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Sharing uniformity: A new era beckons

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Abstract

The transfer of preliminary reference jurisdiction to the General Court is the most important change in the EU judicial architecture since the establishment of the Court of First Instance. It elevates the role of the General Court but requires a transition in judicial culture and methodology. The amendments to the Statute of the Court of Justice make for a managed delegation of preliminary reference jurisdiction which seeks to contain the risk of fragmentation in the interpretation of EU law whilst increasing efficiency in the administration of justice. This article places the reform in its historical context and discusses the reform. It focuses on the criteria and the mechanisms of transferring cases to the GC, the problem of horizontal issues, the safety valve mechanisms, and changes to the judicial organisation of the GC. It concludes by welcoming the reform and assessing its institutional implications.

Keywords

CJEU; Preliminary References; General Court; Judicial Protection; Judicial Politics; Interpretation of Law.

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1. Introduction[*]

On 30 November 2022, the CJEU submitted to the Council a request and a proposal for amendment of the Statute of the Court of Justice, under Article 281, second paragraph, of the Treaty on the Functioning of the European Union (TFEU).[1] That provision enables the Statute, which is contained in Protocol No 3 attached to the Treaty on European Union (TEU) and the TFEU, to be amended by the ordinary legislative procedure, save for some fundamental provisions which can only be amended by Treaty revision.[2] The proposed amendments pertained to two areas: the transfer of certain preliminary references to the General Court (GC), and the extension of the requirement to obtain leave to appeal to the Court of Justice (CJ) to additional categories of cases heard by the GC at first instance. Both amendments pursue the same objective, namely they seek to alleviate the CJ from its increasing caseload and give it the opportunity to concentrate on exercising its constitutional jurisdiction. In January 2024, the Council and the Parliament reached agreement on the text of a Regulation amending the Statute ('the amending Regulation') which, subject to relatively minor changes, endorses the CJEU's proposal and also introduces some important transparency requirements.[3]

The transfer of preliminary reference jurisdiction to the GC is a game changer in that it abolishes the CJ's monopoly to hear preliminary references.[4] These are the crown jewels in the CJ's jurisdiction and, time and again, both the CJ itself[5] and the academic discourse[6] have emphasised their importance not only for safeguarding the uniformity, unity, and coherence of EU law but also, more generally, the integration blueprint. The judicial dialogue is very lively and it is notable that, in 2023, courts from all Member States submitted references to the CJ.[7] Article 267 TFEU is the most important procedural provision of the Treaties and, in the integration through law paradigm, the key that unlocks the integration door.[8] Thus, the transfer of preliminary reference jurisdiction to the GC is the most significant change in the EU's judicial architecture since the establishment of the Court

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[*] I am very grateful to Professor Niamh Nic Shuibhne and Dr Darren Harvey for their valuable comments on earlier drafts. All errors remain mine.

[1] Request submitted by the Court of Justice pursuant to the second paragraph of Article 281 of the Treaty on the Functioning of the European Union, with a view to amending Protocol No 3 on the Statute of the Court of Justice of the European Union (hereinafter 'CJEU request') <https://curia.europa.eu/jcms/jcms/P_64268/en/> accessed 30 May 2024.

[2] These are the provisions contained in Title I of the Statute (Articles 2-8) and Article 64 on language arrangements.

[3] See European Parliament legislative resolution of 27 February 2024 on the draft regulation of the European Parliament and of the Council amending Protocol No 3 on the Statute of the Court of Justice of the European Union (07307/2022 – C9-0405/2022 – 2022/0906(COD)), P9_TA(2024)0086 (hereinafter 'amending Regulation'), and see for the final text, which is identical, Regulation of the European Parliament and of the Council amending Protocol No 3 on the Statute of the Court of Justice of the European Union, 2022/0906 (COD), Brussels, 6 March 2024.

[4] See for very valuable analyses of the proposed changes, D Sarmiento, 'Editorial Note – On the Road to a Constitutional Court of the European Union: The Court of Justice After the Transfer of the Preliminary Reference Jurisdiction to the General Court' (2023) 19 Croatian Yearbook of European Law and Policy VII; S Iglesias Sánchez, 'Preliminary Rulings before the General Court, Crossing the last frontier of the reform of the EU judicial system?' (*EU Law Live*, 17 December 2022) <https://issuu.com/eulawlive/docs/weekend_edition_125> accessed 30 May 2024; M Bobek, 'Preliminary rulings before the General Court: What judicial architecture for the European Union?' (2023) 60 Common Market Law Review 1515.

[5] See, e.g., Opinion 1/09, *Creation of a unified patent litigation system* (8 March 2011) ECLI:EU:C:2011:123; Case C-284/16, *Slovak Republic v Achmea*, Judgment (6 March 2018) ECLI:EU:C:2018:158; Case C-561/19, *Consorzio Italian Management*, Judgment (6 October 2021) ECLI:EU:C:2021:799.

[6] See, by way of example, A Arnull, 'Judicial Dialogue in the European Union' in J Dickson and P Eleftheriadis (eds), *The Philosophical Foundations of European Union Law* (OUP 2012); E Cloots, 'Germs of Pluralist Judicial Adjudication' (2010) 47(3) Common Market Law Review 645; G de Búrca and JHH Weiler (eds), *The European Court of Justice* (OUP 2001); A-M Slaughter, A Stone Sweet and JHH Weiler (eds), *The European Court and National Courts. Doctrine & Jurisprudence: Legal Change in its Social Context* (Bloomsbury Publishing 1998).

[7] See Court of Justice, 'Statistics concerning the judicial activity of the Court of Justice – 2023' <https://curia.europa.eu/jcms/jcms/Jo2_14640/> accessed 30 May 2024.

[8] See T Tridimas, 'The ECJ and the National Courts: Dialogue, Cooperation, and Instability' in AM Arnull and D Chalmers (eds), *Oxford Handbook of European Union Law* (OUP 2015).

of First Instance (CFI). It raises a key question: how can the uniform interpretation of EU law be guaranteed when there are two sources of authority?

This article provides an analysis of the reform. It does not examine the changes made to Article 58a of the Statute extending the requirement to obtain leave to appeal before the CJ.[9] It first places the amendments to be introduced in their historical context and the framework of the Treaties. It then discusses those amendments, focusing on the criteria chosen for allocating references to the GC. It concentrates on problem areas, especially the condition of exclusivity and the concept of 'independent question'. It looks at the safety valves seeking to ensure uniformity and discusses the procedural safeguards provided. The concluding section attempts to assess the implications of the reform.

2. Historical context

The possibility of transferring preliminary references to the GC is provided in Article 256 TFEU (ex Article 225 EC), and was introduced by the Treaty of Nice in 2001. It has not, however, been utilized so far. Instead, in the 2000s, different routes were chosen to manage the workload, namely the establishment of the Civil Service Tribunal (CST), which has subsequently been abolished, the progressive transfer of more direct actions to the GC, and the introduction of procedural reforms to streamline the process of litigation.

In 2015, the structure of the CJEU underwent a major reform entailing a substantial increase in the number of GC members and the abolition of the CST. The reform was a resounding endorsement of the two level structure of the EU judiciary and a rejection of the specialized courts model. It proved particularly controversial as the views of the CJ and the GC diverged and, at Council level, the need to ensure strict equality in the representation of all Member States prevailed over a more *communautaire* judicial structure. The aim of the reform was to enable the EU judiciary to cope with its increasing caseload and improve efficiency in the administration of justice. Throughout the 2000s, the GC faced a steady increase in its caseload. The high number of cases, coupled with their complexity which made adjudication time consuming, led to a dramatic increase in the number of pending cases, posing a concrete risk that the EU judiciary would be unable to fulfill its mission. Discussions on the reform of the judicial structure began in 2011. The CJEU submitted to the EU legislature a proposal for amending the Statute which provided, *inter alia*, for the increase in the number of judges of the GC by at least 12, namely from 27 to 39.[10] In relation to the caseload, two possible solutions were identified. The establishment of a specialized court in the field of intellectual property, which was favoured by the GC,[11] or an increase in the number of judges of the GC.

The CJ favoured an increase in the number of GC judges. It considered that that option would be faster to implement and provide a more effective solution, since removing only trademark cases would not resolve the general overload of the GC. By contrast, increasing the number of judges would enable the GC to allocate judges to the areas where they are most needed, without precluding the creation of specialized chambers. The CJ considered that a generalized jurisdiction would also benefit the consistency of EU law.[12]

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[9] Article 58a of the Statute, as amended, extends the requirement to obtain leave to appeal before the CJ to appeals against (a) GC judgments concerning decisions of independent boards of appeal of certain EU bodies which hitherto were not included in the leave to appeal system; and (b) GC judgments relating to the performance of contracts containing an arbitration clause under Article 272 TFEU.

[10] See 'Draft Amendments to the Statute of the Court of Justice of the European Union and to Annex I thereto' (Council doc. 8787/11 <https://data.consilium.europa.eu/doc/document/ST-9571-2012-INIT/en/pdf> accessed 2 June 2024), submitted by the ECJ to the EU legislature, 28 March 2011. The ECJ's proposals also provided for the attachment of temporary judges to the CST.

[11] See 'Draft Amendments to the Statute of the Court of Justice of the European Union and to Annex I thereto' (n 10) 6, footnote 7.

[12] See ibid, 8.

That proposal was submitted by the CJEU and received the support of the Commission[13] and the Legal Affairs Committee of the European Parliament.[14] Ultimately, whilst the proposal was received favourably by the Council, the latter found it impossible to agree on a method for appointing the additional judges if they were to be fewer than the number of Member States. The compromise reached was to abolish the CST and double the number of GC members, so that there would be two judges per Member State.[15] As a result, the number of GC member was gradually increased and there are now two judges per Member State.

Notably, in 2017, the CJEU rejected the possibility of transferring preliminary references to the GC on the grounds that, at that time, references were dealt with expeditiously.[16] Nonetheless, as the CJEU noted in its request for the amendment of the Statute, by 2023 the situation was very different.[17] First, there had been an increase in the number and complexity of preliminary references leading, consequently, to the gradual increase in the length of proceedings.[18] Secondly, the 2015 reform of the judicial framework had been completed with the GC reaching 54 judges.[19] In the light of those developments, the CJEU considered that it was necessary, in the interests of the proper administration of justice, to make use of the possibility provided for in Article 256(3) TFEU and transfer certain references to the GC.[20]

The CJEU's proposal was well-received by the EU institutions and the Member States, all of whom shared its basic tenets. The Member States were keen to ensure that the transfer of references to the GC would not lead to a lowering of their procedural rights. The Commission's opinion[21] was favourable, raising some technical issues. The CJEU's proposal was considered by the European Parliament's Committee on Legal Affairs and the Committee on Constitutional Affairs, and a Council Working Party. Following quadrilogue negotiations among the CJEU, the Council, the Commission and the Parliament, a final compromise text was endorsed by COREPER and the Parliament in January 2024,[22] and approved by the Parliament in plenary session on 27 February 2024. The Council gave its final approval on 6 March 2024,[23] opening the way for the amendment to the Statute.[24] The final text of the amending Regulation amends the Statute in three ways. It provides for the transfer of certain preliminary references to the GC; it extends the cases where an appeal to the CJ against a judgment of the GC is made subject to prior leave;[25] and it introduces provisions which increase transparency in judicial matters. The third category, which is a welcome development, was not

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[13] Commission Opinion of 30.9.2011 on the requests for the amendment of the Statute of the Court of Justice of the European Union, presented by the Court, COM/2011/596 final.

[14] See Draft Report on the draft regulation of the European Parliament and of the Council amending the Statute of the Court of Justice of the European Union (02074/2011 - C7-0090/2011 - 2011/0901(COD)), JURI_PR(2011)475771.

[15] See Art 48 of the Statute of the Court of Justice as amended by Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union, OJ L341/14.

[16] See CJEU, 'Report submitted pursuant to Article 3(2) of Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council amending Protocol No 3 on the Statute of the Court of Justice of the European Union' <https://perma.cc/E3T2-GX3N>.

[17] See CJEU request (n 1) 3.

[18] ibid.

[19] ibid.

[20] CJEU request (n 1) 6.

[21] Commission Opinion on the draft amendment to Protocol No 3 on the Statute of the Court of Justice of the European Union, presented by the Court of Justice on 30 November 2022, COM/2023/135 final.

[22] The final text was endorsed by COREPER in 18 January 2024 and the Parliament's Committee on Legal Affairs (JURI) unanimously voted to approve it on 24 January 2024.

[23] Amending Regulation (n 3).

[24] See, for details and further references to reports and relevant documents, R Mańko, 'Amending the Statute of the Court of Justice of the EU. Reform of the preliminary reference procedure' (*EP Briefing*, 7 February 2024) EPRS_BRI(2023)754559_EN accessed 2 June 2024.

[25] See n 9.

included in the original CJEU proposal and has been added at the instigation of the European Parliament.[26]

3. The Treaty framework

Article 256(3) TFEU states that the GC is to have jurisdiction to hear preliminary references 'in specific areas' laid down by the Statute. This suggests that the areas of jurisdiction must be specified by the Statute. It does not, however, preclude the transfer of preliminary references in multiple areas, nor does it necessarily mean that the GC's jurisdiction should be exceptional. The only requirement is that the areas must be sufficiently specified in the Statute. The CJEU understands Article 256(3) TFEU as meaning that references may be transferred only where they are focused on specific areas and do not raise questions of 'horizontal nature'.[27] This reading is shared by the Parliament and the Council who introduced amendments to the CJEU proposal seeking to delineate with greater accuracy the areas in which jurisdiction is transferred.[28]

It is interesting to draw here an analogy with Article 127(6) TFEU which empowers the Council to confer '*specific tasks* upon the European Central Bank concerning *policies* relating to the prudential supervision of credit institutions…' (emphasis added). The narrow wording of this mandate proved no barrier to elevating the European Central Bank (ECB) to the principal prudential supervision under Banking Union, with specified but broad prudential responsibilities, not only concerning policies, but also pertaining to the actual supervision.

The reform of preliminary references is based on three pillars: the criterion used for allocating preliminary references to the GC is the subject-matter of the reference; it is for the CJ to decide, via a verification process, whether the reference should be transferred to the GC; and a number of safeguards are provided to assimilate the preliminary reference procedure before the GC to that before the CJ.

4. The criterion for allocation: Subject areas

Under the amending Regulation, the jurisdiction of the GC to hear preliminary references is defined according to the subject-matter of the dispute. It does not depend on the seniority of the national court that makes the reference or the importance of the questions raised, but solely on the area to which the reference relates. Nonetheless, as we shall see, the importance of the question raised may be a factor that would be difficult to ignore.

Under new Article 50b, paragraph 1, of the Statute, the GC is to have jurisdiction to hear requests for a preliminary ruling that 'come exclusively within one or several of the following specific areas':

(a) the common system of value added tax;

(b) excise duties;

(c) the Customs Code;

(d) the tariff classification of goods under the Combined Nomenclature;

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[26] See below, section 9.

[27] See CJEU request (n 1) 4.

[28] See, in particular, the additions made to the preamble and Article 50b of the Statute: Compare CJEU request (n 1) and the final text of the amending Regulation (n 3).

(e) compensation and assistance to passengers in the event of denied boarding or of delay or cancellation of transport services;

(f) the scheme for greenhouse gas emission allowance trading.

The above areas were suggested by the CJEU and were accepted, subject only to drafting amendments, by the European Parliament and the Council.

In determining in which areas preliminary references would be transferred, the CJEU took into consideration essentially four criteria: (a) easiness of identification and distinctiveness; (b) importance of the area in question; (c) existence of established case law; and (d) volume of litigation. In particular, the CJEU considered that the areas chosen should display the following features.[29] They must be clearly identifiable on reading the order for reference and sufficiently separable from other areas of EU law; they must raise few issues of principle; there must be a substantial body of CJ case law capable of guiding the GC and preventing the potential risk of inconsistencies; and the areas chosen must, based on historical experience, attract a sufficiently high number of references for the transfer to have a real impact on workload.

Those criteria received approval by the Commission and the Parliament. The six designated areas stated in Article 50b, paragraph 1, were identified on the basis of the above criteria after carrying out an analysis of judicial statistics from 1 January 2017 to 30 September 2022.[30] The proposal submitted by the CJ states, in particular, that those areas are clearly defined and sufficiently separable; they are governed by a limited number of EU acts; only rarely raise issues of principle since only 3 out of more than 630 cases were dealt with by the Grand Chamber during the period in question. Also, there is abundant CJ case law which should considerably limit the risk of divergences.[31] The designated areas represent, on average, roughly 20% of all requests for a preliminary ruling brought before the CJ each year.[32]

The above criteria are sound and provide a relative degree of certainty. The areas transferred appear to be well-chosen. Inevitably, the risk of divergence cannot totally be eliminated, but the design chosen provides good comfort. In any event, there are many sources of divergence. It arises, *inter alia*, by the way the national courts use the preliminary reference procedure and may exist also within the case law of the CJ. Total uniformity is unattainable and, perhaps, also undesirable.

The extent to which the areas in which jurisdiction is transferred to the GC meet the criteria stated above can only be determined on the basis of experience at a certain point in time. It is correct to say that, in recent years, those areas have given rise to few issues of principle and that a substantial body of CJ case law has already developed. There is, however, nothing to prevent the EU legislature from overhauling the rules governing one or more of those areas, in which case it will be for the GC to interpret and shape the new laws. The transfer of references takes the genie out of the bottle: it inevitably upgrades the role of the GC and gives it a higher stake in the interpretation of EU law.

Notably, in contrast to what the CJ proposal suggests, the statistics do not point to an acute increase in the number of preliminary references. The information provided in the annual reports of the CJEU, as summarized in the table below, indicates that the number of preliminary references introduced per year has remained fairly stable since 2017 and has somewhat declined in the last three years; there has not been a great increase in the duration of proceedings; the ratio of new to completed cases is not on an upward trend nor is the number of pending cases. It would appear therefore that the CJ has succeeded in managing its case load. This, however, does not make the

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[29] See CJEU request (n 1) 4-5.

[30] ibid, 5.

[31] ibid.

[32] ibid.

reform any less welcome. First, it is reasonable to anticipate that the caseload will increase as the remit of EU law expands and EU measures proliferate. Law reform is more likely to be successful when it is preventive and anticipatory rather than when it attempts to fix a problem that has already occurred. Secondly, given the increase in the number of judges of the GC, it is entirely appropriate to take the view that the transfer of some references makes for better use of resources. Thirdly, the complexity of the issues raised in litigation has increased. It makes eminent sense to enable the CJ to concentrate on the most important cases.

Table - Preliminary references

	2017	2018	2019	2020	2021	2022	2023
New cases	553	568	641	557	567	546	518
Completed cases	447	520	601	534	547	564	532
Duration of proceedings in months	15.7	16	15.5	15.9	16.7	17.3	16.8
Pending cases	661	709	749	772	792	774	760

5. The condition of exclusivity

Under Article 50b, paragraph 1, the GC has jurisdiction only in relation to references that come exclusively within one or several of the specific areas listed therein. Within those areas, the GC has jurisdiction to hear both questions on validity and on interpretation. Indeed, it would not have been appropriate to separate the two. This opens the prospect of the GC having the final say (subject to the review mechanism of Article 256(3), third paragraph, TFEU) on the validity of EU measures.

But what does it mean that the reference must come 'exclusively within' one or several of the specific areas listed? Clearly, where a reference also raises issues pertaining to other subject areas, e.g. one of the four freedoms or EU law measures in an area outside the designated areas, it cannot be referred to the GC. It is submitted that, if one or more of the questions referred pertain to such issues, in principle, it is not for the CJ to determine during the verification procedure whether those questions are meritorious, e.g. whether they are relevant to the outcome of the proceedings. The case should be retained by the CJ. The verification stage should be as short and efficient as possible and enter into the substance as little as possible.

Nonetheless, the criterion of exclusiveness is not unproblematic and, in some cases, it may not be easy to determine whether it is fulfilled. There are, in particular, three kinds of issues that merit closer analysis: (a) questions pertaining to admissibility or jurisdiction; (b) questions pertaining to effects and remedies; and (c) so-called horizontal or independent questions.

5.1. Questions pertaining to admissibility or jurisdiction

Should a reference be retained by the CJ where it raises issues pertaining to admissibility or jurisdiction? These include, for example, whether the referring court is a court or tribunal or whether the question referred is hypothetical. It could be argued that these questions do not pertain exclusively to one or more of the specific areas listed in Article 50b, paragraph 1. Nonetheless, that argument appears incorrect. Article 50b, paragraph 1, defines the cases to be transferred on the basis of their substantive subject-matter. Issues of admissibility and jurisdiction are incidental and go beyond the scope of verification, which does not envisage control of admissibility but only control of jurisdiction *ratione materiae*. Also, the answer to those questions may be better informed by the arguments of the parties in the written and oral procedure which takes place after the decision to

transfer the case to the GC. It is by no means unheard of for a government to dispute the admissibility of a reference in the field of VAT.[33] It is for the GC to address such issues.

This is made clearer in the final version of the amending Regulation. Under the amendments made by Parliament, recital 16 states that it is for the GC to decide on issues of jurisdiction or admissibility raised 'explicitly or implicitly' by the request for a preliminary ruling transferred to it. Thus, the intention is that, even if the referring court expressly asks a question on jurisdiction, the case should still be remitted to the GC.

Nonetheless, problematic cases may arise. The question of admissibility may raise independent questions in the areas listed in Article 50b, paragraph 2, which are reserved for the CJ.[34] Strictly speaking, the issue whether the referring court is a court or tribunal within the meaning of Article 267 is a question 'relating to the interpretation of primary law' which, under Article 50b, paragraph 2, is reserved to the CJ. The definition of the judicial universe, i.e. the bodies with which the CJEU can converse, is a constitutional question. Indeed, the case law suggests as much.[35] This could offer the possibility to the CJ to keep the reference in certain cases. Also, a question on admissibility may pertain to general principles of Union law or the Charter, as when, for example, the question is raised whether the referring court fulfils the requirements of judicial independence.[36] Such cases are unlikely to arise in the subject areas transferred to the GC but the possibility cannot be excluded. In such cases, it would not be in breach of Article 50b if the CJ decided to retain the reference. Article 50b is phrased in sufficiently flexible terms to allow for some judicial discretion. Nonetheless, the possibility of retaining the reference on those grounds should be very sparingly exercised. Inevitably, the importance and novelty of the question raised may here play a role in determining whether the reference is retained.

One could envisage other situations where an admissibility issue may give rise to problems. For example, the question whether the referring court, or a court with similar characteristics, is a court or tribunal may be pending in another reference which has been retained by the CJ because it does not raise issues that fall exclusively within the subject areas transferred. In such a case, reasons of judicial economy might suggest that it would make sense for the CJ to keep the reference. However, the possibility of conflicting rulings can also be avoided by the GC staying the proceedings and awaiting the ruling of the CJ in the related case.

5.2. Questions pertaining to effects and remedies

Questions pertaining to the effects of a provision within the designated subject-areas may also give rise to challenges. For example, a case may raise the issue whether a provision has direct effect or a question pertaining to its interpretational force in the light of the *Marleasing*[37] principle. In some cases, the issue relating to the specific provision may be very difficult to separate from the issue pertaining to the underlying general principle. Both the specific provision of Union law and the underlying principle may need to be interpreted. In principle, however, such questions should not exclude a reference from being transferred to the GC, unless it is clear that the issue raised is an

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[33] See, e.g., Case C-106/10, *Lidl & Companhia v Fazenda Pública*, Judgment (28 July 2011) ECLI:EU:C:2011:526 and, also, Joined Cases C-618/11, C-637/11 and C-659/11, *TVI – Televisão Independente SA v Fazenda Pública*, Judgment (5 December 2013) ECLI:EU:C:2013:789, both pertaining to the calculation of the taxable amount under the VAT directives. In both cases, the Portuguese government contested the admissibility of the reference.

[34] See below 5.3.

[35] See, e.g., Opinion 1/09 (n 5); Case C-284/16 (n 5).

[36] See, e.g., Case C-718/21, *LG v Krajowa Rada Sądownictwa*, Judgment (21 December 2023) ECLI:EU:C:2023:1015, where the CJ held that the referring court did not fulfil the requirements of independence and impartiality.

[37] Case C-106/89, *Marleasing v Comercial Internacional de Alimentación*, Judgment (13 November 1990) ECLI:EU:C:1990:395.

independent one. An important, albeit perhaps not conclusive, consideration here is whether the referring court has asked a specific question on that point.

In answering the question, the GC may find it appropriate to remind the referring court the duties arising from *Marleasing* and how they might preclude a specific interpretation of national law, even if no specific question has been asked on this point. Such pronouncements would fall squarely within the remit of the GC's jurisdiction.

The national court may also raise a question concerning liability for damages. In principle, this would take the reference outside the remit of the GC, but a case by case evaluation may also be needed here. For example, the question may relate solely to whether a provision is intended to confer rights to individuals for the purposes of *Francovich*.[38] Such a question pertains to the effect of the provision and is closely related to direct effect. It could therefore be considered that it should be decided by the GC.

A related issue is whether the reference should be retained by the CJ if the referring court asks whether the retroactive application of the ruling should be restricted. This is a question on the interpretation of Article 267, and thus may be viewed as an 'independent' one since it pertains to primary law, but a case-by-case approach may also be warranted in this instance.

5.3. Horizontal issues and the concept of 'independent question'

The reference may raise issues pertaining both to the interpretation or validity of provisions that fall within the specific areas transferred to the GC and to the interpretation of the Treaties, the Charter, or a general principle of law. Issues belonging to both those categories may arise either because the referring court has expressly asked or because the need to determine them arises in the course of the examination of the questions referred. For example, it may be necessary to examine the effect of a Charter provision, e.g. Article 47, or a general principle of law, e.g. proportionality, on the interpretation of the specific EU law provision or national rule applicable. It is an established maxim of interpretation that EU acts and national measures must be interpreted in the light of EU primary law, including the Charter and the general principles of law.[39] Also, in implementing EU law, where multiple possibilities exist, the Member States must select the option that is compatible with general principles.[40] The national court may ask whether a national provision implementing an EU measure in the designated subject areas is compatible with the Charter. This may, in turn, entail an interpretation of the EU provision applicable and the Charter.

Does the fact that a reference raises such a horizontal issue mean that it cannot be referred to the GC? This is, in fact, the most difficult question that arises under the reform. The requirement that the reference must fall exclusively within one or more of the specific areas designated appears to exclude horizontal issues, but the definition of horizontal issue is left open. The proposal submitted by the CJEU states that transfer to the GC presupposes that the reference does not 'raise questions regarding the interpretation or validity of Union law of a horizontal nature'.[41] This, however, provides little guidance. Article 50b, paragraph 3, of the Statute presupposes that the CJ will provide detailed rules in its Rules of Procedure determining when the question referred falls exclusively within one

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[38] Joined Cases C-6 and C-9/90, *Francovich and others*, Judgment (19 November 1991) ECLI:EU:C:1991:428.

[39] See, e.g., Case C-601/15, *J.N. v Staatssecretaris voor Veiligheid en Justitie*, Judgment (15 February 2016) ECLI:EU:C:2016:84, para 48; Case C-218/82, *Commission v Council*, Judgment (13 December 1983) ECLI:EU:C:1983:369, para 15; The Queen on the application of Case C-340/08, *M and Others v HM Treasury*, Judgment (29 April 2010) ECLI:EU:C:2010:232; Case C-106/89 (n 37).

[40] See Joined Cases 201 and 202/85, *Klensch v Secrétaire d'état à l'Agriculture et à la Viticulture*, Judgment (25 November 1986) ECLI:EU:C:1986:439.

[41] CJEU request (n 1) 4.

or more of the designated areas. The CJ will then verify whether a reference meets the requirement of exclusiveness by applying those rules, which are currently under preparation.

In an effort to provide further clarification, the final text of the amending Regulation adds a second paragraph to Article 50b of the Statute, inserted by the European Parliament, which reads as follows:

> *Notwithstanding the first paragraph, the Court of Justice shall retain jurisdiction to hear and determine requests for a preliminary ruling that raise independent questions relating to the interpretation of primary law, public international law, general principles of Union law or the Charter of Fundamental Rights of the European Union.*

This rider is intended to make for a clearer delineation of the cases that are to be transferred but, in fact, it may give rise to more problems. Its inclusion is justified by recital 13 as follows:

> *The right to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law is a fundamental right guaranteed by Article 47, second paragraph, of the Charter. Therefore, it should be clearly stated in the Statute itself that the Court of Justice will retain jurisdiction where the request for a preliminary ruling raises independent questions of interpretation of primary law, public international law, general principles of Union law or the Charter, having regard to their horizontal nature, even where the legal framework of the case in the main proceedings falls within one or more of the specific areas in respect of which jurisdiction to give preliminary rulings is conferred on the General Court by this Regulation.*

This rationale is not entirely persuasive. The right to a fair and public hearing must be respected in all cases irrespective of the subject-matter and whether the case is heard by the CJ or the GC. It is not clear why it dictates that certain cases must stay with the CJ. Clearly, it is not only the CJ but also the GC that applies primary law, public international law, general principles, and the Charter. It is Article 256(3) TFEU that forbids the transfer of general preliminary reference jurisdiction to the GC,[42] not the right to a fair hearing. Still, neither Article 256(3) TFEU nor Article 47 of the Charter dictate a sufficiently specific understanding of how horizontal issues are to be dealt with when they arise in the context of the specific subject areas transferred to the GC and are inter-related to them.

Since Article 50b, second paragraph, starts with the reservation '[n]otwithstanding the first paragraph', it appears to create an exception in cases where the request for a reference comes exclusively within the specific areas listed therein. Strictly characterized, it is not a clarification of exclusivity but an exception to it.[43]

When can it be said that a reference raises 'an independent issue relating to the interpretation' of the higher ranking norms listed in paragraph 2? 'Independent' could be taken to mean 'separate' or 'self-standing' or 'unrelated' or, even, 'important'.

Under the first understanding, 'separate' means that the reference raises an issue of interpretation of one of the higher ranking norms which goes beyond its mere application in the case in issue. It assumes a distinction between interpretation and application of the law which is used in other contexts.[44] This is a reasonably reliable criterion although by no means a trouble-free one.

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[42] See above, section 3.

[43] It could be thought that a reference that raises horizontal issues would not come within the scope of the first paragraph of Article 50b since it would not pertain exclusively to the areas listed therein. However, given the addition of paragraph 2, it would be difficult to consider that there are horizontal issues that take a reference outside the scope of paragraph 1, even though they do not raise an independent issue relating to interpretation of the norms referred to in paragraph 2.

[44] For example, in the context of the preliminary reference procedure, the CJEU has power to interpret Union law but not to apply it to the facts of the case. Nonetheless, the precise distinction between interpretation and application is very elastic and the ECJ enjoys significant discretion as regards the specificity of its ruling. See T Tridimas, 'Constitutional Review of

Under the second interpretation, 'self-standing' means that, to be retained by the CJ, the reference must raise an issue of interpretation of a higher ranking norm that not only goes beyond its application in the circumstances but holds value in subject areas other than those transferred to the GC. This interpretation is narrower and would favour more transfers to the GC.

Independent could also be taken to mean 'unrelated'. Under this interpretation, a reference is retained by the CJ only where it includes questions pertaining to the norms listed in Article 50b, paragraph 2, which bear no connection to the questions relating to the areas transferred. This interpretation, however, does not hold ground: if the reference raises issues which relate to areas other than those transferred, then the requirement of exclusivity is not met in the first place and the case cannot not be remitted to the GC.

According to the final understanding stated above, the CJ can keep the reference if it raises an issue of interpretation of a higher norm and that issue is one of principle, i.e. important for the development of EU law, for example, a point on which the CJ has not pronounced or in which there is conflicting case law or on which there is discord between the CJ and the GC. The great difficulty with this interpretation is that it is not supported by the language used by Article 50b, paragraph 2. Where importance is jurisdictionally material, the Treaty uses different language: see Article 256(3), second and third subparagraphs, and Article 256(2), second subparagraph, which are discussed below.[45] Also, such an interpretation is not supported by a systematic construction of the amending Regulation. Nonetheless, the importance of the issue may well infuse the judicial inquiry.

All in all, it is submitted that the correct interpretation of independence gravitates towards the first understanding, i.e. whether the reference involves separate questions relating to the norms stated in Article 50b, paragraph 2. Nonetheless, whether the issues raised are self-standing and/or are issues of principle may be a material factor in marginal cases. It is important to bear in mind here two considerations.

First, the determination whether the reference raises an independent issue is to be made by the CJ at the verification stage.[46] It must therefore be made as quickly as possible and, in principle, only on the basis of the order for reference. For the system of transfers to work, efficiency is key. The CJ therefore will need to make a determination whether, on the basis of the information on the file, there is a very substantial likelihood that an independent issue of interpretation is raised.

The second consideration is that the transfer of cases to the GC is determined on the basis of subject areas and not type of jurisdiction. Within the designated subject areas, the GC can hear both references on interpretation and on validity of EU measures. References that pertain to validity will inevitably require the GC to interpret higher ranking rules of EU law, most of which fall in the categories listed in Article 50b, paragraph 2. In such cases, strictly speaking, the interpretation of that rule is never 'independent' as it is an integral part of the question referred. The only instance where a question of validity will not require the interpretation of primary EU law, international law, general principles of EU law, or the Charter, will be where the validity of an EU measure in the designated areas is of sub-legislative nature and it is argued that it runs counter to a higher-ranking EU measure. Essentially, the transfer of preliminary reference jurisdiction to the GC inevitably means that the GC will engage with the high ranking rules listed in Article 50b, paragraph 2, and such engagement is not by itself a reason for the reference to be retained by the CJ.

Member State action: The virtues and vices of an incomplete jurisdiction' (2011) 9(3-4) International Journal of Constitutional Law 737.

[45] See sections 6.2. and 6.3.

[46] See section 6.1.

It is submitted that the following criteria may be relevant in deciding whether a reference raises an independent issue:

- Whether the referring court has expressly asked a question that relates to the interpretation of one or more of the norms stated in Article 50b, paragraph 2. This is a key consideration and, in most cases, a decisive one. Reliance on this criterion promotes legal certainty and leads to efficiency in making the transfer decision;
- The reasons for asking the question referred as they appear in the order for reference;
- Whether answering the question prima facie appears to require the interpretation of a higher ranking norm listed in article 50b, paragraph 2, going beyond what can reasonably be regarded as its mere application on the basis of the established CJ case law;
- Whether there is established case law on the specific issue of interpretation of the higher ranking norm concerned. The clearer the case law, the easier to conclude that the issue raised pertains to the application rather than the interpretation of the norm, and therefore that no independent issue within the meaning of Article 50, paragraph 2, arises.

Inevitably, in marginal cases, the CJ will have to exercise discretion. It should be remembered, however, that the decision whether to retain the reference should be made as soon as possible and solely on the basis of the order for reference. In this respect, the inquiry of the CJ will inevitably be limited. Also, in many cases, it is impossible to separate questions of interpretation of the specific provisions of EU law referred to from the interpretation of the norms listed in paragraph 2. It is inherent in the reform that the GC will play an enhanced role in interpreting and applying the norms listed in Article 50b, paragraph 2, in the specific areas where jurisdiction has been transferred to it. For the transfer of jurisdiction to be meaningful, the frame of mind should be towards empowering rather than limiting the GC. If a reference raises a key issue of interpretation within one of the subject-areas transferred to the GC, this is not a reason for the reference to be kept by the ECJ. The GC will thus be able to shape the case law in the area subject to the possibility of review under Article 256(3), third paragraph, TFEU.

A case may refer exclusively to the areas listed in Article 50b(1), paragraph 1, but may raise the same or similar issues to another reference which, because it raises also other issues, is heard by the CJ. In such cases, it would make sense for the CJ to have the possibility to retain the case. Alternatively, to avoid inconsistent rulings, it would make sense for the GC to stay proceedings until the CJ has adjudicated on the issue.

5.4. Case law examples

It is interesting here to speculate whether certain issues could be considered as independent within the meaning of Article 50b, paragraph 2, by reference to selected judgments.

An apt example is provided by *Johnston v RUC*.[47] Although its subject-matter is not within the areas transferred to the GC, it serves to illustrate the inter-relationship between EU legislation and primary law. The referring court asked questions pertaining to the interpretation of the 1976 Equal Treatment Directive[48] and Article 224 EEC (now 347 TFEU). The CJ, however, answered by reference to the general principle of judicial protection. It held that a national rule, under which a decision of the executive certifying that an act was done for the purposes of safeguarding national security

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

[48] Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L39/40, now replaced by Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L204/23.

could not be questioned before a court of law, was incompatible with the right to judicial protection. It deprived an individual of the possibility of asserting by judicial process the rights conferred by the Equal Treatment Directive.[49] It is submitted that *Johnston* raised an independent issue of the principle of judicial protection even though no specific question on it had been referred to the ECJ.

