practice, the actual compliance checks could be done using a *multi-filter* system. Firstly, we must acknowledge that not all transport of goods is genuine. Traders might declare one set of goods, when in reality other goods are the object of transport, as recently exemplified by lorries carrying waste to Romania that had been declared as other goods.¹⁶⁰ Furthermore, traders might also declare a different volume, weight, quantity or value, so as to pay less VAT and other types of taxes. Therefore, public authorities have an interest in checking the transport of goods. However, such checks should not result in checks at the EU's internal borders, unnecessary impediments to the intra-EU movement of goods, and should be in line with the EU's VAT Directive.

Thus, public authorities could choose to institute roadside controls, in their countries' interior, using a multi-filter approach and cross-checks at the seller and buyer. In order not to create unnecessary traffic jams and congestion, permanent, fixed checkpoints could be created in different locations inside the country, to which more flexible measures could be added, such as: *ad-hoc* checkpoints, mobile control teams, road cameras, the aerial surveillance of roads using drones, helicopters, road scales for weight checks, and checks conducted at parking places for lorries. Furthermore, Member States authorities could cooperate, using even existing mechanisms in place such as the Fiscalis Programme, to cross-check the information at the loading place, transport company and delivery place. Multi-filter systems and cross checks could also benefit from more de-centralisation. For example, authorities that are performing the checks could be given more autonomy in order to perform checks where they consider it necessary.

¹⁵⁹ European Commission, 'Report from the Commission to the European Parliament and the Council on the Application by the Member States of Directive 2000/30/EC', COM(2020) 107 final.

¹⁶⁰ D Popa, 'Sute de camioane întră lunar în România cu „donații”, panouri fotovoltaice sau haine second hand. În realitate ele transportă deșeuri periculoase' (Hotnews.ro, 27 July 2024), at hotnews.ro.

According to statista.com, Romania and Hungary have some of the lowest controls performed by the countries' internal police in the EU¹⁶¹ (see Figure 4). This is problematic because it increases the likelihood of traders and freight hauliers not obeying the law, which ultimately results in the authorities using their national borders to create checkpoints where compliance can be checked with cumbersome E-Systems. Contrary to this, Austria, which neighbours Hungary and is close to Romania, does not implement systems like EKAER or Ro e-Transport since Austrian authorities perform numerous internal checks.¹⁶²

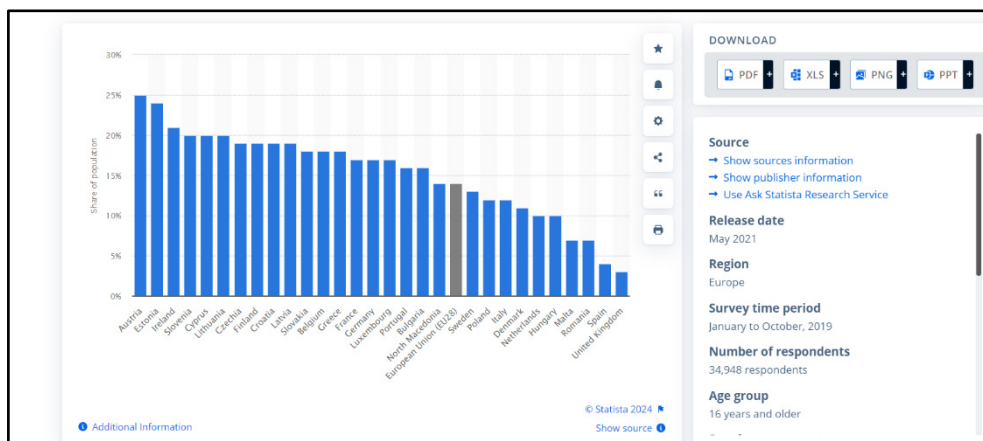


Figure 4. Percentage of people that have been stopped by the police in the last twelve months in selected European countries in 2019, by country.

Furthermore, one can also point to existing examples in Romania of multi-filter systems that are in operation, such as those introduced by the Romanian authorities fighting the illegal trade in tobacco products at Romania's northern border with Ukraine. Tobacco smuggling from Ukraine and Romania is a recognised problem, due to the high excise taxes one must pay on such products in Romania. Patrolling the 270 km long land border between the two countries is a difficult task, as most of that border is covered by mountains and forested areas. Thus, the Romanian Police and other domestic authorities apply a multi-filter system beyond the border that includes permanent and ad-hoc checkpoints, mobile controls, and checks on warehouses. These checks have resulted in a lowering of illicit trade in tobacco from

¹⁶¹ O McEvoy, 'Percentage of People that Have Been Stopped by the Police in the Last Twelve Months in Selected European Countries in 2019, By Country' (Statista, 31 July 2024), at www.statista.com.

¹⁶² Federal Ministry for Innovation Mobility and Infrastructure of the Republic of Austria (n 5).

Ukraine. Currently, the smuggling of and illicit trade in tobacco products is primarily done at the borders with the Republic of Moldova and Bulgaria.¹⁶³

Lastly, the efforts put into raising awareness and preventing the illegal trade in tobacco products should also be mentioned. Unfortunately, EKAER and RO e-Transport do not adequately focus on prevention and ways by which public authorities can help private individuals and companies obey the law. Instead, their approach is to impose hefty fines and sanctions.

In conclusion, a multi-filter approach and cross checks, using random and frequent internal checks would more adequately protect the Internal Market and ensure compliance with Regulation 1100/2008, than systematic border checks.

7. Conclusions

Following this complex legal and practical analysis of the Hungarian EKAER and Romanian RO e-Transport systems, designed to help combat VAT evasion for the intra-EU trade in goods, we would like to point out the following.

In a well-integrated regional organisation, like the EU, with an internal market that ensures the free movement of all means of production, and which has adopted and continuous to adopt numerous pieces of secondary legislation, in fields such as internal checks, VAT collection, and the common transport policy, ‘doing it alone’ seems not to be a feasible option. The EKAER system in its original version and RO e-Transport in its current version not only create numerous practical problems for traders and freight hauliers, but they also breach the CMR Convention, the EU’s rules on the free movement of goods, the VAT Directive with its implementing regulations, and Regulation 1100/2008.

Instead of such ‘solo’ measures, we would like to remind domestic authorities of what the European Court of Auditors argued in its 2021 Report on Exchanging Tax Information in the EU:

‘A single Member State cannot manage its internal taxation system, especially as regards direct taxation, without receiving information from other Member States. In order to overcome the negative effects of this phenomenon, it is indispensable to have administrative cooperation between the Member States’ tax administrations’.¹⁶⁴

¹⁶³ C Balaban, ‘Contrabanda cu țigarete în România a scăzut la 7,7% din totalul consumului, în luna ianuarie (studiu)’ (Agerpres.ro, 3 March 2024), at www.agerpres.ro.

¹⁶⁴ European Court of Auditors, ‘Special Report No 03/2021 – Exchanging Tax Information in the EU: Solid Foundation, Cracks in the Implementation’, at www.eca.europa.eu, 10. This text is also to be found in Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, recital 2.

Annex 1

Questionnaire

1. How big is your company? (no. of employees)
2. What products do you import/export?
3. From/to which EU country do you import/export?
4. Did you have to fill out EKAER/ RO e-Transport?
5. Did you encounter problems with filling out EKAER/ RO e-Transport? If so, what kind of problems?
6. Did the carrier you used encounter problems when the Hungarian/ Romanian authorities checked compliance with EKAER/ RO e-Transport at the Romania-Hungary or Romania-Bulgaria borders?
7. What costs in time and money do you estimate you incur due to the EKAER/ RO e-Transport rules?

Annex 2

Case Study 1

1. Company based in Romania with one permanent employee acting as a commercial intermediary.
2. Transactions involving wood, timber, furniture, and agricultural products.
3. Imports from and exports to Hungary, Bulgaria, Germany, France, Denmark, Slovakia, Czechia, and Serbia (non-EU).
4. Yes.
5. The following problems have been mentioned:
 - 5 working days needed to adapt to the new e-System
 - Extra time needed to fill out transaction in e-System: 15-30 min per transaction
 - Once the merchandise arrives to the EU-based destination another 10-20 min are needed per transaction to confirm the arrival of the product in the e-System
 - Doubling of information: the same information is needed when filling out CMR note
 - Problems arise when the buyer returns certain faulty/non-conforming products for which the e-System should be filled out again
6. No, because the company used valuable time and resources to fill out the e-System, so that the freight hauliers did not encounter problems.
7. The following costs were mentioned:
 - Since e-Transport requires the filling out of information both at the time of loading of the merchandise and after it arrives to the destination, the total time spent per transaction is between 25-60 min, depending on the complexity of the transport

- The costs are not only incurred by the seller, but also by the buyer and the freight haulier. For e.g., the freight haulier needs to wait until all the data is entered into the E-System which can take more time when the system does not work.
- The freight hauliers were checked at Romania's intra-EU borders before 1 January 2025, and are checked at different points close to the border after Romania's entry into the Schengen Area
- A lorry normally covers 90 km in 60 minutes, which at a minimum rate of 1 euro/km results in 90 euros/h. Thus, for a lorry to wait for 30 min until the E-System is filled out, a cost of 45 euros is incurred. On top of this one must add the extra labour costs incurred by the seller's employee to fill out the forms as well as the indirect costs due to lost production time (the time lost completing the forms can be used to gain new clients, perform other, more lucrative tasks, etc)

Case Study 2

1. Company based in Romania, 2 permanent employees.
2. Olive oil, olives, cosmetics, honey, jams, and Turkish delight.
3. Imports products from Greece.
4. Yes.
5. No, the company did not encounter any problems. However, it is a very bureaucratic procedure, cumbersome, and the company does not understand its purpose.
6. Yes, the freight haulier has encountered problems at the Romania-Bulgaria border. However, not because of the company, but because of products of other companies transported by the same freight haulier, for which E-Transport was not filled out.
7. Each year, in total, an estimated 14-15 days are lost just on filling out the relevant forms in the E-System, which results in about EUR 1000-1500 indirect costs to the company.

Case Study 3

1. Company based in Romania with 27 employees.
2. Transactions involving iron-based products, such as gates and fences.
3. Imports products from other EU countries, such as Poland.
4. Yes.

5. Yes. When the lorry, carrying products from Poland, crossed the Hungary-Romania border, the Romanian authorities accused the company of not having the UIT code required by the e-Transport system, even though the company had obtained the code on the same day. Following this, the Romanian authorities imposed a fine and confiscated the goods. The company brought judicial proceedings against ANAF.
6. Yes, at the Romanian border with Hungary the lorry driver was interrogated by the Romanian authorities for lacking the UIT code required by the e-Transport system, even though it was not the duty of the freight haulier to obtain the UIT code.
7. The following costs have been mentioned
 - Seizure of the goods worth approximately 100.000 RON (20.000 Euros)
 - Fine imposed by the Romanian authorities
 - Legal costs: stamp duty for initiating judicial proceedings; legal representation fees

To Bite Off More than One Can Chew? Climate-led Conditionality in the EU's Generalised Scheme of Preferences Through the Lens of the Paris Agreement on Climate Change

*Virginia Remondino**

TABLE OF CONTENTS: 1. Introduction. – 2. Origins and structure of the EU GSP regime. – 3. Climate-led conditionality in the present GSP Regulation. – 3.1. Positive conditionality in the GSP+ scheme: granting additional trade preferences upon ratification and effective implementation of climate-related conventions. – 3.2. Negative conditionality in the GSP+ scheme: withdrawing trade benefits for failures to comply with specified international climate standards. – 4. The 2021 Commission's proposal for a novel GSP regulation: climate conditionality at a crossroads. – 5. On a slippery slope: assessing the existence and extent of substantive and procedural obligations under the Paris Agreement on climate change. – 5.1. Legal obligations for GSP+ beneficiary countries *ex* Article 15 of the Commission's proposal. – 5.2. Legal obligations for GSP beneficiary countries *ex* Article 19 of the Commission's proposal. – 6. Concluding remarks.

ABSTRACT: Since its launch in 1971, the EU generalised scheme of preferences (GSP) has represented a landmark tool of the Union's common commercial policy, aiming at heightening market access for developing and least developed countries through preferential tariff treatment conceded voluntarily, non-reciprocally and on a non-discriminatory basis. Over the decades, the EU GSP has evolved, from a measure apt at sustaining industrialisation in vulnerable third countries to an instrument fostering sustainable development beyond the Union's borders. As such, the present GSP Regulation, through its GSP+ arrangement, subordinates both the granting and temporary withdrawal of tariff preferences upon, *inter alia*, implementation of twenty-seven international conventions, also related to the environment. The Regulation, however, is to be put to the test by the most pressing ecological issue of the present millennium, notably climate change. Accordingly, does the EU GSP regime provide for a form of climate-led conditionality, connected to the respect of the landmark Paris Agreement on climate change (PA)? The article first reconstructs the origins and structure of the EU GSP regime, with the aim of exploring to what extent both a positive and a negative climate-led conditionality can be envisaged thereof. Secondly, the analysis dwells on the 2021 Commission's proposal for the revision of the GSP Regulation, putting ahead the leeway of granting and temporarily withdrawing trade preferences upon respect of the Paris Agreement on climate change. Against this backdrop, the investigation ponders the systemic limitations of the proposal, whose operationalisation through the lens of the PA remains nebulous.

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KEYWORDS: EU generalised scheme of preferences – common commercial policy – EU external action – conditionality – Paris Agreement on climate change – environmental integration.

1. Introduction

All economic activities engender an impact on the environment and climate. Trade does not represent an exception.¹ With climate change denoting the most severe ecological challenge of the present millennium², policies and normative measures aiming at tackling it, also of a trade nature³, have been rapidly proliferating at the global level.⁴

It thus denotes no coincidence that the debate dwelling over the use (and misuse) of commercial tools to contribute to addressing and combating climate change has intriguingly tickled legal doctrine and practitioners worldwide.⁵ Whilst the trade regime

¹ Cf. World Trade Organization, *World Trade Report 2022: Climate Change and International Trade* at www.wto.org 11. It is worth highlighting that the 2023 summary report of the UN Intergovernmental Panel on Climate Change (IPCC) emphasizes that global net anthropogenic greenhouse gas (GHG) emissions, one of the leading causes of anthropogenic climate change, continue to increase, accounting to about 12 per cent more in 2019 compared to 2010 levels, 54 per cent higher than in 1990. See Intergovernmental Panel on Climate Change, *Synthesis Report of the IPCC sixth assessment report (AR6) – Summary for Policymakers*, at www.ipcc.ch 4.

² In this regard, the 2024 United Nations report on sustainable development clearly emphasizes that: '[c]limate records were shattered in 2023 as the climate crisis accelerated in real time. Rising temperatures have not abated and global greenhouse gas emissions continue to climb'. See United Nations, *The Sustainable Development Goals Report 2024* at unstats.un.org.

³ Cf. K Kulovesi, 'Real or Imagined Controversies? A Climate Law Perspective on the Growing Links between the International Trade and Climate Change Regimes' (2014) 6 *Trade, Law & Development* 55, 57.

⁴ See Grantham Research Institute on Climate Change and the Environment, *Climate Change Laws of the world* at climate-laws.org.

⁵ For general comments on the trade and environment *nexus* in international and EU law, see *ex multis* RA Brand, 'Sustaining the Development of International Trade and Environmental Law' (1997) 21 *Vermont Law Review* 823; G Sacerdoti, 'La disciplina del commercio internazionale e la protezione dell'ambiente' in P Fois (ed), *Il principio dello sviluppo sostenibile nel diritto internazionale ed europeo dell'ambiente* (Editoriale Scientifica 2007) 63; E Brown Weiss, JH Jackson and N Bernasconi-Osterwalder, *Reconciling Environment and Trade* (Brill 2008); G Marín Durán and E Morgera, *Environmental Integration in the EU's External Relations: Beyond Multilateral Dimensions* (Oxford University Press 2012); G Marceau and C Marquet, 'La jurisprudence de l'OMC et la recherche d'un équilibre entre développement économique et considérations non-commerciales: le cas de l'environnement' (2017) 30 *Revue Québécoise de droit international* 119; G Adinolfi, 'Alla ricerca di un equilibrio tra interessi economici e tutela dell'ambiente nella politica commerciale dell'Unione europea' (Eurojus, 14 May 2017) at rivista.eurojus.it; E Cima, *From Exception to Promotion: Re-Thinking the Relationship between International Trade and Environmental Law* (Brill 2021). For illustrations concentrating on the interlink entwining climate change and international trade instruments, see *inter alia* E Morgera and K Kulovesi, 'The Role of the EU in Promoting International Standards in the Area of Climate Change' (2013) University of Edinburgh School of Law Research Paper Series 22–2013, at www.pure.ed.ac.uk; DS Olawuyi, 'Harmonizing International Trade and Climate Change Institutions: Legal and Theoretical Basis for Systemic Integration' (2014) 7 *Law and Development Review* 107; D Park, *Legal issues on climate change and international trade law* (Springer 2016); R Leal-Arcas, *Solutions for Sustainability: How the International Trade, Energy and Climate Change Can Help* (Springer 2019).

does represent a 'critical node to mobilize'⁶ in the solution to climate change, scholars have long warned against the deployment of discriminatory international trade measures for the attainment of given environmental protection objectives, reflecting a tension which, if overstretched, may subvert international trade rules.⁷

This represents no innovation. As early as 1992, with the drafting of the first international convention specifically devoted to climate change, *viz.* the United Nations Framework Convention on Climate Change (UNFCCC)⁸, the urgency to promote an open international trading system capable of better addressing the problem of environmental degradation was underscored, yet accenting the stipulation for climate change measures, including unilateral ones, not to constitute a means of arbitrary or unjustifiable discrimination to, nor a disguised restriction on, international trade.⁹

In light of the foregoing, the European Union (EU or Union) has, in the past decades, been actively elaborating commercial tools – comprising both bilateral¹⁰ and unilateral instruments – seeking to sustain the international climate change regime, hence

⁶ P Brenton and V Chemutai, 'The Trade and Climate Change Nexus: The Urgency and Opportunities for Developing Countries' (World Bank Group 2021) ix.

⁷ Cf. M McKenzie, 'Climate Change and the Generalized System of Preferences' (2008) 11 *Journal of International Economic Law* 679, 680.

⁸ United Nations Framework Convention on Climate Change (opened for signature 4 June 1992, entered into force 21 March 1994) (UNFCCC).

⁹ Ibid Art 3(5). Differently, the Paris Agreement on climate change (opened for signature 22 April 2016, entered into force 4 November 2016) (PA) mentions trade measures neither in its preamble nor in its operative clauses. Nevertheless, some legal commentators have interpreted the seventh recital of its preamble, according to which its '[p]arties may be affected not only by climate change, but also by the impacts of the measures taken in response to it' as an implicit allusion to unilateral trade instruments. See in this sense D Bodansky, J Brunnée and L Rajamani, *International Climate Change Law* (Oxford University Press 2012) 348.

¹⁰ Starting with the free trade agreement concluded between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part (signed 6 October 2010, entered into force 13 December 2015), the EU has systemically enshrined, within its so-called 'new generation free trade agreements', provisions concerning sustainable development, in general, and climate change, in particular. For an overview in legal literature concentrating on the integration of clauses pertaining to climate change within the EU's preferential trade agreements, see specifically C Bertram and H Van Coppenolle, 'Strengthening the Paris Agreement through trade? The Potential and Limitations of EU Preferential Trade Agreements for Climate Governance' (2024) 24 *International Environmental Agreements: Politics, Law and Economics* 589. For general accounts on the integration of sustainability considerations in the Union's preferential trade agreements, cf. G Marín Durán, 'Sustainable Development Chapters in EU Free Trade Agreements: Emerging Compliance Issues' (2020) 57 *Common Market Law Review* 1031; G Adinolfi, 'A Cross-Cutting Legal Analysis of the European Union Preferential Trade Agreements' Chapters on Sustainable Development, Further Steps Towards the Attainment of the Sustainable Development Goals?' in C Beverelli, J Kurtz and D Raess (eds), *International Trade, Investment, and the Sustainable Development Goals: World Trade Forum* (Cambridge University Press 2020) 15; A Muccione, 'Il rapporto dei capitoli su 'commercio e sviluppo sostenibile' con la disciplina in materia commerciale' in G Adinolfi (a cura di), *Gli Accordi Preferenziali di Nuova Generazione dell'Unione Europea* (G Giappichelli 2021); S Villani, 'I Capitoli in Materia di Sviluppo Sostenibile negli Accordi Commerciali dell'Unione Europea: Prove di Rilevanza Sistemica' (2022) 3 *Diritto del commercio internazionale* 707.

responding to given primary law requirements.¹¹ Notably, the EU is called on by its founding treaties¹² to define and pursue its external policies and action as to attain given foreign policy objectives.¹³ Article 207 TFEU, legal basis of the common commercial policy (CCP), explicitly mandates that the CCP ‘shall be conducted in the context of the principles and objectives of the Union’s external action’, enshrined in Articles 3(5) and 21 TEU.¹⁴ Whilst the former Article stipulates that the EU ‘shall contribute to [...] the sustainable development of the Earth’¹⁵, along with fostering ‘free and fair trade’¹⁶, Article 21 TEU mandates that the Union is to ‘help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development’.¹⁷ Moreover, from a more general perspective, the mentioned provisions call on

¹¹ For general accounts see *inter alia* P Leino, ‘The Journey Towards All that is Good and Beautiful: Human Rights and ‘Common Values’ as Guiding Principles of EU Foreign Relations Law’ in M Cremona and B de Witte (eds), *EU Foreign Relations Law: Constitutional Fundamentals* (Hart Publishing 2008) 259; R Mastroianni, ‘Le garanzie dei valori dell’azione esterna e il ruolo della Corte di giustizia’ in R Baratta, C Morviducci and E Sciso (eds), *I valori dell’Unione europea e l’azione esterna* (G Giappichelli 2016) 215; M Cremona, ‘Human Rights as a Value of EU Trade Policy’ in M Balboni and C Danisi (eds), *Human Rights as a Horizontal Issue in EU External Policy* (Editoriale Scientifica 2021); E Kassoti and RA Wessel, ‘The Normative Effect of Article 3(5) TEU: Observance and Development of International Law by the European Union’ in P García Andrade (ed), *Interacciones entre el derecho de la Unión Europea y el derecho internacional público* (Tirant lo Blanch 2023) 19.

¹² See Treaty on the Functioning of the European Union (TFEU) [2012] and Treaty on European Union (TEU) [2012].

¹³ From this perspective, Art 205 TFEU specifies that: ‘the Union’s action on the international scene, pursuant to this Part, shall be guided by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down in Chapter 1 of Title V of the Treaty on European Union.’ Generally, see J Larik, *Foreign Policy Objectives in European Constitutional Law* (Oxford University Press 2016); E Neframi, ‘The Dynamic of the EU Objectives in the Analysis of the External Competence’ in E Neframi and M Gatti (eds), *Constitutional Issues of EU External Relations Law* (Nomos 2018) 63.

¹⁴ For a comment cf. A Dimopoulos, ‘The Effects of the Lisbon Treaty on the Principles and Objectives of the Common Commercial Policy’ (2010) 15 *European Foreign Affairs Review* 153. See also C Kaddous, ‘The Transformation of the EU Common Commercial Policy’ in P Eeckhout and M López Escudero (eds), *The European Union’s External Action in Times of Crisis* (Hart 2019) 429.

¹⁵ Art 3(5) TEU.

¹⁶ *Ibid*

¹⁷ Art 21(2)(f) TEU. Also relevant for present purposes is Art 21(2)(d) TEU, according to which the Union, in its external relations, shall ‘foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty’. Along with the objectives guiding the Union’s action on the international scene, Art 11 TFEU further postulates that ‘environmental protection requirements must be integrated in the definition and implementation of the Union’s policies and activities’, also comprehending the CCP. See Opinion 2/15 *Free Trade Agreement between the European Union and the Republic of Singapore*, EU:C:2017:376, paras 146–147. For a comment cf. C Beaucillon ‘Opinion 2/15: Sustainable is the New Trade. Rethinking Coherence for the New Common Commercial Policy’ (2017) 2 *European Papers* 819. Also A Aseeva, ‘Retour vers le futur: la politique étrangère de l’Union européenne, le commerce international et le développement durable dans l’avis 2/15’ (2017) 42 *Revue Juridique de l’Environnement* 785.

the Union to contribute to the 'strict observance and development of international law'.¹⁸

Against this backdrop, the generalised scheme of preferences (GSP)¹⁹, as a Union's trade measure²⁰, offers an intriguing case study to analyse and assess the potential for EU unilateral commercial instruments to foster climate protection worldwide, in particular in order to promote the attainment of the objectives enshrined in the Paris Agreement on climate change (PA).²¹ As the investigation will argue and despite some inherent deficiencies, the instrument represents in fact a significant expression of the interaction entwining international and EU law, with the GSP regime providing a significant tool for the enforcement of the former.

The present article is structured as follows. Section 2 traces the origins and structure of the EU GSP regime, depicting how ecological variables have been progressively inserted and affirmed therein. In section 3 the article discloses to what extent environmental conditionality operates within the current EU GSP Regulation²², specifically by illustrating whether both a positive (sub-section 3.1.) and a negative (sub-section 3.2.) climate-led conditionality may be envisioned. Building on previous considerations, section 4 gathers attention on the 2021 Commission's proposal²³ for the revision of the scheme, putting ahead the leeway of granting and temporarily

¹⁸ Art 3(5) TEU. With a different wording, Art 21(2)(b) TEU stipulates that, in its international relations, the Union shall aim at 'consolidat[ing] and support[ing] [...] the principles of international law'.

¹⁹ Regulation (EU) 978/2012 of the European Parliament and of the Council Regulation of 25 October 2012 applying a scheme of generalised tariff preferences. For sake of clarity, throughout the present article the generic acronym 'GSP' is to be deployed as to identify all the special arrangements covered by the GSP Regulation.

²⁰ The GSP Regulation has been adopted on the legal basis proper of the EU common commercial policy, *i.e.* Art 207 TFEU. The choice of the correct legal basis for the GSP Regulation has, interestingly, also been subject to the scrutiny of the European Court of Justice. See Case 45/86 *Commission of the European Communities v Council of the European Communities*, EU:C:1987:163.

²¹ For an overview on the intersection between the Paris Agreement on climate change and international trade law, see OE Fitzgerald, 'Introduction to the Paris Agreement and the World Trade Organization' in P Delimatsis and L Reins (eds), *Trade and Environmental Law* (Edward Elgar 2021).

²² Regulation (EU) 978/2012 (n 19). Throughout the present article, the expression 'climate conditionality' will be deployed to address both the granting of trade preferences upon respect of international conventions specifically dealing with climate change (positive climate conditionality) and the related withdrawal of preferences for failures to comply with given climate conventions (negative climate conditionality). For a general comment on the deployment of political conditionality, under both a positive and a negative perspective, see E Fierro, 'Approaching Conditionality' in E Fierro (ed), *The EU's Approach to Human Rights Conditionality in Practice* (Martinus Nijhoff 2003).

²³ Commission 'Proposal for a regulation of the European Parliament and of the Council on applying a generalised scheme of tariff preferences and repealing regulation (EU) 978/2012 of the European Parliament and of the Council' COM (2021) 579 final. At time of writing, negotiations on the Proposal are still pending in first reading. Since the European Parliament and Council were not able to find an agreement prior to the expiry date of the current EU GSP Regulation, this latter one has been extended for the period 2024-2027. Cfr. Regulation (EU) 2023/2663 of the European Parliament and of the Council of 22 November 2023 amending Regulation (EU) No 978/2012 applying a scheme of generalised tariff preferences.

withdrawing trade preferences upon respect of the Paris Agreement on climate change. Section 5 is thus to concentrate on the systemic limitations of the proposal, whose effective operationalisation through the lens of the PA remains ambiguous. In this regard, the analysis elaborates on the Commission's intent of mainstreaming negative climate conditionality, as detailed by Articles 15 and 19 of the proposal (sub-sections 5.1. and 5.2.). Section 6 concludes by providing some final remarks, putting the spotlight on the potential for the agreed extension²⁴ of the current GSP Regulation in bringing the Council and European Parliament back to the negotiating table, possibly giving teeth to the 2021 Commission's proposal.

2. Origins and structure of the EU GSP regime

The current EU GSP Regulation was finalised in 2012, entering into force in 2014. As an international construct, the GSP epitomises a system aiming at heightening market access for developing and least-developed countries (LDCs), by means of preferential tariff treatment conceded voluntarily and non-reciprocally by developed countries on a non-discriminatory basis.²⁵ Its roots are to be found in the first and second sessions of the United Nations Conference on Trade and Development (UNCTAD), held in the 1960s.

As a matter of fact, it shall be kept in mind that, in the bosom of the framework instituted by the General Agreement on Tariffs and Trade (GATT)²⁶, granting tariff

²⁴ Regulation 2023/2663 (n 23). Particularly, negotiations for a novel GSP regulation stalled on the contentious issue of introducing, within the piece of legislation, a specific form of negative conditionality. In accordance with Art 19(1)(c) of the Commission's proposal (n 23), all the preferential arrangements covered by the GSP regime, as specified in the mentioned Commission's proposal, could be temporarily withdrawn on the ground of '*serious shortcomings* in customs controls on the export or transit of drugs (illicit substances or precursors), or *related to the obligation to readmit the beneficiary country's own nationals* or serious failure to comply with international conventions on antiterrorism or anti-money laundering', emphasis added. This peculiar type of negative conditionality has been harshly contested by the European Parliament, accusing the Council to 'hijack this trade and development tool [*i.e.* the GSP Regulation] and put it to the service of its migration objectives'. See European Parliament, *MEPs pause GSP negotiations as Council hijacks scheme for migration agenda* at www.europarl.europa.eu. Along with opposition from the European Parliament, the proposition of rendering the withdrawal of trade benefits conditional upon readmission of third countries' nationals was firmly opposed by several non-governmental organisations, in an open letter addressed to the Council of the EU. See International Federation for Human Rights, *Joint NGO letter: Delete all reference to readmission as a conditionality in draft EU GSP reform* at www.fidh.org. From a purely legal perspective, Vigidal has argued that the inclusion of a form of migration-led conditionality within the proposal for a novel GSP regulation could also contravene the obligations contracted by the EU under WTO law. See G Vigidal, 'Passing Political Pressure for a Development Agenda? WTO Law Limits to the Trade-Migration Linkage in the Proposed EU GSP Regulation' (EU Immigration and Asylum Law and Policy, 28 April 2023) at eumigrationlawblog.eu.

²⁵ See generally GM Grossman and AO Sykes, 'A Preference for Development: The Law and Economics of GSP' (2005) 4 *World Trade Review* 41; G Marín Durán and E Morgera (n 5) 145.

²⁶ General Agreement on Tariffs and Trade (signed 30 October 1947, provisionally entered into force 1 January 1948) (GATT).

preferences limitedly to some of its contracting parties would, ordinarily, account for a breach of the most-favoured-nation (MFN) principle, embedded in Article I GATT.²⁷ Accordingly, the establishment of GSP schemes necessitated an 'explicit authorization'²⁸, *i.e.* a precise legal basis, under the GATT framework, to be ultimately found in the enabling clause.²⁹

The European Community (EC) launched its first GSP program in 1971³⁰, which yet did not entail any ecological or climate components.³¹ The scope of the arrangement was, assertively, that of sustaining industrialisation and an export-oriented economic growth in developing and least-developed countries, with a specific emphasis on manufacturing products.³² Nevertheless, over time, the environmental conditionality character of the measure has been progressively strengthened, in particular due to the enhanced political and normative *momentum* generated at both international and EU level around environmental matters.³³ The first GSP scheme to integrate ecological requirements was the so-called 'GSP environment'³⁴, a component of a

²⁷ For an in-depth historical reconstruction of the GSP system in the bosom of the GATT/WTO see JC Sánchez Arnau, *The Generalised System of Preferences and the World Trade Organisation* (Cameron May 2004); N Breda dos Santos, R Farias and R Cunha, 'Generalized System of Preferences in General Agreement on Tariffs and Trade/World Trade Organization: History and Current Issues' (2005) 39 *Journal of World Trade* 637; L Bartels, 'The Trade and Development Policy of the European Union' (2007) 18 *European Journal of International Law* 715.

²⁸ Cf. G Marín Durán and E Morgera (n 5) 146.

²⁹ As well claimed by Switzer, in contrast to the MFN predicate demanding most-favoured-nation treatment to be extended *unconditionally* to all other GATT contracting parties, there would be no provision in the enabling clause stipulating that the granting of GSP benefits shall be 'unconditional', thus foreseeing the eventuality to provide for both positive and negative conditionalities within GSP systems. Cf. S Switzer, 'Environmental Protection and the Generalized System of Preferences: A Legal and Appropriate Linkage?' (2008) 57 *International and Comparative Law Quarterly* 113, 115. Of this view see also L Bartels, 'The WTO Enabling Clause and Positive Conditionality in the European Community's GSP Program' (2003) 6 *Journal of International Economic Law* 507; J Harrison, 'Incentives for Development: The EC's Generalized System of Preferences, India's WTO Challenge and Reform' (2005) 42 *Common Market Law Review* 1663.

³⁰ Regulation (EEC) of the Council 1309/71 of 21 June 1971.

³¹ Cf. S Switzer (n 29) 117.

³² G Marín Durán and E Morgera (n 5) 147.

³³ For a general comment, see V Nanda and G Pring, *International Environmental Law and Policy of the 21st Century* (Brill 2012) 97–158. From an EU law perspective, it should be recalled that, in 1994, the European Commission adopted a communication concerning the novel role that the EU GSP should play in the international arena, acknowledging how special trade incentives could represent critical components for fostering sustainable development worldwide. Cf. European Commission, 'Communication of 1 June 1994 on Integration of developing countries in the international trading system - role of the GSP 1995-2004' COM (1994) 212 final. For an in-depth outlook see R Zvelc, 'Environmental Integration in EU Trade Policy: The Generalised System of Preferences, Trade Sustainability Impact Assessments and Free Trade Agreements' in E Morgera (ed), *The External Environmental Policy of the European Union: EU and International Perspectives* (Cambridge University Press 2012) 178.

³⁴ The GSP environment was first introduced by Regulation (EC) 3281/94 of the Council of 19 December 1994 applying a four-year scheme of generalised tariff preferences (1995 to 1998) in respect

broader category of regulatorily provided special incentive arrangements.³⁵ The GSP environment chiefly embraced an ‘incentive-based approach’³⁶, conditioning the granting of additional, non-reciprocal, trade preferences to beneficiary countries upon respect of internationally recognized standards apropos the sustainable management of tropical forests.³⁷ Some years later, Regulation (EC) 2501/2001 foresaw, for the first time, the eventuality for commercial benefits to be provisionally and unilaterally withdrawn on specified environmental grounds.³⁸

The above-mentioned special incentive schemes were hence the predecessors of what, in the aftermath of the *EC-Tariff Preferences* WTO dispute³⁹ – and with the coming into force of the reformed GSP Regulation of 2005⁴⁰ – became known as the

of certain industrial products originating in developing countries. Subsequently, amendments were integrated into Regulation (EC) 2501/2001 of the Council of 10 December 2001 applying a scheme of generalised tariff preferences for the period from 1 January 2002 to 31 December 2004.

³⁵ In accordance with Regulation 2501/2001(n 34), besides the GSP environment, four other special incentive arrangements were conceived. Notably, the special arrangement for least developed countries; the special arrangement to combat drug production and trafficking; the special incentive arrangement for the protection of labour rights; and the general GSP.

³⁶ Cf. S Gstöhl, ‘No Strings Attached? The EU’s Emergency Trade Preferences for Pakistan’ in I Govaere and S Poli (eds), *EU Management of Global Emergencies: Legal Framework for Combating Threats and Crises Account* (Brill 2014) 55.

³⁷ Art 8(1) Regulation 3281/94 (n 34).

³⁸ In relation to all the arrangements provided for by Regulation 2501/2001 (n 34), the possibility of unilaterally and temporarily withdrawing trade concessions was circumscribed, according to Art 26(1)(g), to infringements of the objectives of the listed international conventions on the conservation and management of fisheries resources. Alongside, Art 26(3) of Regulation 2501/2001 foresaw the possibility of withdrawing the trade preferences provided by the special incentive arrangements specified in title III, including the GSP environment scheme, when the national legislation of the beneficiary country no longer incorporated, *inter alia*, the environmental standards referred to in Art 21(2) of Regulation 2501/2001, or if the domestic legislation was not effectively complied with; or in cases in which the undertakings specified in Art 22(1) of Regulation 2501/2001 were not respected.

³⁹ In the year 2001 the inclusion of Pakistan in the special incentive arrangement for drugs (*i.e.* the drugs arrangement) triggered a legal reaction by India against the then European Community in the bosom of the WTO, on the asserted discriminatory nature of the measure at stake. In particular, India regarded the preferences accorded under the arrangement to run counter to Art I(1) of GATT, along with several provisions proper of the enabling clause. Ultimately, the Appellate Body (AB), called on to adjudicate on the dispute, ruled for the WTO-inconsistency of certain aspects of the special arrangement. In response to the AB report, the EC decided to modify its special incentive arrangements into what became known as the ‘special incentive arrangement for sustainable development and good governance’, or GSP+. A comprehensive assessment of the *EC-Tariff Preferences* dispute goes beyond the scope of the present article. For comments in legal literature, see *ex multis* S Charnovitz and others ‘The Appellate Body’s GSP decision’ (2004) 3 *World Trade Review* 239; J Harrison (n 29); M Irish, ‘GSP Tariffs and Conditionality: A Comment on EC-Preferences’ (2007) 41 *Journal of World Trade* 683; L Bartels, ‘The WTO Legality of the EU’s GSP+ Arrangement’ (2007) 10 *Journal of International Economic Law* 869; A Tomazos, ‘The GSP Fallacy: A Critique of the Appellate Body’s Ruling in the GSP Case on Legal, Economic, and Political/Systemic Grounds’ in GA Bermann and PC Mavroidis (eds), *WTO Law and Developing Countries* (Cambridge University Press 2010) 306.

⁴⁰ Regulation (EC) 980/2005 of the Council of 27 June 2005 applying a scheme of generalized tariff preferences. Regulation 980/2005 was reviewed on several occasions, in particular by Regulation

GSP+ arrangement. The 2005 GSP Regulation was thus composed of three distinct schemes: (i) a general arrangement (general GSP) granting duty-free access for non-sensitive products and tariff reductions for sensitive products to all beneficiary countries;⁴¹ (ii) the special incentive arrangement for sustainable development and good governance (GSP+), offering duty-free access to vulnerable developing countries for approximately all goods covered by the general GSP, on the condition of ratification and effective implementation of specified international conventions, also correlated to environmental protection;⁴² and (iii) the everything but arms (EBA) scheme, according duty-free access to the EU market to all goods coming from LDCs, with the exception of arms and ammunitions.⁴³

In particular, under the former GSP+ scheme, vulnerable developing countries were entitled to request additional trade preferences – *vis-à-vis* those granted under the general GSP – on specified products as far as they could demonstrate to have ratified and effectively implemented the international conventions listed in the Regulation.⁴⁴ Additionally, from a negative conditionality perspective, GSP+ benefits could be temporarily withdrawn if the national legislation of the beneficiary country could no longer incorporate the conventions, including environmental ones, indicated in the GSP Regulation itself, or effective implementation of the former could not be granted.⁴⁵ The overall structure predisposed by the 2005 GSP Regulation remained unaltered when the system was revised in 2012, continuing to present three distinct arrangements each granting a diverse level of access to the Union's market.⁴⁶

(EC) 732/2008 of the Council of 22 July 2008 applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 31 December 2011. Yet, no major changes were introduced regarding the GSP+ arrangement.

⁴¹ Regulation 732/2008 (n 40) Art 6.

⁴² Ibid, Arts 7-10. In this vein, Lebzelter and Marx argue that the additional tariff concessions granted under the GSP+ scheme would represent 'a form of compensation, or reward, for having signed up to, and for implementing the relevant international law', thus 'offering the 'carrot' of preferences'. Cf. T Lebzelter and A Marx, 'Is EU GSP+ Fostering Good Governance? Results from a New GSP+ Compliance Index' (2020) 54 *Journal of World Trade* 1, 4.

⁴³ Ibid, Arts 11-12.

⁴⁴ See Regulation 980/2005 (n 40) Annex III.

⁴⁵ Regulation 732/2008 (n 40) Art 15(2), reading: '[...] the special incentive arrangement referred to in Section 2 of Chapter II [*i.e.* the special incentive arrangement for sustainable development and good governance] may be withdrawn temporarily, in respect of all or of certain products included in this arrangement and originating in a beneficiary country, in particular if the national legislation no longer incorporates those conventions referred to in Annex III which have been ratified in fulfilment of the requirements of Article 8(1) and (2) or if that legislation is not effectively implemented'. Alongside and with a view to environmental integration, according to Art 15(1)(e) of Regulation 732/2008 (n 40), the temporary withdrawal of trade preferences could occur in cases of 'serious and systematic infringement of the objectives of regional fishery organisations or arrangements of which the Community is a member concerning the conservation and management of fishery resources'.

⁴⁶ Under the current GSP Regulation, beneficiary countries in the general GSP scheme benefit from lower than MFN treatment or zero import duties on approximately 66 per cent of their tariff lines applied by the Union. Under the GSP+ program, instead, the EU grants duty free import on all products covered

Against this background, the following section is to investigate if, and to what extent, the current GSP+ arrangement, to date the only scheme to provide for environmental-led conditionality within the GSP Regulation presently in force,⁴⁷ makes both the granting of additional trade preferences (sub-section 3.1.) and the withdrawal of those benefits (sub-section 3.2.) subject to respect of the international conventions pertaining to climate change.

3. Climate-led conditionality in the present GSP Regulation

As noted, the current GSP Regulation maintains a tripartite structure, including as a specific arrangement for the enhancement of sustainable development and good governance the GSP+ scheme. The latter grants to vulnerable developing countries non-reciprocal and duty-free access for specified products, conditional on ratification and effective implementation of the mandated twenty-seven international conventions (*i.e.* the relevant conventions) relating to labour and human rights, environmental and climate protection, as well as good governance.⁴⁸ Currently, the GSP+ arrangement counts eight beneficiaries.⁴⁹ Annex VIII of the current GSP Regulation entails, among the indicated relevant conventions, two climate-related agreements, *viz.* the United Nations Framework Convention on Climate Change and the Kyoto Protocol.⁵⁰ Since the present GSP Regulation was finalised in 2012, it logically does not include amongst the listed environmental conventions the Paris Agreement on climate change, as the latter was signed by the EU only in 2016.⁵¹

It is nonetheless worth emphasizing that the enclosure of the UNFCCC amongst the environmental deals whose ratification and implementation are explicitly mandated by the current GSP Regulation represents a significant improvement when compared to previous *praxis*, as the former GSP Regulation merely comprised, within the conventions related to climate change, the Kyoto Protocol to the

by the general GSP. Finally, under the EBA arrangement, duty-free and quota-free access is applied to all products exported by the concerned LDCs, with the only exception of arms and ammunitions.

⁴⁷ According to legal scholars, the GSP+ scheme would represent the ‘current and most complete instrument through which the EU applies [conditionality]’. Cf. I Borchert and others ‘The Pursuit of Non-Trade Policy Objectives in EU Trade Policy’ (2020), EUI Working Papers 26–2020, at cadmus.eui.eu. Of this view see also C Portela, *Enforcing Respect for Labour Standards with Targeted Sanctions* (Friedrich Ebert Stiftung 2018).

⁴⁸ For a general overview of the requirements for eligible countries to enter into the GSP+ arrangement, see European Commission, *GSP Insights* at drive.google.com (last accessed 5 May 2025).

⁴⁹ These are: Bolivia, Cabo Verde, Kyrgyzstan, Mongolia, Pakistan, Philippines, Sri Lanka and Uzbekistan. See European Commission, *Generalised Scheme of Preferences Plus (GSP+)* at trade.ec.europa.eu.

⁵⁰ Kyoto Protocol to the United Nations Framework Convention on Climate Change (opened for signature 16 March 1998, entered into force 16 February 2015).

⁵¹ Decision (EU) 2016/590 of the Council of 11 April 2016 on the signing, on behalf of the European Union, of the Paris Agreement adopted under the United Nations Framework Convention on Climate Change.

UNFCCC.⁵² As rightly argued by Marín Durán and Morgera, whereas the GSP+ has traditionally endorsed a far-reaching approach to environmental integration, some 'degree of selectivity'⁵³ could hence be observed as to the choice of the Multilateral Environmental Agreements (MEAs) appointed as criteria for eligibility under the special arrangement for sustainable development and good governance.⁵⁴

3.1. Positive conditionality in the GSP+ scheme: granting additional trade preferences upon ratification and effective implementation of climate-related conventions

In accordance with Article 10, read in conjunction with Article 9, of the current GSP Regulation, a GSP beneficiary country shall be granted the additional tariff preferences⁵⁵ provided under the GSP+ scheme if several conditions are met.⁵⁶ Besides submitting an explicit request to that effect⁵⁷ and qualifying as 'vulnerable' due to a lack of trade diversification and insufficient integration within the international trading system⁵⁸, the concerned country necessitates, from a climate change perspective, to have ratified both the UNFCCC and the Kyoto Protocol.⁵⁹ Alongside, the *ad hoc* monitoring bodies constituted under those conventions shall not have acknowledged any serious failure in the effective implementation of any of the aforesaid arrangements.⁶⁰ Further requirements to benefit from the trade preferences granted under the GSP+ scheme include: lack of formulation of a reservation prohibited under the relevant conventions, or which is considered forbidden for the purpose of those conventions;⁶¹ devising of a binding undertaking to maintain ratification of the relevant

⁵² Regulation 732/2008 (n 40) Annex III. The limited enclosure of the Kyoto Protocol among the climate conventions whose ratification and implementation were necessary as to benefit from the additional trade preferences granted under the GSP+ scheme has been criticised in legal doctrine. See M McKenzie (n 7) 689.

⁵³ G Marín Durán and E Morgera (n 5)160.

⁵⁴ The Authors underlined that it 'may appear odd' that the European Union excluded the necessary ratification and implementation of the UNFCCC as a positive condition for receiving GSP+ tariff benefits, given that 'this agreement, rather than the Kyoto Protocol, sets out the key commitments of developing countries under the international climate change regime and the two instruments are usually read together'. See Ibid 161.

⁵⁵ These are spelt out by Art 12(1) of Regulation 978/2012 (n 19), specifying that the common customs tariff *ad valorem* duties on all products listed in annex IX, originating in a GSP+ beneficiary country, shall be suspended. Additionally, in accordance with Art 12(2), common customs tariff specific duties on the aforesaid products shall be suspended entirely, with the only exception of goods for which the common customs tariff duties include *ad valorem* duties.

⁵⁶ Products included in the GSP+ arrangement are specified in Annex IX of Regulation 978/2012 (n 19).

⁵⁷ Regulation 978/2012 (n 19) Art 10(1)(a).

⁵⁸ Ibid Art 9(1)(a).

⁵⁹ Ibid Art 9(1)(b), read in conjunction with Annex VIII.

⁶⁰ Ibid Art 9(1)(b).

⁶¹ Ibid Art 9(1)(c).

conventions and ensure their effective implementation;⁶² acceptance of the reporting, monitoring and review obligations defined by the provisions of the relevant conventions;⁶³ and participation and cooperation in the monitoring procedure specified by Article 13 of the present GSP Regulation.⁶⁴

Against the normative backdrop prescribed by the current GSP Regulation, the latest biennial Commission's report on the GSP determined that the GSP+ arrangement positively contributed to fostering the implementation of the covered international agreements, in particular in the environmental and climate change domains.⁶⁵ The findings would hence be coherent with traditional legal literature concentrating on the role played by positive trade conditionality in engendering human rights through, in particular, ratification of related international arrangements.⁶⁶

Nevertheless, it is important to bear in mind that challenges associated, in particular, with effective compliance with the requirements mandated by the GSP+ scheme continue to persist. It has thus been maintained that the GSP regime has, so far, produced a limited (albeit positive) impact on sustainable development, particularly due to the inherent difficulties in evaluating the causal relationship between ratification of the aforesaid international agreements and domestic reforms carried out in beneficiary countries.⁶⁷

⁶² Ibid Art 9(1)(d).

⁶³ Ibid Art 9(1)(e).

⁶⁴ Ibid Art 9(1)(f).

⁶⁵ Of utmost importance for the present examination, the Commission and the High Representative of the Union for Foreign Affairs and Security Policy (HR) underline that all GSP+ beneficiary countries have signed the Paris Agreement on climate change, sometimes responding to specific requests of the GSP+ monitoring missions, as in the specific case of the Philippines. Cf. European Commission and the High Representative of the Union for Foreign Affairs and Security Policy, 'Joint Report: Report on the Generalised Scheme of Preferences covering the period 2018-2019' JOIN (2020) 3 final. The latest biannual report on the implementation of the GSP highlights that 'overall, beneficiary countries [*i.e.*, GSP, GSP+ and EBA beneficiaries] are making progress in addressing key environmental and climate change challenges', with higher 'ambition in the nationally determined contributions and co-operation in multilateral fora regarding climate change'. See European Commission and the High Representative of the Union for Foreign Affairs and Security Policy, 'Joint Report to the European Parliament and the Council on the Generalised Scheme of Preferences covering the period 2020-2022' JOIN (2023) 34 final 12. The findings would be consistent with the conclusions of the 2020 sustainability impact assessment predisposed for the novel GSP regulation. This underlines that, with regard to environmental conventions, the ratification rate of GSP beneficiary countries is 'relatively high'. See Commission, *Study in Support of an Impact Assessment to prepare the Review of GSP Regulation No. 978/2012 - Volume 1: Main Report* at op.europa.eu 105.

⁶⁶ In this sense cf. L Bartels, 'The Application of Human Rights Conditionality in the EU's Bilateral Trade Agreements and Other Trade Arrangements with Third Countries' (Study for the European Parliament Directorate General External Policies of the Union 2008) at europarl.europa.eu 13. On the positive implications of trade conditionality in the specific domain of labour rights, see J Orbie and L Tortell, 'The New GSP+ Beneficiaries: Ticking the Box or Truly Consistent with ILO Findings?' (2009) 14 *European Foreign Affairs Review* 663.

⁶⁷ See Commission, *Mid-Term Evaluation of the EU's Generalised Scheme of Preferences (GSP) - Final Report* at op.europa.eu, hereinafter 'Mid-Term Review', 118

Alongside, whereas the ratification share of relevant MEAs, including climate change conventions, has been deemed 'relatively high', their level of implementation remains mixed across the different beneficiary countries.⁶⁸ It has thus been underlined that: '[i]n the area of environment and climate, GSP+ countries have a good track-record on ratification of the listed conventions, albeit the level of implementation often remains problematic'.⁶⁹ Accordingly, the European Commission, in its impact assessment accompanying the proposal for a novel GSP regulation, has put the spotlight on 'the need to put further measures in place in order to ensure that the GSP supports positive environmental development'⁷⁰, specifically by fostering monitoring of compliance with the relevant international conventions.⁷¹

3.2. Negative conditionality in the GSP+: withdrawing trade benefits for failures to comply with specified international climate standards

The temporary withdrawal of the additional trade preferences mandated by the special incentive arrangement for sustainable development and good governance is to be envisioned in two scenarios: (i) the GSP+ beneficiary country fails to respect its binding commitments concerning the maintenance of ratification of the relevant conventions and their effective implementation, or it fails to fulfil its reporting and monitoring obligations as specified by the present GSP Regulation;⁷² or (ii) the GSP+ beneficiary country has formulated a reservation which is prohibited by any of the relevant conventions or which is considered to be incompatible with the object and

⁶⁸ Cf. Commission, *Study in support of an impact assessment to prepare the review of GSP Regulation No. 978/2012 - Volume 1: Main Report* (n 65) 106.

⁶⁹ G Van der Loo, 'The Commission Proposal on Reforming the Generalised Scheme of Tariff Preferences: Analysis of Human Rights Incentives and Conditionalities' (European Parliament in-depth analysis requested by the DROI Subcommittee 2022) 9. See also L Beke and N Hachez, 'The EU GSP: A Preference for Human Rights and Good Governance? The Case of Myanmar' (KU Leuven Working Papers 155-2012) 11, emphasizing that the 'progress in ratification does not seem to be matched with progress in implementation on the ground'.

⁷⁰ Commission Staff Working Document of 22 September 2021, 'Impact Assessment Report Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on applying a generalised scheme of tariff preferences and repealing Regulation (EU) No 978/2012 of the European Parliament and of the Council' SWD(2021) 266 final 16. The impact assessment suggested including the Paris Agreement in the international conventions that GSP+ beneficiaries need to comply with, as well as extending negative climate conditionality as also to include environmental and good governance conventions.

⁷¹ In this vein, the Mid-Term Review brought to the surface that the GSP+ beneficiaries were 'lagging behind' with the reporting obligations mandated by the environmental conventions listed in Annex VIII, requirements which were prodromic to the effective implementation of the Conventions. From the perspective of the international climate change regime, the Review showed, by way of illustration, that Bolivia failed to comply with the reporting obligations proper the UNFCCC, while Paraguay had not notified and adopted measures in order to implement its intended nationally determined contributions (INDCs) under the aforesaid Convention. Cf. Mid-Term Review (n 67) 117-18.

⁷² Regulation 978/2012 (n 19) Art 15(1) read in conjunction with Art 9(1)(e-f).

purpose of those conventions.⁷³ Shall the Commission have a reasonable doubt about the occurrence of the mentioned breaches, it can adopt an implementing act to initiate the procedure for temporarily withdrawing the tariff preferences provided under the GSP+ arrangement.⁷⁴

Granted that, as previously indicated, both the UNFCCC and the Kyoto Protocol are included among the international conventions whose ratification and effective implementation are required in order to qualify for the preferential treatment specified by the GSP+ scheme, the non-respect of their binding commitments shall legitimise the Commission to initiate – and eventually carry out – the procedure for temporarily withdrawing the tariff preferences granted under the special incentive arrangement.⁷⁵ In this vein, positive and negative conditionality stand as the two sides of the same coin, the latter being typified by the GSP+ intrinsic *ratio* of promoting compliance with internationally recognised sustainability and good governance standards through the deployment of commercial means.⁷⁶ A *ratio* which, being substantiated through the possible deployment of assertive means, renders the GSP Regulation substantially different from other instruments proper of the Union's common commercial policy, in particular its preferential trade agreements of a new generation. In fact, these latter ones have long disregarded the possibility of imposing trade 'sanctions' in cases of non-compliance with their provisions pertaining to sustainability, instead relying on cooperative means for settling the eventual disputes arising under so-called 'trade and sustainable development' (TSD) chapters.⁷⁷

⁷³ Ibid Art 15(1) read in conjunction with Art 9(1)(c).

⁷⁴ Ibid Art 15(3).

⁷⁵ Notice however that the process for withdrawing trade preferences is gradual in nature, aiming at allowing the concerned country to remedy the alleged breach. See Art 15(9) Ibid

⁷⁶ Cf. S Velluti, 'The Promotion and Integration of Human Rights in EU External Trade Relations' (2016) 32 *Utrecht Journal of International and European Law* 41.

⁷⁷ The 'toothless' enforcement mechanism envisaged under the majority of the TSD chapters proper of the Union's new generation free trade agreements has given rise to a vivid debate in legal literature. On the one hand, several commentators, in line with the traditional view expressed by the European Commission, have disregarded the possibility of imposing countermeasures in cases of non-compliance with the obligations stemming from the provisions enshrined in TSD chapters, considered unwarranted also from an effectiveness standpoint. In this sense, see G Marín Durán (n 10); D Prévost and I Alexovicova, 'Mind the Compliance Gap: Managing Trustworthy Partnerships for Sustainable Development in the European Union's Free Trade Agreements' (2019) 6 *International Journal of Public Law and Policy* 236. On the other hand, some commentators – in line with some EU Members States and civil society representatives – have advocated for the possibility of imposing economic 'sanctions' in cases of violations of the obligations enshrined in TSD chapters. Cf. in particular M Bronckers and G Gruni, 'Retooling the Sustainability Standards in EU Free Trade Agreements' (2021) 24 *Journal of International Economic Law* 25. This debate has led the European Commission to rethink from the inside its approach to the enforcement of the TSD chapters proper of the Union's new generation free trade agreements, leading to a change of paradigm crystallized in the European Commission, 'Communication: The power of trade partnerships: together for green and just economic growth' COM(2022) 409 final. See further note 98.

Along with the described *specialis* withdrawal procedure applicable to the GSP+ arrangement only, the current GSP Regulation also entails a *generalis* withdrawal mechanism⁷⁸, which shall pertain to ‘provisions common to all arrangements’.⁷⁹ In accordance with this procedure, the preferential arrangements can be temporarily revoked at the occurrence of ‘serious and systemic violations of principles laid down in the conventions listed in Part A of Annex VIII of the Current GSP Regulation [i.e. core human and labour rights UN/ILO Conventions]’,⁸⁰ yet not extending to the international agreements related to environmental and good governance principles embedded in part B of Annex VIII of the present GSP Regulation, possibly posing queries under a coherence perspective.⁸¹

In light of the foregoing, it can be argued that a twin-track approach to negative climate conditionality is established by the current GSP Regulation: while qualified breaches of MEAs do not permit the temporary withdrawal of the GSP benefits under the *generalis* withdrawal mechanism, a GSP+ beneficiary country may lose its preferential status when, in particular, failing to maintain ratification and effectively implement the concerned climate conventions.⁸²

In addition, it shall be highlighted that legal doctrine has long concentrated on the effectiveness of negative conditionality in concretely fostering compliance with internationally recognized environmental and climate standards.⁸³ In particular, the sporadic and inconsistent utilisation of the withdrawal mechanism for trade preferences under the GSP Regulation has been harshly condemned.⁸⁴ As rightly noted by

⁷⁸ Regulation 978/2012 (n 19) Art 19.

⁷⁹ Ibid Chapter V.

⁸⁰ Ibid Art 19(1).

⁸¹ On the relevance of the principle of coherence in EU external environmental law, see M Cremona, ‘Coherence and EU External Environmental Policy’ in E Morgera (ed), *The External Environmental Policy of the European Union: EU and International Perspectives* (Cambridge University Press 2012) 33.

⁸² Note, in addition, that the *specialis* withdrawal mechanism under Art 15 of Regulation 978/2012 (n 19) obliges the Commission to temporarily withdraw the special incentive arrangement for sustainable development and good governance in case the beneficiary country no longer respects its binding undertakings as formulated in Art 9 of the said Regulation. Differently, Art 19 of the current GSP Regulation on the *generalis* withdrawal procedure merely specifies that the preferential arrangements provided for by Art 1(2) of Regulation 978/2012 ‘may’ be withdrawn in the specified cases. Accordingly, the Commission would not be under a legal obligation to trigger Art 19 of the present GSP Regulation.

⁸³ Cf. for overviews C Portela (n 47); JD Janer Torres, ‘The Generalized Scheme of Preferences as a Carrot-and-Stick Mechanism of EU Trade Policy in Pursuit of Non-Trade Policy Objectives’ in LM Hinojosa-Martínez and C Pérez-Bernárdez (eds), *Enhancing the Rule of Law in the European Union's External Action* (Edward Elgar 2023) 244, 256-260. From the specific perspective of the engagement of the European Parliament in the withdrawal of trade preferences, see KL Meissner, ‘Requesting Trade Sanctions? The European Parliament and the Generalized Scheme of Preferences’ (2021) 59 *Journal of Common Market Studies* 91.

⁸⁴ See L Beke and N Hachez (n 69) 13; K Yaraslau, ‘Why European Union Trade Sanctions Do Not Work’ 17 (2008) *Minnesota Journal of International Law* 209. For a contrary opinion see Wardhaugh, arguing that the Commission's ongoing monitoring of beneficiary countries' compliance with the international conventions listed by the GSP Regulation is no ‘idle threat’, as the withdrawal of

Van der Loo, the European Commission has, so far, decided to rely on the withdrawal procedure provided by the GSP Regulation only in a very limited number of cases, instead attempting to engage with beneficiary countries through the deployment of ‘more constructive instruments’⁸⁵, such as structured dialogues.⁸⁶ Also, it is worthy of note that none of the infrequent cases involving the temporary retraction of preferences under the GSP Regulation has, to date, concerned violations of international environmental or climate change conventions.⁸⁷

4. The 2021 Commission’s proposal for a novel GSP regulation: climate conditionality at a crossroads

The present GSP Regulation was set to expire on 31 December 2023, thus concluding its ten-year cycle. To prevent both the general GSP and GSP+ schemes from ceasing to apply,⁸⁸ the European Commission has, in September 2021, tabled its proposal for a new GSP regulation, aiming at renewing the arrangements for another decade.⁸⁹ The proposal maintains the essential structure and features of its predecessor, yet with some significant innovations.

Sri Lanka’s designation in 2010 and the subsequent review of Bolivia’s status in 2012 indicate. Accordingly, the author claims that a stick-based approach is likely to be a more effective means for promoting human rights through trade instruments. See B Wardhaugh, ‘GSP+ and Human Rights: Is the EU’s Approach the Right One?’ (2013) 16 *Journal of International Economic Law* 827, 832. It is worth emphasizing that also the mid-term review for the GSP Regulation has highlighted that negative conditionality does not constitute an effective deterrent for the prevention of human rights violations, for which see *supra* (n 67). On the point see G Van der Loo (n 69) 10.

⁸⁵ G Van der Loo (n 69) 9.

⁸⁶ Notice that the European Commission’s margin of discretion over its choice to trigger the withdrawal procedures specified by the GSP Regulation has also been at the centre of a 2015 case brought before the General Court (GC) by the Italian tanning industry association. See Case T-338/14 *Unione Nazionale Industria Conciaria (UNIC) v European Commission*, EU:T:2015:59. Yet, the case was considered inadmissible by the GC, as the contested measure could not be considered a reviewable act *ex Art 263 TFEU*.

⁸⁷ To date, the European Commission has decided to resort to negative conditionality against beneficiary countries in limited cases. By way of illustration, worth mentioning are the 2010 cases concerning Venezuela and Sri Lanka, which were downgraded from the GSP+ scheme to the general GSP arrangement. Whereas Venezuela had failed to ratify the United Nations Convention against corruption (opened for signature 9–11 December 2003, entered into force 14 December 2005), thus losing its GSP+ status permanently, the violations charged to Sri Lanka regarded the country’s failure to effectively implement several international agreements, entailing the International covenant on civil and political rights (opened for signature 16 December 1966, entered into force 23 March 1976); the Convention against torture and other cruel, inhuman or degrading treatment or punishment (opened for signature 10 December 1984, entered into force 26 June 1987); and the Convention on the rights of the child (opened for signature 20 November 1989, entered into force 2 September 1990). Consequently, Sri Lanka’s preferences were suspended from 2010 to 2017. See for an analysis I Borchert and others, (n 47) 26.

⁸⁸ Notice that imports from least-developed countries, *ex Art 43* of the Commission’s proposal of the Commission’s proposal for a novel GSP Regulation, would continue to be covered by the EBA scheme, as the arrangement does not have an expiry date.

⁸⁹ Proposal COM (2021) 579 final (n 23) Art 43.

Relevantly, the necessity for the novel piece of legislation to mirror the environmental and climate priorities of the EU, as specified by the 2019 European Green Deal,⁹⁰ is underlined. In this vein, the proposal also appears in line with the perspective embraced by the Commission in its 2021 trade policy review⁹¹, predicating the tripartite necessity to support an open, assertive and *sustainable* commercial policy. As a consequence, climate conditionality is reinforced along a two-pronged guideline.

In primis, the list of international conventions whose ratification and effective implementation are indispensable to benefit from the additional commercial preferences granted under the GSP+ scheme results updated. Annex VI to the proposal includes, among the relevant conventions, the Paris Agreement on climate change, substituting the Kyoto Protocol. Accordingly, in order to be bound by the newly introduced international agreements, third countries which were already beneficiaries under the GSP+ scheme as of 31 January 2023 are to (re)apply in accordance with the procedure provided by the proposal.⁹²

Secondly, the proposal brands negative conditionality as a vital component for contributing to the fight against climate change.⁹³ Thus, while the *specialis* mechanism for the temporary withdrawal of preferences applicable to the GSP+ arrangement is maintained without major modifications,⁹⁴ negative climate conditionality is streamlined as also to embrace the general GSP and EBA schemes. Specifically, the *generalis* temporary withdrawal procedure, already spelt out in Article 19 of the current GSP Regulation, now extends the possibility of temporarily revoking all the arrangements presently covered by the Regulation in instances of ‘serious and systemic violation of the principles laid down in the conventions listed in Annex VI’⁹⁵, the latter also entailing environmental, climate and good governance conventions. In the words of the Commission, the mainstreaming of negative conditionality would find its *raison d’être*

⁹⁰ European Commission, ‘Communication: The European Green Deal’ COM (2019) 640 final. For general overviews, see L Krämer, ‘Planning for Climate and the Environment: The EU Green Deal’ (2020) 17 *Journal for European Environmental and Planning Law* 267; M Falcone, ‘Il Green Deal europeo per un continente a impatto climatico zero: la nuova strategia europea per la crescita tra sfide, responsabilità e opportunità’ (2020) 15 *Studi sull’integrazione europea* 379; M Onida, ‘Il Green Deal Europeo’ in P Manzini and M Vellano (a cura di), *Unione Europea 2020: I dodici mesi che hanno segnato l’integrazione europea* 257.

⁹¹ European Commission, ‘Communication: Trade Policy Review - An Open, Sustainable and Assertive Trade Policy’ COM (2021) 66 final.

⁹² Proposal COM (2021) 579 final (n 23) Art 10(8) .

⁹³ *Ibid* 9.

⁹⁴ *Ibid* Art 15.

⁹⁵ *Ibid* Art 19(1)(a). It shall be specified that if the Commission considers that findings justify the temporary withdrawal for the reasons specified in Art 19(1), it shall be empowered to adopt delegated acts to temporarily revoke the preferential arrangements covered by the GSP Regulation. Interestingly, in the adoption of the delegated acts, the Commission may consider the socio-economic effects of the temporary withdrawal of tariff preferences in the beneficiary country. On this point see extensively C Portela, ‘Are EU GSP Withdrawals and CFSP Sanctions Becoming More Alike?’ (2023) 28 *European Foreign Affairs Review* 35, 43.

in the prospect of ‘engag[ing] on such issues [*i.e.* environmental protection and good governance] in support of the UN Sustainable Development Goals (SDGs) and the contribution of the EU’s green agenda to GSP beneficiary countries’.⁹⁶

It has hence been suggested that whereas the extension of the *generalis* withdrawal procedure to environmental and climate-related international agreements would not engender a major impact on GSP+ beneficiary countries, already required to maintain ratification and to effectively implement all the listed international agreements, for general GSP and EBA beneficiaries such a leeway might prove particularly challenging, as the latter ones would now, *de jure*, be mandated not to undermine the asserted ‘principles’ of the specified international deals.⁹⁷ Yet, the proposal appears coherent with the novel policy guidelines put forward by the European Commission in its 2021 trade policy review, stressing the necessity of rendering the Union’s CCP tools – entailing both its unilateral and bilateral instruments – more assertive on the international plane.⁹⁸

Anyhow, it can be argued that the proposal stops short to effectively supersede the twin-track approach to the retraction of the GSP preferential arrangements on climate grounds. Proceeding with order, it can be inferred that the *generalis* and *specialis* withdrawal procedures attribute to GSP beneficiaries a different set of obligations to be complied with as not to incur in the temporary withdrawal of the preferential arrangements.

Particularly, it can be claimed that the *specialis* withdrawal procedure applicable to GSP+ countries only, spelt out in Article 15 of the Commission’s proposal, displays an all-embracing character, subjecting GSP+ beneficiary countries to comprehensive substantive obligations. These latter ones can be divided in three core cate-

⁹⁶ Proposal COM (2021) 579 final (n 23) 7.

⁹⁷ Cf. G Van der Loo (n 69)12.

⁹⁸ Besides the proposal for a novel GSP regulation, it shall be kept in mind that the Commission’s intention of rendering more assertive its common commercial policy, and the normative instruments related to it, also surfaces from the mentioned change of paradigm which has characterized the enforcement mechanism proper of the EU new generation free trade agreements’ TSD chapters. In fact, the Commission had traditionally favoured a ‘cooperative’ approach to the enforcement of the said chapters, disregarding the leeway of imposing economic ‘sanctions’ in cases of non-compliance with the obligations stemming from them. Nonetheless, with the advent of the 2022 Communication on ‘the power of trade partnerships’, the Commission has put forward the possibility of imposing countermeasures ‘as a matter of last resort’, notably in cases of ‘serious violations of core TSD commitments, namely the ILO fundamental principles and rights at work, and of the Paris Agreement on Climate Change’. Cf. Communication COM(2022) 409 final (n 77) 11. For comments in legal literature, see A Mensi, ‘Sviluppo sostenibile e meccanismi di risoluzione delle controversie negli accordi commerciali conclusi dall’unione europea: criticità e nuove prospettive’ (2023) 78 *La comunità internazionale* 271; V Remondino, ‘New Generation Free Trade Agreements at a Crossroads. Assessing Environmental Enforcement of the E.U.’s Trade and Sustainable Development Chapters from Global Europe to the Power of Trade Partnerships Communication’ (2023) 8 *University of Bologna Law Review* 149; G Marín Durán, ‘The EU’s Evolving Approach to Environmental Provisions in Free Trade Agreements’ in RA Wessel and others, (eds), *EU External Relations Law and Sustainability: The EU, Third States and International Organizations* (Brill 2024) 257.

gories: (i) maintenance of ratification and effective implementation of the international conventions included in Annex VI; (ii) acceptance of regular monitoring and review of implementation records in accordance with the *ad hoc* provisions of the relevant conventions, along with cooperation with the Union's reporting and monitoring procedure as provided by Article 13 of the Commission's proposal; and (iii) lack of formulation of a reservation in relation to any of the relevant conventions, which is prohibited under those conventions or which is considered by Article 9 of the Commission's proposal to be incompatible with the object and purpose of the relevant conventions.⁹⁹

Contrariwise, under the *generalis* withdrawal procedure proper of Article 19(1)(a) of the Commission's proposal, the GSP-covered preferential arrangements may be temporarily withdrawn only at the occurrence of qualified violations of the principles laid down by the concerned international conventions. Violations which, assertively, shall be both serious and systemic.¹⁰⁰

Against this backdrop, the following section elaborates on the normative implications which might stem from extending negative climate conditionality upon respect of obligations deriving from the Paris Agreement on climate change.

5. On a slippery slope: assessing the existence and extent of substantive and procedural obligations under the Paris agreement on climate change

As it has been exposed in the previous section, the recent Commission's proposal for a novel GSP regulation streamlines negative climate conditionality behind the GSP+ arrangement, subjecting all GSP beneficiaries to the respect of the Paris Agreement on climate change. Yet, the envisaged twin-track approach to negative conditionality triggers a reflection on the concrete obligations which shall be effectively fulfilled by GSP beneficiaries under the normative framework of the Paris Agreement on climate change, as not to incur in the temporary withdrawal mechanism mandated by, one the one hand, Article 15 and, on the other hand, Article 19(1)(a) of the Commission's proposal.

5.1. Legal obligations for GSP+ beneficiary countries *ex* Article 15 of the Commission's proposal

In section 4 it has been argued that, under the *specialis* withdrawal procedure spelt out in Article 15 of the Commission's proposal, the special incentive arrangement for sustainable development and good governance can be temporarily withdrawn in case of a failure by a GSP+ beneficiary country to respect the three core binding undertakings enshrined in Article 9 of the proposal. The latter, hence, deserves to be

⁹⁹ Proposal COM (2021) 579 final (n 23) Art 15.

¹⁰⁰ See C Portela (n 95) 42.

singularly investigated against the backdrop of the obligations established by the Paris Agreement on climate change.

5.1.1. Maintenance of ratification and effective implementation of the Paris Agreement on climate change

As to keep benefitting from the tariff preferences provided under the GSP+ arrangement, the beneficiary shall give ‘a binding undertaking to maintain ratification of the relevant conventions [i.e. the Paris Agreement on climate change] and to ensure the effective implementation thereof’.¹⁰¹ Two points thus deserve a specific scrutiny: the notion of ‘maintenance of ratification’ and the concept of ‘effective implementation’.

In connection with the former, some preliminary considerations prove necessary. *In primis*, the obligation for GSP+ beneficiary countries to ‘maintain ratification’ of the Paris Agreement on climate change appears to give expression to a principle which is starting to emerge in the domain of international environmental law. Notably, the principle of non-regression.¹⁰² Whereas the latter has been predominantly conceived as an obligation for States not to derogate to, nor regressing from, domestic environmental measures and laws,¹⁰³ the ratio underpinning it – i.e. preventing the so-called ‘environmental backsliding, in the face of major challenges like climate change’¹⁰⁴ – could well support its application also in relation to international conventions and standards, such as the PA.¹⁰⁵

Secondly, it should be pointed out that it is not the first time that the expression ‘maintenance of ratification’ is deployed within the remit of the EU GSP regime, having been originally enshrined in both Article 9(1)(d) of Regulation 980/2005 and

¹⁰¹ Proposal COM (2021) 579 final (n 23) Art 9(1)(d).

¹⁰² According to Mitchell and Munro, the principle of non-regression from environmental standards, which finds its roots in the international human rights regime, still accounts to ‘an unrealised concept that appears in theoretical and advocacy literature but is not readily observable in the primary sources of international environmental law’. Yet, the Authors claim that, recently, ‘there have been signs that this principle could transform from a theoretical concept to a legal reality’, having been expressly codified in Art 3(c) of the 2018 Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (opened for signature 9 April 2018, entered into force 22 April 2021). See AD Mitchell and J Munro, ‘An International Law Principle of Non-Regression from Environmental Protections’ (2023) 72 *International and Comparative Law Quarterly* 35, 61 ff. For general insights on the principle of non-regression in international environmental law, see *inter alia* M Prieur, ‘Une vraie fausse création juridique: le principe de non-régression’ (2016) 41 *Revue juridique de l'Environnement* 319; M Prieur, ‘The Principle of Non-Regression’ in L Krämer and E Orlando (eds), *Principles of Environmental Law* (Edward Elgar 2018) 251; M Vordermayer-Riemer, *Non-Regression in International Environmental Law: Human Rights Doctrine and the Promises of Comparative International Law* (Intersentia 2021).

¹⁰³ AD Mitchell and J Munro (n 102).

¹⁰⁴ *Ibid* 62.

¹⁰⁵ Cf. M Prieur, ‘Une vraie fausse création juridique’ (n 102) 323, comparing denunciation from an international environmental treaty to a form of regression from given levels of protections.

Article 8(1)(b) of Regulation 732/2008,¹⁰⁶ and later embedded within the EU GSP Regulation currently in force.¹⁰⁷ Yet, as its predecessors, the proposal for a novel GSP regulation does not elucidate on the meaning of the notion. Nevertheless, by relying on the definition of the term 'ratification' provided by the Vienna Convention on the law of treaties (VCLT),¹⁰⁸ the obligation to maintain ratification might still be conceptualised as the preservation of the State's consent to be bound by a treaty.¹⁰⁹ In this vein, a GSP+ beneficiary country ought to refrain from any act which could undermine its original consent to be legally bound by the relevant conventions listed in Annex VI of the Commission's proposal, in particular by denouncing them.

From the specific perspective of the Paris Agreement on climate change, it could hence be claimed that the obligation to maintain ratification is to be substantiated in a general duty to abstain from triggering the *ad hoc* withdrawal procedure spelt out in Article 28 PA, consenting each party to the agreement to withdraw from it by giving written notification to the depositary.¹¹⁰ Accordingly, whereas from an international law standpoint the GSP+ beneficiary's choice to withdraw from the Paris Agreement on climate change represents the exercise of a sovereign choice,¹¹¹ under

¹⁰⁶ Interestingly, the provisions extended the obligation to maintain ratification not only to the listed relevant conventions, but also to 'their implementing legislation and measures', hence presenting a broader scope of application *vis-à-vis* the current GSP Regulation and Commission's proposal for a novel GSP Regulation.

¹⁰⁷ Regulation 978/2012 (n 19) Art 9(1)(d) .

¹⁰⁸ Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) (VCLT). According to Art 2(1)(b) VCLT, ratification is defined as an 'international act so named whereby a *State establishes on the international plane its consent to be bound by a treaty*', emphasis added.

¹⁰⁹ For general comments in legal doctrine, see *inter alia* A Bolintineau, 'Expression of Consent to be Bound by a Treaty in the Light of the 1969 Vienna Convention' (1974) 68 *American Journal of International Law* 672; M Fitzmaurice, 'Consent to Be Bound – Anything New under the sun?' (2005) 74 *Nordic Journal of International Law* 483; A Aust, *Modern Treaty Law and Practice* (Cambridge University Press 2013) 87-113; M Fitzmaurice and P Merkouris, *Treaties in Motion: The Evolution of Treaties from Formation to Termination* (Cambridge University Press 2020) 96-120; J Brunnée, 'Consent', *Max Planck Encyclopedia of Public International Law* (online version 2022).

¹¹⁰ By providing an express provision on withdrawal, Art 28 PA (n 9) is thus to fall within the field of operation of Art 54(a) VCLT, mandating that '[t]he termination of a treaty or the withdrawal of a party may take place: (a) in conformity with the provisions of the treaty'. Accordingly, any Party to the PA which desires to withdraw from it must comply with the procedural requirements set out in Art 28(1) of the Paris Agreements on climate change, reading: '[a]t any time after three years from the date on which this Agreement has entered into force for a Party, that Party may withdraw from this Agreement by giving written notification to the Depositary.' For a comprehensive analysis concerning the substantial and procedural requirements of the withdrawal procedure of the Paris Agreement on climate change, see R Cantley-Smith, 'Article 28: Withdrawal' in G Van Calster and L Reins (eds), *The Paris Agreement on Climate Change: A Commentary* (Edward Elgar 2021) 422.

¹¹¹ In this sense see H Woolaver, 'From Joining to Leaving: Domestic Law's Role in the International Legal Validity of Treaty Withdrawal' (2019) 30 *European Journal of International Law* 73, 104, noting that: 'treaty withdrawal decisions are equally as central to the expression of national sovereignty as the joining of treaties'. The recognition of the right to withdraw from a treaty as the exercise of a

the EU GSP regime the withdrawal would further consist in a failure to respect one of the conditions laid down in the Commission's proposal. Still, it can be argued that, by making a formal request as to benefit from the additional tariff preferences granted under the GSP+ scheme, the beneficiary country would willingly agree to restrain the exercise of its sovereign right concerning the possibility of withdrawing from the listed relevant conventions, having to comply with the obligations spelt out by the Commission's proposal in order to benefit from the conferred trade benefits.

Coming to the concept of 'effective implementation', the Commission's proposal, following suit with the current GSP Regulation,¹¹² provides a definition of the expression, signifying 'the *integral* implementation of the undertakings and obligations undertaken under the international conventions listed in Annex VI, thus ensuring fulfilment of the principles, objectives and rights guaranteed in these conventions in the beneficiary country's entire territory'.¹¹³ As GSP+ beneficiary countries would consequently be bound to implement *in toto* the Paris Agreement on climate change, identifying what undertakings and obligations would subsist on its parties reveals vital. To begin with, it shall be noted that the PA, whilst certainly binding in its form¹¹⁴, imposes few substantive obligations on its individual signatories.¹¹⁵ The incapability of the arrangement to singularly¹¹⁶ address obligations on its parties would remarkably transpire from Article 2 PA, laying down the core objective of the agreement. The clause, calling on its signatories to strengthen a '*global* response to the threat of climate change'¹¹⁷ fails to mandate any national-level emissions' reduction target, instead relying on three variables proper of the collective long-term climate

State's national sovereignty has also been recognized by some multilateral conventions. Specifically, see Art XVI(2), first line, of the Chemical Weapons Convention (opened for signature 13 January 1993, entered into force 29 April 1997), reading: '[e]ach State Party shall, *in exercising its national sovereignty*, have the right to withdraw from this Convention if it decides that extraordinary events, related to the subject-matter of this Convention, have jeopardized the supreme interests of its country', emphasis added.

¹¹² Regulation 978/2012 (n 19) Art 2(1). On the point in legal literature, see R Zvelc (n 33)182.

¹¹³ Proposal COM (2021) 579 final (n 23) Art 2(11), emphasis added.

¹¹⁴ Legal literature has interestingly thrown the attention on the difference existing between the legal form of the Paris Agreement on climate change, *viz.* an international agreement under Art 2(1)(a) VCLT, and the level of bindingness of its provisions. According to Bodle and Oberthür 'while formally speaking the whole of the Paris Agreement is binding on its parties under international law, whether and to what extent its individual provisions establish legal rights and obligations (...) depends on their wording'. See R Bodle and S Oberthür, 'Legal Form of the Paris Agreement and Nature of Its Obligations' in D Klein and others (eds), *The Paris Agreement on Climate Change: Analysis and Commentary* (Oxford University Press 2017) 97.

¹¹⁵ Cf. D Bodansky, 'The Legal Character of the Paris Agreement' (2016) 25 *Review of European, Comparative and International Environmental Law* 142.

¹¹⁶ Within the Paris Agreement on climate change (n 9), only limited provisions refer to the individual signatories to the Agreement, by deploying the expression 'each party'. These clauses are Arts 4(2), 4(3), 4(9), 4(16), 4(17), 7(9), 7(10), 13(7), 13(8), 13(11) and 25(1) Paris Agreement on climate change.

¹¹⁷ *Ibid* Art 2(1), emphasis added.

pathway.¹¹⁸ In Ghaleigh's terms, the provision would hence constitute the roots of the 'general toothlessness of the Agreement',¹¹⁹ posing 'no legal disincentive to those parties whose commitment to the PA objective is weak or wavering'.¹²⁰

This notwithstanding, the normative content of the Paris Agreement on climate change is not completely deprived of legal significance. A closer scrutiny of its provisions discloses, *inter alia*, the subsistence of several obligations and undertakings individually incumbent on each Party¹²¹, which can be categorized into three focal categories: (i) mitigation;¹²² (ii) adaptation;¹²³ and (iii) finance.¹²⁴ Since GSP+ beneficiaries would be bound to implement integrally the international agreement at stake, it is believed that a failure to comply with any of the aforesaid categories of obligations may, abstractly, legitimise the EU to trigger the *specialis* withdrawal mechanism mandated by the proposal. This represents an important innovation *vis-à-vis* the international climate change regime, in which no assertive enforcement mechanism is, to date, available.¹²⁵

Still, three variables are worth minding. First, the Paris Agreement on climate change mainly envisages substantive obligations of conduct rather than of result.¹²⁶ Significant in this regard are the mandatory undertakings incumbent on the signatories under Article 4(2) PA¹²⁷, calling on each party to 'prepare, communicate and maintain' domestic emissions reduction targets, termed nationally determined contributions (NDCs), with a view to reaching the agreement's objective as enshrined in Article 2 PA.¹²⁸ Alongside, parties to the agreement are mandated to 'pursue domestic mitigation measures, *with the aim of achieving* the objectives of such contributions'.¹²⁹ Thus, the arrangement would generate a good faith expectation that each

¹¹⁸ Ibid Art 2(1)(a-c).

¹¹⁹ N Singh Ghaleigh, 'Article 2: Aims, Objectives and Principles' in G Van Calster and L Reins (eds) (n 110) 89.

¹²⁰ Ibid

¹²¹ Cf. L Rajamani, 'The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations' (2016) 28 *Journal of Environmental Law* 337.

¹²² Paris Agreement on climate change (n 9) Arts 3–6.

¹²³ Ibid Art 7.

¹²⁴ Ibid Art 9. Yet, it shall be reminded that, as stressed by Bondansky et al., obligations on climate finance are 'rather modest' and mostly binding on developed country parties to the Paris Agreement on climate change. Cf. D Bodansky, J Brunnée and L Rajamani (n 9) 240.

¹²⁵ See extensively C Reichenbach, 'The Missing Dispute Resolution Mechanisms in International Climate Change Agreements' (2022) 3 *Global Energy Law and Sustainability* 129.

¹²⁶ For a general account, see S Oberthür and R Bodle, 'Legal Form and Nature of the Paris Outcome' (2016) 6 *Climate Law* 40.

¹²⁷ Cf. D Bodansky, J Brunnée and L Rajamani (n 9) 231, emphasizing that the 'most significant legal obligations of the Paris Agreement are to be found in its mitigation article [*i.e.* Art 4]'. See extensively B Mayer, *International Law Obligations on Climate Change Mitigation* (Oxford University Press 2022).

¹²⁸ Paris Agreement on climate change (n 9) Art 3.

¹²⁹ Ibid Art 4(2), emphasis added.

signatory would effectively endeavour to achieve its NDC, yet falling short of requiring its objectives to be concretely fulfilled.¹³⁰

Secondly, it must be noted that some clauses of the Paris Agreement on climate change, while presumably creating individual obligations for each state party, yet include semantic constructs which decrease their legal enforceability. Paradigmatic in this sense is the provision embedded in Article 7(9) PA, compelling¹³¹ each party to ‘as appropriate, engage in adaptation planning processes and the implementation of actions, including the development or enhancement of relevant plans, policies and/or contributions’.¹³² In Bodle and Oberthür’s terms, the PA would thus entail ‘soft’ language that ‘nudges but does not prescribe’.¹³³

Thirdly, it shall be stressed that developing countries, the specific addressees of the GSP+ arrangement, boast a differential position in the normative framework of the Paris Agreement on climate change, under the environmental law principle of common but differentiated responsibilities and respective capabilities (CBDRRC or, for sake of simplicity, principle of differentiation).¹³⁴ As a consequence, within the

¹³⁰ In this sense cf. D Bodansky, J Brunnée and L Rajamani (n 9) 231. See also R Bodle, L Donat and M Duwe, ‘The Paris Agreement: Analysis, Assessment and Outlook’ (2016) 10 *Carbon and Climate Law Review* 5, 7, highlighting that: ‘the PA does not oblige parties to actually fulfil these NDCs, hence their content is not as such legally binding. Parties are only required to pursue measures ‘with the aim of achieving’ the objectives of such contributions’. Contrarily see Mayer, arguing that ‘the Parties to the Paris Agreement have an obligation of conduct to pursue measures expected to implement the mitigation target contained in their NDC’. Cf. B Mayer, ‘International Law Obligations Arising in Relation to Nationally Determined Contributions’ (2018) 7 *Transnational Environmental Law* 251, 256.

¹³¹ Paris Agreement on climate change (n 9) Art 7(9), reading: ‘each Party *shall*, as appropriate, engage in adaptation planning processes and the implementation of actions, including the development or enhancement of relevant plans, policies and/or contributions’, emphasis added.

¹³² Ibid emphasis added.

¹³³ R Bodle and S Oberthür (n 114) 98.

¹³⁴ On the historical affirmation and content of the principle, see generally CD Stone, ‘Common but Differentiated Responsibilities in International Law’ (2004) 98 *American Journal of International Law* 276; P Cullet, ‘Differential Treatment in Environmental Law: Addressing Critiques and Conceptualizing the Next Step’ (2016) 5 *Transnational Environmental Law* 305; F Pellizzari, ‘Responsabilità comune e differenziata nel riscaldamento globale’ (2020) Università Cattolica Working Papers 03-2020, at ideas.repec.org. It is worth emphasizing that the normative nature of the principle of common but differentiated responsibilities and respective capabilities remains contested among commentators. Majoritarian legal literature yet excludes that the principle can, to date, represent a norm of customary international law, binding *erga omnes*. In this sense see T Deleuil, ‘The Common but Differentiated Responsibilities Principle: Changes in Continuity after the Durban Conference of the Parties’ (2012) 21 *Review of European, Community and International Environmental Law* 271; L Rajamani, ‘Common but Differentiated Responsibilities’ in L Krämer and E Orlando (eds) (n 102) 291. Nevertheless, in the bosom of the international climate change regime, the CBDRRC principle finds codification both in Art 3 of the UNFCCC and in Art 2(2) of the PA, international agreements binding *inter partes*. Accordingly, the Principle applies between their contracting parties, to date the majority of the states of the international community. From this angle of perspective cf. J Scott and L Rajamani, ‘EU Climate Change Unilateralism’ (2012) 23 *European Journal of International Law* 469, 477; J Brunnée and C Streck, ‘The UNFCCC as a negotiation forum: towards common but more differentiated responsibilities’ (2013) 13 *Climate Policy* 589; C Voigt and F Ferreira, ‘Differentiation in the Paris Agreement’

normative scaffold of the international agreement under scrutiny, obligations binding on developing-country parties to the PA would be less stringent in comparison to those ones incumbent on developed-country signatories.¹³⁵ This would occur with regard to both substantive and procedural obligations. In connection to the former and by way of example, whereas all parties to the Paris Agreement on climate change are mandated to undertake and communicate NDCs *ex Article 4(2) PA*, also by duly considering the requirement of progression,¹³⁶ it is inferred that developed country parties should 'take the lead',¹³⁷ in undertaking absolute emission reduction targets.¹³⁸ On the contrary, developing country Parties are simply encouraged to 'continue enhancing their mitigation efforts',¹³⁹ moving over time towards 'economy-wide emission reduction or limitation targets in the light of different national circumstances'.¹⁴⁰

In relation to the latter, an important element to take into consideration concerns the modalities and mechanisms through which compliance with the obligations deriving from the Paris Agreement is to be assessed. As the next sub-paragraph will

(2016) 6 *Climate Law* 58; G Marín Durán, 'Securing Compatibility of Carbon Border Adjustments with the Multilateral Climate and Trade Regimes' (2023) 72 *International and Comparative Law Quarterly* 73, 83.

¹³⁵ It must be clarified that the Paris Agreement does not elucidate on the concrete meaning of the terms 'developed' and 'developing' country parties, a deficiency which has been addressed in legal doctrine. In this regard, Rajamani underlines that '*Needless to say the terms "developed" and "developing" countries have not been defined in the Paris Agreement. In Paris, countries with "economies in transition" as well as those whose "special circumstances are recognized" by the COP, viz. Turkey, sought to ensure that they would be included in the category of developing countries and thus entitled to any benefits that might flow thereon. This proved contentious until the end, but the term "developing countries" was eventually left open and undefined*'. Cf. L Rajamani, 'Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics' (2016) 65 *International and Comparative Law Quarterly* 493, 513, emphasis added. From a similar perspective, yet within the remit of the UNFCCC, see R Boyte, 'Common but Differentiated Responsibilities: Adjusting the "Developing"/"Developed" Dichotomy in International Environmental Law' (2010) 14 *New Zealand Journal of Environmental Law* 63, 83-84.

¹³⁶ The requirement of progression, as enshrined in Art 3 of the Paris Agreement on climate change (n 9), mandates that efforts made by all parties 'will represent a progression over time, while recognizing the need to support developing country Parties for the effective implementation of this Agreement'. Progression is also referred to in other landmark clauses of the Paris Agreement on climate change, first and foremost Art 4 on mitigation. For a general account see C Voigt and F Ferreira, "'Dynamic Differentiation": The Principles of CBDR-RC, Progression and Highest Possible Ambition in the Paris Agreement' (2016) 5 *Transnational Environmental Law* 285.

¹³⁷ Paris Agreement on climate change (n 9) Art 4(4).

¹³⁸ *Ibid* Art 4(5). further requires support to be provided to developing country parties for the implementation of Art 4, recognizing that 'enhanced support for developing Country Parties will allow for higher ambition in their actions'.

¹³⁹ *Ibid* Art 4(4).

¹⁴⁰ *Ibid*.

illustrate, differentiation is also reflected within the provisions of the PA concerning monitoring and review, constructed around the concept of ‘built-in flexibility’.¹⁴¹

5.1.2. Acceptance of reporting requirements, regular monitoring and review of implementation records ex Articles 13-15 of the Paris Agreement on climate change

In accordance with Article 9(e) of the Commission’s proposal, GSP+ beneficiaries shall accept ‘without reservation the reporting requirements imposed by any of the relevant conventions’, along with giving ‘a binding undertaking to accept regular monitoring and review of its implementation record in accordance with the provisions of the relevant conventions’.

The Paris Agreement on climate change envisages a three-pronged oversight system, composed of an enhanced transparency framework (ETF)¹⁴², an implementation and compliance mechanism (ICM)¹⁴³ and the global stocktake.¹⁴⁴ Since the latter is essentially¹⁴⁵ to assess collective, rather than country-level, progress towards the attainment of ‘the purpose of [the PA] and its long term goals’¹⁴⁶, worth investigating for present purposes are, in particular, the first two facets of the oversight system.

Without demanding completeness¹⁴⁷, it shall be remarked that the ETF addresses both individual reporting and review requirements in the light of transparency, regarded as ‘an indispensable backbone of the international climate change regime’.¹⁴⁸ In relation to reporting, each party to the PA is mandated to regularly provide two compulsory¹⁴⁹ sets of information: a national inventory report of ‘anthropogenic emissions by sources

¹⁴¹ Ibid Art 13(1).

¹⁴² Ibid Art 13.

¹⁴³ Ibid Art 15.

¹⁴⁴ Ibid Art 14.

¹⁴⁵ Whereas the global stocktake is primarily to assess collective, rather than individual, efforts towards the attainment of the Paris Agreement’s long term goals, legal scholars have read the third paragraph of the provision, according to which ‘the outcome of the global stocktake shall inform Parties in updating and enhancing, in a nationally determined manner, their actions and support [...]’, as generating a strong and individual expectation for individual parties to the Paris Agreement on climate change to enhance the ambition of their climate action. Cf. D Bodansky, J Brunnée and L Rajamani (n 9) 245.

¹⁴⁶ Art 14(1) Paris Agreement on climate change (n 9). According to Bodansky et al. the global stocktake performs a ‘crucial function in the context of ‘nationally determined’ contributions. It allows a *collective assessment* of whether national efforts add up to what is necessary to limit temperature increase to well below 2° C’. See D Bodansky, J Brunnée and L Rajamani (n 9) 244, emphasis added.

¹⁴⁷ For illustrations in legal literature concentrating on transparency within the framework of the Paris Agreement on climate change, see *inter alia* A Kohli, ‘Making Sense of Transparency and Review in the Paris Agreement’ (2015) 26 *Yearbook of International Environmental Law* 46.

¹⁴⁸ H van Asselt and K Kulovesi, ‘Article 13: Enhanced Transparency Framework for Action and Support’ in G Van Calster and L Reins (eds) (n 110) 302.

¹⁴⁹ Besides the mandatory reporting requirements proper of Art 13(7) of the Paris Agreement on climate change (n 9), each party ‘should’, ex Art 13(8), additionally provide, *as appropriate*, information concerning ‘climate change impacts and adaptation under Article 7’.

and removals by sinks of greenhouse gases'¹⁵⁰, prepared according to good practice and the methodologies therein provided;¹⁵¹ and information essential to track progress made towards the implementation and achievement of its NDC *ex* Article 4 PA.¹⁵² Information provided is, secondly, to undergo a review process in two steps, comprising both a technical expert¹⁵³ and a party-to-party review.¹⁵⁴

In the light of the foregoing, it could be claimed that a GSP+ country's failure to accept the reporting requirements proper of Article 13(7) PA, as well as its refusal to accept review under Article 13(11-12) PA, may account to a failure to effectively fulfil its monitoring undertakings as specified by Article 9(e) of the Commission's proposal. Nevertheless, as anticipated, it is vital to consider that GSP+ beneficiaries, as developing country parties to the PA, continue to be assigned, yet to a more limited extent in comparison to previous praxis¹⁵⁵, a differential status under the ETF.¹⁵⁶ The latter, being constructed in the aforementioned context of built-in flexibility, inevitably allows 'developing countries to report in less detail'¹⁵⁷, merely requiring them to account for 'basic information'.¹⁵⁸ Similarly to reporting, also the review mechanism *ex* Article 13(11-12) PA allows for flexibility, offering a significant margin of manoeuvre to developing countries in terms of timing of the process.¹⁵⁹ It may be hence argued that the Paris Agreement on climate change,

¹⁵⁰ Paris Agreement on climate change (n 9) Art 13(7)(a).

¹⁵¹ *Ibid*, including: 'methodologies accepted by the Intergovernmental Panel on Climate Change and agreed upon by the Conference of the Parties serving as the meeting of the Parties to this Agreement'.

¹⁵² *Ibid* Art 13(7)(b) reading: 'information necessary to track progress in implementing and achieving its nationally determined contribution under Article 4'.

¹⁵³ *Ibid* Art 13(11).

¹⁵⁴ *Ibid* Art 13(12).

¹⁵⁵ The PA generally supersedes the bifurcated system of reporting and review proper of both the UNFCCC and the Kyoto Protocol, envisaging *ad hoc* obligations mainly on developed-country parties. To the opposite, the Paris Agreement's monitoring mechanism is, in principle, equally applicable to both developed and developing countries which are Parties to it. For a general illustration see C Falduto, J Ellis and K Simeonova, 'Understanding reporting and review under Articles 6 and 13 of the Paris Agreement' (2021) OECD/IEA Climate Change Expert Group Papers 2021-04, at www.oecd.org.

¹⁵⁶ In this vein, Art 13(2) of the Paris Agreement on climate change (n 9) specifies that: 'the transparency framework shall provide flexibility in the implementation of the provisions of this Article to those developing country Parties that need it in the light of their capacities'. Legal scholars have brought to the surface the systemic shortcomings of this provision, which may *de facto* lead to the continuation of the two-pronged system previously in force. See from a critical perspective A Tabau, 'Evaluation of the Paris Climate Agreement According to a Global Standard of Transparency' (2016) 10 *Carbon and Climate Law Review* 23; L Rajamani (n 135) 502-503.

¹⁵⁷ H van Asselt and K Kulovesi (n 148) 306.

¹⁵⁸ *Ibid* Basic information may regard, for instance, the typology of sectors and gases covered by the reporting activity and the time series for the reporting. See United Nations Framework Convention on Climate Change, Decision 18/CMA.1, Modalities, procedures and guidelines for the transparency framework for action and support referred to in Article 13 of the Paris Agreement, UN Doc FCCC/PA/CMA/2018/3/Add.2 (2019).

¹⁵⁹ (n 9) Art 13(11) provides that 'for those developing country Parties that need it in the light of their capacities, the review process shall include assistance in identifying capacity-building needs',

whilst positively considering the diverse capabilities of its developing country parties, inevitably lowers the threshold for compliance under Article 15(1) of the Commission's proposal.

Eventually, coming to the implementation and compliance mechanism of Article 15 PA, suffice to notice that the instrument might entail a specific significance for GSP+ beneficiaries merely in light of the binding undertaking to accept regular monitoring of implementation records¹⁶⁰, as the provision stops short to envisage reporting and review obligations directly incumbent on individual parties to the agreement.¹⁶¹

5.1.3. Lack of formulation of reservations prohibited under the Paris Agreement on climate change

Conclusively, the Commission's proposal foresees the possibility for GSP+ tariff preferences to be temporarily withdrawn at the occurrence of a beneficiary country's formulation of a reservation¹⁶² which is prohibited under the relevant conventions, or which is incompatible with the object and purpose of those conventions, as detailed by Article 9(c) of the Commission's proposal.¹⁶³

whereas Art 13(12) underlines that the 'technical expert review [...] shall pay particular attention to the respective national capabilities and circumstances of developing country Parties'.

¹⁶⁰ Proposal COM (2021) 579 final (n 23) Art 9(c).

¹⁶¹ Paris Agreement on climate change Art 15(1) (n 9) merely stipulates that 'a mechanism to facilitate implementation of and promote compliance with the provisions of this Agreement is hereby established'. For a general account see Y Dagnet and E Northrop, 'Facilitating Implementation and Promoting Compliance (Article 15)' in D Klein and others (eds) (n 144).

¹⁶² According to Art 2(1)(d) VCLT, the term 'reservation' means a: 'unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State'.

¹⁶³ Proposal COM (2021) 579 final (n 23) Art 15(1), read in conjunction with Art 9(c). In this regard, the Commission's proposal clarifies under which circumstances a reservation is to be considered incompatible with the object and purpose of the relevant conventions. Notably, this occurs when '(i) a process explicitly set out for that purpose under the convention has so determined'; or '(ii) in the absence of such a process, the Union where it is a party to the convention, and/or a qualified majority of Member States parties to the convention, in accordance with their respective competences as established in the Treaties, objected to the reservation on the grounds that it is incompatible with the object and purpose of the convention and opposed the entry into force of the convention as between them and the reserving state in accordance with the provisions of the Vienna Convention on the Law of Treaties, signed in Vienna on 23 May 1969'. In this vein, the Commission's proposal manages to clarify the boundaries of the application of Art 19(c) VCLT, merely stipulating that a reservation can be formulated by a State unless it is 'incompatible with the object and purpose of the treaty'.

In fact, due to its open-ended terms, the operationalization of Art 19(c) VCLT has proved particularly difficult. As well underscored by Aust: '[m]any differing views have been expressed as to how [the compatibility test ex Art 19(c) VCLT] should be applied, especially to human rights treaties, but the practice of states is patchy and uncertain'. See A Aust (n 109) 123. Legal literature has long concentrated on reservations incompatible with the object and purpose of treaties, in particular with regard to human rights conventions. Cf. *ex multis* P Imbert, *Les réserves aux traités multilatéraux: évolution de droit et de la pratique depuis l'avis consultatif donné par la Cour Internationale de Justice le 28 mai 1951* (Pedone 1978); E Lijnzaad, *Reservations to UN-Human Rights Treaties: Ratify and Ruin?* (Martinus Nijhoff 1995);

The Paris Agreement on climate change, akin to the UNFCCC¹⁶⁴ and the Kyoto Protocol¹⁶⁵, expressly disallows reservations *ex Article 27 PA*, stating that ‘no reservations may be made to this Agreement’.¹⁶⁶ It thus follows, as a logical consequence, that the formulation of any reservation advanced by GSP+ beneficiaries in the bosom of the Paris Agreement on climate change can legitimise the Union to trigger the *specialis* withdrawal procedure for a failure to comply with Article 9(c) of the Commission’s proposal.

Accordingly, the proposed GSP regulation manages to institute a hard enforcement mechanism flowing, as a direct legal consequence, from the formulation of the illegitimate reservation. This marks a striking point of divergence from the ordinary public international law regime, in which the legal effects of prohibited reservations have long given rise to debate.¹⁶⁷ In fact, in the silence of the Vienna Convention on the law of treaties on this point¹⁶⁸, two predominant positions have emerged. On the one hand, supported by the ruling of the International Court of Justice (ICJ) in its 1951 advisory opinion on reservations to the Convention of genocide¹⁶⁹, the ‘total

R Goodman, ‘Human Rights Treaties, Invalid Reservations, and State Consent’ (2002) 96 *American Journal of International Law* 531; U Linderfalk, ‘On the Meaning of the ‘Object and Purpose’ Criterion, in the Context of the Vienna Convention on the Law of Treaties, Article 19’ (2003) 72 *Nordic Journal of International Law* 429; U Villani ‘Tendenze della giurisprudenza internazionale in materia di riserve ai trattati sui diritti umani’ in G Venturini and S Bariatti (eds), *Liber Fausto Pocar - Diritti individuali e giustizia internazionale* (Giuffrè 2009) 969; B Simma and G I Hernández, ‘Legal Consequences of an Impermissible Reservation to a Human Rights Treaty: Where Do We Stand?’ in E Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press 2011) 60.

¹⁶⁴ Art 24 UNFCCC.

¹⁶⁵ Art 26 Kyoto Protocol.

¹⁶⁶ In this vein, Art 27 PA falls within the category of prohibited reservations provided by Art 19(a) VCLT, according to which ‘a State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless: (a) the reservation is prohibited by the treaty’.

¹⁶⁷ For a general account see *ex multis* R Baratta, *Gli effetti delle riserve ai trattati* (Giuffrè 1999) 83 ff.; G Gaja, ‘Il regime della Convenzione di Vienna concernente le riserve inammissibili’ in *Studi in onore di Vincenzo Starace* (Editoriale Scientifica 2008) 349, 358-361; A Pellet, ‘The ILC Guide to Practice on Reservations to Treaties: A General Presentation by the Special Rapporteur’ (2013) 24 *European Journal of International Law* 1061, 1090-1094. According to the latter Author, while formally Art 21 VCLT concerns the ‘[l]egal effects of reservations and objections to reservations’, in reality ‘it says little on these effects, on which it sheds little light, and *nothing on the effects of an invalid reservation*’. Cf. *ibid* 1090, emphasis added.

¹⁶⁸ See in this sense B Simma and G I Hernández (n 163) 64, arguing that the VCLT presents ‘major gaps’ concerning the discipline of the consequences of impermissible reservations.

¹⁶⁹ ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion), ICJ Reports 1951, 15, paras 26-27, observing that: ‘[a]s no State can be bound by a reservation to which it has not consented, it necessarily follows that each State objecting to it will or will not, on the basis of its individual appraisal within the limits of the criterion of the object and purpose stated above, consider the reserving State to be a party to the Convention’. Accordingly, in replying to the first submitted question, the Court straightforwardly ruled that: ‘a State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible

invalidity',¹⁷⁰ solution was put forward, postulating that, when an illegitimate reservation is formulated, the reserving state could not be considered as a party to the specific agreement. In the words of Giegerich, '[t]he Court thus assumed that an impermissible reservation would render this State's ratification or accession ineffective *in toto*'.¹⁷¹ On the other hand, the so-called 'severance',¹⁷² doctrine was endorsed. The latter, whilst being codified neither in the VCLT nor finding support in international customary law¹⁷³, was developed by international adjudicators, in particular by the European Court of Human Rights in the famous *Belilos* case.¹⁷⁴ Later, it was embraced, with some variations, by the International Law Commission (ILC) in its 2011 Guide to Practice on Reservations to Treaties.¹⁷⁵ So, according to the severa-

with the object and purpose of the Convention; *otherwise, that State cannot be regarded as being a party to the Convention*', emphasis added.

¹⁷⁰ T Giegerich, *Treaties*, 'Multilateral, Reservations to', *Max Planck Encyclopedia of Public International Law* (online version 2020).

¹⁷¹ Ibid the Author is yet critical about the position embraced by the ICJ in its Advisory Opinion, arguing that: 'from a policy standpoint, the ICJ's strict solution is unsatisfactory because it eliminates any serious legal risk for the reserving party which is tempted to safeguard its individual interests by extensive reservations and expect nothing worse than ending up not being a party to the treaty'.

¹⁷² For a comprehensive analysis cf. KL McCall-Smith, 'Severing reservations' (2014) 63 *International and Comparative Law Quarterly* 599; B Simma and GI Hernández (n 163). For a critical position see LR Helfer, 'Not Fully Committed? Reservations, Risk, and Treaty Design' (2006) 31 *Yale Journal of International Law* 367, 380, arguing that the remedy of severance of illegitimate reservations ought to be analyzed in conjunction with the discipline of denunciation proper of a treaty. From this perspective, the Author highlights that: 'if a treaty body's decision to sever is erroneous – that is, if the reservation was in fact a condition of the state's consent to be bound – holding the state to the entire treaty without the benefit of the reservation binds the state to obligations to which it expressly declined to consent and from which it may not lawfully withdraw'.

¹⁷³ Cf. KL McCall-Smith, 'Severing reservations' (n 172) 611.

¹⁷⁴ *Belilos v Switzerland* App no 10328/83 (ECtHR, 29 April 1988) para. 60, in which the Court held that: 'the declaration in question does not satisfy two of the requirements of Article 64 of the Convention, with the result that it must be held to be invalid. At the same time, it is beyond doubt that Switzerland is, and regards itself as, bound by the Convention irrespective of the validity of the declaration'. For insights in legal literature see I Cameron and F Horn, 'Reservations to the European Convention on Human Rights: the *Belilos* Case' (1990) 33 *German Yearbook of International Law* 69; S Marks, 'Reservations Unhinged: The *Belilos* case before the European Court of Human Rights' (1990) 39 *International and Comparative Law Quarterly* 300.

¹⁷⁵ ILC, 'Guide to Practice on Reservations to Treaties' (2011) (hereinafter ILC Guide to Practice). According to guideline 4.5.1. '[a] reservation that does not meet the conditions of formal validity and permissibility set out in Parts 2 and 3 of the Guide to Practice is null and void, and therefore devoid of any legal effect'. Still, as underlined by Pellet (n 167) 1092, declaring a reservation null and void, independently of the reactions of the other contracting parties, 'only partially solves the question of the status of the author of an invalid reservation in relation to the treaty'. From this perspective, the ILC Guide to Practice provides an answer to the latter question in guideline 4.5.3., representing the final, compromise solution following confrontation between the ILC and human rights bodies in the aftermath of the adoption of General Comment No. 24 by the Human Rights Committee (11 November 1994, CCPR/C/21/Rev.1/Add.6 (1994)) and of the Preliminary

bility principle, the State or international organisation that has formulated the illegitimate reservation would remain bound to the treaty without benefitting from the reservation¹⁷⁶, considered devoid of any legal effect.¹⁷⁷ Furthermore and importantly, the ILC Guide to Practice has made it clear that the formulation of an impermissible reservation ‘produces its consequences pursuant to the law of treaties and does not engage the international responsibility of the State or international organization which has formulated it’.¹⁷⁸

Against this background, the Commission's proposal, by foreseeing an alternative effect directly stemming from the devising of the impermissible reservation – *i.e.* the temporary withdrawal of the additional trade preference provided by the GSP+ scheme – radically reinvents the wheel *vis-à-vis* the international law regime concerning the legal effects of illegitimate reservations. As a matter of fact, whereas the Commission's proposal does embrace neither the total invalidity nor the severance doctrine formulated in the bosom of public international law, it envisages as the sole consequence stemming from the formulation of the illegitimate reservation the possible withdrawal of the additional tariff preferences granted under the GSP+ scheme, in order to induce the wrongdoing beneficiary State to compliance.¹⁷⁹ From this latter perspective, the *ratio* underpinning the triggering of the temporary withdrawal mechanism would thus be similar to the one grounding the application of countermeasures under international law¹⁸⁰, whose adoption in relation to impermissible reservations –

Conclusions on Reservations to Normative Multilateral Treaties Including Human Rights Treaties as included in the Report of the International Law Commission on the work of its forty-ninth session, 12 May-18 July 1998, UN Doc A/52/10 (1998). For an extensive analysis see Pellet (n 167) 1092-1093.

¹⁷⁶ Cfr. ILC Guide to Practice guideline 4.5.3(2), reading: ‘[u]nless the author of the invalid reservation has expressed a contrary intention or such an intention is otherwise established, it is considered a contracting State or a contracting organization without the benefit of the reservation’.

¹⁷⁷ Ibid, in accordance with guideline 4.5.2, the objection to the invalid reservation is not considered necessary to declare its nullity. Nonetheless, it is specified that the State or international organisation ‘which considers that a reservation is invalid should formulate a reasoned objection as soon as possible’.

¹⁷⁸ Ibid Guideline 3.3.2. In this respect B Simma and GI Hernández (n 163) 74, argue that the wording of the guideline ‘clarifies the nature of the act of formulating a reservation, confining it strictly to the law of treaties, and in this sense settles in the negative the question of whether formulating a reservation could entail a breach of an international obligation’.

¹⁷⁹ Accordingly, the *ratio* underpinning the withdrawal mechanism proper of the EU GSP regime would be that of ‘rectify[ing] the shortcoming giving rise to the suspension’ of the trade benefits. From this perspective see critically C Portela (n 95) 44.

¹⁸⁰ Under Art 49(1) of the ILC, Draft Articles on the Responsibility of States for Internationally Wrongful Acts (2001) (hereinafter ILC Draft Articles), ‘[a]n injured State may only take countermeasures against a State which is responsible for an internationally wrongful act *in order to induce that State to comply with its obligations* under part two’, emphasis added. In this vein, the commentary accompanying the ILC Draft Articles underlines that countermeasures are ‘taken to achieve a specified end, whose justification terminates once the end is achieved’. See ILC, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001) 129. In legal doctrine see on the point FI Paddeu, ‘Countermeasures’, *Max Planck Encyclopedia of Public international Law* (online version 2015), 16, emphasizing that: ‘the countermeasure is not an end in itself, but only a means to an

given the absence of international responsibility – would appear to be excluded at the root.¹⁸¹

5.2. Legal obligations for GSP beneficiary countries *ex* Article 19 of the Commission's proposal

As anticipated, the Commission's proposal entails, in Article 19, a *generalis* withdrawal mechanism applicable to all the covered arrangements, which can be triggered at the occurrence of 'serious and systemic violations of principles laid down in the conventions listed in Annex VI'.¹⁸² Compared to the above-examined *specialis* withdrawal procedure, Article 19 displays a qualified character, restraining the Commission's margin of manoeuvre in the assessment of breaches occurred under the framework of the Paris Agreement on climate change. In fact, the Commission shall be entitled to act only for violations which, on the one hand, display the characteristic of being both systemic and serious and that, on the other, affect the principles inherently established by the PA. These two distinct facets are thus worth analysing.

At the outset, the Commission's proposal specifies that violations *ex* Article 19(1)(a) shall be both 'serious' and 'systemic', yet without providing further elucidation as to the effective meaning of these terms within the context of the GSP Regulation. This normative lacuna might pose some queries of utmost practical relevance since, as rightly noted by Karimova, the deployed terms have, thus far, resisted authoritative definition also in the bosom of public international law.¹⁸³ With specific

end. *If the countermeasure is not taken for the purpose of inducing the target State to comply with its obligations, it will be unlawful*', emphasis added. On the point see also DJ Bederman, 'Counterintuiting Countermeasures' (2002) 96 *American Journal of International Law* 817, 822, arguing that following the publication of the ILC Draft Articles '[t]he use of countermeasures for purely punitive reasons – without any hope or expectation that the malefactor state will actually back down from its offensive conduct – appears to be now precluded [by Art 49 of the ILC Draft Articles]'. Generally on the topic, cf. C Focarelli, *Le contromisure nel diritto internazionale* (Giuffrè 1994); L Sicilianos 'La codification des contre-mesures par la Commission du droit international' (2005) 38 *Revue Belge de Droit International* 447; EK Proukaki, *The Problem of Enforcement in International Law: Countermeasures, the Non-Injured State and the Idea of International Community* (Routledge 2010).

¹⁸¹ See guideline 3.3.2 of the ILC Guide to Practice (n 175) and Art 49 ILC Draft Articles (n 180), according to which countermeasures can be adopted only against a State which is 'responsible' for an internationally wrongful act.

¹⁸² Proposal COM (2021) 579 final (n 23) Art 19(1)(a).

¹⁸³ Cf. T Karimova, 'What Amounts to a "Serious Violation of International Human Rights Law"? An Analysis of Practice and Expert Opinion for the Purpose of the 2013 Arms Trade Treaty' (2014) Geneva Academy Briefing Paper 6-2014, at www.geneva-academy.ch. Whilst an extensive examination of the concept of 'serious and systemic violation' goes beyond the scope of the present investigation, legal scholars have long debated on the concrete meaning of the expression, often paralleled with similar semantic constructs such as the well-known formula of 'gross and systemic violations'. Cf. *ex multis* P D'Argent, 'Le droit de la responsabilité internationale complété? Examen des Principes fondamentaux et directives concernant le droit à un recours et à réparation des victimes de violations fla-

regard to the word 'systemic', clarification could still be provided by the guidelines adopted by the Council of Europe¹⁸⁴, conceptualising the term as 'something that is spread throughout, wide and extensive, affecting a group or a structure as a whole'¹⁸⁵ and not concretising in a 'single occurrence'.¹⁸⁶

Yet, more complex reveals the task of giving shape and colour to the expression 'serious violation', with both quantitative¹⁸⁷ and qualitative¹⁸⁸ assessments having been advanced. Nonetheless, the concept of 'serious violation', for the purposes of the Commission's proposal, might, at a first reading, be assimilated to that of 'material breach' of a treaty, *ex* Article 60(3) VCLT.¹⁸⁹ In particular, the serious violation of the principles of the relevant conventions could be abstractly connected to the hypothesis foreseen by let. (b) of Article 60(3) VCLT, according to which a material breach consists of 'the violation of a provision essential to the accomplishment of the object or purpose of the treaty'. This reading would result partially supported by a recent Commission's communication¹⁹⁰, which conceptualises the 'serious violations (...) of the Paris Agreement' as any 'failure to comply with obligations that *materially defeats the object and purpose of the agreement*'.¹⁹¹

Still, at a more careful analysis some relevant differences between the two formulations come to the surface. Firstly, it shall be noted that the definition of 'serious violation' put forward by the Commission introduces an express qualification of the

grantes du droit international des droits de l'homme et de violations graves du droit international humanitaire' (2005) 51 *Annuaire Français de Droit International* 27; D Shelton, *Remedies in International Human Rights Law* (Oxford University Press 2006).

¹⁸⁴ Council of Europe, 'Methodology for assessment of systemic human rights violations' (February 2020) at rm.coe.int.

¹⁸⁵ *Ibid* 9.

¹⁸⁶ *Ibid*.

¹⁸⁷ E.g. see Council of Europe, 'Eradicating impunity for serious human rights violations: Guidelines and reference texts' (2011) H/Inf (2011) 7 <<https://rm.coe.int/1680695d6e>>.

¹⁸⁸ Cf. D Shelton (n 183) 390, defining 'gross' violations as violations which are 'particularly serious in nature because of their cruelty or depravity'.

¹⁸⁹ The parallelism between the concept of 'material breach', *ex* Art 60 VCLT, and the notion of 'serious and persistent breach', proper of EU law, in particular *ex* Art 7 TEU, has also been noted in legal literature. See in this regard B Blagoev, 'Expulsion of a Member State from the EU after Lisbon: Political Threat or Legal Reality' (2011) 16 *Tilburg Law Review* 191, 230.

¹⁹⁰ Communication COM(2022) 409 final (n 77). The interpretative value of EU non-binding acts, including Commission's communications, has long been recognized by the European Court of Justice in the Union's legal order. See *inter alia* case C-322/88 *Grimaldi v Fonds des maladies professionnelles*, EU:C:1989:646, paras 18-19.

¹⁹¹ Communication COM(2022) 409 final (n 77), p. 11, emphasis added. It must still be pointed out that, as anticipated, the mentioned Commission's communication does not refer to the concept of 'serious violation of the Paris Agreement' in relation of the EU GSP regime, instead elaborating on it in the similar context of the trade and sustainable development chapters included in the Union's new generation free trade agreements.

breach, which shall notably defeat the object and purpose of the treaty ‘materially’.¹⁹² The latter term presumably relates to the gravity of the violation, as hinted at by the explanatory memorandum accompanying the Commission’s proposal, highlighting that the withdrawal procedure proper of the EU GSP regime shall be ‘activated in cases of exceptionally grave violations’.¹⁹³ To the opposite, the wording of Article 60(3)(b) VCLT does not qualify, in qualitative terms, the breach of the essential provision, thus appearing to ‘permit reactive termination or suspension of a treaty already in the event of what amounts to no more than a minor or trivial violation of an essential provision’.¹⁹⁴

Accordingly, and secondly, the definition of ‘serious violation’ elaborated by the Commission omits to specify that the breached provisions – *rectius*, the principles of the relevant conventions – shall present the requirement of essentiality, contrary to the conceptualisation of the material breach *ex* Article 60(3)(b) VCLT.¹⁹⁵ From this side of the spectrum, the European Commission, in evaluating whether to trigger the withdrawal mechanism *ex* Article 19(1)(a) of the proposal, would not need to

¹⁹² In other linguistic versions, the Communication relies on the terms ‘substantiellement’ or ‘sostanzialmente’ to qualify the gravity of the violation.

¹⁹³ Proposal COM (2021) 579 final (n 23), explanatory memorandum 3 and 7.

¹⁹⁴ O Dörr and K Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2018) 1106. The Authors yet also underline that Art 60(3)(b) VCLT ‘was obviously meant to cover only cases in which the violation seriously jeopardized the accomplishment of the treaty’s object and purpose’. See also M Xiouri, ‘Material Breach of a Treaty: Some Remarks on the Partial Award of 30 June 2016 in the Matter of an Arbitration between Croatia and Slovenia’ (2019) 8 *Cambridge International Law Journal* 131, 142, differently arguing that even a minor breach of an essential provision would constitute a breach under Art 60(3)(b) VCLT. From a similar perspective, Simma and Tams argue that ‘contrary to what might be expected, there is [in Art 60(3)(b) VCLT] no reference to the intensity or gravity of the breach; instead, the provision’s focus is on the character of the treaty obligation that is being breached’. Accordingly, the Authors come to the conclusion that ‘grave breaches of treaty provisions that are not essential’ would not account to a breach for the purposes of Art 60 VCLT Cf. B Simma and CJ Tams, ‘Reacting against Treaty Breaches’ in D B Hollis (ed), *The Oxford Guide to Treaties* (Oxford University Press 2020) 569, 575.

Against this backdrop, legal doctrine has thus brought to the surface how Art 60(3)(b) VCLT would fail to straightforwardly address the issue of minor breaches of essential provisions, merely demanding ‘whether a (major or minor) breach affects the accomplishment of the object and purpose of the treaty.’ Cf. ME Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Brill 2009) 743. For a different position see FL Kirgis, ‘Some Lingering Questions about Article 60 of the Vienna Convention on the Law of Treaties’ (1989) 22 *Cornell International Law Journal* 549, 552, arguing that, whereas the literal formulation of Art 60(3)(b) might suggest that any violation essential to the accomplishment of the object and purpose of a treaty could represent a material breach, ‘common sense suggests that the answer should be otherwise’. The Author hence emphasizes that a minor violation of an essential provision would not constitute a material breach of a treaty.

¹⁹⁵ By relying on the International Law Commission’s commentary to the draft on now Art 60 VCLT, Kirgis clarifies that essential provisions of an international treaty are not restrained to those ‘directly touching the central purposes of the treaty’. Instead, ‘other provisions considered by a party to be essential to the effective execution of the treaty may have been very material in inducing it to enter into the treaty at all’, also if presenting an ancillary character. See FL Kirgis (n 194) 552. In this sense also ME Villiger (n 194) 743; A Aust (n 109) 260.

assess whether the specific provision of the relevant conventions shall be deemed essential for the attainment of the object and purpose of a given treaty.

Therefore, the concepts of 'material breach', *ex* Article 60(3)(b) VCLT, and of 'serious violation', *ex* Article 19(1)(a) of the Commission's proposal, whilst similar at a first glance, can, at a more careful analysis, be depicted as a photograph accompanied by its negative film. In fact, on the one hand, the VCLT foresees a violation (abstractly not further qualified) of a provision which shall be essential for the accomplishment of the object and purpose of a treaty.¹⁹⁶ On the other hand, the conceptualisation of 'serious violation' put forward by the Commission demands a grave violation of any (and not essential) principle proper of the relevant conventions, which might engender the attainment of their object and purpose.

Building on these considerations, it remains to be evaluated what can be deemed a 'principle' within the specific framework of the Paris Agreement on climate change. As anticipated, the latter entails a guiding principle, enshrined in Article 2(2) PA. Notably, the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.¹⁹⁷ Yet, as rightly noted in legal literature, whereas the clause has the 'potential to create legally binding obligations',¹⁹⁸ it is still 'framed carefully as to dilute its legal effect'.¹⁹⁹ According to Rajamani, this would specifically concretise in three major shortcomings, likely to render the provision's enforcement highly unfeasible. *In primis*, Article 2(2) PA fails to expressly identify the subjects tasked with implementation, passively referring to 'this Agreement'.²⁰⁰ Secondly, and concordantly, Article 2(2) PA does not deploy prescriptive language, but rather predictive, merely providing that the Paris Agreement on climate change 'will be [instead of shall be] implemented to reflect' the principle of differentiation. Yet, these shortcomings would not constitute major

¹⁹⁶ From this side of the spectrum, as underlined by Villiger, 'a typical example of [a violation *ex* Art 60(3)(b) VCLT], would be the non-performance, or the incorrect performance, of certain treaty provisions'. Accordingly, the requirement of essentiality would be connected to the function performed by specific provisions within a given treaty's regime. *Cf.* ME Villiger (n 194)742, emphasis added.

¹⁹⁷ Art 2(2) Paris Agreement on climate change (n 9) reads: '[t]his Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances'. It shall be noted that, besides the principle of common but differentiated responsibilities and respective capabilities, Art 2(2) PA also refers the equity. The latter has been understood in legal literature as a broader concept, which includes and embeds the principle of differentiation. See in this sense T Deleuil (n 134) 271; P Cullet (n 134) 306. For a more general account, *cf.* F Soltau, *Fairness in International Climate Change Law and Policy* (Cambridge University Press 2009) 186.

¹⁹⁸ L Rajamani, 'Guiding Principles and General Obligation (Article 2.2 and Article 3)' in D Klein and others (eds) (n 114) 133.

¹⁹⁹ *Ibid*

²⁰⁰ *Ibid.* From this perspective, the Author underlines that Art 2(2) PA does not expressly deploy clearer formulations, such as 'each Party' or 'all Parties' of the Agreement, formulations which would more straightforwardly identify the subjects tasked with implementing the principle under scrutiny.

deficiencies from the perspective of the enforcement of Article 19(1)(a) of the Commission's proposal. In fact, for the purposes of the latter, GSP beneficiary countries would not be directly bound by the wording of Article 2(2) PA, which does not result incorporated *expressis verbis* in the proposal.

Instead, the key challenge would relate to the third shortcoming identified by Rajamani, *i.e.* the absence of a clear definition or interpretation of the principle of differentiation within the remit of international climate change law, with Article 2(2) PA not providing 'an authoritative account of this principle'.²⁰¹ Whereas it is undoubtedly true that legal principles are, by their very nature, 'highly abstract',²⁰² the diverging conceptualisations of the principle of CBDRRC, put forward from the advent of the UNFCCC²⁰³, might thus hinder the effective enforcement of Article 19(1)(a) of the Commission's proposal.²⁰⁴

Eventually, from a policy standpoint, it is important to point out that the principle of differentiation has been traditionally conceived as a principle aiming at integrating, within the multilateral climate change regime, the necessities of developing and least developed countries, notably through the conception of less cumbersome obligations incumbent on them.²⁰⁵ It would thus result counterintuitive to picture a situation in which this category of countries, which are the beneficiaries of the EU GSP regime, would be in violation of the principle of CBDRRC. Conversely, it is interesting to note that several developing countries have recently blamed the Union to be in violation of the mentioned principle, in particular in the drafting of unilateral trade measures aiming at implementing the Paris Agreement on climate change.²⁰⁶

²⁰¹ Ibid.

²⁰² See on the point G Marín Durán (n 134) 82-83. The Author emphasises that 'legal principles are highly abstract, embodying general standards against which to evaluate governmental decision-making but leaving considerable room for interpretation. Put differently, the CBDRRC principle is open-ended: while it may sway decision-makers in a particular direction, it does not itself specify particular actions'.

²⁰³ See for an overview T Deleuil (n 134) 272-273. For an insight concentrating on the normative content of the principle of CBDRRC, cf. L Rajamani (n 134); I Ibrahim, T Deleuil and PD Farah, 'The Principle of Common but Differentiated Responsibilities in the International Regime of Climate Change' in P Farah and E Cima (eds), *China's Influence on Non-Trade Concerns in International Economic Law* (Routledge 2016) 146, 147-148.

²⁰⁴ For a comprehensive overview of the evolution of the principle of differentiation in the international climate change regime see L Rajamani (n 135).

²⁰⁵ See from this perspective cf. T Deleuil (n 134) 271. The Author, citing D Shelton, 'Equity' in D Bodansky, J Brunnée and E Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2008) 639, 647, argues that the principle of differentiation aims at acknowledging that 'imposing equal obligations on subjects of law that are unequal in relevant ways may be perceived as unjust if they exacerbate inequalities or impose unfair burdens on those least able to bear them'.

²⁰⁶ This has been the case in relation to Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism, which has given rise to stark opposition from the so-called 'BASIC' countries, *i.e.* Brazil, South Africa, India and China. See in this respect South African Government, *Joint Statement issued at the conclusion of the 30th*

6. Concluding remarks

As the present article has attempted to illustrate, climate-led conditionality, as a specific category of environmental conditionality, has gradually developed and imposed in the generalised scheme of preferences' regime.²⁰⁷ If the first EU GSP Regulation was essentially apt at sustaining industrialisation and an export-oriented economic growth in developing and least developed countries, with no consideration being attached to environmental variables²⁰⁸, the system presently in force envisages the attainment of ecological and climate objectives as an integral component of the Union's common commercial policy, as mandated by the EU founding treaties.²⁰⁹ In this vein, the Union would concomitantly act on the international scene as a 'good global actor'²¹⁰ – an expression which anchors the external projection of the EU to the objectives that it shall fulfill globally *ex* Article 3(5) and 21 TEU – and as a 'market power'²¹¹, deploying an economic leverage for the externalization of its trade-related environmental agenda.²¹²

Indeed, it has been illustrated that the current GSP Regulation, under the GSP+ arrangement, subordinates the granting and the temporary withdrawal of additional tariff preferences for vulnerable developing countries to, *inter alia*, the ratification and effective implementation of given international conventions, amongst which the UNFCCC and Kyoto Protocol are encompassed. The reliance on conventional instruments (rather than EU standards) as yardsticks of both positive and negative conditionality would thus seem to suggest an express valorisation, by the EU, of the obligations contracted by GSP beneficiaries at international level, thus contributing to the 'strict observance and development of international law', as mandated by the objectives grounding the Union's external action.²¹³ Moreover, the possibility of

BASIC Ministerial Meeting on Climate Change hosted by India on 8th April 2021 (2021) at www.gov.za, para. 19, reading: '[m]inisters expressed grave concern regarding the proposal for introducing trade barriers, such as unilateral carbon border adjustment, that are discriminatory and against the principles of Equity and CBDR-RC'.

²⁰⁷ In this sense see also L Huici Sancho, 'What Kind of "Generalized" Systems of Preferences?' (2006) 21 *European Journal of Law and Economics* 267, 282.

²⁰⁸ Cf. G Marín Durán and E Morgera (n 5) 147.

²⁰⁹ Regulation 978/2012 (n 19) Preamble, para. 2.

²¹⁰ For a comprehensive examination of the concept within the remit of the Union's external action, see E Fahey and I Mancini (eds), *Understanding the EU as a Good Global Actor: Ambitions, Values and Metrics* (Edward Elgar 2022).

²¹¹ C Damro, 'Market Power Europe' (2012) 19 *Journal of European Public Policy* 682.

²¹² This approach results confirmed by the explanatory memorandum which accompanies the Commission's proposal, in which it is stated that: 'an extension of negative conditionality to environmental and good governance conventions would create similar opportunities to engage on such issues in support of the UN Sustainable Development Goals (SDGs) and the contribution of the EU's green agenda to GSP beneficiary countries'. See Proposal COM (2021) 579 final (n 23), explanatory memorandum 7.

²¹³ Art 3(5) TEU. See also Art 21(2)(b) TEU.

withdrawing tariff preferences upon, in particular, the failure to implement the mentioned climate change conventions constitutes a hard enforcement mechanism for ensuring compliance with the obligations contracted at international level, accordingly making up for the current lack of an effective dispute settlement mechanism under the aegis of the UNFCCC.

This notwithstanding, shortcomings persist. Whereas the capability of the present GSP Regulation to effectively deliver on its sustainability objectives by means of a conditionality approach has been, as shown, mainly contested under an effectiveness perspective²¹⁴, it shall also be highlighted that the current piece of legislation stops short of moving with the times of the international climate change regime, failing to include amongst the relevant conventions the landmark Paris Agreement on climate change.

It hence comes as no coincidence that in advancing its proposal for a novel GSP regulation the European Commission has underscored the inevitability to ‘improve the GSP’s overall efficiency and effectiveness to respond to future challenges’²¹⁵, proceeding along a bipartite guideline: on the one hand, streamlining negative climate conditionality also to the general GSP and EBA schemes; on the other, updating the list of the relevant conventions as also to include the PA. From this side of the spectrum, within the unilateral wave which currently typifies the CCP²¹⁶, the Commission’s proposal interestingly still aims at valorising the respect of international environmental law, continuing to refer to international standards as yardsticks of both positive and negative conditionality.

The article has then elaborated on the normative implications connected to the advanced prospect of subjecting all GSP arrangements to the respect of the Paris Agreement on climate change. As discussed, it can be inferred that the Commission’s proposal upholds a twin-track approach in the potential retraction of trade preferences at the occurrence of failures to effectively comply with the obligations and undertakings descending from the Paris Agreement on climate change, with GSP+ beneficiaries having to withstand a heavier burden, particularly represented by the all-embracing commitment to implement ‘integrally’²¹⁷ the PA. On the contrary, GSP and EBA beneficiary countries would undergo, in the light of the *generalis* withdrawal procedure enshrined in Article 19 of the proposal, the sole obligation to refrain from bringing about qualified breaches of the Paris Agreement on climate

²¹⁴ See *inter alia* W Zhou and L Cuyvers, ‘The Effectiveness of EU’s Generalised System of Preferences: Evidence from ASEAN Countries’ (2012) 11 *Journal of International Trade Law and Policy* 65; J Vogt, ‘A Little Less Conversation: The EU and the (Non) Application of Labour Conditionality in the Generalized System of Preferences (GSP)’ (2015) 31 *International Journal of Comparative Labour Law and Industrial Relations* 285; C Portela (n 47).

²¹⁵ Proposal COM (2021) 579 final (n 23) 2.

²¹⁶ On the point see specifically T Verellen and A Hofer, ‘The Unilateral Turn in EU Trade and Investment Policy’ (2023) 28 *European Foreign Affairs Review* 1.

²¹⁷ Art 2(11) Proposal COM (2021) 579 final (n 23).

change, *i.e.* 'serious and systemic violations of the principles laid down'²¹⁸ thereof. And yet, this bifurcation in the withdrawal mechanism of tariff preferences comes as no surprise, since the more demanding environmental obligations incumbent on GSP+ beneficiaries logically represent the counterbalance of the conferred additional tariff preferences.²¹⁹

Whilst, at first glance, it could be concluded that the *specialis* withdrawal mechanism established by the proposal denotes the most vigorous system to guarantee effective implementation of the Paris Agreement on climate change, it has been maintained that the latter presents systemic characteristics which may constitute an obstacle for the effective operationalisation of Article 15 of the Commission's proposal. These can be brought back to two major deficiencies: generally, the presence of few substantive obligations, worded in legally binding terms and incumbent on individual signatories; specifically, the exigence to duly consider the differential status enjoyed by developing country parties to the PA, these latter ones being subject to fewer obligations in comparison to developed country signatories.

On the other side of the spectrum, it has been emphasized that the *generalis* withdrawal mechanism mandated by Article 19(1)(a) of the Commission's proposal may be triggered only at the occurrence of a temporally generalised violation of the principle of differentiation, grave enough to engender an impact on the object and purpose of the Paris Agreement on climate change. In this respect, it can be claimed that the most severe setback in the implementation of the aforesaid proposal's provision would be to ascertain whether the principle of common but differentiated responsibilities could, *de facto*, undergo enforcement. In view of the limitations illustrated in section 5 this eventuality does not, to date, reveal plausible.

In light of the foregoing, the recent decision of the European Parliament and Council to extend the current GSP Regulation until 31 December 2027, while continuing to negotiate on the 2021 Commission's proposal, might thus represent an opportunity for the legislators to rethink from the inside the embraced approach to climate conditionality, being assigned the prospect to foster the GSP Regulation currently in force along a bipartite line.

On the one side, the assertion according to which negative conditionality shall represent the backbone of the novel GSP regulation should be recalibrated. As previously noted, the majority of legal commentators have considered the 'stick approach' to trade conditionality to be ineffective in fostering sustainable development beyond the Union's borders.²²⁰ Moreover, the present article has underlined, from an international climate change law perspective, the normative deficiencies which would render the triggering of both the *specialis* and the *generalis* withdrawal procedures highly trivial in practice.

²¹⁸ Art 19(1)(a) Proposal COM (2021) 579 final (n 23).

²¹⁹ In this sense also T Lebzelter and A Marx (n 42) 4.

²²⁰ See *inter alia* C Portela (n 47); K Yaraslau (n 84).

Accordingly and on the other side, positive climate conditionality could be conferred a more prominent role within the scaffold of the proposal, in the light of empirical evidence suggesting its more effective contribution to the furthering of environmental and climate protection in beneficiary countries.²²¹ A constructive contribution to the streamlining of positive, rather than negative, conditionality has been put forward by the European Parliament, suggesting to subordinate also the granting of general GSP tariff preferences to the ratification of the relevant conventions.²²² Additionally, in the enhancement of positive conditionality, attention shall be bestowed to the monitoring of the maintenance of ratification, along with the implementation of, the relevant conventions. Under this viewpoint, the proposition of the European Commission to introduce a ‘plan of action’ for implementation is hence to be welcomed.²²³ Yet, the proposal fails to detail the content of the plan, whilst its normative bindingness remains blurred.²²⁴ Improvements in this regard have been put forward by the European Parliament, integrating definitory elements which shall be proper of the plan²²⁵ while also explicitly subjecting the granting of the additional tariff preferences upon, amongst other things, whether the beneficiary country has ‘started implementing’²²⁶ it. Nonetheless, it remains to be seen whether the proposed amendments will, eventually, see the light of day.

In conclusion, whilst certainly ambitious on paper, the concrete effectiveness of the current GSP regime in fostering climate protection worldwide remains dubious, biting off more than it can chew.

²²¹ Cf. T Lebzelter and A Marx (n 42).

²²² European Parliament, ‘Report on the Proposal for a Regulation of the European Parliament and of the Council on Applying a Generalised Scheme of Tariff Preferences and Repealing Regulation (EU) No 978/2012 of the European Parliament and of the Council (COM(2021)0579 – C9-0364/2021–2021/0297(COD))’ (17 May 2022) A9-0147/2022 at www.europarl.europa.eu.

²²³ According to Art 9(d) Proposal COM (2021) 579 final (n 23), the ‘binding undertaking to maintain ratification of the relevant conventions and to ensure effective implementation thereof’ shall be accompanied by a ‘plan of action for the effective implementation of the relevant conventions’.

²²⁴ In particular, it would not be clear from Arts 9-10 of Proposal COM (2021) 579 final (n 23), whether the granting of the status of GSP+ beneficiary shall be subordinated to the respect of the plan of action.

²²⁵ In accordance with amendment 35, introducing Art 2(10a) to the original Commission’s proposal for a novel GSP Regulation, the plan of action is defined as: ‘a forward looking and priority-oriented list of measures, including legislative measures, to be adopted and actions to be taken by a beneficiary country necessary to effectively implement the core international conventions referred to in Annex VI, and based on, *inter alia*, available information and in particular the most recent conclusions of the monitoring bodies of the conventions; the plan of action shall also provide for a timeframe for each listed measure and action and identify as precisely as possible the relevant institution or structure responsible in the beneficiary country for its implementation and oversight. Each listed measure and action, or set thereof, constitute the benchmarks for the progressive suspension of tariffs, as agreed in the tariff suspension schedule included to the plan of action’. See European Parliament (n 222).

²²⁶ Ibid See Amendment 52.

A Case Study of Judicial-Legislative Interactions via the Lens of the DSA’s Host Liability Rules

*Rónán Riordan**

TABLE OF CONTENTS: 1. Introduction. – 2. Analytical framework and methodology. – 3. Case Study: the development of intermediary liability for host service providers. – 3.1. Justification of case selection. – 3.2. Host liability under the ECD. – 3.3. The Court’s jurisprudence on host liability. – 3.4. Host liability under the Digital Services Act. – 4. Has the Court exercised influence? – 5. Conclusions.

ABSTRACT: This paper explores the relationship between the Court of Justice of the European Union and the EU Legislature. Taking intermediary liability rules for hosts under Article 14 of the e-Commerce Directive (ECD) and its subsequent revision under the Digital Services Act (DSA) as a case study, the paper explores this relationship. The analysis focuses on the distinction between ‘active’ and ‘neutral’ roles for hosts developed by the Court of Justice in its case law. The paper shows how the Court’s rulings shaped the application of host liability rules under the ECD, subsequently impacted their revision during the DSA negotiations, and how the Legislature addressed the uncertainty created by its case law on voluntary investigations via the introduction of a ‘Good Samaritan’ clause. Methodologically the paper draws on legal scholarship and political science literature, employing a mixed methods approach which combines doctrinal analysis, process tracing, and a law attainment typology to explore these dynamics. The paper concludes that while the Court’s jurisprudence was important during negotiations, it also highlights the challenges it posed as both a form of legal regulation, and by extension as a tool of integration. These issues necessitating legislative intervention. The paper’s findings lend weight to the increasing body of literature in legal scholarship which argues that there has been a shift in European integration dynamics, with positive integration playing an increasingly important role.

KEYWORDS: Court of Justice – EU legislature – host liability – Digital Services Act – judicial-legislative interactions – European integration dynamics.

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1. Introduction

The relationship between the Court of Justice and the Union Legislature has long been the subject of scholarly debate. At the heart of this debate lies the tension between law and politics and, in the European context, theories of European integration that explore the dynamics between negative and positive integration, ‘Integration through Law’, and more recently narratives of the Union’s over-constitutionalisation. This paper seeks to consider these dynamics by exploring how the Court impacts legislative negotiations, how political institutions engage with case law, and what these dynamics might tell us about broader institutional relationships and integration as a process.

To do this, the paper explores the interactions between the Court of Justice of the European Union and the Union Legislature during the drafting of legislation.¹ It takes the development of intermediary liability for host service providers under Article 14 of the e-Commerce Directive (ECD)² as a case study, assessing how the provision was interpreted by the Court and the subsequent impact of its jurisprudence on the drafting of the Digital Services Act (DSA).³ The legal analysis focuses on the distinction between ‘active’ and ‘neutral’ roles developed in case law to determine when hosts may be attributed with ‘knowledge’, and therefore when they may be deprived of the protection offered by the ECD’s liability exemptions.⁴ This jurisprudence created legal uncertainty regarding voluntary own investigations conducted by hosting providers, leading to the introduction of a ‘Good Samaritan’ clause in response to the ambiguity created by the Court. That provision partially draws upon the Court’s jurisprudence to resolve legal uncertainty.

¹ Throughout this paper I refer to the Court of Justice of the European Union as the ‘CJEU’, ‘Court of Justice’, or the ‘Court’ where capitalisation indicates its distinction from courts in the general sense.

² Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘e-Commerce Directive’).

³ Regulation (EU) 2020/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Service Act); The original proposed text for this regulation was European Commission, Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM/2020/825 final; The Council assented to the final draft text on the 4th of October, Council of the European Union, ‘Council gives final approval to the protection of users’ rights online’ (Press Release, 4 October 2022) at www.consilium.europa.eu.

⁴ The significance of the Court’s case law via these legal concepts has already been acknowledged in the literature, see E Rosati, *Copyright and the Court of Justice of the European Union* (Oxford University Press 2019) 201–204. See also F Wilman, ‘Between preservation and clarification’ (*Verfassungsblog*, 2 November 2022) at verfassungsblog.de.

The paper argues that while the Court's influence on the Legislature was wide (in that there is extensive consideration of its jurisprudence and its ideas are drawn on both implicitly and explicitly), its influence was limited. The Legislature, in seeking to determine how to revise the ECD's liability rules turned to the Court for guidance, reinforcing the findings of Weatherill who has argued that case law has become a body of drafting guidelines for the Union Legislature.⁵ Yet, the case study also finds the influence of the Court was varied. Different institutions, and different actors within those institutions, drawing different conclusions as to the meaning of case law or deployed it differently.

The paper opens by outlining its analytical framework and methodology. The analytical framework explores the synergies between some of the dominant theoretical frameworks for understanding the relationship between the Court and Legislature in European integration. These frameworks are then linked to broader perspectives of the Court as a 'powerful' institution in European integration. The paper shifting its focus towards the concept of 'influence' which is deployed as a tool to trace the wider array of ways in which judicial impact may occur.

To distinguish between degrees of influence on legislation the paper pays particular attention to the locus of the incorporation of the Court's jurisprudence. Emphasising the differing purposes and functions of recitals and articles, and the implications of this for the operation of legislative frameworks, the paper explores how the asymmetrical incorporation of jurisprudence into these provisions impacts a framework's application, and by extension the influence of case law on law-making. This is combined with three methods for tracing influence in legislative negotiations. Traditional doctrinal research,⁶ process tracing,⁷ and a law attainment typology which typifies influence into four categories; 'codification', 'modification', 'non-adoption', or 'override'.⁸ With these tools in hand the paper turns to the case study, justifying the case selection, assessing the rules under ECD and how they were interpreted by the CJEU.⁹ The paper then evaluates the impact of the Court's jurisprudence on the formulation of the DSA host liability rules and the offshoot effect of that jurisprudence for the

⁵ S Weatherill, 'The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court's Case Law has become a "Drafting Guide"' (2011) 12 *German Law Journal* 827–864.

⁶ T Hutchinson and N Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 *Deakin Law Review* 83–119.

⁷ D Beach and R Brun Pedersen, *Process Tracing Methods: Foundations and Guidelines* (2nd Edition University of Michigan Press 2019).

⁸ D Sindbjerg Martinsen, *An Ever More Powerful Court? The Political Constraints of Legal Integration in the European Union* (Oxford University Press 2015) 34–36.

⁹ Joined Cases C-682/18 and C-683/18 *Frank Peterson v Google LLC and Other and Elsevier Inc v Cyando AG* EU:C:2021:503.

insertion of the Good Samaritan clause under Article 7. The study places a particular focus on the uneven incorporation of the Court's jurisprudence into recitals and articles to better understand the nature of the influence exercised.