Sturgeon[50] concerned the right of air passengers to compensation in the event of a flight delay under Regulation No 261/2004,[51] an area where references are to be transferred to the GC. The CJ interpreted the regulation as meaning that passengers are entitled to compensation not only when a flight is cancelled, which is expressly provided in Article 5, but also when a flight is delayed, despite the absence of an express provision to that effect. The Court stated that the avowed objective of the regulation was to strengthen the protection of passengers by compensating them for damage suffered during air travel. In view of that objective, the situations covered by the regulation must be compared by reference to the type and extent of the various types of inconvenience and damage suffered.[52] The regulation afforded a right to compensation to passengers whose flights were cancelled when they were re-routed and, as a result, suffered a loss of time equal to or in excess of three hours in relation to the duration of their scheduled journey. In the light of that choice, to deny the right to compensation to passengers who suffered a similar loss of time when their flight was delayed appeared unjustifiable.[53] On the basis of the judgment, and with the benefit of hindsight, *Sturgeon* can be viewed as raising an independent issue of interpretation pertaining to the principle of equal treatment. This is because reliance on that principle was the key ground for answering the question and the Court's pronouncement is of wider importance, transcending the field of air transport. Also, the interpretation of that principle could not be said to derive from existing case law. The judgment could have repercussions beyond the areas transferred to the GC. There are, however, two difficulties with characterizing *Sturgeon* as raising an independent issue. First, it would probably not be clear, by reading only the order for reference, that the case raised an independent issue pertaining to the principle of equal treatment. Secondly, since the subject-matter fell squarely within the areas transferred, it would be perfectly acceptable to consider that the GC should be allowed to develop the law in that area.

Fransson[54] raised an independent issue, but it is easier to classify. In contrast to *Sturgeon*, where the referring court did not expressly ask a question on the principle of equal treatment, in *Fransson* the questions referred related to the *ne bis in idem* principle and the scope of application of the Charter, and not the interpretation of the Sixth VAT Directive.[55]

An independent issue also arose in *Cussens*,[56] where the reference related both to the interpretation of the Sixth VAT Directive and the principle that abusive practices are prohibited in the sphere of value added tax. A more difficult case is *Salumi*.[57] An Italian court referred a number of questions pertaining to the interpretation of specific provisions of Regulation No 1697/79 on the post-

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[49] Case C-222/84 (n 47) para 20.

[50] Joined Cases C-402/07 and C-432/07, *Sturgeon v Condor Flugdienst GmbH*, Judgment (19 November 2009) ECLI:EU:C:2009:716.

[51] Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (Text with EEA relevance) - Commission Statement, OJ L46/1.

[52] Joined Cases C-402/07 and C-432/07 (n 50), para 49.

[53] ibid, paras 57-58.

[54] Case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, Judgment (7 May 2013) ECLI:EU:C:2013:280.

[55] Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment, OJ L145/1, now replaced by Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ L347/1.

[56] Case C-251/16, *Cussens and others v TG Brosnan*, Judgment (22 November 2017) ECLI:EU:C:2017:881.

[57] Joined Cases 212 to 217/80, *Amministrazione delle Finanze v Salumi*, Judgment (12 November 1981) ECLI:EU:C:1981:270.

clearance recovery of import duties or export duties,[58] but the questions referred raised broader issues on the permissibility of retroactive application of law and the principle of legal certainty. The Court went beyond the interpretation of the regulation holding that, since the regulation did not contain any transitional provisions, it was advisable to have recourse to generally recognized principles of interpretation to determine its effect *ratione temporis*.[59] It interpreted the regulation on the basis of the principle of legal certainty but also provided an interpretation of that principle which was key to answering the question referred. Still, it may not be unreasonable to consider that a case such as *Salumi* should be decided by the GC. Interpretation cannot be compartmentalized. The questions referred expressly pertained only to the interpretation of the regulation and the significance of the principle of legal certainty could not become obvious until the court engaged with the legal issues involved after considering the observations of the parties. Conceivably, such a case could be referred back to the CJ under Article 256(3), sub-paragraph 2, but it is doubtful if it would meet the threshold of requiring a decision of principle likely to affect the unity or consistency of Union law.

Van Es Douane Agenten[60] concerned the classification of goods under the Common Customs Tariff. The imported goods were classified under Commission Regulation No 482/74. This had been adopted on the basis of Council Regulation No 97/69, which, however, was repealed with effect from 1 January 1988 by Council Regulation No 2658/87 introducing a new nomenclature. Since the importation of the goods had taken place after 1 January 1988, the issue arose whether the repeal of Council Regulation No 97/69 meant that Commission Regulation No 482/74 had lapsed. Referring to *Deutsche Milchkontor*,[61] the CJ stated that legal certainty is a fundamental principle of EU law which requires that rules imposing charges on taxpayers must be clear and precise so that they may be able to ascertain unequivocally their rights and obligations.[62] It held that, under Article 15(1) of Regulation No 2658/87, the Commission was expressly required to amend regulations adopted on the basis of Regulation No 97/69 and that, failing such express amendment, individuals were not in a position to determine the precise scope of Commission Regulation No 482/74 in the light of the provisions of Regulation 2658/87. Consequently, Regulation No 482/74 could not be applied to declarations concerning importations after 1 January 1988.

Did this case raise an independent issue relating to the interpretation of legal certainty? It is evident from the grounds of the judgment that reliance on that principle was a *sine qua non* for the determination of the outcome. Nonetheless, the importance of the principle might not be clear before a full analysis of the issues involved. Also, arguably, the Court did not make a new finding as to what the principle may entail but ruled primarily on its effect, although the distinction is admittedly rather fine. It would be preferable to consider that such a case should be remitted to the GC.

The conclusion from the above survey is that, in some cases, it may be difficult to determine whether an independent issue is raised before full engagement with the case which can only take place after the verification process; and that the importance of the issue and the existence of case law in the area may be material factors.

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[58] Council Regulation (EEC) No 1697/79 of 24 July 1979 on the post-clearance recovery of import duties or export duties which have not been required of the person liable for payment on goods entered for a customs procedure involving the obligation to pay such duties, OJ L197/1.

[59] Joined Cases 212 to 217/80 (n 57) para 8.

[60] Case C-143/93, *Van Es Douane Agenten v Inspecteur der Invoerrechten en Accijnzen*, Judgment (13 February1996) ECLI:EU:C:1996:45.

[61] Joined Cases 205 to 215/82, *Deutsche Milchkontor and Others v Germany*, Judgment (21 September 1983) ECLI:EU:C:1983:233.

[62] ibid, para 27.

6. Safety valves

The risk of having two courts hearing preliminary references is that the uniformity and unity of EU law may be undermined. There are essentially three safety valves to contain that risk. These apply, respectively, upon the transfer of a reference to the GC (*ex ante* control), upon examination of the case by the GC (*in media res* control), and after the GC has delivered its judgment (*ex post* control). The first is provided by the amended Statute through the verification procedure, whilst the other two are embedded in Article 256(3) TFEU.

6.1. Ex ante control: Verification by the CJ

Under Article 50b, paragraph 3, all requests for a preliminary ruling are to be submitted to the CJ. It is then for the CJ to verify, 'as quickly as possible'[63] and in accordance with the detailed rules set out in its Rules of Procedure, that the request falls exclusively within one or more of the areas to which paragraph 1 refers. If so, the CJ must transmit that request to the GC. The CJ thus acts as a gate keeper. The way the CJ will make the verification is not provided in the Statute but must be provided in its Rules of Procedure. The involvement of the CJ is not on substantive grounds but merely on grounds of competence. It cannot keep the reference because it raises an important issue (although, as we saw, this may be a relevant factor in some cases), or because the reference is made by a national court of last instance, or because the referring court asks the CJEU to reconsider its previous case law. As the CJEU stated in its proposal to the Council:

> *It is important to state, in that regard, that the verification carried out by the Court of Justice in that context does not consist of an assessment of whether it is appropriate to refer the case before the General Court or to leave it with the Court of Justice, in the light of the interest of the questions referred for a preliminary ruling. That verification seeks exclusively to ensure compliance with the principle of conferral of jurisdiction, as Article 256(3) of the Treaty on the Functioning of the European Union does not confer on the General Court any jurisdiction to rule on questions referred for a preliminary ruling that do not come within one or within several of the specific areas laid down by the Statute.*[64]

Recital 14, added by the Parliament, provides further guidance on how the verification should be carried out and envisages a one- or a two-step approach. Following a preliminary analysis, and after hearing the Vice-President of the CJ and the First Advocate General, the President of the CJ informs the Registry whether the request for a preliminary ruling should be transferred to the GC or should be referred, for further analysis, to the general meeting in which all the Judges and Advocates General participate. The process is to be carried out 'within a time frame that does not exceed what is strictly necessary, taking into account the nature, the length and the complexity of the case.'[65]

The referral to the GC will presumably take the form of an order but it is not envisaged that it will be reasoned. Under recital 15, brief reasons explaining the decision to transfer the case to the GC or to retain it are to be provided by the court that deals with the case in its ruling on the preliminary reference.[66] There should perhaps be more explanation if the CJ decides to keep the reference, as this is the exception to the rule.

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[63] Those words were added in the amending Regulation by the European Parliament.

[64] CJEU request (n 1) 6.

[65] See amending Regulation (n 3) preamble, recital 14.

[66] Recital 15 also states that the CJ should publish and regularly update a list of examples illustrating the application of Article 50b of the Statute as inserted by this amending Regulation.

By referring the case to the GC, the CJ does not provide directions to the latter as to what can and cannot be decided: the order as such is transferred to the GC and thereon it becomes the responsibility of the latter. Also, the scheme of the amendment suggests that the verification is made on the basis of the information provided in the order for reference, i.e. before the submission of observations by parties who are entitled to do so under Article 23 of the Statute. Otherwise, the CJ would be required to engage with the substance of the case. This interpretation is also supported by the requirement that the verification must happen as quickly as possible. However, the Statute does not prohibit the CJ from seeking further clarification from the referring court at the verification stage, where the order is unclear.

Inevitably, in marginal cases where it is not clear whether the requirements of exclusivity and, especially, independence are met, the CJ will enjoy some discretion at the verification stage. However, if the objectives of the new system are to be met, the power of the CJ to hold on to the reference should be exercised with caution and sparingly.

A consequential amendment is made to Article 54, second paragraph, of the Statute which deals with conflicts of jurisdiction between the CJ and the GC. Under that provision, as amended, where the GC finds that it does not have jurisdiction to hear and determine an action or a request for a preliminary ruling in respect of which the CJ has jurisdiction, it must refer that action or request to the CJ. Likewise, where the CJ finds that an action or a request for a preliminary ruling falls within the jurisdiction of the GC, it must refer that action or request to the GC, whereupon the GC may not decline jurisdiction.

It is submitted that this provision should be read subject to the verification mechanism. Once the CJ transfers a preliminary reference to the GC following verification, the latter may not decline jurisdiction, even if it considers that the case has wrongly been transferred to it. Remission to the CJ in such a case is only possible under the conditions of Article 256(3), second paragraph, TFEU.[67]

In many cases, the CJ reformulates the question referred to provide the national court with a helpful answer. The GC may do the same provided that the reformulation does not lead to the dispute raising issues that go beyond its jurisdiction as defined by Article 50b, paragraphs 1 and 2, of the Statute.

6.2. In media res control

Article 256(3), second paragraph, TFEU provides that, where the GC considers that the case requires a decision of principle likely to affect the unity or consistency of Union law, it may redirect the reference to the ECJ for a ruling. Thus, redirection is subject to two conditions being fulfilled: first, the case must require a decision of principle and, secondly, the issue raised must be likely to affect the unity or consistency of Union law. [68]

Under the first condition, an issue of principle may pertain to procedure or substance, but its importance must exceed the specific dispute. This would include questions of general principles of EU law, the protection of fundamental rights, the division of competences between the Union and the Member States, or the allocation of powers among the institutions. Such issues, however, must exceed an elevated threshold of importance to merit the return of the reference to the CJ. It would also include issues which are of substantial importance for the development of the law in an area transferred to the GC, even if they are not horizontal.

Under the second condition, the issue of principle raised must be likely to affect the unity or consistency of Union law. This covers issues in which there is inconsistent case law at the CJ level,

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[67] See below 6.2.

[68] See, for a discussion, S Hummelbrunner, 'The Unity and Consistency of Union Law, The Core of Review under Article 256(2) and (3) TFEU' (2018) 73 Zeitschrift für öffentliches Recht 295.

or GC level, or between the two courts; or novel issues which are of defining importance to the development of the law. The reference to 'unity and consistency' does not presuppose the existence of precedent but includes also issues whose resolution will shape the future development of the law.[69]

Notably, where the above conditions are fulfilled, the return of the reference to the CJ is not compulsory but optional. This essentially emphasises judicial comity rather than hierarchy. However, if the reference is not returned to the CJ, the latter may exercise the review jurisdiction provided in Article 256(3), third paragraph.[70]

The rules of procedure will need to provide for the modalities of the return of a reference to the CJ. Interested parties do not have a right as a matter of fair trial to make observations on whether the GC should return the reference to the CJ, although they may have a useful role to play in assisting the GC to decide whether a case merits return. It is important to emphasise that the possibility of returning a reference to the CJ is an exceptional one and should be used sparingly.

6.3. Ex post control

Under Article 256(3), third paragraph, TFEU, decisions given by the GC on questions referred for a preliminary ruling may exceptionally be subject to review by the CJ, under the conditions and within the limits laid down by the Statute,[71] where there is a serious risk of the unity or consistency of Union law being affected. A similar rule applies under Article 256(2) TFEU, second subparagraph, in relation to the review by the CJ of GC decisions on appeals by specialised courts. Following the abolition of the CST, the GC no longer exercises appellate jurisdiction but, for the period when it did so, there were few review cases.[72] It is an open question whether the CJ will understand its review jurisdiction under Article 256(3) in the way it understood its review of GC decisions on appeal from the CST under Article 256(2). Suffice it to say that, in a well-functioning system, the exercise of review by the CJ, just as the elevation from the GC to the CJ, should be exceptional. This is acknowledged expressly in the CJEU's request for amending the Statute.[73]

7. Procedural guarantees to ensure uniformity

The amending Regulation provides for certain process safeguards with a view to ensuring that the uniform interpretation of EU law will not be prejudiced. The objective is to provide, as much as possible, for equivalent safeguards to those which apply where preliminary reference jurisdiction is exercised by the CJ. References will be allocated to a designated GC chamber. Provision is also made for the use of an extended court formation and the assignment of an advocate general.

New Article 50b(3), paragraph 4, of the Statute provides that the GC is to assign requests for a preliminary ruling to chambers designated for that purpose. This is designed to promote

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[69] This would include, for example, issues such as those adjudicated in Case C-222/84 (n 47), Case C-284/16 (n 5) or Joined Cases C-402/05 P and C-415/05 P, *Kadi & Al Barakaat International Foundation v Council and Commission*, Judgment (3 September 2008) ECLI:EU:C:2008:461, although issues of such magnitude are unlikely to arise in the areas transferred to the GC.

[70] See below, 6.3

[71] See Art. 62 to 62b.

[72] See Case C-579/12 RX-II, *Commission v Strack*, Judgment (19 September 2013) ECLI:EU:C:2013:570; *Case* C-197/09 RX-II, *M v European Medicines Agency (EMEA)*, Judgment (17 December 2009), ECLI:EU:C:2009:804; Case C-334/12 RX-II, *Jaramillo and Others v EIB*, Judgment (28 February 2013), ECLI:EU:C:2013:134; Case C-417/14 RX-II, *Livio Missir Mamachi di Lusignano v Commission*, Judgment (10 September 2015) ECLI:EU:C:2015:588; Joined Cases C-542/18 RX-II and C-543/18 RX-II, *Simpson v Council & HG v Commission*, Judgement (26 March 2020) ECLI:EU:C:2020:232.

[73] CJEU request (n 1) 6.

consistency in the treatment of references, since they will all be dealt with by the same chambers.[74] It will also facilitate 'culture transition'. The GC has built expertise in adjudicating cases which are fact-heavy, require the analysis of complex economic evidence, and demand a painstaking analysis of the evidence. Preliminary references, by contrast, focus not on the search for factual truth but the correct interpretation. They require a delicate appreciation of the division of powers between the CJEU and the referring court, which remains competent to decide on the facts and the application of the CJEU's ruling on them. The exercise of the new jurisdiction requires a rewiring of the judicial mind, which is easier to achieve through specialization within the GC.

A new paragraph (4) is added to Article 50 of the Statute, providing that, when exercising its preliminary reference jurisdiction, the GC is to sit in a chamber of intermediate size if a Member State or an institution of the Union that is a party to the proceedings so requests.[75] The avowed objective is to maintain the consistency of preliminary rulings given by the GC.[76] The number of judges that will compose that chamber is not specified but will be settled by the rules of procedure. It will be more than five, but fewer than fifteen, which is the number of judges of the Grand Chamber.[77] This is without prejudice to the GC's existing power to decide to sit as a grand chamber, which in practice is rarely exercised.[78] The concept of a chamber of intermediate size is in fact not unknown to the GC. Article 28 of the Rules of Procedure envisages the possibility that, whenever the legal difficulty or the importance of the case or special circumstances so justify, a case may be referred to the Grand Chamber or to 'a Chamber sitting with a different number of Judges'.

8. The designation of advocates general

An innovation is the use of advocates general. New Article 49a of the Statute provides that, in preliminary reference cases, the GC is to be assisted by one or more advocates general. This does not mean that an advocate general has to be assigned in every reference case. As the CJEU states in its proposal,[79] according to Article 20, paragraph 5, of the Statute, which applies to the GC by virtue of Article 53, paragraph 1, a case may be adjudicated without an Opinion where it raises no new point of law. Thus, in contrast to the designation of a specific chamber to hear preliminary references, which applies to all references, there is here flexibility.

The GC judges are to elect from among their number, in accordance with the rules of procedure, the judges that are to perform the duties of advocate general. In the period during which those members act as advocate general, they may not sit as judges in preliminary reference cases.[80] One assumes that they should also not sit as judges in a direct action raising similar points to those raised in a preliminary reference in which they act as advocate general. Provision should be made to this effect in the rules of procedure, although recusal in such cases appears to be already covered by Article 18 of the Statute.

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[74] ibid, 7.

[75] The possibility of an extended chamber was envisaged in the proposal submitted by the CJEU (recital 11) but the amending Regulation, as finally agreed, also added the obligation to refer the reference to that chamber when a Member State or an institution so requests.

[76] See amending Regulation (n 3) recital 21.

[77] Normally, the GC sits in chambers of three judges or, in cases that raise more difficult issues, in chambers of five judges. The Rules of Procedure, in line with Article 50 of the Statute, provide also for the possibility of a single judge chamber and of a grand chamber composed of fifteen judges. See Rules of Procedure of the GC, Articles 13 et seq. and Article 50, paragraph 2, as now amended by the amending Regulation.

[78] See, e.g. for a recent case, Case T-125/22, *RT France v Council*, Judgment (27 July 2022), ECLI:EU:T:2022:483.

[79] CJEU request (n 1) 7.

[80] Art 49a, para 2, of the Statute.

For each request for a preliminary ruling, the advocate general will be selected from among the judges elected to perform that duty who belong to a chamber other than the chamber to which the request in question has been assigned.[81] Judges will be elected to perform the duties of advocate general for a term of three years and they may be re-elected once.[82] This rotation system is to be welcomed as it avoids the over-compartmentalization of the GC and enables a great number of members to act in a dual capacity.

The introduction of an advocate general is welcome. It can be expected to contribute to the strength of the analysis carried out by the *juge rapporteur* and the other judges. It will be recalled that Article 49 of the Statute already provides for the possibility of a judge of the GC being called upon to act as advocate general. This possibility, however, was used rarely and only in the first years of the CFI.[83]

It may be said that the systematic use of advocates general in preliminary references, but not in direct actions, is not necessarily justified on substantive grounds. A direct action before the GC may give rise to equally, if not more, complex issues of law, especially because direct actions are not confined to the specific areas in which the GC acquires preliminary reference jurisdiction. Cases such as *Kadi*[84] or *Front Polisario*[85] provide testament to this. However, the provision for the involvement of an advocate general in preliminary references is justified on grounds of legitimacy and equality of treatment. It reassures national courts and interested parties that the request for a preliminary reference will not be heard by a 'lesser' court formation or, at least, that they will benefit from the same safeguards as those that apply where the reference is heard by the CJ.[86] It is further justified by the fact that, in preliminary reference cases, there is no appeal to the CJ.

9. Transparency

At the instigation of the Parliament, some important changes are made which were not included in the CJEU's original proposal.

Article 23, paragraphs 1 and 2, of the Statute are amended to expand the range of institutions to which the order for reference must be sent. It is to be notified not only to the parties, the Member States, the Commission, and the Union entity which adopted the act whose validity or interpretation is in dispute, but also to three new addressees: the European Parliament, the Council, and the ECB. Where these institutions consider that they have a particular interest in the issues raised by the reference, they are entitled to submit observations within two months of the notification.

Whether a 'particular interest' exists is a matter for the court hearing the reference to determine although one would surmise that the burden would not be very high. That requirement is not as strict as the requirement provided by Article 263, paragraph 3, TFEU, in relation to the ECB and the Committee of the Regions, that an action for annulment must be intended to protect their prerogatives. Article 23 of the Statute uses the term 'particular' interest. This may give the impression that the test is stricter than that applied under Article 40, paragraph 2, of the Statute to

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[81] ibid, para 3.

[82] ibid, para 4.

[83] See, e.g., Case T-24/90, *Automec v Commission*, Judgment (10 March 1992), ECLI:EU:T:1992:39.

[84] Case T-315/01, *Kadi v Council and Commission*, Judgment (21 September 2005) ECLI:EU:T:2005:332, Case T-306/01, *Yusuf and Al Barakaat International Foundation v Council and Commission*, Judgment (21 September 2005) ECLI:EU:T:2005:331, and on appeal Joined Cases C-402/05 P & C-415/05 P (n 69).

[85] Case T-512/12, *Front Polisario v Council* (*Front Polisario I*), Judgment (10 December 2015) ECLI:EU:T:2015:953 (on appeal, Case C-104/16 P, *Council v Front Polisario*, Judgment (21 December 2013) ECLI:EU:C:2016:973); Joined Cases T-344/19 and T-356/19, *Front Polisario v Council*, Judgment (29 September 2021) ECLI:EU:T:2021:640; Case T-279/19, *Front Polisario v Council*, Judgment (29 September 2021) ECLI:EU:T:2021:639.

[86] See recital 19.

the interventions of private parties in direct actions, which simply refers to the existence of an 'interest in the result of case'[87] without using the term 'particular'. The requirement of Article 40, paragraph 2, has been interpreted strictly in the case law in a way that makes it difficult for private parties to overcome it.

Nonetheless, it is an open question whether the term 'particular' interest will lead the CJEU to interpret the new right of the European Parliament, the Council, and the ECB restrictively. It is submitted that it should not and that the case law on intervention in direct actions under Article 40, paragraph 2, does not provide a sound point of reference. Submitting statements of case in preliminary references is not the same as intervening in direct actions as the jurisdiction of the Court is different. Also, the particular interest has to be seen in the light of the mandate of the European Parliament, the Council, and the ECB under the Treaties.

A commendable innovation included in the new Statute is the requirement of transparency. A new paragraph (5) added to Article 23 of the Statute provides that statements of case or written observations submitted by an interested person pursuant to Article 23 must be published on the website of the CJEU within a reasonable time after the closing of the case, unless that person raises objections to the publication of his/her own written submissions.

It seems that this applies to the statements of case or observations submitted by any party that is entitled to submit observations in a preliminary reference, including the parties in the main proceedings and interveners in those proceedings. It addresses, at least partially, a long-standing concern. Pleadings submitted to the CJEU cannot be accessed by the public. The change is welcome. It contributes to good governance. It recognizes that the preliminary reference procedure is not just a dialogue between the referring court and the CJEU, but may raise issues which affect the interests of many public and private actors. Access to the statements of case clarifies the issues raised, highlights the diverse perspectives of the stakeholders and makes judicial decision-making more transparent. As recital 4 states, it is in line with the fact that the CJEU is increasingly required to rule on matters of a constitutional nature or relating to fundamental rights.[88] In fact, consideration should be given to extending the obligation of disclosure to pleadings also in direct actions involving inter-institutional disputes as they may also involve matters of a constitutional nature.

The preamble states that the publication is without prejudice to Regulation No 1049/2001[89] regarding public access to European Parliament, Council and Commission documents.[90] This suggests that those institutions may object to the disclosure of their observations only where such objection is warranted under Regulation No 1049/2001. Other EU bodies or a private party that is entitled to submit observations under Article 23 may raise objections to the disclosure of their observations. It is not clear whether they have an unfettered right to do so or whether it can only be exercised subject to conditions to be specified in the rules of procedure.

Transparency is also improved in another respect. New Article 62d of the Statute provides that, before submitting a request or a proposal for the amendment of the Statute, the CJEU or the Commission, as appropriate, is to consult widely. This recognizes the key role played by the CJEU in the administration of justice at pan-European level and is to be welcomed. It increases open governance and accountability. According to the preamble, public consultations are to be conducted in an open and transparent way, allowing for the widest possible participation. The

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[87] See Art 40, para 2, of the Statute under which the same requirement applies to the bodies, offices and agencies of the Union.

[88] See amending Regulation (n 3) recital 4.

[89] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L145/43.

[90] Recital 4.

results should be communicated to the CJEU or the Commission, as the case may be, and also to the Council and the Parliament, and be made public.[91]

The amending Regulation also includes a transitional provision.92 It further requires the CJEU, one year from the date of its entry into force, to publish and regularly update a list of examples of the application of Article 50b of the Statute; and, four years from its date of entry into force, to present a detailed report to the European Parliament, the Council and the Commission on the implementation of the reform.[93] This may provide the opportunity for revisiting the specific areas where jurisdiction is transferred to the GC.

10. Conclusion

The transfer of preliminary reference jurisdiction to the GC is the most important change in judicial architecture since the establishment of the CFI. Although the CJ does not appear to face an acute workload problem in terms of judicial statistics, the reform is necessary and anticipates future developments. It should be welcomed.

The subject-matter criterion used for the transfer of references to the GC is sound and the areas chosen for transfer have been well selected. The challenge is to maintain the uniform interpretation of EU law, but it is unlikely that the transfer will lead to unhealthy fragmentation. There are good preventive and corrective mechanisms in place and, on a cost benefit analysis, the reform comfortably passes the test. Also, the pursuit of uniformity in interpretation should not become an obsession. There is, perhaps, a tendency to use it as a proxy for concentrating judicial power.

The most difficult issue is the determination of cases which raise an 'independent question' relating to the interpretation of the norms listed in Article 50b, second paragraph. In some cases, it will be impossible to separate issues pertaining to the interpretation or validity of the specific provisions of EU law transferred from the interpretation of Treaty provisions, Charter rights and general principles. As was shown above, the case law manifests that, in some cases, it may be difficult to determine whether an independent issue is raised before full engagement with the case which can only take place after the verification process. Inevitably, in marginal cases, the CJ will have to exercise discretion and it can be expected that the importance of the issue raised will infuse the judicial enquiry. The tenet of this contribution is that, for the reform to be effective, the verification process should be as streamlined as much as possible and the inquiry of the CJ should be limited. It is inherent in the reform that the GC will play an enhanced role in interpreting and applying the totality of EU law as a *corpus* where it deals with EU law provisions in the areas transferred. For the transfer of jurisdiction to be meaningful, the frame of mind should be towards empowering rather than limiting the GC.

The implementation of the reform requires a change in the judicial culture of the GC. It will need to step out of the fact-finding mentality, which is necessary in direct actions, and focus more on statutory interpretation relying on the referring court for the definition of factual background.

In institutional terms, the big winner is the EU judiciary. The GC acquires a role in ensuring the uniform interpretation of EU law and its status is enhanced whilst the CJ has more time to focus on the strategic development of EU law. The reform serves as a recognition of the CJ's gradual evolution to the supreme court of the Union and facilitates the exercise of its constitutional jurisdiction. In the shadow of the technical changes made, there is CJEU empowerment and a shift

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[91] Recital 19.

[92] Under Article 2 of the amending Regulation, requests for a preliminary ruling pending before the CJ on the first day of the month following the date of entry into force of the Regulation are to be dealt with by the CJ.

[93] See Art 3 of the amending Regulation.

in the judicial paradigm. The CJ increasingly becomes the top tier of an expanded centralized judicial bureaucracy. There is an added qualitative element in its jurisdiction which becomes more targeted and selective. The granting of jurisdiction to the GC entails a sharing of preliminary references which differs markedly from the delegation granted to national courts under the *CILFIT*[94] – *Consorzio* model.[95] The *act clair* doctrine is broader both in terms of its remit, since it applies in all areas of interpretation, and in terms of the number of judicial actors to whom decision-making power is entrusted, since it covers all national courts. It is, however, narrower in that the national courts are not granted the power to shape interpretation, their mandate being much more circumscribed. By contrast, in the areas covered by the transfer, the GC is entrusted to shape EU law. The risk of fragmentation is more contained as the GC is part of the same judicial structure, owes no allegiance to any national legal order, and poses no risk of rebellion. It is a managed delegation that is designed not to challenge the CJ.[96]

The reform can be seen as a harbinger to the GC acquiring preliminary reference jurisdiction in more areas. Experience suggests that, once the first step is made, more road is likely to be covered. The steady expansion of GC jurisdiction in direct actions may well be accompanied by the piecemeal and circumspect enhancement of its role under Article 267 TFEU. The reform is more likely to be the opening shot rather than a one-off change.

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[94] Case C-283/81, *CILFIT v Ministry of Health*, Judgment (6 October 1982) ECLI:EU:C:1982:335.

[95] Case C-561/19 (n 5).

[96] See, for a critique, Bobek (n 4).

Antitrust Damages Actions in National Courts: Trends in the Case-Law of the European Court of Justice

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Abstract

This paper examines the current state of case law of the European Court of Justice on private enforcement of competition law in the European Union, highlighting the ongoing debates and challenges. Despite an overall consolidation of private enforcement, significant divergence persists among Member States regarding the facilitation of private enforcement and the application of the EU Cartel Damages Directive. The ECJ continues to strengthen private enforcement through a general claimant-friendly interpretation of the Damages Directive and the traditional application of Articles 101 and 102 TFEU in conjunction with the principle of effectiveness. Recent decisions in the discussed cases of *Volvo*, *Sumal*, *PACCAR*, *RegioJet*, *Tráficos Manuel Ferrer*, and *Repsol* cover pivotal questions of the temporal application of the Damages Directive, disclosure of evidence, quantification of harm, and international jurisdiction, as well as the ever-persistent issue of the relationship between public and private enforcement. In an outlook, the paper argues that principles and mechanisms of private enforcement developed in EU competition law can be effectively utilized in various other areas of EU law enforcement. The dual role of private enforcement, compensating victims and ensuring compliance with EU competition law, presents potential for broader application in areas such as data protection and financial law.

Keywords

Competition Law; Private Enforcement; Damages; Disclosure; Judicial Estimation; Temporal Application; Jurisdiction; Public Enforcement; Compensation; Deterrence.

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1. Introduction*

Antitrust damages actions have been guided by the ground-breaking case law of the European Court of Justice (ECJ) since *Courage*[1] and *Manfredi*[2]. In these cases, the ECJ laid the foundation for later legislative developments in the EU Damages Directive[3] and its national implementation laws. Roughly ten years have passed since the adoption of the EU Damages Directive in 2014. The Damages Directive has substantially changed the landscape for antitrust damages actions in the Member States of the European Union.[4] There has been a considerable surge in the number of antitrust damages actions being brought before the national courts of the Member States.[5] Recently, the first cases on the Damages Directive have reached the ECJ, which can certainly be described as a new wave of judgments on antitrust damages law.[6] In its judgments, the ECJ played a crucial role in interpreting the modernised framework for antitrust damages actions based on the Damages Directive, but also made significant statements on the principle of effective enforcement of competition law enshrined in primary law and which remains the central principle for effective damages actions in the EU even after the Damages Directive.

This paper analyses this new wave of judgments of the ECJ on antitrust damages actions and works out five current trends in the jurisprudence of the ECJ. First, it illustrates that we are currently in a transitional phase where certain proceedings can already be based *ratione temporis* on the Damages Directive, while others must solely rely on primary law, *i.e.* effective enforcement of Union competition law. At the same time, the ECJ emphasises the continuous fundamental importance of the principle of effectiveness, which applies in the context of the Damages Directive guiding its interpretation. It can also be applied independently in cases that lie outside the scope of the Damages Directive. Second, it demonstrates that disclosure of evidence introduced with Chapter II of the Damages Directive is certainly a novel instrument in the procedural traditions of many Member States and therefore raises doubts in need of clarification by the ECJ. Yet, it can rightfully be seen as a crucial procedural instrument and, accordingly, the rules on disclosure of evidence in the Damages Directive are an important evolution for antitrust damages proceedings. Third, it shows that quantification of harm remains the decisive challenge in antitrust damages actions, putting a focus on the problems national courts have with adjudicating concrete cases, e.g., by judicial estimation of harm. In this area, the jurisprudence of the ECJ again highlights an

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[1] Case C-453/99, *Courage and Crehan*, Judgment (20 September 2001) ECLI:EU:C:2001:465.

[2] Case C-295/04, *Manfredi*, Judgment (13 July 2006) ECLI:EU:C:2006:461.

[3] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (Damages Directive), OJ L 349/1.

[4] For a comprehensive overview, see BJ Rodger, M Sousa Ferro and F Marcos (eds), *Research Handbook on Private Enforcement of Competition Law in the EU* (Elgar 2023); A Biondi, G Muscolo and R Nazzini, *After the Damages Directive: Policy and Practice in the EU Member States and the United Kingdom* (Wolters Kluwer 2022) passim; BJ Rodger, M Sousa Ferro and F Marcos (eds), *The EU Antitrust Damages Directive: Transposition in the Member States* (OUP 2018) passim.

[5] See JF Laborde, 'Cartel damages actions in Europe: How courts have assessed cartel overcharges' (2021) 3 Concurrences, Art. N° 102086.

[6] Cf, in particular, on the applicability of the directive as well as on certain questions of interpretation: Case C-267/20, *Volvo and DAF Trucks*, Judgment (22 June 2022) ECLI:EU:C:2022:494; Case C-163/21, *PACCAR*, Judgment (10 November 2022) ECLI:EU:C:2022:863; Case C-57/21, *RegioJet*, Judgment (12 January 2023) ECLI:EU:C:2023:6; Case C-312/21, *Tráficos Manuel Ferrer*, Judgment (16 February 2023) ECLI:EU:C:2023:99; Case C-25/21, *Repsol*, Judgment (20 April 2023) ECLI:EU:C:2023:298.

interpretation through the lens of the principle of effectiveness. Fourth, the paper presents the growing potential for forum shopping through the jurisprudence of the ECJ, particularly on the notion of undertaking. Fifth, it presents the increasing role of private enforcement as a true second pillar next to public enforcement and the relationship between public and private enforcement in the view of the ECJ. The paper closes with an outlook on future developments and challenges for private damages actions.

2. Transitional Phase for Antitrust Damages Actions

The current status of antitrust damages law can certainly be described as a transitional or intermediate phase for antitrust damages actions where cases at the national and ECJ level concern both pre- and post-Damages Directive law. On the one hand, this transitional state dates back to the overall transposition deadline of the Damages Directive. Although the Damages Directive was adopted on 26 November 2014 and was supposed to be transposed into Member State law by 27 December 2016,[7] the rules of the Damages Directive are not yet fully applicable in many cases before national courts. In practice, companies would typically avoid initiating antitrust damages actions before the respective Member State had incorporated the Directive into national law due to the strengthening of private enforcement through the Damages Directive. In addition, a number of damages actions, which still occupy the courts of the Member States to this day, above all the trucks cartel,[8] are based on competition law infringements pre-dating the Damages Directive.[9] Accordingly, several cases that reach the ECJ equally still completely or partially need to deal with the law prior to the application of the Damages Directive, where EU law only played a role through the guidance of the principles of effectiveness and equivalence of EU competition law.

On the other hand, the Damages Directive itself has special rules on its application *ratione temporis*, which also contributes to the fact that the antitrust damages law is in transition.[10] This nuanced system is most relevant for cases that were brought before national courts after the Directive and the laws transposing it got into force but still based upon facts predating the Directive's transposition deadline. For those cases, Article 22 of the Damages Directive foresees a transitional period of application (at least) for its substantive provisions. Article 22(1) prohibits the retroactive application of national rules adopted to implement substantive provisions of the Damages Directive. Such provisions cannot apply to cases pre-dating the actual transposition of the directive, i.e. potential anticompetitive behaviour that occurred before 26 December 2016.[11] Yet, Article 22(2) leaves it to the discretion of Member States whether to apply procedural provisions to such proceedings based on facts pre-dating the Directive but being initiated after 26 December 2014. Thus, procedural provisions can potentially apply much earlier than the substantive provisions. As most Member States simply transposed the Directive without further limiting the temporal

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[7] Damages Directive (n 3) art 21(1). Some Member States, such as in Spain, however missed the transposition deadline, cf Case C-267/20 (n 6) para 48.

[8] Cf F Marcos, 'Trucks cartel damages claims: Thousand and odd judgments issued by Spanish Appeal Courts' (2023) 31(1) Zeitschrift für Europäisches Privatrecht 178ff.

[9] For Germany, see for example Bundesgerichtshof (Federal Court of Justice) KZR 35/19, *Trucks I*, Judgment (23 September 2020) ECLI:DE:BGH:2020:230920UKZR35.19.0; KZR 19/20, *Trucks II*, Judgment (13 April 2021) ECLI:DE:BGH:2021:130421UKZR19.20.0.