In the broader scholarly context, the case study contributes to the literature exploring the relationship between the Union's legislative institutions and its judicial branch, as well as reflecting on broader trends in the dynamics of European integration.¹⁰

2. Analytical framework and methodology

The idea that the Court of Justice is a powerful institution is particularly prominent in the political sciences. This attribution of power is clearly present in Scharpf's asymmetry thesis. He posited that while the Union is adept at integrating negatively, its ability to integrate positively is limited. Negative integration is easily pursued owing to the impact of European law and the ability of the Commission and the Court to expansively interpret the Treaties.¹¹ Over time extending the Union's reach across almost all areas of policy without recourse to political decision-making. Politics unable to respond to these negatively driven integrationist tendencies due to the high institutional barriers to legislating in areas driven by negative integration. The resulting asymmetrical preference for negative integration acting to the detriment of the democratic accountability and the legitimacy of European integration.¹²

Dieter Grimm later argued that the Court, through its rulings read in conjunction with the principles of primacy,¹³ direct effect,¹⁴ equivalence,¹⁵ and effectiveness,¹⁶

¹⁰ J Zgliniski, *Europe's Passive Virtues: Deference to National Authorities in EU Free Movement Law* (Oxford University Press 2020); D Sindbjerg Martinsen (n 8); D Grimm, 'The Democratic Costs of Constitutionalisation: The European Case' (2015) 21 *European Law Journal* 469–471; SK Schmidt, 'Governing by judicial fiat? Over-constitutionalisation and its constraints on EU legislation' (EUSA International Biennial Conference, Denver, 9–11 May 2019); G Davies, 'Does the Court of Justice own the Treaties? Interpretative pluralism as a solution to over-constitutionalising' (2018) 24 *European Law Journal* 358–375; T Horsley, *The Court of Justice of the European Union as an Institutional Actor: Judicial Law-making and Its Limits* (Cambridge University Press 2018).

¹¹ F Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press 1999). See in particular Chapter 2 (43–83) and conclusions (107–204).

¹² For a discussion of Scharpf's asymmetry thesis see M van den Brink, M Dawson, and J Zgliniski, 'Revisiting the asymmetry thesis: negative and positive integration in the EU' (2025) 32 *Journal of European Public Policy* 209–234 at 212–214.

¹³ Case 6/64 *Flaminio Costa v E.N.E.L.* EU:C:1964:66.

¹⁴ Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* EU:C:1963:1.

¹⁵ Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* EU:C:1976:188.

¹⁶ Art 19(1) TEU requires Member States to provide remedies sufficient to ensure effective legal protection of Union law within the domestic legal system. Art 47 of the Charter guarantees effective

has over-constitutionalised the Union's legal order.¹⁷ The Court's reach extending to almost every area of law and policy, national and supranational alike. These factors, taken in conjunction with its position as the final arbitrator of all issues of Union law,¹⁸ and its non-majoritarian institutional nature,¹⁹ resulting in a situation where it *de facto* directs policy choices at the expense of democratic decision-making by reducing political choices to legal questions; minimising the answers to the application of substantive and procedural legal rules. Grimm noted that this would lend support to Scharpf's asymmetry thesis. While acknowledging that the Union had effectively pursued positive integration in fields such as environmental protection, it had failed in areas such as social policy.²⁰ Scharpf later built on Grimm's work, drawing a link between his thesis and over-constitutionalisation. He forwarded that the concurrent factors of (1) modern capitalism's encompassment of all aspects of our societies coupled with (2) the construction of the treaties around economic freedoms allows (3) the Court (and Commission) to intervene in all areas of national governmental powers. Resulting in the prioritisation of economic rights over individual and social rights due to the high barriers to reaching political agreements.²¹

Both Grimm's over-constitutionalisation narrative, and Scharpf's asymmetry thesis, sit alongside the 'Integration through Law' framework which is prominent in legal scholarship.²² This framework views the law not just as a technical system of rules, but as a normative legitimising force. Law serving as a fundamental mechanism for regulating and fostering economic, social, and political integration via the constitutionalisation of the Union's legal order. However, it too highlights the difficulties encountered by politics in driving integration forward when Member States seek to protect

remedies where rights and freedoms derived under Union law have been violated. The foundational case is C-6/90 and C-9/90 *Francovich and Bonifaci v Republic of Italy* EU:C:1991:428.

¹⁷ D Grimm (n 10).

¹⁸ Art 19(1) TEU.

¹⁹ Art 19(2) TEU specifies the 'Judges and the Advocates-General of the Court of Justice and the Judges of the General Court shall be chosen from persons whose independence is beyond doubt'. This requirement is reinforced by Arts 253 and 254 TFEU. Case 294/83 *Parti écologiste 'Les Verts' v European Parliament* EU:C:1986:166, para 23; D Keleman, *Eurolegalism: The Transformation of Law and Regulation in the European Union* (Harvard University Press 2011) 40–41.

²⁰ D Grimm (n 10) 469–470.

²¹ F Scharpf, 'De-constitutionalisation of European Law: The re-empowerment of Democratic Political Choice' in S Garben and I Govaere, *The Division of Competences between the EU and the Member States: Reflections on the Past, Present, and the Future* (Bloomsbury 2017).

²² This theory grew from a project organised by M Cappelletti, M Seccombe, and J Weiler at the European University Institute which was published as a series of papers over a number of years in the 1980s. See M Cappelletti, M Seccombe, and J H. Weiler (eds), *Integration through Law: Europe and the American Federal Experience* (De Gruyter 1986). It must be noted that this was an interdisciplinary project to which political scientists made significant contributions.

their own interests.²³ Union law is not just as an agent for integration, but also an object of integration. Union law is both a product and creator of the European polity.²⁴

While the integration through law narrative lends support to the asymmetry thesis it also differs from it. The latter highlights the imbalance between the economic and the social by emphasising the inability of politics to respond to negative integration. While the former emphasises the central role of politics through the law it creates, this reflects broader trends in legal scholarship that highlight the steady growth of secondary law instruments today compared to previous decades. This growth in secondary legislation is viewed by some scholars as shifting us toward positive integration and rebalancing the historical asymmetry towards politics and the Legislature.²⁵ In legal scholarship this idea is often articulated via the ideas of ‘judicial deference’ or ‘legislative priority’ rules.

Legal research increasingly emphasises the importance the Court places on legislation.²⁶ Van den Brink laments the systematic neglect of the study of the impact of the Union Legislature on Union law, arguing that shifting our focus away from the Court towards political institutions reshapes our understanding of their relationship.²⁷ He notes that integration through law has become synonymous with ‘judge-made law’ which does lend support to the asymmetry thesis. However, legislation – in his opinion – is understudied and undervalued in exploring how Union law is made and operates.²⁸ His earlier research shows how in citizenship law, where the Court was historically activist, this trend reversed as secondary law increased and primary law is increasingly framed by politics.²⁹ Dawson notes a growth in the Legislature’s role, power and legislative output. This is beneficial not just as a means of meeting new challenges via positive integration, but as a tool to protect the legitimacy of the

²³ JH Weiler, ‘The Transformation of Europe’ (1991) 100 *Yale Law Journal* 2405, 2428–2431.

²⁴ D Augenstein and M Dawson, ‘What Law for What Polity? “Intergration through Law” in the European Union Revisited’ in D Augenstein (ed), *Intergration through Law Revised: The Making of the European Polity* (Ashgate 2012) 1.

²⁵ J Zgliniski, ‘The end of negative market integration: 60 years of free movement of goods litigation in the EU (1961–2020)’ (2023) 31 *Journal of European Public Policy* 633–656, specifically at 634, and at 647–648.

²⁶ EN Chaoimh, *The Legislative Priority Rule and the EU Internal Market for Goods* (Oxford University Press 2022) 249–251; P Syrpis has made similar observations, he however has reservations regarding the coherency of the Court’s deference. P Syrpis, ‘EU Secondary Legislation and its Impact on Derogations from Free Movement’ in P Koutrakos, NN Shuibhne, and P Syrpis (eds), *Exceptions From EU Free Movement Law: Derogation, Justification and Proportionality* (Hart 2016) 278–296.

²⁷ M van den Brink, *Legislative Authority and Interpretation in the European Union* (Oxford University Press 2024).

²⁸ Ibid 6.

²⁹ M van den Brink, ‘Off Track, Again? EU Citizenship and the Right to Social Assistance’ (2023) 11 *Hungarian Yearbook of International and European Law* 18–69.

Court as a non-majoritarian institution. By increasingly interpreting the treaties via secondary law, and with the assistance of political institutions, the Court can 'share the blame' for difficult decisions.³⁰

Weatherill has been more critical of the degree of deference the Court has shown to the Legislature, particularly the widespread use of Article 114 as a legal basis.³¹ Whereas de Witte argues the wide discretion applied regarding Article 114 is coherent with the function and character of the competence to legislate for the internal market from a legal perspective. It allows politics to adjudicate if, and how, to incorporate non-market concerns into internal market legislation, rather than the Court.³² Enabling the mainstreaming of non-economic (social) considerations into the Union's legal order, which became more prominent under Lisbon.³³ Maduro observed in his seminal work that even in areas heavily influenced by primary law, the Court paid significant attention to the legislative and political preferences of political actors.³⁴ Bogoeski, examining the revision of the Posted Workers Directive, argues that while the Legislature did 'not reverse or radically transform the Laval paradigm but rather operates within its framework' the revision 'substantially adjusted the Laval Quartet's operational framework'.³⁵ Equally Zgliniski argues that it is fundamentally a mistake to assume that the Legislature merely takes its cues from the Court. Highlighting how secondary law departed from *Cassis de Dijon* by establishing minimum alcohol requirements and legislating away one of the Court's most infamous decisions.³⁶

In summary, there is considerable debate as to the relationship between the Court and the Legislature. These differences to some degree grow from the different theoretical frames, and the different empirical methods, used to reach and validate findings. To consider these issues the paper explores interactions between the Court of Justice and Legislature in practice on political decision-making processes. It does so by considering the Court's impact on the development of the Digital Services Act. The paper

³⁰ M Dawson, 'Revisiting Europe's 'law-politics imbalance' in M Dawson, B de Witte, and E Muir (eds), *Revisiting Judicial Politics in the European Union* (Edward Elgar 2024) 17–33.

³¹ S Weatherill (n 5).

³² B de Witte, 'A competence to protect: The pursuit of non-market aims through internal market legislation' in P Syrpis (ed), *The Judiciary, the Legislature and the EU Internal Market* (Cambridge University Press, 2012).

³³ Ibid.

³⁴ M Piores Maduro, *We the Court: The European Court of Justice and the European economic constitution: a critical reading of Article 30 of the EC Treaty* (Hart, 1998), see in particular Chapters 2 and 4.

³⁵ V Bogoeski, 'The Revision of the Posted Workers Directive as a Polanyian Response to Commodification of Labor in Europe' (2021) 2 *Global Perspectives* 1–12 at 5–6 specifically.

³⁶ J Zgliniski, 'Governing the internal market: from judicial politics to ordinary politics' in Dawson, de Witte, and Muir (eds) (n 30) 184; Case C-120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* EU:C:1979:42.

shifts its methodology away from notions of ‘power’ and toward that of ‘influence’.³⁷ The justification for this approach is that preoccupations with notions of ‘judicial power’ may lead us to neglect the broader ways in which politics responds to court-driven law, and vice versa.³⁸ By considering the Court’s influence rather than its power, this paper seeks to capture a wider array of avenues via which the Court may impact the creation of legislative acts, and political responses to case law.³⁹ Influence – from a political science perspective – characterises an actor’s ability to shape a decision in line with their preferences.⁴⁰ Like power, it is a relational concept, implying an actor may cause another actor(s) to change their course of action.⁴¹ However, influence, unlike power is devoid of the threat of sanctions, a key characteristic of power.⁴² In seeking to trace influence the paper is not attempting prove causality as such claims can be misleading. In particular as the level of documentation needed to account for the impact of individuals – if it exists – is not publicly available.⁴³

³⁷ The conventional assumption is that the Court of Justice exercises power, or is a powerful actor, in the legislative process; G Davies, ‘Legislative Control of the European Court of Justice’ (2014) 51 *Common Market Law Review* 1606–1607; D Sindbjerg Martinsen, ‘Judicial Influence on Policy Outputs? The Political Constraints of Legal Integration in the European Union’ (2015) 48 *Comparative Political Studies* 1622–1660; M Blauberger, ‘With Luxembourg in mind ... the remaking of national policies in the face of ECJ jurisprudence’ (2012) 19 *Journal of European Public Policy* 109–126; F Wasserfallen, ‘The judiciary as legislator? How the European Court of Justice shapes policy-making in the European Union’ (2010) 17 *Journal of European Public Policy* 1128–1146; SK Schmidt, *The European Court of Justice and the Policy Process: The Shadow of Case-law* (Oxford University Press 2018).

³⁸ D Sindbjerg Martinsen (n 8) 3.

³⁹ L Conant, *Justice Contained: Law and Politics in the European Union* (Cornell University Press 2002).

⁴⁰ A Dür, ‘Measuring interest group influence in the EU. A note on methodology’ (2008) 9 *European Union Politics* 559–576; A Dür bases his definition on J Nagel, *The Descriptive Analysis of Power* (Yale University Press 1975) 29.

⁴¹ P Bachrach and MS Baratz, ‘Decisions and Nondecisions: An Analytical Framework’ (1963) 57 *The American Political Science Review* 637; Context-shaping influence denotes the ability of an actor to (re-)define, or limit, the range of policy options open to another actor. See D Sindbjerg Martinsen (n 8) 8; C Hay, ‘State of the art: divided by a common language: political theory and the concept of power’ (1997) 17 *Politics* 50; On conduct-shaping influence see A Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press 2000) 202; It is correct to say the Court conferred with legal prerogatives or ‘powers’ by the treaties. It is the final arbitrator of all issues of Union law. (Case C-453/00 *Kühne* EU:C:2004:17, paras 21–27). It is tasked with interpreting EU law and ensuring its equal application (Art 263 TFEU). It has the power to annul acts or measures which violate the Treaties (Art 265 TFEU). It is responsible for imposing sanctions on EU institutions (Article 268 TFEU read in conjunction with Art 240 TFEU).

⁴² P Bachrach and MS Baratz (n 41) at fn 15. M Weber defined power as the chance of an individual securing their will even where it is met with resistance. M Weber, *Economy and Society: An Outline of Interpretive Sociology*, edited by G Roth and C Wittich (University of California Press 1978) 212; R Dahl defined power as a social relationship wherein A has power over B, to the extent that A can force B to do something they would otherwise not do, see R Dahl, ‘The Concept of Power’ (1957) 2 *Behavioural Science* 201–214.

⁴³ From Judges to Advocate General, and Référéndaire in the Court, to the Directors-General, principal advisers, Heads of Unit, and Desk Officers for example.

How then can we track influence? My proposed answer is rather simplistic; look for doctrinal and interpretative similarities between case law and legislative acts. In addition, try to identify references to the Court by legislative institutions during negotiations. Where we see a mirroring of language between texts it is fair to presume there is a possible link between case law and the legislation adopted. Yet, the mere presence of linguistic similarities does not indicate definitive influence; it could be coincidence. To address this the paper uses inductive reasoning underpinned by the combination of three methods – doctrinal research, process tracing, and a law attainment typology – to identify links between case law and legislation.

To better assess the nature of the Court's influence the paper pays special attention to the distinctions drawn between articles and recitals of legislation.⁴⁴ Article 296 TFEU specifies that Union acts 'shall state the reasons for which they are based...'.⁴⁵ This was expanded upon by the institutions via two instruments. In 1993 the Council adopted a Resolution on the drafting of legislation, which was built upon in 1998 by an international agreement between the Parliament, Council, and Commission establishing common guidelines for drafting legislation.⁴⁶ These instruments have been expanded upon via a joint practice guide – also issued by the Parliament, Council, and Commission – for persons authoring Union legislation. It states that recitals are a mandatory requirement of Union legislation, representing the locus where the obligation imposed by Article 296 TFEU is fulfilled.⁴⁷ Klimas and Vaičiukaitė note that legally, recitals must be 'sufficient as a matter of law; that is, they must sufficiently describe the purpose of the act' for it to be operative, otherwise, the measure is invalid.⁴⁸

However, recitals do not have the same legal status as articles. Articles are the binding provisions of a legislative measure,⁴⁹ also called the operative provisions or enacting terms.⁵⁰ Recitals are subordinate to articles and may only affect their scope

⁴⁴ L Humphreys, C Santos, L di Caro, G Boella, L van der Torre, and L Robaldo, 'Mapping Recitals to Normative Provision in EU Legislation to Assist Legal Interpretation' in A Rotolo (ed), *Legal Knowledge and Information Systems* (IOS Press BV 2015) 41–50.

⁴⁵ The second paragraph of Art 296 TFEU was previously the standalone Art 253 of the Treaty Establishing the European Community (Consolidated version 1997).

⁴⁶ Council Resolution of 8 June 1993 on the quality of drafting of Community legislation; Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation.

⁴⁷ Art 296 TFEU, second paragraph; European Commission, *Joint practical guide of the European Parliament, the Council and the Commission for persons involved in the drafting of European Union Legislation* (Publications Office of the European Union 2016) 31; Case 24/62 *Germany v Commission* EU:C:1963:14, paras 69–70.

⁴⁸ T Klimas and J Vaičiukaitė, 'The Law of Recitals in European Community Legislation' (2008) 15 *ILSA Journal of International & Comparative Law* 93.

⁴⁹ Joint Practice Guide (n 47) 38.

⁵⁰ *Ibid* 24.

where they suffer from ambiguity or inconsistency.⁵¹ Where both clear but there exists an inconsistency between them, the article's provisions take precedence.⁵² Where recitals are clear, but an article suffers from ambiguity, the recitals will be used to interpret the provision.⁵³ The Court often deploys recitals to address uncertainty in articles. This has recently been restated by the Court in *Kočner v Europol*.⁵⁴ Connecting this back to the question of influence, that the Court's jurisprudence is not incorporated directly into articles does not necessarily reflect a lack of, or decreased, influence. Recitals may act as controls on articles where ambiguity exists, opening a (intentional?) doorway for judicial influence. There are even examples of the Court's jurisprudence being directly and explicitly codified in recitals, most notably Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment (though this is undoubtedly unusual).⁵⁵

Building on this methodology, the paper combines three methods to track the Court's influence. First, doctrinal research is used to identify similarities between jurisprudence and legislation.⁵⁶ It requires the use, and understanding, of specific words and phrases with unique, multi-layered, legal meanings, entangled and interwoven with other legal rules and concepts, creating a web of meaning(s) not always accessible to non-lawyers.⁵⁷ Doctrinal approaches to legal research are therefore quantitative and qualitative, requiring engagement with both the trends in the use of rules over time (quantitative) and detailed engagement with minute details of the law on a case-by-case basis (qualitative).⁵⁸ A doctrinal analysis is used to compare case law with the final DSA text. However, this approach reveals only part of the Court's impact given it only allows us to compare A (the ECD), with B (the CJEU's case law), and C (the DSA) from a textual perspective. Events occurring between B and

⁵¹ T Klimas and J Vaičiukaitė (n 48) 92.

⁵² Ibid 92; Case C-162/97 *Criminal proceedings against Gunnar Nilsson, Per Olov Hagelgren and Solweig Arrborn* EU:C:1998:554, para 54. The CJEU stating that preambles, of which recitals form part, have no legal force and cannot be used to derogate from the operative provisions; Furthermore recitals have no independent legal effect, see Case C-308/97 *Giuseppe Manfredi v Regione Puglia* EU:C:1998:566, para 29–30.

⁵³ T Klimas and J Vaičiukaitė (n 48) 92, fn 137; Case C-224/95 *P. Moskof AE v Ethnikos Organismos Kapnou* EU:C:1997:551, para 78; N Fennelly, 'Legal Interpretation at the European Court of Justice' (1996) 20 *Fordham International Law Journal* 656–679; Llio (n 44) 42–43, fn 134.

⁵⁴ Case C-755/21 *Kočner v Europol* EU:C:2024:202, paras 55–63, and para 59 in particular.

⁵⁵ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast). That act cites Case C-262/88 *Douglas Harvey Barber v Guardian Royal Exchange Assurance Group* EU:C:1990:209; Cases C-7/93 *Bestuur van het Algemeen Burgerlijk Pensioen-fonds v G. A. Beune* EU:C:1994:350; and Case C-262/88 *Manuel Enrique Peinado Guitart* EU:C:2010:795.

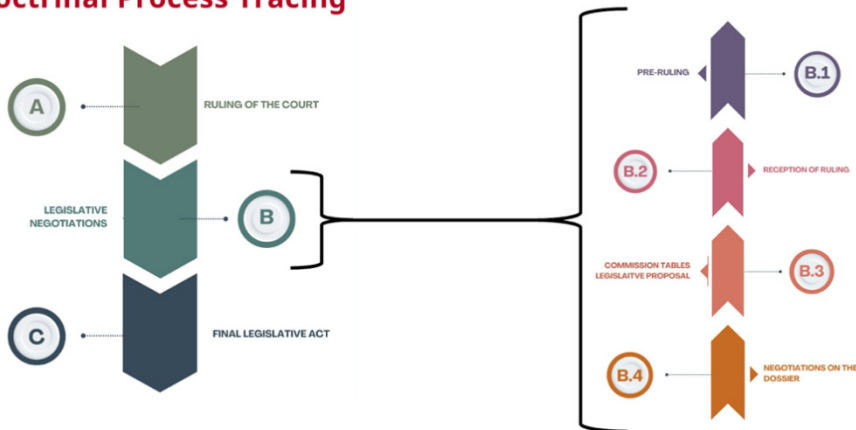
⁵⁶ T Hutchinson and N Duncan (n 6) 110 at fn 3 specifically.

⁵⁷ D Watkins and M Burton (eds), *Research Methods in Law* (Routledge 2013) 15.

⁵⁸ See D Watkins and M Burton (n 57).

Research Framework

Doctrinal Process Tracing



C remain unobserved. To address this an adapted form of process tracing is used to examine what happens between a ruling and the legislative proposal, with a particular emphasis on the impact of jurisprudence on legislative negotiations.⁵⁹ This enables inferences that can be used to map the impact of the CJEU's jurisprudence.⁶⁰ The research is conducted backwards to review the hypothesised cause (the Court's case law) which is traced through the mechanisms (e.g. the EU Legislature)⁶¹ that act as conduits via which case law – and the Court's influence – may travel into a legislative act as recorded in documents produced during legislative negotiations.⁶² I draw on an array of documents from legislative negotiations, beginning with the Commission's original proposal,⁶³ intervening documents produced during legislative negotiations,⁶⁴ and the final text adopted, to account for the input of a wide array

⁵⁹ D Beach and R Pedersen (n 7) fn 4.

⁶⁰ Ibid.

⁶¹ Conceptualised as their committees, sub-committees, and directorates; T Pavone and Ø Stiansen, 'The Shadow Effect of Courts: Judicial Review and the Politics of Preemptive Reform' (2022) 116 *American Political Science Review* 322 at 327.

⁶² Point (C) is conceptualised as the final agreed legislative act which appears to incorporate the Court's case law, herein the DSA.

⁶³ Documents available at eur-lex.europa.eu.

⁶⁴ Accessible at eur-lex.europa.eu. The first reading stage forms part of the EU's ordinary legislative procedure, see Art 294 of the TFEU; many resources were accessed via EUR-Lex (eur-lex.europa.eu) which is run and maintained by the Publications Office of the EU; I also examined files made available via freedom of information requests via www.asktheeu.org which is run and maintained by Access Info Europe and mySociety; Regulation (EC) No 1049/2001 of the European Parliament and

of actors between (A) and (C).⁶⁵ There are of course limitations to this approach. Examining only negotiation documents excludes other avenues via which interactions might occur, such as spontaneous meetings of committee members at the coffee bar, conversations via email, and the Commission's role as a repeat player before the Court.⁶⁶ Moreover, this approach also has the downside of not examining the Commission and Member State relationships with Union institutions and the impacts of these interactions on litigation strategies before the Court, prior to the issuance of a ruling at point (A). This by extension leaves it unknown how much of the Court's case law is of its own genius.⁶⁷ The findings herein nonetheless provide valuable insights by utilising official records of these negotiations to gain at least a partial view of these interactions at a very detailed level of examination.

Finally, how can we measure influence? Martinsen forwards a four-category typology for measuring judicial influence on legislative outputs, adopted by this paper.⁶⁸ 'Codification' represents the incorporation of jurisprudence into a legislative output, the strongest form of influence.⁶⁹ 'Modification' denotes the adjustment of jurisprudence via the legislative process so its impact is reduced or augmented, a weaker – but still notable – form of influence.⁷⁰ 'Non-adoption' denotes situations where no political response can be reached, resulting in legal uncertainty.⁷¹ 'Overrides' constitute the weakest form of influence, characterising the overturning of the Court's jurisprudence.⁷² Her typology therefore attempts to identify if any of '...the rules, principals, and interpretations generated by the court are attained in legislative acts...'.⁷³ Martinsen's typology is augmented via the use of the distinctions between articles and recitals (outlined previously) to better understand the Court's influence

of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents; I am very grateful to the individuals who submitted freedom of information requests via the asktheeu.org as I was subsequently able to access a number of resources for this paper.

⁶⁵ T Pavone and Ø Stiansen (n 61) 327.

⁶⁶ M Mandujano and T Pavone, 'Follow the leader: the European Commission, the European Court of Justice, and the EU's rule of law revolution' (2025) 32 *Journal of European Public Policy* 444–437. See also at 444–452.

⁶⁷ A Hofmann, *Strategies of the Repeat Player: The European Commission between Courtroom and Legislature* (epubli GmbH 2013); A Vauchez, *Brokering Europe: Euro-Lawyers and the Making of a Transnational Polity* (Cambridge University Press 2015).

⁶⁸ D Sindbjerg Martinsen (n 8) 34–36, fn 5; Note, D Sindbjerg Martinsen uses the phrase 'policy' outputs.

⁶⁹ Ibid 36.

⁷⁰ Ibid 35.

⁷¹ Ibid 36.

⁷² Ibid 35–36.

⁷³ Ibid 9.

on lawmaking and the relationship between the Court and Legislature during negotiations. Allowing us to draw broader findings regarding the relationship between law and politics, and positive and negative integration.

3. Case Study: the development of intermediary liability for host service providers

An information society service was defined, under the ECD, as 'any service provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services'.⁷⁴ The ECD's exemptions for intermediary liability were used to identify when such service providers can be held liable for information posted on their platforms. An intermediary service provider, a subcategory of information society service provider, was defined, *inter alia*, as a provider that either; (A) transmitted information within a communication network, (a 'mere conduit'), (B) facilitated the automatic, intermediate and temporary storage of information for more efficient onward transmission (a 'catching service'), or (C) stored information provided by service recipients (a 'hosting service').⁷⁵ This paper focuses on the latter providers and hosting services and considers how the Court of Justice's case law impacted the text of the DSA.

The Commission in its proposal for the ECD noted that while electronic commerce represented a unique opportunity for economic growth, this potential could not be realised 'unless the many legal obstacles which remain to the online provision of services' were eliminated.⁷⁶ It linked the proposal to its 1997 'Communication on electronic commerce',⁷⁷ and highlighted the development of a heterogeneous regulatory environment within the Union – owing from both legislative and jurisprudential divergence between Member States – as creating significant barriers to the

⁷⁴ Art 2(a) of the e-Commerce Directive defined this by reference to Directive 98/34/EC as amended by Directive 98/48/EC; This has been superseded, consolidated, and all amendments to its text codified under Directive 2015/1535/EU of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (codification). The new provision of relevance is Art 1(b); Remuneration need not be profit-making in nature, see Case C-281/06 *Hans-Dieter Jundt and Hedwig Jundt v Finanzamt Offenburg* EU:C:2007:816, paras 25–33; Services are to be considered services where they are not governed by the provision on Goods, Persons, or Capital, see Case C-159/90 *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others* EU:C:1991:378, para 17. See further Joined Cases C-360/15 and C-31/16 *College van Burgemeester en Wethouders van de gemeente Amersfoort v X BV and Visser Vastgoed Beleggingen BV v Raad van de gemeente Appingedam* EU:C:2018:44.

⁷⁵ Arts 12–15 of the e-Commerce Directive; This position is generally upheld by the DSA Proposal, see Arts 3–6.

⁷⁶ European Commission, 'Proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal market', COM 1998 586 final, 3.

⁷⁷ European Commission, 'Electronic Commerce: Commission presents framework for future action' (Press Release, IP/97/313, Brussels, 16 April 1997), accessible at ec.europa.eu.

freedom of services and by extension fragmenting the internal market.⁷⁸ The removal of such obstacles would ensure the free circulation of online services.⁷⁹ Highlighting some of the pressures driving positive integration in this area.

3.1. Justification of case selection

I argue that the DSA, and these specific provisions, constitute a strong test case for exploring judicial influence on law-making. A significant degree of legal integration has occurred here.⁸⁰ The ECD harmonised liability rules over two decades ago, establishing it as a well-embedded area of Union-level regulatory control. Furthermore, it has been the subject of considerable litigation. Of the forty-four rulings issued by the Court of Justice wherein the ECD formed part of the operative grounds of its decisions between 2002 and 2023, sixteen specifically raised issues regarding Article 14 on hosting.⁸¹ Building on this point, when legal integration occurs, we may assume that politicians will engage.⁸² The movement of the regulatory fora from the domestic to the Union level is likely to result in competing and complimentary political interests between Member States in an area of regulation of significant economic impact.⁸³ The dossier was furthermore subject to considerable scrutiny during its negotiations.⁸⁴ This area of regulation

⁷⁸ Commission Proposal on e-Commerce (1997) (n 76) 3.

⁷⁹ Ibid 3.

⁸⁰ D Sindbjerg Martinsen (n 8) 10. Sindbjerg Martinsen cites AL George and A Bennett, *Case Studies and Theory Development in the Social Sciences* (MIT Press 2005) 120–123.

⁸¹ Figures gathered via curia.europa.eu. Search criteria used as follows: Note of criteria selected: Court = ‘Court of Justice’, Period or date = ‘Date of delivery’; period= ‘from 01/01/2002 to 31/12/2023’, Case status = ‘Cases closed’, References to case-law or legislation = [Search in = ‘Grounds of judgment, Operative part’; Category = ‘Directive’; Number = ‘31’; Year = ‘2000’; Article = ‘14’;]. On this basis the liability provisions of the directive arise in 36.36 per cent of all cases concerning the ECD which have been litigated before the CJEU.

⁸² D Sindbjerg Martinsen (n 8) 10.

⁸³ Ibid; AL George and A Bennet (n 80); See EB Haas, ‘The European and the Universal Process’ (1961) 15 *International Organisation* 366–392 and EB Haas, *The Uniting of Europe: Political, Social and Economic Forces 1950–1957* (University of Notre Dame Press 1958); A 2015 report examining the sale of online goods (not online services) estimated the total value of business to consumer (B2C) sales at €241 billion in 2011. Another 2015 report concluded that €270 billion worth of goods and services were purchased via online intermediaries within the European Union during 2014, lowering prices by an estimated €1 billion. See Copenhagen Economics, *Online Intermediaries: Impact on the EU economy* (October 2015) 3–4, accessible at copenhageneconomics.com. It should be noted that his report was commissioned by the European Digital Media Association (EDiMA) which represented notable online intermediary service providers such as Amazon, Apple, Facebook, Google, and Microsoft. EDiMA rebranded in 2020 as ‘DOT Europe’; A Politico Report from 2023 notes that 75 per cent of users in 2022 bought or ordered goods or services online and E-commerce accounted for 18 per cent of businesses total turnover. See A Irurzun Pérez, C Papi, and R Gutiérrez, ‘Life after 30: What next for the EU single market?’ (*Politico*, November 2023) at politico.eu, 26.

⁸⁴ S Lee Myers, ‘E.U. Law Sets the Stage for a Clash Over Disinformation’ (New York Times, 27 September 2023), at www.nytimes.com. The article observes the DSA represents ‘years of painstaking bureaucracy in the making’ and that it ‘reflects a growing alarm in European capitals that the unfettered flow of disinformation online’.

links to wider political and societal debates as to the governance of our online world, in particular how and when we should hold online service providers accountable for the impact of their services on individuals, businesses, and society.⁸⁵ Host provider's activities, through their storage and making accessible information provided by recipients to third parties, bring into contact with the Union's internal market freedoms and fundamental rights guarantees.⁸⁶ The Commission observed that while online intermediary platforms have brought benefits to individuals and contributed to the growth of the internal market, there is increasing concern regarding issues such as the trade of illegal goods, services, and online content they facilitate. Moreover the exploitation of the underlying algorithmic systems supporting their services to amplify the spread of disinformation has significant implications for the protection of fundamental rights.⁸⁷

The case law of the Court was fundamental to shaping our legal understanding of the ECD's host liability provisions, filling in gaps in the legislative framework and providing increased clarity (but also uncertainty) as to its application. These factors increase the likelihood of the dossier's politicisation and scrutiny given legislation provides a means to manage these conflicts, providing 'more predictability for any potential dispute on clash of rights' than case law.⁸⁸

3.2. Host liability under the ECD

The ECD was key to the Commission's legislative agenda during a period of increased concern regarding divergences between the regulatory approaches of Member States.⁸⁹ It grew from the Commission's 'European Initiative in Electronic Commerce'⁹⁰ which sought to ensure access to the global market place, establish a favourable legal framework, and promote a favourable business environment.⁹¹

⁸⁵ V Golunova and J Montero Regules, 'The Digital Services Act and freedom of expression: triumph or failure?' (*Alexander von Humboldt, Institute Für Internet und Gesellschaft Blog Post*, 8 February 2021, at www.hiig.de).

⁸⁶ See generally T Perišin, 'Interaction of Fundamental (Human) Rights and Fundamental (Market) Freedoms in the EU' (2006) 2 *Croatian Yearbook of European Law & Policy* 69–98; T Szabados, 'Conflicts Between Fundamental Freedoms and Fundamental Rights in the Case Law of the Court of Justice of the European Union - A Comparison with the US Supreme Court Practice' (2018) 3 *European Papers* 558–600.

⁸⁷ European Commission, *Shaping Europe's digital future: The Digital Services Act Package* at digital-strategy.ec.europa.eu.

⁸⁸ T Szabados (n 86) 596.

⁸⁹ European Commission, 'Communication to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions: Globalisation and the Information Society: The Need for Strengthened International Coordination' COM(1998) 50 final 6–8.

⁹⁰ European Commission, 'Communication from the Commission to the Council, the European Parliament, The Economic and Social Committee and the Committee of the Regions: A European Initiative in Electronic Commerce' COM(1997) 157.

⁹¹ *Ibid* 24–25.

Its liability regime was a central component of this agenda as it would help create legal certainty for businesses. Historically there were no Union-level rules regulating this issue and the Court issued no rulings prior to legislative intervention. Under the ECD liability was governed by Articles 12–14. Article 14, our focus, is concerned with liability rules for ‘hosting’ providers. Article 14(1) specified that where an online provider conducts activities which involve storing the information of a service user, they are not liable for the information stored, subject to two conditions; (A) they do not have ‘actual knowledge’ of either illegal activity or information, and with regard to claims for damages they are not aware of the facts or circumstances from which such illegality is apparent.⁹² (The majority of analysis will relate to this provision). (B) Upon gaining such knowledge or awareness the provider acted ‘expeditiously’ to remove or disable access to the information in question.⁹³ Article 14(2) specifies that 14(1) does not apply where the service recipient is ‘acting under the authority or control’ of the provider. Hosts were therefore providers who store information supplied by users under the ECD. E.g., YouTube, iCloud, Facebook, or Instagram. Relatedly Article 15 of the ECD prohibits Member States from imposing general obligations to monitor or seek facts relating to illegal activity, meaning specific and voluntary monitoring requirements are permissible.⁹⁴

3.3. The Court’s jurisprudence on host liability

Google v Louis Vuitton is a central case in this area.⁹⁵ The Court was asked how to attribute knowledge to a provider per Article 14. Louis Vuitton took issue with Google’s advertising system, AdWords, arguing it infringed its trademarks by allowing third-party advertisers to use similar words and iconography stored as search terms within the AdWords system. The Court relied on the idea of an internet referencing provider playing an ‘active role’ with regard to its knowledge or control over the stored data per Article 14(1)(a).⁹⁶ It considered Recital 42 ECD which outlined that the liability exemptions covered only activities of the provider which were ‘of a mere technical, automatic and passive nature,’ wherein information is transmitted or temporarily stored, for the sole purpose of making its transmission more efficient.

⁹² Art 14(1)(a) of the e-Commerce Directive.

⁹³ Art 14(1)(b) of the e-Commerce Directive.

⁹⁴ Art 15 of the e-Commerce Directive read in conjunction with Recital 47.

⁹⁵ Joined Cases C-236/08 to C-238/08 *Google France SARL and Google Inc. v Louis Vuitton Malletier SA, Google France SARL v Viaticum SA and Luteciel SARL and Google France SARL v Centre national de recherche en relations humaines (CNRRH) SARL and Others* EU:C:2010:159.

⁹⁶ *Ibid* para 111.

The Court reasoned this implies the provider possesses neither knowledge nor control over the information.⁹⁷ Recital 46 stated that 'to benefit from the limitation of liability, the provider of an information society service, consisting of the storage of information, upon obtaining actual knowledge or awareness of illegal activities, has to act expeditiously to remove or disable access to the information concerned'.⁹⁸

The Court reasoned that the exemptions were intended to apply where the provider 'has neither knowledge of nor control over the information' per Article 14(1), with Recital 42 specifying that the activity is of a 'mere technical, automatic and passive nature'.⁹⁹ To establish liability it needed to be established if a provider acted in a 'neutral' manner; whether its conduct was merely 'technical, automatic and passive, pointing to a lack of knowledge' or control.¹⁰⁰ This test of neutrality was new, appearing nowhere in the ECD, the Court equated the technical, automatic and passive conditions to mean a party must act neutrally. It concluded that Google – with the aid of software – processes data entered by advertisers, and the resulting advertisements were displayed under conditions controlled by Google who determined the order in which results were displayed based on the amount of money paid by the advertisers.¹⁰¹ The Court clarified that such payments, or that fact Google set the terms and conditions of payments, could not have the *de facto* effect of depriving them of the liability exemptions.¹⁰² Additionally, that there were similarities between the keywords selected, and the search terms of internet users, wasn't itself sufficient to attribute knowledge, or control, to a provider.¹⁰³ However, Google's role in drafting the commercial messages which accompany advertising links, or the selection of keywords, was a factor which could be considered to attribute knowledge or control.¹⁰⁴ If Google had not played an active role, – it acted neutrally for the purpose of Article 14(1)(a) – it could not be held liable for the data unless it failed to act expeditiously to remove it per Article 14(1)(b). This was ultimately a matter for the referring court to determine as the arbitrator of facts.

Similarly to *Google v Louis Vuitton*, it was argued in *L'Oréal v eBay* that eBay was liable for trademark infringements, in particular through the displaying of trade-

⁹⁷ *Google v Louis Vuitton* (n 95) para 13.

⁹⁸ Ibid paras 13 and 20; This is restated in Art 14(1)(a) of the e-Commerce Directive.

⁹⁹ Ibid para 113.

¹⁰⁰ Ibid para 114.

¹⁰¹ Ibid para 115.

¹⁰² Ibid para 116.

¹⁰³ Ibid para 117.

¹⁰⁴ Ibid para 118.

marks on its website and in sponsored advertising links displayed by search engines.¹⁰⁵ The Court observed that eBay processed data, entered by its ‘customer-sellers’, provided assistance to sellers to enhance their sales offers, helped set up online shops, promoted and increased sales, including by advertising products sold on its platform, by service users, using search engine operators to trigger the display of advertisements on the behalf of its customer-sellers.¹⁰⁶ It specified that where a service provider gave assistance entailing the optimisation of the presentation of offers for sale or promoting said offers, ‘it must be considered not to have taken a neutral position’ but rather to ‘have played an active role’.¹⁰⁷ However if a provider merely stored sale offers, set the terms of service, was remunerated, and provided general information to customers it ‘cannot have the effect of denying it the exemptions’.¹⁰⁸ The Court cited *Google v Louis Vuitton*, pointing to the origin of the neutral concept.¹⁰⁹ This ruling also saw the Court underline that general monitoring obligations of ‘all the data’ of customers to prevent future infringements were incompatible with Article 15 ECD.¹¹⁰

These rulings, while creating clarity regarding Article 14’s scope and application, simultaneously created ambiguity vis-à-vis situations where hosts utilised automated technological measures to detect, without human intervention, illegal activities or information.¹¹¹ Could this lead to the attribution of actual knowledge? These issues were highlighted by the Commission during negotiation on the DSA,¹¹² and as was anticipated¹¹³ the Court clarified some of these issues in *YouTube v Cyando* which was issued six months after the DSA proposal was tabled.¹¹⁴ The Court reiterated that when assessing if a host may benefit from Article 14, it is necessary to

¹⁰⁵ Case C-324/09 *L’Oréal SA and Others v eBay International AG and Others* EU:C:2011:474.

¹⁰⁶ Ibid paras 28 – 31 read in conjunction with para 113 and the operative part of the judgment para 145(6); Art 14(1)(a) of the e-Commerce Directive.

¹⁰⁷ Ibid para 116.

¹⁰⁸ Ibid para 115.

¹⁰⁹ Ibid para 113.

¹¹⁰ Ibid para 139. Art 15 was read in conjunction with Art 2(3) of Directive 2004/48/EC.

¹¹¹ European Commission, Recommendation 2018/334/EU of 1 March 2018 on measures to effectively tackle illegal content online.

¹¹² European Commission, ‘Commission Staff Working Document – Impact Assessment, Accompanying the Document Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC’, (SWD(2020) 348 Final (PART 1/2)) 24, 31–32.

¹¹³ European Commission, ‘Commission Staff Working Document – Impact Assessment, Accompanying the Document Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC’, (SWD(2020) 348 Final (PART 2/2)) 159.

¹¹⁴ *Youtube v Cyando* (n 9).

determine if its role is neutral.¹¹⁵ It clarified that the fact that a provider voluntarily implements technological measures to detect, in uploaded videos, content which infringes copyright does not, *per se*, mean it plays an active role.¹¹⁶ It outlined a provider may not be deprived of Article 14(1)(a)'s exemptions solely on the grounds it is generally aware or possesses 'abstract knowledge', that its platform is used to share information which illegal.¹¹⁷ Actual knowledge must be 'specifically established or readily identifiable',¹¹⁸ and 'the fact that the operator ... automatically indexes content uploaded ... that that platform has a search function and that it recommends videos based on users' profiles or preferences is not a sufficient ground for the conclusion that that operator has 'specific' knowledge of illegal activities carried out on that platform or of illegal information stored on it.¹¹⁹

3.4. Host liability under the Digital Services Act

The Commission proposed the DSA in December 2020.¹²⁰ The proposal took the form of a regulation and was framed as 'building on key principles set out in the e-Commerce Directive'.¹²¹ It described the ECD's liability rules as a 'foundation of the digital economy',¹²² citing stakeholder evaluations¹²³ as strongly supporting their maintenance.¹²⁴ The European Parliament, adopted two resolutions before the DSA's formal tabling.¹²⁵ In the first it called for a 'comprehensive revision of the E-Commerce Directive'¹²⁶ which would not 'create any derogations or new exemptions to the current liability regime'¹²⁷ specifying that it should take into account the case

¹¹⁵ *Youtube v Cyando* (n 9) para 106. It cited *L'Oréal v eBay* (n 105) in support.

¹¹⁶ *Ibid* para 109.

¹¹⁷ *Ibid* para 111; Opinion of AG Saugmandsgaard ØE in Case C-683/18 *Frank Peterson v Google LLC and Other and Elsevier Inc v Cyando AG* EU:C:2020:586, paras 172–190 and para 196.

¹¹⁸ *Youtube v Cyando* (n 9) para 113.

¹¹⁹ *Ibid* para 114.

¹²⁰ DSA Proposal (n 3).

¹²¹ *Ibid* 2.

¹²² *Ibid* 3.

¹²³ The Commission received 2,863 responses during its public consultations. See European Commission, *Summary Report on the Open Public Consultations on the Digital Services Act Package* (Press Release, 15 December 2020) at digital-strategy.ec.europa.eu.

¹²⁴ *Ibid* 9.

¹²⁵ Art 225 TFEU.

¹²⁶ European Parliament, Resolution of 20 October 2020 with recommendations to the Commission on the Digital Services Act: Improving the functioning of the Single Market (2020/2018(INL)). See Annex I, General Principles.

¹²⁷ *Ibid* at the Annex to the Resolution, IV, Transparency and Information Obligations Principles.

law of the Court concerning ‘active’ and ‘passive’ roles.¹²⁸ In the second it underlined its preference for the ‘preservation of the current framework on the limited liability ...’.¹²⁹ The Commission interpreted these as a call for the ‘ambitious reform of the existing e-Commerce legal framework while maintaining the core principles of its liability regime’.¹³⁰

The proposal noted that the liability rules had been interpreted by the Court which provided ‘valuable clarifications and guidance’, but argued these clarifications should be included in a regulation to ensure effective harmonisation and to avoid legal fragmentation.¹³¹ (Implying the Court caused the Commission to change its course of action from maintaining the status quo). The Commission stated that the ECD’s liability framework had been maintained via the DSA proposal ‘as interpreted by the Court of Justice...’.¹³² The proposal draws on several legal studies regarding the ECD,¹³³ in addition to its legal analysis which utilised a ‘rich collection of case law’.¹³⁴ The proposal highlighted the uncertainty created by case law, in particular its disincentivising impact on voluntary own-investigations or using automated measures to detect illegal activity.¹³⁵ This uncertainty is also highlighted in the literature.¹³⁶ This points towards the Court’s impact on the drafting process, and the Commission’s detailed consideration and instrumentalisation of case law to justify and insulate its policy positions.¹³⁷

The staff working documents observe ‘clear evidence of legal fragmentation and differentiated application of the existing rules by Member States, and ultimately by

¹²⁸ Ibid para 58.

¹²⁹ European Parliament, Resolution of 20 October 2020 on the Digital Services Act and fundamental rights issues posed (2020/2022(INI)) para 30.

¹³⁰ DSA Proposal (n 3) 1.

¹³¹ Ibid 3.

¹³² Ibid.

¹³³ Ibid 10.

¹³⁴ DSA Proposal (n 3) 10; The proposal cites the following rulings of the Court of Justice; Case C-108/09 *Ker-Optika* EU:C:2010:725; Case C-291/13 *Papasavvas* EU:C:2014:2209; Case C-484/14 *Tobias McFadden v. Sony Music* EU:C:2016:689; Case C- 434/15 *Asociación Profesional Élite Taxi* EU:C:2017:981 or Case C-390/18 *Airbnb Ireland UC* EU:C:2019:1112. It also cites the resolutions of the European Parliament at fn 65 and 70.

¹³⁵ DSA Proposal (n 3) 10 at fn 47, 48, & 49.

¹³⁶ E Rosati (n 4) 117–118.

¹³⁷ M Blauberger and SK Schmidt, ‘The European Court of Justice and its political impact’ (2017) 40 *West European Politics* 911–912; K Alter and S Menunier-Aitsahalia, ‘Judicial Politics in the European Community: European Integration and the Pathbreaking *Cassis de Dijon* Decision’ (1994) 26 *Comparative Political Studies* 535–561.

national courts'.¹³⁸ Specifically the 'liability regime for online intermediates continues to establish the key regulatory pillar' for the online world,¹³⁹ however 'conflicting interpretations in national courts (sometimes even between domestic courts) have introduced significant levels of uncertainty'.¹⁴⁰ The existing rules were described as 'outdated'.¹⁴¹ Furthermore, while Recital 42 ECD was interpreted to mean host providers must act in a 'passive and neutral role',¹⁴² national courts subsequently applied this case law in contradictory fashions. Some equated the active role with 'appropriation' of content such that a 'reasonably informed user' would conclude the host is the author.¹⁴³ Thus highlighting the weakness of case law as a form of legal regulation, as well as broader structural issues with the Union's legal system (in particular the co-opting of national judicial infrastructures to establish a decentralised pan-European judicial network).

The Commission emphasised the importance of avoiding scenarios where automatic, algorithmic ordering, displaying, tagging, or indexing, of content leads to the attribution of an 'active role', given these activities are necessary for modern online services.¹⁴⁴ Case law might disincentivise smaller players leading them to avoid taking proactive measures to detect illegal activities which might lead to their attribution with an 'active role'.¹⁴⁵ The Commission's proposal highlighted the need to clarify the rules and eliminate disincentives for voluntary own-investigations undertaken to ensure user safety.¹⁴⁶ This concern was highlighted by stakeholders: 'intermediaries, national authorities, research institutes and civil society organisations consider that the current liability regime creates disincentives to act and call for the removal of disincentives for voluntary measures'. Equally, some user and trade associations,

¹³⁸ Staff working documents drew on case-law as part of their evidential justifications citing, for example; *L'Oréal v eBay* EU:C:2011:474; Joined Cases C-236/08 to C-238/08, *Google France and Google v Louis Vuitton* (n 95).

¹³⁹ Ibid.

¹⁴⁰ Ibid. This issue was highlighted in several practitioner's reports. For an example see Steven James, 'L'Oréal v eBay and the growing accountability of e-operators' *Latham & Watkins e-commerce law and policy* (September 2011) 7.

¹⁴¹ SWD (2020) 349 FINAL (Part 1/2)) (n 112) 11.

¹⁴² Ibid 31; It cites Advocate General Jääskinen's Opinion in *L'Oréal v eBay*, specifically his remark that 'neutrality' does not appear to be quite the right test under the directive for this question'; See the Advocate Generals Opinion in Case C-324/09 *L'Oréal SA v eBay International AG and Others* EU:C:2010:757, para 146.

¹⁴³ SWD (2020) 349 FINAL (Part 1/2)) (n 112) 31-32.

¹⁴⁴ SWD (2020) 349 FINAL (Part 1/2)) (n 112) 32.

¹⁴⁵ Ibid 32.

¹⁴⁶ DSA proposal (n 3) 3.

and creative industry representatives, expressed concerns ‘that such clarifications could weaken the responsibilities of intermediaries, absent positive obligations’.¹⁴⁷

Thus, the Commission’s proposal shows considerable engagement with the relevant case law, highlighting its limitations as a form of legal regulation,¹⁴⁸ and of negative integration by emphasising the importance of intervention by political institutions.¹⁴⁹ It is important to recall that the DSA proposal was tabled before the ruling in *YouTube v Cyando* which clarified some of the above issues.

The original proposal referred to the ‘Court of Justice’ on eight occasions,¹⁵⁰ and to ‘case law’ twice.¹⁵¹ The proposal maintained the ECD liability regime, replicating Articles 12–14 as Articles 3–5 in the DSA. The recitals restate the Court’s above jurisprudence. Recital 18 addressed the application of liability rules, outlining they should only apply where a service provider is providing services ‘neutrally, by a merely technical and automatic processing of the information’ and should not apply where a provider plays an ‘active role of such a kind as to give it knowledge of or control over, that information’,¹⁵² mirroring the Court’s ruling in *L’Oréal v eBay*.¹⁵³ Indicating significant influence, which is particularly evident when we consider that Recital 18 concerns all intermediary service providers, not just hosts.¹⁵⁴ Indeed this language is retained in the final regulation.¹⁵⁵ However it is important to note that other amendments, which sought to widen the scope of this recital, ultimately failed.¹⁵⁶ Recital 19 also illustrates influence, that provision indicating the different categories of intermediary service providers – ‘mere conduits’, ‘catching’, and ‘hosting’ services – should be considered having regard to the way those distinctions have been interpreted by the Court.¹⁵⁷ Similarly, Recital 20 specified that providers who deliberately collaborate with a service recipient to undertake illegal activities do not

¹⁴⁷ SWD (2020) 349 FINAL (Part 1/2) (n 112) 25.

¹⁴⁸ SK Schmidt (n 10) 5–6.

¹⁴⁹ FW Scharpf, ‘Balancing Positive and Negative Integration: The Regulatory Options for Europe’ (1997) Max Planck Institute for the Study of Societies Working Paper 97/8, at www.econstor.eu.

¹⁵⁰ DSA Proposal (n 3) at Recital 6, 16, 19, 85 and Arts 52(3), 54(4), 61(5), 62(5)(b).

¹⁵¹ *Ibid* at Recital 6 and 16. The final regulation refers to the Court of Justice on fifteen occasions.

¹⁵² *Ibid* at Recital 18.

¹⁵³ Case C-324/09 *L’Oréal v eBay* (n 105); Caroline Cauffman and Catalina Goanta, ‘A New Order: The Digital Services Act and Consumer Protection’ (2021) 12 *European Journal of Risk Regulation* 764–765.

¹⁵⁴ DSA Proposal (n 3) at Recital 18.

¹⁵⁵ *Ibid*.

¹⁵⁶ Discussed in more detail below.

¹⁵⁷ DSA Proposal (n 3) at Recital 19.

provide their services 'neutrally',¹⁵⁸ mirroring both *L'Oréal v eBay* and *Google v Louis Vuitton*.¹⁵⁹

Articles 3–5 replicated the ECD's Article's 12–14 with relatively minor textual changes. Article 5 governed host liability and Article 5(1) was almost identical to Article 14(1) ECD, however instead of imposing a positive obligation on Member States to ensure hosts are not liable where they fall within Article 14, it creates a direct entitlement for providers reflecting the change from that of a directive to a regulation.¹⁶⁰ One notable change was the addition of Article 5(3), concerning platform liability under consumer protection law for the trade of goods or services online, however, this provision is not of immediate concern to the present analysis.¹⁶¹ A notable change from the ECD's liability framework is the introduction of a 'Good Samaritan' clause. This clause can be connected to the Court's rulings that created uncertainty regarding voluntary investigations where a platform takes measures to prevent illegal activities. Article 6, titled 'voluntary own-initiative investigations and legal compliance',¹⁶² outlined that providers would not be deemed ineligible for the exceptions in Articles 3–5 solely on the basis that they conducted a voluntary investigation, or other activities 'aimed at detecting, identifying and removing, or disabling access to, illegal content'.¹⁶³ Nor for taking the 'necessary' steps to comply with Union law.¹⁶⁴ This provision should be considered in light of Recital 25 of the proposal which specified it should be clarified, to not 'discourage activities aimed at detecting, identifying and acting against illegal content' and that providers who undertake such actions are not necessarily deprived of the exceptions provide the activities are conducted 'in good faith and in a diligent manner'.¹⁶⁵ Good faith including actions taken to 'comply with Union law' and that such activities 'should not be taken into account when determining' if they can rely on an exemption from liability, particularly where they provide a 'service neutrally' and 'can therefore fall within the scope of the relevant provision'.¹⁶⁶ Relatedly, we see the replication and simpli-

¹⁵⁸ Ibid at Recital 20.

¹⁵⁹ Case C-324/09 *L'Oréal v eBay* (n 105); Joined Cases C-236/08 to C-238/08 *Google v Louis Vuitton* (n 95) para 114.

¹⁶⁰ Art 288 TFEU; Regulations are binding in their entirety whereas directives are binding as regards their goal.

¹⁶¹ Art 5(3) of the DSA proposal is a new provision but does not appear to have been influenced by the examined case-law.

¹⁶² Art 6 of the DSA proposal (n 3).

¹⁶³ Ibid.

¹⁶⁴ Ibid.

¹⁶⁵ Recital 25 of the DSA proposal (n 3).

¹⁶⁶ Ibid.

fication of Article 15 ECD as Article 7 DSA which specifies that no general obligations to either monitor information transmitted or stored by intermediary providers nor to actively seek facts relating to illegal activity shall be imposed.¹⁶⁷ This provision must of course be considered in light of Recital 28 of the dossier which specified the prohibition does not affect monitoring in specific cases.¹⁶⁸ The Commission observed during the DSA's tabling that cases were pending before the Court addressing the issue of voluntary own investigations. Equally, the protection of 'Good Samaritans' has existed in the United States since the 1990s.¹⁶⁹

An amendment to Recital 18 proposed by Parliament sought to specify the mere ranking, ordering, and use of recommender systems, does not, itself, amount to an exercise of control.¹⁷⁰ This amendment from January 2022 appears to incorporate the CJEU's decision in *YouTube v Cyando*, issued in June 2021, which resolved some of the uncertainty emerging from *Google v Louis Vuitton* and *L'Oréal v eBay*, pointing towards the Court's ongoing influence. A draft text dated the 15th of June, circulated by Fabrice Dubreuil, Chairman of COREPER, following trialogue, sees the removal of the jurisprudence from *YouTube v Cyando*.¹⁷¹ This might indicate pushback against the Court. Equally, it may indicate a choice to insulate adjacent legal areas from the Court's influence by limiting the incorporation of its specifically to hosting providers rather than extending it to all intermediary service providers.

3.4.1. Host Liability

The First Reading stage before the Council is particularly interesting, in one progress report Member States indicated their support for the existing ECD liability framework.¹⁷² Several delegations demonstrate detailed engagement with host liability issues, such as the Netherlands, who queried when the 'actual knowledge of illegal

¹⁶⁷ Ibid Art 7.

¹⁶⁸ Ibid at Recital 28.

¹⁶⁹ 47 U.S.C. § 230(c) (1996) of the US code.

¹⁷⁰ Amendment 16 in European Parliament, 'Amendments adopted by the European Parliament on 20 January 2022 on the proposal for a regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC' COM(2020)0825.

¹⁷¹ Council of the European Union, 'Communication from the secretariat general of the Council to the delegations concerning the digital services act, letter to the president of the IMCO Committee of the European Parliament', Doc 9342/22, 15 June 2022, 15.

¹⁷² Council of the European Union, 'Progress Report: message from the Presidency to the Council concerning the Proposal for a Regulation on a Single Market for Digital Services', Doc 8570/21, 12 May 2021, 3; Council of the European Union, 'General Approach: message from the General Secretariat of the Council to the Council concerning the Proposal for a Regulation on a Single Market for Digital Services', Doc 13203/21, 18 November 2021, 1.

content' requirement would be fulfilled under Article 5 DSA,¹⁷³ and Denmark, who while critical of Article 5(3)'s failure to address importers responsibilities vis-à-vis online marketplaces and the sale of goods from third countries, indicated general support of the DSA's liability provisions.¹⁷⁴

An examination of internal working documents from Council negotiations, released following freedom of information requests, show far more detailed consideration of the CJEU's rulings, and their impact, on the formulation of the host liability provisions. Following a COREPER¹⁷⁵ meeting in November 2021, a compromise text on the DSA was circulated to Member States.¹⁷⁶ An amendment to Recital 22¹⁷⁷ was proposed which specifies that actual knowledge, for host service providers, cannot be obtained solely on the basis that a provider is generally aware, or possesses abstract knowledge, that their service is used to share illegal content.¹⁷⁸ Furthermore, it specifies that a provider's automatic indexing of content, offering a search function, and recommendation of content to users based on their profiles or preferences, are not sufficient grounds to reach the conclusion a provider has specific knowledge regarding illegal activities/content.¹⁷⁹ This amendment mirrors, almost verbatim, *YouTube v Cyando*.¹⁸⁰ However this language was subsequently removed bringing the Court's influence into question. Yet, the language is retained in Recital 22, which specifically addresses liability for hosting services in the proposed DSA text from the 15th of June, 2022.¹⁸¹ This was approved by the Council on the 4th of October 2022.¹⁸² Demonstrating the continuing impact of the Court. While the inclusion of the jurisprudence from *Youtube v Cyando* would have extended the impact of case law to mere conduits and catching service providers, the maintenance of the Court's test in Recital 22 upholds the current position and embedded it.

¹⁷³ Council of the European Union, 'Message from the Senate of the State's General of the Netherlands to the President of the Council concerning the application of the Principles of Subsidiarity and Proportionality', Doc 9881/21, 16 June 2021, 6.

¹⁷⁴ Council of the European Union, 'Message from the General Secretariat of the Council to the Council concerning the 'General Approach and Statements'', Doc 13203/21 ADD 1, 18 November 2021, 2.

¹⁷⁵ Committee of the Permanent Representatives of the Governments of the Member States to the European Union (COREPER).

¹⁷⁶ Council of the European Union, Doc 13203/21 (n 172) 21, fn 108.

¹⁷⁷ Ibid 21; Recital 22 is intended to address the requirements of Art 5(b) (requirement to act expeditiously upon obtaining actual knowledge) and Art 6 (voluntary own investigations) under the DSA Proposal.

¹⁷⁸ Ibid.

¹⁷⁹ Ibid.

¹⁸⁰ *YouTube v Cyando* (n 9) paras 111–115.

¹⁸¹ Council of the European Union, Doc 9342/22 (n 171) 17.

¹⁸² Council of the European Union, Press Release (4 October 2022) (n 3).

Government queries on the dossier point towards the importance placed on the Court's rulings. For instance, a question submitted by an unspecified Member State regarding Article 2(f) of the draft expressed concern regarding search engines and the applicability of the DSA's requirements to such providers.¹⁸³ The response noted that *Google v Louis Vuitton* did not exclude referencing services from being considered hosting services, but simultaneously remarked that every case brings a unique set of facts and circumstances which may mean such a provider falls outside the scope of the liability exemption, this ultimately being an issue for the Court.¹⁸⁴ Indicating an intention to avoid creating a rigid framework, favouring a flexible approach that would facilitate the Court's continued interpretation, development, and adaptation of the rules to new situations.

France, in query forty-two, submitted that Articles 5(2) – (3) and Recital 18, taken collectively, codify and incorporate case law. The French authorities point out that Article 5(2) excluded the exemption from liability where the recipient of the service acts under the control or authority of the service provider.¹⁸⁵ Furthermore, Recital 18 applies the same 'terms of case law regarding the 'active role' played by the marketplace in the transaction'.¹⁸⁶ However, they argued that these terms require legislative clarification, in particular the criteria to be used to determine when the role of the third-party sellers, or service providers, can be considered weak or *de facto* null and void.¹⁸⁷ In a detailed response the Commission stresses that the status of an intermediary as 'neutral' needs to be 'assessed on a case-by-case basis'.¹⁸⁸ It highlighted that there was still uncertainty as to when 'a host has played an active role of such a kind as to lead to knowledge or control...'.¹⁸⁹ It goes to lengths to clarify that automated activities, such as tagging and providing search functionalities, are now 'absolutely necessary to navigate among an endless amount of content and should not be considered as 'smoking gun' for such an 'active role'...'.¹⁹⁰ It concluded by noting that the Court might clarify these questions in pending cases,¹⁹¹ which it subsequently did in *Youtube v Cyando*, and for which the Parliament appears

¹⁸³ Council of the European Union, 'Communication from the Presidency to the working Party on Competitiveness and Growth (Internal Market) concerning 'a selection of questions sent by Member-States on Chapter I and II', Working Document 2289/2021, 17 February 2021, 10.

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid* 22.

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid.*

¹⁸⁹ Council of the European Union, Working Document 2289/2021 (n 183) 10.

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid* 10.

to have tabled an (unsuccessful) amendment.¹⁹² Regardless of the success, this again highlights the impact of the Court's on negotiations.¹⁹³

Finally, in query fifty-two, concern is expressed regarding the non-codification of case law. While the query notes that the Court's jurisprudence forms part of several recitals, it laments that is not directly incorporated into the articles.¹⁹⁴ The Commission responded rather strongly stating the 'DSA does not 'codify' existing case law...but reflects such case law in the recitals, making also clear that it is subject to further interpretation by the Court'.¹⁹⁵ It again stressed that more cases are pending that might provide further clarifications on how to interpret the liability exemptions.¹⁹⁶ There are a few other amendments proposed to Articles 3 – 5, most involving changes of a minor nature.¹⁹⁷

3.4.2. *The Good Samaritan Clause*

Article 6 – which allows providers to retain their safe harbour liability exemption where they take steps to detect, identify, remove, or disable access to illegal content – is discussed in Council negotiations in February 2021. The Commission was asked to 'elaborate on which obligations, if any, are imposed on platforms that obtain 'actual knowledge of illegal activity or illegal content' because of 'voluntary own-initiative investigations?'. In particular if it had considered clarifying the provision to make clear that 'the good samaritan provision applies to the distinction between active and passive intermediaries?' which could be achieved by 'codifying the general requirements for neutral/passive intermediary services in line with the case law'.¹⁹⁸ The Commission stated the DSA did not codify case law in its enacting terms, rather its recitals reflect case law to make it clear that the law is 'subject to further interpretation by the Court'. The Commission noted that there were then two cases pending in which it might 'give further guidance on how to interpret the requirement of 'neutrality' in relation to the conditional liability exemption for hosting services'.¹⁹⁹

Concerning Article 6, the Commission specifically states that such activities and measures taken by providers 'should not be taken into account' when determining exemptions from liability, in particular if the provider provided a service 'neutrally' without this rule 'implying the provider can necessarily rely thereon'. This indicates that the Commission was conscious of the Court's existing jurisprudence and its

¹⁹² Council of the European Union, Doc 9342/22 (n 171) 15.

¹⁹³ Council of the European Union, Doc 13203/21, (n 172) 21.

¹⁹⁴ *Ibid.* 27.

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.* Note this statement was issued prior to the CJEU's decision in *Youtube v Cyando*.

¹⁹⁷ *Ibid* at notation 154 in connection with amendment 136.

¹⁹⁸ Council of the European Union, Working Document 2289/2021 (n 183) 27.

¹⁹⁹ *Ibid.*

likely impact on the interpretation of the provision, in addition to the likelihood that the Court would provide future clarifications. The Commission wanted to keep the door open for the Court to influence the direction of the law moving forward and envisaged the Court elaborating on its active and neutral jurisprudence. The notion of neutrality explicitly included in the proposal's original text via Recital 25. Given the brevity of Article 6 as tabled, it is very likely that Recital 25 was intended to control that article's application and interpretation where uncertainty arose.

Article 6 was amended by the Parliament to include measures to comply with national legal obligations, which is retained in the final regulation.²⁰⁰ Amendment 138 introduced an extensive revision specifying that all such voluntary measures must be 'effective and specific' with appropriate safeguards, including human oversight, documentation, and requirements to ensure such measures are 'non-discriminatory, proportionate, transparent and do not lead to over-removal of content'.²⁰¹ However this amendment was unsuccessful.²⁰² In the Council, Germany sought to have the words 'diligent manner' added, expressing concern that the existing wording was 'too vague' and would create 'legal uncertainty'. The Austria similarly suggested the wording 'in good faith and in a diligent manner' be introduced.²⁰³ The Austrian delegation highlighted its proposed wording on the Commission's text for Recital 25.²⁰⁴ Trilogue documents reveal that Austria's proposal was the only amendment proposed by the Council to Article 6.²⁰⁵ Interestingly Spain links Article 6 with its comments concerning Article 5 and its view that the Court's jurisprudence from both *L'Oreal* and *eBay* should be included in to increase legal certainty.²⁰⁶ This proposal was unsuccessful.²⁰⁷

²⁰⁰ Amendments adopted by the European Parliament on 20 January 2022 (n 170) at Amendment 137 specifically.

²⁰¹ Ibid 138.

²⁰² As is reflected in the final text of the DSA.

²⁰³ Council of the European Union, 'Digital Services Act: Consolidated comments on Chapters 1 + 2 and respective recitals', Doc WK 2574/2021 REV 2, 8 March 2021, 34 and 173.

²⁰⁴ Ibid 175.

²⁰⁵ Council of the European Union, 'Règlement relatif à un marché intérieur des services numériques (législation sur les services numériques) et modifiant la directive 2000/31/CE: tableau 4-colonnes', Doc 5620/22, 1 février 2022, 292 – 294.

²⁰⁶ Ibid 171 –172 read in conjunction with 163–164.

²⁰⁷ As is reflected in the final text of the DSA.

4. Has the Court exercised influence?

Applying Martinsen's typology to the case study what can we determine regarding the nature of the Court's influence?²⁰⁸ The Commission resists the characterisation that it is codifying case law, this resistance in part seems to stem from a motivation to allow the judiciary to continue to develop the rules within the confines of the relevant legislative frameworks. The Commission stated that decisions on attributing liability need to be assessed on a 'case-by-case basis' by the Court for example.²⁰⁹

The DSA does incorporate the case law on active and neutral roles within its text via the recitals, but not in the articles.²¹⁰ Under Martinsen's law attainment typology, incorporation is considered codification, the strongest form of influence.²¹¹ Therefore the Court has exercised influence over the legislative process.²¹² Augmenting Martinsen's typology with the legal distinctions between articles and recitals we can further reflect on the type of influence. Recitals are not independently operative; therefore, the Court has exercised a weaker form of influence versus had the case law been replicated with the articles. However, Article 5(a) DSA proposal, which became Article 6(a) in the final act, is somewhat unclear and ambiguous, owing to the wording that host providers are exempt from liability on the condition that they do 'not have actual knowledge of illegal activity or illegal content...'.²¹³ The consequence of this is that the DSA's recitals, which now refer to the Court's active and neutral roles, will likely be used to resolve any ambiguity regarding the meaning of 'actual knowledge'. Furthermore, the incorporation of the Court's test for liability in *Youtube v Cyando* via Recital 22 concerning host providers' use of automatic indexing, search, and recommender systems will equally be used to resolve ambiguity regarding the meaning of 'actual knowledge'. Therefore, while not part of the operative provisions, the jurisprudence may control the interpretation of Article 6. This is particularly notable as the non-codification of those notions in the operative provisions of the directive arguably makes them less concrete, and therefore open to further interpretation by the Court. This indeed would reflect the Commission's stated intention that the recitals merely reflect the Court's case law, 'making also clear that it is subject to further interpretation by the Court'. Thereby embedding a dynamic approach to interpretation that allows the law to evolve.

²⁰⁸ D Sindbjerg Martinsen (n 8) 35–36, fn 5.

²⁰⁹ See for instance Council of the European Union, Working Document 2289/2021, (n 183) 10, 22, 27.

²¹⁰ DSA at Recital 18 and 20 for example.

²¹¹ D Sindbjerg Martinsen (n 8) 36.

²¹² Though this influence is very specific given the host liability rules are *lex specialis*.

²¹³ Art 6(a) DSA.

Martinsen's typology seeks to ascertain if any of the rules, principles, and interpretations generated by the Court are attained in legislative acts.²¹⁴ This categorically is the case regarding the host liability rules under the proposed regulation, and the Court of Justice has exercised significant influence in that it has caused another actor to change their course of action. In this instance it has changed the course of action of the legislative institutions, particularly the Commission, but also the Parliament and Council, from a position of maintaining the status quo for host liability to amending the legislation to reflect its augmentation, via case law, of the ECD's liability rules for host providers.

Equally, the Court has had a significant impact, via its host liability jurisprudence, on Article 7 (previously Article 6 in the Commission's original dossier). The Court's jurisprudence in *Google v Louis Vuitton* and *L'Oréal v eBay* created legal uncertainty with regard to the liability of intermediary service providers for voluntary own investigations. In part to address this uncertainty Article 7 is created. That provision neither overrides the Court's jurisprudence, nor embeds it. Rather it clarifies that intermediary services are not to be made liable for the purposes of Articles 4, 5, and 6 where they diligently and in good faith, conduct actions to detect, identify, remove, or disable access to illegal content, or they take measures to comply with legal obligations, in light of the uncertainty that the Court's rulings created before *YouTube v Cyando*.²¹⁵ Indeed there seems to be a degree of alignment between the Court's reasoning in that judgment and this provision. The Court specifying in *Youtube v Cyando* that where providers implement voluntary technological measures to detect content infringing copyright, this does not necessarily mean it played an active role unless actual knowledge can be attributed to them.²¹⁶ Similar language can be seen in Recital 26 of the final regulation, in addition to the reference to the Court's notion of acting neutrally with regard to voluntary actions, indicating that the Court's jurisprudence influenced the drafting of the provisions.²¹⁷ Equally, the introduction of the provision can be seen to take inspiration from Section 230(c) of the Communications Decency Act in the United States which I have pointed toward already. Article 7 can be understood as a response to the uncertainty created by the Court, its case law perceived as disincentivising voluntary attempts to address such activities and content. In this way, the Court has exercised context-shaping influence given that the institutions have shaped 'their conduct, strategies, and behaviour to fit what the Court has already ruled or is likely to articulate in the future'.²¹⁸

²¹⁴ D Sindbjerg Martinsen (n 8) 9.

²¹⁵ Recital 26 of the DSA.

²¹⁶ *Youtube v Cyando* (n 9) paras 109–113.

²¹⁷ Recital 26 of the DSA.

²¹⁸ D Sindbjerg Martinsen (n 8) 8.

5. Conclusions

This paper has sought to examine the relationship between the Court of Justice and the Union Legislature with the aim of reflecting on the dynamics of positive and negative integration, and the interactions between law and politics in the contemporary period. It attempted to address these questions by bridging political science literature and legal scholarship via an inquiry that was empirically grounded, conceptually embedded, doctrinally informed, and theoretically framed.