[10] N Imgarten, 'Temporal applicability of the Cartel Damages Directive 2014/104/EU revisited – recent jurisprudential developments' (2023) 16(1) Global Competition Litigation Review 57; Ph Kirst, 'The Temporal Scope of the Damages Directive: A Comparative Analysis of the Applicability of the New Rules on Competition Infringements in Europe' (2019) 16(1) European Competition Journal 97.

[11] Assuming that transposition of the directive was assured by the respective Member State in accordance with the deadline set out in Art. 21 of the Directive, to which Art. 22 makes explicit reference.

application beyond what is foreseen in Art. 22 of the Directive, procedural norms already applied in these Member States for all proceedings initiated from the transposition date of the Directive.

Nevertheless, since Articles 21 and 22 of the Damages Directive do not explicitly define which provisions of the Damages Directive are of a procedural and which are of a substantive nature, the majority of cases that have reached the ECJ partly deal with this distinction. Naturally, since Articles 21 and 22 of the Damages Directive belong to EU law, the ECJ held in *Volvo* that the question 'in the absence of a reference to national law in Article 22 [Damages Directive], be assessed in the light of EU law and not in the light of the applicable national law.'[12] Member States have discretion to establish that national procedural rules implementing the Damages Directive may be applicable to legal actions initiated after 26 December 2014, but before its transposition.[13] However, Member States have no power to interpret EU law and have no discretion to determine whether the provisions of the Damages Directive are substantive or procedural. The discretion of the Member States in that regard 'could undermine the effective, consistent and uniform application of those provisions throughout the European Union.'[14]

According to the ECJ, a provision is procedural if it contains only procedural measures, for example a provision that is relating to the particular powers in order to establish the facts[15] or that is having another evidentiary purpose[16]. A provision is substantive if it directly affects the legal situation of the parties to the dispute and relates to the constituent elements of non-contractual civil liability,[17] particularly if the rule is closely linked to the emergence, incurrence, and scope of the non-contractual civil liability[18]. In the further row of judgments up to date, the ECJ established the following provisions of the Damages Directive to be procedural and open to retroactive effect: Articles 5 and 6 on disclosure of evidence[19] and Article 17(1) on judicial damages estimation[20]. The following provisions are substantive and without retroactive effect: Article 9 on the effect of the decisions of national competition authorities[21], Article 10 on limitation periods[22] and Article 17(2) on the presumption of harm[23].

In connection with the transitional phase and the question of the applicability of the Damages Directive, the role of the principle of effectiveness is given particular emphasis in the new wave of judgments. Above all, the continuing role of the principle of effectiveness becomes apparent, despite the applicability of the Damages Directive and the general interconnectedness of the rules of the Damages Directive with the principle of effectiveness. Naturally, in case the Damages

[12] Case C-267/20 (n 6) para 39.

[13] C-637/17, *Cogeco Communications*, Judgment (28 March 2019) ECLI:EU:C:2019:263, para 28

[14] Case C-267/20 (n 6) para 41.

[15] Case C-57/21 (n 6) para 42.

[16] Case C-267/20 (n 6) para 92.

[17] Case C-163/21 (n 6) para 33; Case C-57/21 (n 6) para 42; see in more detail Imgarten (n 10) 58f.

[18] cf Case C-267/20 (n 6) para 96.

[19] Case C-163/21 (n 6) para 33; Case C-57/21 (n 6) para 42.

[20] Cf Case C-267/20 (n 6) para 85; Case C-312/21 (n 6) para 51.

[21] Case C-25/21 (n 6) paras 38-39.

[22] Cf Case C-267/20 (n 6) para 79; see also Case C-605/21, *Heureka*, Opinion of Advocate General Kokott (21 September 2023) ECLI:EU:C:2023:695, para 73. Nonetheless, in specific cases, if the limitation period had not elapsed at the time of transposition of the directive, even the substantive provision can apply as this would not constitute a true case of retroactivity, cf N Imgarten 'Temporal Applicability of the Cartel Damages Directive: Case C-267/20 Volvo and DAF Trucks' (2023) 14 Journal of European Competition Law & Practice 95.

[23] Cf Case C-267/20 (n 6) para 98; on possibilities for a more differentiated interpretation see Imgarten (n 22) and Imgarten (n 10) 59f.

Directive is not applicable, the ECJ reiterates the old mantra[24] that Member States have procedural autonomy to determine the rules governing antitrust damages actions for violation of Union competition rules, provided that they abide with the principles of equivalence and – most importantly in private enforcement of competition law[25] – effectiveness.[26] The question of whether and when the Damages Directive is applicable, however, may also be related to the effectiveness principle. In *Volvo*, for example, the applicability of the Damages Directive depended on whether limitation periods had elapsed, which raised the question of when they start to run.[27] This is determined, *inter alia*, by the principle of effectiveness.[28]

The judgment in *Tráficos* most clearly demonstrates the continuing relevance of the principle of effectiveness alongside and intertwined with the provisions of the Damages Directive. Although Article 22 of the Damages Directive provides special rules on the temporal application of the Directive, the Directive does not change the validity of the previous case law on the principle of effectiveness in connection with primary EU competition law.[29] The ECJ held that the Damages Directive contains provisions that merely declaratorily confirm the existing case law, such as the right to full compensation in Article 3[30] and the general joint and several liability of all undertakings that committed the infringement in Article 11(1)[31]. Those rules apply immediately.[32] However, more precisely, these rules had already been established case-law long before the Damages Directive itself had even been written. In case of (temporal) inapplicability of certain rules of the directive, the case-law on the principle of effectiveness of Art. 101 TFEU continues to apply without any modification. The same must be true for possible legal lacunas in the system of the directive, i.e. certain questions that were explicitly or implicitly not harmonised. Such an approach is valid because a possible inapplicability of the Damages Directive cannot lead to the inapplicability of the Treaties, which are superior to the Directive in the hierarchy of norms. Private enforcement of competition law was already carried out before the adoption of the Damages Directive solely on the basis of the Union competition rules in conjunction with the principle of effectiveness.[33] The Damages Directive only acquires legal effects through Article 288 TFEU. A blocking effect of the Damages Directive vis-à-vis the Treaties would virtually reverse this principle. This entails that even if a provision of the Damages Directive was classified as substantive norm in view of Article 22 of the Damages Directive, the case law on Articles 101 and 102 TFEU and the principle of effectiveness continue to apply.

However, this jurisprudence raises several follow-up questions. First of all, it remains unclear which rules of the Damages Directive simply reaffirm existing case law and therefore apply with immediate effect. Secondly, even if there is no previous case law on a given provision of the Damages Directive, the question arises, which provisions of the Damages Directive can just be interpreted as written-out, although not yet established, examples of the principle of effectiveness, and therefore simply declaratorily reaffirm primary law. Given that the ECJ established new procedural instruments for

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[24] Case C-33/76, *Rewe v Landwirtschaftskammer für das Saarland*, Judgment (16 December 1976) ECLI:EU:C:1976:188, para 5.

[25] Cl Zois, 'The Protean Nature of the Effectiveness Principle in the Private Enforcement of EU Competition Law' (*EU Law Live*, 19 July 2023) <https://eulawlive.com/competition-corner/the-protean-nature-of-the-effectiveness-principle-in-the-private-enforcement-of-eu-competition-law-by-clio-zois/> accessed 25 March 2024.

[26] C-637/17 (n 13) para 47; Case C-25/21 (n 6) paras 58ff.

[27] Cf Case C-267/20 (n 6) paras 48-49; for details, see Imgarten (n 22).

[28] Cf Case C-267/20 (n 6) para 50.

[29] Case C-312/21 (n 6) paras 35, 61.

[30] *ibid*, para 35; see also Damages Directive (n 3) recital 12.

[31] Case C-312/21 (n 6) para 61.

[32] *ibid*, paras 35, 61.

[33] Case C-453/99 (n 1).

antitrust damages actions under Articles 101 and 102 TFEU and the principle of effectiveness before the adoption of the Damages Directive,[34] few provisions of the Damages Directive remain that do not seem to reaffirm primary law.[35] The Damages Directive certainly introduces (new) substantive requirements for antitrust liability that go beyond the standards previously developed in the case law on Articles 101 and 102 TFEU and the principle of effectiveness, such as the limitation of joint and several liability of small and medium-sized undertakings and of leniency applicants in Articles 11 (2)-(4). Yet, especially for the latter, arguments that leniency applications play a decisive role in detecting cartels and consequently that the partial protection of leniency applicants against damages actions is vital to guarantee an effective (public) enforcement of Article 101 TFEU, is a well-known limitation in the jurisprudence of the ECJ.[36] Therefore, any such exceptions could also be based on primary competition law and the principle of effectiveness directly in a careful balancing of the objectives of public and private enforcement of competition law.[37]

In sum, while the current status of litigation on antitrust damages actions in front of the ECJ can certainly be described as a transitional phase when it comes to the applicability of the Damages Directive *ratione temporis*, the jurisprudence of the ECJ has demonstrated that one thing is here to stay: the principle of effectiveness as the guiding principle for antitrust damages actions.

3. Focus on Disclosure of Evidence

The rules on disclosure of evidence have been described as the key procedural evolution for antitrust damages actions.[38] This is supported by the new wave of judgments from the ECJ, which largely focus on the novel disclosure rules under the Damages Directive and highlight the importance of disclosure by requiring a broad EU-autonomous interpretation of the novel rules but also by underlining the limitations of disclosure provided by the rules of the Damages Directive.

Overall, these new judgments place a functional on the disclosure rules: the purpose of the disclosure obligations is to overcome the information asymmetry in antitrust damages actions and to foster effective private damages actions.[39] This information asymmetry stems from a multitude of circumstances coming together in the usual settings of antitrust damages actions.[40] Usually, the injured party holds the burden of proof for the existence of the infringement, the causal link and the harm suffered, including – most importantly – its quantum, but the necessary evidence is mostly located with the infringer or third parties. Furthermore, infringements are often secret and damages quantification is technically complicated and usually requires a large set of data, which does not lie in the hands of the injured party. Given this information asymmetry, the ECJ judgments underline the central role of disclosure for successful damages actions. For example, in the first judgment on the central provision of Article 5 of the Damages Directive in *PACCAR*, the ECJ held that

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[34] See, e.g., for access to evidence, Case C-360/09, *Pfleiderer*, Judgment (14 June 2011) ECLI:EU:C:2011:389, paras 24-26; Case C-536/11, *Donau Chemie*, Judgment (6 June 2013) ECLI:EU:C:2013:366, paras 33, 41.

[35] Imgarten (n 10) 59.

[36] Case C-360/09 (n 34); Case T-437/08, *CDC Hydrogene Peroxide v Commission*, Judgment (15 December 2011) ECLI:EU:T:2011:752; Amtsgericht Bonn (District Court, Bonn, Germany) Case 51 Gs 53/09, Judgment (18 January 2012); Case T-344/08, *EnBW Energie Baden-Württemberg v Commission*, Judgment (22 May 2012) ECLI:EU:T:2012:242; Case C-536/11 (n 34); Case C-365/12 P, *Commission v EnBW*, Judgment (27 February 2014) ECLI:EU:C:2014:112; Case C-162/15 P, *Evonik Degussa v Commission*, Judgment (14 March 2017) ECLI:EU:C:2017:205; Case C-517/15 P, *AGC Glass Europe and Others v Commission*, Judgment (26 July 2017) ECLI:EU:C:2017:598.

[37] See on this below.

[38] See, D Calisti, L Haasbeek and F Kubik, 'The Directive on Antitrust Damages Actions: Towards a stronger competition culture in Europe, founded on the combined power of public and private enforcement of the EU competition rules' (2014) 2(12) Neue Zeitschrift für Kartellrecht 466, 467f.

[39] Damages Directive (n 3) Recitals 14-15.

[40] See, in detail, L Hornkohl, *Geschäftsgeheimnisschutz im Kartellschadensersatzprozess* (Mohr Siebeck 2021) 59ff.

the provision does not only relate to documents in their control which already exist but can also include those documents that the party to whom the request to disclose evidence is addressed must create *ex novo* by compiling or classifying information, knowledge or data in its possession.[41] The ECJ argues with the function of disclosure to remedy the information asymmetry and the overall function of disclosure obligations for the effective private enforcement of EU competition law.[42] Noteworthy, the ECJ again maintains a broad, EU-autonomous interpretation also of the disclosure rules where the principle of effectiveness plays a central role: the disclosure rules should be applied effectively so as to provide injured parties with tools that are capable of compensating for the information asymmetry between the parties to a dispute.

At the same time, the new wave of cases highlights the key role of the conditions of the disclosure test, in particular the proportionality requirement and the rules on disclosure of documents in the hands of competition authorities. In *PACCAR*, the ECJ ruled that in order to decide if in the case at hand evidence would need to be produced *ex novo*, the conditions of disclosure, most notably proportionality, needs to be taken into account in order to prevent the excessive and investigative usage of disclosure in that context.[43] As the ECJ emphasised, the proportionality test is not a mere formality but a true balancing exercise of the legitimate interest of all parties and third parties involved for the referring court. This balancing is particularly important in situations such as in *PACCAR*, but must also apply for general disclosure requests regarding already existing documents. Naturally, as the intervention in such cases is less rigorous, it is more likely for such requests to be proportionate.

Similarly, the ECJ takes a conciliatory approach in *RegioJet* when it comes to the further conditions for disclosure of documents in the hands of competition authorities of Article 6 of the Damages Directive. It follows a very structured test by differentiating three groups of documents to which the documents must be clearly assigned. The so-called 'grey list' of Article 6(5) of the Damages Directive at dispute in *RegioJet* limits disclosure of certain categories of documents (mainly files that were prepared by the defendant for the authority's investigation) until the competition authority has closed its proceedings. As a limiting exemption provision, the ECJ autonomously interprets the grey list narrowly,[44] which can likely also be transposed to the so-called 'black list' limiting disclosure altogether for leniency statements and settlement submission of Article 6(6) of the Damages Directive.[45] In particular, national rules on the list of documents that may be classified in the grey (or black) list may not be extended by the transposing laws of the Member States.[46] Thus, disclosure in private enforcement proceedings was in this case not *per se* excluded for the duration of parallel administrative proceedings, but the general proportionality test of Article 5 of the Damages Directive continues to apply and must be taken into account in addition to the provisions of Article 6 of the Damages Directive in cases involving disclosure of documents in the hands of competition authorities.[47] Consequently, *PACCAR* and *Regiojet* show one of the typical dichotomies in antitrust damages actions: while disclosure should remedy the information asymmetry, conditions and proportionality serve to strike a balance and prevent fishing expeditions. With the overall emphasis of the conditions and limits to disclosure in its case law, the ECJ follows a balanced approach that

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[41] Case C-163/21 (n 6) paras 41-64.

[42] ibid, paras 59, 61.

[43] ibid, paras 64, 68.

[44] Case C-57/21 (n 6) paras 101-109.

[45] See to that regard also the pending case C-2/23, *FL und KM Baugesellschaft*.

[46] Case C-57/21 (n 6) paras 108f.

[47] ibid, paras 72-78.

avoids an Americanization[48] of traditional civil law systems in the EU towards *discovery* instead of *disclosure*.

Lastly, the judgment in *Tráficos* underlined the central role of disclosure in the overall system of measures of the Damages Directive that should remedy the information asymmetry in antitrust damages actions. The ECJ emphasises that the various measures interact with each other and that there can be a hierarchy in certain situations. Article 17(1) of the Damages Directive allows for judicial estimation of the amount of harm, when it is 'practically impossible or excessively difficult precisely to quantify the harm suffered'.[49] The ECJ held that Article 17(1) of the Damages Directive is a measure intended to remedy the asymmetry of information concerning the relevant data for quantifying the damage.[50] Thus, the difficulty to quantify a concrete amount of harm could stem from the claimants' lack of information, which, according to the ECJ, should first be addressed by using the Directive's disclosure rules in order to obtain the necessary data for an accurate quantification.[51] Only if an exact quantification is still practically impossible or excessively difficult after disclosure, for example when there are particularly great difficulties in interpreting the documents submitted with regard to the price mark-up, a recourse to judicial estimation is possible.[52] Yet, according to the ECJ, a claimant's inaction with regard to disclosure cannot be remedied by means of judicial estimation.[53] The exact relationship of the various measures to one another will certainly remain a question of each individual case. Moreover, there might be cases where it is already foreseeable from the outset that disclosure cannot remedy the difficulties of quantification due to other grounds than pure information asymmetry.[54] Such situations require further discussion as the relationship between objective economic complexity on the one hand and information asymmetry on the other hand is not fully clear from the current jurisprudence. Yet, *Tráficos* shows the interplay of the various measures but, at the same time, the important role of the procedural instrument of disclosure. Even if it represents a completely new procedural instrument for many of the continental EU Member States, the ECJ clearly brings it to the forefront of civil (antitrust) proceedings.

This central role of disclosure also connects the measure to the crucial principle of effectiveness mentioned. Advocate General *Szpunar* has already lined out in his opinion on *PACCAR* that disclosure of documents contributes to the effectiveness of EU competition law.[55] His argumentation that disclosure might be necessary in order to initiate such an action altogether illustrates that (pre-trial) disclosure of evidence may be necessary for EU primary law reasons. An ever-growing number of EU law instruments already includes disclosure obligations, such as the IP Enforcement Directive,[56] the Collective Consumer Redress Directive[57]. With an additional look at disclosure from the perspective of the effective enforcement of EU law, a general principle of EU law might emerge. In that context, antitrust damages actions play an important role in promoting such a procedural instrument and the ECJ's interpretation on it.

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[48] See on this R Becker, 'Kartellrechtliche Schadenersatzklagen à l'américaine' in W Möschel and Fl Bien (eds), *Kartellrechtsdurchsetzung durch private Schadenersatzklagen?* (Nomos 2010).

[49] See on damages quantification also below.

[50] Case C-312/21 (n 6) paras 54f; see also Damages Directive (n 3) recital 47.

[51] Case C-312/21 (n 6) paras 56f.

[52] See, for example, ibid, para 53.

[53] ibid, para 57.

[54] See, to this regard, ibid, para 54.

[55] Case C-163/21, *PACCAR*, Opinion of Advocate General Szpunar (7 April 2022) ECLI:EU:C:2022:286, para 50.

[56] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ L 195/16, Art. 6.

[57] Directive 2020/1828/EU of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers, OJ L 409/1, Art. 18.

4. Quantification of Harm as the Key Challenge

Initial analyses have shown that, on the whole, damages are still reluctantly awarded in the EU.[58] The reason for this is above all the challenging quantification of damages in antitrust damages actions. The required counterfactual analysis builds on the hypothetical and thus speculative scenario typical for damages claims, which is more complex in the case of cartel infringements due to the necessary reconstruction of entire market structures compared to the typical differential hypothesis.[59] Quantifying damages is fact-intensive, requires complicated economic models, and is costly.[60] In principle, the Damages Directive foresees alleviating measures, such as the mentioned disclosure rules to provide claimants with the necessary data for quantification. The other central provision to foster damage quantification is Article 17 of the Damages Directive. While Article 17(1) allows for judicial estimation, Article 17(3) of the Damages Directive incentivises the involvement of competition authorities to assist the national court with quantifying damages.

The *Tráficos* case law was the first judgment of the ECJ dealing with damages quantification itself, given that procedures in the EU Member States often have not reached the stage of damages quantification yet, let alone lead to a referral to the ECJ. Therefore, *Tráficos* certainly serves as a leading judgment in determining the legal boundaries for the quantification and estimation of damages. As mentioned above, the case dealt with an interpretation of Article 17(1) of the Damages Directive and the conditions for judicial estimation, *i.e.* when precise damages quantification is 'practically impossible or excessively difficult'. While the ECJ clarified the mentioned hierarchy of the judicial estimation provision in relation to the disclosure rules,[61] it also laid out a hierarchy between the goal of precise damages quantification and the (only) exceptional judicial estimation. The wording of Article 17(1) of the Damages Directive alone demonstrates that precise damage quantification always takes precedence, and that judicial damages estimation is a supporting measure of an exceptional nature. The ECJ underlines this approach once again.[62] *Tráficos* dampens the role of damages estimation next to precise damages quantification but paints an overall stringent picture from an overall EU liability law perspective. Like in actions for civil liability in general, antitrust damages actions aim to compensate damages as precisely as possible.[63] Any overcompensation, even indirectly through damages estimation, should be avoided.[64] Full and correct compensation is at the core of antitrust damages law; alleviating measures play an (important) second role.

This balanced approach between rule and exception serves as guidance to further examination when precise damages quantification is 'practically impossible or excessively difficult' in the sense of Article 17(1) of the Damages Directive. Apart from the mentioned understanding of the ECJ in terms of hierarchy of the judicial estimation provision in relation to the disclosure rules, the ECJ also hinted that judicial estimation is possible without prior disclosure in cases where the quantification difficulties do not stem from the lack of data.[65] However, 'the mere existence of those uncertainties, inherent in proceedings concerning liability and which arise, in actual fact, from the

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[58] See Laborde (n 5); Marcos (n 8).

[59] European Commission, 'Practical Guide on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union', SWD(2013) 205 <https://perma.cc/BR25-WGF5>, para 16.

[60] Damages Directive (n 3) Recitals 45-46.

[61] See n 6.

[62] Case C-312/21 (n 6) paras 52ff.

[63] ibid, para 52.

[64] See also Damages Directive (n 3) art 3(3).

[65] Case C-312/21 (n 6) paras 53f.

confrontation of arguments and expert reports in the exchange of arguments' is not sufficient.[66] Contradictory expert opinions alone do not seem to be enough. As interpreted by national courts following *Tráficos* but interpreting the ECJ rather liberally, other difficulties could arise from problems interpreting the documents submitted through disclosure because of the language of the documents,[67] challenges in the selection of the applicable quantification methods, the nature of the damaging event, or the factual unquantifiability of an exact amount due to the great complexity or due to the heterogeneity of the products.[68] The possibilities of making use of judicial estimation are therefore manifold.

Even if the trend in the case law of the Court of Justice initially appears restrictive here, *Tráficos* only underlines the role of judicial estimation as a manifestation of the principle of effectiveness. The wording of the provision on judicial estimation in Article 17(1) of the Damages Directive repeats the usual wording of the ECJ concretising the principle of effectiveness ('render practically impossible or excessively difficult'[69]). The principle of effectiveness in EU law fundamentally serves as a limitation and thus as a deviation from ordinary procedural rules. In this respect, it is dogmatically correct to treat damages estimation as an exception to exact quantification through evidence, potentially obtained through disclosure. Nevertheless, the manifestation of the effectiveness principle in the wording of Article 17(1) of the Damages Directive also shows that the effectiveness of EU competition is in the foreground of the provision, and thus also the fundamentally broad understanding of the ECJ's effectiveness principle is to be taken as a basis.

In practice, the exceptional rule of judicial damages estimation will likely play an increasingly important role in adjudicating concrete cases. Keeping in mind the high degree of complexity of cartel damages, it is an illusion to believe that just through disclosure of information and potentially economic expert opinions, one could uncover and determine the actual damage. Due to the hypothetical nature of damages calculation and complex counterfactuals in often dynamic market structures, absolute precision is unattainable. In principle, this does not contradict the ECJ's case-law in *Tráficos* as long as the judicial estimation serves the principle of effectiveness, which remains the reason for its existence. Towards national courts, the ECJ's case-law could therefore be interpreted as a reminder to strive for precision even if it will not be fully reached. After all, the relationship between proof and judicial estimation is not black and white, but comprises many shades of grey. For example, actual evidence, potentially obtained through disclosure, can be used as a basis for judicial estimation if this evidence makes a certain overcharge plausible even if it may not be able to prove a concrete percentage of overcharge due to the outlined uncertainties connected with the counterfactual examination.[70] Another example may be the extrapolation of damages from a representative sample.[71] The Court of Justice therefore incentivises its national counterparts to reflect carefully on the different options. Although limiting the length of proceedings has a high value itself, the quick and easy route of judicial estimation should, in the view of the ECJ, not become the automatic default choice.

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[66] ibid, para 52.

[67] Tribunal Supremo (Supreme Court, Spain) case 923/2023, Judgment (12 June 2023) ECLI:ES:TS:2023:2492, para 6.21

[68] Landgericht Berlin (Regional Court of Berlin, Germany) 16a O 1/20 Kart, Judgment (19 June 2023) ECLI:DE:LGBE:2023:0619.16AO1.20KART.0A; Landgericht Mannheim (Regional Court of Mannheim, Germany) 14 O 61/18 und 14 O 103/18 Kart, Judgment (23 June 2023) ECLI:DE:LGMANNH:2023:0623.14O103.18KART.00; Juzgado de lo Mercantil nº3 de Valencia (Commercial Court, Valencia, Spain) case 24/2023, Judgment (10 March 2023); Audiencia Provincial de Madrid (Provincial Court, Madrid, Spain) case 231/2023, Judgment (9 March 2023); Audiencia Provincial de Valencia (Provincial Court, Valencia, Spain) case 185/2023, Judgment (23 February 2023); Tribunal Supremo (Supreme Court, Spain) case 923/2023, Judgment (12 June 2023) ES:TS:2023:2492, paras 6.15 and 6.24.

[69] Case C-453/99 (n 1) para 29.

[70] Ch Thole, 'Beweisrecht und Kartellschadensprozess – aktuelle Fragen und Entwicklungen' (2023) 11(9) Neue Zeitschrift für Kartellrecht 447, 449ff.

[71] Cf Landgericht Mannheim (n 68) para 183.

5. A Forum for Forum Shopping

The jurisdiction and the applicable law for antitrust damages actions are decisive for successful antitrust damages claims. The jurisprudence of the ECJ shows a trend towards giving claimants a greater freedom as to where to file a damages action. Claimants can therefore increasingly choose a forum, i.e. divert to forum shopping. Such forum shopping may be based on different influencing factors that may establish jurisdiction. In principle, a distinction can be made between factors relating to the claimant's seat or market activity (1.) and factors related to the defendants' legal entity, group structure and economic activity under the single economic entity doctrine (2.). Both can have a significant impact on the claimants' ability to engage in forum shopping (3.).

5.1. Forums Related to the Claimant's Seat and Behaviour

First, the vast possibility for forum shopping stems from the generous interpretation of Article 7(2) Brussels Ibis Regulation on matters relating to tort, delict or quasi-delict, in the ECJ's recent case law on antitrust damages actions.[72] Generally, Article 7(2) Brussels Ibis Regulation covers both 'the place where the damage occurred' and 'the place of the event giving rise to it' for antitrust damages actions and determines not only the international but also the local jurisdiction.[73] In the much criticised[74] *CDC* case, the ECJ ruled that the place of the event giving rise to it was the place of the conclusion of the founding agreement of that respective cartel.[75] Should several places come into consideration for complex factual cases, only the damage resulting from an isolated agreement, not the total damage, could be claimed in the court of that place.[76] Whether other acts can also be considered as the place of the event giving rise to it has not yet been clarified by the ECJ. The literature suggested above all the place of the acts of implementation of the agreement on the market,[77] which would give claimants an even broader possibility to pick the forum for actions involving large EU-wide cartels.

In a number of recent judgments, the ECJ has also further interpreted the place where the damage occurred.[78] A synopsis of these decisions results in a market-based approach. According to the ECJ, there are two places where the damage occurred. In case the claimant acquired the cartelised goods or services only in one place, this place determines the place of the court where the damage occurred.[79] In case the claimant acquired the cartelised goods or services in several places, to avoid any fragmentation of jurisdiction within a Member State to create predictability, the place where the

[72] See, in particular, Case C-451/18, *Tibor-Trans Fuvarozó és Kereskedelmi v DAF Trucks*, Judgment (29 July 2019) ECLI:EU:C:2019:635.

[73] Case C-882/19, *Sumal v Mercedes Benz Trucks España*, Judgment (6 October 2019) ECLI:EU:C:2021:800, para 65.

[74] R Harms, J Sanner and J Schmidt, 'EuGVVO: Gerichtsstand bei Kartellschadensersatzklagen' (2015) 26(15) Europäische Zeitschrift für Wirtschaftsrecht 584; A Stadler, 'Schadensersatzklagen im Kartellrecht – Forum shopping welcome! – Zugleich Besprechung von EuGH, Urteil v. 21.5.2015 – C-352/13' (2015) 70(23) Juristenzeitung 1138; W Wurmnest, 'International jurisdiction in competition damages cases under the Brussels I Regulation: CDC Hydrogen Peroxide' (2016) 53(1) Common Market Law Review 225.

[75] Case C-352/13, *CDC Hydrogen Peroxide v Akzo Nobel*, Judgment (21 May 2015) ECLI:EU:C:2015:335, para 44.

[76] ibid, para 45.

[77] M Danov, Jurisdiction and Judgments in Relation to EU Competition Law Claims (Bloomsbury 2011) 94.

[78] Case C-352/13 (n 75); C-451/18, Case C-451/18 (n 72); Case C-30/20, *RH v AB Volvo*, Judgment (15 July 2021) ECLI:EU:C:2021:604.

[79] ibid, paras 39f.

damage occurred is the seat of the aggrieved buyer.[80] At this court, the claimant can file an antitrust damages action involving the entire or total damage, not just the one resulting from that place.[81] With this approach, the ECJ departs from the so-called mosaic theory otherwise applicable for Article 7(2) Brussels Ibis Regulation.[82] However, both the place of acquisition and the seat of the injured party must, respectively, be in a Member State 'in which the affected market is located'[83], hence fostering a market-based approach. Yet, the cross-border distribution of cartelised goods through subsidiaries easily opens another market for cartelised goods. This approach already allows quite far-reaching forum shopping as the harmed buyer can claim the entire damage at his seat as long as his seat is in an affected market. More generally, with the overall extensive interpretation of Article 7(2) Brussels Ibis Regulation, the claimant already has a wide choice of possible jurisdictions.

5.2. Forums Related to the Defendants – Single Economic Entity Doctrine

Second, the recent transfer of the single economic entity doctrine in *Skanksa*[84] and *Sumal*[85] from public to private enforcement of competition law has many implications for antitrust damages actions overall and also opened the door for further jurisdictional possibilities for claimants. Early on, the ECJ established the so-called single economic entity doctrine to interpret the concept of undertaking for public enforcement of EU competition law. The ECJ has consistently held that an undertaking within the meaning of Articles 101 and 102 TFEU is 'any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed'.[86] EU competition law addresses the undertaking as a single economic entity: Instead of being based on legal entities, the concept of undertaking in EU competition law is functional and underpinned by an understanding from an effectiveness perspective. Several distinct legal entities can constitute a single economic entity. Subsidiaries, sister and parent companies in one group can therefore be held liable for infringements of competition law by any of them. Not all companies in a group automatically belong to one economic entity. According to the case law of the ECJ, two points are decisive for determining the economic entity: a connection of the legal entities to a unit and a uniform economic activity of these.[87] The first point concerns the decisive question of which natural or legal persons can form an (economic) entity. According to the ECJ the entity requires a unified organisation of personal, material, or immaterial resources and economic, organisational or legal ties.[88] This can take place, for example, through control agreements under company law in legal terms. The second point requires, as a consequence of the activity-based functional interpretation, a uniform economic market behaviour of the individual legal entities, for example, through decisive influence

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[80] ibid, paras 41f; Case C-352/13 (n 75) paras 52f.

[81] ibid, para 54.

[82] P Mankowski 'Article 7' in U Magnus and P Mankowski (eds), *Brussels I bis Regulation: European Commentaries on Private International Law*, Vol. I (Otto Schmidt 2016) paras 207ff.

[83] Case C-451/18 (n 72) para 34.

[84] Case C-724/17, *Vantaan kaupunki v Skanska Industrial Solutions*, Judgment (24 March 2019) ECLI:EU:C:2019:204.

[85] Case C-882/19 (n 73).

[86] Constant jurisprudence, see Case C-41/90, *Klaus Höfner and Fritz Elser v Macroton*, Judgment (23 April 1991) ECLI:EU:C:1991:161.

[87] Summarizing the jurisprudence: E Fischer and P Zickgraf, 'Zur Reichweite der wirtschaftlichen Einheit im Kartellrecht' (2022) 186 Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht 125, 133.

[88] Case C-407/08 P, *Knauf Gips v Europäische Kommission*, Judgment (1 July 2010) EU:C:2010:389, paras 84 and 86: Case C-155/14 P, *Evonik Degussa GmbH und AlzChem AG gegen Europäische Kommission*, Judgment (16 June 2016) ECLI:EU:C:2016:446, para 27; Case C-97/08 P, *Akzo Nobel v Europäische Kommission*, Judgment (10 September 2009) ECLI:EU:C:2009:536, para 58.

over the subsidiary[89] or due to the fact that the subsidiary is distributing cartelised goods[90]. In *Skanksa* and most notably *Sumal*, the ECJ transferred its jurisprudence to private damages actions, required by a uniform application of EU competition law and the principle of effectiveness;[91] competition law is effectively enforced through an enforcement system comprising of public and private enforcement.[92]

Applying the single economic entity doctrine in *Skanksa* and *Sumal* for antitrust damages actions offers a wide variety of forum shopping. Via the general head of jurisdiction under Article 4(1) Brussels Ibis Regulation, a person domiciled in a member state can be sued at their domicile or seat. Since the different members of a cartel are jointly and severally liable,[93] the claimant can already choose which cartel member to sue for the entire damage at their seat. Applying the single economic entity doctrine to antitrust damages actions opens the door for a double joint and several liability: between the members of the cartel and within different legal entities of a cartel member, which constitutes the single economic entity. According to *Sumal*, the different legal entities of a single economic entity are jointly and severally liable for the damage.[94] Under Article 4(1) Brussels Ibis Regulation, in case of joint and several liability, the claimant can choose from all the seats of the legal entities belonging to that single economic entity and can sue for the entire damage. Therefore, ultimately, the injured party may, at its discretion, sue any entity belonging to a single economic entity involved in the cartel infringement for the entire damage at the seat of that entity. Depending on the size of the cartel and the group companies involved in the cartel, the single economic entity doctrine could open a general jurisdiction against a legal entity, be it the mother company or a subsidiary, in each Member State. Depending on the structure of the group, the single economic entity even has extraterritorial dimensions.[95]

Furthermore, even though the ECJ has not explicitly decided this matter yet,[96] Article 8 No 1 Brussels Ibis Regulation applies in the context of the single economic entity doctrine. According to Article 8 No 1 Brussels Ibis Regulation, several persons domiciled in an EU Member State may be sued in the court of the place where one of the defendants is domiciled, the so-called anchor defendant, provided the claims are closely connected. Joint and several liability is generally recognised as such a close connection[97] and must therefore also apply in the context of the mentioned double joint and several liability. In *CDC*, the ECJ recognised it in the context of joint and several liability of cartel members.[98] There is no reason to interpret Article 8 No 1 Brussels Ibis Regulation differently in the case of joint and several liability of the legal entities belonging to one single economic entity.[99] Via Article 8 No 1 Brussels Ibis Regulation, the claimant can then designate one of the liable entities as an anchor defendant and file a joint and several claim for damages at that seat against any entity of

[89] Cases 6/73 and 7/73, *Istituto Chemioterapico Italiano S.p.A. und Commercial Solvents Corporation v Europäische Kommission*, Judgment (6 March 1974) ECLI:EU:C:1974:18, paras 132f.

[90] Case C-882/19 (n 73) para 52.

[91] ibid, paras 33, 35.

[92] See also on this the following section.

[93] See Damages Directive (n 3) art 11(1).

[94] Case C-882/19 (n 73) para 44.

[95] See L Hornkohl, 'The Extraterritorial Application of Statutes and Regulations in EU Law' (2022) 1 MPILux Research Paper http://dx.doi.org/10.2139/ssrn.4036688.

[96] See, however, the questions on this matter in pending case C-393/23, *Athenian Brewery and Heineken*.

[97] P Jenard, *Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters* (Signed at Brussels, 27 September 1968), OJ C 59/1, 26; see also D Paulus, 'Art. 8 EuGVVO' in R Geimer and R Schütze (eds), *Internationaler Rechtsverkehr in Zivil- und Handelssachen* (66 edn, CH Beck 2023) paras 32ff; R Thode, 'Art. 8 EuGVVO' in *BeckOK ZPO* (51 edn, CH Beck 2023) para 27.

[98] Case C-352/13 (n 75) para 33.

[99] Precisely on this question, cf the pending case C-393/23, *Athenian Brewery and Heineken.*

the same economic unit, but also against any other entity of any economic unit involved in the cartel infringement. The double joint and several liability in the case of pan-European cartels and cross-border groups of companies may result in a correspondingly wide choice of forums, but also a possibility to concentrate the proceedings in that forum of choice of the claimant.

5.3. Continuous Impact of Forum Shopping

Between the expanding jurisprudence on Article 7(2) Brussels Ibis Regulation and on the single economic entity doctrine, a claimant in antitrust damages actions can choose between a multitude of forums to sue for the entire damage. The choice of forum continues to be of crucial importance in cartel damages actions. Despite the efforts of the Damages Directive to harmonise the substantive and procedural rules, due to the minimum-harmonisation approach regarding most provisions of the Damages Directive, Member States law still differs greatly.[100] Especially, the law of evidence, as highlighted by the previous chapter on estimation of damages, is mostly national civil procedural law. For its application, national statutes as well as established national jurisprudence have much higher importance than the Damages Directive or the only limited jurisprudence of the ECJ on the matter. Moreover, general court structures and experiences with antitrust damages actions are different in the Member States. Differences range from the availability of different forms of collective action, case management, or presumptions relating to the amount of damages. National law and national developments are, therefore, still a key driver in antitrust damages actions, and it matters greatly where an action can be brought.

6. An Everlasting Issue: the Role of Private Enforcement

In all of the judgments of the new wave discussed here,[101] the overall role of private enforcement, also in context of its relationship to public enforcement, is extensively addressed by the ECJ. The function of private enforcement is determined in relation to public enforcement and in the context of the overall enforcement system of EU competition law.

Generally, the ECJ tends to focus both on the compensatory but also the deterrent effect of private damages actions in the new waves of judgements. The compensatory function has been stressed ever since *Courage*, covering the direct harm to injured parties through anticompetitive conduct.[102] Private enforcement should furthermore also deter undertakings from violating competition law in the first place since they have to fear both the fine and the damages.[103] The wording of the ECJ even tends towards a punitive function, insofar as the ECJ repeatedly held that private enforcement participates 'in the financial penalization of anticompetitive conduct'.[104] With this, the ECJ recognises economic theory, showing that damages have a fine-increasing or replacing function.[105] Overall, with private actions, competition law itself is more widely applied and enforced as it leads to an enforcement of additional violations in case of stand-alone actions or an increase in negative consequences for follow-on actions. Antitrust damages actions therefore remedy the 'indirect harm

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[100] See, in detail, BJ Rodger, M Sousa Ferro and F Marcos, 'There must be 27 ways to get your damages: Heterogeneity and Uncertainty in Antitrust Private Enforcement' (*EU Law Live*, 14 June 2023) <https://eulawlive.com/competition-corner/there-must-be-27-ways-to-get-your-damages-heterogeneity-and-uncertainty-in-antitrust-private-enforcement-by-barry-rodger-miguel-sousa-ferro-and-francisco-marcos/> accessed 25 March 2024.

[101] For references, see n 6.

[102] See also Damages Directive (n 3) art 1(1).

[103] Cf Case C-882/19 (n 73) para 37.

[104] Case C-312/21 (n 6) para 42.

[105] See O Bodnar and others, 'The Effects of Private Damage Claims on Cartel Activity: Experimental Evidence' (2023) 39(1) Journal of Law, Economics, and Organization 27, 28.

done to the structure and operation of the market, which was not able to reach full economic efficacy, in particular as regards benefits to the consumers concerned'[106]. Consequently, private actions take into account that the competitive process itself and overall function of markets are disrupted through anti-competitive conduct. Thus, private damages actions also follow primarily a public policy objective, which needs to be taken into account when interpreting EU and national rules on private enforcement.

The ECJ clarifies time and again that private enforcement complements public enforcement; both form an integral part of the system for enforcement of the EU competition rules.[107] Next to public enforcement, private enforcement is needed: combating anticompetitive conduct only through the public sphere, the Commission and the national competition authorities, is not sufficient to ensure full compliance with Articles 101 and 102 TFEU. The right for any person to seek compensation for such harm strengthens the working of the EU competition rules since it discourages agreements or practices, frequently covert, which are liable to restrict or distort competition, by contributing to the maintenance of effective competition in the European Union.[108] As the present rulings have also shown, the ECJ repeatedly sets incentives that encourage private lawsuits.

This understanding has several implications for practice. Understanding both public and private enforcement as an integral part of the system for enforcement of the EU competition rules allows the general cross-interpretation and cross-fertilisation of principles from public to private enforcement and vice versa. The ECJ has demonstrated such an endeavour with the recent transfer of the single economic entity doctrine in *Skanksa* and *Sumal* from public to private enforcement of competition law. Furthermore, and as the ECJ underlined in *Regiojet*, this means that public and private enforcement can and should work in parallel. Yet, the interpretation of the ECJ also stresses the potential for stand-alone actions. The competition authorities have limited capacities and need to prioritise.[109] Especially for established theories of harm, minor or local infringements, private stand-alone actions can, in theory, take over and ensure the effective enforcement of EU competition law and deter anticompetitive behaviour, next to providing compensation to harmed parties. Given that private enforcement is the only form of enforcement in stand-alone cases, the deterrence function needs to be sufficiently considered in these actions. Even for follow-on actions, the public policy objective of private actions again places them in the light of the effective enforcement of EU competition rules, which at least influences the teleological interpretation of Member State rules or provisions of the Damages Directive. Accordingly, interpretations are to be expected which, in addition to the effective outcome with regard to the compensation of individuals, will also take into account the competitive process itself. The 'enforcement' in private enforcement is clearly underlined by the ECJ.

7. Conclusion and Outlook

In conclusion, it is important to emphasise the significant role that private enforcement of EU competition law plays in ensuring the effectiveness of the entire system. This is achieved through the consequent and consistent application of EU law, especially the principle of effectiveness, by national courts and referrals of still unresolved questions to the ECJ, which are both key elements in this regard. It can be expected that the ECJ will remain actively seized with matters relating to the interpretation of both the Damages Directive and the principle of effectiveness guiding its

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[106] Case C-312/21 (n 6) para 42; Case C-163/21 (n 6) para 56.

[107] Case C-57/21 (n 6) para 66, clarified that public and private enforcement 'are complementary and that they may in principle be carried out simultaneously'.

[108] Cf Case C-882/19 (n 73) para 37.

[109] O Brook and K Cseres, *Policy Report: Priority Setting in EU and National Competition Law Enforcement* (2021) <http://dx.doi.org/10.2139/ssrn.3930189> accessed 25 March 2024.

application. The coming into force of the directive furthers judicial dialogue between national and European courts as the directive opens up a number of unresolved questions, old and new, that can be addressed through preliminary references.[110] The concept of the dual role of private enforcement is particularly noteworthy as private enforcement can not only help to compensate victims of competition law infringements but also ensures compliance with EU competition law more generally. It thereby combines both corrective and preventive elements. Interestingly, this concept could potentially be extended to other fields of EU law enforcement, such as data protection and financial law, thus broadening its scope and impact. The impact of private enforcement beyond competition law is supported by the similarities in the overall harm to society and the type of damage suffered in fields such as data protection law. If one follows such an argument, it is likely that principles and mechanisms of private enforcement as developed in EU competition law by the ECJ can be effectively utilised in various other areas of EU law enforcement. A notable example of this integration can be seen in the recent Hungarian data protection case,[111] where public and private enforcement were successfully combined to address the violations.

Overall, it is clear that private enforcement not only complements public enforcement, but also enhances the overall enforcement of EU law. By allowing victims to seek compensation and ensuring compliance with EU law, private enforcement serves as a valuable tool in maintaining a fair and competitive market. Its potential expansion into other areas of EU law enforcement further highlights its significance and potential for broader application. As such, it is crucial to recognise and support the innovative and leading role of private enforcement in the effective implementation and enforcement of EU competition law.

[110] Currently pending cases touch upon a number of issues related to the preceding arguments and will certainly enrich the debate. These pending cases include C-605/21, *Heureka* on limitation periods; C-2/23, *FL und KM Baugesellschaft* on the protection of leniency and settlement submissions; C-253/23, *ASG* on collective actions through assignment of claims and C-393/23, *Athenian Brewery and Heineken* on international jurisdiction.

[111] Cf Case C-132/21, *Nemzeti Adatvédelmi és Információszabadság Hatóság*, Judgment (2 January 2023) ECLI:EU:C:2023:2.

Demolishing procedural autonomy in the name of effectiveness: *Unicaja*, *Ibercaja* and *SPV Project*

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Abstract

For the sake of the effectiveness of Directive 93/13 on unfair terms in consumer contracts, the CJEU judgments in *Unicaja*, *Ibercaja* and *SPV Project* urge the courts of Spain and Italy to disregard essential principles of national procedural law, such as *res judicata*, preclusion, party disposition, consistency of judgments or prohibition that an appellant is prejudiced by her own appeal. After looking at the judgments themselves, this contribution discusses the consequences for consumers, businesses and national courts. Next, several points of critique are made. These points refer to (i) the potential risks to the principles of equality, legal certainty and impartiality; (ii) the accuracy of the CJEU's argument on the effectiveness of Directive 93/13, as, on the one hand, the said basic principles of national procedural law do not prevent *diligent* consumers from availing themselves of the full protection granted by the Directive and, on the other hand, the proper enforcement of mandatory rules with a strong dimension of public interest do not necessarily require exceptions to the application of those principles; (iii) the undermining of the principle of procedural autonomy; (iv) the new risks of reluctance to accept the primacy of EU law and the authority of the CJEU; and (v) the doubts as to the scope and limits of the jurisprudence stemming from *Unicaja*, *Ibercaja* and *SPV Project*. Subsequently, the alternative approach of *Impuls Leasing* – focussing on *particular provisions* of national procedural law rather than on *basic principles* – is considered. Ultimately, looking at subsequent cases decided by the CJEU, it appears that the Court is willing to make the approach in *Impuls Leasing* prevail and to keep the jurisprudence emanating from *Unicaja*, *Ibercaja* and *SPV Project* contained.

Keywords

EU Law; Unfair Terms; Consumer Contracts; Effectiveness; Principles; Procedure; *Res Judicata*; Preclusion; Party Disposition; Consistency; *Reformation in Pejus*; Procedural Autonomy.

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1. Introduction

On 17 May 2022, the Grand Chamber of the Court of Justice delivered its judgments on *Unicaja*,[1] *Ibercaja*[2] and *SPV Project*.[3]

These three judgments dealt with consumer protection cases on the interpretation of Articles 6(1) and 7(1) of Directive 93/13[4] on unfair terms in consumer contracts. As is well known, Article 6(1) states that unfair terms 'shall not be binding on the consumer'; and Article 7(1) compels the Member States to ensure that 'adequate and effective means exist to prevent the continued use of unfair terms'.

It should be noted that both provisions aim to correct the power imbalance and the information asymmetry that exists between the consumer signing the contract and the business introducing unfair terms in that contract and imposing those terms on the consumer. In this regard, Recital 9 of Directive 93/13 underscores that 'acquirers of goods and services should be protected against the abuse of power by the seller or supplier, in particular against one-sided standard contracts and the unfair exclusion of essential rights in contracts'.

In the three judgments delivered on 17 May 2022, the decision of the Court is essentially the same. The CJEU reminds its well-known jurisprudence that it is for the Member States to establish the particular procedural rules that need to be applied for the effectiveness of EU law (principle of procedural autonomy), although, when there is a conflict between the application of national procedural law and the application of EU law, the latter should prevail (principle of effectiveness).[5] On the basis of this jurisprudence, the CJEU comes to the conclusion that *the effectiveness of Articles 6(1) and 7(1) of Directive 93/13 require that national courts should disregard, in favour of the consumer, any principle of national procedural law, no matter how essential or core this principle might be in the particular procedural system.*

The following pages will be devoted to the judgments themselves – and, particularly, to looking at the principles of national procedural law that the CJEU is calling national courts to disregard. I will then discuss the consequences of these judgments for consumers, businesses and national courts. Subsequently, several points of critique will be made. Ultimately, I will look at alternatives and new trends, with a view to formulating a short conclusion.

2. *Unicaja*, *Ibercaja* and *SPV Project*

In *Unicaja*,[6] a Spanish consumer had sued her bank. She claimed that one of the terms of the contract of loan (the so-called 'floor clause') was unfair and that the bank should be ordered to repay the consumer *all* the amounts paid under the said term from the moment the contract entered into force. The consumer was represented by a lawyer. The Spanish Court of First Instance partially upheld the claim: it found that the term was indeed unfair, but, applying a judgment of the Spanish Supreme Court of 9 May 2013, it only ordered the bank to repay the amounts that had been unduly paid after 9 May 2013; the part of the claim relating to the amounts unduly paid before 9 May 2023

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[1] Case C-869/19, *L v Unicaja Banco SA, formerly Banco de Caja España de Inversiones, Salamanca y Soria SAU*, Judgment (17 May 2022) ECLI:EU:C:2022:397.

[2] Case C-600/19, *Ibercaja Banco SA*, Judgment (17 May 2022) ECLI:EU:C:2022:394.

[3] Cases C-693/19 and C-831/19, *SPV Project 1503 Srl and Others v YB and Others v YX and ZW*, Judgment (17 May 2022) ECLI:EU:C:2022:395.

[4] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L95/29.

[5] Cf L Cadiet, 'L'autonomie procédurale dans la jurisprudence de la Court de justice – Réflexions naïves d'un Huron au Palais du Kirchberg' in B Hess and K Lenaerts (eds), *The 50th Anniversary of the European Law of Civil Procedure* (Hart 2020).

[6] Case C-869/19 (n 1).

was expressly rejected (so that the bank was declared to be entitled to keep these amounts); costs were nevertheless awarded to the consumer. The bank filed an appeal but only contested the costs award. The consumer did not appeal, and therefore, according to Spanish law, the decision on the main claim became *res judicata*.

While the appeal filed by the bank was pending, the CJEU issued its judgment in *Gutiérrez Naranjo*[7] where it concluded that the judgment of the Spanish Supreme Court of 9 May 2013 was contrary to Article 6(1) of Directive 93/13 and, consequently, that consumers should be entitled to recover any amounts paid on the basis of a contract term that is unlawful under the Directive without any temporal limitation.

In the pending appellate proceedings initiated by the bank to challenge the costs award, neither the bank nor the consumer raised the issue of whether *Gutiérrez Naranjo* should be applied in any way to decide the appeal. A few weeks later, the Spanish Court of Appeal issued its ruling, limiting its decision to the only point that had been subject to the appeal, namely the issue of litigation costs.

The consumer then reacted by filing an appeal in cassation before the Spanish Supreme Court. The consumer argued that, even though the decision on the main claim had not been subject to the original appeal by the bank, the Court of Appeal should have *sua sponte* re-decided the whole case in light of the new case-law in *Gutiérrez Naranjo* and, thus, upheld the consumer's original claim in full with an order to repay all amounts paid under the unfair term. The Spanish Supreme Court noticed that the argument of the consumer was at odds with basic principles of national procedural law and sent a preliminary reference to the CJEU.

Ultimately, the CJEU found that, indeed, the effectiveness of Directive 93/13 required that the Spanish Court of Appeal should have re-decided the whole case in light of *Gutiérrez Naranjo*, even if this re-decision ultimately entailed the disapplication of a number of principles of national procedure. Particularly, these principles were:

1) Party disposition (para 15: 'principle of the delimitation of the subject matter of an action by the parties'): contrary to this principle, the CJEU said that the Spanish Court of Appeal should have extended sua sponte the subject matter of the appeal to an issue (the re-examination of the main claim in light of the then brand new CJUE's judgment in Gutiérrez Naranjo) that had not been raised by the parties.
2) Consistency of the judgment (para 15: 'the principle of the correlation between claims put forward in the action and the rulings contained in the operative part'): contrary to this principle, the CJEU said that the Spanish Court of Appeal should have ruled on an issue (the application of Gutiérrez Naranjo to the merits of the main claim) that was neither raised nor discussed during the appellate proceedings.
3) Prohibition that an appellant is prejudiced by her own appeal (para 15: 'the principle of the prohibition of reformatio in pejus'): contrary to this principle, the CJEU said that the Spanish Court of Appeal should have decided the appeal filed by the appellant (the bank) to worsen the appellant's position and favour the appellee (the consumer).
4) Res judicata (para 16: 'the rule of Spanish law according to which, where part of the operative part of a judgment is not challenged by any of the parties, the appeal court cannot deprive it of its effects or alter the wording thereof, displays certain similarities with res judicata'): contrary to this principle, the CJEU said that the Spanish Court of Appeal should have modified the part of the first instance judgment that had been accepted by the two parties and, thus, had become res judicata.

[7] Cases C-154/15, C-307/15 and C-308/15, *Gutiérrez Naranjo*, Judgment (21 December 2016) ECLI:EU:C:2016:980.

5) New case-law does not justify setting aside res judicata (see position of the Italian Government in para 29 of the opinion of AG Tanchev:[8] 'the subsequent reversal of national or Union case-law cannot justify setting aside the principle of res judicata'): contrary to this principle, the CJEU said that new case-law may be invoked to set aside a decision that has already become res judicata.

Moreover, in *Ibercaja*[9] and *SPV Project*,[10] the CJEU concludes that no rigid system of preclusion can be applied to the right of consumers to invoke unfair contract terms under Directive 93/13.

'Preclusion' here means the prohibition of making any submission or any act that was legally set to have been submitted or performed at an earlier stage. Thus, under a rigid system of preclusion, parties to judicial proceedings are strictly required to react timely, so that if they are given the opportunity to perform a specific act (eg, filing a brief, offer of a particular item of evidence…) and they fail to do so in the corresponding period or moment, they will be precluded (barred) from doing it at any later stage. This preclusion, which sometimes operates automatically (ie, by the mere fact of the passing of time, without any need for a judicial decision), is to apply, firstly, within the pending proceeding (internal effects of preclusion). And, secondly, it is also to apply in any subsequent proceeding between the same parties with a connected subject matter (external effects of preclusion), normally through the notion of 'implicit' or 'virtual' *res judicata*, which entails the legal fiction that there has been a judicial decision on all the questions that, although not actually raised by the parties and decided by the court, were closely connected to the case to which the final judgment refers. Naturally, the rigid system of preclusion intends to favour legal certainty, to structure the proceedings in a way that continuous back-and-forths are avoided and, ultimately, to require the parties (and their lawyers) to sharpen their diligence and refrain from hiding any information, arguments or evidence until the last minute.

In the context of the Spanish rigid system of preclusion, in *Ibercaja*,[11] the CJUE calls into question the internal effects of preclusion during a pending proceeding and the external effects of preclusion in subsequent proceedings. Essentially, the Court says that the opportunity of a consumer to raise the issue of the unfairness of contract terms is not subject to preclusion while the proceeding is pending; and that, if proceedings have terminated, such an issue may be validly raised in a subsequent proceeding. In the case at hand, a bank had instituted enforcement proceedings against a consumer on the basis of an enforceable instrument containing a contract of loan secured with a mortgage. The consumer had been duly served and had appeared before the court represented by a lawyer. As no opposition to enforcement was ever filed within the legal time-limit (ten working days after service), under Spanish procedural law, the consumer became precluded from opposing enforcement on any ground, including the potential existence of unfair terms. Almost twenty-one months after service, the consumer – still represented by a lawyer – raised the issue of the unfairness of the consumer contract at stake. The CJEU finally approved the conduct of the consumer and said that, in light of Directive 93/13 and the principle of effectiveness, no preclusion should apply and the court hearing the pending proceeding should examine whether there existed unfair terms or not. Moreover, the CJEU went on to say that, even if enforcement proceedings happened to be terminated and consumer's property had already been transferred to a third party, the existence of unfair contract terms could still be examined and decided in the context of a subsequent proceeding instituted by the consumer and aimed at 'obtaining compensation, under that Directive [93/13], for the financial consequences resulting from the application of unfair terms'.

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[8] Case C-869/19, *L v Unicaja Banco SA, formerly Banco de Caja España de Inversiones, Salamanca y Soria SAU*, Opinion of Advocate General Tanchev (15 July 2021) ECLI:EU:C:2021:617.

[9] Case C-600/19 (n 2).

[10] Cases C-693/19 and C-831/19 (n 3).

[11] Case C-600/19 (n 2).

In the same vein, in *SPV Project*,[12] the CJEU makes clear that consumers are exempted from preclusion regarding any subsequent proceedings (ie, from the external effects of preclusion in the form of an 'implicit *res judicata*' or '*preclusione pro judicato*'). In *SPV Project*, a creditor had instituted an order for payment procedure in Italy against a consumer and submitted the contract on which the claim was based. The consumer failed to file a statement of opposition in time and, as a result, the court issued a decision declaring the order for payment final and enforceable. Under Italian law, this decision was deemed to be equivalent to a final judgment with 'implicit' *res judicata* effects over any reasons the debtor might have had to oppose the claim (a rule which, incidentally, is very much in line with *Thomas Cook*[13]). Nevertheless, the CJEU said that neither preclusion nor *res judicata* applied and that the existence of unfair contract terms could still be examined and decided in the context of the subsequent enforcement proceedings.

3. Consequences

3.1. For consumers and their lawyers

As a result of *Unicaja*, *Ibercaja* and *SPV Project*, consumers and lawyers representing consumers (such as the lawyers representing the consumers in *Unicaja* and *Ibercaja*) are granted the greatest leeway to invoke unfair contract terms and are hardly subject to any procedural limit in this regard. It does not matter when and how they have pleaded unfair terms. Upon an allegation of unfair terms, the court will always be under the duty to examine this allegation, regardless of how negligent or wilful the consumer or her lawyer has been. Thus, at the end of the day, consumers and lawyers representing consumers are generally permitted to be negligent or to unfaithfully delay their allegations of unfair terms without hardly suffering any negative consequences from a procedural perspective.

However, there still seem to be two procedural limitations. The first and clearest limitation is explicit *res judicata*, as long there is no new case-law that would have amounted to a different decision. In this regard, it is worth recalling how, in *Unicaja*, there was an explicit decision of the court rejecting a part of the claim (the part relating to the amounts that had been unduly paid prior to 9 May 2013) and that this decision was *res judicata*, as the consumer – under the advice of her lawyer – had decided not to file an appeal. Nevertheless, the fact that the CJEU had issued subsequent case-law that would have led to the granting of that part of the claim (the judgment in *Gutiérrez Naranjo*) was found to be a sufficient ground to do away with *res judicata* and to allow the consumer to validly re-litigate the said part of the claim. Consequently, had not this subsequent case-law existed, the consumer would have been barred from any re-litigation. In summary, in the view of the CJEU, a consumer may be barred from invoking unfair contract terms for procedural reasons when: (i) there already exists a reasoned decision of a court – issued on its own motion or at the request of a party – analysing and establishing whether a particular contract term is unfair or not under Directive 93/13 (an 'explicit' or 'actual' *res judicata*);[14] and (ii) there is no new case-law justifying the setting aside of *res judicata*.[15]

The second and much more obscure limitation is that there has been a 'complete inaction on the part of the consumer concerned'.[16] However, one may wonder if these words of the CJEU – 'complete

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[12] Cases C-693/19 and C-831/19 (n 3).

[13] Case C-245/14, *Thomas Cook Belgium*, Judgment (22 October 2015) ECLI:EU:C:2015:715.

[14] Cf Case C-421/14, *Banco Primus*, Judgment (26 January 2017) ECLI:EU:C:2017:60, para 49.

[15] Case C-869/19 (n 1).

[16] Case C-869/19 (n 1) para 28; Case C-600/19 (n 2) para 44; Cases C-693/19 and C-831/19 (n 3) para 60; all of them mentioning Case C-32/14, *ERSTE Bank Hungary*, Judgment (1 October 2015) ECLI:EU:C:2015:637, para 62.

inaction on the part of the consumer concerned' – really entail a serious limitation for consumers willing to invoke unfair terms. In this regard, it should be recalled that, in *Unicaja, Ibercaja* and *SPV Project*, the consumers had remained inactive even though they had been duly served and – at least in *Unicaja* and *Ibercaja* – they were represented by a lawyer. In *Unicaja*, the consumer had failed to appeal the judgment delivered in the first instance and had failed to appear before the court of appeal and invoke the new case-law in *Gutiérrez Naranjo*; in *Ibercaja*, the consumer appeared before the court shortly after service but missed the opportunity to contest the proceedings timely (the opposition occurred almost twenty-one months after service); and, in *SPV Project*, the consumer had been duly served with the order for payment and had nonetheless remain inactive and let the order become final and enforceable.

From these facts, it follows that, for the CJEU, *a late reaction by the consumer cannot be considered a 'complete inactio*n' for the purposes of compliance with Directive 93/13 – even if it is an extremely late reaction, years later than the moment when that reaction was legally expected to have taken place. In addition, these facts also show that, for the CJUE, when assessing whether the consumer has been completely inactive, *it makes no difference whether the consumer is represented by a lawyer* (and, thus, whether the consumer has qualified legal advice in the ongoing proceeding and whether the consumer is ultimately entitled to sue her lawyer for professional misconduct in a subsequent proceeding). Consequently, if, in the mind of the CJEU, being legally represented and reacting almost two years later than the moment required by law cannot be regarded as a 'complete inaction', the notion of 'complete inaction' appears to be very diffuse. Perhaps, the only scenario where a 'complete inaction' can bar a consumer from validly invoking unfair terms is the following: (i) the court had expressly informed the consumer about the potential unfairness of the contract terms and about a clear and reasonable time-limit for the consumer to react; and, subsequently, (ii) the consumer either expressly refused to invoke unfair terms or let the said time-limit expire.[17]

3.2. For businesses

For businesses, *Unicaja, Ibercaja* and *SPV Project* are no good news. First, these judgments make businesses subject to procedural inequality. In this regard, it is now clear that, when businesses engage in consumer litigation, procedural limitations arising out of basic principles of procedural law (like preclusion or *res judicata*) apply to them but do not apply to the opposing party (the consumers) in respect of key allegations (unfair terms). And, most significantly, *Unicaja*, *Ibercaja* and *SPV Project* create a great deal of legal uncertainty, both during the pendency of proceedings and after *res judicata*, as businesses are constantly exposed to late submissions or the reopening of cases.

3.3. For national courts

For national courts, *Unicaja*, *Ibercaja* and *SPV Project* clearly entail a reinforcement of their power-duty to apply Directive 93/13 in favour of the consumer in any proceedings, either of its own motion or on the application of a party. The three judgments insist on the need for national courts to adopt a role of pro-active representatives of the State seeking that the outcome of the case duly favours the position of the consumer in accordance with EU law. While proceedings are pending, the court keeps its judicial power-duty to apply Article 6(1) of Directive 93/13 throughout the proceedings, including appeal stages; this contains the power-duty to investigate and require evidence from the parties with a view to deciding on the potential unfairness of terms in consumer contracts. This is,

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[17] Cf, in this regard, the reasoning of Case C-83/22, *Tuk Tuk Travel*, Judgment (14 September 2023) ECLI:EU:C:2023:664, para 61. Also, Case C-724/22, *Investcapital* Judgment (29 February 2024) ECLI:EU:C:2024:182, paras 46-52.

borrowing the words of *Bondora*,[18] the power to request from the parties 'additional information relating to the terms of the agreement relied on in support of the claim at issue, in order to carry out an *ex officio* review of the possible unfairness of those terms'. After proceedings have been finalised, this power may still be used, although only upon application of the consumer, and may operate against implicit *res judicata* and, when there is new case-law interpreting Article 6(1) of Directive 93/13, also against explicit *res judicata*.

Furthermore, under the jurisprudence in *Unicaja*, *Ibercaja* and *SPV Project*, national courts might face a greater deal of procedural complexity. The coexistence of two opposing procedural principles within the same procedure – one set of procedural principles applying to the right of the consumer to avail herself of the protection granted by Directive 93/13 and another set of principles applying to everything else – as well as the intrinsic procedural inequality of arms created by this coexistence, might not be easy to handle.

Finally, the three judgments are intended to increase the workload of the national courts. On the one hand, old cases may now be re-litigated. In Spain, for example, hundreds of thousands of cases on 'floor clauses' (around 700,000 cases only after 2017)[19] could be re-litigated on the basis of *Unicaja*.[20] On the other hand, in new cases, courts are urged to deploy more time and resources to analyse potential unfair terms. In general, this extra work should be aimed at providing legal certainty, in terms of producing a judicial decision that becomes explicit *res judicata* and is suitable for barring the consumer from validly invoking unfair terms in a belated manner. In this regard, for instance, the proposal of the Italian Attorney General to adapt the Italian order for payment procedure to *SPV Project* read: 'in the order for payment requested against a consumer, the judge must declare that she has examined the contract terms giving rise to the proceedings and that this examination, grounded at least in a summary manner, does not reveal the subsistence of any unfair term'.[21] This proposal was finally taken up and further developed by the Italian Supreme Court, so that, after *SPV Project*, any Italian judge who is to decide on an application for an order for payment:

> 'a) must carry out, of its own motion, a review of the potential unfairness of the terms of the contract concluded between the trader and the consumer in relation to the subject matter of the dispute;
>
> b) shall do so on the basis of the elements of fact and law that are already in its possession, which may be supplemented, pursuant to Article 640 of the Code of Civil Procedure, with its power to investigate of its own motion, to be exercised in harmony with the structure and function of the order for payment procedure:
>
> > b.1.) may, therefore, ask the plaintiff to produce the contract and to provide any clarifications that may be necessary, also in order to determine whether the debtor qualifies as a consumer;
> >
> > b.2) where the assessment is complex, as the judge shall not conduct an *ex officio* investigation that exceeds the function and the purpose of the order for payment procedure

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[18] Cases C-453/18 and C-494/18, *Bondora*, Judgment (19 December 2019) ECLI:EU:C:2019:1118.

[19] Cf the yearly reports *Panorámica de la Justicia*, available at the website of the Statistics Department of the Spanish Council for the Judiciary <https://www.poderjudicial.es/cgpj/es/Temas/Estadistica-Judicial/Estudios-e-Informes/Panoramica-de-la-Justicia/> accessed 1 April 2024. Raw data is available at <https://www.poderjudicial.es/cgpj/es/Temas/Estadistica-Judicial/Base-de-datos-de-la-estadistica-judicial--PC-AXIS-/> accessed 1 April 2024.

[20] Some examples of judgments deciding these re-litigated cases shortly after *Unicaja* were published: Judgment of the Audiencia Provincial Badajoz (2nd Section) 1014/2022, of 30 December, ES:APBA:2022:1658; Judgment of the Audiencia Provincial Ciudad Real (2nd Section) 540/2022, of 28 November, ES:APCR:2022:1663; Judgment of the Audiencia Provincial Cáceres (1st Section) 742/2022, of 25 October, ES:APCC:2022:990.

[21] *Conclusioni della Procura Generale della Corte di Cassazione*, appeal no. 24533/2021, of 30 January 2023, 17.

(e.g. she shall not request a court-appointed expert's report), the judge shall reject the application for an order for payment;

c) at the outcome of the review:

c.1) if it finds that the clause is unfair, it will draw the consequences as to the rejection or partial granting of the application;

c.2) if, on the other hand, the review on the unfairness of the clauses affecting the claim brought before the court gives a negative result, it will issue a reasoned decree, pursuant to Article 641 of the Code of Civil Procedure, also in relation to the aforesaid examination;

c.3) the order for payment will contain the warning indicated in Article 641 of the Code of Civil Procedure as well as the express warning that, in the absence of opposition, the consumer-debtor will no longer be able to rely on the possible unfairness of the terms of the contract and the decree not opposed will become irrevocable'.[22]

4. Critique (i): Doubts as to equality, legal certainty and impartiality

In my understanding, reasonable doubts may be raised as to the compatibility of the jurisprudence in *Unicaja*, *Ibercaja* and *SPV Project* with essential procedural guarantees, namely the principles of equality, legal certainty and impartiality.

As pointed out above, these three judgments of the CJEU bring a degree of procedural inequality, as businesses are still subject to a number of procedural limitations from which their counterparties (the consumers) are freed. This may lead to unfair situations where, for example, the consumer is permitted to invoke unfair terms more than one year later than the moment required by national procedural law (as no preclusion ever applies to consumers) whereas a business' submission may be rejected because of a delay of one day (as preclusion still applies to businesses).

More worrying, in this author's view, are the consequences in terms of lack of legal certainty for businesses, especially in terms of the instability of explicit *res judicata*, which, after *Unicaja*, will *ad infinitum* remain conditional on any changes in the case-law of the CJEU. In addition, the CJEU seems to have done away with the legal certainty that several European systems seek with the notion of implicit *res judicata*. In a way, it looks like a majority of judges at the CJEU have a sort of 'allergy' to this notion and think that the only admissible – the only true – notion of *res judicata* appears to be that of explicit *res judicata*.

Finally, a more personal concern – probably very much related to the particular legal culture of the author of these lines, where judges are meant to clearly distance themselves from the parties – is the risk to judicial impartiality. This concern is not limited to *Unicaja*, *Ibercaja* and *SPV Project*, as it extends to the whole case-law of the CJEU requiring national courts to deploy a pro-active role in favour of one party to the proceedings (the consumer) to the detriment of the other party (the business). The way I see things, the CJEU is constantly asking national courts to protect *ex officio* one of the parties to the proceedings and to do nothing to protect the other.

It will be argued that this is not really the case, as the CJUE is simply requiring national courts to apply EU substantive law (to make this law effective), which is part of their judicial function. Nevertheless, this argument is hiding that, to achieve this noble aim (to make law effective), the CJEU is requiring judges (who are natural persons, with all their cognitive flaws and limitations) to take a psychological stance in favour of the consumer. Under the case-law of the CJEU, judges must

[22] Judgment of the *Corte Suprema di Cassazione* (*Sezioni Unite Civili*) 9479/2023, appeal no. 24533/2021, of 6 April 2023, 40-41.

scrutinise the contract terms in search of any indications of unfairness and, as appropriate, demand additional information or evidence from the parties in order to determine whether any unfairness exists. In other words, the CJEU requires that, to favour one party, national judges carry out an investigation on the facts and evidence of the case. This kind of investigation has long been seen as potentially compromising impartiality, as shown by the studies on the confirmation bias and the cognitive dissonance.[23] Indeed, once a person has conducted an investigation and has come to a conclusion, she has a natural tendency to overestimate any assertions or materials confirming her conclusion and, in turn, to underestimate any other assertions or materials contradicting her conclusion; in short, an investigator cannot be truly impartial. Ultimately, this explains why, in criminal cases, the role of the (partial) investigator and the role of the (impartial) adjudicator must be clearly separated.[24]

Under the current jurisprudence of the CJEU, national judges are turned into a sort of 'consumer police' who must investigate *ex officio* any deed committed by businesses violating Directive 93/13. The policy decision to create a function of 'consumer police' may, to some extent, be plausible. But, from the perspective of the right to a fair trial before an impartial tribunal enshrined in Article 6 ECHR, I doubt whether it is a good idea to attribute this function of 'consumer police' to the same judges that are required to adjudicate the same cases that they were previously required to investigate. Perhaps, involving other types of national authorities, such as the State Attorney or specific public agencies would have been a better idea. And, in any event, I very much doubt whether the CJUE was the right institution to create such a function and to attribute it to national judges.

Be it as it may, it should be stressed that, in order to preserve judicial impartiality as much as possible, once the condition of the defendant as a consumer is clarified, any *ex officio* investigation of civil judges on unfair terms must be limited to very simple tasks, namely asking the parties to submit the contract or any other document whose existence may be inferred from the submissions of the parties, and assessing whether the terms of the contract are unfair under Directive 93/13. Going beyond these tasks without an application of a party would put judicial impartiality too much at risk.[25]

5. Critique (ii): The effectiveness of Articles 6(1) and 7(1) of Directive 93/13 does not require the non-application of basic principles of national procedural law

Even if the aforementioned doubts about equality, legal certainty and impartiality could be overcome, there is still, in my view, a fundamental critique to the approach of the CJEU in *Unicaja, Ibercaja* and *SPV Project*, namely that the effectiveness of Articles 6(1) and 7(1) of Directive 93/13

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[23] Cf, eg, R Nickerson, 'Confirmation Bias: A Ubiquitous Phenomenon in Many Guises' (1998) 2(2) Review of General Psychology 175.

[24] Cf *De Cubber v Belgium*, Application No 9196/80, Judgment (26 October 1984), ECLI:CE:ECHR:1984:1026JUD000918680, paras 27-30, although an assessment of the particular circumstances is required in order to determine the extent to which an investigating judge dealt with the case and whether this extent amounts to a lack of impartiality (cf ECtHR *Borg v Malta*, Application No 37537/13, Judgment (12 January 2016), ECLI:CE:ECHR:2016:0112JUD003753713, paras 88-90).

[25] Cf M Cedeño Hernán, *Protección de los consumidores, claúsulas abusivas y poderes de dirección del juez en el Proceso Civil* (Tirant 2023) 93-94, emphasizing that the *ex officio* investigation must be limited to evidence mentioned in the court file so that the civil judge does not become a inquisitor who goes out of the proceedings in search of unknown or unmentioned evidence. In support of her conclusion, the author looks at the opinion of AG Tanchev in Case C-511/17 (*Lintner*, Opinion of Advocate General Tanchev (19 December 2019) ECLI:EU:C:2019:1141, paras 59-64). According to AG Tanchev, it is acceptable that a national court takes measures *ex officio* 'to complete the case file, such as requesting clarification or documentary evidence from the parties in the dispute, in order to form an opinion whether a contractual term is unfair'. AG Tanchev concludes that the matter of whether national courts should have 'more extensive *ex officio* 'measures of inquiry'' (such as '*ex officio* hearing of witnesses, *ex officio* ordering of evidence by third parties, *ex officio* hearing of experts, or *ex officio* visits') 'remains in principle within the discretion of the national court based on the relevant national procedural law'.

does not require the non-application of the basic principles of national procedural law that were considered in the three judgments.