Most clearly it considered how the Court's interpretations impact legislative processes and equally how political institutions engage with, or contest, such decisions. The findings highlight a clear identification, by political institutions, of the limitations of case law as a form of legal regulation. The Commission's analysis emphasises the necessity of re-regulation to counteract the legal uncertainty created by the Court. The decentralised application of its rulings by national judicial systems – a key infrastructure via which negative integration is pursued – resulting in unequal enforcement, legal fragmentation, and conflicting domestic applications of its jurisprudence. This by extension creates barriers in the internal market, necessitating re-regulation and the pursuit of further positive integration to address the undesirable effects of case law. Equally, the Legislature moves beyond the Court's jurisprudence – given its negative impact on legal certainty for voluntary own investigations – via the creation of Article 7 DSA.

Therefore, while case law matters in the legislative process, how, why, and to what extent it matters is open to debate and interpretation. In this regard, the findings herein substantiate the view of Weatherill that case law plays an important role as a body of drafting guidelines for the Union Legislature.²¹⁹ By extension the paper lends weight to the claims of Scharpf and Grimm as to the effects of case law on political decision-making. However, it also highlights that political actors do not engage with case law as neutral interpreters. Rather they actively politicise rulings, drawing differing conclusions as to the meaning of the law which they leverage to suit their own preferences and policy objectives. Their fidelity to the Court's intended meaning (if it is possible to conclusively identify such a thing) is questionable in some respects. Suggesting that while case law may constitute a body of drafting guidelines, the meaning of those guidelines is shaped as much by politics as by law. This conclusion supports the integration through law narrative which emphasises the central role of politics via the law it creates, highlighting the institutional capacity of the Union to politically direct integration through law.

²¹⁹ S Weatherill (n 5).

More broadly the paper sought to examine what these dynamics can tell us about the relationship between these institutions. The paper provides grounds to question the established theoretical frames for understanding the relationships and dynamics between the Court and Legislature. In the early periods of the Union's development the Treaties – and the Court's interpretation of them – dominated the integration process. Against this backdrop Scharpf developed his asymmetry thesis, the legal community and its integration through law theory, both later influencing Grimm's over-constitutionalisation narrative. However, legal scholars are increasingly re-examining the accuracy of these theories in the contemporary period, emphasising the growth of secondary legislation as creating a shift in institutional dynamics.²²⁰

The findings of this paper lend empirical support to the increasing claims in the literature which suggest that the ability of these theories to sufficiently capture the current dynamics between the Court and Legislature, and the driving forces behind European integration more broadly, need to be revisited. Scharpf and Grimm place at the core of their argumentation a strong belief that politics lacks the institutional capacity to direct the course and pace of European integration given the power of negative integration. While a key concern of their work is the perceived imbalance between the economic and social, this case study provides evidence that the universal extension of those claims to all areas of Union law is problematic. The case study demonstrates that not all aspects of economic activities come within the scope of the Treaty framework in the same way. While the economic activities of host service providers have profound impacts on our societies, both primary law and case law were completely silent as to liability before legislative intervention. This is unsurprising given the technical and commercial nature of the issues. Yet, the fragmented approach to liability before the ECD's establishment created barriers to the freedom of movement of services, an obstacle to securing the internal market, and by extension impediment to European integration in this area. However, the removal of these barriers was driven by politics.

This finding, coupled with the increasing evidence of judicial deference toward political decision-making processes highlighted by the literature, suggests a shift in the relationship between primary and secondary law. De Búrca in 2003 argued that the Court's rulings in the area of fundamental rights and citizenship law – in particular its decision in *UPA* – indicate that the Court has entered a period of judicial deference, acting to the detriment of its previous attitude regarding the protection of

²²⁰ M van den Brink, M Dawson, and J Zginski (n 12) 227–228; L López Zurita and S Arne Brekke, 'A Spoonful of Sugar: Deference at the Court of Justice' (2024) 62 *Journal of Common Market Studies* 1177–1203.

individual rights characteristic of its earlier case law.²²¹ Zgliniski's research furthermore highlights the Court's increasingly deferential attitude toward national decision-making as underpinned by domestic legal frameworks.²²² Recently Gerbaudo's work illustrated how the Court's rulings in the area of asylum and refugee law point toward a prioritisation of the application of secondary legislation over the right to an effective remedy enshrined in Article 47 of the Charter and the principle of non-refoulment in International law.²²³

Whether this latter development is good or bad is beyond the scope of this paper. However, the findings underline a need to reengage with these theoretical frameworks. The symmetry of influence between the Court and the Legislature appears to have evolved, shaped by the growth of secondary law and the rise of the Union Legislature within the Union's institutional framework. Arguably creating a shift in the relationship between law and politics, the Court and Legislature, and negative versus positive integration more broadly.

²²¹ G de Búrca, 'The European Court of Justice and the Evolution of EU Law' in TA Börzel and Rachel A. Cichowski (eds), *The State of the European Union* (Oxford University Press 2003) 48–76 and 68.

²²² J Zgliniski, 'The rise of deference: The margin of appreciation and decentralized judicial review in EU free movement law' (2018) 55 *Common Market Law Review* 1341–1385.

²²³ M Gerbaudo, 'Paving the way to the New Pact on Migration and Asylum: Some reflections on Ministero dell'Interno' (Joined Cases C-228/21, C-254/21, C-297/21, C-315/21, C-328/21)' (2025) 32 *Maastricht Journal of European and Comparative Law* 1–15.



***The Borders Within: Socio-economic Rights
and Non-discrimination in EU Law***

edited by Vladislava Stoyanova, Alezini Loxa and Serde Atalay

**The Borders Within: Socio-economic Rights
and Non-discrimination in EU Law.
An Introduction to the *Special Section***

Vladislava Stoyanova^{*}, *Alezini Loxa*^{**} and *Serde Atalay*^{***}

TABLE OF CONTENTS: 1. Introduction. – 2. Borders, Markets, Distinctions and Rights. – 3. Conclusion.

ABSTRACT: This editorial introduces the *Special Section* on 'The Borders Within: Socio-Economic Rights and Non-discrimination in EU Law' whose purpose is to provide a comprehensive and non-fragmented understanding of socio-economic rights, the right to non-discrimination and their meaning for welfare in EU Member States. Under EU law the boundaries between national socio-economic policies and the enjoyment of socio-economic rights by non-citizens become blurred. This is due to the complicated link between EU and national social policy, the operation of national policies against the background of EU social objectives as well as the different categories of non-citizens entitled to EU social rights (among which are also EU citizens). The editorial introduces the contributions of this *Special Section* which engage with non-discrimination between nationals of a Member State and EU citizens resident in that Member State, nationals of a Member State and third-country nationals, as well as EU citizens resident in a host Member State and third-country nationals resident in that Member State. The changing comparisons and the different limitations accepted as legitimate shape a complicated picture of the borders between insiders and outsiders in EU law as regards accessing socio-economic rights. In conclusion the editorial highlights the multilevel tension which characterises the attribution and limitation of socio-economic rights in the EU. Such rights are caught between the universal aspiration of equal treatment, the limitations imposed by concerns over migration as well as the demands imposed by financial solidarity within and between the Member States, and social justice aspirations at the collective EU level.

KEYWORDS: non-discrimination – socio-economic rights – migration – social policy – EU citizens – third-country nationals.

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1. Introduction

The contributions in this *Special Section* engage with socio-economic rights and non-discrimination as sources of welfare for nationals of the Member States, EU citizens on the move and third-country nationals. Under European human rights law, states have considerable discretion when it comes to socio-economic policy-making despite the direct impact of such policies on individuals' enjoyment of economic and social rights.¹ Moreover, there is room to differentiate between citizens and non-citizens as well as among non-citizens in the distribution of welfare as a matter of state discretion.² Under EU law, on the other hand, the boundaries between national socio-economic policies and the enjoyment of socio-economic rights by non-citizens become blurred for a series of reasons.

First, the EU and the Member States have shared competence over social policy under Article 4(2)(b) TEU. The Member States have historically had different national welfare systems based on different valuations of redistributive justice.³ While there has been reluctance to cede competence to the EU, the EU can undertake action in accordance with Title X TFEU in order to promote specific social policy objectives within the fields mentioned in Article 153 TFEU.⁴ Second, the establishment of the EU citizenship and the right to non-discrimination under Article 18 TFEU require EU Member States to extend equal treatment to EU nationals residing within their borders in the enjoyment of socio-economic rights. This has been historically connected to the integrating function of the principle of equal treatment for free movement under EU law.⁵ As a result, Member States' discretion to exclude non-citizens from socio-economic rights has been curtailed, though not erased.⁶ Third, social rights are part of the EU Charter of Fundamental Rights and within the field

¹ See for example, L Slingenbergh, 'Social Security in the Case Law of the European Court of Human Rights' in F Pennings and G Vonk (eds), *Research Handbook on European Social Security Law* (Edward Elgar Publishing 2015).

² *Ponomaryovi v. Bulgaria*, App no. 5335/05 (ECtHR, 21 June 2011).

³ S Blum, J Kuhlmann and K Schubert (eds), *Routledge Handbook of European Welfare Systems* (2nd edn, Routledge 2021).

⁴ For the most recent reaction to ceding competence see the action for annulment introduced by Denmark and Sweden against the Proposal for a Directive of the European Parliament and of the Council on adequate minimum wages in the European Union, COM(2020) 682 final. See Opinion of AG Emiliou in Case C-19/23, *Kingdom of Denmark v European Parliament and Council of the European Union* EU:C:2025:11.

⁵ See E Muir, *EU Equality Law: The First Fundamental Rights Policy of the EU* (1st edn, Oxford University Press 2018).

⁶ D Kochenov, N Cambien and E Muir (eds), *European Citizenship under Stress: Social Justice, Brexit and Other Challenges* (Brill Nijhoff 2020); S Devetzi, 'EU Citizens, Residence Rights and Solidarity in the Post-Dano/Alimanovic Era in Germany' (2019) 21 *European Journal of Migration and Law* 338; J Baquero Cruz, *What's Left of the Law of Integration?* (Oxford University Press 2018) 87 ff.; E Guild, 'Does European Citizenship Blur the Borders of Solidarity?' in E Guild, C Gortázar Rotaèche and D Kostakopoulou (eds), *The Reconceptualization of European Union Citizenship* (Brill Nijhoff 2014).

of application of EU law; they also extend to non-EU nationals.⁷ This means that next to the national socio-economic policies, the EU engages with questions of social justice between and within the Member States under Articles 2 and 3 TEU.⁸

In order to provide a comprehensive and non-fragmented understanding of socio-economic rights, the right to non-discrimination and their meaning for welfare in EU Member States, one has to necessarily take into account the complicated link between EU and national social policy, as well as the operation of national policies against the background of EU social objectives when examining the attribution and limitations of socio-economic rights to different categories of non-citizens (among which are also EU citizens). This is precisely what this *Special Section* does by examining who is included within the welfare structures of Member States and how, and who is not and why. Through a series of contributions, this *Special Section* demonstrates the tension between rights that are presumed to carry a cost for public finances, financial solidarity between the Member States and the complicated dynamics of belonging at domestic level dictated by policy choices at a supranational level.⁹

2. Borders, Markets, Distinctions and Rights

The *Special Section* starts with an article by Pavlina Hubkova who revisits the traditional understanding of socio-economic rights and their relation to the market under EU law in order to argue that their protection does not necessarily go against the internal market rationale of EU law, neither does it come with extra costs that cannot be carried by the EU economies. By following an analytical rather than a critical approach, Hubkova shows the interconnections between political considerations related to social policy, economic considerations behind socio-economic rights and EU primary and secondary law. To do so, Hubkova provides an overview of the relation of the internal market to fundamental rights in the development of EU law before recounting the complicated history of socio-economic rights in EU law. Hubkova reminds us not only of early contentious attempts to bring the protection of socio-economic rights to EU law but also of the complicated position of various

⁷ See S Iglesias Sánchez, 'The Constitutional Status of Foreigners and European Union Citizens: Loopholes and Interactions in the Scope of Application of Fundamental Rights' in D Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Hart Publishing 2017) 243.

⁸ See D Kochenov, G De Burca and A Williams (eds), *Europe's Justice Deficit?* (Hart Publishing 2015).

⁹ Cf. GP Freeman, 'Migration and the Political Economy of the Welfare State' (1986) 485 *The Annals of the American Academy of Political and Social Science* 51; SLB Jensen and C Walton (eds), *Social Rights and the Politics of Obligation in History* (1st edn, Cambridge University Press 2022) particularly part III.

social rights due to the unclear distinction between rights and principles under Article 52(5) of the Charter.¹⁰ Subsequently, she turns to the specific provisions of the Charter and explains how various of these provisions can be revisited in light of an economic perspective. Crucial in her analysis is the distinction between labour rights and the provisions on social security and social assistance.

As regards labour rights, Hubkova suggests that although they are presented as part of ‘social Europe’ in contrast to ‘market Europe’, labour rights are clearly rights of those who are active in the specific labour market. Looking at these rights through an economic lens implies that these rights must be considered as having pro-market aspects rather than mere opportunities to ‘consume’ public budgets. The legal protection of these fundamental rights in EU law inevitably means protection of those who play a weaker role in economic relations but who remain economically active and thus contribute directly to the EU's economic performance and prosperity. Similarly, neither environmental protection, consumer protection nor health care are principles whose observance would necessarily mean only eating from the common cake, since they can be seen as incentives for economic activity, investment or innovation. As regards the ‘genuine solidarity’ provisions of social security and social assistance, such rights are considered ‘costly’ and depend on national budget. Hubkova challenges these understandings, first by suggesting that all rights (also civil and political) are costly as they depend on state action for their protection and enforcement. Most importantly, Hubkova argues that, viewed from a broader economic perspective, such rights should not be seen as a drain on national resources. Although they include the rights of those who are economically inactive or less active, the granting of such entitlements further influences the economic performance of the EU: either they enable people to return to the labour market (e.g. in the case of free childcare) or they enable people to spend money (in the case of cash benefits), which boosts aggregate demand and thus influences both the domestic and the EU economy. Overall, Hubkova's contribution asserts that both the content of socio-economic rights and their relative power against free market considerations can be supported by economic arguments.

In conclusion, Hubkova suggests that we should reconsider our perception of socio-economic rights and their relation to the internal market: they are not some sort of tolerable brakes or obstacles to the economy, but its full components. While the protection of socio-economic rights may be formally perceived as a corrective to the exercise of economic freedoms and the functioning of the internal market, in

¹⁰ On earlier attempts to protect social rights see the non-binding Community Charter of Fundamental Social Rights of Workers adopted at the European Council in Strasbourg meeting on 8, 9 December 1989. On the complicated relation of rights and principles in the solidarity chapter of the Charter see Opinion of AG Cruz Villalón in Case C-176/12 *AMS* EU:C:2013:491 para. 55; Case C-173/99 *BECTU* EU:C:2001:356, para. 43; D Guðmundsdóttir, ‘A Renewed Emphasis on the Charters Distinction between Rights and Principles: Is a Doctrine of Judicial Restraint More Appropriate?’ (2015) 52 *Common Market Law Review* 685.

practice, these rights involve micro and macro-economic considerations. Hence the ultimate question is not whether we can afford solidarity through legally enforceable socio-economic rights, but rather how to design a legal system that provides such rights with due regard to the double social and economic function they serve.

After Hubkova's conceptual contribution, Sandra Mantu, Alezini Loxa, and Matteo Manfredi look at the socio-economic rights of specific groups of individuals under EU Law. Sandra Mantu reconsiders the well-established limitations to social rights for EU citizens and examines to what extent human rights law and the protection of human dignity can extend rights to destitute EU citizens. The starting point for her analysis is that EU citizens are a category of migrants who enjoy equal treatment with nationals of the Member State where they reside as a matter of primary and secondary EU law. Indeed, concerning equal treatment, they are much more protected than non-EU migrants who lack such a 'constitutionalised' right to equal treatment and who enjoy a weaker position under EU anti-discrimination legislation. Yet, this right to equal treatment for EU citizens is stratified and conditional on the legality of their residence, which requires possession of sufficient resources so as not to become an unreasonable burden on the host state's welfare system. In the relevant framework, social rights are granted under equal treatment for economically active EU citizens because they operate as part of the completion of the internal market. The attribution of social rights removes obstacles to free movement of workers and citizens. However, when it comes to economically inactive EU citizens, their right to free movement is conditional and it transmutes into a conditional right of equal treatment and limited social rights. It is within this complex legal terrain that human dignity as an EU fundamental right enters the picture as possible justification for social rights for economically inactive EU citizens.

Specifically, in the *C.G.* case, the Court of Justice of the EU (CJEU) relied on the Charter to interpret the claim to social rights made by an EU citizen lacking sufficient resources.¹¹ In its previous jurisprudence such an EU citizen would have been found to be outside the scope of Directive 2004/38 which regulates the residence and rights of migrant EU citizens, and therefore outside the equal treatment provisions contained in this Directive.¹² As Mantu notes, *C.G.* introduces the possibility to rely on EU fundamental rights - human dignity, the best interest of the child and respect for family life - as justifications for access to social rights for otherwise excluded migrant EU citizens. Furthermore, it establishes positive state obligations towards vulnerable EU citizens since states must ensure they live in dignified conditions, even when they are refused social assistance.

¹¹ Case C-709/20 *C.G. v The Department for Communities in Northern Ireland* EU:C:2021:602.

¹² Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

This mention to human dignity is a new addition to the legal toolkit of the CJEU. To get an understanding of what this right means for equal treatment of EU citizens and their claims to social rights, Mantu explores the use of human dignity in the CJEU and European Court of Human Rights (ECtHR) case law. She brings together two different models for migrants' access to social rights: the EU free movement model and the human rights model which is dependent on human dignity considerations. Understanding *C.G.* as the case that bridges the two models, Mantu investigates how human dignity informs the interpretation of socio-economic rights under human rights law and whether it can function as an alternative or corrective to the conditional nature of equal treatment for migrant EU citizens. After reviewing the relevant frameworks, she demonstrates that the conditions for claiming social rights by destitute EU citizens by invoking human dignity as used in the context of the ECtHR case law are high: they demand state action if the living conditions of the migrant reach a certain level of severity, if states have obligations towards such migrants, and if the migrant can be seen as vulnerable. Finally, drawing on diverse literature, Mantu problematizes the role of human dignity in human rights law and its potential as a justification for social rights for migrants. She shows that there is difficulty in reconciling the absolute nature of human dignity understood as foundational value of human rights with the conditionality and relativity that characterise social rights, even when conceived of as human rights. She concludes that while there is an agreement that human dignity requires a minimum of social rights which establishes positive state obligations, there is no clarity as to what states' obligations corresponding to this minimum core in respect of a dignified existence are. The fit between human dignity, equality and social rights is imperfect in both EU citizenship and human rights law.

This imperfection is further exacerbated by comparing the limitation to social rights for destitute EU citizens to those of third-country nationals. Alezini Loxa's contribution continues this thread and maps the accepted limitations to social rights of destitute EU citizens, long-term residents and third-country nationals under EU law. By examining the accepted limitations to social rights as they appear in secondary law and case law for both EU and non-EU migrants, Loxa demonstrates that there are overlaps behind the objectives served by the attribution of such rights, while divergences exist behind the legitimate limitations. But the areas of convergence and divergence are to some extent counterintuitive.

Similarly to Hubkova, Loxa shows that social rights are granted not only due to human rights considerations, but also to ensure a better functioning of the internal market (by avoiding obstacles to free movement for EU citizens and by avoiding labour exploitation and unfair competition as regards third country nationals). When it comes to limitations to social rights, as Mantu's contribution also shows, the free movement framework has developed with conditionalities in secondary law to minimize the negative impacts of migrant movement on national economies. The limitation of rights is based on the objective of maintaining the financial equilibrium of

the Member States and is construed with due regard to financial solidarity between Member States. Both secondary law and case law acknowledge a clear link between the economic contribution of an EU citizen and the more extensive social rights they are entitled not only under Directive 2004/38, but also under the Regulation 492/2011.¹³ As regards third country nationals, despite the fragmentation of the relevant framework, the economic function of the migrant is also used as a source of more extensive rights, while limitations are inserted in the relevant secondary law in order to avoid the repercussions of granting rights for public finances.

The counterintuitive differentiation enters the picture in the judicial review of accepted limitations. While both EU citizens and third country nationals are attributed rights in view of their economic function, one would expect that the limitations to EU migrants' social rights would be reviewed in light of the primary status of EU citizenship for the EU constitutional architecture. In practice, limitations to social rights are reviewed in light of the legitimate objective of protecting public finances with very limited room for protection for destitute EU citizens. In contrast, in the area of migration, and despite the fragmentation that appears in the relevant secondary law which is also emphasised by Manfredi, Loxa suggests that the CJEU has consistently emphasized the protection afforded by the Charter to consolidate the rights of migrants, even those with irregular status.

Loxa suggests that, in the relevant case law, the CJEU puts forward the social objectives served by secondary law (integration of long-term residents and fair treatment for all legally resident migrants) not as a byproduct of the economic contribution of the third country nationals, but rather under a positive vision of social justice in line with the social objectives of primary law. In the case law, the CJEU draws on the attribution of social rights to third country nationals with a view to social cohesion and integration (an integration that is presumably more easily achieved by EU migrants). This means that when limitations to social rights are reviewed, the potential burdens to national welfare systems are weighed against the Charter, thereby ensuring equal access to a minimum set of social rights that can guarantee a dignified life for all those who fall within the scope of EU law. To constructively combine these opposing yet overlapping logics, Loxa argues that there is room for evolution in judicial review by combining elements of the judicial approach for both EU and non-EU migrants in light of the social objectives of the EU under Article 3 TEU and the Charter. Loxa presents the potential of this combination not as a groundbreaking shift in the functional approach followed by EU law to social rights, but rather as a limited change that can bring about more extensive protection of social rights for all migrants, while being acutely aware of the limitations of EU law due to the attribution of rights in the form of equal opportunities and due to financial solidarity as the key justification behind the more extensive attribution of social rights.

¹³ Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union.

Finally, Manfredi turns to secondary law and explores the regulation of access to social rights for third country nationals under EU law. This exploration has three aspects. The first one examines whether and how third-country nationals, who have a legal status under EU secondary law, receive equal treatment compared to nationals of the host Member States regarding social benefits. The second aspect relates to the conditions under which it is justifiable to require third-country nationals to integrate into the host country before granting equal treatment and how such conditions can be proportionately implemented. The third aspect relates to the impact of the Charter on third-country nationals' access to social benefits in the EU.

As Loxa also discusses, third-country nationals' access to social rights on equal terms to nationals of the host state is regulated by a set of Directives and is differentiated depending on the category of third-country nationals involved. Unlike in the case of EU citizens, EU primary norms do not contain a non-discrimination clause that applies to third-country nationals. The CJEU has held that Article 18 TFEU and, relatedly, Article 21 of the Charter can only cover situations of discrimination on the basis of EU nationality, thereby excluding third-country nationals from the scope of the relevant provisions.¹⁴ While the relevant secondary law partially compensates for the lack of a general principle of non-discrimination for third country nationals, according to Manfredi, it further entrenches disparities, highlighting the need for a more coherent and harmonized approach to equal treatment under EU law. The study reviews, in particular, secondary law and case law on equal treatment provisions in three directives: Directive 2003/109 on long-term residents, Directive 2011/95 on beneficiaries of international protection, and Directive 2024/1233 on single permit holders.¹⁵

Similarly to the personal scope of these directives which varies and does not cover all third-country nationals legally residing or working in a Member State, the extent of the right to equal treatment is also varied in the various instruments. Directive 2003/109 and Directive 2011/95 refer to the Member States' national law to determine what falls under social benefits. In contrast, Directive 2024/1233 refers to

¹⁴ See Joined Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze* EU:C:2009:344, para 52.

¹⁵ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents; Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast); Directive (EU) 2024/1233 of the European Parliament and of the Council of 24 April 2024 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (recast). In the case of the Single Permit Directive the case law analysed interprets provisions of Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State.

the social security benefits within the scope of the European social security coordination provisions in Regulation 883/2004.¹⁶ As far as access to social assistance is concerned, equal treatment is generally excluded in respect of third-country nationals, except in case of long-term residents falling under the scope of Directive 2003/109. In fact, the requirement of having sufficient resources ‘without having recourse to the social assistance system of that Member State’ is often laid out as a condition for the grant of a right of residence to third-country nationals. One of the main justifications for introducing such conditions is the argument that Member States should only grant access to social benefits that reflect national solidarity, if the beneficiaries have proven to be sufficiently integrated in the host society, *inter alia* by having contributed for a certain period of time to the financing of these benefits or by having proof of a sufficient level of integration. Also, the exceptions to the right to equal treatment are worded differently. These differences are related to the nature of the third-country national’s stay in the EU (temporary or long-term) and the economically driven approach of the Member States. This fragmented approach is further exacerbated by the significant barriers Member States impose to restrict access to various social benefits due to the limitations of national solidarity.

However, this fragmented approach risks coming into conflict with the equal treatment provisions laid down in EU primary and secondary law. Manfredi reminds us that the principle of equal treatment plays a significant role in the development of the common immigration policy within the European Union. To examine ways to limit the use of exceptions to the principle of equal treatment by Member States and to address the fragmented protection of third-country nationals’ access to social benefits under EU secondary law, Manfredi explores the potentials of particularly Article 20 and Article 34 of the Charter. In relation to Article 20 of the Charter which provides for equality before the law, the CJEU has held that it also applies to third-country nationals in situations falling within the scope of Union law. This means that comparable situations should be treated equally, and different situations should not be treated similarly unless justified and with respect to the principle of proportionality. It can be derived that third-country nationals who acquire a certain status through EU directives are in comparable situations to nationals of the host Member State regarding equal treatment for social benefits. In this regard, Manfredi suggests that this Article could ensure proportionality and fairness in evaluating discriminatory practices or exclusions.

As regards Article 34 of the Charter on social security and social assistance, the Court has highlighted its importance in defining core benefits of which third country national cannot be deprived. In the relevant case law, the purpose of the benefit becomes a central factor for the assessment: if it is essential for a dignified existence, it must be granted to all third country nationals under equal treatment conditions. In

¹⁶ Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

contrast, for non-core benefits, Member States can exclude migrants if they explicitly derogate from equal treatment when transposing the relevant Directives. Moreover, this Article explicitly links social assistance to ensuring a dignified existence for all those who lack sufficient resources. Manfredi links Article 34(3)'s mention of 'a decent existence for all those who lack sufficient resources' to the right to human dignity enshrined in Article 1 of the Charter and suggests that Article 34 provides a strong legal foundation for extending protections based on the fundamental principle of human dignity.

In closing, Manfredi suggests that determining which benefits can be considered core benefits within the framework of EU law could provide a basis for ensuring a minimum level of uniform protection of fundamental social rights and would limit the discretion of national authorities, particularly in areas pertinent to essential needs like food, housing, and healthcare. By identifying core benefits, the national authorities could reasonably ensure that individuals, including third-country nationals, have access to necessities for a dignified existence, regardless of their nationality or immigration status while, at the same time, the uncertainty associated with case-by-case assessments by national courts would be limited. However, such a definition would require political agreement which can be a complex and challenging task given the different perspectives and interests involved.

3. Conclusion

The contributions in this *Special Section* engage with non-discrimination between nationals of a Member State and EU citizens resident in that Member State, nationals of a Member State and third-country nationals, as well as EU citizens resident in a host Member State and third-country nationals resident in that Member State. The changing comparisons and the different limitations accepted as legitimate shape a complicated picture of the borders between insiders and outsiders in EU law as regards accessing socio-economic rights.

All the articles develop against the background of a multilevel tension between the universal aspiration of equal treatment, the limitations imposed by concerns over migration as well as the demands imposed by financial solidarity within and between the Member States, and social justice aspirations at the collective EU level. The respective analyses suggest that these tensions have been dealt with by the creation of a continuum of rights rather than a clear-cut differentiation between insiders and outsiders in EU law. While EU citizenship and its primary status under EU law and the early case law of the CJEU created spaces for imaginaries of post-national citizenship, this status is no longer enough to overcome the concerns of Member States on the limits of their

national welfare systems.¹⁷ These concerns have been considered as legitimate, driven the conditionality of social rights under Directive 2004/38, and been confirmed in case law with little regard to fundamental rights considerations.¹⁸ At the same time, the fair treatment demanded by Article 79(1) TFEU has been translated into equal treatment for certain third-country nationals and has overcome national limitations with strong basis on the Charter.¹⁹ In practice, EU law creates a system of variable degrees of social rights that should be delivered at the domestic level for economically active or self-sufficient EU citizens, economically active third country nationals, and destitute EU citizens finding themselves in extreme vulnerability.²⁰ The relevant framework establishes stratified hierarchies of rights among non-citizens which are then implemented in domestic law.²¹ This finding also fits well with literature outside the field of law which investigates the evolution of social policy and welfare states away from universality and based on differentiation of social rights depending on the individual's deservingness.²²

In parallel, all the contributions reveal a tension between the economic rationale of the EU, past and present, and the cosmopolitan aspiration of social rights and inclusion.²³ The historical tension has been well discussed in scholarship and is currently expressed in the demand of Article 3 TEU for a highly competitive social market economy which shall also combat social exclusion and discrimination.²⁴

¹⁷ Baquero Cruz (n 6); D Kostakopoulou, 'The Evolution of European Union Citizenship' (2008) 7 *European Political Science* 285; Cf Y Nuhoğlu Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (University of Chicago 1994).

¹⁸ N Nic Shuibhne, 'What I Tell You Three Times Is True: Lawful Residence and Equal Treatment after Dano' (2016) 23 *Maastricht Journal of European and Comparative Law* 908; D Thym, 'When Union Citizens Turn into Illegal Migrants: The Dano Case' (2015) 40 *European Law Review* 249; C Barnard, 'The Day the Clock Stopped: EU Citizenship and the Single Market' in P Koutrakos and J Snell (eds), *Research Handbook on the Law of the EU's Internal Market* (Edward Elgar Publishing 2017) 102.

¹⁹ Iglesias Sánchez (n 7); S Iglesias Sánchez, 'Nationality: The Missing Link between Citizenship of the European Union and European Migration Policy' in E Guild, C Gortázar Rotaecche and D Kostakopoulou (eds), *The Reconceptualization of European Union Citizenship* (Brill Nijhoff 2014) 65.

²⁰ A Loxa, 'EU Law, Migration and Racial Capitalism Encounters at the Neoliberal EU (B)order' (2024) 4 *Retfærd. Nordisk Juridisk Tidsskrift* 11, 23.

²¹ L Morris, *Managing Migration: Civic Stratification and Migrants' Rights* (1st edn, Routledge 2002); Cf E Aeran Chung, 'Creating Hierarchies of Noncitizens: Race, Gender, and Visa Categories in South Korea' (2020) 46 *Journal of Ethnic and Migration Studies* 2497.

²² See for example S Bendixsen and L Näre, 'Welfare State Bordering as a Form of Mobility and Migration Control' (2024) 50 *Journal of Ethnic and Migration Studies* 2689; C Joppke, 'Neoliberal Nationalism and Immigration Policy' (2024) 50 *Journal of Ethnic and Migration Studies* 1657; Y Mounk, *The Age of Responsibility: Luck, Choice, and the Welfare State* (Harvard University Press 2017).

²³ Cf S Harb and P-É Vandamme, 'An Egalitarian Fortress? Global Distributive Justice and the EU' (2023) 45 *Journal of European Integration* 577; T Isiksel, *Europe's Functional Constitution: A Theory of Constitutionalism Beyond the State* (Oxford University Press 2016) 95–124.

²⁴ FW Scharpf, 'The Asymmetry of European Integration, or Why the EU Cannot Be a "Social Market Economy"' (2010) 8 *Socio-Economic Review* 211; J Kenner, 'Economic and Social Rights in the EU Legal Order: The Mirage of Indivisibility' in T Hervey and J Kenner (eds), *Economic and Social*

While Mantu and Manfredi take this differentiation between economic and social objectives as the background against which the limitations of social rights for EU citizens and third country nationals respectively are demanded, Hubkova and Loxa challenge the clear cut differentiation between economic costs and the social imperatives served by social rights.

Another thread that connects the contributions, and which has also been explored in EU law scholarship, is the role of the CJEU in the construction of equal treatment, social rights and the delineation of the scope and extent of social solidarity.²⁵ While Hubkova's contribution reminds us of the effects of CJEU decisions for the position of labour rights under EU law and their relation to internal market provisions, Mantu's article points to the limits of judicial decision making. Mantu criticises the CJEU for the indeterminacy of its use of human dignity, while at the same time she is acutely aware of how a determinate intervention to social policy could lead to overcoming democratic decision making.²⁶ Loxa and Manfredi on the other hand point to the incoherences in CJEU case law, the variable emphasis on primary law for different categories of migrants as well as the use of the Charter as an attempt to restore coherence into a fragmented legal order.

In the end, what all authors suggest is that social rights and the extent to which they can protect or exclude people is very much dependent on political choices, as, after all, the distribution of collective common goods in any society is dependent on political struggles for equality.²⁷ Despite the more nuanced understanding of the relationship between social rights and public finances, the contributions do point to the limitations of social rights to ensure welfare for all those within the jurisdiction of Member States. At the same time, human dignity appears to be a key consideration having the potential of creating a minimum level of protection for both destitute EU citizens and third-country nationals.

Rights under the EU Charter of Fundamental Rights—A Legal Perspective (Hart Publishing 2003) 1; D Ashiagbor, 'On the "Slow Constitutionalisation" of Social Europe' in M Claes and E Vos (eds), *Making Sense of European Union Law* (Hart Publishing 2022) 73; J Ryszka, 'Protection of Social Rights as a Permanent Challenge for the European Union' (2021) 46 *Review of European and Comparative Law* 109.

²⁵ B de Witte, E Muir and M Dawson (eds), *Judicial Activism at the European Court of Justice* (Edward Elgar Publishing 2013); E Muir, 'The Transformative Function of EU Equality Law' (2013) 21 *European Review of Private Law* 1231; JHH Weiler, 'Deciphering the Political and Legal DNA of European Integration, An Exploratory Essay' in J Dickson and P Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press 2012) 137.

²⁶ Cf M Dawson, 'The Political Face of Judicial Activism: Europe's Law-Politics Imbalance' in B de Witte, E Muir and M Dawson (eds), *Judicial Activism at the European Court of Justice* (Edward Elgar Publishing 2013) 11.

²⁷ See MA Wilkinson, 'Politicising Europe's Justice Deficit: Some Preliminaries' in D Kochenov, AT Williams and G de Búrca (eds), *Europe's Justice Deficit?* (Hart Publishing 2015) 112.

***The Borders Within: Socio-economic Rights
and Non-discrimination in EU Law***

edited by Vladislava Stoyanova, Alezini Loxa and Serde Atalay

**Can We Afford Solidarity? Socio-economic Rights Under
EU Law and Their Relationship with the Internal Market
Rationale Through an Economic Lens**

*Pavĺina Hubková**

TABLE OF CONTENTS: 1. Introduction. – 2. Setting the scene: internal market and fundamental rights. – 3. Socio-economic rights in EU law: a legal result of a political decision. – 4. Socio-economic rights from an economic perspective. – 4.1. Labour rights through an economic lens. – 4.2. Economic conditions for and economic implications of social security rights. – 4.3. The importance of using an economic lens in political decision-making. – 5. Conclusions.

ABSTRACT: Socio-economic rights have always held a controversial position in EU law. They are often seen as ‘costly’, dependent on the economic performance of Member States, and as a mere corrective measure to potential harmful effects of the internal market. However, looking at these rights through an economic lens reveals that their protection does not necessarily conflict with the internal market rationale. Encompassing both labour rights and social security rights, socio-economic rights both depend on and influence the economic performance of the EU and its Member States. This article thus argues that they should not be perceived as mere tolerable brakes or obstacles to the EU economy, but rather as integral components of it.

KEYWORDS: EU Charter – socio-economic rights – labour rights – social security benefits – internal market – economic performance.

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1. Introduction

Socio-economic rights have always been controversial in European integration. Attempts to include them among the fundamental rights and thus in the Charter of Fundamental Rights of the EU (EU Charter) even provoked a political backlash because they were seen as ‘costly’, and their protection was seen as dependent on the economic performance of each Member State. The history of the Lisbon Treaty and the EU Charter negotiations implies that socio-economic rights were seen as factors that do not contribute to the economic performance of the internal market, but rather represent the consumption of the assets that the economy has produced. However, this idea presupposes that the enforcement of such rights always implies an intervention in public budgets, which is the case of social security benefits and social assistance. Nevertheless, Chapter IV of the EU Charter, entitled ‘Solidarity’, which groups together rights of a mainly socio-economic nature, contains more than provisions on social security and social assistance. It also covers labour-related rights, such as the right to information, the right of collective bargaining or the right to fair working conditions, which – focusing on their economic core – are pro-market aspects rather than pure opportunities to ‘consume’ public budgets. The legal protection of these fundamental rights in EU law inevitably means the protection of those who play a weaker role in economic relations, but who remain economically active and thus contribute directly to the EU’s economic performance and welfare. Similarly, neither environmental protection, consumer protection nor health care are principles whose observance would necessarily mean only eating from the common cake, since they can be seen as incentives for economic activity, investment or innovation. Finally, even the provision of ‘core’ solidarity rights in forms of social benefits cannot be, from the economic point of view, viewed purely as sunk costs, as the money distributed to individuals circulate back into the economy through their spending.

This article examines the protection of socio-economic rights in the EU through the triad ‘politics-economy-law’ and through the prism of their respective ‘codes’: code of power, code of profit, and code of legality. Both the content of socio-economic values and their relative power against any competing value can be supported by economic arguments (related to decisions upon scarce resources, and based on the pursuit of profit and the common goal of economic welfare), but it requires a political choice to turn them into the code of legality, i.e. into the binary code of rights and obligations. A political component matters: some of the socio-economic rights are substantively embedded in EU law, while the content and contours of the others are decided at the level of national political decision-making and EU law respects them and pulls them into its realm through the principle of non-discrimination. However, regardless of the level in which they become operational, socio-economic

rights should be considered as an important part of the internal market. Looking at these rights through an economic lens is apt to show that their protection does not necessarily imply a step against the internal market rationale. Socio-economic rights both depend on and influence the economic performance of the EU and its Member States. Therefore, they should not be perceived as mere tolerable brakes or obstacles to the economy, but as its full components.

The overall approach of this article is analytical and explanatory rather than critical. While focusing on the issue of socio-economic rights in EU law naturally opens the door to critiques of specific legal regimes and approaches – often accused of favouring capital over labour and reflecting a neoliberal or neoclassical bias in the legal system – the primary aim of the article is not to criticize EU policies, legal frameworks, or judicial decisions related to the protection of socio-economic rights. This article aims to illuminate the interconnections between three systems – politics, economy, and law – and point out to the interrelations of their respective powers: political, economic, and legal. It does not assume that ‘the market’ is an omniscient and omnipotent entity that naturally produces desired outcomes and that any public intervention negatively interferes with this noble goal, nor does it assert that any economic theory is capable of normatively determining how social relations should be organized. At the same time, it does not regard the pursuit of profit or economic prosperity as inherently immoral or antisocial. Instead, it is based on the understanding that market structures are shaped by political decisions implemented through legal rules and frameworks. It also emphasizes that both the creation and redistribution of wealth depend on political decisions, while being simultaneously influenced by economic conditions and having economic consequences.

Moreover, the article asserts that the ‘economic’ should not be narrowly interpreted as merely ‘pro-business’, ‘pro-capital’, or ‘pro-profit’, but rather as concerned with the principles guiding how decisions upon the allocation of scarce resources (tangible, intangible, or human) are made in order to maximize value (encompassing both productivity and overall welfare). From this perspective, even the ‘social’ is inherently economic since social policies are also linked to the allocation and redistribution of scarce resources, taking costs and benefits into account. Consequently, socio-economic rights must be understood as integrating both elements contained in their name, i.e. as being both social (protecting individuals who are members of the society) and economic (having an economic rationale and economic implications).

In this context, the article seeks to examine the political decisions underlying the protection of socio-economic rights in the EU, and to explore how these decisions are influenced by economic conditions and what economic consequences they entail. The structure of the article is as follows. First, it provides a brief overview of the internal

market's underlying logic and the role of fundamental rights within it. Second, it presents the legal protection of socio-economic rights in the EU as the product of political decision-making across multiple interconnected levels. Third, it analyses the protection of specific socio-economic rights through an economic lens. It analyses labour rights and social security rights separately, highlighting their different relations to the economic conditions and economic implications. Finally, it points to the underlying political dimension, which should ideally take the economic one into account.

2. Setting the scene: internal market and fundamental rights

The European integration started as an economic project. The intention of integration was to create the common and then the internal market. The Treaty of Rome declared its goal to ensure (economic) prosperity of the Member States, and the common market was meant as a means to reach this goal through the reduction and eventually elimination of any obstacles hindering cross-border trade among the Member States. The Single European Act (SEA) upgraded the efforts into the form of internal market, which was defined as 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured'.

The whole political plan behind the integration reflected certain economic assumptions and economic theories, arguably having its roots mainly in *ordo-liberalism*¹ or at least getting some inspiration from *ordo-liberalism*:² the reduction of barriers to the cross-border trade enables free movement of factors of production among the Member States – the capital moves where a higher return of investment is expected, and the workers move where they can earn higher wages. At the same time, the free movement of goods and services means that the producers can reach a broader range of potential consumers. Moreover, the free competition among producers promises an advantage for the consumers, since they have a better access to goods or services of a lower price and/or higher quality. Overall, the idea of free movement of both factors of production and production itself is based on the pursuit of so-called allocative efficiency, which in economic terms means that (scarce) resources are allocated where their value is

¹ P Nedergaard, 'The Influence of Ordoliberalism in European Integration Processes - A Framework for Ideational Influence with Competition Policy and the Economic and Monetary Policy as Examples' (2013) MPRA Paper No. 52331; A Lechevalier, 'Eucken under the Pillow: The Ordoliberal Imprint on Social Europe' in A Lechevalier and J Wielgohs (eds), *Social Europe - a Dead End: what the eurozone crisis is doing to Europe's social dimension* (DJØF 2015).

² *Ordo-liberalism* itself is not an entirely uniform or coherent movement. For an argument that at least two distinct paradigms of *ordo-liberalism* have influenced European economic integration, see primarily F Bruno, 'Ordoliberal Ideas on Europe: Two Paradigms of European Economic Integration' (2023) 49 *History of European Ideas* 737.

maximized.³ Consequently, as the economic theory explains, the allocative efficiency inevitably brings about economic growth. Against this economic background, the vision of European integration was constructed on the belief that free trade and economic exchange in a common market without internal borders would lead to the achievement of economic prosperity, which was also closely linked to the political and social stability that post-war Europe sought.⁴

At the same time, the ordo-liberal blueprint – albeit its real impact being contested⁵ – required that the free exchange of production and of the factors of production need to be supported by the strong state and strong public institutions, which would guarantee that the exercise of any of the four freedoms brings about the desired economic welfare. Within the European integration, the liberalization was not conceived as clearly separating the economic interests from the political ties as such,⁶ but rather as an attempt to liberate the market from political constraints having its origin at the national level.⁷

Neither economic ideas on their own nor in conjunction with political power could succeed without the framework of law and legal institutions. In this context, the political power must have translated the economic visions into laws and legal rules. Indeed, the internal market is not only an economic concept, but also – and maybe foremost – a legal concept,⁸ which is embedded in primary law, and hence it has a constitutional value in EU law. In the current version of primary law, Article 3(3) of the Treaty on European Union (TEU) obliges the Union to establish an internal market aimed at promoting the sustainable development of Europe based on, among others, ‘balanced economic growth and price stability’. The legal definition of the internal market, which practically copies the definition mentioned already in the SEA, appears in Article 26(2) of the Treaty on the Functioning of the European Union (TFEU). And the TFEU also elaborates upon the (fundamental) economic freedoms which shall be ensured in the internal market: the free movement of goods (Articles 34–36), the free movement of workers (Articles 45–48), the right of establishment (Articles 49–55), the free movement of services (Articles 56–62), and the free movement of capital (Articles 63–66).

³ R A Posner, *Economic Analysis of Law* (7th edn, Wolters Kluwer 2007) 11.

⁴ S Weatherill, *Law and Values in the European Union* (Oxford University Press 2016) 306–308.

⁵ J Hien and C Joerges, ‘Dead Man Walking? Current European Interest in the Ordoliberal Tradition’ (2018) 24 *European Law Journal* 142; J Hien, ‘The Rise and Fall of Ordoliberalism’ (2023) 22 *Socio-Economic Review* 1947.

⁶ Bruno (n 2) 740.

⁷ D Ashiagbor, ‘Unravelling the Embedded Liberal Bargain: Labour and Social Welfare Law in the Context of EU Market Integration’ (2013) 19 *European Law Journal* 303, 304–305.

⁸ S Weatherill, *The Internal Market as a Legal Concept* (Oxford University Press 2017).

The law as a means to reach economic goals together with the translation of economic ideas into rights and obligations turned up to be crucial for the European economic integration. First, the Treaties set the legal obligations of the Member States to eliminate barriers of trade, and these obligations could be directly enforced by the Commission through the system of the infringement procedure.⁹ Second, and perhaps more importantly, the new legal system – created as a combination of the provisions in the Treaties and the pro-active case law of the Court of Justice – weaponized the private parties against the Member States. The idea of free movement of goods, services, persons, and capital was converted into fundamental economic freedoms of individuals to perform such movement, i.e. into individual rights that have direct effect in the domestic legal order and are directly enforceable before national courts. In such a setting, the fundamental right to move freely among Member States gained a prominent position within legal rules, because taking advantage of such a right is deemed to bring about positive implications for the economic performance of the European Communities (EC) and later the EU as a whole.

On the contrary, fundamental human rights, which do not have direct impact upon economic growth, have had, as a whole, a fragile position in EU law since the beginning of European integration. The original Treaties were mostly silent with regard to human rights and their protection. The principle that women deserve equal payment at work as men, i.e. right to be treated equally, was recognized in the original Treaty of Rome, but even this right was supposed to serve economic goals: a Member State, which would allow for lower wages of women would gain an economic advantage because of a relatively lower level of costs of labour in general, which would restrain the idea of free competition among the Member States.¹⁰ Similarly, the prohibition of discrimination of workers on ground of nationality did not have a status of a human right, but it was based on a purely economic rationale: with regard to equal pay, it incentivized the workers to move to another Member State, and at the same time, it prevented so-called social dumping, which could raise unemployment rate in the host state, if incoming foreign workers were paid less.¹¹

Even the Court of Justice was initially reluctant to recognize fundamental human rights as an intrinsic part of EC law claiming that the Treaty does not entrust it with a mandate to protect human rights.¹² Only later, and perhaps due to a certain pressure

⁹ Currently according to Art 258 ff TFEU.

¹⁰ C Barnard, *EU Employment Law* (4th edn, Oxford University Press 2012) 643.

¹¹ F Pennings, 'How Do Social and Economic Rights Relate to Each Other in the Social Market Economy: An Introduction to This Special Issue' (2019) 15 *Utrecht Law Review* 1–2.

¹² Case 1/58 *Friedrich Stork & Cie v High Authority of the European Coal and Steel Community*, EU:C:1959:4; Case 2/56 *Mining undertakings of the Ruhr Basin being members of the Geitling selling*

from the national courts and with a view to solidify its own power,¹³ the Court of Justice was willing to admit human rights as part of general principles of EC law.¹⁴ Thanks to their recognition within general principles and later also thanks to the reference in the Maastricht Treaty,¹⁵ fundamental human rights acquired the status of primary law. However, in the logic of the internal market, fundamental rights have always remained rights of the second order, lagging behind the core of internal market and fundamental economic freedoms derived therefrom.

The protection of fundamental human rights in EU law serves mainly as a correction to potentially negative side effects of the internal market or of the performance of economic freedoms. Even after the Lisbon Treaty, which upgraded the EU Charter to primary law, the EU remains primarily an economic and political organization, not a human rights organization. The political pressure to keep this setting is noticeable in a fact that there are at least three provisions repeating that despite its status of primary law, the EU Charter does not extend or change the competences and powers of the Union as defined in the Treaties.¹⁶ Moreover, according to its Article 51(1), the EU Charter is applicable only within the scope of EU law, which means that its provisions are to be observed when another piece of EU law is in play in the first regard. As Lenaerts and Gutierrez Fons describe it metaphorically, the EU Charter ‘is the “shadow” of EU law. Just as an object defines the contours of its shadow, the scope of EU law determines that of the Charter’.¹⁷

The application of the EU Charter in individual cases hence depends on the applicability of other EU rules. In practice, the EU Charter can only be invoked when another EU rule is directly relevant to the case. This triggering element may be a Treaty provision, but it most often involves secondary legislation. Two scenarios are

agency for Ruhr coal, and the Geitling selling agency for Ruhr coal v High Authority of the European Coal and Steel Community, EU:C:1957:4; and *Case 40-64 Marcello Sgarlata and others v Commission of the EEC*, EU:C:1965:36.

¹³ A O'Neill and J Coppel, ‘The European Court of Justice: Taking Rights Seriously?’ (1992) 29 *Common Market Law Review* 669; JHH Weiler and NJS Lockhart, ‘“Taking Rights Seriously” Seriously: The European Court and Its Fundamental Rights Jurisprudence – Part II’ (1995) 32 *Common Market Law Review* 579.

¹⁴ *Case C-29/69 Erich Stauder v City of Ulm - Sozialamt*, EU:C:1969:57.20; and *Case C-11/70 Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, EU:C:1970:114.

¹⁵ Art F(2) Treaty on the European Union (1992).

¹⁶ Art 6(1) TEU, Art 51(2) EU Charter, and Declaration no. 1 annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007.

¹⁷ K Lenaerts and JA Gutierrez Fons, ‘The Place of the Charter in the EU Constitutional Edifice’ in S Peers, T Herve, J Kenner and A Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart 2014) 1567.

possible: first, secondary legislation directly elaborates on fundamental rights, concretizes them, or translates EU Charter principles into enforceable rights, hence aligns with the very purpose of the EU Charter.¹⁸ Second, the EU Charter is activated by secondary legislation of any subject matter that might produce negative side effects infringing fundamental rights. It follows that while the EU Charter holds the status of primary law, sets the ultimate standard, with which all EU rules must be compatible, and ensures the transversal application of fundamental rights across EU policies, its application in individual cases remains accessory to the application of ‘more substantive’ EU rules.

3. Socio-economic rights in EU law: a legal result of a political decision

The provision of the TEU, which mandates the Union to establish an internal market (Article 3(3)) adds that the task of the Union is also to combat social exclusion and discrimination, to promote social justice and protection, gender equality or solidarity between generations. However, the status and power of socio-economic rights derived from this task remain relatively weak.

As the history shows, the social dimension of the economic project was discussed even in the early years of integration, but most aspects of social policy were kept in the hands of the Member States.¹⁹ Although measures for coordinating social security among the Member States were already adopted as in the 1950s,²⁰ they primarily focused on ensuring equal treatment between domestic and migrant workers, with the goal of eliminating discriminatory social security provisions that could hinder labour mobility. The choice of form of social security arrangements and of conditions to claim entitlements of social policy was left to the national level. In other words, while the creation of economic wealth was meant to be a common interest, its re-distribution remained a matter of the national political decisions. Anyway, the employment of the principle of non-discrimination based on the nationality and the whole idea to coordinate social security among the Member States had – again – an

¹⁸ Cf. E Muir, ‘The Fundamental Rights Implications of EU Legislation: Some Constitutional Challenges’ (2014) 51 *Common Market Law Review* 219; E Muir, ‘Winds of Treaty Change? Taking Fundamental Rights in the EU yet More Seriously’ (2023) 30 *Maastricht Journal of European and Comparative Law* 543; Y Lorans, ‘Le législateur européen et la protection des droits fondamentaux dans l’Union : vers une concrétisation législative de la Charte’ (2021) 57 *Revue trimestrielle de droit européen* 59.

¹⁹ More about this in F De Witte, ‘The Architecture of the EU’s Social Market Economy’ in P Koutrakos and J Snell (eds), *Research Handbook on the Law of the EU’s Internal Market* (Edward Elgar Publishing 2017) 121–124.

²⁰ Council Regulation No. 3 of 16 December 1958 on the Social Security of Migrant Workers; Council Regulation No. 4 of 16 December 1958 Laying Down the Implementing Procedures and Supplementing the Provisions of Regulation No. 3 on the Social Security of Migrant Workers.

economic rationale: the risk of losing social security when moving to another Member State could prevent the worker from performing such movement, which would go against the very idea of economic integration.

Even in the early stages of the integration, the idea of free movement of workers enlightened the fact that the workers not only embody factors of production, but they are also human beings and members of the society with social needs, and this must be reflected at the EC level. The growing concerns related to potentially negative repercussions of the free movement of workers, which became acute in the 1980s mainly with the advent of the SEA,²¹ led eventually to the adoption of the Community Charter of the Fundamental Social Rights of Workers ('Community Charter') in 1989. However, the Community Charter did not have binding legal force, and it presented solely a document of a declaratory nature or rather an action plan. Its provisions needed to be further elaborated into legislative acts, where some social rights of workers were finally recognised as justiciable rights.²² Even if, e.g., the right to annual paid leave and other rights related to working time,²³ occupational health and safety,²⁴ protection of pregnant workers²⁵ and younger workers,²⁶ or rights of posted workers²⁷ were embedded in legally binding acts, these rights remained, in the hierarchy of individual rights in the EU, on the second position behind fundamental economic freedoms, which have always kept the status of primary law.

Another attempt to equalize the status of social or socio-economic rights came with the adoption of the EU Charter. The political negotiations around the EU Charter and its role in EU law highlighted a major contentious issue of whether social and

²¹ For an historic overview, see, e.g. J Krommendijk, 'Principled Silence or Mere Silence on Principles? The Role of the EU Charter's Principles in the Case Law of the Court of Justice' (2015) 11 *European Constitutional Law Review* 321, 323–324.

²² Cf. S Garben, 'Balancing Fundamental Social and Economic Rights in the EU: In Search of a better method' in B Vanhercke, D Ghailani, S Spasova and R Pochet (eds), *Social policy in the European Union 1999-2019: The Long and Winding Road* (European Trade Union Institute 2020) 57.

²³ Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time, later repealed by Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time.

²⁴ Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work.

²⁵ Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC).

²⁶ Council Directive 94/33/EC of 22 June 1994 on the protection of young people at work.

²⁷ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

socio-economic rights should be or even can be included in the EU catalogue of fundamental rights, which was supposed to gain the power of primary law.

Some Member States welcomed including these rights into EU primary law as a step to balance the initially uneven relation between the economic (here understood mostly as encompassing capital) and the social (covering the interests of workers/individuals) in EU law, and to address the so-called social deficit. The opposing camp, including mainly the UK and Poland,²⁸ but with reservations also from the Netherlands or Denmark,²⁹ pointed to the fact that social rights are ‘costly’,³⁰ and their real enforcement is practically dependent on the economic performance and budgetary possibilities of individual Member States, which – they believed – precluded these rights from being enshrined as EU fundamental rights.

The opposing opinions are, in any case, part of a stream of belief that social or socio-economic rights can never have a proper place among rights, which are fully embedded in respective constitutions and are directly enforceable based on their constitutional value. The reason for this belief is that socio-economic rights cannot be considered ‘real rights’, because this category is reserved solely for civil and political rights, which require negative obligations from the state, i.e. not to interfere with such rights.³¹ Sometimes such rights are labelled ‘programmatic rights’ or even ‘rights on paper’,³² because they need to be transposed into proper legal entitlements through legislative acts and cannot be justiciable based on their mere reference in a catalogue of human rights. In this perspective, socio-economic rights are not considered self-standing rights not only because they require a further action by public powers but also because such an action is dependent on policy choices and allocation of resources based on prioritisation, which can vary in time.³³ Similarly, one can find

²⁸ Their reservations eventually led to the arrangement of protocol (no. 31) attached to the Lisbon Treaty in order to be protected against the direct effect of socio-economic rights. But the protocols only repeat the clause already included in Art 51(1) of the EU Charter. In Dougan’s words, ‘the Protocol emerges as a fantasy solution to a fantasy problem’ (M Dougan, ‘The Treaty of Lisbon 2007: Winning Minds, Not Hearts’ (2008) 45 *Common Market Law Review* 617, 670).

²⁹ For the overview of opposing opinions, see Krommendijk (n 21) 324.

³⁰ For a summary of such opinions and their critical assessment see S Koukoulis-Spiliotopoulos, ‘Les droits sociaux: droits proclamés ou droits invocables? Un appel à la vigilance’ in B Favreau (ed), *La Charte des droits fondamentaux de l’Union européenne après le traité de Lisbonne* (Bruylant 2010) 288.

³¹ M Nowak, ‘Social Rights in International Law: Categorization versus Indivisibility’ in Christina Binder and others (eds), *Research Handbook on International Law and Social Rights* (Edward Elgar Publishing 2020) 9.

³² F Ferraro, ‘The Social Dimension of Fundamental Rights in Times of Crisis’ in S Civitarese, M. and S Halliday (eds), *Social rights in Europe in an age of austerity* (Routledge 2018) 208.

³³ Cf. P Goldsmith, ‘A Charter of Rights, Freedoms and Principles’ (2001) 38 *Common Market Law Review* 1201, 1213.

arguments that social rights should be considered principles, since they can be materialized by specific policies according to the level of the economic and social development of the concrete state.³⁴

In any event, the arguments related to the alleged resource-dependency of socio-economic rights, and hence to the budgetary conditions of the Member States, eventually led to a kind of political compromise.³⁵ On the one hand, provisions on social rights were kept in the text of the EU Charter, and, on the other hand, the EU Charter includes a differentiation between provisions including subjective rights and provisions including mere principles. Article 52(5) EU Charter clarifies that provisions containing principles ‘may be implemented by legislative and executive acts’ by the EU institutions or by national institutions, when they implement EU law. By that Article, the institutions are invited to elaborate the (vague) principles further into (concrete) rights and to specify conditions for their exercise or enforcement. While (subjective) rights included in the EU Charter can be directly invoked by an individual before courts, principles are ‘judicially cognisable’ only as interpretative tools when applying legislative or executive acts, in which principles are elaborated into subjective rights, or as a yardstick for the assessment of legality of those acts.

The question is whether all social or socio-economic rights included in the EU Charter can really be considered as mere principles, which require further elaboration into subjective rights. In his opinion in case *Association de médiation sociale* (AMS), AG Cruz Villalón asserted that the social rights included in the Solidarity chapter of the EU Charter are connected to a ‘strong presumption’ that they belong to the category of principles.³⁶ He pointed out to the constitutional traditions of the Member States, which indicate that social rights related to the social policy can operate only when they are followed by action or implementation by public authorities. Therefore, those social rights as such cannot be directly enforced by individuals unless they are implemented into a form of subjective rights through the acts of public authorities. In the words of the AG, social rights are rights ‘by virtue of their subject-matter’, but since they are not directly enforceable, they must be considered principles ‘by virtue of their operation’.³⁷

However, this ‘strong presumption’ is easily rebutted when looking at the individual provisions of the Solidarity chapter and the case law interpreting them. While the differentiation between rights and principles can be viewed as reaching a political compromise in the time of drafting of the EU Charter, the reality shows that while

³⁴ C McCrudden, ‘The Future of the EU Charter of Fundamental Rights’ (2002) Jean Monnet Working Paper at jeanmonnetprogram.org (last accessed 17 April 2025)

³⁵ Krommendijk (n 21) 326.

³⁶ Opinion of AG Cruz Villalón in Case C-176/12 *Association de médiation sociale v Union locale des syndicats CGT and Others*, EU:C:2013:491, para 55.

³⁷ *Ibid* para 45.

some of socio-economic rights are left to the Member States and recognized by EU law as principles, some other are even apt to gain a status of subjective rights invocable even in horizontal relations.

A closer look shows that the ‘social’ chapter of the EU Charter, labelled as ‘Solidarity’, groups provisions of different nature and of different legal quality. Concerning the subject-matter, most of the provisions refer to classic rights of workers in employment relations: right to information and consultation within the undertaking (Article 27); right of collective bargaining and action (Article 28); the right to access to a free placement service for job applicants (Article 29); protection in the event of unjustified dismissal (Article 30); right to fair and just working conditions, including a right to paid annual leave (Article 31); prohibition of child labour and protection of young people at work (Article 32); protection from dismissal for a reason connected with maternity and the right to paid maternity leave and parental leave (Article 33(2)).

In addition to labour rights, the chapter on solidarity also refers to the legal, economic and social protection of the family (Article 33), it recognises and respects the right to social security benefits and social services (Article 34) and includes various other rights or principles of a ‘social nature’, such as the right to health care (Article 35), environmental protection (Article 37) or consumer protection (Article 38). Some other rights of social nature or with social aspects can be found in other chapters of the Charter, e.g. freedom to choose an occupation and right to engage in work (Article 15); equality between men and women in employment, work and pay (Article 23); or the rights of the elderly (Article 25).

When it comes to the differentiation between subjective rights and mere principles, which must be elaborated into proper rights in legislative measures, it is necessary to look behind the text of provisions. The Explanations to the EU Charter, a legally non-binding document, which must, however, ‘be given due regard by the courts’ (Article 51(7)), points out that the environmental protection (Article 37) includes a typical principle. Furthermore, the document admits that the provision on the family and professional life (Article 33) or the provision on the social security and social assistance (Article 34) contain both elements of a right and of a principle.

So far, the Court of Justice has been mostly avoiding stating explicitly that a concrete provision entails a mere principle. The only recognition of a principle seems to be in *Glatzel*, where the Court of Justice explained that the wording of Article 26 EU Charter, according to which ‘the Union recognises and respects the right of persons with disabilities’, means that this provision does not entail an invokable subjective right. Although the provision refers to the right, it is, according to the Court of

Justice, a principle that is only recognised and respected at the level of the EU Charter, and its applicability is dependent on EU or national legislation, which would give it more specific expression.³⁸

Otherwise, the line between rights and principles remains rather unclear. However, regardless of whether a provision contains a ‘right’ or an ‘element of a right’, the case law seems to accentuate mostly the issue of whether the given provision refers to a right, which can function as a stand-alone claim in the national proceedings, i.e. whether there is a right that is invocable as such based on the EU Charter itself without the necessity to ‘materialise’ this right in secondary legislation or national legislation. Going back to the provisions contained in the Solidarity chapter, the right to paid annual leave, enshrined in Article 31(2), is an example of such a perfectly invocable right as confirmed in the recent case law.³⁹ Not only is this right ‘an essential principle of EU social law’,⁴⁰ but it is a fundamental right of its own which is directly applicable even in horizontal relations.⁴¹

According to the Court of Justice, the reason for this conclusion lies also in the fact that Article 31(2) does not refer to the necessity to imprint the right into legislative acts. Such a reference, on the contrary, is included in Article 27 on the workers’ right to information and consultation within the undertaking, which explicitly states that such a right is guaranteed ‘under the conditions provided for by Union law and national laws and practices’. Interestingly, in the opinion of AG Cruz Villalón, this reference to Union and national law makes the whole provision a principle.⁴² On the other hand, the Court of Justice merely asserts that the provision requires more specific expression of the right in EU law or national law to be fully effective,⁴³ which means that Article 27 does not ‘confer on individuals a right which they may invoke as such’,⁴⁴ but it does not call it a principle explicitly. In Kenner’s observation, ‘Article 27 [...] appears to

³⁸ Case C-356/12 *Wolfgang Glatzel v Freistaat Bayern*, EU:C:2014:350, paras 74–78.

³⁹ Joined Cases C-569/16 and C-570/16 *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn*, EU:C:2018:871; Case C-684/16 *Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v Tetsuji Shimizu*, EU:C:2018:874; and Case C-218/22 *Comune di Copertino* EU:C:2024:51.

⁴⁰ *Bauer and Willmeroth* (n 39) para 58.

⁴¹ D Leczykiewicz, ‘Horizontal Application of the Charter of Fundamental Rights’ (2013) 38 *European Law Review* 479; S Prechal, ‘Horizontal Direct Effect of the Charter of Fundamental Rights of the EU’ (2020) 66 *Revista de Derecho Comunitario Europeo* 407; E Frantziou, ‘(Most of) the Charter of Fundamental Rights Is Horizontally Applicable: ECJ 6 November 2018, Joined Cases C-569/16 and C-570/16, *Bauer et Al*’ (2019) 15 *European Constitutional Law Review* 306.

⁴² AG Cruz Villalón in *Association de médiation sociale* (n 36) paras 63 and 65.

⁴³ Case C-176/12 *Association de médiation sociale v Union locale des syndicats CGT and Others*, EU:C:2014:2, para 45.

⁴⁴ *Ibid* para 47.

blur the rights/principles distinction'.⁴⁵ Remarkably, later in the *Glatzel* case, the Court of Justice used the very same reasoning and even quoted the *AMS* case while referring to the 'principle' (of the integration of persons with disabilities).⁴⁶ So, even if the Court did not explicitly endorse the definition of a principle proposed by AG Cruz Villalón in *AMS*, its subsequent case law tends to indicate that it aligns with his approach.

In any case, whether a provision embodies a principle requiring further elaboration through legislation, or a right calling for more specific expression in such legislation, it implies – in both cases – that the provision itself does not confer a subjective right to be invoked before courts on its own. It follows that when a principle is transformed into a subjective right through EU secondary legislation, or when a right is given more specific expression in such legislation,⁴⁷ it signifies, in both cases, that a right of a social or socio-economic nature derives its enforceability from EU secondary law. From a purely formal or legalistic perspective, such social or socio-economic rights have a lesser value than fundamental economic freedoms, which are embedded in primary law, and have a direct effect based on the primary law itself. When principles or rights calling for further elaboration become operational only through the national legislation, their legal status is even weaker.

To date, the only fundamental socio-economic right that appears to hold the status of primary law based on the EU Charter itself is the right to paid annual leave. While this right does not require specific expression in legislation to be fully effective and is directly applicable even in horizontal relations, it still cannot be invoked in isolation before a court. This limitation arises from the accessory nature of fundamental rights and the mechanisms for their protection under EU law. As already recalled above, the provisions of the EU Charter apply to a case only if it falls within the scope of EU law,⁴⁸ and a case is considered within this scope only if another relevant piece of EU law is applicable to it in the first place. Given the nature of the right to paid annual leave, it is difficult to envision a situation where it would be invoked with a link to an EU law measure other than the Working Time Directive.⁴⁹

⁴⁵ J Kenner, 'Economic and Social Rights in the EU Legal Order: The Mirage of Indivisibility' in T Hervey and J Kenner (eds), *Economic and social rights under the EU Charter of Fundamental Rights: a legal perspective* (Hart Publishing 2003) 19.

⁴⁶ *Glatzel* (n 38) para 78.

⁴⁷ E Muir, 'The Fundamental Rights Implications of EU Legislation' (n 18).

⁴⁸ B De Witte, 'The Scope of Application of the EU Charter of Fundamental Rights' in M González Pascual and A Torres Pérez (eds), *The right to family life in the European Union* (Routledge 2017); B Pirker, 'Mapping the Scope of Application of EU Fundamental Rights: A Typology' (2018) 3 *European Papers* 133, 156.

⁴⁹ Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time.

The horizontal direct effect of the EU Charter's provisions primarily addresses situations where this directive has not been properly transposed into national law. With the aim to circumvent the problem that the provisions of the directive lack horizontal direct effect, an individual can invoke Article 31(2) of the EU Charter even in horizontal relations.

It follows that even from a legal perspective, the Solidarity chapter of the EU Charter does not contain a homogenous group of socio-economic rights, because different provisions have different legal status. There are several axes, which explain the differences. First, it matters whether the given socio-economic right is of a labour law nature or falls under social security. Second, it is important to distinguish between a right that can be directly relied upon before a national court and a right or principle that requires specific expression in legislation. Third, it is crucial to determine whether this specific expression is contained in EU secondary legislation or left to national legislation. In any case, as it holds true for the EU Charter as a whole, the applicability of all socio-economic rights depends on the application of another measure of EU law. Therefore, regardless of how relatively strong the individual provisions of the Solidarity chapter may be, they retain an accessory character and, despite having the status of primary law, they require legislative action either at the EU or national level to become fully operational.

4. Socio-economic rights from an economic perspective

Variations among socio-economic rights are also evident from an economic perspective. The most visible are those related to the subject matter of the 'social' provisions and the rights or principles they encompass. Most of the provisions in the Solidarity chapter concern work-related rights with a strong economic and even pro-market element. They must be distinguished from provisions calling for 'genuine solidarity', such as the provision referring to social security and social assistance. While both these categories have a strong economic dimension and are closely tied to the economy as a whole, they do so in distinct ways.

4.1. Labour rights through an economic lens

Labour rights protect either current workers, i.e. those who are economically active, or jobseekers, i.e. those who are willing and objectively able to enter the explicit labour market.⁵⁰ Since labour rights are closely linked to workers as economic

⁵⁰ On the issue of labour beyond the explicit labour market, see K Rittich, 'In the Middle of Things: The Political Economy of Labour beyond the Market' (2022) 1 *European Law Open* 781.

agents, the exercise of such rights inevitably leads to economic implications. As economic studies show, labour laws and labour standards in general can have both positive and negative effects – both on different individuals and on the economy as a whole; they can be assessed differently depending on whether the perspective is microeconomic or macroeconomic; and they can manifest themselves differently in the short term compared to the long term.⁵¹ In any case, it is not the purpose of this paper to go into the details of how concrete labour rights affect the internal market, and the whole economy of the EU. The following lines will only highlight the economic dimension of the work-related rights protected by the EU Charter.

Looking at the protection of labour rights through a microeconomic lens leads to several remarks related to the costs of the respect of these rights by the employer, but with a varying intensity depending on the content of a concrete right. At the same time, the recognition and use of such rights is likely to have even macroeconomic repercussions. Let us closely look at three labour rights: the right to information and consultation (Article 27), the right to fair and just conditions (Article 31) and the right of collective bargaining and action (Article 28).

The right to information and consultation implies an obligation on the part of the employer to provide such information and thus to engage in a certain positive behaviour, which may entail some costs. However, the mere fulfilment of such an obligation does not jeopardise the employer's economic activity in general, could not endanger its economic interests covered by EU law, and hence could not affect the economic performance of the EU as a whole. Moreover, the respect of this right strengthens the bargaining power of the employee, and hence it has a pro-market effect in general.

With regard to the right to fair and just working conditions (including right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave), the exercise of this right affects the economic activity of the employer to a greater extent. Firstly, the limitation of maximum working hours has an impact on the organisation of production. Secondly, the right to an annual period of paid leave means that the employer must also pay for the time when the employee does not perform any tasks. However, while respecting the right to fair working conditions may entail costs for the employer in the short term, it protects the employer's interests in the long term: allowing an employee to take a break is not only an act of solidarity with a worker who happens to be a human being but also

⁵¹ See the overview of the economic literature in S Deakin and F Wilkinson, 'Right vs Efficiency? The Economic Case for Transnational Labour Standards' (1994) 23 *Industrial Law Journal* 289. For a more recent empirical study see, e.g., Z Adams, L Bishop, S Deakin, C Fenwick, S Martinsson Garzelli and G Rusconi, 'The Economic Significance of Laws Relating to Employment Protection and Different Forms of Employment: Analysis of a Panel of 117 Countries, 1990–2013' (2019) 158 *International Labor Review* 1.

has a positive impact on economic performance in general. It does not require a robust empirical analysis to conclude that a worker, who has had sufficient rest, is likely to be more efficient, less likely to make mistakes and less likely to cause damage to the employer. As the economic studies show, the reduction of working hours and flexible working arrangements really increase the productivity, and therefore they have positive effects on the economic performance of the firm.⁵² From a broader perspective, efficient production of one firm contributes to the good economic performance of the whole society.⁵³

A socio-economic right, which appears to be extremely interesting from an economic perspective is the right of collective bargaining and to strike. In general, the purpose of the collective action is based on the presumption that there is a significant imbalance in bargaining power between a worker and an employer.⁵⁴ As an individual, a worker has a weaker position with regard to negotiating the wage or the working conditions. The collective action allows for workers to unite and use the aggregated power in the negotiations with the formally stronger employer. Therefore, the exercise of the right of collective action helps to equalize the weapons on both sides. Furthermore, as shown in a study made for the Organisation for Economic Co-operation and Development (OECD), collective bargaining – if it is performed according to well set rules – can even increase productivity, improve skills in the workplace, spread good practices, and in the long term, it can lead to the decrease of unemployment.⁵⁵ Deakin adds that the positive impact on employment and productivity can be induced by the fact that the unionizing and the collective action support or increase motivation and commitment of workers.⁵⁶ In this sense, collective bargaining is a perfect pro-market tool, and not something that would go – *prima facie* – against the values or the pillars of the internal market as a whole.⁵⁷

⁵² See e.g. L Golden, 'The Effects of Working Time on Productivity and Firm Performance: A Research Synthesis Paper' (2012) ILO: Conditions of Work and Employment Series No. 33 at www.ilo.org.