5.1. On the argument that consumers are to be treated differently in civil proceedings because they are 'weak' parties under Article 6(1) of Directive 93/13

In its judgments, the CJEU seems to suggest that the non-application of basic procedural principles is necessary to even up the power imbalance that exists between the consumer and the business, which would correspond to the purpose of Article 6(1) of Directive 93/13. In other words, for the CJEU, it appears that, under Article 6(1), a consumer litigating with a business must be considered as a 'weak' or 'vulnerable' party who deserves special treatment in terms of procedure, amounting to exceptions to basic principles of national procedural law.[26]

Indeed, Article 6(1) of Directive 93/13 deals with a situation of presumed power imbalance – of presumed inequality – between consumers and businesses.[27] Yet, in my understanding, Article 6(1) does not deal with an imbalance of power existing in a procedural setting but with an imbalance of power existing *at the time the contract is signed*. Due to the different bargaining power that exists between the two parties to the contract, Article 6(1) mandates that all unfair terms shall not be binding on the consumer. This is a substantive provision trying to correct an imbalance that appears at the contractual stage, when no judicial proceedings have yet occurred. As such, the provision may operate outside judicial proceedings and without the need for judges to intervene. Thus, it is not a provision attempting to correct any *procedural* inequality or imbalance; it is not a provision implying a need for any special *procedural* treatment of consumers.

Let us now imagine that Article 6(1) is not duly complied with, so that a business tries to enforce an unfair term (to make it binding) on the consumer. We could then end up in a procedural setting before the courts of justice. In this setting, the question is whether Article 6(1) may be fully effective in a court system that applies the procedural principles of party disposition, consistency of the judgment, prohibition of *reformatio in pejus*, preclusion, *res judicata* and prohibition of new case-law as a ground for altering *res judicata*. To this question, *Unicaja, Ibercaja* and *SPV Project* have responded in the negative. Yet, I believe that this response is not appropriate as, in my view, Article 6(1) may be fully effective in a procedural setting where the said basic principles of national procedural law are respected *provided that the consumer acts diligently*. To justify this opinion, I will refer briefly to the general position of claimants and defendants in civil proceedings and, subsequently, to the question of whether consumers merit to be treated differently.

In general, civil claimants are expected to have *diligently* sought the necessary legal advice or information before filing their claims. Regarding civil defendants, once they have been duly served, they should *diligently* take the proceedings seriously and decide whether and how to react. Here, a defendant may decide either to appear before the court and provide for her defence, or to remain silent (in default). The need to make this choice does not result from a proper duty but from a burden

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[26] Case C-600/19 (n 2) paras 35-37 and Cases C-693/19 and C-831/19 (n 3) paras 51-53: 'According to settled case-law of the Court, the system of protection introduced by Directive 93/13 is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his or her bargaining power and his or her level of knowledge. As regards that weaker position, Article 6(1) of the Directive provides that unfair terms are not binding on consumers. It is a mandatory provision which aims to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them. In that context, the Court has held on several occasions that the national court is required to assess of its own motion whether a contractual term falling within the scope of Directive 93/13 is unfair, compensating in this way for the imbalance which exists between the consumer and the seller or supplier, where it has available to it the legal and factual elements necessary for that task.'

[27] Cf Recital 9 of the Directive 93/13 (n 4).

on the defendant.[28] An equivalent degree of diligence is therefore required of both claimants and defendants when it comes to defend their cases.

Moving one step forward, the general rule is procedural equality, ie, that claimants and defendants shall enjoy equivalent procedural rights, burdens and duties. Of course, procedural equality does not mean that claimants and defendants are completely equal, and some of the inequalities that might exist between claimants and defendants have caught the eye of the law. Consequently, legal systems usually provide mechanisms for correcting potential party inequalities and information asymmetries in litigation. Among these mechanisms, it is frequent to find rules facilitating one party to hire a lawyer at the early stages of the proceedings, so that both parties can access qualified legal advice;[29] these rules may even foresee automatic free legal aid for certain types of litigants who are deemed to deserve a special protection.[30] Depending on whether parties are legally represented, different situations may occur:

a) When both parties have appeared before the court and are represented by a lawyer, to the best of my knowledge, legal systems never go as far as comparing the reputation or the quality of the work of the lawyers, as all of them are deemed to be equally competent. Thus, normally, the law does not engage into a discussion about potential procedural inequalities arising out of the allegedly better or worse legal skills of the lawyer of one of the parties. Accordingly, the legal consequences of the lawyers' mistakes and the impact of these mistakes on the client's interests should be the same, regardless of the actual legal skills of the lawyer making the mistake. Indeed, the rules dealing with lawyers' mistakes may vary from one jurisdiction to another. A strict approach is that the consequences of those mistakes shall stay within the boundaries of the contractual relationship between lawyer and client – allowing the client to institute new proceedings against her lawyer for professional misconduct – and do not affect the on-going proceedings.[31] A lenient approach would permit the correction of the mistake in the on-going proceedings, thereby freeing the client from any negative consequences of the said mistake, even though often at the price of creating additional work for the court and the counterparty, as well as additional costs and delays in the proceedings.[32] Every legal system chooses its own approach and that approach remains the same for every lawyer representing a party, irrespective of the lawyer's reputation or skills.

b) When, after the defendant has been duly served, it turns out that one party is represented by a lawyer and the other is not, legal systems sometimes consider introducing some legal mechanisms to correct potential procedural inequalities arising out of the fact that one party is represented by a lawyer while the other is not. Here, three different scenarios may be envisaged:

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[28] Cf V Richard, *Le jugement par défaut dans l'espace judiciare européen* (2019, PhD Thesis. Droit. Université Panthéon-Sorbonne - Paris I) 87 ff, 160 ff <https://theses.hal.science/tel-02519727> accessed 1 April 2024.

[29] Cf WB Rubenstein, 'The concept of equality in civil procedure' (2002) 23(5) Cardozo Law Review 1877-1878, mentioning legal aid schemes or rules aiming at making lawyers more affordable.

[30] Eg, Article 2(d) of the Spanish Free Legal Aid Act grants free legal aid – which includes free legal representation – to all employees litigating for the rights against their employers, irrespective of the higher or lower financial resources the employee might have.

[31] Eg, the approach of the Italian *Corte di Cassazione (Sezione V)* in its Ordinanza no. 29548, of 25 October 2023, appeal no. 9993/2015, para 15: 'Likewise, in the case of a late filing of an appeal, the party may not be granted relief from sanctions if the delay is due to a fact attributable to the defence counsel, the latter's negligence constituting an event external to the trial, which pertains to the pathology of the relationship [of the party] with the professional, relevant only for the purposes of a liability action against the said professional'.

[32] This kind of approach is possible in England and Wales, in light of the particular circumstances surrounding the lawyer's mistake. Eg, *Badejo v Cranston [2019] EWHC 3343 (Ch)*: 'justice is better done in this case by enabling the current action to proceed to a trial, rather than requiring the appellant to start new proceedings for his claim, or alternatively a claim for negligence against the solicitors, or possibly both. Paying all the costs of the current claim, and incurring the cost of funding two new actions, would in my judgment be disproportionate to the seriousness of the breach and any harm done to the administration of justice or to the respondent that is attributable to the breach'.

- When the non-represented party has actually appeared before the court (as a self-represented party or, with the expression used in Ireland, England and Wales, as a 'litigant in person'), it may be reasonable to infer that the represented party has better and immediate access to legal advice both in terms of substance and procedure, while the non-represented party has not. To correct this procedural imbalance, legal systems may provide for mechanisms facilitating the non-represented party to access legal representation for the on-going proceedings.[33] Other legal systems provide the non-represented party with general information about procedure, or even refer the non-represented party to supporting institutions.[34] Eventually, some legal systems also include some procedural tools that would allow the judge hearing the case to give some guidance to the non-represented party, so long impartiality is not put at risk.[35]
- When the non-represented party is a defendant in default of appearance, it is reasonable to assume that the claimant is in an advantageous position to win the case, as the court can only consider the claimant's arguments and evidence. Generally, legal systems do not provide any means to correct this imbalance, as the imbalance is presumed to have been created by the will or neglect of the defendant in default of appearance, and thus it seems fair that she is the only one suffering the consequences. Nevertheless, when this presumption does not correspond to reality – because the defendant did not appear before the court because of force majeure or any other reasons beyond her control – legal systems provide for remedies to set aside the default judgment and restore procedural equality.[36]
- Exceptionally, where the law considers the non-represented party as a 'vulnerable' party for whom it may be impossible or very difficult to understand the legal implications of litigation, legal systems provide mechanisms to correct the imbalance arising from the inactivity of the defendant. For example, some legal systems prohibit a default judgment against minors or mentally disabled persons and provide for the appointment of a public defender who will then take over the legal representation of the vulnerable party.[37]

Let us now turn to consumers. In my view, under the current statutory law, there is no reason to conclude that they must be subject to different rules. The substantive rule in Article 6(1) of Directive 93/13 does not say anything about procedure. And there is not, to my knowledge, any special procedural rule establishing that the procedural situation of a consumer is essentially different from the procedural situation of any other claimant or defendant. If Ms Smith, 35 years old, rents a car under a contract that includes unfair terms, she may go into litigation as a consumer against the car rental company. If the same Ms Smith injures Mr Jones, 85 years old, while driving her car, she might find herself into litigation as a non-consumer against Mr Jones. As Ms Smith happens to be the same person in both types of litigation, *from a procedural viewpoint*, there are no essential differences between the position of Ms Smith when litigating as a consumer against the car rental company and the position of Ms Smith when sued as a non-consumer by Mr Jones. A consumer engaged in litigation is essentially a citizen engaged in litigation, irrespective of who is the opposing party. There are a few explicit procedural rules that benefit consumers (eg, special rules on jurisdiction;[38]

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[33] Eg, in Spain, Article 32 of the Code of Civil Procedure provides for a mechanism whereby, when just one of the parties is represented by a lawyer, the party who is not represented by a lawyer may request the stay of proceedings for the purposes of availing herself of a free legal aid scheme.

[34] Eg, in England and Wales, <https://www.judiciary.uk/guidance-and-resources/advice-for-litigants-in-person/> accessed 1 April 2024.

[35] One of these tools is the German *Hinweispflicht* (§ 139 ZPO), which may benefit both represented and non-represented parties, provided that impartiality is preserved. Cf PL Murray and R Stürner, *German Civil Justice* (Carolina Academic Press 2004) 176-177.

[36] Cf V Richard (n 28) 178 ff.

[37] Eg, Article 8 of the Spanish Code of Civil Procedure.

[38] Eg, Articles 17-19 of Regulation 1215/ 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L351/1.

or rules alleviating the burden of proof for consumers[39]). Yet, the same due diligence and the same burdens of appearance and defence apply to both consumers and non-consumers.

Accordingly, consumer-claimants are expected to *diligently* seek the necessary legal advice before filing their claims; and consumer-defendants are expected to choose their reaction *in a diligent manner*. Furthermore, consumers have access to lawyers and legal aid schemes, just as any claimant or defendant has. And, finally, consumers may reasonably be subject to the same rules that apply to non-consumers when it comes to the consequences of their procedural activity or lack of activity:

a) When the consumer is represented by a lawyer (as happened in Unicaja and Ibercaja), there are no legal grounds to presume that the legal advice provided by this lawyer is of a poorer quality than the legal advice provided by the lawyer of the counterparty. Thus, there are no grounds to apply one set of rules to the consequences of the mistakes committed by the lawyer of the consumer and another set of rules to the mistakes committed by the lawyer of the counterparty.

b) When the consumer has no legal representation, none of the potential scenarios amount to a special procedural treatment:

    - If the consumer has actually appeared before the court without legal representation, she might avail herself of all the means that the legal system deploys to ensure the legal protection of any other type of self-represented party.
    - When the consumer is a defendant in default of appearance, she may suffer the same consequences as any other defendant who remains silent after service and, consequently, she may be exposed to default judgments and their legal equivalents, such as orders for payment that have become final and enforceable (as happened in SPV Project).
    - Finally, to my knowledge, there are no statutory rules – at least no explicit rules – establishing that consumers are to be regarded as 'vulnerable' parties, in the sense that they should be granted a public defender when they remain inactive in judicial proceedings.

Against this background, I believe that a consumer taking judicial proceedings seriously and, as appropriate, making use of the mechanisms that aim at correcting procedural imbalances – mechanisms that apply to all sorts of claimants and defendants, irrespective of their condition of consumer or of non-consumer – should never fear the procedural principles of party disposition, consistency of the judgment, prohibition of *reformatio in pejus*, preclusion, *res judicata*, and prohibition of new case-law as a ground for altering *res judicata*. None of these principles prevents a diligent and responsible consumer from availing herself of the protection granted by Article 6(1) of Directive 93/13. She just has to seek the necessary legal advice without delay and use the opportunities given by the procedural rules to invoke unfair terms in a timely way.

5.2. On the argument that Articles 6(1) and 7(1) of Directive 93/13 amount to a special treatment of consumers for reasons of public interest

It may nevertheless be argued, 'but what if the consumer is not diligent and responsible?' Here the answer of *Unicaja, Ibercaja* and *SPV Project* appears to be that the lack of diligence and responsibility on the part of the consumer shall nevertheless not prevent the application (the *effectiveness*) of Article 6(1), as the non-binding nature of unfair terms is a *rule of mandatory law that has a strong dimension of public interest*. Accordingly, the CJUE seems to conclude that Article 6(1) should be

[39] Eg, Article 11 of Directive 2019/771 on certain aspects concerning contracts for the sale of goods, OJ L136/28.

applied (should be *effective*) at any cost, even at the cost of sacrificing basic procedural principles.[40] Again, I believe this further argument of the CJEU is not accurate.

In this respect, it should be noted that there are many provisions of mandatory civil law, both of national law (eg, on tenancies[41]) and of EU law (eg, on competition[42]), that the courts may only enforce upon a timely request of the person concerned (ie, with due regard to the principles of preclusion, party disposition and consistency of the judgment), that do not require that a party should be prejudiced by her own appeal (ie, with due respect to the principle of prohibition of *reformatio in pejus*) and whose application to a particular case may be decided in a stable manner by way of *res judicata* (ie, with due respect to the principle of *res judicata* and the prohibition of using new case-law as a ground for altering *res judicata*). In other words, for many years, the fact that mandatory rules – either national or European mandatory rules – might be applicable to a particular case has not determined the need to do away with basic procedural principles.[43] Of course, this reality does not prevent the law-maker from establishing that some particular rules of mandatory civil law, in light of the public interest that they entail, must be enforced against some of those principles; ie, the law-maker is naturally free to establish exceptions to the application of basic procedural principles.[44] However, I believe the EU law-maker has not – at least, not yet – made this decision in regard to the EU rules on unfair terms in consumer contracts, as, in my honest opinion, no provision in Directive 93/13 contains that kind of exceptions.

As indicated above, Article 6(1) is, to my understanding, a purely substantive provision without any procedural implications for the national legal systems. And, furthermore, Article 7(1) – the other provision of Directive 93/13 that was taken into account by the CJEU as a ground for its decisions on *Ibercaja* and *SPV Project* – does not establish any exceptions to the principles of national procedural law either. This latter article requires Members States to ensure that adequate and 'effective means' exist to prevent the continued use of unfair terms. However, in my opinion, the existence of those 'effective means' is perfectly compatible with the basic principles of national procedure that were considered in *Unicaja*, *Ibercaja* and *SPV Project*. Here, Article 7(1) may perfectly be effective when

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[40] Case C-600/19 (n 2) para 36, and Cases C-693/19 and C-831/19 (n 3) para 52, stressing that Article 6(1) of Directive 93/13 'is a mandatory provision'. Also, Case C-600/19 (n 2) para 50, and Cases C-693/19 and C-831/19 (n 3) para 65, underscoring 'the nature and importance of the public interest underlying the protection which Directive 93/13 confers on consumers'.

[41] Eg, Article 4.1 of the Spanish Urban Tenancies Act (Act no. 29/1994, of 24 November): 'The leases governed by this Act shall be imperatively subject to the provisions of Titles I and IV hereof and to the provisions of the following paragraphs of this Article'.

[42] Cf Recital 1 of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance, OJ L349/1: 'Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) are a matter of public policy'.

[43] In my opinion, it is not right to make a difference between *national* and *EU* mandatory law for the purposes of determining whether basic principles of national procedural law should or should not be respected. This conclusion is implied by the CJEU in *Van Schijndel* (C-430/93 and C-431/93, *Van Schijndel*, Judgment (14 December 1995) ECLI:EU:C:1995:441, para 13). Here, it is worth quoting the opinion of AG Jacobs (C-430/93 and C-431/93, *Van Schijndel*, Opinion of Advocate General Jacobs (15 June 1995) ECLI:EU:C:1995:185, para 27): '(...) if the view were taken that national procedural rules must always yield to Community law, that would, as will appear below, unduly subvert established principles underlying the legal systems of the Member States. It would go further than is necessary for effective judicial protection. It could be regarded as infringing the principle of proportionality and, in a broad sense, the principle of subsidiarity, which reflects precisely the balance which the Court has sought to attain in this area for many years. It would also give rise to widespread anomalies, since the effect would be to afford greater protection to rights which are not, by virtue of being Community rights, inherently of greater importance than rights recognized by national law.' Surprisingly, the CJEU took a different approach in a judgment delivered on the same day (14 December 1995), namely in *Peterbroeck* (C-312/93, *Peterbroeck*, Judgment (14 December 1995) ECLI:EU:C:1995:437). In this case, the CJEU concluded that national procedural rules on time-limitations could be disregarded for the sake of the effectiveness of EU law, even though those procedural rules would still apply in the context of a purely domestic case where only substantive national laws were at stake. Yet, the decision in *Peterbroeck* was much influenced by the 'procedural circumstances such as those in question in the main proceedings'.

[44] This is, for example, the case of Article 752(1) of the Spanish Code of Civil Procedure, under which, when it comes to cases dealing with family law, party disposition is limited, the principle of preclusion does not apply, the State Attorney is generally called to intervene and the court has a duty to order the taking of evidence *ex officio*.

Member States allow a combination of civil actions brought by individual consumers acting with due diligence and care, on the one hand, and applications for injunctions brought by the entities mentioned in Article 7(2), on the other. The fact that the effectiveness of these instruments (these 'means') does not require the suppression of the basic principles of national procedure follows from Article 7(3), which refers to the 'due regard for national laws'; and it also follows from the fact that judges may provide the full protection granted in Directive 93/13 – ultimately contributing to deterring businesses from the persistent use of unfair terms, as required by Article 7(1) – upon the use of those actions and injunctions in accordance with the said procedural principles. Thus, contrary to the opinion of the CJEU, I believe that no exceptions to basic principles of national procedural law may be inferred from Articles 6(1) and 7(1) of Directive 93/13. These two provisions can very well be effective without those exceptions.

6. Critique (iii): Unjustified undermining of procedural autonomy in consumer cases

As it has just been pointed out, in its quest to provide the consumer with the protection afforded by mandatory EU law, in *Unicaja*, *Ibercaja* and *SPV Project*, the CJEU has supplanted the EU law-maker and has created exceptions to basic principles of national procedural law. From these exceptions, it follows that, in consumer cases where Article 6(1) of Directive 93/13 may be applicable, the CJEU requires Member States to have:

- a specific type of judge, namely a judge who has the duty to be pro-active and pro-consumer, even beyond the consumer's pleas, when it comes to ensure the application of Article 6(1);
- a specific structure of the proceedings, namely a flexible structure where the proceeding may move back and forth upon late submissions made by the consumer;
- a specific rule on appeals, namely that those litigating with consumers might be prejudiced by their own appeals; and
- a specific regulation on res judicata – and, thus, on the scope of any subsequent litigation related to an already-decided case – namely that, as regards the application of Article 6(1), the consumer is freed from implicit res judicata and is permitted to challenge explicit res judicata where there is a new case-law interpreting Article 6(1).

These legal requirements of the CJEU are strongly undermining the principle of procedural autonomy, as they impose on Member States the duty to regulate key elements of civil procedure in a particular way. This undermining is, in my opinion, unjustified. As argued in point 5 above, the effectiveness of Article 6(1) and Article 7(1) does not require the non-application of the basic principles of national procedural law considered in *Unicaja, Ibercaja* and *SPV Project*. Thus, ultimately, these three judgments demolish procedural autonomy in consumer cases without good reason.

7. Critique (iv): New risks of reluctance to accept the primacy of EU law and the authority of the CJEU

Furthermore, *Unicaja, Ibercaja* and *SPV Project* created new risks of reluctance to accept the primacy of EU law and the role of the CJEU.

In this regard, a preliminary point is the question of whether the effectiveness of EU law may displace the effectiveness of principles that are deemed to be protected by the Constitutions of

Member States. In *Melloni*,[45] the CJEU responded in the affirmative. However, in subsequent decisions, some constitutional courts have responded in the negative, as they understand that national Constitutions always prevail over EU law. This is the argument behind the *Weiss* judgment of the German Constitutional Court (applying the doctrine of *ultra vires*),[46] the decisions of the Italian Constitutional Court in *Taricco* (implying the possibility of applying the doctrine of the 'counter-limits')[47] or, more recently, the judgment of 7 October 2021 of the Polish Constitutional Court (stressing that the Polish Constitution takes precedence over the EU treaties).[48]

Coming back to *Unicaja*, *Ibercaja* and *SPV Project*, it should be noted that some of the basic principles of national procedural law that were done away with by the CJEU had a constitutional dimension. As the three judgments of the Court dealt with Italian and Spanish cases, let us look at Italy and Spain. In Spain, the principle of *res judicata* is connected with the principle of legal certainty, which is expressly mentioned in Article 9(3) of the Spanish Constitution; and, very much related to the principle of legal certainty, the Spanish Constitutional Court had repeatedly stated that the fundamental right to effective judicial protection under Article 24(1) of the Spanish Constitution includes the right to 'irrevocability, intangibility and inalterability' of final and non-appealable judgments – a statement that, at the end of the day, connects the respect for *res judicata* with the preservation of fundamental rights.[49] A similar argument may be made for Italy, where Articles 3 and 24 of the Italian Constitution had led to conclude that 'the stability of the outcome of judicial proceedings enjoys a constitutional guarantee'.[50] Furthermore, as expressly indicated by the Spanish Supreme Court in its preliminary reference to the CJEU in *Unicaja*, the Spanish Constitutional Court had declared that a violation of the prohibition of *reformatio in pejus* entailed a violation of the fundamental right to effective judicial protection under Article 24(1) of the Spanish Constitution.[51]

Thus, *Unicaja, Ibercaja* and *SPV Project* called into question legal principles protected by the Spanish Constitution and by the Italian Constitution (*res judicata* both in Italy and Spain, and the prohibition of *reformatio in pejus* in Spain). In that legal setting, it could be argued that these judgments risked another crisis between the CJEU and the higher courts of Spain and Italy. These higher courts – inspired by previous decisions of the constitutional courts of Germany, Italy and Poland – could have argued that, regarding *res judicata* and – in Spain – the prohibition of *reformatio in pejus*, the CJEU's decisions should not be abided by, as they were in contradiction with their national constitutions.

The strongest threat that such a thing might happen came from Italy. There, the question of the compatibility of *Unicaja, Ibercaja* and *SPV Project* with Italian law was considered of 'the greatest particular importance' and was referred to the United Sections (*Sezioni unite)* of the Italian Supreme Court for a 'declaration on a point of law'.[52] The potential responses that the United Sections could provide were then analysed in a paper written by Franco De Stefano, who is a judge presiding one of the sections of the Italian Supreme Court. Among those potential responses, De Stefano mentioned the possibility of a 'dissent' through 'a question of constitutional legitimacy to the [Italian]

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[45] Case C-399/11, *Melloni*, Judgment (26 February 2016) ECLI:EU:C:2013:107, paras 55-64.

[46] BVerfG, Judgment of the Second Senate of 5 May 2020 - 2 BvR 859/15, ECLI:DE:BVerfG:2020:rs20200505.2bvr085915.

[47] Order of the Italian Constitutional Court of 23 November 2016, No 24/2017, and Judgment of the Italian Constitutional Court of 31 May 2018, No 115/2018.

[48] Judgment of the Polish Constitutional Court of 7 October 2021 (K 3/2021).

[49] Eg, Judgment of the Spanish Constitutional Court 173/2021, of 25 October de 2021 (ECLI:ES:TC:2021:173).

[50] Eg, R Caponi, 'Giudicato civile e identità nazionale (un appunto con contrappunto sul caso *Taricco*)' (2017) 1 Questione Giustizia 105, 107. The connection between *res judicata* and Articles 3 and 24 of the Italian Constitution appears in the Judgment of the Italian Constitutional Court 364/2007 (ECLI:IT:COST:2007:364).

[51] Eg, Judgment of the Spanish Constitutional Court 196/1999, of 25 October 1999 (ECLI:ES:TC:1999:196).

[52] The referral was operated by the Order of 7 July 2022, of the incumbent President of the Third Civil Section of the Italian Supreme Court, appeal no. 24533/2021.

Constitutional Court for the evaluation of the compatibility of the EU solution with the founding principles of the national constitutional order' or, alternatively, 'a new referral of the question to the Court of Justice, this time prospecting more carefully the centrality in our system of the value of the finality of judicial decisions and the correlated implicit, although "conscious", *res judicata*'. This approach would entail, 'in essence, a thoughtful activation of domestic counter-limits, which could consider as inalienable – for national identity itself – the legal certainty arising from the regime of finality of judicial titles: under the visual angle, at the very least, of the necessary repudiation of a regime of perennial instability of the measures achieved in the courts, the first element of uncontrollable entropy and insecurity in legal, economic and social relations; and, moreover, in an order, such as the Italian one, in which, due to its known structural characteristics, it is already in itself arduous to achieve a judicial title in a timely manner'.[53]

Fortunately for the stability of the EU legal system, the Italian Supreme Court ultimately discarded this drastic approach and decided the issue in a much more quiet way, by way of urging Italian courts always to seek a specific decision on unfair terms leading to explicit *res judicata*, as anticipated above.[54] A similar quiet way to incorporate the new jurisprudence of the CJEU into Spanish law was ultimately adopted by the Spanish Supreme Court.[55]

8. Critique (v): Uncertainty as to the scope and limits of the new jurisprudence of the CJUE

Another important issue arising out of *Unicaja, Ibercaja* and *SPV Project* relates to the scope and limits of the new jurisprudence that these judgments developed and its potential application to other cases dealing with unfair terms and beyond. In this regard, several points of legal uncertainty could be identified.

First, still within the boundaries of the protection of consumers against unfair contract terms, some courts showed doubts as to whether and, as appropriate, how this jurisprudence should be applied. Three preliminary references illustrate these doubts. In *ACNC*,[56] a Spanish court invoked the preliminary reference in *Unicaja* to ask the CJEU whether Article 6(1) of Directive 93/13 would allow departing from the basic principles of party disposition and consistency of the judgment by way of granting the consumer an amount higher than the amount claimed. And in *Getin Noble Bank*[57] and *Investcapital*[58] a Polish court and a Spanish court asked whether Article 6(1) of Directive 93/13 would really allow to disregard the principles of *res judicata* and preclusion under Polish law and Spanish law.

Second, other courts were doubtful as to whether the consequences of *Unicaja* should also have an impact on other areas of EU consumer protection law. In this regard, it should be recalled that the CJEU had previously applied its jurisprudence on Directive 93/13 to decide cases dealing with other

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[53] F de Stefano, 'Questioni processuali, giudicato interno e rapporti con il giudicato ue. In particolare: Le Sentenze della CGUE dal 17 maggio 2022 ad oggi in tema di titolo esecutivo giudiziale e tutela effettiva del consumatore 13' (paper presented on 30 January 2023 in the course *Consumatori e tutela giurisdizionale effettiva in fase monitoria ed esecutiva*, organized by the Scuola Superiore della Magistratura) <https://www.scuolamagistratura.it/documents/20126/7ffa9f7b-dfe5-046e-4dca-fbdcf9bd5504> accessed 1 April 2024.

[54] Judgment 9479/2023 (n 22).

[55] Judgment 522/2022, of 22 July 2022, ES:TS:2022:3211, and Judgment 703/2022, of 25 October 2022, ES:TS:2022:3756.

[56] Case C-652/21, *ACNC vs Unicaja.*

[57] Case C-531/22, *Getin Noble Bank and Others (Contrôle d'office du caractère abusif des clauses)*, Judgment (18 January 2024) ECLI:EU:C:2024:58.

[58] Case C-724/22 (n 17).

pieces of EU consumer protection legislation.[59] Against this background, on a case dealing with package travel, the preliminary reference in *Tuk Tuk Travel*[60] asked the Court of Justice a question that was very similar to the question formulated by a Spanish judge in *ACNC*, namely whether, contrary to the procedural principles of party disposition and consistency of the judgment, the effectiveness of EU consumer protection law would allow granting the consumer more money than the amount that had actually been claimed.

Third, the uncertainties created by *Unicaja, Ibercaja* and *SPV Project* even go beyond EU consumer law and reached EU law in general. On the one hand, given the stress of *Unicaja, Ibercaja* and *SPV Project* on the weakness of the consumer, it was not surprising to find arguments in favour of extending the new jurisprudence to any case involving a party who might be considered weak or vulnerable so that this weak party is to be freed from any procedural limitation. This argument was made by a French judge in the preliminary reference in *K.B. and F.S.* in regard of a criminal defendant *vis-à-vis* a public prosecutor.[61] On the other hand, in light of the emphasis of *Unicaja, Ibercaja* and *SPV Project* on the mandatory nature of Article 6(1), it could be argued that any essential principle of national procedure may be disregarded for the sake of the effectiveness of all kinds of EU mandatory law. This broad interpretation was suggested by AG Kokott in the field of EU environmental law in the case of *Eco Advocacy*.[62]

Finally, it may happen that Unicaja, Ibercaja and SPV Project also create some uncertainty when it comes to recognising or enforcing judgments under the Brussels regime. In particular, these judgments might bring changes to the interpretation of public policy as a ground for refusal of recognition and enforcement under Article 45(1)(a) of the Brussels I bis Regulation. Indeed, an interpretation of Article 45(1)(a) in connection with the CJEU's recurrent assertion that 'Article 6(1) of Directive 93/13 must be regarded as a provision of equal standing to national rules which rank, within the domestic legal system, as rules of public policy',[63] and in connection with the extreme procedural leeway granted to consumers by the CJEU in Unicaja, Ibercaja and SPV Project (allowing them to invoke the defence of unfair terms at almost any moment or procedural stage) could lead to the conclusion that national courts should have the power to refuse recognition and enforcement on the grounds of the existence of unfair contract terms in a consumer contract when this issue was not analysed in the State of origin.[64]

Between the date when Unicaja, Ibercaja and SPV Project were rendered (17 May 2022) and the date when this paper was subject to its latest review (1 April 2024), the CJEU had an opportunity to provide answers to the many of the points of legal uncertainty that have been mentioned above. Except for ACNC (which was withdrawn), the Court had time to decide all the other cases (Getin Noble Bank, Investcapital, Tuk Tuk Travel,[65] K.B. and F.S., and Eco Advocacy). The outcomes of these cases and its implications for the case-law stemming from Unicaja, Ibercaja and SPV Project will be discussed below.[66] The only issue that, to the best of my knowledge, has not yet reached the CJEU

[59] Cf C Aubert de Vincelles, 'La jurisprudence de la Cour de justice de l'Union européenne en matière de droit de la consommation' in F Picod (ed), *Le droit européen de la consommation* (Mare & Martin 2018) 50-51; and JM Fernández Seijo, *La tutela de los consumidores en los procedimientos judiciales* (Wolters Kluwer 2017) 173 ff.

[60] Case C-83/22 (n 17).

[61] Case C-660/21 *K.B. and F.S.*

[62] Case C-721/21, *Eco Advocacy*, Opinion of Advocate General Kokott (19 January 2023) ECLI:EU:C:2023:39, paras 50-51.

63 Cf Case C-869/19 (n 1) para 24.

[64] I thank my colleague Marco Buzzoni for suggesting this point to me in the course of a private conversation about *Unicaja* and *SPV Project*.

[65] Case C-83/22 (n 17).

[66] See point 10 below.

is that of whether Article 6(1) of Directive 93/13 could end up being considered as a valid ground for refusing recognition and enforcement under the Brussels I bis Regulation.[67]

9. An alternative approach: *Impuls Leasing*

Interestingly, the Grand Chamber of the CJEU took a different approach in *Impuls Leasing*.[68] Like *Unicaja*, *Ibercaja* and *SPV Project*, this judgment was also published on 17 May 2022 and was also about the compatibility of Articles 6(1) and 7(1) of Directive 93/13 with national procedural law.

In *Impuls Leasing*,[69] the CJEU refrained from challenging the basic principles of national civil procedure. Instead, it focused on whether the *particular provisions* – not the general principles – imposing procedural limitations on a consumer really prevented the application of Articles 6(1) and 7(1) of Directive 93/13. These particular provisions referred, eg, to the sufficiency of the information and of the time-limit given to the consumer to defend her case; or to the undue deterrent effect that rules on fees, costs or securities might have.

This kind of approach could have also been used in *Unicaja*, *Ibercaja* and *SPV Project*. In *Unicaja*, the CJEU could have taken into account that the consumer was represented by a lawyer. This lawyer was expected to know that, under Spanish law, lower courts are not necessarily bound by the judgments of the Supreme Court (in that particular case, by the Supreme Court Judgment of 9 May 2013) and that an appeal against the judgment given in the first instance was legally possible. In light of these circumstances, the real question to be answered was not whether basic principles of national procedural law were to be disregarded, but rather whether there was any particular provision on fees, costs or securities that might have exerted an undue deterrent effect on the consumer leading to her decision of not filing an appeal against the judgment given in the first instance.

In *Ibercaja* and *SPV Project*, rather than analysing whether consumers may be generally exempted from preclusion, time limitations and implicit *res judicata*, the CJEU could have analysed: (i) whether national procedural law guarantees that, upon service of the order initiating enforcement proceedings (*Ibercaja*) or service of the order for payment (*SPV Project*), the consumer is provided with sufficient information to determine the extent of her rights of defence; (ii) whether the time-limit given to the consumer to react against the order (ten working days in *Ibercaja* and forty calendar days in *SPV Project*) was long enough to find a lawyer who could study the case and invoke unfair contract terms; or (iii) whether excessive litigation fees unduly deterred the consumer from exercising her right of defence.

Should the approach taken in *Impuls Leasing* be used in *Unicaja*, *Ibercaja* and *SPV Project*, the doubts, flaws, risks and uncertainties indicated above would have been very much averted and, ultimately, the answers given by the CJEU would have been more adequate in terms of preserving procedural autonomy and, at the same time, ensuring the effectiveness of EU law.

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[67] Against this conclusion, it has been argued that the notion of public policy in the context of the Brussels I bis Regulation should not be so broad, 'as a too liberal conception of public policy would be incompatible with the principle of free circulation of judgments on which the Brussels regime has been built'. JT Nowak and V Richard, 'Commentary on Article 45' in M Requejo Isidro (ed), *Brussels I Bis. A Commentary on Regulation (EU) No 1215/2012* (Edward Elgar 2022) para 45.73.

[68] Case C-725/19, *Impuls Leasing România*, Judgment (17 May 2022) ECLI:EU:C:2022:396.

[69] ibid, paras 50 ff.

10. A more cautious trend?

In subsequent cases, the CJEU appears to have been more cautious than in *Unicaja*, *Ibercaja* and *SPV Project*. On the one hand, when assessing potential conflicts between the effectiveness of Directive 93/13 and national procedural law, the Court seems to prefer the approach in *Impuls Leasing*, avoiding calling into question the *general principles* of national procedural law and simply looking at the *particular provisions* of national procedural law on time-limits, costs or information. Additionally, when confronted with the applicability of *Unicaja*, *Ibercaja* and *SPV Project* to other areas of the law (consumer protection rules other than Directive 93/13, weak party settings or mandatory law in general), the Court has responded in the negative.

In the case of *Getin Noble Bank*,[70] a Polish court was hesitant to apply the new jurisprudence. The case very much resembled that of *SPV Project*. A debtor had failed to file a statement of opposition against a judicial order for payment and the order had become final and enforceable. Probably struck by the harshness of *Unicaja*, *Ibercaja* and *SPV Project* with national procedural law, the Polish court in charge of enforcement proceedings asked the CJEU whether EU law really amounted to an *ex novo* examination of unfair terms. The court highlighted that such an examination would entail disregarding the rules of Polish procedural law whereby 'a final judgment, including an order for payment (…), is binding on all courts' and the examination of 'the legitimacy of an obligation covered [by] an enforceable instrument' is not permitted. Ultimately, the CJEU responded that Article 6(1) of Directive 93/13 is compatible with the said rules of Polish national procedure as long as Polish law provides for either (i) the *ex officio* examination of any potential unfair contract terms during the order for payment procedure, or, alternatively, (ii) the consumer has the right to oppose the order for payment provided that 'there is a non-negligible risk that the consumer concerned will not lodge the required opposition, either because of the particularly short period allowed for that purpose, or because of the costs that legal action would entail in relation to the amount of the disputed debt, or because the national legislation does not provide for an obligation to give that consumer all the information necessary to enable him to determine the extent of his rights'. The CJEU's reference to the 'the short period', 'the costs' or 'the information necessary' very much resembles the approach in *Impuls Leasing*, as it focuses on particular procedural provisions rather than on basic procedural principles of national law.