⁵³ S Deakin, J Malmberg and P Sarkar, 'How Do Labour Laws Affect Unemployment and the Labour Share of National Income? The Experience of Six OECD Countries, 1970–2010' (2014) 153 *International Labour Review* 1, 17.

⁵⁴ T Novitz, *International and European Protection of the Right to Strike: A Comparative Study of Standards Set by the International Labour Organization, the Council of Europe and the European Union* (Oxford University Press 2003) 49.

⁵⁵ OECD, 'Good Jobs for All in a Changing World of Work: The OECD Jobs Strategy' (OECD 2018) at www.oecd-ilibrary.org (last accessed 13 February 2024).

⁵⁶ S Deakin, 'The Contribution of Labour Law to Economic Development and Growth' in R Blanpain, F Hendrickx and D Du Toit (eds), *Labour law and social progress: holding the line or shifting the boundaries?* (Kluwer Law International BV 2016).

⁵⁷ However, for an opinion that trade unions are negatively affecting markets similarly to cartels, see R Epstein, 'A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation' (1983) 92 *Yale Law Journal* 1357.

However, the exercise of the right to strike can also have negative implications. The strike directly affects the firm by limiting or even stopping the production, and it can bring about additional costs (related, for example, to the contractual penalty for late delivery of goods). A strike, which lasts too long, can even lead to the bankruptcy of the firm, which results in a loss of jobs and thus in the increase of unemployment. Next, a strike can negatively impact consumers and also other firms within the supply chain.⁵⁸ The overview of both positive and negative aspects of the right of collective bargaining and the right to strike show that the concrete parameters of the exercise of such rights must be set carefully, and that the exercise itself must always be assessed in the light of its consequences.

The economic dimension of the right to strike in relation to the internal market rationale was even discussed in a series of cases before the Court of Justice: *Laval*,⁵⁹ *Viking*,⁶⁰ and *Rüffert*.⁶¹ The *Laval* case involved a Latvian company that posted workers to Sweden for construction work but did not want to abide by Swedish collective agreements, which led to collective action by the trade unions. A similar collective action was triggered by a decision by *Viking Line*, a Finnish shipping company, to reflag its vessels to Estonia in order to pay lower wages under Estonian rules. Finally, the *Rüffert* case concerned a public contract in Germany that required contractors to pay wages in accordance with local collective agreements; a subcontractor from Poland employed workers at lower wages, and this led to the question of whether the contractual requirement violated the freedom to provide services. Although the cases were decided before the EU Charter came into effect, and hence before the right of collective bargaining and action was formally recognised as an EU fundamental right, the reasoning of the Court is still worth reminding mostly because it reveals the uneven relation between fundamental economic freedoms and socio-economic rights, and the political dimension behind.

Simply put, in legal terms, all three cases included a clash between freedom of establishment or freedom to provide services on the one hand and right of collective bargaining and to strike on the other hand. In economic terms, the cases involved an effort on the part of the companies to reduce costs by paying lower wages, and a counter-effort on the part of the workers to obtain higher (or at least not lower)

⁵⁸ For a detailed overview of potential threats or harms of the strike, see T Novitz (n 54) 75 ff.

⁵⁹ Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, EU:C:2007:809.

⁶⁰ Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, EU:C:2007:772.

⁶¹ Case C-346/06 *Dirk Rüffert v Land Niedersachsen*, EU:C:2008:189.

wages. The nature of the interest at stake on both sides was virtually the same: economic gain. However, the Court of Justice applied the asymmetrical internal market balancing formula, in which the economic interest covered as a socio-economic right did not have a chance to win.

These cases induced a wave of criticism,⁶² mostly framed as a loss of social Europe against ‘market Europe’.⁶³ The commentators remarked that the Court of Justice ‘gave precedence to market freedoms over social objectives’⁶⁴ or that its approach ‘structurally subordinates social policies to the economic power of market actors’.⁶⁵ From an economic perspective, however, the clash of values in these cases can be presented not as a struggle between the ‘economic’ and the ‘social’, but rather as a struggle between two unequal economic powers. Even workers, united in trade unions, represent market actors with economic interests, but their position in the balancing test is weaker.

According to some commentators, the weaker position of trade unions and eventually the very result of the balancing test can be explained by (perhaps unconscious) inclination of the Court of Justice towards the neoclassical/neoliberal economic theory: as Kaupa puts it with regard to the *Viking* case, neither the textual, nor the teleological interpretation of the provisions on fundamental economic freedoms in the Treaty leads to a clear-cut conclusion that the exercise of the right of collective bargaining and the right to strike can never prevent the relocation/re-flagging of the companies and it is ‘only from a neoclassical perspective that the decision appears inevitable’.⁶⁶ He also points out that albeit the ‘neoclassical bias’ is rather implicit in the text of the judgment in *Viking*, it appears to be more visible in the opinion of the Advocate General who

⁶² Out of many, see, e.g. M Lasser, ‘Fundamentally Flawed: The CJEU’s Jurisprudence on Fundamental Rights and Fundamental Freedoms’ (2014) 15 *Theoretical Inquiries in Law* 1; S Giubboni, ‘The Rise and Fall of EU Labour Law’ (2018) 24 *European Law Journal* 7; C Barnard, ‘EU Employment Law and the European Social Model: The Past, the Present and the Future’ (2014) 67 *Current Legal Problems* 199. For an overview of the reactions and comments, see C Barnard, ‘The Calm after the Storm: Time to Reflect on EU (Labour) Law Scholarship Following the Decisions in *Viking* and *Laval*’ in A Bogg, C Costello and A Davies (eds), *Research handbook on EU labour law* (Edward Elgar publishing 2016).

⁶³ J Louis, ‘Constructing the *Viking* and *Laval* Cases as a Major Defeat for Social Europe: A Contextual and Processual Analysis’ (2023) 2 *European Law Open* 724.

⁶⁴ Garben (n 22) 61.

⁶⁵ F De Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (Oxford University Press 2015) 38.

⁶⁶ C Kaupa, ‘Maybe Not Activist Enough? On the Court’s Alleged Neoliberal Bias in Its Recent Labor Cases’ in M Dawson, B de Witte and E Muir (eds), *Judicial Activism at the European Court of Justice. Causes, Responses and Solutions* (Edward Elgar Publishing 2013) 66.

claims that ‘the exercise of the right to freedom of establishment is [...] instrumental to increasing the economic welfare of all the member states’.⁶⁷

The judgment in *Viking* does not elaborate upon the link between the exercise of the economic freedom and the resulting economic welfare, but it still considers it ‘indisputable’ that the collective action ‘has the effect of making less attractive, or even pointless [...] Viking’s exercise of its freedom of establishment, because it prevents Viking [...] from enjoying the same treatment in the host Member State as other economic operators established in that State’.⁶⁸ Mulder points to critiques according to which the judgment reflects a ‘renewed neoclassical economic theology of free markets’ in the light of which ‘the constitutional foundation of the European Union has converted economic power into a fundamental right and collective labour rights are today considered mostly as an obstructive power that have to be limited’.⁶⁹

It follows from the judgment that the economic interest of the workers to keep their original wages was not taken into account, because only the pursuit of reducing production costs is considered as the main value contributing to the economic welfare in the EU. The presentation of the conflict as an opposition between the economic (represented by firms) and the social (represented by workers) seems to be based on the idea that only producers (firms/companies) are responsible for economic growth and prosperity in general.

In any case, the reasoning of the Court of Justice gives the impression that the internal market and the content and contours of the fundamental economic freedoms together constitute a perfectly neutral setting, which is exempt from and independent of any political decisions,⁷⁰ and that such a neutral system will inevitably bring about economic welfare. However, as critics of the neoclassical approach or proponents of alternative economic theories point out, there are other forces that can contribute to economic welfare, such as strong institutions, re-distribution, investment into innovations, or the reinforcing of the demand side of the market.⁷¹ It is therefore important to emphasize that the choice of the allegedly neoclassical perspective, even if it may have been rather unconscious within the EU judiciary, represents a deeply political decision.

⁶⁷ Opinion of AG Maduro in Case C-438/05 *International Transport Workers’ Federation and Finnish Seamen’s Union v. Viking Line APB*, EU:C:2007:292, para 57.

⁶⁸ *Viking* (n 60) para 72.

⁶⁹ J Mulder, ‘Unity and Diversity in the European Union’s Internal Market Case Law: Towards Unity in “Good Governance”?’ (2018) 34 *Utrecht Journal of International and European Law* 4, 20.

⁷⁰ B Bugarcic, ‘Europe Against the Left? On Legal Limits to Progressive Politics’ (2013) LEQS Paper No. 61/2013, 12 at eprints.lse.ac.uk (last accessed 5 May 2025).

⁷¹ For the overview of such economic theories and their main arguments, see Kaupa (n 66) 62.

Regardless of the critiques, these cases and their judicial outcomes nicely illustrate the interrelationship between economic considerations, political decision-making and legal solutions when it comes to labour rights in EU law. In the absence of a predetermined legal rule for resolving the conflict between a fundamental economic freedom and a fundamental right with economic implications, it fell to the Court of Justice to determine the resolution. However, even the judicial decision required a political choice on how to address the conflict between two competing economic interests through a legal framework. The balancing exercise and its outcome demonstrate that even judicial decision-making contributes to the shaping of the overall political economy of the EU.

4.2 Economic conditions for and economic implications of social security rights

In contrast to provisions on labour rights, the provision of social security and social assistance (Article 34) recognises rights of those who are – for various reasons – not present or active in the explicit labour market, and therefore are not direct contributors to the economic performance of the whole society, or those who are economically active but are entitled to additional form of social security (housing benefits, child benefits) anyway.⁷² It does not matter whether a claimant is an economically active worker or not. The key point is that such rights are not dependent on the active performance in the labour market and do not require any specific economic activity as a counter-performance for the provision of such rights. In other words, an individual is either entitled to a form of access to social services (e.g. assistance in the case of loss of employment), or to social security benefits and allowances in terms of monetary contributions paid from public budgets, but such a person is not obligated to engage in any specific economic activity in exchange for these services or contributions.

These types of social rights are considered extremely costly. However, it would be incorrect to consider them ‘costly’ as opposed to ‘cost-free’ civil or political rights,⁷³ since ‘[a]ll rights are costly because all rights presuppose taxpayer funding of effective supervisory machinery for monitoring and enforcement’.⁷⁴ This means that positive obligations to protect fundamental rights require positive action of the state which is inevitably funded by the public budget. Nevertheless, the reality is that providing social benefits and similar aids can be ‘more costly’ than the protection of

⁷² See e.g. E De Becker, ‘Social Security in the Combat of In-Work Poverty’ in L Ratti and P Schoukens (eds), *Working yet poor: challenges to EU social citizenship* (Hart Publishing 2023).

⁷³ V Mantouvalou, ‘Are Labour Rights Human Rights?’ (2012) 3 *European Labour Law Journal* 151, 168.

⁷⁴ S Holmes and CR Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (WW Norton 1999) 44.

other fundamental rights, sometimes to a considerable extent. For example, as Eurostat figures from 2021 show, the expenditures on pensions, which are paid from the national budgets, vary from 4,5 % of the national Gross Domestic Product (GDP) (Ireland) to 16,4 % of the national GDP (Greece).⁷⁵ Although the payment of other social benefits do not reach the amount of pensions, it holds true that those socio-economic rights, which require monetary performance on the side of the Member State, are enormously budget dependent.

In any event, such budget dependency and considerable costs of the provision of social benefits and similar aid remain the reason why – from the political perspective – the decision upon the design of social systems, concrete social entitlements and the legal conditions for claiming them are left to the Member States. This is reflected in the wording of Article 34. According to the Explanations to the EU Charter, this provision includes both elements of a right and of a principle. A concrete right seems to be present in paragraph 2, which explicitly says that ‘[e]veryone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Union law and national laws and practices’. This implies that individuals are entitled to social security benefits under EU law, but only when they are covered by EU law through the exercise of their economic freedom to move and reside in the EU. Additionally, the provision of these benefits is dependent on the national laws that determine the specific amounts, and the conditions required to qualify for them.

The necessity to reside and move legally within the European Union in order to be covered by Article 34 only reflects the principle that the EU Charter as a whole is applicable only when the case is already within the scope of EU law. It is not in the competence of the EU to set substantive rules on the social security benefits and allowances; EU law only regulates the social security coordination⁷⁶ linked to the movement of people, and it forbids – through the principle of non-discrimination – differences in treatment based on nationality. Similarly, paragraph 1 of Article 34 says that the EU ‘recognises and respects’ the entitlements to social security benefits, while these entitlements must be based on national legislation. There is no entitlement for individuals, which could be based directly on the EU Charter, but the EU Charter only refers to principle to provide for social security.

⁷⁵ Available at Eurostat, ‘Social protection statistics - pension expenditure and pension beneficiaries’ (2024) at ec.europa.eu.

⁷⁶ Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems; Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems.

There is an interplay between the EU level and the national level, where EU law only recognises substantive social security rules set by the national laws. The economic considerations behind such rules thus remain in the national hands, since social benefits are dependent on public budgets and hence on the taxation systems and the consecutive allocation of resources. This covers spheres where the EU does not directly interfere with the Member States' policy choices, as long as the national legal rules do not violate EU law and its principles.⁷⁷

Nonetheless, viewed from the broader economic perspective and in terms of the internal market rationale, social security benefits should not be seen merely as a drain on the resources generated by economically active entities. Of course, they are dependent on the public resources collected through taxes or direct social contributions. But the economy is dynamic, not static. Money makes money, and public investment in various sectors or spheres of the society results in economic assets being recirculated within the economy. Giving money into pockets of those who are not economically active as workers (or producers in general) boosts overall economic demand. Public investments through unemployment benefits, caregiver allowances, pensions, and other social welfare programs are then translated into consumer spending. This spending, in turn, triggers a multiplier effect, further elevating the demand for goods and services.⁷⁸ As empirical economic studies confirm, social security in the form of benefits and allowances functions as an economic stimulus.⁷⁹ Moreover, since private spending is a standard part of the calculation of the GDP, it is worth noting that even a person, who is formally considered to be economically non-active and is entitled to social allowances, contributes to the GDP of the state by spending the money given by that state.

It follows that the national decisions on the social security schemes and on the amount of money invested into people through them influence the national demand, which further affects the circulation of goods and services in the EU, and therefore the EU economy as a whole. Consequently, the economic stimulus can affect back the extent of public resources, because the investment through social security returns to the public budget through taxes. *Ceteris paribus*, higher spending generates more

⁷⁷ Case C-35/19 *BU v État belge*, EU:C:2019:894, para 31.

⁷⁸ R Balakrishnan, D Elson and R Patel, 'Rethinking Macro Economic Strategies from a Human Rights Perspective' (2010) 53 *Development* 27, 37.

⁷⁹ See e.g. empirical evidence in Germany: S Gechert, C Paetz and P Villanueva, 'The Macroeconomic Effects of Social Security Contributions and Benefits' (2021) 117 *Journal of Monetary Economics* 571. For a study based on the data from the USA, see, e.g. C Romer and D Romer, 'Transfer Payments and the Macroeconomy: The Effects of Social Security Benefit Changes, 1952-1991' (2014) National Bureau of Economic Research 20087, at www.nber.org (last accessed 28 April 2024).

money collected through the value added tax (or indirect taxes in general), and enhanced demand in goods or services is apt to boost production, which generates profits that are subject to direct taxes.

Social security entitlements can also appear in non-monetary forms, such as in forms of training or re-training courses for free, or even in the form of children's daycare facilities or facilities providing for other types of care. These kinds of social services are also dependent on the budgetary conditions of the Member State, and they also have economic implications. The provision of these services enables individuals who would otherwise remain outside the explicit labour market to enter it and thereby to contribute to the economy.⁸⁰

Naturally, distributing social security benefits or social services can sometimes lead to negative outcomes or, at least, it can pose challenges. A public budget is not a bottomless pit. A decision to allocate public money into social security schemes means that those resources are not available for other sectors or areas of society where the (multiplication) effect of such a monetary boost can be bigger or where they can simply be more needed. Regarding unemployment benefits specifically, some research indicates that overly generous systems can discourage work, leading to a negative macroeconomic impact by increasing unemployment rates.⁸¹

The politics and policy choices play a crucial role here. The economic theories and the empirical evidence can provide for arguments on how to design the rules on social security and they can show what consequences the application of the rules may bring about. However, the final decision on the concrete scheme is a matter of the political choice. Against the background of the division of competences between the EU and the Member States, the power to settle such a delicate issue was left to the latter. EU law recognises and respects the social security entitlements, which are embedded in national law, rather through a pragmatic approach linked to the free movement of persons. As long as the system does not violate EU law and its principles, e.g. by dissuading individuals from free movement or by enabling discriminatory treatment, the national legislators can settle legal rules on social security on their own. The decisions upon the form and content of the solidarity remain at the national level, and EU law starts being interested in the national system only in the moment when the solidarity arrangements affect internal market principles or come into conflict with EU law in general. The main logic of EU law is highly economical and still linked to the old principles already contained in the regulations on social security

⁸⁰ K. Kalíšková and D. Münich, 'The Impact of Childcare Availability on Maternal Employment: Evidence from Czech Municipalities' (2023) 18 *PLOS ONE* 1.

⁸¹ A. Pereira and J. Andraz, 'On the Long-Term Macroeconomic Effects of Social Security Spending: Evidence For 12 EU Countries' (2015) 3 *Journal of International Business and Economics* 63.

coordination from 1950s: the threat of losing the entitlements to social security or of being subject to discriminatory treatment could prevent individuals from moving to another Member State, which would endanger the very purpose of the internal market. Derivatively, through the principle of non-discrimination, the provision of such rights is even extended to third country nationals and their family members,⁸² for which the initial economic assumption does not apply.

It follows that socio-economic rights having the character of social security remain mostly a matter of national law. They become an issue of EU law and trigger applicability of the EU Charter only in ‘qualified situations’ when they are capable of affecting legal rules, on which the internal market is based. In practice, however, even the national legal rules on social security are linked to the EU economy. Their application in the given Member State influences its economy, and the economic performance of individual Member States together has implications upon the EU as a whole.

4.3. The importance of using an economic lens in political decision-making

It is therefore evident that the social and socio-economic rights protected by EU law not only reflect the ideals of humanity and the values of a democratic society but also possess a strong economic dimension. At the micro level, they reflect the economic interests of individuals – both workers, and economically non-active persons who claim for social security benefits. The desire of workers to earn enough money under fair conditions, or to take an annual vacation while being paid, and even the need to get social benefits while being unable to work – they all represent the same kind of economic pursuit as the efforts of firms to sell more, to reduce costs, and hence to maximize profits.

At the macro level, the protection of socio-economic rights and exercising them also carry economic implications. Protecting workers can enhance their productivity, thereby improving overall efficiency of the firm, which in turn benefits the entire economy. Furthermore, the provision of social benefits can stimulate the economy by boosting aggregate demand. Naturally, there may be adverse economic effects, particularly if specific rights are exercised without appropriate limits or if the overall system lacks proper design. But these flaws somehow mirror the fact that the limitless exercise of the fundamental economic freedoms could have negative consequences as well.

⁸² Regulation (EU) No 1231/2010 of the European Parliament and of the Council of 24 November 2010 extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality.

The protection of socio-economic rights as fundamental rights under EU law has traditionally been seen as a remedy for the potentially harmful side effects of the internal market, which is designed to promote economic prosperity and, in turn, political stability and peace within the EU. From this viewpoint, the pursuit of economic objectives through the internal market is considered the primary goal, while the protection of fundamental rights, including social and socio-economic rights, is viewed as secondary. However, the analysis of social and socio-economic rights reveals that while the ‘economic’ and the ‘social’ can be put in contrast, such a sharp distinction would be incorrect. The social sphere also covers the economic interests – and this means not only the interests of the individuals claiming such rights, but also the economic interests of the whole EU. Consequently, while the protection of socio-economic rights may be formally perceived as a corrective to the exercise of economic freedoms and the functioning of the internal market, in practice, these rights are inherently economic, and they should hence be regarded as an inseparable part of the internal market.

In this context, politicians, policymakers but also judges deciding on socio-economic rights should be aware of their economic nature and familiarize themselves with both the economic conditions under which the provision of these rights is feasible and the economic implications they entail. To this end, they should work with empirical economic evidence and understand the economic arguments related to the protection and enforcement of socio-economic rights in the EU.

5. Conclusion

Social and socio-economic rights are usually seen as a regrouping of the ‘social’ value in the EU as opposed to the ‘economic’ value represented by the internal market and its rationale. The logic of the internal market is based on the idea of free competition in the market without cross-border barriers and has been translated into law through the recognition of four fundamental economic freedoms – the free movement of goods, services, persons, and capital. In other words, the economic rationale has been translated into subjective rights that have direct effect and can be invoked directly before the courts. This is based on the assumption that the free exchange of production and factors of production leads to economic growth and contributes to economic prosperity.

From the perspective of the internal market, socio-economic rights lag behind the fundamental freedoms, because they are not seen as directly contributing to the economic welfare, and because they are sometimes considered as dependent on the economic assets generated by the producers, or as limits of making these assets.

Moreover, although socio-economic rights are protected by EU law, even at the level of primary law, their content often depends on national legislation and thus on national political and policy choices, as they do not always fall within the competence of the EU.

In any event, regardless of whether socio-economic rights ‘materialize’ at the EU level or at the national level, they not only reflect the idea that people deserve a certain protection as members of the society, but they also bear a strong economic element. The exercise of some of them is dependent on public budgets, and some of them affect the production of firms. But in both cases, the protection of socio-economic rights is not a passive or negative aspect of the economy, which would consume the assets created by others. The recognition and exercise of such socio-economic rights can have a positive impact on economic performance of the society, and hence on economic welfare.

While it may be tempting to contrast the social with the economic, a closer look at the nature of socio-economic rights accentuates their economic dimension. These rights inevitably involve economic interests – but the interests of those who are usually the weaker party in economic relations. Whether it is a worker in relation to an employer or a social security claimant in relation to the State, their relationship is clearly economic in nature. Moreover, the wealth they receive in the form of wages or social benefits is not a sunk cost, because they put it back into the economy through their spending, which is also part of the economic output of society. In discussions about the internal market, socio-economic rights should not be viewed merely as barriers, limits, or obstacles to economic growth, but rather as essential economic elements in their own right.

Ultimately, the question should not be whether we can afford solidarity within the EU through legally enforceable socio-economic rights, but rather how we should design the legal system that provides them in order to achieve both the economic and social goals of the EU. Given the inherently economic nature of these rights, along with their dependence on and influence over the economy, politicians and policy-makers deciding on these rights and the conditions for claiming them should ideally be guided by economic arguments and empirical evidence.



***The Borders Within: Socio-economic Rights
and Non-discrimination in EU Law***

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**When Equal Treatment is Not Enough:
Human Dignity for Migrant EU Citizens**

*Sandra Mantu**

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ABSTRACT: Neither in EU citizenship law nor in human rights law, social rights for migrants are absolute rights. Both models accept limitations linked to the idea that states can exclude certain categories of migrants from the welfare state. Under EU law, legal residence conditions access to social rights for EU citizens, while under human rights law, migrants' social claims are linked to the idea of a dignified existence. The latter model has its own difficulties linked to requirements concerning the severity of migrants' conditions, the existence of state obligations towards them and the vulnerability of the applicant. This article examines what human dignity as a matter of EU fundamental rights can add to equal treatment for EU citizens and their social claims after the intervention of the Court of Justice of the EU in the *C.G.* case. It brings together EU law and human rights law to understand how human dignity informs the interpretation of socio-economic rights in human rights law and whether it can function as an alternative or corrective to equal treatment for migrant EU citizens. Human dignity seems to play a role for those migrant EU citizens who reside legally in another EU state, despite not meeting the conditions of EU law, and who are vulnerable. This is an exceptional route to social benefits, but one that does create a minimum of positive obligations for the host state to ensure that migrants live in dignified conditions.

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KEYWORDS: social rights – human rights – vulnerability – destitute EU citizens – dignified living conditions – EU Charter of Fundamental Rights.

1. Introduction

EU citizens are a category of migrants who, upon moving to another EU state, enjoy equal treatment with nationals of that state as a matter of primary and secondary EU law. They are much more protected than non-EU migrants who lack such a ‘constitutionalised’ right to equal treatment, and who enjoy a weaker position under EU antidiscrimination legislation.¹ Yet, when it comes to access to the welfare state and social rights claims, equal treatment for EU citizens is stratified and conditional on the legality of their residence, which requires possession of sufficient resources so as not to become an unreasonable burden on the host state. The objective of protecting national welfare states has gained prominence in the jurisprudence of the Court of Justice of the EU (CJEU), which emphasizes the Member States’ right to deny social claims. The legal framework regulating access to social rights must contend with the tension between, on the one hand, the desire and perceived need to protect the national welfare systems of the EU states from unreasonable burdens and, on the other hand, the idea that the realization of the free movement of persons requires equal treatment. The result is that for migrant EU citizens who lack sufficient resources and who make social claims in their host states, equal treatment can be out of reach and does not guarantee access to social benefits.

As a novelty, in the *C.G.* case² the Court of Justice has relied on the EU Charter of Fundamental Rights (EU Charter) to interpret the claim to social rights made by an EU citizen lacking sufficient resources. In its previous jurisprudence, such an EU citizen would have been found to be outside the scope of Directive 2004/38³, which regulates the presence and rights of migrant EU citizens, and therefore outside the equal treatment provision contained in this directive. Remarkably, the *CG* case introduces the possibility to rely on EU fundamental rights – human dignity, the best interest of the child and respect for family life – as justifications for access to social

¹ S Morano-Foadi and K de Vries, ‘The Equality Clauses in the EU Directives on Nondiscrimination and Migration/Asylum’ in S Morano-Foadi and M Malena (eds), *Integration for Third-Country Nationals in the European Union* (Edward Elgar Publishing 2012) 16; H Verschueren, ‘Employment and Social Security Rights of Third-Country Labour Migrants under EU Law: An Incomplete Patchwork of Legal Protection’ (2016) 18 *The European Journal of Migration and Law* 373.

² Case C-709/20 *CG v The Department for Communities in Northern Ireland* EU:C:2021:602.

³ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

rights for otherwise excluded migrant EU citizens. Furthermore, it establishes positive state obligations towards vulnerable EU citizens since states must ensure they live in dignified conditions, even when they are refused social assistance.

Considering that human dignity is a new addition to the Court's jurisprudence on social rights and EU citizenship, the aim of this article is to explore what human dignity can add to equal treatment for EU citizens and their social claims after the CJEU's intervention in the *C.G.* case. The article discusses two models for migrants' access to social rights: first, in EU free movement law, the principle of equal treatment structures access to social rights for migrant EU citizens. Second, in human rights law, human dignity has been successfully relied upon to derive social rights for migrants. The *C.G.* case creates a bridge between these two models via EU fundamental rights. Consequently, the article brings together EU law and human rights law to understand how human dignity informs the interpretation of socio-economic rights in human rights law and whether human dignity can function as an alternative source of rights or corrective to the conditional nature of equal treatment for migrant EU citizens. The article is structured as follows: section 2 gives a cursory view of social rights for migrant EU citizens, which sets the scene for the arrival of EU fundamental rights in the *C.G.* case in section 3. Section 4 delves into the interpretation of Article 3 ECHR as source of social rights for non-nationals and the relevance of vulnerability for successful claimants. Section 5 examines some of the shortcomings of the combination of human dignity and social rights identified in human rights literature, namely their abstract and general character; the notion of core minimum obligations and the issue of courts lacking democratic credentials to adjudicate on social rights. Section 6 concludes that human dignity remains an exceptional solution for migrant EU citizens claiming social rights outside of equal treatment.

2. The EU law approach to social rights for migrant EU citizens: conditional equal treatment

Social rights are institutionalised and regulated in very different manners at local, state, regional or international levels. Likewise, they can be approached as rights of citizenship, as human rights or as rights of migrants. The EU integration project aspires to incorporate a strong social dimension as per Article 3 TEU, which speaks of the EU's desire to become 'a highly competitive social market economy'. The attempts to achieve this goal and the complex relation between the economic and social

dimensions of the EU integration project are well researched and debated.⁴ In the context of the EU free movement of persons, the question whether equality in relation to social rights and the welfare state accompanies the migrant EU citizen in the host state can be seen as a specific iteration of the strained relation between the economic and the social dimensions of the EU project. EU free movement law deals with this issue as a question of equal treatment between nationals of the host state and migrant EU citizens linked to the idea that one of the underlying objectives of EU free movement law is to remove obstacles to the exercise of fundamental freedoms. Therefore, as a rule primary and secondary EU law recognise a right to equal treatment for EU citizens. Yet, exceptions are envisaged, and EU states are allowed to reserve equal treatment with nationals in the social sphere for economically active, self-sufficient EU citizens and permanent residents.

The EU approach to social rights differs from constitutional law where social rights are considered part of the social contract between the citizen and the state, and from human rights law where rights are recognised because the holder is a human being endowed with dignity. In this section, I will discuss how the EU approach of grounding social rights in equal treatment works well in respect of the free movement of EU citizens as EU workers where it aligns with the objective of removing obstacles to the exercise of the freedom of movement of EU workers as part of the completion of the EU internal market. The idea is that the failure to recognise equal treatment between EU and national workers would affect the effectiveness of the fundamental right to freedom of movement of persons. Social rights for EU workers are recognised as a matter of equal treatment because they serve a specific function within the EU internal market. The recognition of a right to freedom of movement for economically inactive EU citizens, the introduction of EU citizenship and the introduction of EU fundamental rights muddy waters since they do not fit perfectly within the above model that has economic integration as its goal. Both EU citizenship and EU fundamental rights can be explored as opportunities to redefine the link between free movement and social rights beyond a purely economic logic, yet none offer a complete solution. The conditional nature of the right to free movement for economically inactive EU citizens transmutes into a conditional right to equal treatment for such citizens and limited or no social rights for them. It is within this complex legal terrain that human dignity as an

⁴ W Scharpf, 'The Asymmetry of European Integration, or Why the EU Cannot Be a "Social Market Economy"' (2010) 8 *Socio-Economic Review* 211; D Damjanovic, 'The EU Market Rules as Social Market Rules: Why the EU Can Be a Social Market Economy' (2013) 50 *Common Market Law Review* 1685; S Garben, 'The Constitutional (Im)Balance between 'the Market' and 'the Social' in the European Union' (2017) 13 *European Constitutional Law Review* 23; S Giubboni, *Social Rights and Market Freedom in the European Constitution: A Labour Law Perspective* (Cambridge University Press 2006).

EU fundamental right enters the picture as possible justification for social rights for economically inactive EU citizens.

2.1. Social rights and equal treatment for economically active persons

The legal design of the fundamental right to move for the purposes of work or self-employment (Articles 45 and 56 TFEU) includes a right to be treated equally with national workers/self-employed persons. Exceptions are allowed under limited circumstances. They include differential treatment concerning EU workers in the field of public service and the right to exclude EU workers from the national labour market for a limited period after enlargement. Besides these situations, the general rule is that of equal treatment. Article 45(2) TFEU stipulates the prohibition of discrimination on the basis of nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment. This is further operationalised in secondary legislation via Regulation 492/2011⁵ on freedom of movement for workers within the Union and Directive 2014/54,⁶ which introduces measures to facilitate the exercise of rights conferred in the context of freedom of movement for workers. Empirical studies document a reality that is sometimes different from the letter of the law, where migrant EU workers experience abuse and precarization under neoliberal market conditions and flexible employment relations.⁷ Especially after the 2008 economic crisis, there have been recurrent calls to ‘re-socialise Europe’ which are coupled with EU initiatives in the social policy sphere. These initiatives aim to respond to the above-mentioned empirical reality by setting minimum social standards across EU states but without necessarily creating new individual rights, as the example of the directive on minimum wages illustrates.⁸

The EU institutions remain convinced of the fundamental role of equal treatment in the realization of the internal market.⁹ Likewise, in its jurisprudence on the free

⁵ Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union.

⁶ Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers.

⁷ A Simola, ‘EU Citizenship as Precarious Status for Precarious Workers: Implications of National Policies Restricting EU Citizens’ Rights for Young University-Educated EU Migrants in Brussels’ (2020) *EU Citizenship and Free Movement Rights* 190.

⁸ H Haapanala, I Marx and Z Parolin, ‘Decent Wage Floors in Europe: Does the Minimum Wage Directive Get It Right?’ (2023) 33 *Journal of European Social Policy* 421; S Garben, ‘The European Pillar of Social Rights: An assessment of its Meaning and Significance’ (2019) 21 *Cambridge Yearbook of European Legal Studies* 101.

⁹ In the context of Covid-19 see, European Commission, ‘Communication: Guidelines on seasonal workers in the EU in the context of the COVID-19 outbreak’, C/2020/4813.

movement of workers, the Court of Justice interprets the right to equal treatment as essential for the realization of the internal market. The legal reasoning employed by the Court is remarkably stable over the years: discrimination between national and EU workers would make the exercise of the right to free movement less attractive and, therefore, hamper its realization. Even if in practice there are examples of EU workers continuing to work despite being discriminated or treated less favourably than national workers in respect of pay, housing or living conditions,¹⁰ the Court has not faltered from the argument that EU workers would be less willing to move if they would not be entitled to equal treatment. This legal reasoning is sound if we accept that equal treatment functions as a safeguard for workers' rights since it prevents social dumping. In this view, equal treatment in relation to social rights and access to the welfare state for migrant EU workers is beneficial for the workers themselves because it aids their integration and that of their families,¹¹ as well as for the host state since it protects social standards from being downgraded by the operation of market forces.¹² The CJEU has reasoned that EU workers who have contributed to the financing of their host state's social protection systems are entitled to benefit from it in the same way as nationals. Unlike economically inactive EU citizens, EU workers who claim social rights from the host state cannot be treated as unreasonable burdens on the social assistance system; they are entitled to equal treatment because of the contributions they paid into the system.¹³ The right to equal treatment extends to their family members as well.

2.2 Social rights and equal treatment as EU citizenship rights

The right to free movement was extended to economically inactive nationals of EU states prior to the introduction of the legal status of EU citizenship in the Maastricht Treaty, but only conditional upon such nationals having sufficient resources and comprehensive medical insurance so as not to be reliant on the host state. After the introduction of EU citizenship as the legal status that defines the relationship between the EU and the nationals of the Member States, the secondary legislation that

¹⁰ L Berntsen, A Böcker, T de Lange, S Mantu and N Skowronek, 'State of Care for EU Mobile Workers' Rights in the Dutch Meat Sector in Times of, and beyond, COVID-19' (2023) 43 *International Journal of Sociology and Social Policy* 356; I Wagner, *Workers without Borders: Posted Work and Precarity in the EU* (ILR Press 2018); C Rijken and T de Lange (eds), *Towards a Decent Labour Market for Low-Waged Migrant Workers* (Amsterdam University Press 2018).

¹¹ J Tomkin, 'The Worker, the Citizen, their Families and the Court of Justice: Tales of Free Movement from Luxembourg' in P Minderhoud and N Trimikliniotis (eds), *Rethinking the Free Movement of Workers. The European Challenges Ahead* (Wolf Legal Publishers 2009).

¹² CU Schierup, P Hansen and S Castles, *Migration, Citizenship, and the European Welfare State: A European Dilemma* (Oxford University Press 2006).

¹³ For a more recent reiteration see, Case C-488/21 *GV v Chief Appeals Officer* EU:C:2023:1013.

gives it effect perpetuates the division between economically active and economically inactive EU citizens. Although the language of equal treatment is used in relation to all EU citizens, economically active or not, their access to social rights is stratified depending on economic activity and length of residence. As such, Article 18 TFEU prohibits any discrimination on nationality grounds but only within the scope of the Treaty and without prejudice to any special provisions contained therein.

For migrant EU citizens, the relevant provisions are contained in Directive 2004/38 which sets out the conditions for the exercise of the right to free movement. Article 24(1) of the directive sets equal treatment as the general rule, while Article 24(2) introduces exceptions from equal treatment. No equal treatment is expressly allowed for residence up to three months, jobseekers and study related grants and loans prior to the acquisition of the right of permanent residence. Workers and self-employed persons as well as those retaining such statuses under the directive continue to enjoy equal treatment in relation to social rights. For economically inactive citizens, equal treatment and access to the welfare system of the host state is linked to them being resident on the basis of the directive, which the CJEU interprets as residence that meets the conditions of Article 7 (sufficient resources and comprehensive medical insurance). Furthermore, EU citizens who have acquired permanent residence in line with the requirements of Article 16 – five years of legal and continuous residence meeting the conditions of Article 7 – are entitled to equal treatment, even if they no longer meet the sufficient resource condition or stop being economically active.

If for EU workers equal treatment in relation to social rights is seen as leading to their integration in the host state, for EU citizens equal treatment is legally mandated only once they are economically integrated. The different reach of social rights in respect of EU workers and EU citizens who are economically inactive and lack permanent residence is explained as linked to the different sources of the social solidarity they can expect from a host state: work and economic contribution in the case of EU workers, versus an incomplete notion of belonging as EU citizens for the latter category that in turn legitimates a more limited version of transnational solidarity.¹⁴ Minderhoud has referred to this as a ‘catch-22’ situation: economically inactive EU citizens can rely on equal treatment, only if they have sufficient resources not to require social benefits from the host state, raising the question if they are ever entitled to such benefits.¹⁵

¹⁴ F de Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (Oxford University Press 2015); S O’Leary, ‘Solidarity and Citizenship Rights in the Charter of Fundamental Rights of the European Union’ in G de Búrca (ed), *EU Law and the Welfare State* (Oxford University Press 2005) 110.

¹⁵ P Minderhoud, ‘Sufficient Resources and Residence Rights under Directive 2004/38’ in H Verschuere (ed), *Residence, Employment and Social Rights of Mobile Persons: On How EU Law Defines Where They Belong* (Intersentia 2016). See also, H Verschuere, ‘Preventing “benefit tourism” in

The main elements of the Court's jurisprudence on equal treatment for economically inactive EU citizens can be summarised as follows. First, legal residence is interpreted as residence meeting the conditions of Directive 2004/38; second, an emphasis on the conditionality of the right to reside; and third, the ambiguous space for proportionality and individualization as the legal tools to assess social rights claims: does the making of a social right claim indicate the lack of resources? Lack of sufficient resources translates into the failure to meet the residence conditions stipulated by the directive with the consequence that the EU citizen is not within the scope of the equal treatment provision in the directive (Article 24) and presumably also outside Article 18 TFEU, if we understand Article 24 as the operationalization of Article 18 TFEU.¹⁶

The Court's jurisprudence acknowledges that to safeguard their social assistance systems, EU states have the right to refuse social benefits and to terminate residence where economically inactive citizens lack resources. Some Member States have interpreted the right to protect themselves against unreasonable burdens as including the right to categorise social rights claims made by EU citizens as evidence of an unreasonable burden. Furthermore, EU states have responded to the Court's jurisprudence on social rights by emphasising the requirement of legal residence, by expanding the scope of exclusion from equal treatment and by seeking to consolidate via legislative and administrative practices the power to exclude EU citizens from social rights.¹⁷ Such measures may add to social precarity or destitution for the EU citizens in question, but the logic of EU free movement is that such citizens should either become economically productive agents, thus bringing themselves within the paradigm of access to social rights via contributions to the internal market or return to their own state of nationality that retains responsibility for them. The latter option is formalised in the laws of some EU states that award destitute EU citizens a one-time financial help to return to their own state of nationality but no access to social assistance or minimum subsistence benefits (see France, Germany).¹⁸

the EU: A narrow or broad interpretation of the possibilities offered by the ECJ in *Dano*?' (2015) 52 *Common Market Law Review* 363.

¹⁶ This is the manner in which the CJEU interprets the relation between Art 18 TFEU and Art 24 Directive 2004/38/EC (n 3) in *C.G.* (n 2).

¹⁷ S Mantu and P Minderhoud, 'Struggles over social rights. Restricting access to social assistance for EU citizens' (2023) 25 *European Journal of Social Security* 3; S Mantu and P Minderhoud, 'Exploring the Links between Residence and Social Rights for Economically Inactive EU Citizens' (2019) 21 *European Journal of Migration and Law* 313.

¹⁸ ML Basilien-Gainche, 'European States Returning European Citizens: France and the Roma Populations' in S Mantu, P Minderhoud and E Guild (eds), *EU Citizenship and Free Movement Rights. Taking Supranational Citizenship Seriously* (Brill 2020) 265; A Heindlmaier, *Deep Europeanization. How EU Member States Administer Free Movement of Persons and Cross-Border Access to Social Benefits at Street-Level* (PhD Thesis, University of Salzburg 2018).

2.3 Social rights as EU fundamental rights

The European Charter of Fundamental Rights brings together all fundamental rights protected in the EU as they result from the established case-law of the CJEU, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the common constitutional traditions of the Member States. Since the entry into force of the Nice Treaty, the Charter is binding primary law. It covers civil, political, social, and cultural rights and applies to EU citizens and all persons under the jurisdiction of the Member States. Many of the rights contained therein resemble provisions in the ECHR in which case, the ECHR functions as the minimum standard below which the interpretation of EU fundamental rights cannot fall.

Title IV of the Charter is titled ‘Solidarity’ and is inspired by the rights contained in the European Social Charter, another Council of Europe (CoE) instrument, which was adopted after the failure to include socio-economic rights into the ECHR. Historically, the divisions within the CoE system of protection between, on the one hand, judicially enforceable civil and political rights within the ECHR and, on the other hand, social rights as contained in the Social Charter with a weaker enforcement mechanism have been interpreted as having had consequences for EU law as well. The Court of Justice has ‘never seriously attempted to use the general principles of Community law as a source for the protection of social rights.’¹⁹ Nor has the Court tried to use national constitutional traditions that do protect social rights, leading to ‘the second-hand status of social rights’²⁰ within the EU legal order prior to the Lisbon Treaty.

The introduction of new social values within the EU treaties (Article 3 TEU), of human dignity as foundational value (Article 2 TEU) and the EU Charter becoming primary source of EU law are seen as changing this landscape. Yet the ‘Solidarity’ chapter in the EU Charter is considered to have had a limited impact on the social rights of migrant EU citizens and on citizenship law. While the inclusion of a whole title dedicated to solidarity is understood to be an expression of the EU’s values and social objectives,²¹ the effectiveness and justiciability of the solidarity provisions are debated. Some have the status of ‘principles’, while those that are ‘rights’ are always constrained by the formulation ‘as provided for by Union law and national laws and

¹⁹ R O’Gorman, ‘The ECHR, the EU and the Weakness of Social Rights Protection at the European Level’ (2011) 12 *German Law Journal* 1833.

²⁰ Ibid 1837.

²¹ S de Vries and B Safradin, ‘ETHOS - Deliverable 6.3: Struggles for Justice - Impact of the Social and EU Charters in times of crisis’ (Ethos Europe, 20 December 2018), at ec.europa.eu.

practices'.²² This appears in all three subparagraphs of Article 34 EU Charter which details the rights to social security and social assistance (paras 1 and 2) and decent existence for those lacking sufficient resources (para 3). Article 34, much like the rest of Title IV, is appraised as not creating new justiciable rights.²³ Neither does it expand the scope of existing legislation in line with the overall approach of the Charter, which is to reaffirm existing rights.²⁴ Concerning migrant EU citizens, social rights are recognized when citizens move and reside legally which reads as a reiteration of Article 24 of Directive 2004/38. There is nothing in the text of Article 34 EU Charter to suggest a reading whereby it creates additional rights to social security or social assistance. This may also explain why it was not relied upon in EU social citizenship cases.

In the *Dano* case²⁵, the CJEU was asked for the first time to explain the relationship between secondary legislation on EU citizens, the TFEU provisions on equal treatment and the EU Charter of Fundamental Rights. The German referring court found it problematic that EU citizens could be refused social assistance on the basis of EU law as unreasonable burdens for the German welfare system, while destitute asylum-seekers were entitled to a modicum of social rights based on the national constitutional standards linked to a dignified existence. One of the questions raised was whether the EU Charter informed the right to equal treatment that EU citizens enjoy based on Article 18 TFEU and Directive 2004/38. The CJEU's answer was that it lacked jurisdiction to answer the question from an EU fundamental rights perspective because to do so would be to extend the application of the Charter contrary to Article 51. The argument was that when EU states decide what conditions must be met for the award of social benefits, they are not implementing EU law, therefore such conditions cannot be scrutinized from the perspective of the Charter. Accordingly, despite social rights being recognised in the Charter, these provisions are seen as limited to upholding already existing rights. For migrant EU citizens this was understood to mean that no new rights are created and no different interpretation of already existing rights.

Contrary to the position taken in respect of social rights for EU citizens and the Charter, the CJEU has used human dignity (Article 1 EU Charter) to interpret the

²² T Lock, 'Title IV Solidarity' in M Kellerbauer, M Klamert and J Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights* (Oxford University Press 2019) 2178.

²³ F Pennings, 'Does the EU Charter of Fundamental Rights Have Added Value for Social Security?' (2022) 24 *European Journal of Social Security* 117.

²⁴ K Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 *European Constitutional Law Review* 375.

²⁵ Case C-333/13 *Dano* EU:C:2014:2358.

material conditions of asylum seekers based on existing EU laws. In the EU legal order, human dignity is both a foundational value of the EU project (Article 2 TEU), a fundamental right (Article 1 EU Charter) and, according to legal scholars, a foundational constitutional principle.²⁶ The Reception Conditions Directive entitles asylum seekers to material reception conditions which include ‘housing, food and clothing, and a daily expenses allowance’ and stipulates that Member States should provide an adequate standard of living for asylum seekers, which guarantees their subsistence and protects their physical and mental health. The Court of Justice has ruled that even where states seek to sanction the behaviour of an asylum seeker by withdrawing material conditions, they are nonetheless obliged to ensure a dignified standard of living for the applicant; full denial is incompatible with the Directive and sanctions require an individual assessment.²⁷ The CJEU reasons that ‘respect for human dignity within the meaning of that article requires the person concerned not finding himself or herself in a situation of extreme material poverty that does not allow that person to meet his or her most basic needs such as a place to live, food, clothing and personal hygiene, and that undermines his or her physical or mental health or puts that person in a state of degradation incompatible with human dignity’.²⁸ After an analysis of cases in which the CJEU refers to human dignity to interpret the content of material conditions for asylum seekers and the minimum they require, Karin Zwaan argues that ‘Article 1 Charter receives relatively little attention from the Court of Justice; when this provision is mentioned, it is often only in combination with other provisions of the Charter and without any further explanation.’²⁹

To sum up, prior to the *C.G.* case, which is discussed in section 3, the CJEU has not relied on the EU Charter to interpret the social rights of migrant EU citizens choosing to discuss such claims as matters of equal treatment, rather than questions of dignified standards of living as in the asylum cases. This choice reflects the way social rights are dealt with in the EU free movement legal framework, namely as a tool to give effect to a fundamental freedom and linked to the integration of the EU citizen within the EU project.

²⁶ C Dupré, ‘Human Dignity in Europe: A Foundational Constitutional Principle’ (2013) 19 *European Public Law* 319.

²⁷ Case C-233/18 *Zubair Haqbin* EU:C:2019:956.

²⁸ *Zubair Haqbin* (n 28) para 46.

²⁹ K Zwaan, ‘Human Dignity and a Dignified Standard of Living: The Judgment of the Court of Justice in the Case of *Zubair Haqbin* (C233/18)’ (2021) 26 *Bialystok Legal Studies* 143.

3. The *CG* case and the CJEU's U-turn on EU fundamental rights

The *C.G.* case³⁰ takes place within the above sketched legal context within which some economically inactive migrant EU citizens are situated outside the scope of the equal treatment provisions in Directive 2004/38 because they are not or no longer categorised as legally resident. Seen in this light, equal treatment is not enough to protect vulnerable and destitute migrant EU citizens, such as the applicant in the *C.G.* case, a Dutch Croatian national and mother of two who lived in a women's refuge in the UK. The applicant had a national residence status issued under more favourable conditions than those of Article 7 Directive 2004/38 as she did not need to meet the sufficient resources condition. However, the national residence status did not give access to social assistance. The applicant claimed that such exclusion was contrary to Article 18 TFEU since UK nationals in her situation were guaranteed those benefits.

The Court of Justice ruled that the applicant was indeed a person lacking sufficient resources who could be categorised as an unreasonable burden from the perspective of Article 24 of Directive 2004/38 and therefore not entitled to equal treatment.³¹ Yet, the fact that the UK issued her a residence title in recognition of her exercise of free movement rights as an EU citizen – although that residence did not meet the conditions of Directive 2004/38 – meant that she was within the scope of EU law and could rely on EU fundamental rights. The Court acknowledged the vulnerability of the applicant and of her children and ruled that 'the national authorities empowered to grant social assistance can refuse her claim only after having ascertained that the refusal does not expose that citizen, and the children for which he or she is responsible, to an actual and current risk of violation of their fundamental rights, as enshrined in Articles 1, 7 and 24 of the Charter (human dignity, respect for family life and the best interest of the child)'.³² Moreover, the Court goes to state that even if Ms CG is refused social assistance, the host state must ensure that she and her children can live in dignified conditions.

Although the ruling continues the restrictive line of jurisprudence on social rights and Directive 2004/38,³³ it has generally been welcomed for opening the question of social rights to fundamental rights' scrutiny. Herwig Verschueren has argued that the message of *CG* is that once a right to reside is granted to a Union citizen, the host state

³⁰ *CG* (n 2).

³¹ *CG* (n 2) para 80.

³² *Ibid* para 93.

³³ M Haag, 'The Coup de Grâce to the Union Citizen's Right to Equal Treatment: *CG* v. The Department for Communities in Northern Ireland' (2022) 59 *Common Market Law Review* 1081; C O'Brien, 'The Great EU Citizenship Illusion Exposed: Equal Treatment Rights Evaporate for the Vulnerable' (2021) 6 *European Law Review* 801.

needs to ensure that the Union citizen does not end up in a situation that violates human dignity.³⁴ This interpretation is coherent with the Court's older jurisprudence in which it had ruled that economically inactive EU citizens legally resident in a host EU state based on national immigration law or international law could rely on Article 18 TFEU and claim equal treatment with nationals in the sphere of social benefits.³⁵ However, the Court does not revert to this earlier line of jurisprudence that relies on Article 18 TFEU. Instead, it opts for fundamental rights and the idea of living in dignified circumstances as creating some form of positive obligations for the host state.

The ruling has been also criticised since it does not give any guidance on the type or level of assistance the host state should give to such an EU citizen. Nor does it explain the difference between positive obligations towards a destitute EU citizen and equal treatment as a right of EU citizenship. The Court rejected the idea that an EU citizen in CG's situation should be able to rely on Article 24 of the Directive and claim social assistance because this interpretation would be contrary to the aim of preventing abuse of the welfare system. In previous work I questioned the reach of EU fundamental rights and interpreted them as an exceptional source of social rights for destitute EU citizens.³⁶ The Court's reliance on EU fundamental rights to justify access to social benefits is comparable to the *Ruiz Zambrano* jurisprudence where the Court relies on EU fundamental rights to justify a right to reside for TCN family members of static EU citizens. In both situations, EU fundamental rights are called in to offset the legal *status quo*: concerning static EU citizens, fundamental rights justify abandoning the purely internal rule, which underpins the functioning of the EU legal order; concerning destitute EU citizens, fundamental rights override the conditionality attached to the right to free movement. In both cases, the scope of EU law is expanded without abandoning its rationale and general principles. If we take the trajectory of the *Ruiz Zambrano* jurisprudence as yardstick, clearly it has had a major impact in a few EU states that traditionally had issues with giving up sovereignty over the family reunification of their own nationals towards the EU level.³⁷ The CJEU has had to come back time and time again to its initial stance to explain the circumstances in which the *Ruiz Zambrano* right to reside can be effectuated. On this specific issue, the Court's jurisprudence resembles a micro-management of

³⁴ H Verschueren, 'The right to social assistance for economically inactive migrating Union citizens: The Court disregards the principle of proportionality and lets the Charter appease the consequences' (2022) 29 *Maastricht Journal of European and Comparative Law* 483–498.

³⁵ Case C-85/96 *Martinez Sala* EU:C:1998:217; Case C-456/02 *Trojani* EU:C:2004:488.

³⁶ S Mantu, 'Economic or Social EU Citizenship' (2024) 38 *Nordiskt Socialrättslig Tidskrift* 81.

³⁷ E Guild, 'EU Citizens, Foreign Family Members and European Union Law' (2019) 21 *European Journal of Migration and Law* 358.

which personal circumstances are relevant for abandoning the purely internal rule in favour of giving effect to EU citizenship.

Long-term we may witness similar developments in respect of human dignity and social rights with the Court being asked to explain what living in dignified conditions means in specific circumstances. Ultimately, the proof of the pudding is in the eating and the manner in which national courts understand to engage with the *C.G.* ruling will be highly relevant for clarifying the role of EU fundamental rights for the social claims of migrant EU citizens. There are encouraging developments in the UK, where the *CG* ruling was relied upon in a similar case involving a Romanian mother, victim of domestic violence who was housed in a shelter run by a charity and who was refused basic benefits. The applicant was destitute, and her only income was child benefit which was insufficient to cover her and her child's basic needs.³⁸ The UK Court of Appeal ruled that, in line with the CJEU ruling, national authorities must perform an individual assessment of the applicant's circumstances; the existence of a framework capable of providing adequate support was not judged sufficient to discharge state obligations under the Charter.³⁹ One of the interesting aspects of the case is the argument of the UK government that Article 1 EU Charter does not create greater rights than Article 3 ECHR, which corresponds to Article 4 EU Charter, namely not to be subjected to inhuman and degrading treatment. The UK court ruled that Article 1 EU Charter is free standing and cannot be subordinated to Article 4 EU Charter.⁴⁰ The test under Article 1 EU Charter is that of 'living in dignified conditions'. It requires individual assessment and must include the elements found relevant by the CJEU in *CG*, namely the availability of means and resources to meet needs, the degree of isolation and the degree of dependency of children to decide if there is an actual risk of violation of fundamental rights. Mel Cousins argues that despite the importance of the case, questions remain concerning its practical application by the administration and the assessment that the new test requires.⁴¹

At the EU level, relevant questions remain, too: how should we approach EU fundamental rights as a justification for social rights for migrant EU citizens? Are they an alternative or a complementary legal source? Do they strengthen the social dimension of EU citizenship? If so, how since they do not seem to legally enlarge the scope of equal treatment which remains open to those who are legally resident in

³⁸ *Secretary of State for Work and Pensions v AT* [2023] EWCA Civ 1307.

³⁹ C O'Brien and A Welsh, 'Court of Appeal Decides the Secretary of State Is Wrong, Wrong, Wrong: The Charter Applies to People with Pre-Settled Status' (2024) 46 *Journal of Social Welfare and Family Law* 133.

⁴⁰ *Ibid.*

⁴¹ M Cousins, 'A Right to Dignity under the EU Charter of Rights - *Secretary of State for Work and Pensions v AT*' (2024) 31 *Journal of Social Security Law* 221, 222.

line with the directive. To find answers and to explore the link between social rights and human dignity, I turn next to human rights law.

4. Social rights and human dignity in ECHR case law

The above sections have shown that in EU law EU citizens' access to the welfare state and to social rights is termed in the language of equal treatment. The *C.G.* case introduces human dignity in the toolkit of the CJEU to adjudicate on social claims by EU citizens, which creates a bridge to European human rights law, and to the ECHR in particular. The ECHR serves as inspiration for the EU Charter and, where provisions are similar, as minimum standard below which the interpretation of EU fundamental rights cannot fall. This section examines how human dignity informs the interpretation of migrants' social claims based on the ECHR. Although the ECHR does not contain express provisions on social or economic rights, the European Court of Human Rights (ECtHR) has interpreted several provisions as relevant for such rights, while maintaining that the main scope of the Convention is the protection of civil and political rights. The ECtHR jurisprudence on social rights has been criticised, on the one hand, for overreaching because of the introduction of positive state obligations and on the other hand, for lacking consistency and for failing to go far enough to secure the realisation of social rights.⁴²

Social rights for non-nationals have been addressed by the ECtHR in relation to Article 14 ECHR (non-discrimination) since some forms of social security are considered 'possessions' within the scope of Article 1 of Protocol 1 ECHR (the right to property) or within the scope of Article 8 ECHR (the right to family and private life) when social benefits help the family unity or concern children.⁴³ The underlying rationale for this jurisprudence is that where states decide to provide social benefits, they should do so in a manner compliant with Article 14 ECHR.⁴⁴ The ECtHR recognises a large margin of appreciation for state parties because they are considered better placed to appreciate what is in the public interest on social or economic

⁴² For an overview of different positions see, L Slingenberg, 'The Right Not to Be Dominated: The Case Law of the European Court of Human Rights on Migrants' Destitution' (2019) 19 *Human Rights Law Review* 291.

⁴³ L Slingenberg and I Leijten, 'Social Security in the Case Law of the European Court of Human Rights' in F Pennings and G Vonk (eds), *Research Handbook on European Social Security Law* (Edward Elgar Publishing 2023) 30.

⁴⁴ ECHR, 'Guide on the case-law of the European Convention on Human Rights. Immigration' (Strasbourg, 28 February 2025), at ks.echr.coe.int 51.

grounds.⁴⁵ The result is that state policies and choices to exclude migrants from the enjoyment of social rights will be respected as long as they are not manifestly unreasonable. The ground of discrimination will also play a role in how large a margin is recognised: nationality will require more weighty justifications, especially where social security schemes exclude all non-nationals, as opposed to immigration status. Concerning the latter ground for discrimination, Slingenberg argues that in cases where there is an element of individual choice as to immigration status, state parties have more room to exclude than in the case of forced migrants such as refugees.⁴⁶ The ECtHR has ruled that:

‘a State may have legitimate reasons for curtailing the use of resource-hungry public services – such as welfare programmes, public benefits and health care – by short-term and illegal immigrants, who, as a rule, do not contribute to their funding. It may also, in certain circumstances, justifiably differentiate between different categories of aliens residing in its territory. For instance, the preferential treatment of nationals of Member States of the European Union [...] may be said to be based on an objective and reasonable justification, because the Union forms a special legal order, which has, moreover, established its own citizenship’.⁴⁷

If we are to apply the above reasoning to differences in treatment between EU citizens based on their contribution to welfare states, the distinctions and exclusions operated by Directive 2004/38 in respect of economically inactive EU citizens who are/can become unreasonable burdens seem in line with the ECtHR’s interpretation. We can conclude that when social rights are approached as an issue of non-discrimination linked to existing systems of social protection and their rules of attribution, the ECHR jurisprudence does not provide arguments for a more expansive interpretation of the social entitlements of economically inactive EU citizens.

However, the ECtHR has also addressed social rights for non-nationals as a question of positive state obligations towards destitute persons within their jurisdiction. It is in this second context that human dignity and vulnerability become parameters for assessing non-nationals’ exclusion from social benefits under Article 3 ECHR which prevents torture, inhuman and degrading treatment.⁴⁸ Galina Cornelisse notes that in legal

⁴⁵ ECHR, ‘Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention. Prohibition of discrimination’ (Strasbourg, 31 August 2024), at ks.echr.coe.int 53, referring to *L.F. v UK* App no. 19839/21 (ECtHR, 16 June 2022) and *Luczak v Poland* App no 77782/01 (ECtHR, 27 November 2007)

⁴⁶ L Slingenberg (n 42).

⁴⁷ *Ponomaryovi v Bulgaria* App no. 5335/05 (ECtHR, 21 June 2011).

⁴⁸ D Bedford, ‘Key Cases on Human Dignity under Article 3 ECHR’ 2 *European Human Rights Law Review* 185.

discourse human dignity is closely related to the prohibition of torture, inhuman and degrading treatment which is an absolute right under Article 3 ECHR.⁴⁹ When human dignity enters the legal discourse of other, non-absolute rights, those rights can be limited, as illustrated by the ECtHR jurisprudence on Article 8 and 14 ECHR. Whether a certain treatment violates human dignity will depend on the extent and the degree of the suffering but also by whom it is inflicted and in what circumstances the suffering occurs.

In the ECHR context, human dignity was traditionally used to challenge immigration policies that detain, return, or remove migrants. The *M.S.S. v Belgium and Greece* case is considered a turning point because the ECtHR decided that the living conditions of migrants outside detention can raise an issue under Article 3 ECHR.⁵⁰ Scholars agree that the position of the ECtHR is that ‘exposure to certain material conditions can be incompatible with human dignity’ because of ‘the humiliation and desperation that accompanies the inability of the person to attend to their basic bodily needs’.⁵¹ Lieneke Slingenberg concludes that the ‘situation of persons unable to meet their basic needs of food, hygiene and shelter for significant period coupled with the lack of any likelihood of this situation improving reaches the minimum threshold of severity of treatment to engage state responsibility under Article 3 ECHR’.⁵² The bar is set rather high in terms of the severity of the treatment, to which we can add another limiting factor, namely that an approach to social rights based on freedom from inhuman or degrading treatment requires only a minimum standard of living.⁵³ States may have positive obligations towards such persons but they are not owed similar social obligations as own nationals.

The literature is divided on what brought about the ruling of violation of Article 3 ECHR. Some authors view as decisive the fact that Greece had undertaken obligations towards the reception conditions of asylum seekers and transposed them into national law. The gravity of the living conditions alone is judged insufficient to lead to a violation finding.⁵⁴ Another relevant factor is the applicant’s (lack of) responsibility for their living situation, which is enmeshed with the question of vulnerability. Part of the

⁴⁹ G Cornelisse, ‘Protecting Human Dignity across and within Borders: The Legal Regulation of International Migration in Europe’ in L Gunnarsson, U Mürbe and N Weiß (eds), *The Human Right to a Dignified Existence in an International Context* (Nomos 2019) 95.

⁵⁰ *M.S.S v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011).

⁵¹ Bedford (n 48) 190.

⁵² Slingenberg (n 42).

⁵³ M Simpson, ‘Designed to Reduce People...to Complete Destitution’: Human Dignity in the Active Welfare State’ (2015) *European Human Rights Law Review* 66.

⁵⁴ This issue is summarised in Bedford (n 48). For an interpretation that empathises the existence of state obligations towards these non-nationals see Slingenberg (n 42).

Court's reasoning for finding a violation of Article 3 ECHR concerning the living conditions of the applicant was that asylum seekers are members of a 'particularly underprivileged and vulnerable population group in need of special protection'.⁵⁵ Vulnerability is understood 'in terms of dependency on the relationship with the state' and linked to an understanding of human dignity as a premise for an individual's autonomy and self-realization. Slingenberg proposes to understand the ECtHR's jurisprudence on the social rights of destitute migrants as establishing a 'right not to be dominated'.⁵⁶ This explains why it is not the severity of the situation in which an applicant find herself that predicts the success of a social benefit claim but rather the level of vulnerability of the applicant and the impossibility or inability to leave a difficult situation coupled with the existence of state obligations towards such applicants.⁵⁷ Applicants who failed to apply for benefits, even if that would have implied a restriction of their liberty, to lodge appeals or to cooperate in return procedures were not successful in their claims. The facts of the *C.G.* case contain elements deemed relevant by the ECtHR when interpreting human dignity in the context of material conditions under Article 3 ECHR: the UK had accepted responsibility for the applicant when issuing her with a residence permit and, as a victim of domestic violence, the applicant was part of a special group of vulnerable persons for whom states have extra responsibilities.

The use of the concept of vulnerability to justify the extension of positive state obligation in relations to social rights is not without criticism. Alexandra Timmer et al. describe references to vulnerability as 'double-edged, with vulnerable immigrants possibly – but not at all necessarily – being the beneficiaries'.⁵⁸ The authors worry that 'granting social rights based on vulnerability might make it less necessary to accept certain forms of social or quasi-legal membership as relevant for acquiring rights'⁵⁹, especially where migrants do not reside legally. This last aspect is relevant for how the CJEU will further interpret human dignity for migrant EU citizens considering the exclusion of those who do not reside legally from equal treatment under Directive 2004/38. Ultimately, the legal exclusion from social rights which aims to safeguard the welfare state creates vulnerability and has coercive functions which impact the autonomy of those affected and their dignity.

To sum up, the analysis of ECHR case law on social rights for migrants shows that like EU law, human rights law does not entail an absolute entitlement to social rights for migrants. States are allowed to differentiate between the social entitlements

⁵⁵ *M.S.S v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011) para 251.

⁵⁶ Slingenberg (n 42).

⁵⁷ Ibid 311.

⁵⁸ A Timmer et al., 'The Potential and Pitfalls of the Vulnerability Concept for Human Rights' (2021) 39 *Netherlands Quarterly of Human Rights* 190, 194.

⁵⁹ Ibid 195.

of citizens and non-citizens and between groups of migrants. When approached as a matter of dignified living conditions, ECHR law imposes a minimum of positive state obligations. These obligations will be activated when the treatment reaches a certain threshold, the state has accepted obligations towards the persons in question and these persons are perceived as vulnerable. The ECtHR case law concerns destitute asylum seekers who can be described as a particular group of applicants, an aspect which resembles the use of human dignity as per Article 1 EU Charter by the CJEU in its jurisprudence on reception conditions in EU asylum law. The above-mentioned elements suggest that the scope for human dignity as source of social rights is confined to specific circumstances and vulnerable applicants, and with limited relevance for most migrant EU citizens.

5. Limitations to human dignity as justification for social rights

As a reminder, the article set out to explore what human dignity adds to EU citizenship law. The previous sections have shown that in neither EU citizenship law nor ECHR law, social rights for migrants are absolute rights. Both models discussed, although relying on different notions and principles for justifying social rights, accept limitations linked to the idea that states can exclude certain categories of migrants from the welfare state. To understand the limitations of human dignity in recognising social rights for migrants, this section places the question of limitations in the wider context of social rights as human rights. It discusses different theories concerning the role of human dignity in human rights law – foundational and absolute or pragmatic – and the question of what dignified living conditions means in practice.

5.1. Zooming out on human dignity and its role

The foundational and absolute view of human dignity is linked to the development of the international system of human rights protection after World War II and the transformation of human dignity into a legal right that must be protected and respected in national constitutional law and in human rights instruments. Human dignity is described as ‘the foundation of international human rights law which reaffirms, again and again, the inherent worth and equal dignity of all members of the human family’.⁶⁰ Besides being a legally sanctioned right, dignity functions to support other rights linked to the right to live a dignified existence, that is, to live in

⁶⁰ JR May and E Daly, ‘The Rise of Dignity Law: A Global Perspective on Human Rights’ (Heinonline Blog 25 September 2023), at home.heinonline.org.

ways that reflect self-respect. Courts have found human dignity relevant when adjudicating on the right to housing, health care, a reasonable standard of living, and a clean environment.⁶¹

Similarly, Hollenbach argues that ‘human rights norms support a social or relational understanding of the human person’ whereby human rights and human solidarity are reciprocally related to each other.⁶² The argument is based on a reading of the Universal Declaration of Human Rights (UDHR) as emphasizing the ‘importance of human interdependence and solidarity for the protection of human dignity’.⁶³ The practical consequence of this normative stance is that ‘the advancement of human dignity and the protection of human rights require inter-human solidarity and supportive social relationships.’⁶⁴ Social rights are necessary for the realization of human dignity, which implies both ‘the right to have one’s material needs met on at least a basic level and the right to have social supports that will make this possible.’⁶⁵ The legal definition of the basic level and the (positive) obligations that states have in relation to social rights are less straightforward. This is linked to a wider debate on the inclusion of socio-economic rights into human rights conventions that goes further than the extension of social rights to non-citizens. Main questions concern the justiciability and effective realization of social rights, and the view that socio-economic rights are inferior to civil and political ones.⁶⁶ Similar aspects are relevant when interpreting the social provisions of the EU Charter.

Several tensions animate debates about social rights as human rights. First, despite their universal scope, international treaties allow state parties to differentiate based on citizenship. Second, the lack of a specialised treaty on the socio-economic rights of non-nationals leads to the fragmentation of legal standards between international treaties on socio-economic rights, such as the UN International Covenant on Economic, Social and Cultural Rights (ICESCR) and treaties relevant for non-nationals, such as the UN International Convention on the Protection of the Rights

⁶¹ Ibid. JR May and E Daly, ‘Dignity Rights for a Pandemic’ (2024) 20 *Law, Culture and the Humanities* 21

⁶² D Hollenbach, ‘A Relational Understanding of Human Rights: Human Dignity in Social Solidarity’ (2022) 71 *Emory Law Journal* 1488.

⁶³ Ibid 1493.

⁶⁴ Ibid 1499.

⁶⁵ Ibid 1503.

⁶⁶ S Santino and F Regilme, ‘The Global Politics of Human Rights: From Human Rights to Human Dignity?’ (2019) 40 *International Political Science Review* 279; I Leijten, ‘The German Right to an *Existenzminimum*, Human Dignity, and the Possibility of Minimum Core Socioeconomic Rights Protection’ (2015) 16 *German Law Journal* 23, 35.

of All Migrant Workers and Members of Their Families (ICRMW).⁶⁷ While such treaties stipulate that the rights they enshrine derive from the inherent dignity of the human person, exceptions to their enjoyment are allowed based on citizenship (ICESCR) and legal status (ICRMW). The relationship between equal treatment mandated by human dignity as universal value and the exceptions allowed under international law is described by Lougarre as ambiguous and as creating space for states to limit the socio-economic rights recognised in international law to non-nationals.⁶⁸ Furthermore, the legal credibility of the ICESCR is not helped when interpreted by monitoring bodies as containing a minimum core of socio-economic rights but without a clear definition of what the minimum is or whether states can derogate from the convention if they ensure minimum standards.⁶⁹

The lack of a clear definition of human dignity in human rights law and adjudication has led to a more pragmatic view of human dignity, which is informed by proportionality. Some authors argue in favour of seeing human dignity not as a right, but as an ‘overarching concept’ that is relevant for the interpretation of several rights. Simpson identifies the following rights as relevant: ‘the prohibition of inhuman treatment, the protection of individual autonomy, the protection of group identity or culture and the creation of conditions for the satisfaction of essential needs.’⁷⁰ While this view takes a practical and more pragmatic approach since it builds on how human dignity is used in various jurisdictions, it recognises that there is an agreement on a minimum core understanding of human dignity.⁷¹ This understanding remains abstract and general, in the sense that there is agreement ‘that each human being possesses an intrinsic worth that should be respected, that some forms of conduct are inconsistent with respect for this intrinsic worth, and that the state exists for the individual not vice versa’ but without going into the practical realisation of the above elements.⁷²

Another set of authors propose to understand human dignity as a ‘political notion placing constraints on state institutions’ with an expressive function.⁷³ This argument

⁶⁷ C Lougarre, ‘The Protection of Non-Nationals’ Economic, Social and Cultural Rights in Un Human Rights Treaties’ (2020) 9 *International Human Rights Law Review* 252, 254. International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976); International Convention on the protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003).

⁶⁸ Lougarre (n 67).

⁶⁹ Ibid 268.

⁷⁰ Simpson (n 53) 57.

⁷¹ C McCrudden, ‘Human Dignity and Judicial Interpretation of Human Rights’ (2008) 19 *European Journal of International Law* 655.

⁷² Ibid 723.

⁷³ SC Matteucci and G Repetto, ‘The Expressive Function of Human Dignity: A Pragmatic Approach to Social Rights Claims’ (2021) 23 *European Journal of Social Security* 120.

is empirically informed by how human dignity is used in different national legal contexts by legislators and courts, which leads to a ‘a gap between the mutual obligation to assist those in need, built upon their dignity, and the idea of welfare as a redistributive enterprise involving political choices.’⁷⁴ Human dignity as foundational and absolute value that justifies individual social rights cannot close this gap. In practice, courts decide cases where the failure to provide social rights infringes human dignity by relying on the principle of proportionality since conditionality in the enjoyment of social rights is not considered incompatible with human dignity.⁷⁵ In this vein, the role Civitarese Matteucci and Repetto see for human dignity is as ‘element of a more complex political philosophy grounded on equality and social justice.’⁷⁶ The advantage of this position is that it does away with discussions about the absoluteness of human dignity that requires the provision of social rights and reorients the debate towards what are acceptable limits to social rights provision. In this context, the authors argue that human dignity can help decide what state actions or omissions are disproportionate and fail to pursue an ideal of reciprocity.

What is at stake in the above discussions on the role of human dignity in relation to social rights –foundational and absolute versus pragmatic – is relevant for the question of justification for social rights. The pragmatic view of human dignity exposed by Civitarese and Matteucci relies on equality as justification for individual social rights.⁷⁷ From an EU citizenship law perspective which relies on equal treatment, this seems equally problematic. At national, regional, and international levels, states are allowed to derogate from equal treatment and differentiate between nationals and non-nationals or between those legally resident and those not.⁷⁸ This view of human dignity is built on the idea of human dignity understood as meaning that there cannot be any intrinsic difference of social status between humans. Certain state acts of denial of social rights are a violation of dignity as status, even if there are no harmful consequences.

In the EU context, the relationship between equality and human dignity is far from straightforward. EU states can deny social rights and equal treatment if EU migrants do not reside legally in line with the conditions of Directive 2004/38. The

⁷⁴ Ibid 133.