Similarly, in the case of *Investcapital*,[71] a Spanish court was doubtful as to whether a re-examination of potential unfair terms was possible. The court dealing with an order for payment procedure had indeed examined whether there were unfair terms in the contract upon which the claim was based and had responded in the negative. It had also expressly and timely instructed the consumer-defendant of her rights (i) to make allegations prior to the decision on the said examination, (ii) to appeal the said decision, and (iii) to oppose the order for payment on the grounds of unfair terms. The consumer always remained silent and, under Spanish procedural law, was thus precluded from invoking unfair terms at any later stage. However, the court in charge of enforcement proceedings was still suspicious about the existence of unfair terms and asked the CJEU whether, despite the lack of a timely opposition by the consumer, it was still possible to scrutinise the contract under Directive 93/13 and the new jurisprudence after *Unicaja*, *Ibercaja* and *SPV Project*. The CJEU responded that preclusion may indeed be applied without any risks to the effectiveness of Directive 93/13 where the review of unfair terms 'has already been carried out by a court in the course of the order for payment procedure, provided that that court has identified in its decision the terms which were reviewed, that it has set out, even in summary form, the reasons why those terms were not unfair, and that it has stated that, if the remedies provided for under national law against that decision have not been exercised within the time limit set for that purpose, the consumer will be

[70] Case C-531/22 (n 57).

[71] Case C-724/22 (n 17).

time-barred from asserting the possible unfairness of those terms'. The response of the CJEU is consistent with *Unicaja, Ibercaja* and *SPV Project* in terms of establishing limitations to national courts and consumers where there is explicit *res judicata*, there is no new jurisprudence justifying the setting aside of *res judicata* and there was a clear 'complete inaction' on the part of the consumer concerned.[72] But, looking closely to the CJEU's arguments, one may grasp a certain attempt of the Court to show a higher degree of sensitivity towards the basic principles of national procedure (preclusion and *res judicata*, in the case at hand). In this vein, in line with *Impuls Leasing*, the CJEU noted that it did 'not transpire from the order for reference that procedural constraints might have deterred the consumer from asserting his rights in the order for payment procedure' (para 47); and it devoted its final legal reasoning to stress the importance of 'having regard to the principle of procedural autonomy' (para 51).

In the case of *Tuk Tuk Travel*,[73] a Spanish court invoked the Opinion of AG Tanchev in *Unicaja*[74] – an opinion that was ultimately followed by the CJEU in its judgment of 17 May 2022 – to show some doubts as to whether the effectiveness of Article 15 of Directive 2015/2302, on package travel and linked travel arrangements, should amount to a ruling *ultra petita* in favour of the consumer. Particularly, the referring court asked whether it may order the business-defendant to pay an amount that was higher than the amount claimed by the consumer. The question was finally answered by the CJEU in the negative, mostly on considerations of personal freedom rather than on considerations of procedural autonomy.[75] Yet, it is interesting to note (i) that, instead of building up its decision on *Unicaja, Ibercaja* and *SPV project*, the Court preferred looking at *Lintner*,[76] which is probably the judgment on EU consumer law that is more respectful with the principle of procedural autonomy; and (ii) that, at the end of the day, the decision of the Court preserved a basic principle of national procedure, namely party disposition.

In the case of *K.B. and F.S.*,[77] a French court asked the CJEU whether the case law on consumer protection could also apply for the sake of the effectiveness of EU provisions protecting defendants in criminal cases. Ultimately, both AG Pikamäe and the CJEU responded in the negative, as they understood that consumer law and criminal law are two completely different areas of the law and that the legal relationships arising in a consumer protection context very much differ from those in criminal proceedings.

Finally, the CJUE also rejected AG Kokott's suggestion that the jurisprudence on the disregard of national procedural law by virtue of the effectiveness of EU consumer protection law could be extended to other situations of 'serious infringements' of EU mandatory law, such as EU environmental law. The Court argued that the said jurisprudence only referred to the 'specific characteristics of those areas and of the EU law provisions concerned, such as the necessity of compensating for the imbalance which exists between the consumer and the seller or supplier'. Be it as it may, the Court kept its jurisprudence in *Unicaja, Ibercaja and SPV Project* contained.[78]

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[72] Cf point 3.1 above.

[73] Case C-83/22 (n 17).

[74] Case C-869/19, Opinion of Advocate General Tanchev (n 8).

[75] Cf E Vallines, 'Tuk Tuk Travel (C-83/22): rebuilding procedural autonomy or simply defending personal freedom?' (*EU Law Live*, 4 October 2023) <https://eulawlive.com/op-ed-tuk-tuk-travel-c-83-22-rebuilding-procedural-autonomy-or-simply-defending-personal-freedom-by-enrique-vallines/> accessed 1 April 2024.

[76] Case C-511/17, *Lintner vs Unicredit Bank Hungary*, Judgment (11 March 2020) ECLI:EU:C:2020:188.

[77] Case C-660/21, *K.B. and F.S. (Relevé d'office dans le domaine pénal)*, Opinion of Advocate General Pikamäe (26 January 2023) ECLI:EU:C:2023:52, paras 17, 30 and 68-73; and Case C-660/21, *K.B. and F.S. (Relevé d'office dans le domaine pénal)*, Judgment (22 June 2023) ECLI:EU:C:2023:498, paras 24 and 52).

[78] Case C-721/21, *Eco Advocacy*, Opinion (n 62); and Case C-721/21, *Eco Advocacy*, Judgment (15 June 2023) ECLI:EU:C:2023:477, para 25.

11. Conclusion

Unicaja, Ibercaja and *SPV Project* are disturbing judgments. Without providing any convincing reasons, they do away with core principles of the Spanish and Italian procedural systems and, at the end of the day, put these systems upside down in consumer cases. They even created additional risks of reluctance to accept the primacy of EU law and the role of the CJEU.

It would be preferable that, when deciding cases in the future, the CJUE reconsiders the jurisprudence of these three judgments or, at least, tries to keep it as confined as possible. The alternative approach in *Impuls Leasing* - focussing on *particular provisions* rather than on *basic principles* - could be an important tool in this regard. The Court seems to have started moving in this direction. But this still needs to be confirmed by subsequent decisions.

The Scope of the Equivalence and Effectiveness Principle in State Liability Litigation (C-278/20 - *Commission/Spain*)

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Abstract

In its ruling on the *Commission v Spain* case C-278/20 of 28 June 2022, the Court of Justice declared that Spain failed to fulfil its obligations under EU law regarding the regime of State liability for damages caused to individuals by EU law infringements perpetrated by the legislature. The Court partially upheld the action of the Commission, inasmuch as it was concerned with the principle of effectiveness, but the action was dismissed concerning the alleged breach of the principle of equivalence. This second aspect, which would seem to be unproblematic from the point of view of Spanish law, presents important challenges when seen from the EU law perspective, since the judgment arrives at a counterintuitive and problematic solution, with crucial implications for the interaction of EU law with national procedural law.

Keywords

Liability of the Member States; Damages Actions; Effectiveness; Equivalence; Infringement Proceedings; Effective Judicial Protection.

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1. Introduction[1]

In its ruling on the *Commission v Spain* case C-278/20 of 28 June 2022,[2] the Grand Chamber of the Court of Justice has declared that Spain has failed to fulfil its obligations under EU law regarding the regime of State liability for damages caused to individuals by EU law infringements perpetrated *by the legislature*. Given the restrictive character of national legislation, this declaration of infringement has not come as a surprise to many. The Court has, however, only partially upheld the action of the Commission because by declaring that some of the contested provisions of Spanish law do not comply with the requirements of the *principle of effectiveness*. The action of the Commission was dismissed for what it concerned the alleged breach of the principle of equivalence. This second aspect, which would seem to be unproblematic from the point of view of Spanish law, presents important challenges when seen from the EU law perspective, since the judgment arrives at a counterintuitive and problematic solution, with crucial implications for the interaction of EU law with national procedural law.

The part of the ruling dealing with the principle of effectiveness has an indubitable interest for Spain and has fostered a new (still pending) legal reform.[3] However, from a broader point of view, the part of the ruling which contains the motivation of the declaration of infringement by Spain does not break new ground – beyond the fact that it consolidates the principle of effectiveness as a parameter of legality –, and has a robust foundation in established case law.[4] For this reason, this contribution will leave aside the national implications of the ruling,[5] in order to focus on the broader consequences for the EU legal order – which have most likely motivated that this case was decided by the Grand Chamber of the Court.

For this purpose, this contribution will first offer a presentation of the background to the dispute, which dates back to previous litigation before the Court of Justice in the *Transportes Urbanos* case.[6] It will then present the legal framework in Spain consisting in the two laws adopted in 2015 which, for the first time, introduced specific legislation concerning state liability for breaches of EU law, and examine the ruling and the Opinion of the Advocate General. It will finally offer a critical analysis of the judgment and of its future implications. It will be posited that the interpretation offered by the Grand Chamber's related to the scope of application of the principle of equivalence introduces a

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[1] This article draws on previous publications in the framework of project I+D 'El Principio de lealtad en el sistema constitucional de la Unión Europea', PID2019-108719GB-I00, 2020-2024. See: S Iglesias, 'The narrow(er) scope of equivalence (and effectiveness) in State liability actions: what if I told you that they are not real principles? – *Commission v Spain* (C-278/20)' (*EU Law Live*, 20 July 2022) <*https://eulawlive.com/op-ed-the-narrower-scope-of-equivalence-and-effectiveness-in-state-liability-actions-what-if-i-told-you-that-they-are-not-real-principles-commission-v-spain-c-278-20-by-sar/*> accessed 2 February 2024, and S Iglesias, 'La construcción jurisprudencial del principio de responsabilidad del Estado desde la autonomía procesal y sus límites (equivalencia y efectividad): un modelo agotado tras la sentencia *Comisión/España* (C-278/20)' (2023) 74 Revista de Derecho Comunitario Europeo 111 <https://doi.org/10.18042/cepc/rdce.74.04>.

[2] Case C-278/20, *Commission v Spain*, Judgment (28 June 2022) ECLI:EU:C:2022:503.

[3] The Project is still pending approval. See: 'Anteproyecto de ley de modificación parcial de la Ley 39/2015, de 1 de octubre, del procedimiento administrativo común de las administraciones públicas y la ley 40/2015, de 1 de octubre, de régimen jurídico del sector público en materia de responsabilidad patrimonial del Estado legislador por daños derivados de la infracción del Derecho de la Unión' <https://perma.cc/Q59W-RJNN>.

[4] L Feilhès, 'Responsabilité de l'État et autonomie procédurale : les nouvelles (im)précisions sur les príncipes d'équivalence et d'effectivité' (2022) 3 Revue des affaires européennes 551.

[5] For a commentary by the specialised literatura, see i.a.: E Cobreros Mendazona, 'La responsabilidad patrimonial del Estado legislador por su incumplimiento del derecho de la Unión Europea tras la intervención del Tribunal de Justicia' (2022) 219 Revista de Administración Pública 21; G Doménech Pascual, 'Repensar la responsabilidad patrimonial del Estado por normas contrarias a Derecho' (2022) 4 InDret 168; G Doménech Pascual, 'On the Principles of Effectiveness and Equivalence in State Liability Actions for Breaches of EU law (C-278/00)' (2022) 4 Review of European Administrative Law 45; G Fernández Farreres, 'Una nueva incidencia en el tortuoso proceso de la configuración legal de la responsabilidad patrimonial del Estado legislador (la sentencia del Tribunal de Justicia de la Unión Europea (Gran Sala) de 28 de junio de 2022 ("As. C-278/20")' (2022) 221 Revista Española de Derecho Administrativo 21.

[6] Case C-118/08, *Transportes Urbanos y Servicios Generales*, Judgment (26 January 2010) ECLI:EU:C:2010:39.

worrisome avenue for creating differentiated systems of liability, acknowledging an area where States are openly allowed to discriminate actions based on EU law.

2. Previous litigation: *Transportes Urbanos*

The national regulation which is at the basis of the case can only be understood in light of the genesis of the principle of State liability for EU law breaches in Spain, which has eminently a jurisprudential origin. Indeed, as in many other Member States,[7] this area has been characterised by the absence of a pre-existing regulation contemplating specifically the liability of the State when it comes to breaches of EU law at the time when the principle was proclaimed in *Francovich*.[8] In the Spanish case, this phenomenon is amplified by the preeminence of case law as the main avenue to find a way to implement the principle of State liability for legislative acts, also regarding damages caused by the infringement of higher-ranking constitutional provisions.[9]

Against this backdrop, the Spanish Supreme Court struggled to create a coherent case law that would respect the differences between the centralised system of constitutionality control and the diffuse system through which national legislation can be found to be contrary to EU law. This situation led to the development of a line of case-law by the Spanish Supreme Court which established different criteria to find State liability in situations where a law had been declared unconstitutional or contrary to EU law. Essentially, state liability for breaches of EU law was subjected to additional conditions, such as the exhaustion of available remedies against the administrative act having caused the damage.[10] This case law was precisely the object of the preliminary ruling case in *Transportes* Urbanos,[11] whereby the Spanish Supreme Court questioned the compatibility of its own case law with EU law and asked for guidance to the EU Court. Even though the Spanish Supreme Court tried to justify the soundness of the application of different criteria, seeking to establish the non-comparable character of the systems of constitutionality control and control of compliance with EU law, that attempt resulted unsuccessful. The Court (as well as the Advocate General in that case[12]) concluded that the case law of the Supreme Court infringed the principle of equivalence, as the differences pointed out by the Supreme Court could not justify the existence of such divergent regimes, and both remedies were comparable.

The aftermath of *Transportes Urbanos* is marked by the attempt of the Supreme Court to bring its case-law regarding State liability for legislation contrary to EU law in line with its case-law on legislation contrary to the Constitution.[13] However, there was never a complete unification of both systems, since State liability for legislation contrary to EU law continued to be subject not only to national requirements, but also to requirements stemming directly from the case-law of the Court of Justice, among which the requirement of 'sufficiently serious violation' posed a significant difference from the regime governing liability for unconstitutional legislation. This left unsolved

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[7] As noted already in the judgement of the court in Cases C-46/93 and C-48/93, *Brasserie du pêcheur and Factortame*, Judgment (5 March 1996) ECLI:EU:C:1996:79, para 30.

[8] Cases C-6/90 and C-9/90, *Francovich and Others*, Judgment (19 November 1991) ECLI:EU:C:1991:428.

[9] The origins of that case law are also relatively recent (the early 2000s). See, for example, E García de Enterría, 'Sobre la responsabilidad patrimonial del Estado como autor de una ley declarada inconstitucional' (2005) 166 Revista de Administración Pública 99.

[10] For an explanation of that case law: Doménech Pascual, 'On the Principles of Effectiveness and Equivalence in State Liability Actions for Breaches of EU law' (n 5).

[11] Case C-118/08 (n 6)

[12] Case C-118/08, *Transportes Urbanos*, Opinion of M Poiares Maduro (9 July 2009) ECLI:EU:C:2009:437, points 35 et seq.

[13] See MC Alonso García and I Martín Delgado, *La responsabilidad del Estado por el incumplimiento de las obligaciones normativas derivadas del Derecho de la Unión Europea. El caso de España* (Iustel 2020).

another aspect of the application of the principle of equivalence to the regime of State liability for laws infringing EU law,[14] which will be taken over by subsequent legislation.

3. The infringement of the principle of effectiveness and the narrowing down of the principle of equivalence

3.1. The infringement of the principle of effectiveness

On the basis of the previous case law, the requirements for State liability for legislative acts were first codified (and made more stringent) by laws 39/2015 and 40/2015.[15] The undertone of the legislation was markedly restrictive, in the aftermath of an EU ruling that had given rise to many claims against the State. [16]

Once the Commission application arrived at the Court, the main line of defence of the Kingdom of Spain against the infringement claims was based on the argument that the Commission had confined itself only to a partial analysis of the domestic legal remedies available, ignoring all other possible avenues, which could provide possible redress. After thoroughly analysing the complex and vast legal framework presented by Spain, both Advocate General Szpunar [17] and the Court concluded that none of the alternative procedures or remedies relied on by Spain actually allows individuals to establish the liability of the legislature.

One important takeaway from this initial part of the ruling is that the Court clarified the test for determining the relevant national legal framework of reference to assess compliance with effectiveness and equivalence. Although according to settled case-law, the examination of whether a national rule complies with those 'principles' must take into account, *inter alia*, the role of a given provision in the national proceedings, this does not mean that the Commission is obliged to systematically examine all the legal remedies available in the concerned Member State.[18] The test put forward by the Court, following the Advocate General, is that of a 'contextualised analysis of the provision (…) which may entail (…) the analysis of other procedural provisions applicable to the legal remedy (…), or the analysis of legal remedies which have the same purpose as that remedy'.[19]

After these findings, the Court proceeded to examine the compatibility of the Spanish legislation with the principle of effectiveness. The contested legal regime of State liability for damages caused by breaches of EU law emerges from a combined reading of Law 40/2015 on the legal system governing the public sector[20] (Articles 32(3) to (6) and Article 34(1)) and of Law 39/201 on the common

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[14] It is also noteworthy that this aspect never reached the Court of Justice through a preliminary ruling. The doctrine has broadly engaged with the problems presented by this approach, see e.g. E Cobreros Mendazona, 'La exigibilidad del requisito de la violación suficientemente caracterizada al aplicar en nuestro ordenamiento el principio de la responsabilidad patrimonial de los Estados por el incumplimiento del Derecho de la Unión Europea' (2015) 196 Revista de Administración Pública 11; Alonso García and Martín Delgado (n 13).

[15] Ley 40/2015, of 1st October, 'de Régimen Jurídico del Sector Público' (BOE No 236, 2 October 2015, p 89411) and Ley 39/2015, of 1st October, 'del Procedimiento Administrativo Común de las Administraciones Públicas' (BOE No 236, 2 October 2015, p 89343).

[16] Case C-82/12, *Transportes Jordi Besora*, Judgment (27 February 2014) ECLI:EU:C:2014:108. Pointing to this connection, I Ibáñez García, 'El régimen de responsabilidad patrimonial de la Ley 40/2015 ante el TJUE (recurso por incumplimiento C-278/20)' (2021) 39 Working Paper IDEIR.

[17] Case C-278/20, *Commission v Spain*, Opinion of AG Szpunar (9 December 2021) ECLI:EU:C:2021:996.

[18] Case C-278/20 (n 2) paras 59 and 60.

[19] ibid, para 60 and Case C-278/20 (n 17) point 40.

[20] Ley 40/2015 (BOE No 236, 2 October 2015) (n 15).

administrative procedure of public authorities[21] (Article 67(1), third subparagraph). The new provisions made State liability conditional on several requirements, the majority of which were targeted by the infringement action lodged by the European Commission. The conditions are of two types. First, there are conditions specific to the Spanish legal system, and applicable both to the liability arising from unconstitutional laws and from laws that contravene EU law. Second, there are the EU law-based conditions of *Brasserie du pêcheur*.[22] The fate of the analysis of these two types of conditions will be different after the ruling of the Court of Justice.

Among the first type of conditions, there were several problematic points. Article 32(5) of Law 40/2015, the specific provision related to breaches of EU law, contains three conditions. It provides that, if the loss or harm results from the application of a provision *declared* to be contrary to EU law, compensation may be awarded if the interested person has obtained a *final decision* dismissing an action against the administrative act which caused the loss or harm, if that individual *relied on the EU law* breach that was subsequently recognised.

First, read in conjunction with Article 32(6) of the same law, Article 32(5) implies that a previous judgment declaring the incompatibility of EU law is required. The Court did not hesitate to declare this element of the national provision contrary to the principle of effectiveness. It follows from *Brasserie du Pêcheur*[23] and from *Transportes* Urbanos[24] that a previous (infringement or preliminary) ruling of the Court cannot be a condition for redress.[25]

Second, the Court also found the requirement that the harmed individual must have obtained a final decision dismissing an action against the administrative act having caused the loss or harm to be contrary to the principle of effectiveness. The reason is very simple: there can be loss or harm resulting directly from the legislature, without there being an intermediate challengeable administrative act.[26]

Third, the Court reached the same conclusion regarding the condition that the harmed individual must have claimed the infringement of EU law in the previous administrative action against the harmful administrative act. Even in the situations where that administrative act existed (and the requirement would not therefore be automatically excluded by the findings of the Court on the previous condition), it would be 'excessively difficult, or even impossible, to anticipate what infringement of EU law will ultimately be recognised by the Court'.[27]

In the same vein, the Court upheld the Commission's complaints related to limitation periods. Those periods restricted the right to claim compensation to one year from publication of the decision declaring a provision to be contrary to EU law, and also restricted a claim for the recoverable loss or harm to that occurring within the five years preceding the publication date of the decision declaring a provision contrary to EU law.

All these conditions are based on the declaration of infringement by the Court of Justice, which relies exclusively on considerations based on the principle of effectiveness. Indeed, it is not difficult to grasp how all those elements, individually but also jointly considered, are such to make it practically impossible or excessively difficult to obtain compensation.[28] All the requirements

[21] ibid.

[22] Cases C-46/93 and C-48/93 (n 7).

[23] ibid.

[24] Case C-118/08 (n 12).

[25] Case C-278/20 (n 2) para 104.

[26] ibid, paras 128 and 129.

[27] ibid, para 144.

[28] See, on this discussion, Cobreros Mendazona (n 5), Doménech Pascual (n 5) and Fernández Farreres (n 5).

mentioned in the previous paragraphs were, however, also applicable to claims based on laws declared unconstitutional, so the equivalence principle was not at issue in that regard. However, the additional problem arose from the fact that, in addition to those 'common requirements', the new legal system made EU law-based actions subject to specific requirements, namely, those arising from the case law of the Court of Justice: that the rule of EU law infringed must be intended to confer rights on individuals, that there must be a direct causal link between the breach and the loss/damage, and above all, that the breach of the EU law rule should be 'sufficiently serious' (the so-called '*Brasserie* conditions'). This was found to be non-problematic by the Court of Justice.

3.2. Narrowing down the Principle of Equivalence in State Liability cases

Even before the Commission started infringement proceedings, the Spanish doctrine had already expressed important doubts about the potential incompatibility of the new legislative framework with EU law.[29] Therefore, infringement proceedings could not have come at a surprise this time. The surprise came, however, from the findings of the Court regarding the scope of the principle of equivalence: the elements that could possibly have been considered as more problematic, were condoned by the Court of Justice in what could be considered as a partial overruling, or at least, as a crucial reinterpretation of its previous doctrine on the principle of State liability.

The final plea of the Commission was based on the argument that the principle of equivalence is also infringed because the Spanish legislation, besides the conditions already discussed, subjects the possibility of recovering damages to more restrictive conditions since, most of all, the requirement of 'sufficiently serious violation' does not feature among the conditions required for damages actions based on a breach of the Spanish Constitution. As a result, obtaining damages for breaches of EU law becomes significantly more difficult.

Following the path suggested by the Opinion of Advocate General Szpunar,[30] but going even further, the Court dismissed that argument and held that the principle of equivalence is not applicable in those circumstances. [31]

The key paragraph of the judgment, which will no doubt quickly enter the list of quotable formulas from the case-law, reads as follows: 'the principle of equivalence thus seeks to set limits on the procedural autonomy enjoyed by the Member States *when they implement EU law* and when the latter does not make provision in that regard. It therefore follows that, with regard to State liability for infringement of EU law, that principle is intended to apply *only where that liability is established on the basis of EU law* and, therefore, where the relevant conditions (...) are satisfied.'[32]

The Court went on to state that the principle of equivalence 'cannot form the basis for an obligation on the part of the Member States to allow a right to compensation to arise under conditions more favourable than those laid down by the case-law of the Court'.[33] At this point, the Court notes that the Commission is, in reality calling into question the 'actual conditions under which the State legislature may incur liability for infringements of EU law attributable to that State' in a situation

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[29] See, for example, E Guichot Reina, 'La responsabilidad del Estado Legislador por infracción del Derecho de la Unión Europea en la jurisprudencia y en la legislación españolas a la luz de los principios de equivalencia y efectividad' (2016) 60 Revista Española de Derecho Europeo 49; F Plasencia Sánchez and L de Pedro Marín, 'Sobre los límites a la responsabilidad patrimonial del Estado legislador introducidos por las Leyes 39 y 40 de 2015. Situación actual y expectativas de futuro a la luz del dictamen de la Comisión Europea sobre la infracción de los principios de efectividad y equivalencia' (2019) Anuario de Derecho Administrativo 641.

[30] Case C-278/20 (n 17).

[31] Case C-278/20 (n 2) para 185.

[32] ibid, para 178, emphasis added.

[33] ibid, para 179

where those provisions of Spanish legislation 'reproduce faithfully the conditions laid down in the case-law of the Court.[34] The Court therefore concludes that 'even if the conditions for establishing the liability of the State legislature for infringements of EU law attributable to it are less favourable than the conditions for establishing the liability of the State legislature for a breach of the Constitution, the principle of equivalence is not intended to apply to such a situation'.[35]

Having reached this conclusion, the Court buttresses its reasoning by making reference to its previous case law through three different arguments *ad abundantiam*.

First, the Court refers to its established case-law according to which Member States can make provision for their liability under less restrictive conditions than those enumerated by the Court's case-law, but that 'then that liability must be regarded as being established not on the basis of EU law but on the basis of national law'.[36]

Second, the Court cites also its previous case-law according to which 'in general, the principle of equivalence is not, moreover, to be interpreted as requiring Member States to extend their most favourable rules to all actions brought in a certain field of law.'[37] Third, the Court acknowledges that, as the Commission points out, in Francovich it was stated that 'both the formal and material conditions laid down by national legislation on compensation for loss or harm caused by Member States as a result of an infringement of EU law cannot, in particular, be less favourable than those relating to similar domestic claims'.[38] However – and here it comes the surprising re-reading of past case-law –, the Court states that 'the fact remains, as it is apparent from the actual wording of that case-law, that that clarification still relates to the conditions laid down by national legislation on compensation for loss or harm *once the right to compensation has arisen on the basis of EU law*'.[39]

4. Critical analysis

From the paragraphs of the ruling just described, it is apparent that the judgment of the Court in *Commission v Spain* limits the scope of the principle of equivalence to the conditions imposed by national law that go beyond the three conditions determined by EU case-law (the three *Brasserie* conditions). It is immaterial whether those conditions are substantive or procedural in nature, since the Court acknowledged that the *Francovich* formula, according to which the principles of effectiveness and equivalence apply both to formal and material requirements, remains in place. This finding, however, is not a mere confirmation of previous case-law and represents a crucial development which may have quite far-reaching repercussions. The following lines will explore the problematic relationship of the ruling *Commission v Spain* with previous case law (4.1.) as well as with the scope of application of the Charter (4.2.).

4.1. A departure from previous case law?

[34] ibid, para 180.

[35] ibid, para 181.

[36] Ibid, para 182.

[37] ibid, para 183, referring to Case C-118/08 (n 6) para 34.

[38] Referring to Cases C-6/90 and C-9/90 (n 8) para 43; Cases C-46/93 and C-48/93 (n 7) paras 98-99 and C-470/03, *AGM-COS.MET*, Judgment (17 April 2007) ECLI:EU:C:2007:213, para 89.

[39] Case C-278/20 (n 2) para 184.

Commission v Spain seems not to fit completely with old and newer case law. The Court acknowledged that, as highlighted by the Commission, previous case-law (i.e. *Francovich*) states that 'both the formal and material conditions laid down by national legislation on compensation for loss or harm caused by Member States as a result of an infringement of EU law cannot, in particular, be less favourable than those relating to similar domestic claims'.[40] Although the validity of this statement is confirmed in Commission v Spain, the Court in a quite surprising exercise of retrospective interpretation, affirmed that that clarification still relates to the conditions laid down by national legislation only 'once the right to compensation has arisen on the basis of EU law'.[41] This finding is problematic in its relationship with previous case law in two different regards.

The first and clearest contradiction arises with regard to relatively recent case-law. In *AW and Others (Calls to 112)*,[42] the Court applied the principle of equivalence to one of the substantive conditions of the '*Brasserie-trio*', namely, the *direct causal link*. On the basis of equivalence, the Court found that where domestic law accepts an indirect causal link as sufficient for the State to incur liability for breaches of national law, an indirect causal link must also be regarded as sufficient for rendering a Member State liable for EU law breaches. The limitation of the scope of application of the principle of equivalence in *Commission v Spain* is therefore clearly in contradiction with the ruling in the *AW* case, so it remains unclear whether *AW* is still good law, or whether it has been implicitly overruled by Commission v Spain (which would be unfortunate, due to the fact that the case does not seem to have been considered neither by the Judgment nor by the Opinion).

Second, even if the contradiction with the *AW* case could be minimised as a punctual departure from the case law established by a relatively unimportant ruling of a 5-judges chamber, the consistency problems with previous case-law reach further. The retrospective construction carried out by the Court of Justice in *Commission v Spain* is based on a reinterpretation of the literality of a passage of *Francovich* in a context in which the legal issues are different. Indeed, in spite of the statement of the Court, it does not always follow from previous case law that compliance with the effectiveness and equivalence principles can only be ascertained once the right to compensation has arisen. This is due to the nature of preliminary ruling proceedings, which constitutes the procedure through which the majority of CJEU cases dealing with State liability have been dealt with. Unlike the abstract and general control of the system of liability that the Court is called upon to develop in the present infringement case, the case-law emanating from preliminary ruling cases relies on the specific circumstances and questions posed in a given case. In those cases, the Court answers a specific question about specific requirements that the Court examines from the point of view of the question presented to it by the national jurisdiction. For this reason, on many occasions, the object of the preliminary ruling focuses on the limits to procedural autonomy – that is, on the principles of effectiveness and equivalence – without the Court first having entered into whether or not the *Brasserie* requirements are met[43]. The result is that, in its preliminary rulings, it can rarely be verified whether all *Brasserie* requirements have actually been met – and therefore confirm whether the right to compensation has arisen – before moving on to examine the compatibility of an element of the national responsibility system with the principles of equivalence and effectiveness.

What the Court seems to really have meant in its ruling is that the principles of equivalence and effectiveness – as limits on the principle of procedural and institutional autonomy of the Member States – do not apply where said autonomy has been superseded by the judicially harmonised requirements expressed in *Brasserie*. Indeed, the strong point of the argument of the *Commission v*

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[40] ibid.

[41] ibid, emphasis added.

[42] Case C-417/18, *AW and Others*, Judgment (5 September 2019) ECLI:EU:C:2019:671.

[43] See, e.g.: Case C-279/09, *DEB*, Judgment (22 December 2010) ECLI:EU:C:2010:811; Case C-261/95, *Palmisani*, Judgment (10 July 1997) ECLI:EU:C:1997:351; Case C-445/06, *Danske Slagterier*, Judgment (24 March 2009) ECLI:EU:C:2009:178.

Spain ruling can be found precisely in *Brasserie*. The Court emphasises, referring to this ruling, that its case law points out on multiple occasions that Member States can accept to be held liable on the basis of less restrictive requirements than those established by its own case-law but that, in that case, the liability which they incur is not on the basis of Union law, but of national law. However, although this is a logical deduction, the *Brasserie* judgment does not say exactly that.

In its famous paragraph 66 of the said ruling, the Court stated that, although the famous three requirements are sufficient and necessary, this did not exclude that, under national law, the State could incur liability under less restrictive requirements. This means that from *Brasserie* and subsequent case-law we can infer that the conditions are sufficient and necessary for there to be a right to compensation based directly on Union law. It can also be deduced that, in addition to the said 'harmonised' conditions, reparation must be articulated through national law on liability, complying with the requirements of equivalence and effectiveness. Finally, it follows also from that case law that, within the framework of national law, the right to reparation may be recognised under more favourable conditions.

However, *Brasserie* in no way determines, or even addresses, the question of whether a more favourable regime under national law is subject to any condition or requirement from the point of view of EU law. This crucial element is established by the Court for the first time in *Commission v Spain*.

Finally, the Court evokes the jurisprudential formula according to which 'in general, the principle of equivalence is not, moreover, to be interpreted as requiring Member States to extend their most favorable rules to all actions brought in a certain field of law.'[44] However, with this formula, the Court has traditionally indicated in its case law that the requirement of equivalence does not require extending a certain internal rule to all types of actions, but only to those considered comparable.[45] However, in *Commission v Spain*, this formula is not used in any way to determine the framework of comparability; in effect, the framework of comparability already established in *Transportes Urbanos* is not called into question (even though it could have been). The formula is used rather to point out that the principle of equivalence does not mean precisely what it means: that the most favourable regime (for comparable actions) must also apply to claims based on Union law.

In short, the limitation of the scope of application of the principle of equivalence is dressed up as obvious, as something that has always been there but that we have not been perceptive enough to see. The ruling itself does not acknowledge that it contains an important development, and this is probably why the arguments put forward by the Court fail to satisfactorily resolve the systematic relationship with *Francovich*, *Brasserie*, or the frontal with the recent *AW* judgment.

4.2. The hidden and problematic analogy with the scope of the Charter

The argumentative basis that seems to underlie the reasoning of the ruling in *Commission v Spain* in relation to the principle of equivalence evokes a clear parallelism with the case-law on the scope of the Charter. First, in the crucial paragraph 178 of the judgment, the Court points out that the principle of equivalence, as a limit to the procedural autonomy of the Member States, applies only when they 'implement EU law'. This is a literal reference to the text of Article 51(1) of the Charter, according to which the provisions of the Charter are addressed to Member States 'only when they

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[44] Case C-278/20 (n 2) para 183.

[45] This is corroborated by the case law using that formula, see e.g.: Case C-231/96, *Edis*, Judgment (15 September 1998) ECLI:EU:C:1998:401, para 36; Case C-326/96, *Levez*, Judgment (1 December 1998) ECLI:EU:C:1998:577, para 41; Case C-118/08 (n 6) para 34.

implement Union law'. This is the first time that the Court has used this formula to frame the scope of application of the principle of equivalence (or effectiveness).

Furthermore, by stating in that same paragraph that the principle of equivalence is only intended to apply when liability is incurred 'on the basis of EU law', the Court also appears to apply its own case law also relating to the Charter, according to which, when Member States go beyond what is provided for by a directive to apply more favourable national provisions, they fall outside the scope of application of Union law and, therefore, of the Charter.[46] This is confirmed in Commission v Spain when the Court concludes that the principle of State responsibility 'cannot form the basis for an obligation on the part of the Member States to allow a right to compensation to arise under conditions more favourable than those laid down by the case-law of the Court'.[47]

Commission v Spain thus shows a trend towards harmonising the scope of application of equivalence and effectiveness with the rights of the Charter. Certainly, this cannot lead to surprise and confirms that these principles are nothing more than conceptual shortcuts in the area of procedural autonomy of broader principles, such as equality or effective judicial protection. However, this development is not completely unproblematic precisely when one considers that the principles of equality and effective judicial protection enshrined in the Charter are applicable to the national legislation at issue. Indeed, there is little doubt that the national norm – a norm that introduces for the first time in a national system a provision aimed at offering a means of compensation for violations of EU law by the legislator – constitutes a rule 'implementing EU law'. And this is so because, even before the requirements of State responsibility are met, the situation is covered by Union law: what is sought through the compensation remedy is the reparation of the infringement by the State of the rights that Union law grants to individuals.

This becomes even clearer when looking at the wording of Article 47 of the Charter, according to which 'everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy...'. In other words, when an individual initiates proceedings because she or he considers that a violation of the rights granted by Union law has occurred, Article 47 of the Charter is applicable. Thus, from the point of view of the Charter, it could be concluded that the situation of any person who alleges the violation of their rights granted by the Union law – as it is paradigmatically the case of those who pursue compensation for damages caused by an infringement of the Union law – falls within the scope of its article 47.

Commission v Spain is problematic from this point of view, since it leads to worrying conclusions about the potential position that the Court of Justice could take with respect to the application of the Charter itself, given the argumentative parallelism which underlies the ruling when it comes to determine the scope of the principle of equivalence. The Court seems to imply that, to place ourselves within the scope of application of Union law, it is not only necessary to have suffered a violation of the rights that it grants us, but also that the right to compensation must already have arisen. This entails a double cumulative condition: that the infringement of Union law is challenged, and that the *Brasserie* requirements are also met. This makes State liability an area in which the protection is more circumscribed than in other areas relating to national procedural law.

Furthermore, *Commission v Spain* adds another element of uncertainty in relation to the position of the Court of Justice regarding situations in which Member States provide for 'more favourable' regulation. This is because the *TSN and AKT* case has not settled a generally applicable standard: the consideration of whether more favourable national provisions fall within the scope of the Charter requires a more thorough analysis of the nature of the national act and its inclusion in the EU legal framework, as well as the nature and level of intensity of the Union's competence. More

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[46] Cases C-609/17 and C-610/17, *TSN and AKT*, Judgment (19 November 2019) ECLI:EU:C:2019:981.

[47] Case C-278/20 (n 2) para 179.

recent case law – the *Department for Communities in Northern* Ireland case[48] – casts serious doubts on the general applicability of the *TSN and AKT* doctrine, since in that case the Court of Justice decided to apply the Charter to the situation of a Union citizen who did not meet the requirements of Directive 2004/38 but who had received a residence permit thanks to the application of a more favourable national regime. This development may offer an important argument in the case at hand: the Court seems to recognise that there is a type of situation in which the protection of the Charter is called upon to apply by virtue of its 'EU' nature, as in the case of citizens of the Union residing, under whatever title, in another Member State. Would not the same logic apply in *Commission v Spain*, where we are concerned with the reparation of the damage caused by the infringement of Union law?