⁷⁵ C O’Cinneide, ‘The Human Rights of Migrants with Irregular Status: Giving Substance to Aspirations of Universalism’ in S Spencer and A Triandafyllidou (eds), *Migrants with Irregular Status in Europe* (Springer 2020) 51.

⁷⁶ Matteucci and Repetto (n 73) 134.

⁷⁷ Ibid 134: ‘[t]he problem remains, however, of understanding how status dignity can give weight to the claim to social rights. After all, as Rosen (2012: 55) points out, that we are all equal in dignity is a proposition that assumes we have equal rights, but does not ground or justify it. Equality seems sufficient to theorise that we are entitled to social rights’.

⁷⁸ Lougarre (n 67).

C.G. case seems to bring equality and dignity closer to each other but without creating a perfect overlap. For the CJEU, it was precisely the gravity of the consequences of denying social assistance that brought human dignity as autonomous legal concept into the picture. While I agree that human dignity works to ‘support social rights claims’, in my view the idea from human rights law that equality does a better job at justifying social rights is not supported, at least, by EU free movement law and its interpretation. What these scholarly debates illustrate is the difficulty of reconciling the absolute nature of human dignity understood as foundational value of human rights with the conditionality and relativity that characterise social rights, even when conceived of as human rights.

To sum up, despite different theoretical views on the role of human dignity in human rights law – foundational value, human right or overarching concept that guides the interpretation of other rights – there is agreement that human dignity requires a minimum of social rights which establishes positive state obligations. Yet, there is no clarity as to what states’ minimum core obligations in respect of a dignified existence are stemming from the relative and context dependent character of socio-economic rights. The fit between human dignity, equality and social rights is imperfect in both EU citizenship and human rights law.

5.2. Who decides what ‘dignified existence’ means?

Irrespective of the theoretical approach taken to human dignity, what a dignified existence means and what it requires in terms of state obligations remains unclear. The problem identified is one of indeterminacy, which is also visible in the reasoning of the CJEU in the *C.G.* case: the CJEU identifies a minimum – dignified living conditions – but without defining them. This is not simply a question of definition, but also of competences since courts are criticised when they delineate the scope of social solidarity. This is the case irrespective of the level of jurisdiction and what is at stake – solidarity between nationals or between nationals and non-nationals.

The argument is that courts lack the political currency to do so since they are not democratically elected; social policy is the privilege of democratically elected bodies. It is thus instructive to read Ingrid Leijten’s analysis of how the German constitutional court has been successful in developing a jurisprudence that recognises the existence of a ‘subsistence minimum’ in the German Basic law without being accused of overstepping its role.⁷⁹ This subsistence minimum is understood to involve the means for living a life in accordance with human dignity. Interesting for the EU

⁷⁹ Leijten (n 66) 28.

discussion, is that the German constitutional court reads into the right to a subsistence minimum a ‘form of minimum core protection’ available to German citizens and non-nationals alike but, according to Leijten, ‘without falling prey to the risk of absolute definition of minimum core guarantees.’⁸⁰ The author describes the German notion of a ‘subsistence minimum’ as close to the minimum core obligation notion used in the ICESR since it ‘does not imply a right to material prerequisites and means of subsistence generally and only applies to those things necessary for leading a life consistent with dignity and does not include a right to the full range of possibilities of participating in social, cultural, and political life, but only to an “essential” level thereof’.⁸¹

The takeaway lesson seems to be that indeterminacy concerning the minimum guarantees the justiciability of social rights. Leijten is positive about the use of an absolute yet abstract minimum guarantee because it allows the government the necessary leeway in relation to social policy and budgetary constraints, but without compromising on the robustness of a legally sanctioned right. Despite the imprecise definition of the minimum, the government is under an obligation to review if it is still sufficient, and to revise it if the need is present. Nonetheless, the author is cautious about the German approach being transposable to other courts, such as the ECHR, for constitutional and democratic reasons. First, human dignity can be read as involving a minimum social guarantee and positive social obligations on behalf of the German state because of the existence of the ‘social state principle’ in German constitutional law.⁸² Such a constitutional principle is not present in all jurisdictions, although there are valid arguments to derive it from the foundational nature of human dignity. For the CJEU, this may be less of an issue in light of Article 3 TEU which talks about the EU establishing a ‘highly competitive social market economy [...] combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child’.

Second, the democratic argument is linked to the fact that the ECtHR ‘cannot enter into as direct of a “dialogue” with the legislature as their national counterparts’⁸³ and demand that the legislature revise the content of the core social minimum. Two legal routes are sketched for the ECtHR: first, to supplement its review

⁸⁰ Ibid.

⁸¹ Ibid 36–37.

⁸² Ibid 43.

⁸³ Ibid 45.

of states acts or omissions as arbitrary, reasonable, or disproportionate with qualitative review-guiding rules that leave enough room to national actors. Second, to rely on equal treatment to and ask states to justify why non-nationals are treated differently when it comes to the provision of minimum social benefits.⁸⁴ Notwithstanding the above suggestions, Leijten argues that considering the ECtHR's special position, minimum social protection maybe the best it can afford without overstepping the constitutional and democratic limits identified previously.⁸⁵

The democratic argument discussed above is significant for the CJEU, too because one of the criticisms expressed in relation to its EU citizenship jurisprudence concerns precisely the issue of intervening in the redistribution of national welfare while lacking the democratic credentials to do so.⁸⁶ In EU citizenship law, the redistribution of social resources via equal treatment remains the appanage of EU citizens who reside legally in line with Directive 2004/38 or who are economically active. The *C.G.* case does not change this policy choice. For the time being, human dignity as an EU fundamental right does not translate into a judicial intervention to define the content of minimum social protection for vulnerable EU citizens. Ultimately, the democratic argument seems equally relevant for understanding why the CJEU leaves it to the national court to appraise what a dignified existence amounts to for the applicant in *C.G.* and her children.

6. Conclusions

Migrants' entitlement and access to social rights is a topic that generates many discussions, especially in a context of shrinking welfare states. Who should be entitled to equal treatment, who should make that choice or what level of resource redistribution is acceptable or necessary are questions that inform such debates. Migrant EU citizens can rely on equal treatment but as the article has discussed this right is fragmented and stratified. The right to live in dignified conditions derived from Article 1 EU Charter is a new addition to the legal toolkit of the CJEU when adjudicating upon social claims by EU citizens. The question the article has sought to answer is what this new tool adds to the current design of the right to equal treatment for EU citizens. Are fundamental rights a corrective, an alternative or an interpretative tool for equal treatment concerning social rights? This question is pertinent since for migrant EU citizens who lack resources and who make social claims on their host states,

⁸⁴ Ibid 46–47.

⁸⁵ Ibid.

⁸⁶ SK Schmidt, 'The Limits of Judicializing Transnational Welfare: Progression and Regression of the ECJ Case Law on Access to Social Benefits' in T Kostakopoulou and D Thym (eds), *Research Handbook on European Union Citizenship Law and Policy: Navigating Challenges and Crises* (Edward Elgar Publishing 2022) 247.

equal treatment can be out of reach and does not guarantee access to social benefits. The objective of protecting national welfare states has gained prominence in CJEU jurisprudence which emphasizes the right to exclude from social rights. For now, human dignity seems to play a role as alternative source of rights for those migrant EU citizens who reside legally in another EU state, despite not meeting the conditions of EU law, and who are vulnerable. This is an exceptional route to social benefits, yet it creates obligations for the host state. As such, the host state must ensure that despite the refusal of benefits the person can live in dignified conditions.

To get a better understanding of what living in dignified conditions means, the article has explored the use of human dignity by the CJEU and the ECHR. The CJEU has applied human dignity as per Article 1 EU Charter to interpret state obligations towards asylum seekers who are entitled to material conditions under EU law. The minimum in this context requires being able to meet basic needs of ‘bed, bath and bread’. However, EU citizens are not in the same situation as asylum seekers and EU law stipulates that host EU states have obligations towards them, if they are legally resident. Otherwise, they can fall back on their own states. The ECHR jurisprudence on social rights for non-nationals seemed a suitable route to investigate what human dignity may mean for social rights. The gist of this jurisprudence is that state obligations under Article 3 ECHR will exist if the living conditions of the migrant reach a certain level of severity, if states have obligations towards such migrants, and if the migrant can be seen as vulnerable. These cumulative conditions set a high bar for social rights claims by destitute EU citizens who, following the *C.G.* ruling, must nonetheless be legally resident.

Human dignity appears as an exceptional and alternative route to minimum social benefits for migrant EU citizens, which becomes relevant once equal treatment under Directive 2004/38 has been taken out of the equation. The appeal of a legally recognised right to live in dignified conditions goes much further than destitute EU citizens and asylum seekers. EU workers and the economically active enjoy equal treatment with nationals of the host state, which seems the most extensive version of entitlement to social rights that migrants can have. It goes much further than equal treatment or human dignity in the context of the ECHR. Considering the many instances in which such workers work and live in EU states in terrible conditions despite a legal entitlement to equal treatment, a right to live in dignified conditions operating alongside equal treatment may offer a legal route to improve their situation, too. If neither equal treatment, nor human dignity can offer protection to everyone every time, viewing them as complementary may prove a more legally successful way to realise social rights for migrants.



***The Borders Within: Socio-economic Rights
and Non-discrimination in EU Law***

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Insiders, Outsiders, and the Constructed Limits to Social Rights in EU Law

*Alezini Loxa**

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ABSTRACT: This paper engages with limitations to social rights for different categories of migrants under EU law. By looking at how EU law construes accepted limitations to social rights and how the Court of Justice reviews such limitations, the paper suggests that there is room for different interpretation of limitations to social rights under secondary law in view of a more coherent understanding of their function under EU law. Specifically, the paper maps the accepted limitations to the social rights of EU migrants, long-term residents, and regular migrants. By reviewing the justifications put forward behind all the accepted limitations to social rights, the paper argues that the function served by limitations to social rights is uniform across all categories of migrants: that is avoiding the presumed negative effects of migration to national redistributive mechanisms. At the same time, the Court follows different paths of review depending on the status of the migrants (EU or non-EU). While some differentiation in the approach followed by the Court is justified, the paper argues that there is room for evolution in judicial review by combining elements of the judicial approach for both EU and non-EU migrants in light of the social objectives of the EU under Article 3 TEU and the Charter. The paper presents the potential of this combination not as a groundbreaking shift in the functional approach followed by EU law to social rights, but rather as a limited change that can bring about more extensive protection of social rights for all migrants.

KEYWORDS: migration – social rights – equal treatment – EU citizens – long-term residents – migrants.

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1. Introduction

This paper analyses accepted limitations to social rights of migrants under EU law in order to demonstrate how judicial review on the matter could evolve and better align with primary law. Some preliminary notes should be made in this regard. First, by social rights the paper refers to equal treatment provided under EU law on access to social security, social assistance, and other state supported facilities like education and healthcare in different instruments.¹ When reference is made to equal treatment the comparator is always the national of the Member State where the migrant resides. This is the case in all the instruments providing for equal treatment as regards various social rights for both EU and non-EU migrants.² Second, when referring to accepted limitations to social rights, reference is made to limitations to equal treatment which are provided in the relevant secondary law. Third, throughout the paper I refer to social and economic considerations behind the limitations to social rights. By this I mean factual elements examined by EU institutions when adopting a legal instrument or interpreting EU law. Economic considerations refer to factors related to the economy of the Member States more broadly, including, for example, labour market conditions, recession, trade. Social considerations refer to factors related to human life and society including, for example, human rights, social cohesion, education, social welfare. These considerations are taken into account in the adoption of secondary legislation as well as in the interpretation of EU law in order to ensure the development of the legal system in line with primary law objectives.³ Finally, when referring to migrants, the analysis follows a literal understanding of the migrant status and it means all the individuals who move away from their country of origin and establish themselves in an EU Member State. This means that the paper will analyse the relevant secondary law and case law as regards both EU and non-EU migrants.

Migration law research under EU law is usually dichotomized along two distinct categories: free movement, and migration from third countries. There is a presumed difference in the normative foundations of the attribution of rights to each category

¹ The definition is inspired by the similar use of the term social rights in KM de Vries, 'The Integration Exception: A New Limit to Social Rights of Third-Country Nationals in European Union Law?' in D Thym (ed), *Questioning EU citizenship: judges and the limits of free movement and solidarity in the EU* (Hart Publishing 2017).

² See Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, Art 7; Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, Art 24; Directive (EU) 2024/1233 (n 2), Art 12; Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, Art 11.

³ See the objectives referred to in Art 3 TEU.

of migrants under these frameworks, with different literature addressing the two frameworks.⁴ On the one hand, an independent body of literature has developed on free movement and the rights that are enjoyed by EU migrants in that framework.⁵ In this literature, and in the EU institutional practice, migration is termed as mobility, so as to emphasize its domestic character.⁶ EU migrants are referred to as citizens and they enjoy specific (privileged) mobility rights and certain political rights.⁷ The history of EU migrants' rights tells a story of gradual attribution of rights as a means to 'the legal and practical realization of the internal market'.⁸ In this context, Thym has noted that there is a 'normative surplus' of EU citizens' rights because their implementation is 'meant to sustain the integration process'.⁹ On the other hand, migration to the EU from third countries is examined in the context of the Area of Freedom, Security and Justice.¹⁰ The central presumption on the regulation of migration from third countries is that it was introduced to ensure that a true Area of Freedom, Security and Justice would be available to EU citizens on the move.¹¹ The literature that engages with migration from third countries to the EU is primarily human rights geared. Scholars explore international and EU human rights frameworks, and they argue for the necessity of a more liberal approach to third-country nationals.¹² Critical scholars have also engaged in research in this field. Specifically, some have criticized the EU legal order for the exclusion of migrants therefrom and

⁴ D Thym, "'Citizens" and "Foreigners" in EU Law. Migration Law and Its Cosmopolitan Outlook' (2016) 22 *European Law Journal* 296; D Thym, 'EU Migration Policy and Its Constitutional Rationale: A Cosmopolitan Outlook' (2013) 50 *Common Market Law Review* 709.

⁵ See S Mantu and others (eds), *EU Citizenship and Free Movement Rights: Taking Supranational Citizenship Seriously* (Brill Nijhoff 2020); D Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Hart Publishing 2017); W Maas (ed), *Democratic Citizenship and the Free Movement of People* (Martinus Nijhoff Publishers 2013); E Guild, *The Legal Elements of European Identity: EU Citizenship and Migration Law* (Kluwer Law International 2004).

⁶ Thym, "'Citizens" and "Foreigners" in EU Law' (n 4) 296.

⁷ Rights enumerated in Art 20 (2)(b) and (d) and Arts 22–24 TFEU.

⁸ M Everson, 'The Legacy of the Market Citizen' in J Shaw and G More (eds), *New Legal Dynamics of European Union* (Clarendon Press 1995) 85.

⁹ Thym, 'EU Migration Policy and Its Constitutional Rationale' (n 4) 725.

¹⁰ K Groenendijk, 'Categorizing Human Beings in EU Migration Law' in D Jacobs, A Rea and S Bonjour (eds), *The Others in Europe* (Editions de l'Université de Bruxelles 2011).

¹¹ This is also reflected in the wording of Art 3(2) TEU. C Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press 2016); K Hailbronner, *Immigration and Asylum Law and Policy of the European Union* (Kluwer Law International 2000).

¹² JHH Weiler, 'Thou Shalt Not Oppress a Stranger: On the Judicial Protection of the Human Rights of Non-EC Nationals - A Critique' (1992) 3 *European Journal of International Law* 65; A Wiesbrock, *Legal Migration to the European Union* (Brill Nijhoff 2010) 5–6 for a brief overview of the relevant literature.

have identified different reasons underlying it.¹³ Few scholars have addressed adequately both EU migrants and third-country nationals in their research, with emphasis on the divergence of the frameworks.¹⁴

By examining the accepted limitations to social rights as they appear in secondary law and case law for both EU and non-EU migrants, the paper shows that there are overlaps behind the objectives served by the attribution of such rights, while divergences exist behind the legitimate limitations. But the areas of convergence and divergence are to some extent counterintuitive. While both categories of migrants are attributed rights in view of their economic function, one would expect that the limitations to EU migrants' social rights would be reviewed in light of the primary status of EU citizenship for the EU constitutional architecture. However, in practice, limitations to social rights are reviewed in light of their economic function. At the same time the limitations to non-EU migrants' rights are reviewed in light of their social function and in view of the need to protect their rights under the Charter. After presenting these two frameworks in the analysis that follows in Sections 2 and 3, the paper offers insights on how we could combine the two approaches to the benefit of both groups in Section 4. Specifically, the paper argues for more use of the Charter as a means of review for the rights of EU migrants, and economic considerations as a means for extension of the rights of non-EU migrants.

2. The limitation of social rights of EU migrants

The social rights of EU migrants and their corresponding limitations date back to the establishment of Community law. National disputes centred on the limits of financial solidarity between Member States, the rights to be enjoyed by migrant workers and the national organisation of the welfare state lay behind the establishment of core legal concepts and principles of the free movement of workers.¹⁵ From the 1970s, to

¹³ Security, externalization, colonialism are identified as reasons for exclusion. See T Spijkerboer, 'Bifurcation of People, Bifurcation of Law: Externalization of Migration Policy before the EU Court of Justice' (2018) 31 *Journal of Refugee Studies* 216; E Balibar, *Nous, citoyens d'Europe ?* (La Découverte 2001); D Bigo, RBJ Walker and S Carrera, *Europe's 21st Century Challenge : Delivering Liberty* (Routledge 2010).

¹⁴ See the work Thym (n 4); C Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press 2016) arguing for an extension of rights of EU migrants to non-EU migrants. Historically arguments for convergence were raised before the completion of the framework after the early 2000s, see D O'Keeffe, 'The Free Movement of Persons and the Single Market' (1992) 17 *European Law Review* 3, 16–17; E Guild, *European Community Law from a Migrant's Perspective* (PhD Thesis, Radboud University, 2000), later published as E Guild, *Immigration Law in the European Community* (Brill Nijhoff 2001).

¹⁵ An indicative example is Case 75/63, (*Hoekstra*) *Unger v Bedrijfsvereniging voor Detailhandel en Ambachten*, ECLI:EU:C:1964:19, the first judgement where the Court found that the concept of

the tumultuous litigation of the Court in the years following the economic crisis of 2008, residence rights and the corresponding equal access to social rights for EU migrants has always been central to the Court's docket.¹⁶ EU law scholarship has been equally occupied with following the developments, making sense of the case law and the obligations it creates for Member States, and envisioning ways in which such rights operate against the background of the provisions on EU citizenship and free movement of persons.¹⁷ The following section will first present the relevant secondary law, while section 2.2 will engage with the case law of the Court.

2.1. Secondary law

In the relevant area of EU law two instruments are key when examining the relation of residence rights and equal access to social rights, as well as its their corresponding limitations.¹⁸ First, the Citizens' Rights Directive which was adopted to ensure the effective exercise of free movement rights drawn by the status of the EU citizenship under Article 21 TFEU.¹⁹ The Directive harmonised the conditions of entry and residence of EU migrants as well as their family members. Since the Directive provides for residence rights for economically inactive EU migrants and job seekers (that is migrants that do not make an economic contribution to the host state), equal access to social rights can be limited. Article 24(2) of the Directive provides that Member States

'worker' has and autonomous meaning under EU Law. The case originated in a dispute concerning the application of Regulation No 3 on social security for migrant workers [1958] OJ 30/561.

¹⁶ See Case 76/72 *Michel S. v Fonds national de reclassement social des handicapés* EU:C:1973:46 and Case 94/84 *ONEM v Deak*, ECLI:EU:C:1985:264; Case C-333/13 *Dano* EU:C:2014:2358; Case C-67/14 *Alimanovic* EU:C:2015:597; Case C-299/14 *García-Nieto and others* EU:C:2016:114; Case C-181/19 *Jobcenter Krefeld v JD* EU:C:2020:794.

¹⁷ It would be next to impossible to provide a conclusive overview. See S Mantu and others (eds) (n 5); J Shaw, 'Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford University Press, 2021); SA Mantu and PE Minderhoud, 'Exploring the Links between Residence and Social Rights for Economically Inactive EU Citizens', (2019) 21 *European Journal of Migration and Law* 313; E Guild, 'Does European Citizenship Blur the Borders of Solidarity?' in E Guild, C Gortázar Rotaèche and D Kostakopoulou (eds), *The Reconceptualization of European Union Citizenship* (Brill Nijhoff, 2014); Thym (ed) (n 5); N Cambien, D Kochenov, and E Muir (eds), *European Citizenship under Stress: Social Justice, Brexit and Other Challenges* (Brill Nijhoff, 2020); Maas (ed) (n 5); M Dougan, N Nic Shuibhne and E Spaventa (eds), *Empowerment and Disempowerment of the European Citizen* (Hart Publishing 2012).

¹⁸ See however Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, particularly Arts 4 and 7, which applies to both EU and non-EU nationals legally resident in EU Member States and under which beneficiaries are guaranteed that their benefits will be paid by the Member State in which they are covered on the same terms as those applicable to the nationals of that State, even if they move to or reside in another Member State.

¹⁹ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

have no obligation to grant equal access to social assistance during the first three months of residence or to migrants who entered as jobseekers. The same provision allows Member States to restrict equal treatment regarding maintenance aid for studies to economically active migrants and their families and to only allow such aid to economically inactive migrants after the acquisition of a right of permanent residence. The reason why such limitations were introduced in the Directive is to avoid EU migrants becoming unreasonable burdens on the social assistance system of the host state.²⁰

Essentially it is workers, self-employed migrants and their families that enjoy full equal treatment rights and do not fall under the derogation of Article 24(2) Citizens' Rights Directive. The differentiation in this, and the broader attribution of rights under this Directive lies in the presumption that workers, by virtue of their status, cannot become a burden, but will rather be net contributors to the system. What is more, even if workers were entitled to equal treatment under Article 24, there is limited potential are that they would overburden national welfare systems, as they would be excluded from them for other reasons. Specifically, social assistance is usually aimed at supporting persons through mechanisms of solidarity so that they can have a decent livelihood. Workers and self-employed individuals would most probably be excluded on the basis of their finances, as they would have sufficient resources to ensure their livelihood without the need of state support.

In parallel to the Citizens' Rights Directive, the Worker's Regulation attributes more specific rights to EU migrant workers and their family members.²¹ The Regulation was adopted as means to ensure the effective exercise of free movement of workers under Article 45 TFEU and codified earlier legislation in the field.²² Without creating new rights compared to the earlier framework, Article 7(2) of said regulation provides for equal treatment for workers and their families as regards social and tax advantages in the host Member State. This provision has historically been interpreted broadly as a specific expression of equal treatment as prescribed in Article 45(2) TFEU and it has set the basis for extensive protection of social rights for EU migrant workers and their families.²³

Overall, free movement of EU migrants develops with clearly construed limitations in secondary law to minimize the negative impacts of migrant movement on

²⁰ See Recital 10, 16 but see also Directive 2004/38/EC (n 19), Art 14(1).

²¹ Regulation (EU) No 492/2011 (n 2).

²² Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community.

²³ See Case 32/75 *Cristini v S.N.C.F.* EU:C:1975:120; Case 63/76 *Inzirillo v Caisse allocations familiales Lyon* EU:C:1976:192; Case 261/83 *Castelli v ONTPS* EU:C:1984:280; Case 157/84 *Fras-cogna v Caisse des dépôts et consignations* EU:C:1985:243. See also recently *Jobcenter Krefeld v JD* (n 16); Case C-488/21 *Chief Appeals Officer and others* EU:C:2023:1013.

national economies. The limitation of rights under the relevant Directive is based on the objective of maintaining the financial equilibrium of the Member States and is construed with due regard to financial solidarity between Member States.²⁴ Both secondary law and case law, as will be explained in the next section, acknowledge a clear link between the economic contribution of an EU migrant and the more extensive social rights they are entitled to under the Workers Regulation. The economic function of the migrant is the source of more extensive social rights, as has been the case already since free movement of workers under Community law. At the same time the protection of public finances is put forward as the justification for the relevant limitations.

2.2. The consolidation of the limitations in the case law

After the introduction of the EU citizenship provisions with the Maastricht Treaty, the Court of Justice of the EU proceeded in expansive interpretations of equal access to social rights for various nationals who could not establish residence rights under the secondary law of the time.²⁵ This was celebrated in scholarship as an indication of the potential of EU citizenship as an independent status, disconnected from statist limitations.²⁶

In the relevant case-law, the Court did not invalidate the limitations prescribed in secondary law. Rather, while acknowledging the economic considerations that preclude the unlimited enjoyment of rights by EU migrants, it tried to expand protection by focusing on how such limits should be reviewed in light of the social and political objectives of primary law that established the legal status of EU citizenship.²⁷ In this early case-law, the Court made a differentiation between EU residence

²⁴ See *Jobcenter Krefeld v JD* (n 16) para 66. See also Opinion of AG Pitruzzella in Case C-181/19 *Jobcenter Krefeld v JD* EU:C:2020:377 para 1.

²⁵ Case C-85/96 *Martínez Sala/Freistaat Bayern* EU:C:1998:217; Case C-184/99 *Grzelczyk* EU:C:2001:458.

²⁶ See J Shaw, 'View of the Citizenship Classics: Martínez Sala and Subsequent Cases on Citizenship of the Union' in L Azoulay and M Poirares Maduro (eds), *The Past and Future of EU Law : The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) 356. C Timmermans, 'Martínez Sala and Baumbast Revisited' in L Azoulay and M Poirares Maduro (eds), *The Past and Future of EU Law : The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) 345; For a critique see AJ Menéndez, 'European Citizenship after Martínez Sala and Baumbast: Has European Law Become More Human but Less Social?' in L Azoulay and M Poirares Maduro (eds), *The Past and Future of EU Law : The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) 363.

²⁷ See for example *Martínez Sala/Freistaat Bayern* (n 25) paras 34 and 45, where the Court suggested that EU migrants lawfully residing in a Member State should enjoy equal treatment on access to family benefits regardless of whether their residence rights were stemming from EU secondary law or not. See later the infamous judgement in *Grzelczyk* (n 25) para 31 where the Court referred to the

rights, which could be limited for economic reasons, and social rights stemming from EU citizenship, once a migrant finds themselves in a host state.²⁸ Member States could deny residence to economically inactive EU migrants who did not possess sufficient resources, in order to protect their national welfare systems from collapse. However, if they recognized a right of residence under national law, by virtue of this lawfulness of residence, EU migrants had to be protected under equal treatment provisions, furthering the objectives of social cohesion in the Member States. In this balancing of economic considerations as a limit to residence and social considerations behind treatment in the host state, the Court acknowledged the discretion of Member States to remove EU migrants who had recourse to the social assistance system, however such removal should not be the automatic consequence of having recourse to the social assistance system.²⁹ In different cases, different considerations were invoked by the Court as criteria to be taken into account when Member States carry the balancing act between granting social assistance and preserving the public finances of Member States.³⁰ In the relevant case law, as Jesse and Carter have suggested, the Court acknowledged the legitimate interest of Member States to protect their national welfare systems, but in practice it strengthened the position of EU migrants seeking access to social assistance.³¹

This approach of the Court did not last for long but rather shifted soon after the adoption of the Citizens' Rights Directive.³² The most representative case on the matter, and one that has been well examined in the literature is the *Dano* case.³³ In this

EU citizenship as 'destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for'.

²⁸ See Case C-456/02 *Trojani* EU:C:2004:488; Case C-209/03 *Bidar* EU:C:2005:169.

²⁹ *Trojani* (n 28) para 45.

³⁰ See for example integration in *Bidar* (n 28) para 57. *Bidar* concerned a student, lawfully resident in the UK, where he completed his secondary education and claimed assistance for the tuition fees of his university education. Different criteria were introduced as regards job-seekers where the Court referred to the existence of a genuine link between the applicant and the geographical market in question as a condition to be taken into account in order to examine whether the denial of access to such benefits would be discriminatory for EU migrants under primary law see Case C-138/02 *Collins* EU:C:2004:172 para 67; Joined Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze* EU:C:2009:344 para 38; Case C-224/98 *D'Hoop* EU:C:2002:432 para 38.

³¹ M Jesse and DW Carter, 'Life after the "Dano-Trilogy": Legal Certainty, Choices and Limitations in EU Citizenship Case Law' in N Cambien, D Kochenov and E Muir (eds) (n 17) 141.

³² See for example Case C-140/12 *Brey* EU:C:2013:565, which concerned the residence rights of a German pensioner who claimed a compensatory supplement provided for under Austrian legislation to supplement his German pension. The Court followed the wording and purpose of Directive 2004/38 and confirmed that lawful residence was dependent on the self-sufficiency of an EU migrant.

³³ C Barnard, 'The Day the Clock Stopped: EU Citizenship and the Single Market' in P Koutrakos and J Snell (eds), *Research Handbook on the Law of the EU's Internal Market* (Edward Elgar Publishing 2017) 102; J Baquero Cruz, *What's Left of the Law of Integration?* (Oxford University Press

case, the Court held that access to social benefits under equal treatment presupposed not lawful residence of any kind, but lawful residence in accordance with the conditions of the Directive.³⁴ By setting these conditions, the EU legislature aimed at preventing the movement of people who could pose risks to the social assistance system of the Member States.³⁵ According to the Court, if EU migrants did not comply with the conditions of the Directive on residence rights, they could not claim equal treatment under the EU primary law, as this would run contrary to the objective of secondary law, ‘namely preventing Union citizens who are nationals of other Member States from becoming an unreasonable burden on the social assistance system of the host Member State’.³⁶ The Court also suggested that by setting these conditions in Article 7(1)(b), the Citizens’ Rights Directive sought to prevent economically inactive EU migrants from using the host states’ welfare system as means to fund their subsistence.³⁷ This approach was confirmed in *Alimanovic* and later, in *Garcia Nietto*, which concerned access to benefits during the first three-month period of unconditional residence.³⁸ The Court confirmed that only residence that complied with the conditions set by the Directive qualified for equal treatment, and not any kind of lawful residence. The economic conditioning of a right to reside as a basis of equal treatment was confirmed more clearly in *Commission v the UK*.³⁹ The case concerned a UK law which required the existence of EU residence rights as a condition to access a child benefit. The UK would essentially screen applicants who claimed this benefit and then expel them if they did not meet the conditions of the Citizens’ Rights Directive regarding residence in the UK. While acknowledging that the requirement of legal residence under EU law constituted indirect discrimination, the Court found this justified.⁴⁰ Specifically, it held that such limitations were in line with EU law and could achieve the legitimate objective of protecting public finances.⁴¹

In parallel, more recent jurisprudential evolutions suggest that the Court draws a clear line between free movement of persons and free movement of workers, when it comes to reviewing limitations for access to social rights.⁴² Historically, the Court

2018) 87 ff.; NN Shuibhne, ‘What I Tell You Three Times Is True: Lawful Residence and Equal Treatment after Dano’ (2016) 23 *Maastricht Journal of European and Comparative Law* 908.

³⁴ *Dano* (n 16) para 70.

³⁵ *Ibid.* and Directive 2004/38/EC (n 19), Recital 10.

³⁶ *Dano* (n 16) para 74 and Directive 2004/38/EC (n 19), Recital 10.

³⁷ *Ibid.* para 76.

³⁸ *Alimanovic* (n 16); *Garcia-Nieto and others* (n 16).

³⁹ Case C-308/14 *Commission v United Kingdom* EU:C:2016:436.

⁴⁰ *Commission v United Kingdom* (n 39) para 77. For a critique see C O’Brien, ‘The ECJ Sacrifices EU Citizenship in Vain: *Commission v. United Kingdom*’ (2017) 54 *Common Market Law Review* 209.

⁴¹ *Commission v United Kingdom* (n 39) para 80.

⁴² *Jobcenter Krefeld v JD* (n 16); Case C-488/21 *Chief Appeals Officer and others* EU:C:2022:737.

has allowed for more privileged treatment of workers and former workers as regards residence rights for them and their family members.⁴³ This has been due to the assumption that free movement of workers requires the best possible conditions for the integration of people on the move, and this is achieved by allowing residence for their family members, whereas free movement of persons requires clearly construed limitations to minimize the negative impact of movement on national economies.⁴⁴ This extensive protection of residence rights for workers lies behind the more extensive application of equal treatment in access to social assistance for former workers. In *Jobcenter Krefeld*, the Court held that parents of children who enjoyed a right of residence under the Workers Regulation should have access to social assistance under the more favourable conditions of Article 7(2) of the same Regulation and should not be covered by the limitations of the Citizens' Rights Directive.⁴⁵ The case concerned JD a Polish worker residing in Germany with his daughters who were attending school there. Due to disruptions in his work, JD received social protection benefits for a period of nine months (subsidiary unemployment benefits and subsistence benefits for daughters), which were discontinued. Due to the length of the period during which JD was unemployed, the German authorities deemed that he could no longer retain the status of a worker, but he was rather considered a job-seeker. His right of residence at that stage was derived from the fact that his daughters were attending school by virtue of the Workers Regulation. So, the national court asked how the accepted limitations to equal treatment, which were meant to apply to job-seekers under the Citizens' Rights Directive, should apply to persons who had the right of residence under the Workers Regulation, and who could no longer be considered workers.

As AG Pitruzzella mentioned in his Opinion, this case demanded that the Court clarify the limits of social solidarity.⁴⁶ And it did so by reference to the different objectives of free movement of workers and free movement of persons. In light of the objective of the Citizens' Rights Directive, the limitation to equal treatment is established as a means to minimize the negative economic impact of attribution of

⁴³ See Regulation (EEC) No 1612/68 (n 22), Art 12. See also Case C-413/99 *Baumbast and R* EU:C:2002:493 and Case C-480/08 *Teixeira* EU:C:2010:83 where the Court held that where a child enjoys a residence right to access education under Regulation 1612/68, this right can create residence rights for their primary carer. See also Case C-310/08 *Ibrahim and Secretary of State for the Home Department* EU:C:2010:80, para 59 where the Court held that EU migrants parents of children who had a residence right based on Regulation 492/2011 could enjoy a derived right of residence from their children without the need to satisfy the conditions of Directive 2004/38, that is, without the need to have sufficient resources and health insurance.

⁴⁴ See also *Jobcenter Krefeld v JD* (n 16) para 51.

⁴⁵ *Ibid.*

⁴⁶ Opinion of AG Pitruzzella (n 24) para 1.

rights to migrants. In the case at hand, the Court held that that there was an ‘appreciable distinction’ to be made between a EU migrant who worked in a Member State and had children in school there and then became unemployed (residence under Article 10 Workers Regulation), an EU migrant who resided in a Member State for less than three months (residence under Article 6(1) Citizens’ Rights Directive),⁴⁷ and an EU migrant who resided in a Member State as a first-time job-seeker (residence under Article 14(4) Citizens’ Rights Directive).⁴⁸ The latter two categories were those excluded from equal treatment in social assistance under Article 24(2) Citizens’ Rights Directive. The appreciable distinction which the Court mentioned essentially refers to the fact that an EU migrant has worked and contributed to growth in the first scenario. Due to this, their subsequent unemployment, together with the fact of having children in the host Member State, means that their claim to equal treatment should be accepted, as it would not adversely affect the economy of Member States.⁴⁹

The differentiation between the accepted limitations for EU migrant workers and the accepted limitations in free movement of persons was confirmed in *Chief Appeals Officers* where the Court examined the question of equal access to social assistance by dependent relatives in the ascending line of EU migrant workers.⁵⁰ In this case, the Court confirmed that different justifications can be accepted for limitations to equal access to social rights for EU migrants and their family members depending on whether they are workers or not.⁵¹ Specifically, the Court suggested that migrant workers contribute to the economy of the host state and relatedly, the limitation of their (or their family members’) social rights cannot be justified by considerations related to the protection of the national welfare system to which after all they have personally contributed by paying taxes.⁵² The objective of Recital 10 of the Citizens’ Rights Directive in relation to an unreasonable burden potentially placed on the social assistance systems of Member States can justify the limitation

⁴⁷ *García-Nieto and others* (n 16).

⁴⁸ *Jobcenter Krefeld v JD* (n 16) para 67.

⁴⁹ Essentially if the children did not have an autonomous right stemming from JDs initial work, JD would not be able to claim a residence right without self-sufficiency, trumping the limitations of the Directive 2004/38/CE.

⁵⁰ *Chief Appeals Officer and others* (n 42). See also previous case law on children of migrant workers and access to social assistance *ONEM v Deak* (n 16); Case C-316/85 *CPAS de Courcelles v Lebon* ECLI:EU:C:1987:302 on children of migrant workers, Case C-131/85 *Gül v Regierungspräsident Düsseldorf* EU:C:1986:200 and Case C-59/85 *Netherlands v Reed* EU:C:1986:157.

⁵¹ For more detail see A Loxa, ‘Back to free movement basics: Social assistance for family members of EU migrant workers in Chief Appeals Officer and Others, C-488/21’ (EU Law Live, 15 January 2024), at eulawlive.com.

⁵² *Chief Appeals Officer and others* (n 42) para 71.

of rights in the context of free movement of persons, but not in the context of free movement of workers. This finding is also reflective of the more privileged treatment secondary law reserves for economically active migrants and their family members as reflected both in the parallel existence of the Workers Regulation and the Citizens' Rights Directive and in more specific provisions of the latter.⁵³ The above analysis shows that both secondary law and case-law acknowledge a clear link between the economic contribution of an EU migrant and the more extensive social rights they are entitled to, as well as between the accepted limitation of social rights and the protection of public finances.

3. The Differentiated Social Rights of Non-EU Migrants

Contrary to the functional logic that dictated the attribution of social rights to EU migrants, the harmonization of access to social rights for non-EU migrants on equal terms with nationals of the Member States where they reside has been dictated under both a socially oriented and an economic logic. Specifically, at the time when the EU migration policy was being shaped, the EU was promoting an identity that was socially and culturally pluralistic, based on respect of human rights and human dignity.⁵⁴ At the same time, equality for non-EU migrant workers was linked to the observance of labour law, as a precondition for attracting migrants for highly skilled jobs, a demand the EU population could not meet.⁵⁵ As the Commission stated in a Communication in 2004, granting such equality in terms of wages and working conditions was in the interest of society, which could benefit fully from the contribution of migrants to the economic and social life, while at the same time this would ensure that economic exploitation would not fuel unfair competition in the Union.⁵⁶ The rights non-EU migrants enjoy under secondary law today are provided in different instruments based on the category of migration.

Specifically, the Single Permit Directive lays down a minimum core of rights for all migrants, resident in EU territory, regardless of whether such migrants draw their

⁵³ See for example Directive 2004/38/CE (n 19), Art 17 on different criteria for access to permanent residence for workers and self-employed persons, Directive 2004/38/CE (n 19), Art 24(2), which excludes workers and self-employed persons from the derogations from equal treatment and Directive 2004/38/CE (n 19), Art 14(4) which introduces greater protection against expulsion for workers, self-employed persons and job seekers.

⁵⁴ On a community immigration policy, European Commission, 'Communication from the Commission to the Council and the European Parliament on a Community immigration policy', COM(2000) 757 final 19.

⁵⁵ COM(2000) 757 (n 54) 19.

⁵⁶ *Ibid* 13.

right to reside from national or EU law.⁵⁷ In the corresponding attribution of rights, we see the reproduction of the considerations of the EU institutions and the Court behind the rights of EU migrants at the initial stages of Community law. The first such consideration is that non-EU migrants contribute through their work to the EU project and, therefore, they should enjoy a set of rights.⁵⁸ Secondly, granting rights equal to those of the nationals of the host Member State to non-EU migrants ensures that there is no unfair competition between the Member States, but also between non-EU and EU migrants, thus avoiding social dumping and migrant exploitation.⁵⁹ In reproducing such considerations, the Single Permit Directive constitutes yet another attempt to align migration with the economic and social objectives of the EU. Note that a recast Single Permit Directive has been adopted in April 2024 and was presented by the Commission in 2022 with emphasis on fundamental rights protection for migrants in line with the case law.⁶⁰

Next to the Single Permit Directive, the Family Reunification Directive adopted in 2003 applies to all legally resident non-EU migrants and excludes all migrants whose status is considered uncertain or temporary granting the former family reunification rights as means to promote economic and social cohesion.⁶¹ The Family Reunification Directive provides certain social rights to the family members of the migrants under

⁵⁷ Directive (EU) 2024/1233 (n 2), Art 3 (2) excludes from the scope of the instrument the following: family members of EU nationals covered under Directive 2004/38/CE; EEA, Swiss Nationals and their families enjoying rights equivalent to those of EU nationals; posted workers; intra-corporate transferees; seasonal workers and au pairs; beneficiaries of international protection and temporary protection; long-term residents; migrants whose removal is suspended; self-employed, seafarers.

⁵⁸ See Directive (EU) 2024/1233 (n 2), Recital 19.

⁵⁹ See also European Commission, 'Proposal for a Council Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State' COM(2007) 638, 3-7. See also Case C-302/19 *INPS (Prestations familiales pour les titulaires d'un permis unique)* EU:C:2020:957 para 34.

⁶⁰ Directive (EU) 2024/1233 (n 2). See European Commission 'Proposal for a Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State', COM(2022) 655 final.

⁶¹ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, Art 3: asylum seekers, temporary protection or subsidiary protection status holders, family members of Union citizens whose conditions for reunification are regulated in Directive 2004/38 and finally non-EU migrants who are entitled to more favourable treatment under agreements concluded between the EU and third countries and the EU and Member States and third countries, or who are entitled to more favourable conditions under the Charter. See also Amended proposal COM(2002)0225 final. See Recital 4 of the Directive which mentions the central role of family reunification in the creation of sociocultural stability and integration for non-EU migrants and explains that such outcome serves to promote economic and social cohesion as fundamental objectives stated in the Treaty.

Article 14 with reference on equal terms as those applicable to the sponsor. However such rights will not be analysed further, as the focus of the article is on the limitations of social rights for EU and non-EU migrants to the exclusion of the derivative rights of their family members.⁶² In parallel, a series of sectoral Directives include more specific provisions and grant rights of different kind and extent to researchers and students, highly skilled workers, intra-corporate transferees and seasonal workers.⁶³ These sectoral instruments provide for specific rights attached to each category of migrants. Finally, the Long-Term Residents Directive regulates the rights of non-EU migrants who have lawfully resided in a Member State for a period of five years. This Directive was introduced as means to promote the social objectives of the EU by ensuring fair treatment to legally resident non-EU migrants and to put in place an integration policy that would grant non-EU migrants rights and obligations comparable to those of EU migrants.⁶⁴ Recital 4 of the Directive mentions that the integration of non-EU migrants who have had a long residence in the EU is key in promoting the economic and social cohesion of the Union.⁶⁵ The following section will present the accepted limitations to social rights under these instruments, while section 3.2 will present how such limitations have been reviewed in the case-law.

⁶² See K Groenendijk, 'Family Reunification as a Right under Community Law' (2006) 8 *European Journal of Migration and Law* 215.

⁶³ Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects, and au pairing (Researchers and Students Directive); Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer; Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment (Blue Card Directive 2009); Directive (EU) 2021/1883 of the European Parliament and of the Council of 20 October 2021 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, and repealing Council Directive 2009/50/EC (Blue Card Directive 2021) and Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers.

⁶⁴ Council Directive 2003/109/EC (n 2). See also European Council, Presidency Conclusions, 15 and 16 October 1999; European Commission, 'Proposal for a Council Directive concerning the status of third-country nationals who are long-term residents' COM(2001) 127 final, Explanatory memorandum 1.1.

⁶⁵ See also proposed revision. European Commission, 'Proposal for a Directive of the European Parliament and of the Council concerning the status of third-country nationals who are long-term residents', COM(2022) 650 final. See also the similar demands of the Parliament in Committee on Civil Liberties, Justice and Home Affairs, 'Report on new avenues for legal labour migration'(2020/2010(INI)) (rapporteur: Sylvie Guillaume) and of public stakeholders in Commission, Directorate General for Migration and Home Affairs, Synthesis Report, Analysis of the responses to the public consultation on the future of legal migration, January 2021.

3.1. Accepted Limitations to Social Rights of Non-EU Migrants

Equal access to social rights is guaranteed in all the relevant Directives. However, instead of general equal treatment clauses, the framework in place now provides detailed enumeration of the areas where equal treatment must be granted, as well as the accepted limitations to these areas.⁶⁶

The table below shows the areas where the Directives provide for social rights, as well as the accepted limitations to such rights.⁶⁷

	Single Permit Directive	2024 Single Permit Directive	Researchers and Students Directive	2021 Blue Card Directive	Seasonal Workers Directive	Long-Term Residents Directive
Access to employment	x	x	x	x	x	Limitations possible
Working Conditions	✓	✓	✓	✓	✓	✓
Education and Vocational Training	Limitations possible	Limitations possible	Limitations possible	Limitations possible	Limitations possible	Limitations possible
Recognition of professional qualifications	✓	✓	✓	✓	✓	✓
Tax Benefits	Limitations possible	Limitations possible	Limitations possible	x	Limitations possible	Limitations possible
Social Security	Limitations possible	Limitations possible	Limitations possible	✓	Limitations possible	Limitations possible

TABLE. Rights under the Migration Directives.

First of all, the Long-term residents Directive is the only instrument providing for equal access to employment and self-employed activities. However, Member

⁶⁶ The initial proposals by the Commission provided entitlements to equal treatment and during negotiation various limitations were inserted. Cf A Beduschi, 'An Empty Shell? The Protection of Social Rights of Third-Country Workers in the EU after the Single Permit Directive' (2015) 17 *European Journal of Migration and Law* 210. On the force of general equal treatment clauses in EU law see E Muir, *EU Equality Law: The First Fundamental Rights Policy of the EU* (Oxford University Press 2018).

⁶⁷ Revised and extended version of table 4, Rights, A Loxa, *Sustainability and EU Migration Law, What Place for Migrants' Rights* (Phd Thesis, Media Tryck 2023) 294.

States are allowed to limit equal access to employment for activities reserved for EU or EEA nationals, as well as regards positions which involve the exercise of public authority, thereby mirroring the relevant limitations of Article 45(4) TFEU. Next to this, unlimited equal treatment is guaranteed regarding working conditions; however, there is a lack of coherence in the way this is framed in the relevant Directives.⁶⁸ Despite the different framing, it is safe to assume that the right applies to all legally resident migrants without differentiation, as it constitutes an expression of Article 13 of the Charter.⁶⁹ Equal treatment as regards recognition of professional qualifications is also provided in all the Directives. The Legal Fitness Check suggested extending this right to applicants for permits who have not yet been authorized to enter/reside in the EU, as in some cases the recognition of professional qualifications is necessary for access to certain employment, as is the case for highly skilled workers and researchers.⁷⁰ In addition, all the Directives provide equal treatment as regards access to advice services afforded by employment offices apart from the Long-term residents one which makes no mention to the relevant right.⁷¹ This exclusion is peculiar, however the general right to access employment services under the other directives should not come as a surprise in light of the continuous emphasis in different Commission documents on training the existing workforce to correspond to new needs and on ensuring that labour needs are covered by non-EU migrants already resident and active in the internal market.⁷² Finally, all the Directives also provide for freedom of association and affiliation. The Seasonal Workers Directive makes explicit reference to the right to strike and take industrial action, including the right to negotiate and conclude collective agreements. In any case, the relevant right is a specific expression of Article 12 of the Charter, and as a result, it should not be differentiated between different categories of non-EU migrants, as the right is guaranteed to everyone regardless of their nationality.⁷³

⁶⁸ Some Directives (Researchers and Students Directive (n 63), Blue Card Directive (n 63), Single Permit Directive (n 2)) include health and safety in the workplace, whereas both versions of the Blue Card Directive also include the minimum working age, working hours, leave and holidays in the relevant provisions.

⁶⁹ See European Commission Staff Working Document, 'Fitness Check on EU Legislation on legal migration', SWD(2019)1055 PART 2/2, Annex 5, Section 2.5.

⁷⁰ Ibid. Section 1.5.

⁷¹ This was not the case in Researchers Directive and Blue Card Directive 2009, but now they are all recast.

⁷² Recently in European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, European Skills Agenda for sustainable competitiveness, social fairness and resilience', COM(2020) 274 final.

⁷³ Fitness Check on EU Legislation on legal migration (n 69), Annex 5, Section 2.5.

As to the rest of the areas mentioned in the table where equal treatment is required, they appear with different limitations and variations. Some can be explained due to other rights, enjoyed by non-EU migrants (whether they enjoy mobility rights or not, and what is the status under which they entered), while others are firmly based on economic considerations of averting risks from migration. Specifically, in the area of education, limitations appear in all the instruments, allowing Member States to exclude study grants from equal access to migrants.⁷⁴ What is more, Member States are given the possibility to set conditions of access to university and higher education.⁷⁵ In the Single Permit Directive, the text mentions appropriate language proficiency, payment of fees or specific educational prerequisites as possible conditions, and Member States can also limit access to education, if it is not linked to the specific employment activity of the non-EU migrant.⁷⁶ A similar possibility on limiting equal treatment regarding access to education or training directly linked to the employment activity also exists in the Seasonal Workers Directive.⁷⁷ Finally, the Single Permit Directive provides for the possibility to limit the application of equal access to education to non-EU migrants who are employed, or are registered as unemployed, and to exclude students.⁷⁸ In the area of education, the Fitness Check conducted in 2019 by the Commission that

While some [restrictions] appear ‘logical’, such as the restriction in the SPD [Single Permit Directive] that the right can be limited to those who are in employment or are registered as unemployed, the reason why others have been introduced in one or more Directives (but not in others) cannot be easily explained, such as the restrictions related to language proficiency and the fulfilment of specific educational prerequisites.⁷⁹

Arguably, even such limitation is not really justified if we take into account the social aims pursued by the Directives. Apart from aligning migration with the economic objectives of the EU, the relevant instruments seek to secure fair treatment for migrants and to achieve some kind of social progress in the form of rights attributed to migrants. The emphasis put on education as part of the integration policies pursued

⁷⁴ In European Commission, ‘Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment’ COM(2007) 637 final, Explanatory memorandum, Art 15, the Commission stated that the reason for limitation of access to study grants was that migrants workers would not normally be entitled to them on the basis of their contribution as workers.

⁷⁵ Council Directive 2009/50/EC (n 63), Art 14(2); Directive (EU) 2021/1883 (n 63), Art 16(2); Directive (EU) 2024/1233 (n 2), Art 12(2). See also Council Directive 2003/109/EC (n 2), Art 11(3).

⁷⁶ Directive (EU) 2024/1233 (n 2), Art 12(2)(a)(iv).

⁷⁷ Directive 2014/36/EU (n 63), Art 23(2)(ii).

⁷⁸ Directive (EU) 2024/1233 (n 2), Art 12(2)(a)(i) and (ii).

⁷⁹ Fitness Check on EU Legislation on legal migration (n 69), Annex 5.

at EU level to ensure social cohesion necessitates full equal treatment as regards access to education.⁸⁰

Another area of tension is access to social security, social assistance, and social protection, which are differentiated between the categories of non-EU migrants. The Legal Fitness Check suggested that the limitation of access to social security in employment related Directives is justified, as this is linked to the condition that migrants have sufficient resources to not become a burden.⁸¹ Equal treatment applies to social security as a recognition that workers contribute by their work and tax payments to public finances, and to serve as a safeguard against unfair competition that may result from exploitation.⁸² Social assistance, in contrast, was deliberately excluded from the relevant Directives because incoming migrants should have sufficient resources not to require financial support.⁸³ Social assistance and social protection is secured only for long-term residents, but even in their case, it can be limited to core benefits. This was not what the Commission had aimed for in the original proposals while it also suggested the removal of such limitation in the proposal for a recast Long-term residents Directive.⁸⁴ As regards the Directives that also provide rights to free movement in the EU, limitations can be introduced, and equal treatment can be limited to the Member State where the migrants have their registered place of residence.⁸⁵

It should be noted that all these Directives operate against the background of Article 20 of the Charter, which provides for equality before the law within the scope of EU law. Unequal treatment is thereby allowed to the extent it can be justified. Relatedly, the Legal Fitness Check suggested that EU migration law, in the way it is formed through the relevant Directives, could be described as a ‘fine-tuning of legitimate differentiated treatment’.⁸⁶ Looking at the way equal treatment is dissected and diluted in the relevant provisions, it is clear that limitations are inserted in order

⁸⁰See European Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Action plan on Integration and Inclusion 2021-2027’, COM(2020)758 final and in the European Commission, ‘Communication: European Skills Agenda for sustainable competitiveness, social fairness and resilience’ COM(2020)274 final.

⁸¹ Fitness Check on EU Legislation on legal migration (n 69), Annex 5

⁸² European Commission, ‘Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment’, COM(2010)379, Explanatory memorandum Article 15.

⁸³ See Proposal COM(2007) 637 final (n 74), Explanatory memorandum, Art 15. European Commission, ‘Proposal for a Council Directive on a specific procedure for admitting third-country nationals for purposes of scientific research’, COM(2004) 178 final, Art 12.

⁸⁴ Proposal COM(2022) 650 (n 65), Art 12.

⁸⁵ Such limitations appear in the Blue Card Directive 2009 and the Long-term residents Directive but not in the Blue Card Directive 2021 and the Researchers and Students Directive.

⁸⁶ Fitness Check on EU Legislation on legal migration (n 69), Annex 5, 66.

to avoid repercussions of granting rights to public finances. In cases where equal treatment comes with no cost for national economies, there is no reason to discriminate. However, in light of the parallel pursuit of economic and social objectives in these instruments, the question that remains open is to what extent social cohesion can be guaranteed when equal treatment is intentionally limited to deprive migrants from EU law protection.⁸⁷ The next section will look at how the relevant limitations have been judicially reviewed in the case law of the Court.

3.2. The Judicial Review of the Limitations

Contrary to the legislative intention to differentiate social rights between different categories of migrants and to dilute equal treatment by allowing for limitations in order to avoid presumed economic repercussions, the Court has followed a consistent approach and has guaranteed the rights of migrants by reviewing different national limitations in light of the Charter. Economic considerations are not absent from the case law of the Court, and the Court acknowledges how these have shaped the rights of migrants. Nevertheless, it consistently emphasizes the protection afforded by the Charter to consolidate the rights of non-EU migrants. Against the incoherent economic obsession with conditioning the rights of migrant workers in secondary law so that they do not pose risks for the economy discussed earlier, the Court has put forward a positive vision related to the rights all migrants should enjoy under EU law. This concerns not only migrants covered under secondary law but also those whose residence status in Member States is irregular.

Specifically, in *Tümer* the Court had to interpret the scope of application of Directive 80/987/EEC on the protection of employees in the event of insolvency of their employer.⁸⁸ *Tümer*, a Turkish national living in the Netherlands, had worked for a company that was declared insolvent. His application for insolvency benefit was rejected on the ground that he was not legally resident in the Netherlands. In that case, the Netherlands argued that since the Directive was based on Article 137 EC, which provided the Union with competence to adopt Directives with a view to achieving social objectives related to the improvement of working conditions, it could not apply to non-EU nationals, even legally resident ones.⁸⁹ If legally resident

⁸⁷ Cf M Ruhs, *The price of rights: regulating international labor migration* (Princeton University Press 2013).

⁸⁸ Case C-311/13 *Tümer* EU:C:2014:2337. Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer.

⁸⁹ Opinion Of AG Bot in Case C-311/13 *Tümer* EU:C:2014:1997 para 34.

migrants were to be protected, the state argued that the concept of employee could be construed under national law to exclude migrants whose residence is irregular.

AG Bot suggested that excluding non-EU migrants workers from protective measures adopted for employees would not be compatible with the purpose of EU social policy, as it would encourage the recruitment of foreign labour in order to reduce wage costs.⁹⁰ Additionally, with reference to *Germany and others v Commission*, he emphasized that the Court had already acknowledged the relation of the Union's social policy to the policy that applied to workers from third countries.⁹¹ The AG proceeded to suggest that the crucial factor triggering obligations under the relevant Directive was the employment relationship of a person to an insolvent employer.⁹² Importing a condition of nationality in the scope of the Directive would go against its objective to guarantee all employees in the EU a minimum level of protection.⁹³ He then went on to examine whether there was discretion on the part of Member States to exclude irregularly resident migrants. In this examination, he suggested that since the employee status was the crucial status, making it conditional to legal residence would go against non-discrimination.⁹⁴ The AG suggested that irregularly resident migrants who had worked and paid contributions were in a comparable situation to other employees, and there was nothing to justify a differentiated treatment.⁹⁵

The Court confirmed the AG's approach and noted that the EU social policy was concerned with promoting the living and working conditions of both nationals of the EU Member States and non-EU nationals.⁹⁶ It held that Member States could not define the term 'employee' in such a way as to undermine the social objective of the Directive.⁹⁷ As a result, the Directive was found to preclude national laws, such as the Dutch one, which strip migrants with irregular residence of protection. As long as somebody is in employment, the social rights they derive therefrom should not be undermined because their residence is not regularised. This case is significant in showing the application of EU social policy for all migrants engaged in the EU development project. What is more, it is crucial for understanding how the economic contribution made by migrants' work is at the heart of the protection afforded by EU law in ways similar to the protection afforded to EU migrants.

⁹⁰ Ibid. para 52.

⁹¹ Ibid. para 52.

⁹² Ibid. para 54.

⁹³ Ibid. para 54.

⁹⁴ AG Bot in *Tümer* (n 89) para 60

⁹⁵ Ibid. para 89.

⁹⁶ *Tümer* (n 88) para 32.

⁹⁷ Ibid. paras 42, 45.

Next to this case, the Court has also handed down rulings reconstructing equal treatment and limiting the effects of secondary law for the rights of migrants. The line of reasoning that underlies the relevant case law was set in *Kamberaj*, which concerned discriminatory conditions for access to a housing benefit by a long-term resident. In that case, the Court held that while the provisions of the Long-term residents Directive provided for equal treatment in access to social security, social assistance and social protection as defined in national law, these concepts could not be defined unilaterally by Member States without the risk of undermining the effectiveness of the Directive.⁹⁸ The interpretation of what constitutes social security, social assistance and social protection under national law needs to comply with the Charter. Article 34 of the Charter guarantees equal treatment regarding access to specific social benefits in order to guarantee decent living to all those who lack sufficient resources.

In light of this, the Court held that national courts should interpret the relevant concept of social assistance in the Long-term residents Directive in light of the Charter in order to assess whether benefits of different kinds fell under the categories of benefits where equal treatment should be provided.⁹⁹ The Court further stated that the limitation allowed under Article 11(4) of the Directive should be interpreted strictly in light of the social purpose of integration.¹⁰⁰ It also clarified that the provision of the Directive which allowed the limitation of equal treatment only to core benefits could not be invoked on a case-by-case basis. Rather, such a limitation needs to be expressed clearly at the time of implementation of the Directive in national law.¹⁰¹ It further suggested that the meaning and scope of core benefits for the purposes of equal treatment should be construed with reference to the purpose of integration as the objective for long-term residents.¹⁰² It thus held that core benefits are benefits that enable individuals to meet their basic needs such as food, accommodation and health, and should be aligned with the minimum benefits covered by the Charter.¹⁰³

A similar reasoning was followed by the Court in relation to rights under the Single Permit Directive in *Martinez Silva*.¹⁰⁴ In that case a migrant worker was excluded from a grant that was provided to households with at least three minor children and income below a minimum amount. The Single Permit Directive provides for equal treatment

⁹⁸ Case C-571/10 *Kamberaj* EU:C:2012:233 para 78.

⁹⁹ *Ibid.* para 81.

¹⁰⁰ *Kamberaj* (n 98) para 86.

¹⁰¹ *Ibid.* para 87.

¹⁰² *Ibid.* para 90.

¹⁰³ *Ibid.* paras 91-92.

¹⁰⁴ Case C-449/16, *Martinez Silva*, ECLI:EU:C:2017:485.

not in line with national law, but with reference to social security as defined in Regulation 883/2004 and, more specifically, the family benefits covered under Article 3(1)(j) thereof.¹⁰⁵ The Court found that the benefit at issue fell under Article 3(1)(j) of Regulation No 883/2004, with reference to previous case law where it had held that family benefits covered all kinds of benefits which are automatically granted to families on the basis of objective criteria without discretionary assessment of personal needs, and which are intended to meet family expenses, as a public contribution to the family's budget to alleviate the burdens involved in the maintenance of children.¹⁰⁶ Once more, the Court pointed to the possibility to derogate from equal treatment provided in the Directive, but it held that such a possibility existed only if the Member State explicitly chose so at the transposition of the Directive.¹⁰⁷

The line of case law developed in *Kamberaj* for long-term residents, and applied in *Martinez Silva* under the Single Permit Directive, has been since confirmed regarding different types of benefits claimed by non-EU migrants.¹⁰⁸ The Court has followed a clear line of reasoning in promoting the equal treatment for this group. When it comes core benefits, to determine if they need to be granted under equal treatment conditions, Member States need to comply with the Charter and particularly Article 34 thereof. If a benefit serves the purpose set out in Article 34 of the Charter, then non-EU migrants can in no case be excluded therefrom. The central evaluation then seems to concern the purpose of the benefit: does it aim at making life liveable and ensuring a decent existence for all? If so, it needs to be granted to all migrants at the same way in which it is granted to nationals. As regards long-term residents this is guided by the objective of integration, whereas as regards all migrants covered under the Single Permit Directive this is due to the objective of ensuring fair treatment. Then as regards permissible limitations to equal treatment provided under the Directives, Member States must explicitly exclude migrants therefrom by applying them when they transpose the relevant Directives. It is only in such cases that the Court could consider that the relevant discriminatory attribution falls

¹⁰⁵ Regulation (EC) No 883/2004 on the coordination of social security systems in the EU.

¹⁰⁶ *Martinez Silva* (n 104) paras 22-23.

¹⁰⁷ *Ibid.* para 29.

¹⁰⁸ See Case C-302/19 *INPS* EU:C:2020:957 on Italian legislation which excluded the family members of a Single Permit holder who do not reside in Italian territory for the purposes of calculating the entitlement. Similar for longterm residents in Case C-303/19 *INPS* EU:C:2020:958; Case C-350/20 *INPS* EU:C:2021:659 on childbirth and maternity allowance. Case C-462/20 *ASGI and others* EU:C:2021:894 on equal access to goods/services under a family card granting discounts; Case C-94/20 *Land Oberösterreich (Aide au logement)* EU:C:2021:477 making housing assistance for long-term residents dependent on the proof of basic command of language of the Member states; most recently Joined Cases C-112/22 and C-223/22 *CU and ND* EU:C:2024:636 on a condition of 10 year residence in order to access a basic income benefit for long-term residents.

within national law and the relevant measures cannot be reviewed for compliance with the Charter.

In this case law, we see that the Court puts forward the social objectives served by secondary law (integration of long-term residents and fair treatment for all legally resident migrants) not as a byproduct of the economic contribution of the migrants, but rather under a positive vision of social justice in line with the social objectives of primary law. In doing so, the Court connects the protection of migrants under EU law with the evolution of the legal order and the incorporation of human rights guarantees under the Charter. By correlating the limitations allowed under secondary law to the provisions of the Charter, it dictates minimum safeguards of fundamental rights protection, thereby limiting the space for derogation by Member States and the EU legislator.¹⁰⁹

4. Combining the approaches?

Having reviewed the framework of accepted limitations to social rights of EU and non-EU migrants the following can be said. On the one hand limitations to social rights for both EU and non-EU migrants are closely connected to an economic logic. The emphasis on unreasonable burdens to national welfare systems and potential negative economic effects of migration dictate the accepted limitations to social rights. After all social rights are attributed due to the contribution one has made to the EU development project. While this understanding is common between the two frameworks, the reason why social rights are attributed to non-EU migrants as well as the judicial review of the limits applicable to such rights is not exclusively economic. Specifically non-EU migrants are attributed social rights also with a view to social cohesion and integration (an integration that is presumably more easily achieved by EU migrants). This means that when such limitations are reviewed the potential burdens to national welfare systems are weighed against the Charter, thereby ensuring equal access to a minimum set of social rights that can guarantee a dignified life for all those who fall within the scope of EU law. This approach of the Court stands in stark contrast to the interpretations followed on EU migrants' rights, where it has accepted a consolidation of balancing of economic and social objectives by the EU legislature as expressed in the Citizens' Rights Directive. The differentiation could be connected to the maturity of the legal framework on EU migrants,

¹⁰⁹ Cf COM(2022) 655 final (n 60), Explanatory memorandum, Art 12, on the revision of the Single Permit Directive with reference to *INPS* (n 108).

which has been constantly transforming since the 1960s. Secondary law on migration, on the other hand, is very recent and has developed in an ‘environment in which national jealousies and priorities are never far from the surface’.¹¹⁰ In any case, regarding disputes on limitations of social rights of non-EU migrants, the Court consistently reviews national law in light of a more positive vision of what individual rights should look like in a legal system whose constitutional architecture is completed by the adoption of the Charter.

What are we to make of these opposing, yet overlapping logics? Most importantly what are we to make of the overlap behind the reasons why rights are attributed, at the time when limitations to such rights are justified in view of economic considerations for EU migrants but reviewed in light of human rights considerations for non-EU migrants? Such a differentiation would be acceptable if, unlike what the CJEU case law suggests, we were to accept that EU migrants do not ‘enjoy a different status and rights of a different kind’, arguably higher compared to non-EU migrants.¹¹¹ However the Court has consistently emphasised this difference and it has avoided applying its free movement reasoning even in cases concerning long-term residents whose status was supposed to grant them with ‘a set of uniform rights which are as near as possible to those enjoyed by citizens of the European Union’.¹¹²

Taking as a starting point EU law as a complete system of legal remedies complemented with a Charter of Fundamental Rights as a basis for judicial review, the next section suggests that the Charter should gain more ground as a basis of review of limitations to social rights under the Citizens’ Rights Directive.¹¹³ Following, section 4.2 discusses the limitations of the EU legal system due to the attribution of rights in the form of equal opportunities, but also the financial solidarity justification as a reason for attribution of more extensive social rights to EU migrants. That section suggests that despite these limitations, there is a basis for revisiting some of the current accepted limitations to social rights under secondary law for non-EU migrants. The suggestions put forward do not aim to overhaul the current functional approach to social rights in EU law. Rather the argument develops by suggesting that

¹¹⁰ N Walker, ‘In Search of the Area of Freedom, Security and Justice: A Constitutional Odyssey’ in N Walker (ed), *Europe’s Area of Freedom, Security, and Justice* (Oxford University Press 2004) 3.

¹¹¹ See Case C-930/19 *X v Belgian state* EU:C:2021:657 para 89.

¹¹² Council Directive 2003/109/EC (n 2), Recital 2. See most recently *CU and ND* (n 108); V Passalacqua, ‘Another Blow to Discriminatory Conditions of Access to Social Benefits: Joined Cases ND and CU, (C-112 and 223/22)’ (EU Law Live, September 2024) at eulawlive.com; J Bornemann and M Haag, ‘Testing the Inspirational Link between EU Citizenship and Migration Law: C-112/22 and C-223/22 CU and ND on Indirect Discrimination of Long-Term Residents’ (European Law Blog, September 2024) www.europeanlawblog.eu.

¹¹³ See Art 19 TEU, Case C-294/83, *Les Verts*, EU:C:1986:166 para 23; Case C-72/15, *Rosneft*, EU:C:2017:236, para 66.

even with a functional approach to social rights, the current framework can and should deliver more for both EU and non-EU migrants.

4.1. The potential for Charter rights to guide both frameworks

As demonstrated earlier in section 3.2 the Charter has been extensively used when it comes to judicial review of limitations to the social rights of non-EU migrants. The extensive use of the Charter is aligned with the theoretical approach of Thym on EU migration law as a legal area whose constitutional point of reference is a cosmopolitan outlook.¹¹⁴ According to Thym, the cosmopolitan outlook describes a migration governance that can ‘combine migratory opportunities for the economically motivated with the pursuit of legitimate concerns of democratic self-government’ of the Member States.¹¹⁵ These concerns, he argues, can be economic, social and cultural such as protecting less qualified domestic workers or supporting linguistic integration.¹¹⁶ The cosmopolitan outlook suggested by Thym essentially describes the curtailment of absolute state discretion on migration due to considerations related to migrants as human beings, whose rights should be protected.¹¹⁷ On a first level of analysis, Thym’s approach can explain the differentiation in judicial review to social rights limitations as distilled from sections 2.2. and 3.2 respectively if we look at the EU legal system in relation to domestic law and the different restraints it creates for national legal orders.

However, if we look at EU law from an internal perspective related to the structure of the EU legal order and its constitutional characteristics, it is counterintuitive that the Charter does not play an equally important role for those holding the status of EU citizenship.¹¹⁸ A typical constitutional framework would demand full and equal protection of fundamental rights for citizens, with limited/curtailed protection for aliens. However, in EU law the protection of fundamental rights is determined by whether a legal dispute falls within the scope of EU law. As a result, the way in

¹¹⁴ The theoretical framework develops across a series of contributions, Thym “‘Citizens’ and ‘Foreigners’” (n 4); D Thym, ‘EU Migration Policy and Its Constitutional Rationale’ (n 4); D Thym, ‘Ambiguities of Personhood, Citizenship, Migration and Fundamental Rights in EU Law’ in L Azoulai, S Barbou des Places and E Pataut (eds), *Constructing the Person in EU Law: Rights, Roles, Identities* (Hart Publishing 2016) 111; His position also frames the introductory discussion in D Thym, *European Migration Law* (Oxford University Press 2023) 23–29.

¹¹⁵ Thym, ‘EU Migration Policy and Its Constitutional Rationale’ (n 4) 732.

¹¹⁶ Ibid.

¹¹⁷ Thym, “‘Citizens’ and ‘Foreigners’ in EU Law’ (n 4) 306–307.

¹¹⁸ On the importance of the Charter for the constitutional architecture of the EU, see X Groussot and GT Petursson, ‘The EU Charter of Fundamental Rights Five Years on: The Emergence of a New Constitutional Framework?’ in U Bernitz, S de Vries and S Weatherill (eds), *The EU Charter of Fundamental Rights as a Binding Instrument: Five Years Old and Growing* (Hart Publishing 2015) 135.

which fundamental rights application has developed in the case law challenges ‘common wisdom about the way in which a political entity engages with the fundamental rights of citizens and foreigners’.¹¹⁹ This particularity creates paradoxes for the interaction of EU citizenship and migration law with the EU constitutional framework, which have been examined in different contributions by Iglesias Sánchez.¹²⁰ In her work, she has shown that the specificity of the EU fundamental rights protection regime, combined with the EU competence on citizenship and migration does not correspond to expectations based on how the categories of ‘citizen’ and ‘foreigner’ would normally shape fundamental rights protection.¹²¹ While Iglesias Sánchez does not contest the different normative background identified by Thym, she shows that, in some respects, EU migration policy goes further than free movement law as regards the application of EU fundamental rights.¹²² Without contesting the differentiation between free movement and migration regulation under primary and secondary law, I suggest that social rights limitations should be more rigorously reviewed in light of Article 34 of the Charter for all categories of migrants, especially the EU ones. Given the extensive use of the Charter to review the limitations imposed to social rights under secondary law for non-EU migrants, the constitutional architecture of EU law demands an equally extensive use of the Charter also for EU migrants.

4.2. Financial solidarity dictating the outer limits to social rights for all migrants

At the same time however, the extension of judicial review in light of the Charter is the maximum that can be demanded for EU migrants. This is because the very basis of their rights is based on considerations of financial solidarity between the Member States.¹²³ By engaging in a common project of growth, Member States have accepted that they may have to incur the costs for an EU migrant because of the economic benefits they collectively derive from the EU project. After all, a host state’s citizens can migrate to another Member State, too, and will enjoy benefits there. This case

¹¹⁹ S Iglesias Sánchez, ‘The Constitutional Status of Foreigners and European Union Citizens: Loopholes and Interactions in the Scope of Application of Fundamental Rights’ in D Thym (ed) (n 5) 265.

¹²⁰ S Iglesias Sánchez, ‘Nationality: The Missing Link between Citizenship of the European Union and European Migration Policy’ in E Guild, C Gortázar Rotaecche and D Kostakopoulou (eds), *The Reconceptualization of European Union Citizenship* (Brill Nijhoff 2014) 65; S Iglesias Sánchez, ‘Constitutional Identity and Integration: EU Citizenship and the Emergence of a Supranational Alienage Law’ (2017) 18 *German Law Journal* 1797.

¹²¹ Iglesias Sánchez (n 119)

¹²² Ibid.