5. Concluding remarks

Commission v Spain could have just focused on the fact that procedural autonomy and its limits are not the proper framework of analysis because the requirement of a 'sufficiently serious violation' is no longer part of that 'autonomy', as it has been judicially harmonised.

Instead, *Commission v Spain* tells us that Member States are implementing EU law *only where State liability is established after fulfilment of the 'Brasserie-trio' conditions are satisfied*. As a result, with regard to *equivalence* (and arguably effectiveness), having suffered damage due to a breach of EU law does not bring us within the realm of EU law. This entails a twofold cumulative condition for falling within the scope of equivalence: the trigger for the applicability of equivalence (and arguably its effectiveness) has been made conditional on the fulfilment of the requirements for breach of another general principle, that of State liability, which must also be triggered by the fact that national procedures are based on a breach of EU law. Since the reasoning in *Commission v Spain* is based on the 'implementing EU law' criterion, the danger is that this reading will creep back into the interpretation of the scope of the Charter (and of the principle of equality), leaving outside the scope of EU law, for the sake of all other general principles and fundamental rights, State liability procedures before the fulfilment of the *'Brasserie-trio'* conditions is satisfied.

Indeed, the redefinition of the scope of application of the principle of equivalence (which evidently affects that of the principle of effectiveness) is carried out through a methodological shift that tends to harmonise the jurisprudential discourse with the interpretation of the scope of application of the Charter, but reaching some much more restrictive results than the Charter itself would have potentially yielded. The main risk that this ruling presents is that the interpretation of the scope of application of the principle of equivalence established in this matter is transferred to the application of the Charter in the field of State responsibility.

Commission v Spain sets, in this way, a narrower scope for the application of the principle of equivalence in the field of State liability when compared to other areas of law. Where there is no procedural or material harmonisation whatsoever, the Court adopts a holistic approach to the rules governing actions and applies the equivalence and effectiveness tests even to the availability or existence of the remedy itself. However, in the area of State liability, from now on, claiming damages for an EU law breach will not be enough to ensure that national actions are equivalence-compliant: the material conditions for liability must be met before any protection through equivalence can be awarded. Since effectiveness operates in parallel to equivalence as a limit to the principle of procedural autonomy, any consideration of the scope of the latter will inevitably affect the scope of the former.

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[48] Case C-709/20, *Department for Communities in Norther Ireland*, Judgment (15 July 2021) ECLI:EU:C:2021:602, paras 85 et seq.

This development implies that the responsibility of the State is configured as a procedural island, petrified in the requirements of *Brasserie*, and isolated from the possible evolutions of national legal systems. Member States now have freedom not to extend to remedies based on Union law all their more favourable procedural avenues and regulations that deviate from the restrictive criteria of the sufficiently serious violation and that of the norm that aims to confer rights to the individuals. Thus, paradoxically, the principles of equivalence and effectiveness have a broader scope of application and more incisive effects where the procedural autonomy of the Member States should be broader in the absence of any (jurisprudential) harmonisation.

In this context, the future role of the Charter is essential. In any case, if the effects of the jurisprudential harmonisation of the Brasserie *conditions* are such that they lead to excluding the applicability of equivalence (and therefore, of its existential prerequisite: procedural autonomy) perhaps the time has come to reopen the old issue, already raised by Advocate General Mischo in *Francovich*, of true legislative harmonisation at Union level that allows for true overall reflection and the design of a coherent system.

Have a seat, but who is the host?

The difficult identification of decision-makers in the location of EU agencies

(C-59/18 and C-182/18, C-106/19 and C-232/19 *European Parliament, Italy, Comune di Milano v Council*)

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Abstract

This article discusses the 2022 rulings of the Court of Justice on the allocation of the seats of EU agencies. In the absence of any provision in the Treaties or other uniform rules, the allocation of the seats of EU agencies has pragmatically followed the method used for EU institutions. The 2012 Common Approach annexed to their Joint Statement on EU agencies aimed to rationalise such decision-making process and base it on objective criteria. On these grounds, specific selection rules were adopted in the legislative proceedings for the relocation of the two agencies leaving the United Kingdom because of Brexit, the European Medicines Agency (EMA) and the European Banking Authority (EBA), as well as for the location of the newly established European Labour Authority (ELA). These procedures created a hybrid decision-making process where intergovernmental and supranational responsibilities were blurred.

In the actions for the annulment of the decisions on the seats of EMA and ELA, the Grand Chamber of Court of Justice had to settle the question of who decides where an EU agency should be located, the Member States or the EU institutions. The Court of Justice endorsed a full supranational approach: competence belongs to the EU institutions, while the relevant decision of the Representatives of the Member States has no binding legal effect. This article analyses the approach adopted by Court of Justice and focuses on the effects of the rulings on the responsibilities of the Member States and EU institutions.

Keywords

Seats of EU agencies; Selection Procedure; European Medicines Agency (EMA); European Labour Authority (ELA); The Representatives of the Governments of the Member States; Supranational Competence.

Cite as

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1. Introduction

The decision on the seat of EU agencies has always been underregulated in the European Union (EU). In the absence of any provision in the Treaties or other uniform rules, practice followed the method used for EU institutions. The place of EU agencies has been decided by the common agreement of the Representatives of the Governments of Member States. By agreeing on the location on a case-by-case basis, the States implicitly intended to offer each of them the seat of an EU agency. Among others, the very seat of European Medicines Agency (EMA) in London was decided like that in 1993.[1] However, in the 2012 Common Approach annexed to their Joint Statement on EU agencies, the Council, the European Commission and the European Parliament aimed to rationalise such decision-making process and base it on objective criteria.[2]

On these grounds, specific selection rules were adopted in the legislative proceedings for the relocation of the two agencies leaving the United Kingdom because of Brexit, the EMA and the European Banking Authority (EBA), as well as for the location of the newly established European Labour Authority (ELA). The new procedures created a hybrid decision-making process that blurred intergovernmental and supranational responsibilities. In the actions for the annulment of the decisions on the seats of EMA and ELA, the Grand Chamber of Court of Justice had to settle the question of who decides where an EU agency should be located, the Member States or the EU institutions. In three distinct rulings delivered on 14 July 2022,[3] the Court had to deal with what Tridimas has recently called the issue of authority uncertainty under EU law, which concerns the identification of the body responsible for the adoption of the rules and reflects 'an unsettling level of constitutional ambiguity and a certain lack of quality in the law'.[4] In the rulings commented here, the Court of Justice endorsed a full supranational approach and held that the competence belongs to the EU institutions, while the decision of the Representatives of the Member States has no binding legal effect.

This article will proceed as follows. Firstly, it provides the background of the case by outlining the procedures for the allocation of the seats of EMA and ELA (section 2). It thus introduces the positions of the parties in the dispute to demonstrate how interests in the procedure and institutional prerogatives diverged in the blurred framework of responsibilities (section 3). Hence, the key legal issue of the attribution of the power to adopt the decision on the location of the seat of EU agencies is analysed (section 4). On these grounds, the article focuses on the implications of the assigning competence to the EU co-legislators and specifically analyses the relationship between the EU legislative process and the intergovernmental decision (section 5). Finally, the impact of the rulings is considered in the wider context, with the aim of understanding how these rulings are going to affect the establishment of both existing and new EU agencies (section 6).

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[1] Decision taken by common Agreement between the Representatives of the Governments of the Member States, meeting at Head of State and Government level, on the location of the seats of certain bodies and departments of the European Communities and of Europol (30 November 1993), OJ C323/1.

[2] 'Common Approach' annexed to the 'Joint Statement of the European Parliament, the Council of the EU and the European Commission on EU decentralized agencies', para 6, <https://perma.cc/7WHZ-SX73>.

[3] Cases C-59/18 and C-182/18, *Italy and Comune di Milano v Council of the European Union*, Judgment (14 July 2022) ECLI:EU:C:2022:567; Cases C-106/19 and C-232/19, *Italy and Comune di Milano v Council of the European Union and European Parliament*, Judgment (14 July 2022) ECLI:EU:C:2022:568; Case C-743/19, *European Parliament v Council of the European Union*, Judgment (14 July 2022) ECLI:EU:C:2022:569.

[4] T Tridimas, 'Indeterminacy and Legal Uncertainty in EU Law' (2019) 19 King's College London Dickson Poon School of Law. Legal Studies Research Paper Series, 6.

2. Engineering the decision-making process. The background of the dispute

Building on the 2012 Common Approach on the good governance of EU agencies, Member States adopted the proceedings leading to the relocation of EMA after Brexit and the establishment of ELA on the grounds of objective criteria aimed at enhancing the transparency of the selection process and rationalising the distribution of EU agencies' seats throughout the Union. In particular, in 2017, the Heads of State or Government of the 27 Member States in the margins of a meeting of the European Council approved the selection rules for the adoption of a decision on the transfer from London of the seats of the EMA and the European Banking Authority (EBA).[5] In 2019, the Representatives of the Governments of the Member States, in the margins of a meeting of the Committee of Permanent Representatives (Coreper), approved by common accord the procedure and the criteria for determining the location of ELA's seat.[6]

By and large, both the procedures fixed the criteria for the selection, including the accessibility of the proposed location, the existence of adequate education facilities for the children of agency staff, appropriate access to the labour market, social security and medical care for both children and spouses, geographical balance and for the relocation of EMA also business continuity. The procedures were also based on the submission of offers by the interested Member States to be assessed by the Commission and defined the voting rules to be followed for making the decision on the selected offers, whose outcome the Member States agreed in advance to respect. In the case of EMA, in case of a tie between the remaining offers in the third round of votes, the decision would be taken by drawing lots between the tied offers.

The outcomes of the two proceedings were the following. Of the 27 offers submitted, after the third voting round, the Netherlands won the seat of EMA against Italy in the drawing of lots. The Representatives of the Governments of the Member States designated, in the margins of a meeting of the Council, the city of Amsterdam as the new seat of the EMA.[7] Under the established procedure, the legislative process should follow. According to the decision of the Member States:

> 'the Commission will now prepare legislative proposals reflecting today's vote for adoption under the ordinary legislative procedure with the involvement of the European Parliament. The Council and the Commission are committed to ensuring that those legislative proposals are processed as quickly as possible in view of the urgency of the matter'.[8]

Regulation 2018/1718 in fact added art. 71a to the EMA Regulation 726/2004, holding that the EMA shall have its seat in Amsterdam.[9]

With regard to the ELA, the establishing regulation did not include any provision on the location of the Agency.[10] The article on the location of the seat of the Authority included in the initial draft was,

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[5] European Council, 'Procedure leading up to a decision on the relocation of the European Medicines Agency and the European Banking Authority in the context of the United Kingdom's withdrawal from the Union' (22 June 2017), art. 50 <https://www.consilium.europa.eu/media/21503/22-euco-conclusions-agencies-relocation.pdf> accessed 19 March 2024.

[6] Council of the European Union, 'Procedure for the selection of the seat of the European Labour Authority' (14 March 2018), 7491/19 <https://www.consilium.europa.eu/media/39410/procedure-ela-en.pdf> accessed 19 March 2024.

[7] Council of the European Union, 'Outcome of the meeting of the General Affairs Council' (20 November 2017), 14559/17, art. 50 <https://www.consilium.europa.eu/media/31878/st14559en17.pdf> accessed 19 March 2024.

[8] ibid, 3.

[9] Regulation (EU) 2018/1718 of the European Parliament and of the Council of 14 November 2018 amending Regulation (EC) No 726/2004 as regards the location of the seat of the European Medicines Agency, OJ L291/3.

[10] Regulation (EU) 2019/1149 of the European Parliament and of the Council of 20 June 2019 establishing a European Labour Authority, amending Regulations (EC) No 883/2004, (EU) No 492/2011, and (EU) 2016/589 and repealing Decision (EU) 2016/344, OJ L186/21.

in fact, dropped,[11] pending the conclusions of the intergovernmental decision on the selection procedure. The European Parliament and the Council therefore decided to postpone the decision on the seat. Of the four offers received – namely Sofia (Bulgaria), Nicosia (Cyprus), Riga (Latvia), and Bratislava (Slovakia) – the Representatives of the Governments of the Member States selected Bratislava at the margins of the ESPCO Council Meeting and the Council adopted the decision establishing the seat of ELA.[12]
Both procedures primarily rest upon the adoption of intergovernmental decisions that triggered the prompt action of the EU institutions. Based on the agreement of the Member States, EU institutions endorsed such decisions either through the ordinary legislative process in the case of EMA or through the adoption of a decision by the Council in the case of ELA. The actions for annulment hence questioned the real decision-maker in the procedure.

3. The nuanced positions of the parties amid the blurred responsibilities

Seeking annulment under art. 263 TFEU, *Italy and Comune di Milano* challenged both the intergovernmental decision on EMA and the legislative amendment incorporating the selection decision. Similarly, in the case of ELA, the European Parliament challenged the decision of the Council under art. 263 TFEU. The positions of the different parties in the different proceedings show evidence of how nuanced their interests are in the decision-making process. As AG Bobek observed, some arguments are 'simply baffling, amounting to nothing less than advanced legal acrobatics'.[13] To make their point, in fact, some parties found themselves protecting the prerogatives of other parties against their own prerogatives. This is the case of a Member State (Italy) and a local authority (Comune di Milano), which supported the need for an exclusive supranational decision adopted through the ordinary legislative procedure. When denying the powers of the States in the procedure, they defended the prerogatives of the European Parliament to make their argument against the placement of seat in Amsterdam. The Council (and the Netherlands) instead recognised an intergovernmental competence based on art. 341 TFEU, but then considered that the legislative power was freely exercised in the ordinary legislative procedure. In addition, the European Parliament considered the intergovernmental decision on EMA relocation as an act of the Member States with no legally binding effects, but the intergovernmental decision on the ELA seat as 'a legally binding act' of the Council. The result is that the European Parliament considered its own prerogatives upheld in the EMA relocation legislative procedure and infringed in the choice of the ELA's headquarters. The Commission, instead, protected its own prerogatives and supported the supranational competence and the effectiveness of the ordinary legislative procedure. It consistently considered the intergovernmental decision 'purely political',[14] and aligned its role in the specific procedure with its wider responsibility in the legislative procedure.

The position of Comune di Milano is particularly interesting, as it also had to face a question of standing in the procedure. In fact, as a non-privileged actor under art. 263(4) TFEU, the city of Milan should have demonstrated its standing rights under the (in)famous *Plaumann* test.[15] Following the

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[11] Proposal for a Regulation of the European Parliament and the Council establishing a European Labour Authority (13 March 2018), COM/2018/0131 final, art. 4.

[12] Decision (EU) 2019/1199 taken by common accord between the Representatives of the Governments of the Member States on the location of the seat of the European Labour Authority (13 June 2019), OJ L189/68.

[13] Cases C-106/19 and C-232/19, *Italy and Comune di Milano v Council of European Union and European Parliament*, Opinion of AG Bobek (6 October 2021) ECLI:EU:C:2021:816, para 125.

[14] C-59/18 and C-182/18 (n 3) para 40.

[15] See Case C-25/62, *Plaumann v Commission of the EEC*, Judgment (15 July 1963) ECLI:EU:C:1963:17.

Opinion of the AG Bobek[16] and against the contrary positions of the Council and the European Parliament,[17] the Court recognised both the legal interest and the *locus standi* of the city in the proceedings as a competitor in the selection process, even though the outcome of the competition was not considered binding by the Court and the competition did not affect the powers of the municipality as for the *Vlaams Gewest* test.[18] Milano in fact had an interest in the annulment of the regulation, insofar as such annulment would require the adoption of new regulation substantively different from the contested one. This could lead to a new selection, where Milano would have good chances to win.[19] In addition, the Court considered that like in other sectors of EU law, such as state aid and public procurement, Milano was a direct competitor for the designation of the seat of EMA and this defined its legal situation.[20]

Milano thus passed the *Plaumann* test and met the criteria of direct and individual concern. The city was directly concerned, because the decision to assign the seat of the EMA to Amsterdam meant it could not be placed in Milano. Hence the measure has directly affected the legal situation of the individual city, and no discretion has been left in the implementation process.[21] Milano was also individually concerned, because it participated in the selection process and arrived at the final round together with the Netherlands out of a closed group of candidates.[22] The factual situation thus distinguishes Milano individually just as in the case of the addressee of the decision.[23] Under these circumstances, it is not relevant that the regulation did not affect the specific exercise of the powers of the Comune di Milano.[24] Yet the Court rejected reasons related to the impact of the exclusion on the territory and its general effect on the socio-economic conditions.[25] In short, the peculiarity of the bidding procedure mitigated the rigidity of the *Plaumann* test and conferred on the municipality standing rights, which would have been difficult to demonstrate outside that specific context.

4. The identification of the source of authority

The Court of Justice was asked to remove the ambiguity over the source of authority in the procedure and thus decide on the very existence of its own jurisdiction on the location of EU agencies' decisions, as well as on the legitimacy of the legislative process. In a nutshell, the Court found that the decision on the seat of EU agencies should be made not in the name of the Representatives of the Governments of the Member States, but in the name of the Union through the ordinary legislative procedure. Because EU legislation is the source of authority, the Court has jurisdiction under art. 263 TFEU. The Court reached this conclusion by analysing three main grounds of review: art. 341 TFEU on the seat of EU institutions; Protocol 6 on the location of the seats of the institutions and of certain bodies, offices, agencies, and departments of the EU, annexed to the Treaties; and the previous practice in this field.

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[16] Cases C-106/19 and C-232/19 (n 13) paras 89, 94.

[17] Cases C-106/19 and C-232/19 (n 3) paras 41-50.

[18] Case T-214/95, *Vlaams Gewest v Commission*, Judgment (30 April 1998) ECLI:EU:T:1998:77, para 29.

[19] Cases C-106/19 and C-232/19 (n 3) paras 55-56.

[20] Cases C-106/19 and C-232/19 (n 13) paras 90-91.

[21] Cases C-106/19 and C-232/19 (n 3) paras 63-67.

[22] ibid, para 70.

[23] ibid, paras 72-73.

[24] ibid, para 74.

[25] ibid, paras 75-76.

The Court examined the competence of the Member States to adopt the intergovernmental decision under art. 341 TFEU and discussed whether Article 341 TFEU should also apply to decisions determining the seat of the bodies, offices and agencies of the Union. In the ELA case, in fact, the intergovernmental decision was expressly adopted under art. 341 TFEU, as the Representatives of the Governments of the Member States considered that the reference to the 'institutions' under that article of the Treaty had to be interpreted broadly.[26] Following the Opinion of AG Bobek, the Court concluded that neither the wording nor the context of art. 341 TFEU supported the broad interpretation of the concept of institutions. The Court provided different reasons.

Firstly, the Court relied on the very general reconstruction of the interpretation of the provision. The concept of institutions refers to precise entities listed in art. 13 TEU, which does not include EU agencies. Since the TFEU and the TEU constitute 'a unitary constitutional basis for the European Union', the same concept 'must apply transversely and uniformly in both treaties'.[27] Unlike several provisions of the Treaties that have been amended by the Treaty of Lisbon in order to include an express reference to the 'bodies, offices and agencies of the Union' – such as the articles on Court's jurisdiction –, art. 341 TFEU has never been amended.[28] Because of this contextual reconstruction, the Court considered the meaning of the provision 'clear' with no further ado.[29] As Buchta observed, despite the reference to the need to take into account the origin of the provision of EU law, the Court did not refer to the *travaux préparatoires* in the analysis of art. 341 TFEU[30] and cut any alternative interpretation short.

Secondly, the Court compared art. 341 TFEU with other provisions in the Treaty, but it did not recognise any 'systemic, inherent reason' to justify the broader interpretation of the concept of institutions. In particular, even though it refers to EU institutions, art. 340 TFEU on extra-contractual liability needs to be extended to include EU agencies because of its very purpose and intrinsic logic.[31] Broad interpretation is justified in the light of the general principles common to the laws of the Member States expressly referred to in that provision and the need to prevent the EU from being able to escape non-contractual liability through its agencies. Moreover, textually, the concept of 'servants' in art. 340 (2) TFEU encompasses from a functional point of view all the staff working for the European Union, be them in the institutions or in other bodies, offices and agencies. Similarly, art. 342 TFEU on language regimes of EU institutions cannot help to extend the notion of institutions, because the language regime of EU agencies can be different from that in force in the institutions of the Union.[32]

If art. 341 TFEU does not confer competence to determine the location of EU agencies on the Member States, nor does Protocol 6. This Protocol enshrines under EU primary law art. 1 of the Edinburgh Decision, which recognised that the seats of EU institutions should be designated by common accord of the Representatives of the Governments of the Member States. According to the Court, the reference in Protocol 6 to art. 341 TFEU can be explained by the fact that that Protocol

[26] Decision (EU) 2019/1199 (n 12).

[27] Cases C-59/18 and C-182/18 (n 3) paras 69, 72; Cases C-106/19 and C-232/19 (n 3) paras 113, 116; Case C-743/19 (n 3) paras 45, 48.

[28] See also Cases C-59/18 and C-182/18 (n 3) para 70; Cases C-106/19 and C-232/19 (n 3) para 114; Case C-743/19 (n 3) para 46; Case C-743/19, *European Parliament v Council of the European Union*, Opinion of AG Bobek (6 October 2021) ECLI:EU:C:2021:812, paras 94-95.

[29] Cases C-59/18 and C-182/18 (n 3) para 71; Cases C-106/19 and C-232/19 (n 3) para 115; Case C-743/19 (n 3) para 47.

[30] T Buchta, 'Judgments on the selection of the seats of EU agencies: Challenges and what will change' (2022) 29 Maastricht Journal of European and Comparative Law 726, 732.

[31] Cases C-59/18 and C-182/18 (n 3) paras 73-76; Cases C-106/19 and C-232/19 (n 3) paras 117-120; Case C-743/19 (n 3) paras 49-52; see also Cases C-59/18 and C-182/18 (n 28) para 100.

[32] Cases C-59/18 and C-182/18 (n 3) para 77; Cases C-106/19 and C-232/19 (n 3) para 121; Case C-743/19 (n 3) paras 49-53. See also Cases C-59/18 and C-182/18 (n 28) para 98.

refers primarily to EU institutions and to bodies established by the Member States, such as Europol.[33] Protocol 6 is a mere implementation act pursuant to art. 341 TFEU and can in no way constitute an appropriate legal source allowing for an extensive interpretation of this article to include the location of EU agencies. In fact, Protocol 6 did not incorporate art. 2 of that binding Decision, which extended the same intergovernmental decision-making rule to other bodies and departments. Despite the wish of the Member States to reserve that decision to themselves, the provision was not incorporated under primary law and cannot lead to an interpretation of art. 341 TFEU that would run against its 'clear wording'.[34] As the AG's Opinion demonstrated,[35] the adoption of Protocol 6 shows that the Member States considered that their collective decision had to be specifically enshrined in primary law to produce legal effects in EU law. This also means that art. 341 TFEU remains relevant to any possible future decision modifying the seat of an existing institution or determining the seat of a new institution.[36] As scholarship observed,[37] a change of the seat of an EU institution would reasonably require the revision of Protocol 6 through the simplified procedure established in art. 48 TEU, as art. 341 TFEU cannot be used to amend primary law and escape the Treaty procedure. Therefore, the Decision of the Representatives of the Governments of the Member States cannot amend the existing seats of EU institutions enshrined in Protocol No 6.

Finally, the Court considered that previous practice cannot help to frame the case for the competence of the States for two main reasons. Firstly, it is inconsistent, as some procedures have been carried out by the Member States alone and others saw the participation of EU institutions, including in their capacity as co-legislators. In addition, the procedure under the 2012 Joint Statement is not legally binding and it does not reserve competence to the Member States.[38] Secondly, practice cannot run counter to Art. 341 TFEU and as a general rule cannot create a precedent binding on EU institutions in breach of the principle of institutional balance.[39]

As a result, neither EU primary law nor practice justifies the competence of the Member States acting at the intergovernmental level. On these grounds, the competence is allocated to the EU supranational decision-making. According to the Court, in the absence of any details in the Treaties, it is for the EU lawmakers to determine the seat in the same way as they are competent to define the powers, organisation and mode of operation of EU agencies. In other words, the decision on the location of the seat of EU agencies is 'consubstantial with the decision on its establishment'[40] and should be based on functional reasons in order to achieve the objectives of a given policy.

5. The EU legislative competence on EU agencies

The identification of the source of authority in the allocation of the seat of EU agencies required the Court of Justice to frame the role of EU agencies in the EU legal order. The Court clearly shows that the legal foundation of EU agencies is different from that of EU institutions: their establishment is based on acts of EU secondary law rather than primary law. The acts of secondary legislation setting

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[33] Cases C-59/18 and C-182/18 (n 3) para 78; Cases C-106/19 and C-232/19 (n 3) para 122; Case C-743/19 (n 3) paras 49-54.

[34] Cases C-59/18 and C-182/18 (n 3) para 82; Cases C-106/19 and C-232/19 (n 3) para 126; Case C-743/19 (n 3) para 58.

[35] Cases C-59/18 and C-182/18 (n 28) para 112.

[36] Cases C-59/18 and C-182/18 (n 3) para 87; Cases C-106/19 and C-232/19 (n 3) para 131; Case C-743/19 (n 3) para 63.

[37] Buchta (n 30) 733; R Passchier and M Stremler, 'Unconstitutional Constitutional Amendments in European Union Law: Considering the Existence of Substantive Constraints on Treaty Revision' (2016) 5 Cambridge Journal of International and Comparative Law 337, 350.

[38] Cases C-59/18 and C-182/18 (n 3) paras 84-85; Cases C-106/19 and C-232/19 (n 3) paras 128-129; Case C-743/19 (n 3) paras 60-61.

[39] Cases C-59/18 and C-182/18 (n 3) para 86; Cases C-106/19 and C-232/19 (n 3) para 130; Case C-743/19 (n 3) para 62.

[40] Cases C-59/18 and C-182/18 (n 3) para 90; Cases C-106/19 and C-232/19 (n 3) para 134; Case C-743/19 (n 3) para 66.

up EU agencies are adopted on the basis of the substantive provisions implementing a specific EU policy and define how the agency should be involved in the implementation of such policy.[41] EMA and ELA are, in fact, established by the EU legislature on the basis of general provisions of the Treaties. In particular, their legal bases should be found in articles 114 and 168 (4) TFEU in the case of EMA and in articles 46 and 48 TFEU in the case of ELA.

The political sensitivity of the decision to set up an EU agency cannot change the competence framework. Political considerations concern, for instance, the geographical balance and the fair distribution of seats in the Member States and shall be taken into account in the decision-making process. According to the Court, this is not problematic for the co-legislators, who are used to make political choices in the exercise of their competences. Furthermore, the more transparency embedded in the EU legislative process compared to the Member States' agreement contributes to strengthening the democratic foundation of the decision on the seat.[42]

On these grounds, the Court of Justice considered the effects of the intergovernmental decision. As the Representatives of the Governments of the Member States are the authors of the decision, the Court has no jurisdiction to assess the legality of their action beyond art. 273 TFEU – allowing parties to agree to submit the dispute to the Court.

In line with previous case law, in fact, the Court clarified that its own jurisdiction is based on the authorship of acts, irrespective of the binding legal effects.[43] As the Court explained in the ELA case, extending the concept of challengeable acts under art. 263 TFEU to acts adopted, even by common accord, by the Member States would mean allowing direct review by the EU Courts of acts of the Member States.[44] This would circumvent the distribution of judicial competence under the Treaties and the system of legal remedies specifically provided for in the event of failure of Member States to fulfil their obligations under the Treaties (art. 258 TFEU). This means that even though the intergovernmental decision does not respect the institutional balance of powers as set in the Treaties, it cannot be reviewed by the Court.

However, following the AG Opinion[45] and on the basis of previous case law,[46] the Court held that a decision taken by the Member States in an area in which the Treaties do not provide for their action falls outside the EU legal order and should therefore be deprived of any binding legal effects under EU law.[47] This conclusion allows the Court to neutralise the effects of any intergovernmental decision adopted outside the framework of the Treaties which aims at or risks changing the order created by the Treaties. In previous cases, the Court considered the authorship of act sufficient to exclude the scrutiny of any legal effects of the intergovernmental decision.

In the *Sharpston* case, in particular, the Court refused to examine the legal effects of the decision of the Representatives of the Member of 29 January 2020 concerning the end of the mandates of members of EU institutions, bodies, offices, and agencies nominated, appointed or elected by the UK on the date of withdrawal. The authorship of the act made 'immaterial'[48] whether the Member

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[41] Cases C-59/18 and C-182/18 (n 3) para 88; Cases C-106/19 and C-232/19 (n 3) para 132; Case C-743/19 (n 3) para 64.

[42] Cases C-59/18 and C-182/18 (n 3) para 95; Cases C-106/19 and C-232/19 (n 3) para 139; Case C-743/19 (n 3) para 71.

[43] Case C-685/20 P, *Sharpston v Council and Representatives of the Governments of the Member States*, Order (16 June 2021) ECLI:EU:C:2021:485, para 47; C-181/91 and C-248/91, *European Parliament v Council and Commission*, Judgment (30 June 1993) ECLI:EU:C:1993:271, para 12.

[44] Case C-743/19 (n 3) para 86.

[45] Cases C-59/18 and C-182/18 (n 28) para 166.

[46] Cases C-8/15 P to C-10/15 P, *Ledra Advertising and Others v European Commission and ECB*, Judgment (20 September 2016) ECLI:EU:C:2016:701, para 54.

[47] Cases C-59/18 and C-182/18 (n 3) para 110; Cases C-106/19 and C-232/19 (n 3) para 170; Case C-743/19 (n 3) para 89.

[48] C-685/20 P (n 43) para 50. On this point see also K Bradley, 'The Justiciability of Member State decisions implementing the Treaty: the curious case of Comune di Milano (C-59/18 and C-182/18, C-106/19 and C-232/19, and C-)' (*EU Law Live*, 19 September

States acted collectively within the framework of the Treaties or international law. Previously, in the *Pringle* case, the Court also considered the European Stability Mechanism (ESM) compatible with EU law insofar as it was adopted by Member States outside EU law and could not 'affect the common rule of the Union or alter their scope'.[49]

The neutralisation of the legal effects of the intergovernmental decision reflects on both the issue of the derived illegitimacy of the legislative process based on the selection criteria and the instances of infringement of parliamentary prerogatives.

The decision-making rules adopted by the Member States are in fact irrelevant in the legislative process. This means that flaws in the selection procedure cannot affect the lawfulness of the regulation. In the case of EMA, the question particularly arose around the legitimacy of the drawing of lots. Italy and Milano claimed that this was an arbitrary designation method, which constitutes misuse of powers in that it departs from the objective pursued by the selection procedure; namely, to ensure that the best offer for hosting the new seat of the EMA is accepted, having regard to predefined criteria. They also claimed the failure to observe the principles of sound administration and sincere cooperation, in so far as the final drawing of lots was not a fitting selection method for a decision-making process based on technical criteria. The Court rejected all these arguments precisely on the grounds of the lack of any legal connection between this intergovernmental decision and the regulation adopted through the ordinary legislative procedure.[50]

The other relevant aspect is that according to the Court, the intergovernmental decision has 'the force of a measure of political cooperation which cannot in any event encroach on the powers conferred on the institutions of the Union in the context of the ordinary legislative procedure'.[51] This means that only the EU legislative act, which may freely ratify or depart from the intergovernmental decision, is capable of producing binding legal effects under EU law and must necessarily precede any measure for the actual implementation of the location of the seat of the agency concerned. In the case of EMA, Art. 71a of the Regulation relocating the seat of the Agency is the only legally binding provision.

This makes the procedure for the allocation of EU agencies' seats compatible with the prerogatives of the European Parliament and the principles of institutional balance, representative democracy, and sincere cooperation. The Court clarified that the mere fact that Parliament was not involved in the process that led to the adoption of the intergovernmental decision cannot be regarded as an infringement or a circumvention of Parliament's prerogatives as co-legislator for three reasons. First, the intergovernmental decision was adopted outside the framework defined by EU law; second, such decision has no binding force under EU law; and third, the legislative procedure for determining the location of the new seat of the EMA had not been initiated at the time of its adoption.[52]

In the case of EMA, by examining the ordinary legislative procedure, the Court also ascertained that no breach of Parliament's prerogatives occurred during the legislative proceedings, that its role in the procedure was not limited to purely formal aspects and that references to the intergovernmental decision in the Regulation did not affect these findings.[53] However, in the case

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2022) <https://eulawlive.com/op-ed-the-justiciability-of-member-state-decisions-implementing-the-treaty-the-curious-case-of-comune-di-milano-c-59-18-and-c-182-18-c-106-19-and-c-232-19-and-c-743-19-by-kiera/> 19 March 2024.

[49] Case C-370/12, *Thomas Pringle v Government of Ireland and Others*, Judgment (27 November 2012) ECLI:EU:C:2012:756, para 102.

[50] Cases C-106/19 and C-232/19 (n 3) para 171.

[51] ibid, para 147.

[52] ibid, para 148.

[53] ibid, paras 150-158.

of ELA, one might wonder whether there has not been a breach of parliamentary prerogatives, given that the co-legislators, awaiting the intergovernmental decision, decided to set aside the provision relating to the seat of ELA. At least, the absence of the intergovernmental decision affected the legislative process.

6. The unravelled implications of the rulings

By unravelling the issue of authority in the allocation of EU agencies' seats, the Court ended up changing previous practice, while upholding the hybrid aspects of the procedure. While holding the EU exclusive competence through the ordinary legislative procedure, the Court did recognise the political relevance of the preceding intergovernmental decision but deprived it of any legal effects under EU law. This interpretation is going to affect not only the negotiations on the seat of new agencies, but also the current seats of existing agencies, which were determined by a different procedure, including the ELA seat. As the AG Bobek pointed out, due to the lack of legal effects of the Decisions of the Representatives of the Governments of the Member States, the location of the ELA in Bratislava is 'simply a matter of fact'.[54] As Butchta pointed out, to ensure the legal certainty, the founding Regulation should be amended.[55]

In addition, the legal disconnection between the intergovernmental process and the legislative one questions the role of the intergovernmental decision. In the framework of the Court's interpretation, the role that Member States play in their intergovernmental meeting should be replaced by the position of the Council in the ordinary legislative procedure. Following an assessment of bids submitted by interested Member States, it would be up to the Member States in Council and the European Parliament as co-legislators to decide on the location of the EU agency. This is what seems to currently happen with the establishment of the seat of the new Anti-Money Laundering Authority (AMLA). The Commission in fact helped the co-legislators to define the criteria for the allocation of the seat and then launched a call for applications to the Member States.

If the decision of the seat of EU agencies should be based on functional factors related to the implementation of an EU policy in the same way as the definition of powers, organisation and mode of operation, the external intergovernmental support is not essential. In addition, as the Court clarified, the political relevance of the decision can be effectively taken into account by the European Parliament and the Council.

As AG Bobek emphasised, EU law cannot preclude Member States from adopting acts outside the Treaties.[56] However, as scholarship observed, by claiming that EU lawmakers can effectively deal with the political relevance of the decision and that the intergovernmental decision has no legal effects, the rulings of the Court encourage the full 'comunitarisation' of the selection procedure and safeguard the principle of institutional balance of powers, including the protection of the prerogatives of the European Parliament.[57] In particular, the Court's interpretation strengthens the claims of the European Parliament for a stronger role in the decision-making process.

During the EMA-EBA negotiations, the European Parliament expressed its disagreement with the procedure used to select the seats of the two agencies and called for a new procedure to be introduced in the Common Approach. The Council then invited the Commission to draft a report to

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[54] Cases C-59/18 and C-182/18 (n 28) para 172.

[55] Buchta (n 30) 733.

[56] Cases C-59/18 and C-182/18 (n 28) para 173.

[57] M Chamon, 'The Opinions of AG Bobek in the EMA relocation and ELA location cases' (*EU Law Live*, 11 October 2021) 5 <https://eulawlive.com/op-ed-the-opinion-of-ag-bobek-in-the-ema-relocation-and-ela-location-cases-by-merijn-chamon/> accessed 19 March 2024; Buchta (n 30) 733-734.

would serve as a basis for assessing the way forward in engaging with the process of such a revision.[58] However, the Commission concluded that the 2012 Common Approach offered a good framework for the decision-making process relating to the EU agencies' seats and for ensuring that the host Member States meet the specific needs of the agencies. Nevertheless, the matter is not settled. Currently, the European Parliament is fighting for his prerogatives in the establishment of the EU Centre on Child Sexual Abuse. In the proposal for a regulation, the Commission placed the seat of the agency in the Hague,[59] but Parliament requested to replace the specific reference to that city with general criteria that would allow the co-legislators to negotiate the seat in the legislative process.[60]

The 'comunitarisation' of the procedure adds complexity to the decision-making process. The distribution of the decision-making power between two actors – the Council and the European Parliament – under the rules of ordinary law-making may not be able to smooth potential conflicts that may arise in the establishment of an EU agency. As the Council pointed out in the EMA case, strengthening the role of the European Parliament may bring 'paradoxical and detrimental consequences' on the geographical location which would become part of the negotiations and impact the substance of the policy rules.[61] Indeed, as Buchta pointed out, this could lead to a stalemate between the EU institutions, resulting in a delay in the establishment of the agency.[62] The problem is that notwithstanding the shared criteria, if the European Parliament and the Council have divergent and incompatible preferences, the legislative agreement might become difficult to achieve. In the case of EMA, for instance, if the decision between Amsterdam and Milano had to be settled not by the voting in the intergovernmental meeting nor by the drawing of the lots (on which legitimacy the Court did not take a position), but in the legislative process, the strong and opposed preferences might have blocked negotiations. Even if Parliament and Council were not legally required to follow the decision of the Representatives of the Member States, the relevance of such a previous agreement could not be ignored in the relocation of EMA. Concrete evidence also comes from the fact that Parliament and Council postponed the decision of the seat of ELA to the achievement of an agreement in the intergovernmental meeting.