¹²³ It was exemplified in the extensive attribution of rights in C-184/99, *Grzelczyk*, ECLI:EU:C:2001:458 but I would say that such a conception behind the attribution of rights existed already in C-15/69, *Württembergische Milchverwertung Südmilch AG v Ugliola*, ECLI:EU:C:1969:46.

for financial solidarity, no matter how strong, has not gone very far since the enlargement of the EU in the new millennium. If anything, the diverse nature of Member States' economies set the basis for limiting social rights of EU migrants to ensure that the strong welfare states of the West and North would not have to carry the burden for the migrants from the South and East. Regardless of whether this claim had any factual basis, this narrative redefined the degree to which EU states are ready to recognize a full extension of social rights even to the nationals of Member States that are already part of the collective project of growth.¹²⁴

Linking rights to broader questions of justice, Somek has suggested that in a transnational market setting, the distribution of resources becomes irrelevant, and the relative treatment of individuals and equal opportunities are afforded central place.¹²⁵ According to Somek, in the EU, the only distributive mechanism of relevance is the market, and it has a justice-disabling effect.¹²⁶ Looking at the market to correct inequalities, the concern is not on redistribution, but rather on equal access to opportunities.¹²⁷ In the EU context, questions of justice become questions of rights, with an emphasis specifically on non-discrimination.¹²⁸ In such a set-up, human rights do not need to be followed by strong legislative measures and can be promoted judicially by courts. The debate shifts from questions of justice to questions of inclusion in the form of 'the elimination of arbitrary factors that prevent voluntary access by those who meet non-arbitrary conditions'.¹²⁹

The emphasis on inclusion in the form of rights attribution, as suggested by Somek, is apparent in the development of EU migration law. This development has been based on the attribution of mobility and equal treatment rights to people as a means to achieve social progress. Given this, the inclusion of non-EU migrants who do not negatively impact growth (by being self-sufficient and not having recourse to

¹²⁴ D Thym (ed) (n 5); S Devetzi, 'EU Citizens, Residence Rights and Solidarity in the Post-Dano/Alimanovic Era in Germany' (2019) 21 *European Journal of Migration and Law* 338; E Guild, 'Does European Citizenship Blur the Borders of Solidarity?' in E Guild, C Gortázar Rotaecche and D Kostakopoulou (eds), *The Reconceptualization of European Union Citizenship* (Brill Nijhoff 2014) 189; P Minderhoud, 'Back to the Roots? No Access to Social Assistance for Union Citizens Who Are Economically Inactive' in D Thym (ed) (n 5); S Mantu and P Minderhoud (n 17) 313.

¹²⁵ A Somek, 'From Workers to Migrants, from Distributive Justice to Inclusion: Exploring the Changing Social Democratic Imagination' (2012) 18 *European Law Journal* 711, 724.

¹²⁶ Ibid. 711, 716.

¹²⁷ Ibid.

¹²⁸ See also A T Williams, 'The Problem(s) of Justice in the European Union' in D Kochenov, A T Williams and G de Búrca (eds), *Europe's Justice Deficit?* (Hart Publishing 2015) 33 who suggests that reliance on human rights cannot resolve substantive justice issues; Somek (n 125) 720; Also A Somek, 'The Preoccupation with Rights and the Embrace of Inclusion: A Critique' in D Kochenov, A T Williams and G de Búrca (eds), *Europe's Justice Deficit?* (Hart Publishing 2015) 297.

¹²⁹ Somek (n 125) 718.

the social assistance system of Member States) could be demanded under EU law. This would mean revisiting the remaining limitations of social rights prescribed in the Long-term residents Directive. This is partly what the Commission aimed for in the proposal for recasting the Long-term residents Directive which suggested the removal of the possibility to limit equal access to social assistance to core benefits.¹³⁰ As the negotiations for the recast have ceased, it seems unlikely that the currently permissible limitations to equal treatment will be removed in the near future.

At the same time, taking the economic function of social rights at face value would demand the attribution of the same social rights to all non-EU migrants as long as they are engaging in work. In this regard, the current patchwork framework and the differentiation it introduces to accepted limitations is not based on the contribution someone makes by their work, but rather on how urgently a migrant's contribution is needed for the EU economy.¹³¹ The model on which EU law furnishes rights to migrants is based on inclusion in the form of absence of discrimination on grounds that cannot be justified. The attribution of more rights to migrants who are more needed is both arbitrary and out of line with a long-term planning around migration law. We might know what type of migrants the EU economy needs today, but we cannot predict what type of migrants will be most needed in the future.

At the same time, in view of the economic basis underlying the attribution of social rights, an extension of social rights for non-EU migrants in a way comparable to those of EU migrants (thus including economically inactive non-EU migrants who are not yet long-term residents) is harder to justify. That is because the states of origin of such migrants are not directly involved in the EU project of growth. In past bilateral agreements between the EU and third countries, economic or trade cooperation dictated the attribution of social rights to migrants from the associated states.¹³² However, after the setting in place of an autonomous EU migration policy that attributes rights to non-EU migrants based on their residence, such clauses have disappeared. One might also say that they are no longer needed. How would such an extension of social rights be justified? In this case, it could only take place by a commitment to advancing the social objectives of the EU project in line with the approach followed by the Court in the case law, and with a stronger emphasis on human rights as a tool not only for progress, but also for integration of the migrant in the national community under a long-term view of the place migrants will occupy in future EU societies.

¹³⁰ Proposal COM(2022) 650 (n 65), Art 12.

¹³¹ See most crucially the absence of limitations to social security rights under the Blue Card Directive.

¹³² EEA, Switzerland but in the past EEC-Turkey, Morocco, Algeria, Tunisia evolved in Euro Med and Europe Agreements.



***The Borders Within: Socio-economic Rights
and Non-discrimination in EU Law***

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**Access to Social Benefits for Third-country Nationals
in the European Union Between Fragmentation
and Equal Treatment**

*Matteo Manfredi**

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ABSTRACT: The article explores the fragmented legal framework governing third-country nationals' (TCNs) entitlement to equal treatment with nationals of the host Member State regarding access to social benefits under EU law. Access to social advantages for TCNs is shaped by detailed EU secondary legislation, which defines rights and obligations based on an individual's specific legal status. While EU secondary legislation establishes differentiated rules depending on migration status, its transposition and implementation at the national level remain inconsistent: some Member States provide TCNs with broader access to welfare systems, while others impose more restrictive eligibility criteria. In light of this fragmented landscape, the article examines the CJEU's case law concerning the equal treatment provisions in three key migration directives: Directive 2003/109 on long-term residents, Directive 2011/95 on beneficiaries of international protection, and Directive 2024/1233 on the Single Permit. The study further investigates how the Charter of Fundamental Rights might help address the fragmentation surrounding TCNs' access to social benefits. Special attention is given to the role of Article 20 in guiding the interpretation and evaluation of exclusionary or discriminatory measures, and to the potential of Article 34 in guaranteeing a dignified standard of living by establishing core minimum standards. Such standards would limit Member States' discretion in regulating access to social benefits and reduce the legal uncertainty associated with case-by-case assessments by national courts.

KEYWORDS: social benefits – equal treatment – third-country nationals – migration directives – fragmentation – core benefits.

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1. Equal treatment and social benefits for third-country nationals in the European Union

The article underscores the complex landscape of third-country nationals' (TCNs) right to equal treatment with nationals of the host Member State concerning social benefits within the framework of EU migration law. Access to social advantages for TCNs is regulated by a detailed framework of EU secondary legislation, which varies depending on their specific category. However, national practices remain largely inconsistent: some Member States offer broader access to their welfare systems, while others adopt a more restrictive stance.¹

The lack of a coherent framework continues to render access to social benefits for TCNs ambiguous and inconsistent, largely due to the absence of a dedicated non-discrimination clause for TCNs in EU primary law, unlike the provisions afforded to EU citizens.² As it is well known, Article 18 TFEU provides that non-discrimination on the basis of nationality shall be guaranteed within the scope of application of the Treaties. The EU Court of Justice (CJEU or Court) has asserted that the article in question does not apply to TCNs, since it concerns situations in which an EU citizen of a Member State suffers discriminatory treatment in relation to citizens of another Member State merely on the basis of his nationality.³ Specifically, the CJEU affirmed that as the background to Article 18 TFEU was EU citizenship, this article could not apply 'as it stands' to a situation where a TCN has a residence permit in a Member State.⁴

Similarly, Article 21, paragraph 2 of the Charter of Fundamental Rights prohibits discrimination on grounds of nationality 'within the scope of application of the Treaties and without prejudice to any of their specific provisions'. The Charter provision mirrors the intent and limitations of Article 18 TFEU, emphasizing the systemic connection between the prohibition of nationality-based discrimination and the broader EU framework, which governs relationships primarily between Member States and their citizens. The CJEU held that, on the basis of the explanations relating to the Charter, Article 21, paragraph 2 is equivalent to Article 18 TFEU and has the same

¹ For further insights see S Morano-Foadi and K de Vries, 'The equality clauses in the EU directives on non-discrimination and migration/asylum' in S Morano-Foadi and M Malena (eds), *Integration for Third-country nationals in the European Union* (Edward Elgar Publishing 2012) 16.

² D Thym, *European Migration Law* (Oxford University Press 2023) 484.

³ Joined Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze* EU:C:2009:344, para 52.

⁴ Case C-45/12 *Hadj Hamed* EU:C:2011:217, para 41. On this point see E Brouwer and K de Vries, 'Third-country nationals and discrimination on the ground of nationality: article 18 TFEU in the context of article 14 ECHR and EU migration law: time for a new approach', in M van den Brink, S Burri and J Goldschmidt (eds), *Equality and Human Rights: Nothing but Trouble? Liber amicorum Titia Loene* (Utrecht University 2015) 123. The Authors observe that the Court, using the wording 'as it stands' seems to indicate that Art 18 TFEU could apply to Third-country nationals, but only if their situation is covered by EU law (141).

scope.⁵ So far, the Court has indeed excluded an extensive interpretation of the concept of nationality-based discrimination under Article 18 TFEU, thereby conditioning the interpretation of the analogous notion contained in Article 21, paragraph 2, of the Charter.

By limiting the scope of Article 21, paragraph 2 to EU citizens, the Court underscores that EU citizenship is a privileged status intrinsically linked to Member States and their nationals. This ensures that the legal framework prioritizes the rights and obligations of EU citizens over those of TCNs. It also reflects the institutional and political objectives of EU law, which seek to strike a balance between fostering inclusivity and preserving Member State sovereignty in areas such as immigration and the treatment of TCNs. However, this approach has resulted in a fragmented legal framework for protecting the rights of third-country nationals, leaving their entitlements heavily reliant on the provisions of secondary legislation rather than enjoying the same guarantees provided to EU citizens under primary law.⁶

The significance of this restrictive interpretation is heightened in the context of the EU's shifting governance of asylum and immigration. Scholars have observed a gradual convergence between these traditionally distinct legal regimes, spurred by evolving EU law and jurisprudence.⁷ Historically, asylum and immigration were governed by distinct legal frameworks, with specific regulations and directives addressing each area separately. However, recent developments, including changes in EU law and jurisprudence, have led to a convergence of these areas, resulting in increased interaction and integration between asylum, immigration, and other provisions of the Treaties.⁸

One of the main objectives of the EU immigration policy is to ensure the 'fair treatment' of TCNs residing legally in the Member States as mentioned in Article 79, paragraph 1, TFEU as well as in Article 67, paragraph 2, TFEU. This standard,

⁵ See, *ex multis*, Case T-452/15 *Andrei Petrov* EU:T:2017:822, paras 38–39; Case T-618/15 *Udo Voigt* EU:T:2017:821 paras 79–80.

⁶ D Thym, 'European Migration Law between "Rescuing" and "Taming" the Nation State: A History of Half-Hearted Commitment to Human Rights and Refugee Protection' (2023) 8 *European Papers* 1663, 1667–1668.

⁷ B Friðriksdóttir, *What Happened to Equality?: The Construction of the Right to Equal Treatment of Third-Country Nationals in European Union Law on Labour Migration* (Brill 2017), 13–14; S Morano-Foadi and V Prototapa, 'Equality Of Third Country Nationals (TCNs) Twenty Years After Tampere: EU And ECHR Protection' (2019) 26 *Revista General de Derecho Público Comparado* 1.

⁸ See, *inter alia*, M Jesse, 'Missing in Action: Effective Protection for Third-Country Nationals from Discrimination under Community law' in E Guild, K Groenendijk and S Carrera (eds), *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU* (Routledge 2009) 187; C Hublet, 'The scope of Article 12 of the Treaty of the European Communities vis-à-vis Third-Country Nationals: Evolution at Last?' (2009) 15 *European Law Journal* 757; S Iglesias Sánchez, 'Fundamental Rights Protection for Third-Country and Citizens of the Union: Principles for Enhancing Coherence' (2013) 15 *European Journal of Migration and Law* 137; C Favilli, 'L'applicazione ai cittadini di Paesi terzi del divieto di discriminazione per motivi di nazionalità' in G. Caggiano (ed.), *I percorsi giuridici per l'integrazione* (Giappichelli 2014) 121.

whose content appears uncertain, is better specified with reference to third-country nationals who have been residing permanently in the European Union for a certain period of time. At the Tampere meeting on 15 and 16 October 1999, which laid the foundations for the Area of Freedom, Security and Justice, the European Council established that a ‘set of uniform rights which are as near as possible to those enjoyed by EU citizens’ should be defined.⁹ This framework was incorporated into Directive 2003/109 concerning the status of TCNs who are long-term residents (the so-called ‘Long-term resident Directive’).¹⁰

The principle of equal treatment plays a significant role in the development of the common immigration policy within the European Union, thanks to the legal bases contained in Article 79, paragraph 2, letters a) and b), TFEU.¹¹ Despite these legal provisions, there may be instances where the interpretation of Article 21, paragraph 2, of the Charter of Fundamental Rights proposed by the Court appears contradictory. This inconsistency stems from the selective application of equal treatment provisions within various directives governing immigration and asylum policies. Certain EU directives¹² explicitly exclude specific categories of foreigners, such as short-term visa holders or temporary residents, from the scope of equal treatment protections. As a result, the application of equal treatment among TCNs is uneven, creating disparities based on residency status or purpose of stay.¹³

Furthermore, TCNs face significant barriers due to measures imposed by several Member States, which have been reviewed in cases before the Court. These measures include, for instance, restrictions on housing benefits justified by budgetary concerns,¹⁴ requirements for long-term residents to demonstrate basic language proficiency as a condition for accessing housing assistance,¹⁵ limitations on social assistance for beneficiaries of international protection,¹⁶ and strict residency requirements

⁹ European Council, Presidency Conclusions, 15 and 16 October 1999, para 18.

¹⁰ Council Directive 2003/109/EC of 25 November 2003 concerning the status of Third-country nationals who are long-term residents.

¹¹ See, for instance, the aforementioned Directive 2003/109/EC (n 10); Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted; and Directive (EU) 2024/1233 of the European Parliament and of the Council of 24 April 2024 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State.

¹² One may consider, *ex multis*, Directive 2003/109/EC (n 10), which provides equal treatment for TCNs who have legally resided in an EU Member State for at least five years and who hold long-term resident status. However, it does not apply to short-term visa holders or temporary residents, as these individuals do not meet the residency requirements for long-term status.

¹³ Morano-Foadi and de Vries (n 1) 22–23; D McCormack-George, ‘Equal Treatment of Third-Country Nationals in the European Union: Why Not?’ (2019) 21 *European Journal of Migration* 53, 63–69.

¹⁴ Case C-571/10 *Kamberaj* EU:C:2012:233.

¹⁵ Case C-94/20 *Land Oberösterreich* EU:C:2021:477.

¹⁶ Case C-713/17 *Shah Ajubi* EU:C:2018:929.

to qualify for social benefits.¹⁷ Such policies create substantial challenges for TCNs and raise serious questions about their compliance with EU law and the principle of equal treatment. Nevertheless, Member States frequently defend these restrictive measures by invoking the notion of national solidarity, arguing that social benefits should be reserved for individuals who demonstrate integration into the host society either through contributions to social systems or proof of integration.¹⁸

In order to critically assess the scope for limiting Member States' reliance on exceptions to the principle of equal treatment, and to address the fragmented protection of TCNs' access to social benefits under EU secondary law, this contribution will explore the potential of the Charter of Fundamental Rights, particularly Article 20 (Equality before the law) and Article 34 (Social security and social assistance), as a unifying framework.

Article 20 enshrines the general principle of equality, which the CJEU has confirmed is applicable to TCNs insofar as their situations fall within the scope of Union law. In particular, in Opinion 1/17 the Court pointed out that the right enshrined in Article 20 of the Charter is 'available to all persons whose situations fall within the scope of EU law, irrespective of their origin'.¹⁹ Following its case-law, the CJEU recalls that 'equality before the law' requires that 'comparable situations must not be treated differently and different situations must not be treated in the same way, unless such treatment is objectively justified'.²⁰ Moreover, it clarifies that their comparability 'must be assessed in the light of all the elements that characterise them and, in particular, in the light of the subject matter and purpose of the act that makes the distinction in question, while the principles and objectives of the field to which the act relates must also be taken into account'.²¹

This principle was further explained through the Court's recent interpretation of Article 4, paragraph 6, of Framework Decision 2002/584 (European Arrest Warrant) in conjunction with Article 20 of the Charter, which has implications extending beyond criminal law into other areas, including social benefits. This interpretation suggests that national laws which categorically deny any TCN residing or staying in a Member State the possibility of benefiting from the grounds for optional non-execution of a European Arrest warrant are incompatible with EU law. The Court's ruling

¹⁷ Joined Cases C-443/14 and C-444/14 *Alo and Osso* EU:C:2012:233.

¹⁸ H Verschuere 'Equal treatment as an instrument of integration. The CJEU's case law on social rights for third-country nationals under the EU migration directives' (2023) 25 *European Journal of Social Security* 243, 244.

¹⁹ Opinion 1/17 *Accord ECG UE-Canada* ECLI:EU:C:2019:341, paras 168–175, 172. See C Contertse and M Andenas, 'Opinion 1/17 and Its Themes: An Overview' (2021) 6 *European Papers* 621, 627–628.

²⁰ *Ibid.*, para 176.

²¹ *Ibid.*, para 177. See also Case C-930/19 *X v Belgian State*, ECLI:EU:C:2021:657, para 57. For further details, see F Strumia, 'Speaking too little, yet saying too much. The wrong signals about EU values: X. v. Belgian State' (2022) 59 *Common Market Law Review* 1195, 1204–1208.

implies that such laws should not automatically exclude TCNs from the possibility of the executing judicial authority assessing their connections with the Member State.²² By analogy, this reasoning extends to the realm of social benefits, suggesting that TCNs should not face automatic denial based on rigid criteria such as residency duration or language proficiency. This assessment is crucial as it allows for a more nuanced consideration of the individual circumstances and ties that a TCN may have within the Member State, taking into account factors like the person's societal contributions, family connections, and efforts toward integration.

As far as Article 34 of the Charter is concerned, its potential lies in interpreting social assistance and social security schemes as instruments that must uphold fundamental rights, and not applied in a way that undermines human dignity or disproportionately excludes TCNs. This provision encompasses two key types of social rights: the right to access social security benefits (paragraph 1) and the right to social and housing assistance (paragraph 3), both of which must be upheld in accordance with Union law and national legal systems and practices. As for the field of application *ratione personae*, Article 34, paragraph 2, configures a right to access to social benefits for everyone residing and moving legally within the European Union.²³

While paragraph 1 outlines a non-exhaustive list of social risks covered by social security systems, paragraph 3 explicitly links the right to social and housing assistance to ensuring 'a decent existence for all those who lack sufficient resources'. This emphasis on securing a decent existence reinforces the connection to the right to human dignity, a core principle enshrined in Article 1 of the Charter. By doing so, paragraph 3 not only underscores the importance of providing assistance but also highlights the obligation to design these measures in a way that upholds and protects the inherent dignity of individuals who lack sufficient resources.²⁴

Starting from these considerations, the following sections will examine the CJEU's case law concerning the application of the equal treatment provisions set out in three key migration directives: Directive 2003/109 on long-term residents, Directive 2011/95 on beneficiaries of international protection, and Directive 2024/1233 on the single permit. This analysis will explore whether and how Articles 20 and 34 of the Charter of Fundamental Rights can be leveraged to address the fragmented approach to TCNs' access to social benefits under EU secondary law. attention will be devoted to examining the role of Article 20 in guiding the interpretation and eval-

²² Case C-700/21 *O.G.*, ECLI:EU:C:2023:444, para 158. For further analysis see M Manfredi 'L'obiettivo del reinserimento sociale del condannato quale limite all'esecuzione del mandato d'arresto europeo' (2024) *Eurojus* 100.

²³ O Golyner, 'Art 34 – Social Security and Social Assistance' in S Peers, T Hervey, J Kenner and A Ward (eds), *The EU Charter of Fundamental Rights* (Bloomsbury Publishing 2021) 985.

²⁴ E De Becker, 'Social security in the fundamental rights case law of the Court of Justice' in F Pennings and G Vonk (eds), *Research Handbook on European Social Security Law* (Edward Elgar Publishing 2023) 2, 4.

uation of exclusionary or discriminatory measures, and how the obligation to guarantee a decent existence under Article 34 serves as a legal basis for extending protections grounded in the fundamental principle of human dignity.

2. The patchwork approach to social benefits under the EU migration directives

It is apparent from the previous section that TCNs' right to equal treatment with the nationals of the host Member State with regard to social benefits is laid down in various instruments of EU migration law.

As already pointed out, the Tampere conclusions provided significant political impetus for the European Commission to develop policies and instruments aimed at supporting the integration of migrants within EU Member States and at enacting a direct relationship between integration and equality of TCNs residents. It is with reference to individuals who have resided in a Member State for a certain period of time and benefit from a long-term residence permit that the European Council of Tampere set out the objective of granting rights as similar as possible to those enjoyed by EU citizens. This includes the right to reside, receive education, and work as an employee or self-employed person.²⁵

Shortly after Tampere, the Commission proposed a directive that would regulate labour migration from outside the European Union, in order to harmonise the access to national labour markets.²⁶ However, this proposal was rejected by the Member States, that feared to lose their control on the admission criteria governing the entry of TCNs to their labour market. For this reason, the Commission changed its strategy and adopted what scholars refer to as the 'patchwork approach': it divided migrant workers into different categories and proposed legislative initiatives for specific categories of labour migrants, to be negotiated separately.²⁷

In the current complex context, characterised by regulatory fragmentation in the field of migration,²⁸ the European Commission has put forward proposals seeking to simplify

²⁵ V Passalacqua and L Grossio, 'Migrants' Equal Access to Social Benefits under EU Law: Fragmentation and Exclusion during the Covid-19 Crisis in Italy' (2023) 19 *Utrecht Law Review* 57, 59.

²⁶ European Commission, 'Communication on a Community Immigration Policy', COM(2000) 757.

²⁷ H Verschuere, 'Employment and Social Security Rights of Third-Country Labour Migrants under EU Law: An Incomplete Patchwork of Legal Protection' (2016) 18 *European Journal of Migration and Law* 373, 376–377.

²⁸ The first set of directives adopted by the EU legislator lays out the rules on access to employment and employment related rights for the main categories of TCNs who are resident in the Member States. This includes the Family Reunification Directive (Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification), the Long-Term Residents Directive (Directive 2003/109/EC (n 10)), the Students Directive (Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service), the Reception Conditions Directive, originally 2003/9 now 2013/33 (Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)), the Qualification Directive on the status of refugees and beneficiaries of subsidiary protection, originally 2004/84 now 2011/95 (Directive

existing rules and improve the governance of regular migration.²⁹ On one hand, there is recognition of the need for intervention to enhance the flexibility of national labour markets, which could involve measures to facilitate the entry and residence of certain categories of migrants, such as entrepreneurs, self-employed professionals, and job seekers. On the other hand, this favourable stance tends to dissipate when considering the inclusion of workers with lower qualifications. The hesitancy towards including workers with lower qualifications may stem from various factors. There may be concerns about potential competition with native workers in sectors where labour is already abundant or where there are existing challenges related to unemployment or underemployment.³⁰

Most of the migration directives contain clauses that require to the Member States to guarantee equal treatment of migrants having a secure residence status with nationals of the host States, regarding specifically employment and social security rights. However, the specific entitlements and conditions may vary depending on the legal framework governing the rights of TCNs in that particular EU Member State. In some countries, legal residence and a specific duration of stay are enough to presume integration and grant rights.³¹ In others, individuals must demonstrate integration by passing state-

2011/95/EU (n 11)). Other set of directives were adopted on admission of certain categories of TCNs, such as the Blue Card Directive (Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment), the Directive on admission for seasonal employment (Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers) and the Directive on intra-corporate transferees (Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer). The third set of relevant EU instruments facilitates short-term employment and implicitly opens ways for TCNs to enter the Union and remain lawfully in a Member State for a short time and work or look for employment. These include the Visa Code (Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas), the EU Visa Regulation (Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement) and the Regulation on local border traffic at external borders (Regulation (EC) No 1931/2006 of the European Parliament and of the Council of 20 December 2006 laying down rules on local border traffic at the external land borders of the Member States and amending the provisions of the Schengen Convention). In addition to these, the Single Permit Directive (Directive 2011/98 has been recast by Directive 2024/1233 (n 11)) stipulates procedural rules to be applied by Member States and ensures equal treatment of third-country workers who have been issued the single permit with the nationals of the Member State where they reside. See K Groenendijk, 'Equal treatment of workers from third countries: the added value of the Single Permit Directive (2015) 16 *ERA Forum* 547, 549–550.

²⁹ European Commission, 'Commission Staff Working Document of 29 March 2019, Fitness check on EU legislation on legal migration', SWD(2019) 1055 final, 4, 105.

³⁰ Presidency discussion paper of 28 October 2020, n. 12272/20, 'A new way forward on European Migration and Asylum Policy' point 20. See M Borraccetti, 'Le vie legali di accesso all'Unione nel nuovo Patto su asilo e migrazione della Commissione europea', (2020) *I Post di AISDUE* II 97, 103.

³¹ In France, a long-term resident status can often be granted after five years of legal residence, provided certain basic requirements (such as proof of income and residence) are met. Integration is

imposed exams.³² While Member States have significant discretion, this is subject to review by the Court to ensure that measures are legally defined and do not create disproportionate barriers to the exercise of rights.³³

To delve into the analysis of the CJEU's case law on the application of the equal treatment provisions laid down in Directive 2003/109, Directive 2011/95 and Directive 2024/1233, it is necessary to clarify the concept of social benefits referenced by these.

We need to consider that most welfare benefits can be divided into two categories: social assistance and social security. The difference between these categories was clarified by the Court since the *Frilli* case of 1972. According to the CJEU, social assistance seeks to relieve a state of need or poverty: it is the need that causes and justifies the right to assistance.³⁴ Furthermore, the Court specified in the *Dano* and *Alimanovic* cases that social assistance refers to 'all assistance schemes established by the public authorities, whether at national, regional or local level, to which recourse may be had by an individual who does not have resources sufficient to meet his or her own basic needs and those of his or her family'.³⁵ By contrast, social security is not focused on alleviating poverty but rather on indemnifying individuals against certain social risks by providing a supplementary or substitute income. Its purpose is to replace or supplement income rather than to provide a specific level of financial support.

When determining social security and social assistance measures subject to the principle of equal treatment, Member States must uphold the rights and principles enshrined in the Charter of Fundamental Rights of the EU, particularly those outlined in Article 34. This provision plays a pivotal role in interpreting and reviewing legislative acts that implement the access to social benefits, such as Regulation 883/2004 on the coordination of social security systems.³⁶

The regulation at issue covers various social benefits, including sickness benefits, old-age pensions, and maternity allowances.³⁷ However, the determination of whether certain benefits fall under the scope of Article 34 is often challenging due

presumed through prolonged residence. Moreover, in Portugal long-term residence is primarily based on a stable legal stay of five years, often without additional integration requirements.

³² In Germany, the Netherlands, and Austria, individuals seeking long-term resident status must pass both a language test and an integration test, which covers knowledge of the respective country's society, culture, and legal systems.

³³ A Lang, 'Social Integration: The Different Paradigms for EU Citizens and Third Country Nationals' (2018) 3 *European Papers* 663, 691.

³⁴ Case 1/72 *Frilli* EU:C:1972:56, para 14.

³⁵ Case C-333/13 *Dano* EU:C:2014:2358, para 63; Case C-67/14 *Alimanovic* EU:C:2015:597, para 44.

³⁶ Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

³⁷ Art 3 of Regulation 883/2004 (n 36) encompasses various aspects of social security, including sickness benefits, maternity and paternity benefits, old-age pensions, survivors' benefits, invalidity benefits, and benefits for accidents at work and occupational diseases, among others.

to the diversity of social measures across national legal systems. This definitional ambiguity raises important questions about the implications of leaving these concepts incomplete or subject to varying interpretations.³⁸ For example, benefits like maternity allowances are explicitly included under the concept of maternity, as outlined in Article 3, paragraph 1, letter b), of Regulation 883/2004, and thus clearly fall within the scope of Article 34 of the Charter. In contrast, determining whether birth allowances are covered is more problematic. The wide variety of family-related benefits in national legal systems complicates the classification of birth allowances as family benefits under Regulation 883/2004.³⁹

Also, Article 34 serves as a key interpretative tool in applying social security and social assistance provisions within the EU legal framework, particularly in cases where the classification of benefits is ambiguous or varies among Member States. However, limiting the review of measures under Article 34 solely to legislative acts that explicitly implement it risks narrowing its broader purpose within the EU legal order. Such a restrictive approach could result in situations where measures in other policy domains that indirectly undermine the right to social security or social assistance remain beyond review. For instance, policies affecting employment, migration, or healthcare that inadvertently infringe on social security rights might escape scrutiny.⁴⁰ Consequently, some scholars argue for a broader interpretation of Article 34, one that would allow the right to social security and social assistance to be used to review measures that indirectly affect national social security policies within the European Union.⁴¹

Moreover, when it comes to access to social assistance, it is important to note that equal treatment is generally excluded for TCNs, except for long-term residents falling under the scope of Directive 2003/109.⁴² This fragmentation creates differences between migrants that do not necessarily follow coherent criteria, such as the length of migrants' residence in the Member State, their level of integration or their employment status. Furthermore, migrants can fall into multiple categories defined

³⁸ C Barnard, *The Substantive Law of the EU* (Oxford University Press 2019) 290.

³⁹ G Strban, 'Family Benefits in the EU: Is it Still Possible to Coordinate Them?' (2016) 23 *Maastricht Journal of European and Comparative Law* 775, 783.

⁴⁰ Y Joren and F Van Overmeiren, 'General Principles of Coordination in Regulation 883/2004' (2009) 11 *European Journal of Social Security* 47, 67.

⁴¹ D Gallo and A Nato, 'Cittadini di Paesi terzi titolari di permesso unico di lavoro e accesso ai benefici sociali di natalità e maternità alla luce della sentenza *O. D. et altri c. INPS*', (2021) 4 *Lavoro, Diritti, Europa* 1, 13–14.

⁴² See, on this point, the case of Italy, which introduced a 10-year residence condition for entitlement to a basic income, intended to ensure a minimum level of subsistence. The Court considered that the residency condition at issue constitutes indirect discrimination towards TCNs who are long-term residents, as they are legally required to reside in a Member State for only five years to obtain long-term resident status under EU law. Even though that condition also applies to nationals of the Member State, it affects primarily non-nationals, which includes, *inter alia*, those TCNs (Joined Cases C-112/22 and C-223/22 *CU and ND* EU:C:2024:636).

by these directives (for example, one can simultaneously be a subordinate worker and an asylum seeker) but their status and rights will be determined by their residence permit.⁴³ As a result, migrants in comparable situations may face unequal access to social benefits or other rights, depending on the legal category under which they are classified.

The CJEU has issued multiple rulings that clarify when Member States can invoke exceptions to equal treatment provisions. These judgments⁴⁴ establish broad criteria, such as necessity, proportionality, and non-discrimination principles, which Member States must satisfy when justifying exceptions. Yet, uncertainties persist regarding the justification of unequal treatment in cases where secondary legislation lacks explicit derogations.

Despite the progressive features of the directives involved, the CJEU has been criticised for neglecting the selective nature of integration criteria that Member States use to manage immigration. Pre-entry and post-entry integration measures can operate as exclusionary tools, potentially marginalising immigrants seen as less socio-economically or culturally desirable. By endorsing these integration requirements, the CJEU may have missed opportunities to challenge restrictive practices and promote a more inclusive approach to immigration and integration.⁴⁵ This underscores the ongoing conflict between State sovereignty in migration control and rights of TCNs within the EU legal framework.

3. Equal treatment and access to social benefits under Directive 2003/109

The principle of equal treatment between EU citizens and TCNs is expressly referenced in Directive 2003/109, whose main objective is to promote the integration of long-term residents in the host Member States.

According to Article 4 of the Directive, the Member States must grant long-term resident status to TCNs who have resided legally and continuously on their territory for five years immediately prior to the submission of the relevant application. Moreover, Article 5 imposes additional conditions for acquiring long-term resident status, such as demonstrating sufficient resources and having sickness insurance and other ‘integration conditions, in accordance with national law’. These requirements are

⁴³ P Melin, ‘Access to social security and social assistance for third-country nationals: An overview of the recent Court’s case law’ (2023) 23 *ERA Forum* 325, 334.

⁴⁴ Case C-153/14 *K and A* EU:C:2015:453, para 53; Case C-579/13 *P and S* EU:C:2015:369, para 47; Case 540/03 *European Parliament v. Council* EU:C:2006:429, para 70; case C-257/17 *C and A* EU:C:2018:876, paras 62–65. See D Vitiello, ‘In Search of the Legal Boundaries of an “Open Society”. The Case of Immigrant Integration in the EU’ (2022) 2 *Freedom, Security & Justice: European Legal Studies* 151, 163–164.

⁴⁵ M Bottero, ‘Integration (of Immigrants) in the European Courts’ Jurisprudence: Supporting a Pluralist and Rights-Based Paradigm?’ (2023) 24 *Journal of International Migration and Integration* 1719, 1742–1743.

intended to ensure that individuals seeking long-term residence have the means to support themselves and access healthcare services, thereby reducing the potential burden on the Member State's welfare system.⁴⁶ Once TCNs have acquired long-term resident status, they are entitled to invoke equal treatment with nationals of the host country for a wide range of rights and benefits according to Article 11.⁴⁷

The interpretation of Articles 5 and 11 of the Directive was crucial in the case of *P and S*, which dealt with a Dutch law requiring a civic integration examination. This exam tested both oral and written proficiency in the national language, along with knowledge of Dutch society. The requirement applied not only to newcomers but also to long-term residence permit holders, who had to pass the exam within a specific period or face fines.⁴⁸ Given that this requirement did not apply to Dutch nationals, the CJEU assessed whether it contravened the principle of equal treatment laid down in Article 11, paragraph 1 of Directive 2003/109. The Court held that the examination itself did not violate the principle of equal treatment, as long-term residents and nationals of the host State are not in the same position regarding language proficiency and societal knowledge.⁴⁹

The key concern was ensuring that the implementation of these exams did not violate Article 11 or undermine the Directive's effectiveness. The Directive's purpose is to facilitate the integration of long-term residents by ensuring they are proficient in the language and knowledgeable about society, aiding their access to employment and vocational training.⁵⁰ However, if the exams come with excessive financial burdens (e.g., high fees for taking the exam or retaking it) or if fines are

⁴⁶ For an in-depth analysis of Directive 2003/109/EC (n 10) see S Peers, 'Implementing equality? The Directive on long-term resident third-country nationals' (2004) 29 *European Law Review* 437; S Boelaert-Suominen, 'Non-EU nationals and Council Directive 2003/109/EC on the status of third-country nationals who are long-term residents: Five paces forward and possibly three paces back' (2005) 42 *Common Market Law Review* 1011; D Acosta Arcarazo, *The Long-Term Residence Status as a Subsidiary Form of EU Citizenship* (Nijhoff 2011).

⁴⁷ Art 11, para 1, of Directive 2003/109/CE (n 10): 'Long-term residents shall enjoy equal treatment with nationals as regards: (a) access to employment and self-employed activity, provided such activities do not entail even occasional involvement in the exercise of public authority, and conditions of employment and working conditions, including conditions regarding dismissal and remuneration; (b) education and vocational training, including study grants in accordance with national law; (c) recognition of professional diplomas, certificates and other qualifications, in accordance with the relevant national procedures; (d) social security, social assistance and social protection as defined by national law; (e) tax benefits; (f) access to goods and services and the supply of goods and services made available to the public and to procedures for obtaining housing; (g) freedom of association and affiliation and membership of an organisation representing workers or employers or of any organisation whose members are engaged in a specific occupation, including the benefits conferred by such organisations, without prejudice to the national provisions on public policy and public security; (h) free access to the entire territory of the Member State concerned, within the limits provided for by the national legislation for reasons of security'.

⁴⁸ *P and S* (n 44).

⁴⁹ *Ibid.* paras 35, 44.

⁵⁰ *Ibid.* paras 47–48.

imposed for non-compliance that are unaffordable for many long-term residents, this may deter individuals from participating. Such obstacles would undermine the effectiveness of the Directive, as they prevent long-term residents from benefiting from the equal treatment and opportunities intended by the Directive.⁵¹ This outcome stemmed from a contentious interpretation of integration, which was assumed to be achieved through the mandatory acquisition of the host-state's language, despite the fact that the migrants in question had been long-term residents and had legally lived in the Netherlands for more than 10 years.⁵²

In the following case *Land Oberösterreich* the Court provided a different interpretation of Article 11 of Directive 2003/109, ruling that Member States cannot require long-term resident to prove basic language proficiency as a condition for receiving housing assistance, assuming that such assistance is deemed a 'core benefit' under the directive at issue.⁵³

Before considering the concept of 'core benefit' as a limit of the discretionary power of the Member States to adopt integration requirements, it is appropriate for the purposes of our investigation to recall Article 11, paragraph 1, letter d), which refers to equal treatment regarding 'social security, social assistance and social protection as defined by national law'. As already mentioned in the former section, the specific content, scope, and eligibility for these benefits are left to national law and that it is up to the national court to ascertain whether a certain benefit falls under the scope of social security, social assistance or social protection according to the national legislation.⁵⁴ Yet, as clarified by the CJEU, Member States do not enjoy unlimited discretion when defining the measures subject to the principle of equal treatment established in the directive.⁵⁵

The Court addressed the issue in the well-known *Kamberaj* case, concerning the refusal to grant housing assistance to a TCN holding a long-term residence permit.⁵⁶ The CJEU recalled that Directive 2003/109 expressly precludes the EU legislator from giving an autonomous and uniform definition of the concepts of social security and social protection under Article 11, paragraph 1, letter d) thereof.⁵⁷ Thus, it was for the national court to assess whether the housing benefit at issue fell under the

⁵¹ Ibid. para 54. See M Jesse, 'Integration Measures, Integration Exams and Immigration Control: P and S and K and A', (2016) 53 *Common Market Law Review* 1065, 1071–1072.

⁵² Bottero (n 45) 1730.

⁵³ *Land Oberösterreich* (n 15) para 49.

⁵⁴ Verschueren (n 18) 246.

⁵⁵ *Kamberaj* (n 14) para 77.

⁵⁶ For a detailed comment on the judgment see F Costamagna, 'Diritti fondamentali e prestazioni sociali essenziali tra diritto dell'Unione europea ed ordinamenti nazionali: il caso *Kamberaj*' (2012) 6 *Diritti umani e diritto internazionale* 672; S Peers, 'The Court of Justice lays the foundations for the Long-Term Residents Directive: *Kamberaj*, *Commission v. Netherlands*, *Mangat Singh*' (2013) 50 *Common Market Law Review* 529.

⁵⁷ *Kamberaj* (n 14) para 77.

concept of social security and social protection subject to the principle of equal treatment enshrined in the Directive.⁵⁸ However, the EU judges clarified that the interpretation of these concepts under national law cannot undermine the effectiveness of the principle of equal treatment. National courts are therefore required to ensure that the application of social security and social protection provisions does not lead to arbitrary exclusions or discriminatory outcomes, thus preserving the scope and purpose of Directive 2003/109.⁵⁹

Furthermore, the CJEU ruled that the derogations can only be relied upon by the Member States if they clearly stated their intention to do so, for instance in the legislation transposing Directive 2003/109 into national law.⁶⁰ Indeed, on this point, the Court underlined in case *INPS v VR*,⁶¹ that none of the derogations allow Member States to exclude from the right to equal treatment long-term residents whose family members reside not in the territory of the Member State but in a third country, when it grants family benefit to its nationals irrespective of the place of residence of their family members.⁶²

It is important to highlight that Article 11, paragraph 4, of the Directive allows Member States to restrict equal treatment in terms of social assistance and social protection to the ‘core benefits’. However, this limitation does not extend to benefits that fall under social security as defined by national law.⁶³ Moreover, in relation to this exception, recital 13 of the Directives specifies that ‘with regard to social assistance, the possibility of limiting the benefits for long-term residents to core benefits is to be understood in the sense that this notion covers at least minimum income support, assistance in case of illness, pregnancy, parental assistance and long-term care. The modalities for granting such benefits should be determined by national law’.

The CJEU has interpreted the contingent nature of the non-exhaustive list in recital 13 of Directive 2003/109 as evident from its literal wording, particularly the phrase ‘at least’, which implies flexibility in the scope of core benefits. Furthermore, the Court has emphasised that any derogation from the principle of equal treatment

⁵⁸ Ibid. para 81.

⁵⁹ Ibid. para 78. On this point, see the aforementioned *CU and ND* (n 42) on the entitlement to a basic income.

⁶⁰ Ibid., para 87.

⁶¹ Case C-303/19 *INPS v VR* EU:C:2020:958. For a detailed analysis see L Grossio ‘Who is entitled to family benefits? Lights and shadows of the ECJ rulings in *WS* and *VR*’ (2021) 28 *Maastricht Journal of European and Comparative Law* 582.

⁶² *INPS v VR* (n 61) para 30. The non-payment of a family allowance and the reduction of its amount, depending on whether all or some of the family members are absent from the territory of a Member State, are contrary to the right to equal treatment provided for in Art 11, para 1, lett d) of Directive 2003/109/EC (n 10), since they constitute a difference in treatment between long-term residents and nationals of the member States (para 33).

⁶³ H. Verschueren believes this exclusion to be unclear, since a clear distinction between social assistance, social security and social protection cannot always be made (Verschueren (n 18) 246).

must be interpreted strictly, as equality remains the general rule.⁶⁴ This principle was further clarified in the *Kamberaj* case, where the CJEU qualified housing assistance as a ‘core benefit’ under Directive 2003/109. The Court reasoned that housing assistance fulfils the objective of Article 34, paragraph 3, of the Charter, which aims to ensure a decent existence for those lacking sufficient resources. Consequently, where housing assistance serves this purpose, it cannot be excluded from the scope of core benefits, reinforcing the requirement for a consistent and rights-based approach in assessing social benefit entitlements for TCNs.⁶⁵

The same approach was followed by the CJEU in the aforementioned *Land Oberösterreich* case, in which the EU judges recognised housing allowance for a TCN with long-term residence in a Member State as a benefit that ‘contributes to combating social exclusion and poverty, it being intended to ensure a decent existence for all those who lack sufficient resources, as referred to in Article 34, paragraph 3, of the Charter’.⁶⁶ Housing subsidy represents a necessary tool for meeting the essential need for access to decent housing and can rightfully be considered a core benefit under Directive 2003/109.

It is worth noting the distinction made by the Court in *Land Oberösterreich* regarding derogations from the principle of equal treatment is significant. According to the Court’s judgment, if a social benefit is not considered a ‘core benefit’, then a Member State’s derogation from the principle of equal treatment does not fall within the scope of EU law. As a result, such a derogation cannot be assessed under Union law, including the EU Charter.⁶⁷ This stance contrasts with the Opinion of the Advocate General, who argued that a derogation explicitly foreseen or contemplated by EU law falls under the purview of EU law itself. The Advocate General emphasised that when a Member State invokes a derogation as provided in Article 11, paragraph 4, of Directive 2003/109, it is essentially implementing EU law and must therefore adhere to the Charter and the general principles recognised within the Union’s legal framework.⁶⁸

Starting from the recalled case law, the European Commission recently submitted a proposal to recast Directive 2003/109.⁶⁹ Concerning its provisions on equal treatment, article 12 of the Commission proposal clarified that EU long-term residents should have the same right as nationals with regard to the acquisition of private housing. Secondly, the article in question aligns the definition of social security to

⁶⁴ *Kamberaj* (n 14) paras 85–86.

⁶⁵ *Ibid.* para 92.

⁶⁶ *Ibid.* para 42.

⁶⁷ *Ibid.* paras 61–62.

⁶⁸ Opinion of AG Hogan in Case C-94/20 *Land Oberösterreich* EU:C:2021:477, paras 64–71. See Verschueren (n 18) 248.

⁶⁹ European Commission, ‘Proposal for a Directive of the European Parliament and of the Council concerning the status of third-country nationals who are long-term residents (recast)’, COM(2022) 650 final.

the provisions of the other legal migration Directives (that they will be discussed below) and it refers to the branches of social security ruled by Regulation 883/2004.⁷⁰ Nevertheless, the Commission did not propose to delete the reference to the Member States' national definitions of the concepts of 'social assistance' and 'social protection'. However, the proposal does extend the equal access to social protection and social assistance for long-term residents by eliminating the option for Member States to limit such access to 'core benefits'. The removal of these limitations could probably support long-term residents in marginal positions, preventing national authorities from denying social benefits to individuals. Despite this, as the Council decided not to proceed with the recast directive, it is believed that the identification by the EU Commission of additional 'core benefits' subject to equal treatment provisions could reasonably contribute to strengthening TCNs' access to social benefits aimed at ensuring a decent existence.

4. Equal treatment and social benefits for beneficiaries of international protection

The second directive examined in this contribution is Directive 2011/95/EU, often referred to as the 'Qualification Directive'. It establishes standards for the qualification of beneficiaries of international protection, including refugees⁷¹ and beneficiaries of subsidiary protection,⁷² within the European Union. While the primary focus of this directive is on defining the criteria and procedures for granting international protection status, it also includes provisions related to the right to equal treatment, including access to social benefits.

Article 29, paragraph 1, of the Directive specifically provides that Member States shall ensure that beneficiaries of international protection receive, in the country that has granted such protection, 'the necessary social assistance as provided to nationals of that Member State'. However, by way of derogation from this general rule, Article 29, paragraph 2 allows Member States to limit social assistance provided to 'core benefits', although such derogation applies to subsidiary protection holders only.

A key issue in this context is the discrepancy in the duration of residence permits between refugees and beneficiaries of subsidiary protection. It has been suggested in legal scholarship⁷³ that while the latter may receive permits with a shorter duration,

⁷⁰ Regulation (EC) No 883/2004 (n 36) Art 3.

⁷¹ The person is considered a refugee within the meaning of Art 1(A) of the Geneva Convention.

⁷² A TCN or stateless person is eligible for subsidiary protection if this person does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm (Directive 2011/95/EU (n 11) Art 2, para 1, lett f)).

⁷³ G Morgese, 'La direttiva 2011/95/UE sull'attribuzione e il contenuto della protezione internazionale' (2012) 2 *La Comunità internazionale* 255.

this distinction alone does not justify unequal treatment in terms of social assistance. The principle of equal treatment underscores the necessity of ensuring that all individuals granted international protection have access to essential support services and benefits for their integration and well-being. Nevertheless, the Directive maintains an exception to national treatment in social assistance, but only for those granted subsidiary protection status (Article 29, paragraph 2). Refugees, on the other hand, are entitled to the same benefits as nationals.⁷⁴

This distinction has been widely criticised as difficult to justify.⁷⁵ Both refugees and beneficiaries of subsidiary protection require protection, and neither group has chosen nor can change their circumstances. If differential treatment is based solely on their status, it appears discriminatory. An alternative justification could be the difference in the length of residence permits; however, this factor alone does not warrant significant disparities in social assistance. As some scholars argue,⁷⁶ the relevance of status should outweigh the duration of residence permits in determining entitlements to social benefits.

Another critical issue concerns the interpretation of ‘TCNs legally resident’, who are entitled to uniform access to social benefits under EU law. The fragmented nature of EU legislation on TCNs, with distinct legal statuses governed by separate directives, limits the scope of uniform protection. Interpreting ‘legally resident’ with residence in accordance with EU law may ensure consistency and reflect the Court of Justice’s approach to preserving the autonomy of EU law from national legislation. As Pistoia suggests, a reasonable approach would be to interpret the Qualification Directive in light of Article 20 of the Charter, allowing the application of Directive 2003/109 to beneficiaries of international protection who have legally resided in a Member State for at least five years, even if they have not yet obtained long-term resident status.⁷⁷

The Court provided clarification on the application of Article 29 of the Qualification Directive in the well-known *Alo and Osso* case. This case specifically addressed whether the imposition of geographical restrictions on residence permits constituted discrimination against nationals and other legally residing TCNs in the host state, thereby potentially violating the Qualification Directive. Under German law, beneficiaries of international protection who receive social benefits may have their residence permits restricted to a specific area. The Court examined whether such restrictions were compatible with the principle of equal treatment and the rights guaranteed under

⁷⁴ JY Carlier ‘Choice of Residence for Refugees and Subsidiary Protection Beneficiaries; Variations on the Equality Principles: *Alo and Osso*’ (2017) 54 *Common Market Law Review* 642.

⁷⁵ E Pistoia, ‘Social Integration of Refugees and Asylum Seekers Through the Exercise of Socio-economic Rights in European Union Law’ (2018) 3 *European Papers* 781, 796–797.

⁷⁶ Morgese (n 73) 274; S Salomon ‘Constructing Equality in the EU Asylum Law’ (2021) 33 *International Journal of Refugee Law* 608, 639–641.

⁷⁷ Pistoia (n 75) 797.

the Directive. According to the CJEU ‘the grant of social security benefits to a given person will entail costs for the institution that is required to provide those benefits, regardless of whether that person is a beneficiary of subsidiary protection status, a refugee, a third-country national’ or a citizen.⁷⁸ In this regard, the unequal distribution of these benefits to the various categories of beneficiaries (citizens or foreigners) within the territory of the Member State may mean that ‘the costs entailed are not evenly distributed among the various competent institutions, irrespective of the potential qualification of such recipients for subsidiary protection status’.⁷⁹ However, it does not breach the Directive if it aims to facilitate the social integration of beneficiaries of international protection. This assessment focused on whether the residence obligation discriminates against beneficiaries of international protection compared to nationals and other TCNs: it was deemed discriminatory compared to German nationals if aimed at financial burden distribution, but generally non-discriminatory compared to other TCNs if aimed at enhancing social integration.⁸⁰

The Court evaluated whether the residence requirement aligns with the Directive’s provisions and determined that it is not discriminatory regarding the treatment of nationals and TCNs.⁸¹ Concerning nationals, the Court found no conflict with the Directive, noting that beneficiaries of international protection are not in a comparable situation to nationals as far as the objective of facilitating the integration of TCNs is concerned.⁸² For TCNs residing under a different status from beneficiaries of international protection and receiving welfare benefits without a residence condition, the Court deferred this decision to the national court, which must assess if beneficiaries of international protection encounter greater integration challenges than other foreign nationals. If national legislation provides welfare benefits to TCNs residing for reasons other than subsidiary protection only after a certain residence period, due to the condition of financial self-sufficiency upon their admission, and if this period indicates sufficient integration. In such cases, a national court might conclude that beneficiaries of international protection face greater integration difficulties justifying the residence condition.⁸³

The concern with this reasoning does not arise from the fact that beneficiaries of international protection may require specific support measures to facilitate their integration, but from the assumption that they are generally less integrated than other TCNs.⁸⁴ This assumption may or may not be accurate, depending on individual circumstances. The Court’s judgment, which aligns with Directive 2011/95, points to a

⁷⁸ *Alo and Osso* (n 17) para 55.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.* para 58.

⁸¹ *Ibid.* para 50.

⁸² *Ibid.* para 59. See *Y Carlier* (n 74) 249–250.

⁸³ *Ibid.* para 63.

⁸⁴ *Lang* (n 33) 679.

potentially concerning acceptance of restricting the freedom of movement for those under international protection. Moreover, although the CJEU advocates for a case-by-case assessment, it fails to provide guidelines for conducting this assessment in line with the Qualification Directive and the Charter.⁸⁵

While restrictions on the free choice of the place of residence for beneficiaries of subsidiary protection may be justified by the objective to facilitate integration, a reduction in social benefits for refugees during the first three years of residence was found to be illegal. In the *Ayubi* case,⁸⁶ in particular, the Court emphasised that refugees' entitlement to equal treatment regarding social assistance derives from Article 23 of the Geneva Convention, which does not tie refugees' entitlements to the duration of their stay in the respective State.⁸⁷ Therefore, the level of social benefits provided to refugees must be equivalent to that offered to citizens, regardless of the duration of their residence permit.⁸⁸ The issuance of a temporary residence permit to refugees under Directive 2011/95 (initially for a period of three years) does not affect the subsequent treatment, which, according to the Court, must indeed be equal to that of citizens of the Member State, as the duration of the residence permit and the rights granted are two distinct and independent aspects. The granting of social benefits always entails costs, regardless of the status of the person involved, and this should not be an argument to justify the difference in treatment.⁸⁹

The Court further clarified the interpretation of Article 29 by focusing on the concept of 'necessary social assistance'.⁹⁰ This concept was revisited in light of previous CJEU rulings, specifically the *Dano* and *Alimanovic* cases, which elaborated on the notion of social assistance.⁹¹ However, it remains unclear whether the notion

⁸⁵ Pistoia (n 75) 800.

⁸⁶ Case C-713/17 *Shah Ayubi* EU:C:2018:929.

⁸⁷ Art 23 of the Geneva Convention states that contracting states must ensure that refugees residing lawfully on their territory receive the same treatment as their own citizens regarding public assistance, including aspects related to employment and social security.

⁸⁸ Mr. Ayubi, a TCN with refugee status in Austria, was granted a temporary residence permit valid for three years. He applied for assistance in securing means of subsistence and housing for himself and his family. However, his application was denied on the basis that individuals in Mr. Ayubi's situation, with only temporary residency, were eligible for only minimal subsistence benefits under Austrian law.

⁸⁹ *Shah Ayubi* (n 86) para 34.

⁹⁰ *Ibid.* para 21.

⁹¹ In *Dano* (n 35), the CJEU ruled that economically inactive EU citizens who move to another Member State solely to access social assistance may be denied such benefits. The case involved a Romanian national, Ms. Dano, who moved to Germany without seeking employment. The Court emphasised that EU law does not grant an automatic right to social benefits for mobile citizens unless they meet certain residence and self-sufficiency requirements under Directive 2004/38. Similarly, *Alimanovic* (n 35) involved a Swedish national of Bosnian origin and her daughter, both of whom had lived and worked in Germany for less than a year before becoming unemployed. The CJEU ruled that Member States could restrict access to certain social assistance benefits for jobseekers after a specific period, in line with Directive 2004/38. The Court reaffirmed that economically inactive individuals cannot claim equal access to social assistance if they do not meet the residence criteria.

of social assistance for the purposes of Article 29 of the Directive may also cover the branches of social security defined in Regulation 883/2004. According to the Court, this concept cannot be left entirely to the discretion of Member States, which are not empowered to provide beneficiaries of international protection with social benefits that are lower than those provided to their own citizens.⁹²

In the *Ayubi* case, in particular, the CJEU ruled that once the level of social assistance is determined, Member States have a precise and unconditional obligation to ensure that refugees receive the same level of social assistance as nationals.⁹³ By affirming the direct effect of Article 29, paragraph 1, the Court established that refugees can challenge any national legislation or practices that impose different conditions on their access to social assistance. This ruling reinforces the principle of equal treatment and upholds the rights of refugees to receive the necessary support for their integration and well-being within the host Member State.⁹⁴

However, in the *Alo and Osso* case, the CJEU clarified that Article 29, paragraph 2 allows Member States to restrict social welfare assistance for beneficiaries of subsidiary protection to ‘core benefits’ provided to nationals. If a Member State adopts such a restriction, these core benefits must be granted under the same conditions as they apply to nationals.⁹⁵

To define a ‘core benefit’, Article 20, paragraph 3, of Directive 2011/95 emphasises the importance of considering the specific circumstances of vulnerable individuals. This recognises the diverse needs and vulnerabilities of beneficiaries of subsidiary protection and underscores the importance of ensuring that essential support is provided to those most in need. Recital 45 further clarifies that limiting such assistance to ‘core benefits’ encompasses at least minimum income support, assistance in the case of illness or pregnancy, and parental assistance, consistent with benefits provided to nationals. Benefits falling within this definition should be regarded as ‘core benefits’.

To date, the Court of Justice has not applied a Charter-based interpretation to the Qualification Directive, as it has with Directive 2003/109. Applying such a perspective could meaningfully enhance the protection of beneficiaries of international protection. In this context, essential needs such as food, housing, and healthcare should also be recognised as ‘core benefits’ in accordance with Article 34, paragraph 3, of the Charter, ensuring a more comprehensive and rights-based approach to social assistance.⁹⁶

Establishing clear and precise minimum core standards for accessing social benefits by beneficiaries of international protection could mitigate the uncertainty of case-by-case assessments by national judicial authorities and limit the discretion of Member

⁹² *Alo and Osso* (n 17) para 48.

⁹³ *Shah Ayubi* (n 86) para 23.

⁹⁴ *Ibid.*, para 39.

⁹⁵ *Alo and Osso* (n 17) para 49.

⁹⁶ Verschueren (n 18) 250.

States. As correctly highlighted, the discretion of States in applying exceptions to the principle of equal treatment could encourage litigation between beneficiaries of international protection and national or regional authorities, undermining the former's sense of belonging to the host State, which is crucial for social integration.⁹⁷

5. The Single Permit Directive: ensuring equal treatment and access to social benefits for migrant workers

The third directive at the core of this study is Directive 2024/1233, which recently recast Directive 2011/98. It lays down the procedure for issuing a single permit to TCNs residing in a Member State for work purposes, along with a common set of rights applicable to single permit holders, ensuring equal treatment with nationals of that Member State.

A key tenet underlying the Directive is that non-EU migrants contribute to the European Union through their labour and should therefore be entitled to a corresponding set of rights. Additionally, ensuring equal rights across EU territory prevents unfair competition between Member States and mitigates risks of social dumping and migrant exploitation.

The principle of equal treatment is explicitly reflected in Article 12 of the directive, which sets specifically that third-country workers falling under Article 3, paragraph 1, letters b) and c) should be treated equally as nationals of the Member State where they reside. This includes TCNs admitted for employment purposes as well as those with a right of residence in the Member State for reasons other than employment (such as family reunification) but are now legally employed there. Article 12, paragraph 1, letter e) grants them equal treatment regarding social security branches defined in Regulation 883/2004. However, social assistance is explicitly excluded from equal treatment by Recital 27 of the directive, meaning that single permit holders do not have the same rights to social assistance as nationals, highlighting a key distinction in the rights available to them compared to long-term residents.⁹⁸

The Directive at issue also permits general restrictions on the right to equal treatment based on the employment situation of TCNs. Member States may restrict equal treatment in social security branches covered by Regulation 883/2004, limiting its application to third-country workers employed for a minimum of six months and registered as unemployed. Access to family benefits may be denied to certain categories of TCNs, such as those authorised to work for less than six months or based on a visa or admitted for study purposes. The Directive does not confer rights regarding family members residing in a third country but only grants rights to family members joining third-country workers in a Member State.⁹⁹ Nevertheless, Article 12, paragraph 4 ensures that third-country workers moving to a third country, as well

⁹⁷ Pistoia (n 75) 807.

⁹⁸ Verschueren (n 27) 106-108.

⁹⁹ Art 12, para 2 of Directive 2024/1233 (n 11).

as their survivors who reside in a third country and derive rights from those workers, receive statutory pensions related to old age, invalidity, and death, under the same conditions as the nationals of the Member States concerned when they move to a third country. It recognises the contributions made by third-country workers to the social security systems of the Member States and ensures that they receive comparable benefits when they relocate to a third country.¹⁰⁰

The right to equal treatment with respect to social security benefits has been addressed in some judgments of the CJEU, particularly regarding Italian law's criteria for accessing family benefits, such as family, maternity, or childbirth allowance.¹⁰¹ The Court examined the practice of the INPS, the Italian National Social Security Institute, aimed at denying access to specific social benefits to TCNs holding a residence permit for employment purposes rather than long-term residents.¹⁰²

The CJEU recognised the discriminatory nature of this practice in the *Martinez Silva* case, concerning a TCN living in Italy with her three children on the basis of a single work permit and applying to receive a benefit provided for by Italian law. The application was rejected by the Italian government on the ground that national law only allowed the grant of such a benefit to long-term residents.¹⁰³ The Court found that the family benefit in question falls within the scope of Article 3, paragraph 1, of Regulation 883/2004, which pertains to social security benefits aimed at assisting recipients in meeting family expenses. This means that single permit holders are entitled to equal treatment in accessing this benefit under Article 12, paragraph 1, letter e), of the current Directive 2024/1233.¹⁰⁴ The CJEU emphasised that equal treatment is the general rule for accessing social security benefits, ensuring that single permit holders are not discriminated against based on their status,¹⁰⁵ and derogations from the principle at issue are only admissible when the authorities of the concerned Member State have clearly stated their intention to rely on them.¹⁰⁶

¹⁰⁰ For a detailed analysis of the various aspects of the Directive, see A Beduschi, 'An Empty Shell? The Protection of Social Rights of Third-Country Workers in the EU after the Single Permit Directive' (2015) 17 *European Journal of Migration and Law* 210.

¹⁰¹ See Case C-449/16 *Martinez Silva* EU:C:2017:485; Case C-302/19 *INPS v WS* EU:C:2020:957.

¹⁰² R Palladino, 'Non-discrimination in accessing the welfare system. The effectiveness and primacy of EU law over Italian law' in A Di Stasi, I Caracciolo, G Cellamare and P Gargiulo (eds), *International Migration and the Law. Legal Approaches to a Global Challenge* (Taylor & Francis 2024) 209.

¹⁰³ *Martinez Silva* (n 101). See F Costamagna, S Montaldo and F Romanelli, *Access to social advantages for EU citizens and Third country nationals under the law of the European Union. Essential text, cases and materials* (Università degli Studi di Torino 2022) 36–38.

¹⁰⁴ *Martinez Silva* (n 101) paras 23–25.

¹⁰⁵ *Ibid.* para 27.

¹⁰⁶ *Ibid.* para 29. As correctly noted by the referring Court, the Italy had not opted to restrict equal treatment by utilizing the derogations provided by the Directive. Therefore, Mrs. Martinez Silva could not be excluded from receiving the benefit in question in the main proceedings. On this point see also *INPS v WS* (n 101) para 26.

Even in light of these exceptions, in the case *INPS v. WS*, the Court did not accept Italy's refusal to grant a family benefit based on the argument that the family members in question resided in a third country, while the same benefit would have been granted to Italian workers whose family members reside in a third country.¹⁰⁷ The CJEU pointed out that none of the derogations specified in the Single Permit Directive allows Member States to exclude from the right to equal treatment a worker holding a single permit whose family members reside not in the territory of the Member State concerned but in a third country.¹⁰⁸ Such a conclusion could not be inferred from the current Recitals 30 and 35 of the Directive either. Indeed, Recital 30 addresses the situation where the family members of a third-country worker holding a single permit benefit directly from the right to equal treatment, while Recital 35 clarifies that the Directive does not mandate Member States to pay social security benefits to family members who do not reside in the host Member State.¹⁰⁹

The CJEU further stated that the objective pursued by the directive is also to establish a minimum level playing field within the Union.¹¹⁰ By recognising the contributions of TCNs to the EU economy through their work and tax payments, the directive underscores the importance of equal treatment for non-EU citizens in areas such as social security and aims to prevent unfair competition and exploitation between them and nationals of Member States.¹¹¹ Rejecting the argument that TCNs cannot be compared to nationals of the Member State involved is significant. The Court's stance reinforces the principle of equal treatment enshrined in Article 12, paragraph 1, letter e), of the directive and ensures that its provisions hold meaningful weight and are effectively implemented to safeguard the rights of TCNs within the EU.¹¹²

Here it is appropriate to specify that the right to equal treatment under the Single Permit Directive can be invoked by all TCNs falling under the personal scope of the directive. This includes those admitted to a Member State for work purposes, family reunification, or other reasons allowing them to work. In contrast, long-term residents are excluded from the scope of Directive 2024/1233, which seems paradoxical. Long-term residents have already demonstrated their commitment to and integration within a host Member State by residing there for at least five years and meeting certain integration criteria. Despite this, they may have fewer rights to social benefits compared to TCNs covered by the Single Permit Directive, who can immediately benefit from its equal treatment provisions upon starting work in the host Member State.¹¹³ For this reason, the European Commission proposed amendments to the former Directive 2011/98 to

¹⁰⁷ *INPS v WS* (n 101). See Grossio (n 61).

¹⁰⁸ *INPS v WS* (n 101) paras 27–28.

¹⁰⁹ *Ibid.* paras 29–32.

¹¹⁰ *Ibid.* para 33.

¹¹¹ *Ibid.* para 34.

¹¹² *Ibid.* para 43.

¹¹³ Verschueren (n 18) 252.

strengthen the rights of TCNs regarding equal treatment. These included removing limitations on equal treatment for certain categories of TCNs and introducing provisions on equal treatment for social assistance, social protection, and the export of pensions to third countries.¹¹⁴ Nevertheless, this amendment was not incorporated into the new Directive 2024/1233, and the right to equal treatment under Article 12 has remained unchanged.

Another aspect deserves close attention. In the *O.D. and Others* case,¹¹⁵ the Court was asked to rule on the compatibility with EU law of the Italian legislation granting maternity or childbirth allowance exclusively to TCNs who were long-term residents and to clarify the scope of the right to social benefits enshrined in Article 34, paragraph 2, of the Charter, and of the right to equal treatment in the field of social security conferred upon third-country workers by Article 12, paragraph 1, letter e), of the Single Permit Directive.¹¹⁶

The Court found that the childbirth allowance and maternity allowance in question constituted benefits falling within the branches of social security listed in Article 3, paragraph 1 of Regulation 883/2004.¹¹⁷ These allowances were automatically granted to households meeting specific legally defined, objective criteria, without any individual or discretionary assessment of the applicant's personal needs, with the intention of contributing to family expenses. Additionally, the Court noted that the Italian Republic had not chosen to restrict equal treatment under the Single Permit Directive, an option available to Member States.¹¹⁸ Once again, the Court ruled that Italian law was contrary to the principle of equal treatment established in Article 12, paragraph 1, letter e), which specifically reflects the entitlement to social security benefits outlined in Article 34 of the Charter.

Although the Charter played a central role in the request for a preliminary ruling, as evidenced primarily by its emphasis in the question submitted to the Court,¹¹⁹ the CJEU primarily analysed secondary EU law, specifically Directive 2011/98, to determine whether national legislation extending childbirth and maternity allowances solely to TCNs holding a single permit was permissible.¹²⁰ It referred to Article 34 of the Charter just to contextualise the principle of equal treatment enshrined in the Directive.¹²¹

¹¹⁴ European Commission (n 69). See S Peers, 'Take this job and shove it: the revised EU law on non-EU migrant workers' (EU Law Analysis, 22 December 2023) at <https://eulawanalysis.blogspot.com/2023/12/take-this-job-and-shove-it-revised-eu.html>.

¹¹⁵ Case C-350/20 *O.D. and Others* EU:C:2021:659.

¹¹⁶ Gallo and Nato (n 41) 18–23.

¹¹⁷ *O.D. and Others* (n 115) para 60.

¹¹⁸ *Ibid.*, para 64.

¹¹⁹ See Constitutional Court, order 182/2020, para 7. N Lazzarini, 'Dual Preliminarity Within the Scope of the EU Charter of Fundamental Rights in the Light of Order 182/2020 of the Italian Constitutional Court' (2020) 5 *European Papers* 1463, 1470–1472.

¹²⁰ *O.D. and Others* (n 115) paras 50–63.

¹²¹ *Ibid.*, para 46. The Italian Constitutional Court, with the order 29/2024, decided to stay the proceedings and refer a question for a preliminary ruling to the Court to clarify the scope of Art 12,

The *O.D. and Others* case could have offered the CJEU the opportunity to clarify the fundamental nature of the principle of equal access to benefits for TCN migrants, which so far has been relegated to an ‘ordinary legislative function’,¹²² by referring to the EU Charter. Instead, the Court evaded its obligation to interpret Article 34.¹²³ By contrast, in *Kamberaj* and *Land Oberösterreich*, the CJEU relied on Article 34 of the Charter to determine the scope of application of the equal treatment principle with regard to housing assistance. Following this reasoning, if a benefit serves the purpose outlined in Article 34, paragraph 3 - ensuring a decent standard of living and social assistance for those in need - then TCNs cannot be excluded from it.

Thus, the purpose of the benefit is central as Loxa also suggests: if it is essential for a dignified existence, it must be granted under equal treatment conditions, both for long-term residents (to support their integration) and for all migrants covered by the Single Permit Directive (to uphold fair treatment).¹²⁴

By interpreting derogations under Single Permit Directive in light of Article 34, paragraph 3, of the Charter, the Court could set minimum protection thresholds, thereby limiting the discretion of both Member States and the EU legislator in restricting the social rights of migrant workers.

6. The potential impact of the Charter of Fundamental Rights on patching up the EU legislator patchwork approach

The analysis underscored the persistent lack of clear and consistent criteria for ensuring equal treatment of TCNs with regard to social benefits under EU law. A central issue is the fragmented personal scope of the migration directives, which fail to uniformly protect all TCNs legally residing or working within a Member State.

As highlighted in the previous sections, Directive 2003/109 on long-term residents and Directive 2011/95 on the beneficiaries of international protection defer to

para 1, lett. e) of Directive 2011/98 (n 28) concerning cash assistance provided by INPS to financially disadvantaged individuals over sixty-seven. This benefit is distinct from other welfare schemes and is specifically aimed at those in poverty, particularly the elderly. According to Italian law, only Italian and EU citizens, as well as TCNs with long-term residence permits, are eligible for this benefit, which also requires ten years of continuous legal residence in Italy. The main constitutional question is whether this social security benefit falls within the scope of benefits eligible for equal treatment under the Directive. Since the CJEU has not yet clarified this issue, the Constitutional Court has referred the question to the CJEU to determine if the benefit should be included under the Directive and if EU law, particularly Art 34 of the Charter, precludes national legislation from restricting such benefits to foreigners holding the single permit referred to in the Directive.

¹²² E Muir, *EU Equality Law. The First Fundamental Rights Policy of the EU* (Oxford University Press 2020) 121.

¹²³ D Gallo, ‘Migrants’ Social Rights in the Dialogue between the CJEU and the Italian Constitutional Court: Long Live Article 267 TFEU!’ (EU Law Live, 8 September 2021) at eulawlive.com.

¹²⁴ A Loxa, ‘Insiders, Outsiders, and the Constructed Limits to Social Rights in EU Law’ (2025) 10 *European Papers* 163.

national laws to define the scope of social security, social assistance, and social protection. In contrast, the Single Permit Directive aligns social security benefits with those defined under Regulation 883/2004. Additionally, exceptions to equal treatment provisions vary significantly between directives, reflecting inconsistent approaches to TCN rights. These discrepancies, along with the fragmented legal framework, highlight differences in the duration of TCNs' stays – whether temporary or long-term – and the economically driven nature of Member States' migration policies, influenced by political negotiations during the drafting of these directives.¹²⁵

Although the European Commission has recognised the need for greater coherence – proposing to align the Long-Term Residence Directive and the Single Permit Directive in their recast – the current migration directives still lack harmonised provisions on equal treatment. This fragmented legal framework creates uncertainty for migrants while granting Member States excessive discretion to restrict or exclude TCNs' access to social security and social assistance.¹²⁶

The current patchwork of provisions partially compensates for the fact that the general principle of non-discrimination based on nationality, as outlined in Articles 18 TFEU and 21 of the Charter of Fundamental Rights, does not apply to TCNs. As a result, the fragmented framework further entrenches disparities, highlighting the need for a more coherent and harmonised approach to equal treatment under EU law.

Greater consistency could be achieved by interpreting the relevant directives through the lens of Article 20 of the Charter, which enshrines the principle of equality before the law. Such an approach would ensure a stronger and more coherent application of equal treatment rights, particularly in access to social benefits, thereby reducing disparities and uncertainties for TCNs across Member States.

The CJEU has applied the principle of equality before the law, as stated in Article 20 of the EU Charter of Fundamental Rights, to non-EU citizens in contexts governed by Union law.¹²⁷ This principle implies that comparable cases should be treated equally, while differential treatment is only permissible if it is justified and proportionate. From this, it can be inferred that TCNs who have acquired a certain legal status under EU migration directives are in comparable situations to nationals of the host Member State regarding equal treatment for social benefits. The EU legislator indeed specified that these TCNs should be treated comparably to host Member State nationals regarding entitlement to social benefits, with certain explicit exceptions, such as in Article 12, paragraph 2, of the Single Permit Directive.¹²⁸

Moreover, the Court has emphasised the strict interpretation of the exceptions to equal treatment, aligning with the goal of promoting integration and the prohibition of discrimination under the EU primary law. It has clarified that, although EU directives allow for some derogations from equal treatment provisions, such exceptions

¹²⁵ Morano-Foadi and de Vries (n 1) 41–43.

¹²⁶ Passalacqua and Grossio (n 25) 61–63.

¹²⁷ Opinion 1/17 (n 19) paras 168–175; *X v Belgian State* (n 21) para 57; *O.G.* (n 22) para 158.

¹²⁸ Verschueren (n 18) 258.

must be explicitly specified at the time of transposing the directives into national law. Member States are not permitted to introduce new limitations on access to social security or social assistance once the implementation process is complete. As emerged from the previous pages,¹²⁹ these exceptions can only be relied upon if clearly stated by the relevant authorities in the Member State.¹³⁰

Along with considering Article 20, Article 34 of the Charter may have the potential to play a pivotal role in overcoming the patchwork approach of the EU legislator by providing a consistent framework for the protection of social rights of TCNs. However, the Court has been hesitant to apply it. This reluctance may be due to the fact that this right is subject to conditions established by ‘Union law and national laws and practices’, diminishing its effectiveness. As mentioned earlier, in the case of *O.D. and Others v INPS*, the Court barely addressed the right to social security. The case required the Court to evaluate the rights of TCNs with a single permit to access childbirth and maternity allowances under Italian law. Although Article 34, paragraph 2 was central to the preliminary ruling request by the Italian Constitutional Court, it remained peripheral in the Court’s reasoning. The Court only stated that the right to equal treatment in Article 12, paragraph 1, letter e), of the Single Permit Directive specifically reflects the right to social security benefits outlined in Article 34, paragraphs 1 and 2.¹³¹

A more consistent interpretation of the migration directives in light of Article 34 of the Charter by the Court of Justice could also help prevent reverse discrimination against TCNs in accessing to social benefits. This approach has been followed by the Court of Justice in judgments concerning housing benefits (such as the *Kamberaj* case of 2012 and *Land Oberösterreich* case of 2021), where the CJEU invoked Article 34, paragraph 3 of the Charter to underscore the importance of the right to housing as a ‘core benefit’, a fundamental aspect of ensuring a dignified existence, especially for those lacking sufficient resources. By relying on the Charter to delineate the scope of the principle of equal treatment in relation to housing assistance, the Court has strengthened the obligation of Member States to ensure the provision of adequate social and housing support, even when such benefits are governed by national legislation.¹³²

Establishing core minimum standards could promote at least a decent standard of living and ensure effective access to social assistance for those in need. Such standards would contribute to aligning national welfare provisions with the objectives set out in Article 34, paragraph 3 of the Charter, thereby constraining Member States’ discretion in regulating access to social benefits and reducing the legal uncer-

¹²⁹ See the previous section 3.

¹³⁰ *INPS v VR* (n 61) para 26.

¹³¹ *De Becker* (n 24) 14.

¹³² *Iglesias Sanchez* (n 8) 146.

tainty associated with case-by-case assessments by national courts. However, defining ‘core benefits’ can be a complex and challenging task, especially given the different perspectives and interests involved. The EU Commission proposal to recast Directive 2003/109, which clarifies the equal treatment of EU long-term residents regarding the acquisition of private housing, exemplifies efforts to ensure equality and non-discrimination in access to essential services and benefits.¹³³

Clarifying which benefits are fundamental and not subject to the discretion of national authorities is crucial, particularly when they pertain to essential needs like food, housing, and healthcare. By identifying ‘core benefits’, the national authorities could reasonably guarantee that individuals, including TCNs, have access to necessities for a dignified existence, regardless of their nationality or immigration status.

¹³³ European Commission (n 69).

Discriminatory Leveraging Plus: The Standard for Independent Self-Preferencing Abuses after *Google Shopping* (C-48/22 P)

*Eva Fischer**, *Lena Hornkohl*** and *Nils Imgarten****

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ABSTRACT: Almost fourteen years after the European Commission (EC) opened proceedings against Google for abusive behaviour, the European Court of Justice (ECJ) has ruled, confirming in its findings the EC decision of 2017 and siding with the 2021 decision of the General Court (GC) as well as the Advocate General opinion. In its *Google Shopping* judgment, the ECJ paved the way for an independent self-preferencing abuse and outlined the necessary prerequisites for such a type of abuse, which are generally transferrable to other situations. Discrimination – self-favouring and demotion of competitors – plus potentially anticompetitive or exclusionary effects seen in light of all the specific circumstances and accompanying practices constitutes an own form of abuse. *Bronner* is not applicable. The Court further emphasised the burden of proof for infringements on the Commission but applied a workable standard of proof that allowed the Commission to discharge its burden of proof without applying a full counterfactual analysis. It also clarified the applicability of the AEC-test.

KEYWORDS: self-preferencing – self-favouring – discrimination – effects – AEC test – as-efficient-competitor test.

1. Introduction and background

Almost fourteen years after the European Commission (EC) opened proceedings against Google for abusive behaviour, the European Court of Justice (ECJ) has

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ruled,¹ confirming in its findings the EC decision of 2017² and siding with the 2021 decision of the General Court (GC)³ as well as the Advocate General opinion⁴. In its *Google Shopping* judgment, the ECJ paved the way for an independent self-preferencing abuse and outlined the necessary prerequisites for such a type of abuse, which are generally transferrable to other situations. The Court further emphasised the burden of proof for infringements on the Commission but applied a workable standard of proof that allowed the Commission to discharge its burden of proof without applying a full counterfactual analysis. It also clarified the applicability of the AEC-test.

1.1. The disputed conduct

First things first: The problematic conduct in *Google Shopping* essentially results in Google's preferential treatment of its own comparison-shopping service thereby leveraging its market power from the dominant market position in horizontal search to vertically integrated markets and, at the same time, demotion of its competitors.

In detail, Google gave results from its own Google shopping service a more prominent position than other comparison-shopping services on its general search page. The results of the Google shopping service would be displayed separately from and above the general search results (i.e., in highlighted boxes), including images of the purchasable items. The other comparison-shopping services were only shown in the general search results (i.e., as a typical blue link). Here, they were not only subject to the relevance-based ranking of the search results but demoted in their positioning within the search results by a change in the Google search algorithm (e.g., the so-called Panda algorithm). The Google shopping section, which contained both paid advertising as well as relevant search results, would always be displayed on top. As the default option, it looked more attractive to consumers. As a result, Google's practices were in fact a combination of two different practices creating anti-competitive effects in their combination, as now emphasised by the ECJ. First, Google created '(i) the more favourable positioning and display of Google's own specialised results within its general results pages than the positioning and display of results from competing comparison-shopping services'.⁵ Secondly, Google ensured '(ii) the simultaneous demotion of results from competing comparison shopping services by the application of adjustment algorithms'.⁶

¹ Case C-48/22 P *Google LLC v Commission (Google Shopping)*, EU:C:2024:726.

² Commission Decision of 27 June 2017, AT.39740 – *Google Search (Shopping)*, C(2017) 4444 final.

³ Case T-612/17 *Google LLC v Commission (Google Shopping)*, EU:T:2021:763.

⁴ Opinion of AG Kokott in Case C-48/22 P *Google LLC v Commission*, EU:C:2024:14.

⁵ C-48/22 *Google Shopping* (n 1) para 97.

⁶ Ibid.

1.2. A long journey

As already indicated, the case has a long history, which might continue with damages actions.⁷ Originally, the case was initiated by third-party complainants suffering from Google's practices. Amongst 24 others,⁸ *Foundem*, a UK-based vertical search service and competitor of Google, initially originated the case at the EC. After the commitment proceedings initiated in March 2013, failed in September 2014,⁹ the EC moved on to render its infringement decision in 2017. The EC found that Google had abused its dominant position by on the one hand decreasing traffic from its general results page to competing to comparable shopping services but on the other hand increasing traffic to its own, i.e., self-preferencing.¹⁰ The EC based the decision *inter alia* on the enhanced attractiveness of the boxes, the click rate of customers, and the accompanying traffic diversion of the above-described practices.¹¹ In its decision, the EC did not refer to types of abuses previously recognised like a refusal to deal or tying and bundling.

In 2021, the GC largely backed the EC and nearly dismissed all of Google's pleas. According to the GC, Google's self-preferencing practice distorted competition and could be seen as a deviation from competition on the merits.¹² The GC categorised the practice of Google as self-preferencing and a form of leveraging discrimination and its own type of abuse, distinct from a refusal to supply and the *Bronner*¹³ case law¹⁴ – one of the main arguments of Google –, thus limiting the scope of the essential-facility doctrine.¹⁵ The GC underlined the special circumstances of the case and even relied on Google's 'super-dominance'¹⁶ or the obligation of non-discrimination arising from the provisions for internet access providers under Regulation (EU) 2015/2120¹⁷. The GC further backed the EC in its finding of effects but for those on 13 national markets.¹⁸ According to the GC, it sufficed that

⁷ See section 2.1 below.

⁸ T-612/17 *Google Shopping* (n 3) para 29.

⁹ The commitment procedure failed because Google's commitment offers did not satisfy the concerns of the EC to fully ensure compliance with competition law provisions, see T-612/17 *Google Shopping* (n 3) para 26; C-48/22 *Google Shopping* (n 1) para 16.

¹⁰ For an overview of the EC's decisions see N Moreno Belloso, 'Google v. EC (Google Shopping), A case summary' (17 November 2021), at papers.ssrn.com.

¹¹ See Commission (n 2) paras 9, 14.

¹² T-612/17 *Google Shopping* (n 3) para 184.

¹³ Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs-und Zeitschriftenverlag GmbH & Co. KG*, EU:C:1998:569; see in more detail on the *Bronner* test, section 2.1 below.

¹⁴ T-612/17 *Google Shopping* (n 3) para 244.

¹⁵ But disfavoured by B Vesterhof, 'Theories of Self-Preferencing and Duty to Deal – Two Sides of the Same Coin?' (2015) 1 *Competition Law & Policy Debate* 4.

¹⁶ T-612/17 *Google Shopping* (n 3) paras 182–83.

¹⁷ *Ibid* para 180.

¹⁸ *Ibid* paras 450–59.

Google's practices could potentially create a negative impact on competition.¹⁹ Furthermore, the GC held that Google failed to establish a convincing counterfactual for the reduction in traffic, which was in the centre of the EC effects analysis.²⁰ Also, the as-efficient-competitor (AEC) test was judged not to be mandatory to establish abuse under Article 102 TFEU.²¹ An objective justification was not granted by the GC.²² Lastly, Google disputed the calculation of the fine due to the novelty of the theory of harm.²³ Conversely, the GC saw the uniqueness in this novel theory of harm, which deserved a corresponding serious penalisation.²⁴

Against this decision, Google appealed before the ECJ on four grounds. First, Google argued that the EC failed to prove failure to provide access to Google's search algorithm and, second, to sufficiently substantiate the leveraging of market power to the downstream product market. Third, Google further aimed for judicial review of the applied standard of causality between the alleged abusive behaviour and its market effects. Lastly, Google argued for the invalidity of the judgment based on an understanding of the mandatory application of the AEC test. These will be dissected in the following.

2. Dispensability of the indispensability criterion for independent discriminatory leveraging abuses

2.1. We do not need *Bronner*...

For the entirety of the fourteen years of the whole *Google Shopping* proceedings, the competition world argued about the correct legal test and, in particular, the possible applicability of the so-called *Bronner*-criteria for duty to access or supply cases to self-preferencing abuses.²⁵ According to the *Bronner*-criteria, a refusal to access or supply constitutes an abuse, (i.) if that refusal is likely to eliminate all competition in the market in question on the part of the entity applying for access, (ii.) such a refusal is incapable of being objectively justified, and (iii.) the infrastructure, in itself, is indispensable to carrying on that undertaking's business, inasmuch as there is no actual or potential substitute in existence for that infrastructure.²⁶

¹⁹ Ibid para 382

²⁰ Ibid paras 376 et seq.

²¹ Ibid para 538.

²² Ibid para 567.

²³ Ibid para 598.

²⁴ Ibid para 690.

²⁵ See, e.g., amongst many others, C Ahlborn, G Van Gerven, and W Leslie, 'Bronner Revisited: *Google Shopping* and the Resurrection of Discrimination under Article 102 TFEU' (2022) 13 *Journal of European Competition Law & Practice* 87; P Ibáñez Colomo, 'Indispensability and Abuse of Dominance: From *Commercial Solvents* to *Slovak Telekom* and *Google Shopping*' (2019) 10 *Journal of European Competition Law & Practice* 532.

²⁶ *Bronner* (n 13) para 41; Case C-42/21 *P Lietuvos geležinkeliai v Commission*, EU:C:2023:12, para 79.

It therefore came as no surprise that the appeal demanded a final word by the ECJ on the matter in its first ground of appeal. The applicants' arguments can be summarised in the following: Google's conduct, in essence, constituted a refusal of a duty to supply and consequently be assessed against the *Bronner*-criteria, because Google 'failed to provide competing comparison shopping services with access to prominent, dedicated boxes on its results pages, which had rich display features, and which were not prone to demotion by algorithms such as Panda'.²⁷

On the contrary, the ECJ sided with the GC. The case is not about 'access of competing comparison shopping service to boxes, but to access to Google's general results pages under non-discriminatory conditions'.²⁸ While the practice in *Google Shopping* is not unrelated to the issues of access and discrimination, so are many exclusionary practices.²⁹ Indeed, practices such as rebates, exclusivity agreements, bonus schemes, price reductions, tying, bundling, and other forms of predatory behaviour can lead a dominant company to treat downstream customers differently by offering them varying conditions.³⁰

The ECJ hereby followed its line of reasoning known from *TeliaSonera*,³¹ *Slovak Telekom*³² and *Lithuanian Railways*:³³ the *Bronner*-criteria are *only* relevant in the 'specific circumstances' of a refusal to access or supply situation and cannot be transferred to other abusive conduct.³⁴ The ECJ repeated that only a finding of a refusal to access or supply abuse 'has the consequence of forcing that undertaking to conclude a contract with that competitor', which constitutes a severe interference with the dominant company's 'freedom of contract and the right to property'.³⁵ In *Google Shopping*, according to the ECJ, the situation is different and does not amount to the same level of interference with Google's freedom of contract and the right to property, since access to the general results page was given, albeit, on discriminatory conditions.³⁶

2.2. ...because we have a distinct form of abuse

The ECJ rightly gets to the heart of the distinction and paves the way for the recognition of an independent discriminatory leveraging abuse: not concluding a contract at all or breaking off contractual relationships and consequently being forced to conclude a contract represents a significantly more intensive infringement of Google's

²⁷ C-48/22 *Google Shopping* (n 1) para 66.

²⁸ Ibid para 103.

²⁹ Ibid paras 80, 83, 97–99.

³⁰ See already L Hornkohl, 'Article 102 TFEU, Equal Treatment and Discrimination after *Google Shopping*' (2022) 13 *Journal of European Competition Law & Practice* 99, 102.

³¹ Case C-52/09 *Konkurrensverket v Telia Sonera Sverige*, EU:C:2011:83.

³² Case C-165/19 P *Slovak Telekom v Commission*, EU:C:2021:239.

³³ *Lietuvos geležinkiai* (n 26).

³⁴ C-48/22 *Google Shopping* (n 1) paras 90, 110.

³⁵ Ibid paras 91, 112.

³⁶ Ibid paras 97, 99–101, 106, 107, 111–113.

freedom of contract than if Google grants access to its general results page but failed to provide similar visibility and ensure equal treatment when it comes to the display of comparison shopping services.³⁷ The decisive factor is therefore the relevance to fundamental rights, such as freedom of contract, and the rule remains that only an *explicit* refusal to access or supply if you have not previously contracted or have broken off the contractual relationship falls under the *Bronner* category. Therefore, discriminatory conditions of access are a different category.³⁸ In fact, the ECJ sides – rightfully so – with the GC and is even more explicit by stating that there is such a thing as a distinct independent form of discriminatory leveraging abuse.³⁹

3. Standard of the discriminatory leveraging abuse: what is the plus?

Consequently, the heart of the appeal circled around the question: what constitutes an independent discriminatory leveraging abuse, especially in the form of self-preferencing? When does discriminatory leveraging depart from competition on the merits?

3.1. Competition on the merits

As a prerequisite, a definition by the ECJ of competition on the merits or behaviour that no longer constitutes competition on the merits would indeed be useful. The ECJ kept it rather vague by reiterating its rather circular *Superleague*⁴⁰ definition of competition on the merits by stating that it may ‘lead to the departure from the market or the marginalisation of competitors which are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation’.⁴¹ While this definition might be used as a starting-point, a ‘departure from the market’ or ‘marginalisation’ of less-efficient competitors does not offer any positive definition of competition on the merits. Rather, it seems to only refer to what competition on the merits does *not* entail.

Recently, the great Heike Schweitzer, in her last article published after her premature death together with her doctoral student Simon de Ridder, provided for a much more workable definition of competition on the merits, according to which ‘it stands for the general idea that, first, dominant undertakings shall compete on account of their skills, abilities, and superior performance, striving to offer consumers the best value for money or most attractive product or deal instead of competing by obstructing their competitors’ effective access to markets, resources, data, or customers or by otherwise creating competitive disadvantages for actual or potential rivals; and, secondly, that they must consider the effects of their conduct, due to their ‘special

³⁷ Ibid para 112.

³⁸ Ibid para 113.

³⁹ Ibid para 109.

⁴⁰ Case C-333/21 *European Superleague Company*, EU:C:2023:1011 paras 126–27.

⁴¹ C-48/22 *Google Shopping* (n 1) para 164.

responsibility’ not to allow their conduct ‘to impair genuine undistorted competition on the common market’.⁴² Rooted in the Ordoliberal idea of *Leistungswettbewerb*,⁴³ Schweizer and de Ridder show that competition on the merits is directed at market-normal behaviour centred around a consumer-oriented model of competition.

At least and in line with their negatively connoted definition, by determining when discriminatory leveraging constitutes an abuse under Article 102 TFEU, the ECJ reasoning allows the establishment of a test to determine when discriminatory leveraging departs from competition on the merits. Still, one has to put the puzzle pieces together that the ECJ left⁴⁴ in its assessment of the first and second ground of appeals, to determine what we call an independent discriminatory leveraging abuse *plus*.

3.2. Discrimination needed

Firstly, an independent discriminatory leveraging abuse needs a form of discrimination.⁴⁵ In the case at hand, on many occasions, the ECJ clearly flags the special discriminatory conduct of Google, which amounted to (i) giving preferential positioning and visibility to its own specialised results on general results pages compared to those of competing comparison shopping services, and (ii) simultaneously lowering the ranking of results from these competing services through the use of adjustment algorithms.⁴⁶ Thus, the discrimination in *Google Shopping* entails not only a self-favouring conduct alone but at the same time, a demotion of competitors.

3.3. Exclusionary effects plus specific circumstances

However, any form of discrimination is not enough, according to the ECJ, who sides with the GC.⁴⁷ Rather, it must secondly – based on specific, tangle points of analysis and evidence – give rise to at least potentially anticompetitive or exclusionary effects and all the specific circumstances and accompanying practices need to be taken into account.⁴⁸ According to the ECJ, the conduct, market(s) in question or the functioning

⁴² H Schweitzer and S de Ridder, ‘How to Fix a Failing Art. 102 TFEU: Substantive Interpretation, Evidentiary Requirements, and the EC’s Future Guidelines on Exclusionary Abuses’ (2024) 15 *Journal of European Competition Law & Practice* 222.

⁴³ See, e.g., from a historical perspective A Küsters, *The Making and Unmaking of Ordoliberal Language* (Klostermann 2023) 269ff.

⁴⁴ See on the issues with the clarity of the judgment, S Weber Waller, ‘Competition Law Without Policy (and Competition Policy Without Law)’ (18 September 2024), at papers.ssrn.com.

⁴⁵ C-48/22 *Google Shopping* (n 1) paras 158, 187; see on different categories of abusive discrimination in detail Hornkohl (n 30) 100.

⁴⁶ C-48/22 *Google Shopping* (n 1) para 97.

⁴⁷ Ibid para 186.

⁴⁸ Ibid paras 112, 165–68, 187; see generally favouring an effects-based approach especially for new forms of market behaviour B Zelger, ‘Möglichkeiten und Chancen der “bewirkten Wettbew-

of competition on that or those market(s), including obstacles to entry or growth or other blocking measures regarding entry or growth on that or those market(s), the position and competition on related and neighbouring markets, i.e., the leveraging of market power, and other factual circumstances, have to be taken into account.⁴⁹

For the case at hand, the ECJ specifically backed the GC by accepting three circumstances: (i.) the importance and irreplaceable of traffic generated by Google's general search engine for comparison shopping services, i.e., positive network effects, (ii.) the behaviour of users when searching online, i.e., users concentrating on the first three to five and generally only the visible search results, and (iii.) the impact of diverted traffic, i.e., 'that traffic represented a large proportion of traffic to competing comparison shopping services and that it could not be effectively replaced by other sources'.⁵⁰ The (potential) anticompetitive effects of the described discriminatory conduct taken together with these circumstances were, according to the ECJ, 'capable of characterising the existence of practices falling outside the scope of competition on the merits'.⁵¹ At the same time, the ECJ clarified that issues brought forward by the GC, such as the mentioned 'super-dominance' or the obligation of non-discrimination arising from the provisions for internet access providers under Regulation (EU) 2015/2120, were not necessary and decisive to confirm the abusive conduct of Google in the case at hand.⁵²

3.4. What about other forms of discrimination?

We now know the abstract requirements for an independent discriminatory leveraging abuse: a discrimination *plus* (potential) anti-competitive effects *plus* an assessment of the relevant circumstances at hand.⁵³ Yet, the judgment leaves room for interpretation.

Firstly, the ECJ is ambivalent whether *every* discriminatory conduct needs to consist of both elements – self-favouring and demotion. In some parts of the judgment, the Court mentions a combination of both⁵⁴ while in other parts, the sole reliance on self-favouritism or discrimination⁵⁵ seems to be sufficient.

Here, one needs to consider that the self-preferencing conduct in the case at hand – the placement of the Google shopping service separately from the general search results in above-placed highlighted boxes – would have already included a demotion

erbsbeschränkung" in der Digitalökonomie' in E Fischer and L Hornkohl (eds), *Kartellrecht und Zukunftstechnologien* (Nomos 2024) 25–54; B Zelger, *Restrictions of EU Competition Law in the Digital Age: The Meaning of 'Effects' in the Digital Age* (Springer 2023) 78 et seq.

⁴⁹ C-48/22 *Google Shopping* (n 1) paras 165–68.

⁵⁰ Ibid paras 159–61.

⁵¹ Ibid para 162.

⁵² Ibid paras 195, 198.

⁵³ See hereto already in detail Hornkohl (n 30) 107–10.

⁵⁴ See e.g. C-48/22 *Google Shopping* (n 1) paras 107, 171, 187.

⁵⁵ See e.g. ibid paras 99, 143, 158.

of competitors. Every self-preferencing conduct necessarily entails that a competitor's services is treated less favourably and is, therefore, as compared to the favoured own service, demoted. However, in *Google Shopping*, the competitor comparison shopping services were not only included in a lower ranking in the highlighted boxes but on the general search results page, which is subject to the described further demotion.

However, this does not mean that mere self-preferencing without further demotion cannot be considered as abusive. The ECJ highlighted time and again the specific factual circumstances of *Google Shopping* and corresponding case-specific assessment.⁵⁶ We know that once the – quite severe – form of discrimination consisting of both self-favouritism and further demotion comparable to *Google Shopping* is given in a case, an independent discriminatory leveraging abuse is more likely assumed. In that sense, further demotion serves as a high indicator. However, the anti-competitive nature anyway depends on the *plus*-factors. Should other self-preferencing conduct – already constituting discrimination and anyway entailing a certain element of demotion – fulfil the effects-based and all-circumstances *plus*-factors, a discriminatory leveraging abuse cannot be ruled out from a theoretical standpoint.⁵⁷

Secondly, on the *plus*-factors itself, *Google Shopping* is in line with former case law requiring more than a simple discrimination.⁵⁸ The judgment makes clear that even discrimination in the form of a combination of self-preferencing with competitor-demotion is not always harmful to competition and therefore does not qualify as a 'prima facie' or in the literature also called 'by-object' abuses⁵⁹ that, according to ECJ jurisprudence,⁶⁰ goes in hand with a rebuttable presumption of anticompetitive effects, only requiring an effects-analysis on the part of the authority in case of a rebuttal.

Rather, *Google Shopping* is in line with case law taking an effects-based approach, considering all relevant circumstances for conduct, which is not by nature so harmful that it can only be rationalised to harm competition.⁶¹ Only when these conditions are fulfilled, does the dominant company depart from competition on the merits. This finally puts a nail in the coffin of both the argument that self-promoting is always common business practice and the often-brought infamous example of supermarket shelf

⁵⁶ See e.g. *ibid* para 171.

⁵⁷ See hereto already in detail Hornkohl (n 30) 107 et seq.

⁵⁸ Case C-525/16 *MEO – Serviços de Comunicações e Multimédia SA v Autoridade da Concorrência*, EU:C:2018:270, para 31; Case C-209/10 *Post Danmark A/S v Konkurrencerådet*, EU:C:2012:172, para 30.

⁵⁹ P Ibáñez Colomo, 'The Future of Article 102 TFEU after *Intel*' (2018) 9 *Journal of European Competition Law & Practice* 293.

⁶⁰ Summarised at Case T-286/09 *RENV Intel v Commission*, EU:T:2022:19, paras 124–26.

⁶¹ *MEO* (n 58) paras 26–27; see in detail also P Ibáñez Colomo, 'Exclusionary Discrimination under Article 102 TFEU' (2014) 51 *Common Market Law Review* 141, 144.

allocation for their own-brand products, which is seen as unproblematic conduct.⁶² The ECJs effects-based and all-circumstances approach distinguishes common business practices of self-promotion from harmful self-preferencing.⁶³ Transposed to the super-market example: Supermarkets must do more (the *plus*) than allocate favourable shelf space for their own-brand products to commit an independent discriminatory leveraging abuse in the form of self-preferencing. A further demotion of competitors other than positioning the own products more favourably, similar to *Google Shopping*, serves as a strong indicator. Even without such demotion, the effects and surrounding circumstances decide on the anti-competitiveness.

Still, the judgment in *Google Shopping* only provides a direction into what the *plus* must entail, i.e., the relevant threshold when the circumstances allude to an abuse. Naturally, the effects-based and all-circumstances approach amounts to a case-by-case analysis. The circumstances may but are not required to resemble Google's actions and standing within the pertinent and adjacent markets. However, the case of *Google Shopping* provides illustrations of factors that may be significant, especially in digital markets, including user behaviour and the role of gateways.⁶⁴ Consequently, the threshold for consideration should be established at a relatively elevated level, although, e.g., a 'super-dominance' is not necessary. Therefore, national and upcoming EU-case law⁶⁵ will help to further clarify the relevant threshold of circumstances for independent discriminatory leveraging abuses in the form of self-preferencing.

4. The what-if-dilemma: causation and the burden of proof

Similar to the GC proceedings, the applicants claimed an error in the analysis of the causal link between the alleged abuse and its likely effects as well as the wrongful attribution of the burden of proof regarding a counterfactual analysis on Google instead of on the EC.

At this stage, also interesting admissibility questions came up. The ECJ once again outlined the distinction between points of law and points of fact. The analysis is simple and straightforward: The question of whether a counterfactual analysis is necessary and which (abstract) criteria apply are questions of law which are amenable to judicial review in an appeal before the ECJ.⁶⁶ On the other hand, the concrete application of such a counterfactual would amount to questions of fact which can

⁶² Vesterhof (n 15) 5; T Graf and H Mostyn, 'Do We Need to Regulate Equal Treatment? The *Google Shopping* Case and the Implications of its Equal Treatment Principle for New Legislative Initiatives' (2020) 11 *Journal of European Competition Law & Practice* 561, 570–73.

⁶³ See already Hornkohl (n 30) 108.

⁶⁴ See on the comparison to the gatekeeper status of the DMA section 6 below.

⁶⁵ See comprehensively on the EU-wide cases G Colangelo, 'Antitrust Unchained: The EU's Case Against Self-Preferencing' (2023) 72 *GRUR International* 538.

⁶⁶ C-48/22 *Google Shopping* (n 1) paras 204–06.

only be subject to an appeal if the facts were distorted. As the arguments were all about whether a counterfactual analysis by the EC was required by law and which criteria the EC must assess under the relevant legal test, the claimants alleged errors of law which are admissible in the appeal procedure. Otherwise, the appeal would be ‘deprived of parts of its purpose’.⁶⁷

4.1. Burden of proof vs standard of proof for the counterfactual analysis

In the judgment, the ECJ reaffirms the almost obvious statement that the burden of proof for the existence of an infringement of competition law lies with the EC.⁶⁸ However, more important than the question of the attribution of the burden of proof was the issue how the GC dealt with the different elements of evidence and which evidence it regarded as sufficient for a fact to be proven. Naturally, the burden of proof and standard of proof interfere in this regard. If the standard of proof is relatively low, it might be easier for one party (here the EC) to discharge the burden of proof.

Yet, when evaluating the lawfulness of the EC decision and the GC’s appraisal of it, it is important to distinguish burden of proof and standard of proof. Both elements, if assessed wrongfully, might amount to errors of law. An allegedly wrongful assessment of the respective standard of proof does, however, not lead to a wrongful attribution of the burden of proof or vice-versa. In the present case, it is rather clear from the GC’s judgment that it correctly attributed the burden of proof to the EC.⁶⁹ The fact that the GC regarded it as sufficient for the EC to engage in an analysis of different indicia and context of a potential infringement without necessarily requiring the EC to engage in a full counterfactual analysis and application of an AEC test, is a matter of standard of proof. It relates to the relevant level of conviction which is required to assume a potential violation of Article 102 TFEU. The conviction of an authority or a court can be reached through different means of analysis. A counterfactual analysis involving econometrical models or similar means could clearly be one option. Proof through indicia is simply another option to reach a sufficient level of conviction. Generally, the proof of a fact through indicia is well known in civil procedural law and sometimes also referred to as ‘indirect proof’.⁷⁰ Whereas proving

⁶⁷ Ibid para 207.

⁶⁸ Ibid para 224.

⁶⁹ T-612/17 *Google Shopping* (n 3) paras 132–34 and C-48/22 *Google Shopping* (n 1) para 22.

⁷⁰ C Thole, ‘§ 284 ZPO’ in F Stein (ed), *Kommentar zur Zivilprozessordnung* (23rd edn, Beck 2018) para 8; B Moriarty, *Evidence in Civil Law – Ireland* (Lex Localis 2015) 89; B Nunner-Krautgasser and P Anzenberger, *Evidence in Civil Law – Austria* (Lex Localis 2015) 36; T Ivanc, *Evidence in Civil Law – Slovenia* (Lex Localis 2015) 60; S Kramar, *Evidence in Civil Law – Croatia* (Lex Localis 2015) 19; T Renno, ‘Circumstantial Evidence’ in H Ruiz Fabri (ed), *Max Planck Encyclopedias of International Law* (Oxford University Press 2020); see further for an example of acceptance of circumstantial evidence in EU case law, Case C-67/91 *Dirección General de Defensa de la Competencia v Asociación Española de Banca Privada and Others*, EU:C:1992:330, para 39.

a certain fact directly, e.g., through documentary evidence or witnesses, might be superior to indirect evidence, very often in complex litigation, it will be necessary to rely on indirect evidence. Direct evidence is often not available or not sufficient to prove all necessary elements.

Especially when the matter to be proven concerns a hypothetical scenario, e.g., the relevant counterfactual for causation in a case like this one, but also elements of prognosis in merger control, *indicia* is particularly important. Besides, the counterfactual analysis which Google wanted the EC to conduct does not constitute direct evidence either. An analysis of the counterfactual with the help of econometrical modelling is equally based on certain assumptions which are usually based on *indicia* itself. Therefore, it is not necessarily less valuable or less convincing to infer a potential restriction of competition from *indicia* than to infer it from econometrical modelling. The Court, when holding different types of *indicia* admissible,⁷¹ does not establish a priority of either of the different methodologies over the other. It ‘merely found that it is permissible for the Commission to rely on a range of evidence, without being required systematically to use any single tool to prove the existence of such a causal link’.⁷²

From the perspective of the law of evidence, both constitute indirect evidence and must be assessed against their cogency and plausibility. In the concrete case, the EC was able to plausibly demonstrate that Google’s practices led to a decrease in generic search traffic of competing comparison-shopping services, basing its findings on observations of the market developments,⁷³ even without having needed to apply further counterfactual analysis. One likely explanation is that the effects were so strongly visible in the given case that simple observation of the market developments sufficed already to provide sufficiently convincing *indicia* for a potential restriction of competition.⁷⁴ It is very clear from the context and wording of the Court’s judgment that the EC could have alternatively also applied a full counterfactual analysis. It is simply not obliged to do so in case sufficiently cogent evidence can be provided otherwise.⁷⁵

4.2. Counterfactual analysis can be used as counterevidence by the claimant

Consequently, in the view of the ECJ, a counterfactual analysis as a means of evidence can equally be used as evidence in favour of the claimant.⁷⁶ However, in the present case, this would serve as counterevidence aimed at undermining the original

⁷¹ See for concrete examples of *indicia* which the Court deemed relevant and admissible evidence: C-48/22 *Google Shopping* (n 1) paras 221, 225.

⁷² *Ibid* para 228.

⁷³ *Ibid* para 225.

⁷⁴ *Ibid* para 225.

⁷⁵ *Ibid* para 228.

⁷⁶ *Ibid* para 227.

evidence presented by the EC, without shifting the burden of proof, which remains on the EC that initially discharged it through sufficient circumstantial evidence.⁷⁷ It simply refers to the possibility that discharging the burden of proof through the provision of circumstantial evidence by the EC can be challenged by the claimant attacking either the basis of the evidence which the EC provided or by providing contrary evidence themselves. This approach seems reasonable and coherent with common standards of evidence procedure. Furthermore, it is in line with the ECJs view in the *Intel Renvoi* appeal.⁷⁸ Just like in *Google Shopping*, the Court underlined the burden of proof on the Commission.⁷⁹ However, it found that the standard of proof and methodology to be applied by the Commission can be altered by substantiated submissions of the undertaking based on supporting evidence.⁸⁰ Such substantiated submission could be seen in an AEC-analysis in the context of *Intel* or in a counterfactual analysis in the case of *Google Shopping*.

4.3. Relevant criteria for the counterfactual analysis

However, that counterevidence must also be sufficiently cogent either. In particular, a counterfactual analysis must exclude all relevant behaviour which is part of the alleged anticompetitive practice. Otherwise, the counterfactual analysis risks to lose its validity and significance. Studies, as provided by Google,⁸¹ showing no effects in a counterfactual where only the ‘boxes’ were removed but the algorithms remained unchanged do not constitute meaningful counterfactual analyses as these do not cover the nature of the alleged anticompetitive conduct as described above.⁸²

That requirement is not contradicting the finding of the GC and ECJ that ‘none of the practices at issue, taken separately, had given rise to any competition objections’.⁸³ This can, again, be understood when looking at the issue from the perspective of the law of evidence. A simplistic counterfactual analysis, only involving one of the elements of the alleged anticompetitive practice would simply not be sufficiently convincing regarding the absence of effects in the scenario of both practices applied together. This seems reasonable as a counterfactual analysis is naturally facing a risk of imprecision and can only be regarded as an estimate of how markets would have hypothetically had developed. If the potential anticompetitive effects are based on the reasonable assumption that the two elements of the anticompetitive

⁷⁷ Ibid para 228.

⁷⁸ Case C-240/22 P *Intel v Commission*, EU:C:2024:915.

⁷⁹ Ibid para 270.

⁸⁰ Ibid para 144.

⁸¹ C-48/22 *Google Shopping* (n 1) para 237.

⁸² Ibid paras 241; see also AG Kokott in *Google Shopping* (n 4) para 182, underlining that it is the combined (potential) effect which was decisive and which can only be disputed when applying the full counterfactual involving both aspects of the practice.

⁸³ C-48/22 *Google Shopping* (n 1) para 241.

practice (promoting its own boxes and demoting competitors' results) are inextricably linked, a counterfactual analysis of only parts of that practice is too limited to mirror the hypothetical development of the market. It is, therefore, despite being admissible, no cogent evidence.⁸⁴

5. The never-ending tale of the as-efficient-competitor-test

Ever since the beginning of the *Intel*-saga,⁸⁵ much discussion has taken place as to whether the EC could be obliged to always examine the requirements of the AEC test whenever establishing an abuse of dominance. In contrast, considerable resources and time of the EC could be saved if the EC would only be obliged to apply the AEC test in order to prove abusive behaviour on the basis of foreclosure effects if – and only if – the undertaking elaborated on the absence of such effects during the administrative procedure based on supporting evidence.⁸⁶ It is regrettable though that the ECJ did not use the opportunity to further clarify the standard of such arguments of the parties. It is – for now – at the discretion of the EC to evaluate if the presented evidence is sufficient for the EC to be obliged to apply the AEC test. This decision is then subject to judicial review the intensity of which is also still an open question as illustrated by the *Intel*-saga.⁸⁷

5.1. Scope of the as-efficient-competitor-test

Much of the discussion was born from the fact that Article 102 TFEU and its unwritten categories of abuse require the EC to establish that the unilateral conduct in question is abusive and does not constitute competition on the merits. The purpose of this being that the application of Article 102 TFEU is not indicated in cases where a weaker, less competitive company seeks shelter under Article 102 TFEU (the AEC principle). This is in line with the pre-*Intel* jurisprudence stating that 'the objective of Article 102 TFEU is not to protect less-efficient undertakings'.⁸⁸

The first choice one needs to make is whether – for the conduct in question – a (potential) per se restriction of competition is indicated or if based on an effects analysis the EC has to prove harmful effects to competition on the relevant market. As indicated above,⁸⁹ discriminatory leveraging abuses are not per se harmful, but the

⁸⁴ Ibid paras 245–47.

⁸⁵ Case T-286/09 *Intel v Commission*, EU:T:2014:547; Case C-413/14 P *Intel v Commission*, EU:C:2017:632; Case T-286/09 RENV *Intel v Commission*, EU:T:2022:19; C-240/22 *Intel* (n 78).

⁸⁶ See for the requirement of 'supporting evidence', C-48/22 *Google Shopping* (n 1) para 265 and C-240/22 *Intel* (n 78) para 144.

⁸⁷ C-240/22 *Intel* (n 78) para 144 et seq. and the jurisprudence cited.

⁸⁸ See e.g. *Post Danmark* (n 58) para 21. Such standing jurisprudence was also used by the parties, see C-48/22 *Google Shopping* (n 1) para 253, confirmed in para 263.

⁸⁹ See in section 3.3 above.

EC has to consider all relevant circumstances of the conduct and take an effects-based approach.

Second, to make a distinction between harmful and non-harmful conduct under an effects-based approach, the AEC test, in contrast to the AEC principle, is one valid *instrument* because it requires the EC to prove that the undertaking produces different effects on the competition on the relevant market than an undertaking not acting wrongfully. Such additional effects lay, according to the ECJ, in the foreclosure effects proven by actual or potential economic data to show ‘a strategy aiming to exclude competitors that are at least as efficient’.⁹⁰ Such a strategy goes beyond the effects every efficient competitor would cause on the market. This, however, requires a considerable amount of time and resources spent on behalf of the EC. The ECJ is therefore right in assuming that the undertaking itself has to indicate such circumstances, pointing at the fact that foreclosure effects on the market would have occurred in any case. The Commission has to prove a ‘strategy’ behind the market behaviour aiming to create such effects.⁹¹ If no such circumstances are indicated, the EC is not obliged to acquire data to test its assumption of foreclosure effects.⁹²

The ECJ thus dismisses an argument put forward by the parties that the GC had confused the AEC test and the more general requirement to establish an abuse.⁹³ The ECJ ruled that, while it is true that the unilateral behaviour derogates from competition on the merits giving grounds to analyse the extent of the undertaking’s dominant position, the EC is under no obligation to prove a ‘strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market’⁹⁴ if not indicated. Should accused undertakings want to initiate the ECs obligation to apply the AEC test, the undertakings need to state specifics, not just generalised allegations, the ECJ held.⁹⁵ This is convincing since the undertaking is better informed about its own market behaviour than the EC and should be able to point the finger at where the EC needs to look for proof that the application of Article 102 TFEU could be misplaced.

⁹⁰ C-48/22 *Google Shopping* (n 1) para 265.

⁹¹ Ibid para 265.

⁹² Ibid para 265 (*argumentum e contrario*). This was, e.g., the case in *Unilever*. Here, the EC was obliged to examine the facts under the AEC test: Case C-680/20 *Unilever Italia Mkt. Operations Srl and Autorità Garante della Concorrenza e del Mercato*, EU:C:2023:33, para 60–62.

⁹³ C-48/22 *Google Shopping* (n 1) para 264.

⁹⁴ Ibid para 265.

⁹⁵ Ibid para 265, 268.

5.2. Wave goodbye to the more economic approach?

This recent judgment is thus in line with a silent withdrawal of the more economic approach that was once favoured by the European Commission⁹⁶ but lead to a series of pushbacks by the Courts.⁹⁷ However, the recent case-law is arguably indecisive and recent legislative acts do not seem to clearly put efficiency first. For one, the DMA does not include any efficiency defence⁹⁸ even though proclaiming ‘contestable and fair markets’ (Article 1 DMA).⁹⁹ For another, some recent case-law arguably seems to again confirm a more economic approach,¹⁰⁰ the Google Shopping Case, however, points the finger in another direction: By restricting the applicability of the AEC test to cases where either the EC or the parties invoke it, the ECJ clearly refrains from declaring a mandatory application of the AEC test in Article 102 TFEU cases. Such mandatory application of an AEC standard would have fostered a more ‘economic’ application of competition law provisions to establish an abuse of market power. Also, the new draft exclusionary guidelines from the EC shy away from such an approach.¹⁰¹ Overall, one could argue that the requirements of a judicial review proven application of a more economic-based or effects-based analysis in a broader sense seemed simply too high to be workable.

In light of such considerations, it seems favourable to lift the burden for the EC by declaring the AEC test to be only compulsory if either the EC or the undertaking is willing to apply it. For now, we can safely say that there is no AEC standard, e.g., a standard always applicable when establishing abuse under Article 102 TFEU (more economic approach plus), necessarily required to establish an abuse under Article 102 TFEU.¹⁰² The AEC test remains a tool of choice by either the EC or the parties to the infringement. The negative impact of market behaviour can be proven by anticompetitive effects, allowing the EC an analysis of all the circumstances of the

⁹⁶ European Commission, ‘Communication: Guidance on the Commission’s Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings’, COM(2008) 832 final.

⁹⁷ E.g. Case T-80/02 *Tetra Laval BV v Commission*, EU:T:2011:129; Case T-342/99 *Airtours plc v Commission*, EU:T:2004:192.

⁹⁸ L Kumkar, ‘Der Digital Markets Act nach dem Trilog-Verfahren’ [2022] *Recht Digital* 347, 351f; D Seeliger, ‘Art. 8 DMA’ in R Podszun, *Digital Markets Act: Article-by-Article Commentary* (Hart 2023) para 29.

⁹⁹ On the national level, the German legislator sides in its section 19a of the German Competition Act open and contestable markets and long-term prosperity to efficiency concerns and declares the former as prevailing over the latter (German Competition Act, section 19a, para 2).

¹⁰⁰ Case C-377/20 *Servizio Elettrico Nazionale SpA et al v Green Network SpA et al*, EU:C:2022:379; *Intel* (n 85); *Unilever Italia* (n 92). Such interpretation is favoured by P Akman, ‘A Critical Inquiry into “Abuse” in EU Competition Law’ (2024) 44 *Oxford Journal of Legal Studies* 405.

¹⁰¹ European Commission, ‘Draft Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings’, at competition-policy.ec.europa.eu.

¹⁰² Differently Akman (n 100), favouring the adoption of an AEC standard to establish abuse.

case. The Commission's discretion is though limited. Its methodological choice how to prove anticompetitive effects must be 'based on a concrete logical pattern, defined and made explicit' by the Commission.¹⁰³ Should the Commission choose the AEC-test as a method to demonstrate anticompetitive effects, the 'AEC test must be able usefully to support the conclusion' of such effects.¹⁰⁴ The ability of the AEC test to deliver such results is subject to judicial review as can be seen in the *Intel Renvoi* proceedings.¹⁰⁵

6. Conclusion

From a purely procedural standpoint, the ECJ showed very sound and balanced reasoning in *Google Shopping*. It emphasised the burden of proof on the EC but applied a manageable standard of proof for the EC which allowed it to discharge the burden of proof in different ways, including with circumstantial, indirect evidence. This does not preclude that the undertakings concerned provide – without being obliged to – a more detailed counterfactual analysis but in a procedural situation such as the given, this would only constitute possible counterevidence.

From a substantive side, the ECJ judgment has legitimised a certain form of self-preferencing as abusive: discriminatory leveraging in the form of self-favouritism combined with competitor demotion that create (potential) foreclosure effects, depending on the relevant circumstances of the case. The latter were quite severe in *Google Shopping*, relying on the substantial market power, gateway status, and market circumstances. Other self-preferencing practices indubitably must reach a certain comparable magnitude in order to meet this standard. Yet, the breaking point has not yet been fully determined.

Regarding remedies, the *Google Shopping* case certainly highlights the need for more effective and timely solutions. The procedural delay and the fact that the market dynamics shifted in favour of Google over time underscore the limitations of ex-post enforcement in rapidly evolving digital markets. Future cases, such as Google's complaint against Microsoft regarding cloud services,¹⁰⁶ may offer insights into the evolving nature of self-preferencing and the adequacy of current remedies.

Generally, the question arises as to what role the self-preferencing theory of harm under Article 102 TFEU will play for digital companies in the context of growing EU and national digital regulation. In reflecting on the implications of self-preferencing within the framework of the DMA or the German § 19a German Competition Act, it is important to recognize the broader regulatory trends.

¹⁰³ C-240/22 *Intel* (n 78) para 270.

¹⁰⁴ *Ibid* para 268.

¹⁰⁵ *Ibid* paras 268, 270.

¹⁰⁶ P Blenkinsop, 'Google complains to EU over Microsoft cloud practices' (Reuters, 25 September 2024), at www.reuters.com.

The inclusion of self-preferencing in Article 6(5) DMA suggests a more targeted approach to gatekeeper practices, to some degree distinct from the *Google Shopping* interpretation of Article 102 TFEU. It focuses on specific self-preferencing strategies of gatekeepers, namely self-preferencing in ranking and does not require an effects-based analysis. It is, thus, limited not only in the personal sense to gatekeepers but also in terms of self-preferencing practices. Yet, while Article 6(5) DMA highlights only a more favourable treatment, mentioning also ‘related indexing and crawling’ pinpoints to an accompanying demotion similar to *Google Shopping*. Further, albeit the DMA’s disconnect to the effects-based approach, the personal scope of gatekeepers suggests at least a connection to the mentioned necessary specific circumstances highlighting the crucial gateway status in the present case. The fact that gatekeepers under the DMA provide core platform services constituting important gateway(s) per Article 3(1)(b) DMA, is at least loosely comparable to the three specific circumstances surrounding the gateway status highlighted by the ECJ in the present case.¹⁰⁷ Still, the *per se* approach of the DMA prohibitions entails a more straightway prohibition and likely a much swifter procedural handling in the future.

At the same time, national regulation, such as § 19a German Competition Act, takes a much broader stance than the DMA and covers self-preferencing of undertakings of paramount significance for competition across markets. This could invite more expansive enforcement strategies.¹⁰⁸ This divergence raises questions about the balance between sector-specific regulations like the DMA and more general competition-like laws at national levels, such as § 19a German Competition Act.

Additionally, the revision of Regulation 1/2003 and the possibility of stricter national enforcement, such as through economic dependency or essential facility rules, presents an interesting dynamic in that context. A recent study from the German Competition Authority shows pertinent interest in such national endeavours.¹⁰⁹ On the one hand, these national measures tend to fill a gap, since they go beyond Article 102 TFEU and are often rooted in a long-standing tradition in the Member States.¹¹⁰ On the other hand, these rules are capable of further complicating the regulatory landscape for dominant firms, as feared by the EC.¹¹¹

Generally, the implications for Article 102 TFEU and the ongoing draft guidelines revision, also following the newest *Intel Renvoi* judgment,¹¹² indicate a recalibration of the overall abuse of dominance framework. Although presumptions of

¹⁰⁷ C-48/22 *Google Shopping* (n 1) paras 159–61; see also section 3.3 above.

¹⁰⁸ Critically Graf and Mostyn (n 62).

¹⁰⁹ Bundeskartellamt, ‘Nationale Missbrauchsaufsicht und relative Marktmacht im europäischen Kontext’ (26 September 2024), at www.bundeskartellamt.de.

¹¹⁰ Ibid 17 et seq.

¹¹¹ European Commission, ‘Commission Staff Working Document: Evaluation of Regulations 1/2003 and 773/2004’, SWD(2024) 216 final, 239.

¹¹² C-240/22 *Intel* (n 78).

abuse remain relevant,¹¹³ the pushback against a purely economic approach signals a partial return to more formalistic competition law principles. The EC's flexibility in proving abuse, even with indirect evidence, suggests that dominance cases might continue to evolve, but the fundamental standards for Article 102 TFEU remain intact. While also *Intel Renvoi* shows us that the AEC test is not abandoned,¹¹⁴ *Google Shopping* shows us the AEC test's limited scope as a voluntary instrument of either the EC or the undertakings. The intensity of judicial review of the Commission's application of the AEC test and the standard of proof the parties have to comply with during the administrative procedure though remain unresolved.

While the public enforcement stage of *Google Shopping* might be over, private enforcement is not. Private actions have already been brought on national level, most of them having been on hold, waiting for this final ECJ decision.¹¹⁵ Famously, *Heureka*'s damages action brought against Google in the Czech Republic already made it to the ECJ before the actual EC originated *Google Shopping* case did.¹¹⁶ The preliminary reference judgment from April 2024 concerned the statute of limitation for *Google Shopping* related damages actions. This is a topic of highest relevance for practice, given the overall long duration of the proceedings on EU level before we now have a final decision, binding on national courts according to Article 16 Regulation 1/2003.¹¹⁷ In *Heureka*, the ECJ clarified that the limitation period for these types of claims can only commence once the breach of competition law has occurred and the injured party is aware of the necessary information to initiate a legal action.¹¹⁸ Additionally, the ECJ determined that the limitation period must be paused during a Commission investigation and any follow-up court proceedings,¹¹⁹ leaving ample room for private follow on actions now. Still, the potential for private actors to seek redress post-judgment is uncertain due to practical challenges of proving harm and causality in self-preferencing cases.¹²⁰

Finally, while the ECJ's substantive reasoning and procedural handling of *Google Shopping* appear sound, it also illuminates a structural tension in the overall enforcement system of EU competition law. The EC's victory may have come at the cost of third-party rights, as the complainant faced procedural expenses while market

¹¹³ Schweitzer and de Ridder (n 42).

¹¹⁴ See C-240/22 *Intel* (n 78) paras 121, 268 inter alia.

¹¹⁵ See, e.g., the action of *Idealo* brought at the Regional Court of Berlin in 2019, at www.idealo.de; or the action of *PriceRunner* brought at the Patent and Market Court in Stockholm in 2022, at newsroom.pricerunner.com.

¹¹⁶ Case C-605/21 *Heureka Group a.s. v Google LLC*, EU:C:2024:324.

¹¹⁷ See in detail M Serafimova, 'Limitation Periods in Antitrust Actions for Damages: How the CJEU Tamed the Tyrant of Time – *Heureka Group*, C-605/21' (Kluwer Competition Law Blog, 21 May 2024), at competitionlawblog.kluwercompetitionlaw.com.

¹¹⁸ *Heureka Group* (n 116) para 81.

¹¹⁹ *Ibid.*

¹²⁰ J Mouton and L Reed, 'Following the *Google Shopping* Judgment, Should We Expect a Private Enforcement Action?' (2022) 13 *Journal of European Competition Law & Practice* 154 et seq.

dynamics evolved unfavourably for them over the long duration. This case signals a cautious retraction from the economically heavy-handed approach of the last two decades, hinting at a judicial preference for more traditional competition law principles, even if that benefits the regulator over market participants. Thus, while the *Google Shopping* judgment might be viewed as a success for the EC, its long-term impact on market fairness, the effectiveness of competition law and on third-party rights remains contentious.

Uniformity of Refugee Status in EU law and Secondary Movements: Insights from *QY v Germany* and *A. v Generalstaatsanwaltschaft Hamm*

Vladislava Stoyanova*

TABLE OF CONTENTS: 1. Introduction. – 2. No uniform refugee status and no automatic recognition of positive decisions. – 3. Procedural obligation to take ‘full account’ of a positive decision. – 4. The link between a positive decision on refugee status and the content of the status – 5. Conclusion.

ABSTRACT: In *QY v Bundesrepublik Deutschland* (*Effect of a decision granting refugee status*) the Court of Justice held that Member State are not required under EU to automatically recognize the positive decision issued by another Member State. Such a positive decision does have some significance, but very far from being anything close to automatically binding as to the positive conclusion that the applicant is eligible for refugee status. In this article, after briefly describing the facts, I explain the Court’s arguments in *QY* and their justifications. I also make relevant comparative references to the new EU asylum regulations adopted in 2024 (i.e. the 2024 Qualification Regulation and the 2024 Procedures Regulation). More specifically, Section 2 explains that there is no uniform refugee status in the EU. Section 3 clarifies that in *QY* the Court reasoned in favour of procedural obligation upon Member States to take ‘full account’ of positive decisions made by other Member States. Finally, Section 4 explores the link between, on the one hand, the effects of positive decisions for Member States and, on the other, the content of the refugee status. To proceed with this exploration, *A. v Generalstaatsanwaltschaft Hamm* delivered on the same day as *QY* is taken into account.

KEYWORDS: refugee status – secondary movements – mutual recognition – Dublin transfers – content of international protection – non-refoulment.

1. Introduction

The legal questions triggered by the movement of beneficiaries of international protection and by applicants for international protection between Member States, can be quite complicated. These secondary movements have exposed problems with the

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reception conditions in some Member States,¹ which has prevented Dublin transfers from one Member State to another.² These secondary movements also raise questions about the role positive decisions of granting refugee status in EU law. It has been already clarified that Member States are obliged under EU law to mutually recognize *negative* protection decisions (i.e. refusal to grant refugee status).³ How about *positive* decisions to grant refugee status? If an applicant is granted refugee status in one Member State, what implications does this have if the beneficiary moves to another Member States (for the sake of clarity, referred to as new Member State)? These implications might reverberate into different areas, such as when new applications and new procedures for international protection are initiated, in the determination of the reception conditions or the content of the international protection.⁴

In *QY v Bundesrepublik Deutschland* (*Effect of a decision granting refugee status*) the Court of Justice held that Member State are *not* required under EU to automatically recognize the positive decision issued by another Member State.⁵ Such a positive decision *does have some significance*, but very far from being anything close to automatically binding as to the positive conclusion that the applicant is eligible for refugee status. In this article, after briefly describing the facts, I explain the Court's arguments in *QY* and their justifications. I also make relevant comparative references to the new EU asylum regulations adopted in 2024 (i.e. the 2024 Qualification Regulation and the 2024 Procedures Regulation).⁶ More specifically, Section 2 explains that there is no uniform refugee status in the EU. Section 3 clarifies that in *QY* the Court reasoned in favour of procedural obligation upon Member States to take 'full account' of positive decisions made by other Member States. Finally, Section 4 explores the link between, on the one hand, the effects of positive decisions for Member States and, on the other, the content of the refugee status. To proceed with this exploration, *A., v Generalstaatsanwaltschaft Hamm* delivered on the same day as *QY* is taken into account.

¹ Case C-411/10 *N.S. and Others* EU:C:2011:865.

² Regulation No 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).

³ See the pending cases C-288, C-254/21, C-297/21, C-315/21 and C-328. See Joined Cases C-123/23 and C-202/23 *Khan Yunis* EU:C:2024:1042.

⁴ For pending cases at the Court of Justice concerning questions about the role of positive protection decision, see also Case C-288/23 *El Baheer* (pending); Case C-551/23 *Cassen* (pending). See also Case C-352/22 *A. v Generalstaatsanwaltschaft Hamm* EU:C:2024:521.

⁵ Case C-753/22 *QY v Bundesrepublik Deutschland* EU:C:2024:524.

⁶ Regulation (EU) 2024/1348 of 14 May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU; Regulation (EU) 2024/1347 of 14 May 2024 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted, amending Council Directive 2003/109/EC and repealing Directive 2011/95/EU of the European Parliament and of the Council.

2. No uniform refugee status and no automatic recognition of positive decisions

QY, a Syrian national, was granted refugee status in Greece in 2018. She left Greece and went to Germany, where she again applied for international protection. The German administrative court held that she cannot be returned to Greece since she faced the risk of suffering inhuman or degrading treatment. She was granted subsidiary protection status; but contrary to the Greek authorities, the German did not consider her eligible for refugee status.⁷ QY challenged the refusal of refugee status before the German Federal Administrative Court with the argument that the German authorities were obliged to recognize the positive refugee status decision made by the Greek authorities. In its reference for a preliminary ruling, the Federal Administrative Court asked the Court of Justice whether the German authorities were required to grant refugee status *on the sole* ground that such status had been granted in another Member State. Relatedly, the national court also asked whether the German authorities may conduct their own new independent procedure to assess eligibility for refugee status. The first question received a negative answer. The second question was answered in affirmative by the Court of Justice.

To explain these answers, it is first relevant to note that it was clear that the application for protection could not be declared as inadmissible under the terms of Article 33(2) of Directive 2013/32. This provision allows Member States not to examine an application for international protection, where *inter alia* another Member State has granted such protection or where no new elements are invoked in a subsequent application. Article 33(2) of Directive 2013/32 could not be applied since the German authorities had already determined that QY faced a substantial risk of suffering inhuman or degrading treatment in Greece.⁸

In its answer, the Court of Justice took note of Article 78(2) TFEU that envisions the adoption of ‘a uniform status of asylum for nationals of third countries, valid throughout the Union’. It held that progressively with time uniform refugee status was envisioned by EU law. However, EU law has not reached this stage yet. Consequently, Member States are not required to automatically recognize positive deci-

⁷ Eligibility for refugee status and subsidiary protection status is defined in Directive 2011/95/EU on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast). While the first one implies risk of persecution individually targeted at the applicant; subsidiary protection status is granted upon risk of ‘serious harm’ of a more general nature. Once refugee status or subsidiary protection status granted, the beneficiaries are entitled to the same benefits in many respects. However, there are also important ways in which the benefits differ: while refugee status entitles the beneficiary to three-year residence permit, subsidiary protection status entitles the beneficiary to only one year permit.

⁸ For prevention of Dublin transfers due to risk of inhuman or degrading treatment in the receiving Member States, see Joined Cases C-411/10 and C-493/10 *N.S. and M.E.* EU:C:2011:865; Case C-578/16 *CK and Others v Slovenia* EU:C:2017:127.

sions. The Court added: ‘On the contrary, certain provisions of that directive [Directive 2011/95], such as Article 29(1) relating to social welfare, limit certain rights relating to refugee status to the Member State that has granted that status’.⁹ This addition reveals how the status is a conduit for certain rights, including social welfare, and how these rights are ultimately ensured at the level of each Member State.¹⁰ As a consequence, once a Member States takes a positive decision, it is *this* Member State that has to bear the burden of guaranteeing the ensuing rights (i.e. the content of the international protection).

Here it is relevant to observe that this idea is made even more powerful with the 2024 revisions. One can, for example, compare Article 27 (Access to education) of the 2011 Qualification Directive with Article 29 of the 2024 Qualification Regulation. Explicit references to ‘the Member State that granted them international protection’ have been added in the latter provision. Note should be also taken of Article 27 of the 2024 Qualification Regulation that contains a rule to the effect that beneficiaries of international protection have no right to reside in a Member State other than the Member State that granted them protection. Such a rule is absent from the 2011 Qualification Directive.

Not only does the 2024 Qualification Regulation strongly expresses the idea that a positive decision bounds only the Member State that has taken it. Article 40 of this Regulation further intends to punish the beneficiary of international protection if found in a Member States other than the one that granted the protection, in relationship to the possibility of receiving long-terms residence status.¹¹

In *QY* the Court clarified that another Member State might *choose to take the burden*: ‘it is open to them [the Member States] to provide for automatic recognition of such decisions adopted by another Member States’. According to the Court’s reasoning, this is possible due to Article 3 of 2011 Qualification Directive and Article 5 of the Procedures Directive. These allow Member States to have more favourable standards.¹²

Importantly, a provision similar to Article 3 of the 2011 Qualification Directive has been removed from the 2024 Qualification Regulation. The same removal can be observed regarding the 2024 Procedures Regulation. Yet, Recital 6 from the preamble of the latter Regulation says that ‘[t]his harmonisation and convergence of national asylum systems should be achieved without preventing Member States from

⁹ *QY v Bundesrepublik Deutschland* (n 5) para 63.

¹⁰ V Stoyanova, ‘Temporariness of Refugee Protection: For What and in Whose Interest? Cessation of Status as Related to Revocation of Residence Permits’ (2022) 29 *Maastricht Journal of European and Comparative Law* 527.

¹¹ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.

¹² See also *A. v Generalstaatsanwaltschaft Hamm* (n 4) para 44: ‘Member States are thus, as EU law currently stands, free to make recognition of all of the rights relating to refugee status on their territory subject to the adoption, by their competent authorities, of a new decision granting refugee status’.

introducing or retaining more favourable provisions where provided for by this Regulation'. The flexibility for a Member State to make a choice for automatic recognition of a positive decision has been therefore preserved. This finds further support in Recital 45 from the Preamble of the 2024 Procedures Regulation:

'the fact that another Member State has already granted international protection is, *as a rule*, a reason for rejecting an application by the same applicant as inadmissible. Therefore, Member States should *have the possibility* to reject an application as inadmissible where an applicant has already been granted international protection in another Member State. In addition, an application should be considered to be inadmissible when it is a subsequent application without new relevant elements'.¹³

Crucially, such a flexibility is maintained in light of the text of Article 38 of the 2024 Procedures Directive that regulates decisions on the admissibility of applications for international protection. The latter stipulates that the determining authority *may* be authorised under national law to reject an application as inadmissible where a Member State other than the Member State examining the application has granted international protection. Notably, the determining authority is not obliged under EU law to declare the application as inadmissible.

3. Procedural obligation to take 'full account' of a positive decision

Although Member States are not obliged under EU law to automatically recognize a positive refugee status decision, the Court held that they 'must nevertheless *take full account* of that decision and of the elements supporting it'.¹⁴ This can be viewed as a procedural requirement imposed upon the Member States. The Court justified this requirement with the principle of mutual trust. More specifically, the positive decision must be assumed as being taken in accordance with the requirements of EU law.

This justification comes as controversial since the whole problem about the role of the positive decision taken by another Member State, would not arise in the first place, if EU law had been actually followed by this State. Admittedly, the relevant EU law pertains to the reception conditions, which explained why the applicant could not be transferred back to Greece. Yet, it might be difficult to assume that although the latter had not been complied with (i.e. the Reception Conditions Directive), the EU law pertaining to the procedure for granting refugee status has been.¹⁵ Admittedly, while the presumption of mutual trust might be undermined in some specific

¹³ Emphasis added.

¹⁴ *QY v Bundesrepublik Deutschland* (n 5) para 76 (emphasis added).

¹⁵ Admittedly, in light of 2024 Procedures Regulation, the procedures in Member States are expected to become more harmonized. This supports the idea that when one Member State takes a positive refugee status decision, the same outcome/conclusion (i.e. the positive decision) should be reached by following the procedure in another Member State. Yet, the reception conditions have not been

respects (i.e. inhumane reception conditions that prevent transfer back), the presumption might still operate in other respects (i.e. the procedure for making protection-related decisions). Yet, a presumption does it remain. Despite any high thresholds,¹⁶ it might still be possible to rebut it in light of the actual reality.

What might be however the implications from such a fragmented approach to mutual trust? If the presumption of mutual trust and therefore trust in the positive outcomes (i.e. positive protection decisions) of the national procedures stands, could this lead to a situation where EU Member States such as Greece are encouraged to issue positive decisions, knowing that the beneficiaries will anyway move on to other Member States (and cannot be sent back)? Another scenario that can arise from the procedural requirement to ‘take full account’ of the positive decision is the following: Member States will start reviewing (or at least making some form of an assessment) of positive decisions taken by other Member States. This might be an interesting situation of a judicial dialogue between national authorities and courts on the matter.

In *QY* the Court added another related procedural requirement upon the Member State that has to make a new assessment of the application: ‘the competent authority of the Member State called upon to decide on the new application must, as soon as possible, initiate *an exchange of information* with the competent authority of the Member State which previously granted refugee status of the same applicant’.¹⁷ The requirement to exchange information was justified with the principle of sincere co-operation. The objective of such an exchange is to enable the Member State to ‘proceed on a fully informed basis with the checks which it is required to carry out under the international protection procedure’.¹⁸

harmonized to the same level. See Directive 2024/1346 of 14 May 2024 laying down standards for the reception of applicants for international protection.

¹⁶ See *N.S. and Others* (n 1) paras 86 to 94 and 106, where the Court stressed that the transfer of asylum seekers within the framework of the Dublin system may, in certain circumstances, be incompatible with the prohibition laid down in Article 4 of the Charter. The Court held that asylum seeker would run a real risk of being subjected to inhuman or degrading treatment, within the meaning of that article, in the event of a transfer to a Member State in which there are substantial grounds for believing that *there are systemic flaws in the asylum procedure and in the conditions for the reception of applicants*. See also *CK and Others v Slovenia* Case C-578/16, 16 February 2017, para 96: ‘even where there are no substantial grounds for believing that there are systemic flaws in the Member State responsible for examining the application for asylum, the transfer of an asylum seeker within the framework of Regulation No 604/2013 can take place only in conditions which exclude the possibility that *that transfer might result in a real and proven risk of the person concerned suffering inhuman or degrading treatment*, within the meaning of that article’. (emphasis added).

¹⁷ *QY v Bundesrepublik Deutschland* (n 5) para 78.

¹⁸ *Ibid* para 79.

4. The link between a positive decision on refugee status and the content of the status

It has been clarified that, in the *QY* case, the Court held that a positive decision taken in one Member State carries limited procedural legal effects for another Member State. In section 2 above, it was also mentioned how the limitations of these effects were justified with the argument that a positive decision leads to certain rights meant to be exercised in the Member States that has taken this decision. Put it otherwise, a positive decision comes with a certain package of burdens (i.e. the content of international protection rights/the content of the refugee status). When this logic is followed, it comes as unfair for a Member State to take the burden without having the possibility to assess the basis on which it takes the burden (i.e. the grounds for international protection).

As this point it is therefore relevant to further explore the link between, on the one hand, the effects of a positive decision for the new Member State and, on the other, the content of the refugee status. To proceed with this exploration, *A. v Generalstaatsanwaltschaft Hamm* delivered on the same day as *QY* needs to be taken into consideration.¹⁹ The request for preliminary ruling in this case was made in relationship to proceedings related to A. He was a Turkish national with refugee status granted by Italy in 2010 on the ground that he was at risk of political persecution by the Turkish authorities because of his support for the PKK. He, however, had resided in Germany since 2019. In 2020 Turkey requested Germany to extradite A. for the purpose of his criminal prosecution. In its reference for a preliminary ruling the German court asked whether the positive refugee status decision taken by Italy was binding upon Germany to the effect that Germany would not be allowed to extradite him.

After reiterating that as EU law currently stands, there is no uniform status for asylum,²⁰ the Court noted that Member State are free to make a new decision: ‘Member States are thus, as EU law currently stands, *free to make recognition of all of the rights relating to refugee status on their territory subject to the adoption*, by their competent authorities, of a new decision granting refugee status’²¹ Then, however, it assessed a positive decision as not linked to all the rights, but as only linked to removal from the territory for the purpose of extradition. In this respect, the Court clarified that

‘[...] as long as that individual qualifies as a refugee, Article 18 of the Charter precludes the extradition of that individual to the third country which he or she fled and in which he or she risks being persecuted.

¹⁹ *A. v Generalstaatsanwaltschaft Hamm* (n 4).

²⁰ Ibid para 43.

²¹ Ibid para 44 (emphasis added).

In the present case, this means that *as long as there is a risk* that A. may suffer political persecution - because of which he was granted refugee status by the Italian authorities – in his third State of origin which submitted the extradition request, A.’s extradition to that third State must be ruled out under Article 18 of the Charter’.²²

In these paragraphs the following conceptual move is performed in the reasoning – it is not the positive decision *as such* that seems to matter, but the factual reality as to whether there is risk for the person. Along the same lines, the Court added that

‘where the person whose extradition is sought invokes a real risk of inhuman or degrading treatment if extradited, the requested Member State must verify, before carrying out that extradition, that the extradition will not prejudice the rights referred to in Article 19(2) of the Charter’.

This reasoning also suggests a departure from the already made positive decision as such. Yet, then the Court’s reasoning returned to this decision’s role:

‘For the purposes of assessing the risk of infringement of Article 21(1) of Directive 2011/95 and of Article 18 and Article 19(2) of the Charter, the fact that another Member State granted the requested individual refugee status, in accordance with Directives 2011/95 and 2013/32, *is a particularly substantial piece of evidence* which the competent authority of the requested Member State must take into account. Thus, a decision granting refugee status *must lead that authority to refuse extradition*, in accordance with those provisions, provided that that refugee status has not been revoked or withdrawn by the Member State that granted it’.²³

Notably, the standard of ‘substantial piece of evidence’ was not invoked in *QY*. This means that when it comes to the non-removal (as one of the rights that attached to refugee status), the evidential value of the positive refugee decision is much higher. The last sentence in the above quotation implies that such a decision does not simply have an evidential value, but it should automatically preclude the removal. The formal automatic value of the positive decision is further supported by the Court’s statement that ‘the requested Member State [i.e. Germany] cannot authorise extradition unless it has initiated an exchange of information with the authority that granted the requested individual refugee status and *where that status has not been revoked by that authority*’.²⁴

Overall, then although the Court’s reasoning oscillates between the factual reality of risk and the formal automatic role of the positive decision, the latter trumps. This means that the new Member States has to *automatically give effect to the most fundamental minimum right* (i.e. *non-refoulement*) attached to the refugee status provided that this status is not withdrawn (by the Member State that has granted it). Importantly,

²² Ibid paras 58 and 59.

²³ Ibid para 64.

²⁴ Ibid para 72.

when *A. v Generalstaatsanwaltschaft Hamm* is juxtaposed against *QY*, it follows that the role of the positive decision taken by one Member States depends on the rights at issue that attach to this decision. The effects of a positive decision taken by one Member State upon any decision-making procedures or actual decisions in a new Member State, depend on which rights of refugee are at issue. These rights form the content of international protection (i.e. the content of the refugee status). As Chapter VII of the 2011 Qualification Directive has outlined them, these rights range from the very minimum guarantee of *non-refoulement* to much far-reaching benefits such as residence permits, access to the national labour market and social welfare. If the right forming the content of the refugee status pertains to the most fundamental minimum core principle of *non-refoulement*, the positive decision taken by the first Member States holds overriding role. This follows from *A., v Generalstaatsanwaltschaft Hamm* that was about possible *refoulement* to a third country. The further we move from the minimum core of the rights attached to the status and enter the area of e.g. residence permits, employment, education etc, the more diminished is the formal role of the decision. If we follow *QY*, it simply has an evidentiary value.

5. Conclusion

Movements of beneficiaries of international protection between Member States pose a challenge to the very idea of a common asylum system. It cannot be truly common, if the positive decision to grant refugee status ultimately remains a national decision. *QY* clarified that it has an evidential role since the new Member State is under the procedural obligation to take ‘full account’ of the positive decision taken by another Member State. *QY*, as also compared with *A., v Generalstaatsanwaltschaft Hamm*, lays bare the following logic: the more burdens (i.e. the content of international protection rights/the content of the refugee status) the Member States has, the more unfair it can be to undertake these burdens without having the possibility to assess the basis on which it takes the burdens (i.e. the grounds for international protection). This logic, underpinned by the idea that a positive protection decision is a national decision that allows access to the benefit of belonging to the specific *national* community,²⁵ continues to be reflected in the 2024 amendments to the EU asylum legislation.

²⁵ See Gregor Noll, ‘Salvation by the Grace of State? Explaining Credibility Assessment in the Asylum Procedure’ in Gregor Noll (eds), *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Nijhoff Publishers, 2005) 197, 198 where in more theoretical terms, it is explained how the positive asylum decision is a constitutional nature since it concerns inclusion into the protective community of the host state. Noll also adds that ‘[a]sylum procedures are, too, about membership. At a minimalist level, *nonrefoulement* allows for a limited form of membership. At the other extreme of the scale, we encounter a recognised refugee with a permanent residence permit, perhaps aspiring for naturalisation’ (ibid 205).



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