The key problem is that the legislative process makes the tensions in the allocation of seats not only more transparent, but also more constrained than the high-politics negotiations and the voting rules within the Representatives of the Government of the Member States. This will require EU lawmakers to develop instruments to objectively apply the agreed selection criteria to the specific circumstances of the case and effectively bridge the differences in their preferences. In this framework, the Commission should play a relevant mediation role in both the elaboration and the application of the selection criteria. Although 'comunitarisation' may not defuse conflicts in the location of the seats of EU agencies, the rulings of the Court of Justice adopt a clear supranational orientation and demonstrate that the supranational nature of EU agencies is taken seriously.

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[58] Report from the Commission to the European Parliament and the Council on the implementation of the Joint Statement and Common Approach on the location of the seats of decentralised agencies (26 April 2019), COM/2019/187 final.

[59] Proposal for a Regulation of the European Parliament and of the Council laying down rules to prevent and combat child sexual abuse (11 May 2022), COM/2022/209 final, art. 42.

[60] European Parliament, Draft report on the proposal for a regulation of the European Parliament and of the Council, Laying down rules to prevent and combat child sexual abuse (19 April 2023), COM (2022) 209 – C9-0174/2022 – 2022/0155(COD), amendment 192. See T Buchta, 'Selecting the seat of EU agencies – one year after the judgments of the Court of Justice' (*EU Law Live*, 23 October 2023) <https://eulawlive.com/op-ed-selecting-the-seat-of-eu-agencies-one-year-after-the-judgments-of-the-court-of-justice-by-tomas-buchta/> accessed 19 March 2024.

[61] Cases C-59/18 and C-182/18 (n 28) para 89.

[62] Buchta (n 30) 734.

A light(er) at the end of the tunnel? The General Court's judgment in *Czech Republic v Commission* (T-151/20) and the judicial protection of EU Member States in the area of traditional own resources

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Abstract

This contribution addresses the procedural challenges faced by Member States within the European Union judicial system, particularly in the context of traditional own resources. The core issue discussed is the lack of a clear procedural route for Member States to challenge the European Commission's assessments regarding the amounts to be made available to the EU budget. Using the case of the Czech Republic v. Commission (T-151/20) as a primary example, the paper explores the broader implications of judicial protection in the EU's own resources framework.

The EU's system of own resources, which includes duties, levies, VAT-based resources, GNI-based resources, and contributions based on unrecycled plastic waste, is established by Council Decision 2020/2053. Member States are obligated to transfer the assessed amounts to the EU budget promptly. Any delays incur high interest rates, thus pressuring Member States to comply swiftly. However, if a Member State disagrees with the Commission's assessment, they often make payments under reservation and seek judicial redress. However, until recently, no clear route was available for Member States seeking legal redress, creating legal uncertainty and causing Member States to use existing remedies in a creative fashion. In its judgment in Case C-575/18 P, the Court of Justice has provided a solution that allows Member States to seek redress through an action for unjust enrichment. However, this solution is not without its criticisms. Further to this, the review procedure subsequently introduced by Council Regulation No 2022/615 raises further procedural hurdles and ambiguities.

The contribution critically evaluates both the Court's and the Council's solutions, highlighting that while these measures are intended to strengthen judicial protection, they may inadvertently create additional obstacles. The mandatory nature of the review procedure, with its stringent time limits, may leave Member States with a genuine claim without judicial protection. Additionally, the shift in the burden of proof in unjust enrichment actions, as opposed to infringement procedures, further complicates the Member States' position.

The paper underscores the necessity for a balanced approach that provides effective judicial protection without imposing undue procedural burdens. It advocates for a more systematic legislative solution to address the gaps in the EU's judicial protection framework, rather than relying on ad hoc judicial and legislative fixes. This would ensure that Member States can challenge the Commission's assessments effectively while maintaining the integrity of the EU's own resources system.

Keywords

Action for damages – unjust enrichment – own resources of the European Union – judicial protection of EU Member States – gaps in the EU system of judicial protection

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1. Introduction

It is always dangerous to claim that a case is the first case of its kind, but Case T-151/20[1] is probably, to my knowledge and that of others[2], the first time a Member State has brought an action based on the Articles 268 TFEU and Article 340, second paragraph, TFEU against the European Union.[3] The case has a complex history and is, for the time being[4], the end of a long quest for judicial protection by the Czech Republic. At the origin is the lack of a clear route to the EU Courts for Member States seeking to challenge the European Commission's assessment of the amounts they have to make available to the budget of the European Union. Although the judgment in Case T-151/20 is the trigger for this contribution, the aim is to look at the broader issue of legal protection in the area of own resources and to critically assess both the solution of the EU courts and that of the EU legislator. To this end, the contribution is structured as follows. The first part gives a brief description of the EU's system of own resources, focusing on the elements necessary to understand the background to the case. The second part sets out the facts that led to Case T-151/20. The third part describes the various attempts of the Czech Republic as well as a number of other Member States to obtain judicial protection in the area of own resources. Particular attention is paid to the judgment of the Court of Justice in Case C-575/18 P, in which the Court gives its solution to the question of judicial protection in the area of own resources. Part four then analyses the judgment of the General Court in Case T-151/20, in which the General Court applies the solution provided by the Court of Justice in Case C-575/18 P. Part five discusses the legislative solution to the problem of judicial protection in the area of own resources. Part six critically assesses both the Court's and the Council's solution. This also provides an opportunity to reflect on how the gaps in the European Union's system of judicial protection tend to be filled.

2. The European Union's system of own resources and the process of making available traditional own resources

The own resources of the European Union are currently determined by Article 2 of Council Decision 2020/2053[5] and can be divided into four groups: traditional own resources (duties, levies or other amounts in connection with trade with third countries), VAT-based own resources, resources based on the gross national income (GNI) of the Member States, and resources based on the weight of unrecycled plastic waste generated in the Member States. The procedures for making available these resources to the

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[1] Case T-151/20, *Czech Republic v Commission*, Judgment (11 May 2022) ECLI:EU:T:2022:281.

[2] D Utrilla, 'Member States' actions for damages against the EU as a means to offset shortcomings of effective judicial protection? *Czech Republic v Commission*' (EU *Law Live*, 26 May 2020) <https://eulawlive.com/analysis-member-states-actions-for-damages-against-the-eu-as-a-means-to-offset-shortcomings-of-effective-judicial-protection-czech-republic-v-commission-by-dolores-utrilla/#> accessed 19 March 2024.

[3] Public authorities of the Member States have already brought action for damages against the European Union. See, for example, Cases T-339/16, T-352/16 and T-391/16, *Ville de Paris, Ville de Bruxelles and Ayuntamiento de Madrid v European Commission*, Judgment (13 December 2018) ECLI:EU:T:2018:927. Mention can also be made of Cases T-264/10 and T-266/10, *Spain v Commission*, Judgment (21 June 2012) ECLI:EU:T:2012:315, in which Spain asked the General Court to declare that the Commission should pay interest to it following the annulment of two Commission decisions informing Spain that the Commission interrupted the deadline for settling certain interim payment claims within the context of Cohesion Fund and ERDF operational programmes. The claim was of a purely declaratory nature, requesting the General Court to spell out the consequences of the annulment of the Commission decisions, and thus not a proper action for compensation. Further to this, it should be pointed out that the action in Case T-121/20 is a claim for unjust enrichment and not an action for damages proper.

[4] An appeal against the judgment is pending before the Court of Justice: Case C-494/22 P, *Commission v Czech Republic*. See Opinion of Advocate General T Ćapeta (21 March 2024) ECLI:EU:C:2024:268. This Opinion was delivered after the present contribution had been finalised and was not taken into account. Nevertheless, the points made in this contribution are not affected by the Opinion of the Advocate General.

[5] Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom, OJ L424/1.

European Union are laid down in Regulation 609/2014[6], which was Regulation 1150/2000[7] at the time of the events giving rise to the proceedings.

Greatly simplifying, Member States are under a legal obligation to make the necessary amounts available to the EU budget without any intervention from the European Commission (hereafter 'Commission'). The determination of the amounts is done by the Member States and follows quasi-automatically from the applicable legislation. For example, as soon as the legal conditions for the existence of a customs debt are met, the EU is immediately entitled to that amount and the Member State responsible for collecting the amount is expected to transfer that amount to the EU budget within a specific time-period.[8] Any delay in crediting the account of the Commission gives rise to very high interests.[9] Where an entitlement is established but has not yet been recovered by the responsible Member State and no security is provided, a Member State shall enter such entitlement into a separate account, a so-called 'B account'.[10] Where the amount corresponding to that entitlement is recovered at a later date, the Member State concerned shall make the amount available to the EU. Conversely, Member States are released from their obligation to place the amounts entered into a B account at the disposal of the Commission if they prove irrecoverable. Member States can rely on this exception in case of *force majeure* or where the amounts cannot be recovered for other reasons which cannot be attributed to the Member State concerned.[11] The Member States assess themselves whether amounts prove irrecoverable and take the necessary steps to write-off the amounts concerned. Where amounts have been written off, the Member State concerned is required to send a report to the Commission for comments.[12] If the Commission disagrees with the explanations provided by the Member State in the report, the Commission can invite that Member State to pay the amounts concerned. This invitation only reflects an opinion of the Commission and is not binding upon that Member State. This is because the Commission has not been given any decision-making power by the Member States in this context.[13] The legal framework is in a way self-executing.

That being said, the Commission continues to play its role as the guardian of the Treaties in the area of traditional own resources. Where it is of the opinion that a Member State has failed to make the payments it was legally required to do, the Commission can initiate infringement proceedings against that Member State. If the Court of Justice then finds that the Member State has failed to make the payments it was legally required to do, that Member State will be liable to pay the amounts concerned plus interest. The applicable interest rates are very high and start to run from the moment on which the amount should have been made available. As it can take several years to complete an infringement procedure, a Member State runs the risk of having to pay a very high amount of interest if, at the end of the infringement procedure, the Court of Justice finds that the Member State has not fulfilled its payment obligation. Therefore, Member States usually pay the amount indicated by the Commission while expressing reservations[14] and then try to challenge the assessment of the Commission in the EU Courts. This is, however, easier said than done.

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[6] Council Regulation (EU, Euratom) No 609/2014 of 26 May 2014 on the methods and procedure for making available the traditional, VAT and GNI-based own resources and on the measures to meet cash requirements (Recast), OJ L168/39, lastly amended by Council Regulation (EU, Euratom) 2022/615 of 5 April 2022 amending Regulation (EU, Euratom) No 609/2014 in order to enhance predictability for Member States and to clarify procedures for dispute resolution when making available the traditional, VAT and GNI based own resources, OJ L115/51.

[7] Council Regulation (EC, Euratom) No 1150/2000 of 22 May 2000 implementing Decision 94/728/EC, Euratom on the system of the Communities' own resources, OJ L130/1.

[8] See Council Regulation (EU, Euratom) No 609/2014 (n 6) art 10(1).

[9] See ibid, art 12.

[10] ibid, art 6(3), para 2.

[11] ibid, art 13(2); ex Council Regulation (EC, Euratom) No 1150/2000 (n 7) art 17(2).

[12] Council Regulation (EU, Euratom) No 609/2014 (n 6) art 13(3).

[13] V Piegsa, 'Patching a gap in the EU's system of judicial remedies' (*Verfassungsblog*, 13 July 2020) <https://perma.cc/GB83-6R5P>.

[14] Cf. Case C-575/18 P, *Czech Republic v Commission*, Judgment (9 July 2020) ECLI:EU:C:2020:530, para 72.

3. Facts giving rise to the case (and to other cases)

In November 2007, the European Anti-Fraud Office (OLAF) went on a mission to Laos in connection with imports of pocket lighters into several EU Member States of the European Union during 2004-2007. On 15 November 2007, a document 'Agreed Joint Minutes' was signed by all members of the mission, which included a Czech civil servant. On 30 May 2008, an OLAF report was adopted on the basis of those minutes. In that report, it was established that the pocket lighters originated in China and not in Laos. Consequently, these imports should have been subject to an anti-dumping duty. The Member States concerned by these imports were required to commence administrative recovery proceedings. The report was sent to the Czech Republic on 9 July 2008. The final report was adopted by OLAF on 10 December 2008.

As regards the Czech Republic, the OLAF report concluded that recovery had to take place in connection to 28 cases where pocket lighters had been imported into the Czech Republic and released for free circulation between 26 September 2005 and 1 March 2007. However, it appeared not possible for the Czech Republic to proceed to recovery within the required time-limits because the company that imported the pocket lighters into the Czech Republic, Baide, went bankrupt in May 2008. Between November 2013 and November 2014, the Czech Republic undertook the administrative formalities to write off these amounts because they proved to be irrecoverable.

The Commission sent the Czech Republic a letter informing that it did not agree that the amounts were irrecoverable. It considered that the Czech Republic should have established the EU's entitlements before May 2008, and therefore before Baide's bankruptcy, or at least have lodged a security before releasing the pocket lighters for free circulation. Consequently, the Czech Republic could not rely on the impossibility exception, and thus was under a legal obligation to pay the amounts in question. Although the Czech Republic disagreed with the Commission, it paid the amounts in question under protest to avoid paying high interest. It then sought to challenge the Commission's assessment and obtain repayment of the amounts it had allegedly wrongly paid.[15]

4. The long quest for judicial protection and the judgment in C-575/18 P

It took more than seven years for the Czech Republic to obtain a judgment of the General Court holding that the Commission was wrong in part and to recover part of the amounts it had paid in 2015. The delay in judicial protection was caused by the absence of a clear route to challenge the Commission's assessment and to obtain repayment. It forced the Czech Republic to improvise, which led to three different actions against the Commission.

On 30 March 2015, the Czech Republic brought an action for annulment against the Commission's letter in the General Court. On 14 September 2015, the General Court declared actions for annulment brought by the Slovak Republic and Romania against similar Commission letters inadmissible, holding that those letters were merely Commission opinions and no actionable measures.[16] On appeal, in two judgments of 25 October 2017, the Court of Justice confirmed that such letters did not produce any legal effect because payment obligations followed automatically from the applicable legislation.[17] It was thus no surprise that the General Court declared the action of the Czech Republic inadmissible by an order of 28 June 2018.[18]

[15] See Case T-151/20 (n 1) paras 1-15 for the facts of the case.

[16] Case T-779/14, *Slovakia v Commission*, Order (14 September 2015) ECLI:EU:T:2015:655, para 47; Case T-784/14, *Romania v Commission*, Order (14 September 2015) ECLI:EU:T:2015:659, para 44; Case T-678/14, *Slovakia v Commission*, Order (14 September 2015) ECLI:EU:T:2015:661, para 48.

[17] Cases C-593/15 P and C-594/15 P, *Slovakia v Commission*, Judgment (25 October 2017) ECLI:EU:C:2017:800, para 65; Case C-599/15 P, *Romania v Commission*, Judgment (25 October 2017) ECLI:EU:C:2017:801, para 67.

[18] Case T-147/12, *Czech Republic v Commission*, Order (28 June 2018) ECLI:EU:T:2018:395.

On 1 March 2019, the Czech Republic shifted up a gear and brought an action for failure to act against the Commission for failure to bring infringement proceedings against the Czech Republic.[19] At first glance, the action seemed pointless, but there is more to it. It should be noted that the Czech Republic had made the payment under reservation. According to the Czech Republic, a payment made under reservation is a payment that is legally unsound and therefore in breach of EU law. Since it is exclusively for the Court of Justice and not the Commission to determine the rights and obligations of member states, it should be for the Court of Justice to determine whether a payment obligation existed for the Czech Republic in the context of an infringement action. This would allow the Czech Republic to challenge the Commission's assessment of the recoverability of the amounts in question. However, since a conditional payment is an actual payment, the Commission had no interest in bringing infringement proceedings. After all, it had the money at its disposal. Therefore, to allow Member States to challenge the Commission's assessment, the Commission should be required to initiate infringement proceedings in these specific circumstances on the basis of Article 4(3) TEU, as no other remedy is available.

This second attempt seems far-fetched as it goes against settled case law that the initiation of infringement actions is at the discretion of the Commission.[20] Nevertheless, in her opinion of 12 March 2020 in the appeal brought by the Czech Republic against the order of the General Court of 28 June 2018, which is Case C-575/18 P, Advocate General Sharpston was sympathetic to this argument and suggested the Court of Justice to find that the Commission was obliged to bring infringement proceedings under these particular circumstances.[21] Advocate General Sharpston also raised the option of an action for damages based on unjust enrichment, but deemed such an action less appropriate as it would require the General Court to rule, albeit indirectly, on a Member State's compliance with EU law.[22] In its judgment, the Court of Justice rejected creating an obligation for the Commission to bring infringement proceedings.[23] It held, however, that the appropriate action for a Member State under such circumstances would by an action for unjust enrichment.[24]

Case C-575/18 P has been determinative for the outcome of the Czech Republic's long quest for judicial protection. Just days after the opinion of Advocate General Sharpston in that case, the Czech Republic brought an action for unjust enrichment against the Commission.[25] The Court's judgment of 9 July 2020 was followed only a few weeks later by a discontinuance of the action for failure to act.[26] Altough there is always a risk of *post hoc ergo propter hoc*, it would be difficult to deny causation in this case. It is therefore worth taking a closer look at the Court's judgment in Case C-575/18 P. Three points are of particular interest.

First, while the Court rejected creating an obligation for the Commission to initiate infringement proceedings, it confirmed that a payment subject to reservations may justify a finding of a failure to fulfil obligations where a Member State was obliged to make the amounts available.[27]

Second, the Court seems to set out a step-by-step approach for managing disagreements between a Member State and the Commission on the amount of own resources to be made available. In case of disagreement, the Member State should make the amounts available subject to reservations. This would in turn oblige the Commission to enter into a constructive dialogue with the Member State concerned in

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[19] Action brought on 8 January 2019, *Czech Republic v Commission*, T-13/19.

[20] K Lenaerts, K Gutman and JT Nowak, *EU Procedural Law* (2nd edn, OUP 2023) 199.

[21] Case C-575/18 P, *Czech Republic v Commission*, Opinion of Advocate General E Sharpston (12 March 2020) ECLI:EU:C:2020:205, points 131-133.

[22] ibid, point 134.

[23] Case C-575/18 P (n 14) paras 77-78.

[24] ibid, paras 81-84.

[25] Action brought on 16 March 2020, *Czech Republic v Commission*, T-151/20.

[26] Case T-13/19, *Czech Republic v Commission*, Order (30 September 2020) ECLI:EU:T:2020:455, para 1.

[27] Case C-575/18 P (n 14) para 75.

order to clarify their respective positions and reach agreement. If this dialogue fails, the Commission may initiate an infringement procedure. If the Commission does not initiate an infringement procedure, the Member State may bring an action for unjust enrichment.[28]

Third, the judgment suggests that an action for unjust enrichment is available to a Member State only where it has made amounts available subject to reservations and after a constructive dialogue between the Commission and the Member State has failed.[29]

5. The judgment in Case T-151/20

5.1. Subject-matter of the action

A preliminary point the General Court had to decide related to the subject-matter of the action. The Czech Republic argued that the subject-matter was limited to the content of the Commission's letter indicating that the Czech Republic should pay the amounts in question, and that the Commission could not put forward any arguments during the proceedings other than those mentioned in that letter. In response to this argument, the General Court rightly pointed out that an action for unjust enrichment does not require proof of any wrongdoing by the defendant but merely proof of enrichment on the part of the defendant for which there is no valid legal basis and of impoverishment on the part of the applicant which is linked to that enrichment.[30] The Czech Republic could thus not simply refute the arguments contained in the Commission's letter but had to establish the conditions for a successful action for unjust enrichment regardless of the Commission's letter.[31] This means proving that there was no legal obligation under EU law for the Czech Republic to make the amounts at issue available to the Commission, and that the impoverishment of the Czech Republic is linked to the unjustified transfer of those amounts. The Czech Republic could thus also not rely on arguments relating to the conduct of the Commission in the course of the dialogue with the Czech Republic as they would not contribute to proving the existence of unjust enrichment.[32] Conversely, the Commission was not limited to arguments it had raised in its letter requesting payment but could adduce any matters to dispute the existence of unjust enrichment.[33]

5.2. Proving unjust enrichment

In order for the Czech Republic to prove unjust enrichment on part of the Commission, it had to establish that the conditions laid down in the Article 17(2) Council Regulation No 1150/2000 (now Article 13(2) Council Regulation No 609/2014) were met, namely that the amounts were not recoverable for reasons of *force majeure* or for other reasons not attributable to the Czech Republic.

The Commission argued that the Article 17(2) exception was not applicable to the Czech Republic because the amounts had not been entered into a B account within the time-limits prescribed by Article 6(3) of Council Regulation No 1150/2000. The General Court held that this argument was irrelevant since, in the context of an action for unjust enrichment, the Czech Republic had to demonstrate only an enrichment on the part of the Commission for which there was no valid legal basis and a corresponding impoverishment on its part.[34] In these circumstances, it could thus not be required from the Czech Republic to demonstrate

[28] ibid, paras 72-74 and 81.

[29] ibid.

[30] Case T-151/20 (n 1), para 40.

[31] ibid, para 43.

[32] ibid, para 45.

[33] ibid, para 48.

[34] ibid, paras 85-87.

that 'the entire process during the customs proceedings, the recovery of the claim and the transactions relating to own resources was carried out in accordance with all the rules, correctly, in good time and whilst respecting the protection of the financial interests of the European Union'.[35] The alleged failure by the Czech Republic to comply with a procedural requirement did not justify the enrichment of the Commission where a valid legal basis for such enrichment did not exist in the first place. Moreover, the General Court concluded that the time-limits were complied with.[36]

The General Court then considered whether the sums were not recoverable for reasons not attributable to the Czech Republic. The main question was whether the Czech Republic was or could have been aware of the Chinese origin of the pocket lighters before Baide ceased all its activities in the Czech Republic in May 2008, and thus should have established the amounts before that date.

The Commission argued that the Czech Republic was aware of the Agreed Joint Minutes of 15 November 2007 and the evidence of the Chinese origins of the pocket lighters attached to those minutes, since those minutes were signed by a Czech civil servant who was present during the mission to Laos and took part in the inspections. It should thus have established the entitlements as soon as the civil servant had returned from the mission. The Czech Republic claimed that its civil servant did not receive a copy of the evidence at the end of the mission, a fact that was not disputed by the Commission, and that it was therefore not in possession of the evidence necessary to recover the amounts at issue. In turn, the Commission argued that it was up to the Czech Republic to request OLAF to communicate the evidence to it. The General Court sided with the Czech Republic. Evidence is necessary to establish entitlements, and knowledge or awareness of the Chinese origin of the pocket lighters by a civil servant taking part in an inspection mission was not sufficient in this regard.[37] Further to this, in the circumstance of the case, it could not be reproached to the Czech Republic that it had not requested the evidence from OLAF immediately upon the return of the inspection mission. This was especially so since OLAF had agreed to communicate the evidence to the Czech Republic at the beginning of 2008 (and which it only did in July 2008).[38]

The General Court also rejected the argument that the Czech Republic had failed to act with due diligence at the end of the inspection mission. It reiterated that the Czech Republic was entitled to wait for the communication of the OLAF report without asking for the evidence collected during the inspection mission prior to that. Therefore, an obligation for the Czech Republic to make such a request could only have arisen in the beginning of 2008. Given the time it would have taken to obtain the documents from OLAF, analyse the evidence, and carry out tax adjustments, the Commission could not claim that, in light of Baide's cessation of activities in May 2008, the Czech Republic could have recovered more money if it had established the entitlements earlier. Accordingly, the cessation of Baide's activities may have been a reason not attributable to the Czech Republic which could, as a matter of law, relieve the Czech Republic of the obligation to make the sums at issue available to the EU budget.[39]

However, from various elements, it appeared that the Czech Republic was aware of a risk of fraud by Baide at the time of the release of the pocket lighters for free circulation. On 22 March 2006, the Czech Republic had established a risk profile in which information about pocket lighters was included and in which it acknowledged the existence of 'a reasonable suspicion of circumvention of customs legislation'.[40] On 13 April 2006, the Czech Republic sent a letter to OLAF regarding suspicions of fraud on the part of Baide. In the course of July 2006, the Czech Republic had also warned the Slovak customs authorities about the existence of fraudulent imports of pocket lighters allegedly originating in Laos. On 28 August 2006, the

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[35] ibid, para 88.

[36] ibid, para 92.

[37] ibid, paras 102-103.

[38] ibid, paras 120-125.

[39] ibid, paras 133-136.

[40] ibid, para 182.

Czech Republic had opened an investigation into Baide.[41] The General Court concluded from this that the Czech Republic was required on the basis of Article 248(1) of the Regulation implementing the Customs Code to lodge a security for the recovery of anti-dumping duties that Baide may have owed from the determination of the risk profile, i.e. 22 March 2006.[42]

The failure of the Czech Republic to lodge a security from 22 March 2006 onwards meant that the amounts were not recoverable for reasons attributable to the Czech Republic from that date. Consequently, the General Court upheld the action for unjust enrichment only in part, namely for the imports made between 26 September 2005 and 21 March 2006. This amounted to a sum of CZK 17.828.399,66 (approx. EUR 720.052,77[43]) instead of the CZK 40.482.255 (approx. EUR 1.634.995,92[44]) initially claimed.[45]

6. Legislative intervention: Council Regulation No 2022/615

In July 2020, shortly after the judgment of the Court of Justice in C-578/18 P, the European Council invited the European Commission to assess presenting a proposal for the revision of the Council Regulation on the methods and procedure for making available own resources 'in order to tackle some of the challenges with respect to making available own resources'.[46] The proposal of the Commission of 25 June 2021 aimed at improving the existing provisions on the making available of own resources in order to enhance predictability for Member States and to enact procedures for dispute resolution.[47]

To this end, the Commission proposed to insert the practice of payment under reservation into Regulation No 609/2014 and to clarify its practical functioning. In addition, a review procedure was proposed in case of disagreement between the Commission and a Member State on the issue of whether a Member State is released from its obligation to make amounts available to the Commission that prove irrecoverable. Interestingly, the European Parliament was very critical of the review procedure proposed by the Commission and called on the Commission to delete the review procedure from the proposal.[48] The Council, acting as sole legislator, maintained the review procedure in the final version of the amending regulation, which was adopted on 5 April 2022.[49]

Article 13a of Council Regulation No 609/2014 now provides explicitly that a Member State may express reservations on the position of the Commission when making a payment of the contested amount.[50] It also confirms that the entry into account of the payment under reservation interrupts the period for which

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[41] ibid, para 183.

[42] ibid, para 187.

[43] Average exchange rate of the month of the judgment (May 2022). Compare to average exchange rate of the month of introduction of the action (March 2020: EUR 671.526,87) and of the month of the payment subject to reservations (March 2015: EUR 651.024,56). Calculations made with https://www.x-rates.com/calculator/?from=CZK&to=EUR&amount=17282399.66.

[44] Average exchange rate of the month of the judgment (May 2022). Compare to average exchange rate of the month of introduction of the action (March 2020: EUR 1.524.810,06) and of the month of the payment subject to reservations (March 2015: EUR 1.478.256,20). Calculations made with https://www.x-rates.com/calculator/?from=CZK&to=EUR&amount=40482255.

[45] Case T-151/20 (n 1), paras 191-196.

[46] European Council, Conclusion of the Special meeting of the European Council (17-21 July 2020), EUCO 10/20, point 142.

[47] European Commission, Proposal for a Council Regulation amending Regulation (EU, Euratom) No 609/2014 in order to enhance predictability for Member States and to clarify procedures for dispute resolution when making available the traditional, VAT and GNI base down resources, COM(2021) 327 final, 1.

[48] European Parliament, Report on the proposal for a Council regulation amending Regulation (EU, Euratom) No 609/2014 in order to enhance predictability for Member States and to clarify procedures for dispute resolution when making available the traditional, VAT and GNI based own resources, A9-0347/2021: 'The review procedure would risk resulting in a reversal of the 'burden of proof' concerning the accuracy of the calculations and provision of data. The process of making available could be weakened and become protracted. The number of cases brought before the European Court of Justice might multiply. The rapid review clause could thus result in a proliferation of requests for reviews and ensuing interruptions and disturbances of the making available 'machinery'. It would bind administrative capacities and would require additional staff at national level and in the Commission.'

[49] Council Regulation (EU, Euratom) 2022/615 (n 6).

[50] Council Regulation No 609/2014 (n 6), art 13a(1).

interest accrues.[51] These changes are clearly designed to facilitate the bringing of an action of unjust enrichment.

In case of disagreement between a Member State and the Commission on the irrecoverability of traditional own resources, the review procedure provided for in Article 13b of Council Regulation No 609/2014 gives that Member State the opportunity to request the Commission to review its assessment on that point. Such request should be duly reasoned and made within six months of receipt of the Commission's assessment.[52] The Commission is required to respond to such a request within three months. In duly justified cases, the Commission may extend the time-period to respond once by another three months.[53] Where the Commission requires more information from the Member State, the time-limit for the Commission to respond starts to run from the moment it receives the additional information from the Member State concerned.[54] A Member State has to respond within three months to a request for additional information. This period can be extended once by another three months. Where the Member State concerned cannot provide any additional information, the Commission will send its comments based on the available information to that Member State within three or six months upon receipt of the notification that the Member State cannot provide additional information.[55] In any case, the review procedure shall end at the latest two years after the Member State's request for review.[56]

7. Critical assessment

The solutions offered by the Court of Justice's judgment in Case C-578/18 P and Council Regulation No 2022/615 to the problem of judicial protection in the area of traditional own resources warrant critical reflection. As the judgment of the General Court in Case T-115/20 shows, these solutions are not without problems. Moreover, they give rise to additional questions and problems.

7.1. Unclear nature of the action and disadvantage to Member States

The availability of an action for unjust enrichment on the basis of Articles 268 and 340, second paragraph, TFEU is already stretching the concept of an action for non-contractual liability.[57] Using the action for unjust enrichment as a means to overcome an issue of judicial protection in the area of traditional own resources is stretching it even further.[58]

EU actions for unjustified enrichment 'require proof of enrichment on the part of the defendant for which there is no valid legal basis and of impoverishment on the part of the applicant which is linked to that enrichment'.[59] A reading of the General Court's judgment reveals that the Czech Republic's action against the Commission had very little to do with an action for unjust enrichment. Indeed, the real subject-matter of the dispute was whether the Czech Republic had been released from its legal obligation to transfer the sums at issue to the Commission. The issue of repayment of the amounts paid was purely secondary to this question and was only an issue because the Czech Republic paid the amounts to avoid having to pay high interest. It was thus a matter of determining the obligations of the Czech Republic under EU law following a disagreement with the Commission. This is the typical subject-matter of infringement

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[51] ibid, art 13a(3).

[52] ibid, art 13b(1).

[53] ibid, art 13b(2).

[54] ibid, art 13b(3).

[55] ibid, art 13b(4).

[56] ibid, art 13b(5).

[57] Case T-151/20 (n 1), para 40.

[58] Cf. Piegsa (n 13).

[59] Case T-151/20 (n 1), para 41.

proceedings, which the Commission probably would have initiated if the Czech Republic had not made the payment.

From that point of view, it was not far-fetched from Advocate General Sharpston to consider the infringement procedure as a solution to the problem of judicial protection. However, the Court of Justice cannot be faulted for having rejected her suggestion to create an obligation for the Commission to bring infringement proceedings against a Member State in such a specific situation. An exception to the rule that the initiation of infringement proceedings is at the discretion of the Commission, however limited, would undoubtedly have opened the door to additional obligations in the future, changing the nature of the infringement procedure. It was simply not worth doing so in order to solve an issue of judicial protection in the area of own resources. Given that an action for annulment against the Commission's letter was also not feasible, as it was a deliberate choice of the Member States not to give the Commission any formal decision-making power in this regard, an action for unjust enrichment seemed the lesser evil as a temporary solution to the problem of judicial protection.[60]

Nevertheless, because the action for unjust enrichment acts as a substitute for an infringement action in these circumstances, and perhaps also partially as an action for annulment, it comes with a number of procedural issues. First, the scope of the action is not determined by the contacts between the Member State concerned and the Commission prior to the initiation of the action. As the judgment in Case T-115/20 demonstrates, the Commission is free to raise any argument it sees fit against a claim for unjust enrichment by a Member State, only limited by the principle of the protection of legitimate expectations or the right to good administration.[61] This puts the Member State at a disadvantage compared to an infringement action, where the scope of the proceedings is strictly limited by the letter of formal notice and the reasoned opinion.[62] Second, the burden of proof also shifts.[63] In an action for unjust enrichment, the burden of proof is on the Member State to demonstrate that it did not have to pay the amount concerned, whereas in an infringement procedure, it is up to the Commission to prove that the Member State failed to comply with its payment obligations.[64] Thus, a Member State that makes a conditional payment to avoid having to pay high interest still pays a price, namely the erosion of its rights of defence.

In light of this, it is somewhat surprising that the Council has accepted the action for unjust enrichment as the appropriate judicial review mechanism in the area of traditional own resources without much difficulty. In doing so, the Council has not only made permanent something that should have been a temporary solution, but has also accepted that Member States will be in a less favourable position in proceedings before the EU Courts.

7.2. Additional conditions for the exercise of an action for unjust enrichment in the area of traditional own resources?

In its judgment in Case C-578/18 P, the Court of Justice appears to hold that an action for unjust enrichment is available to a Member State on the condition that it has made a payment subject to reservations and that the constructive dialogue has not ended the dispute between the Member State and the Commission.[65] In doing so, the Court attaches conditions for the exercise of an action based on Article 268 TFEU and Article 340, second paragraph, TFEU not provided for in the Treaties.[66] One may wonder

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[60] Cf. Piegsa (n 13).

[61] Case T-151/20 (n 1), para 48.

[62] Lenaerts, Gutman and Nowak (n 20) 209-211.

[63] N Bačić Selanec, 'A (more) complete system of remedies: Effective judicial protection of EU Member States in Czech Republic v Commission' (2022) 59(1) C.M.L.Rev. 171, 183.

[64] Lenaerts, Gutman and Nowak (n 20) 216-218.

[65] Case C-575/18 P (n 14) para 81.

[66] Cf. Bačić Selanec (n 63) 184.

whether the Court has not overstepped its powers here. Moreover, these conditions are less clear than at first glance.

7.2.1. Payment under reservations

The requirement that a Member State must make its payment subject to reservations raises the question whether a Member State that has not made a payment subject to reservations is excluded from bringing an action for unjust enrichment in relation to that payment. Of course, in practice, a Member State that brings an action for unjust enrichment to settle a disagreement with the Commission regarding its payment obligations will normally have made a payment subject to reservations. Nevertheless, it cannot be ruled out that, in certain circumstances, a Member State may seek repayment of amounts paid in good faith, but where it later turns out that there was no obligation to pay. Perhaps this case will be a different type of action for unjust enrichment, since there was no disagreement between the Member State and the Commission on the initial payment obligation and, therefore, no reason to make a payment subject to reservations. More so, it would actually be a genuine action for unjust enrichment, as opposed to an action for unjust enrichment following a payment under reservation, which is rather an artificial construction to fill a gap in the system of judicial protection.

7.2.2. Constructive dialogue

A more fundamental question concerns the requirement of a constructive dialogue between the Commission and the Member State, and whether a Member State may only bring a claim of unjust enrichment where that constructive dialogue has failed to produce a solution.[67]

It is not clear at all what such a constructive dialogue entails. This is further complicated by the fact that Article 13b(1) of Council Regulation No 609/2014 now provides for a review procedure whose purpose is similar to that of constructive dialogue. Given that the review procedure was introduced by the Council Regulation No 2022/615 shortly after the Court's judgment, it appears logical to read the constructive dialogue now as a reference to the review procedure. However, both have different characteristics and dynamics. A constructive dialogue, on the one hand, is initiated by the Commission when a Member State makes a payment subject to reservations. The Commission is obliged to do so on the basis of Article 4(3) TEU.[68] The review procedure, on the other hand, is initiated by a Member State upon receiving comments from the Commission in which the Commission expresses its disagreement with the Member State's assessment on the recoverability of amounts. There is no obligation for the Member State to initiate the review procedure.[69] These different characteristics are not without consequences, in particular where the Court considers participating in a constructive dialogue – read as review procedure – as a prerequisite for bringing an action for unjust enrichment.[70]

In case of a constructive dialogue, the initiative is with the Commission. When the Commission fails to initiate a constructive dialogue in breach of Article 4(3) TEU, a Member State may not have access to an action for unjust enrichment. It would first have to bring an action for failure to act against the Commission for failure to initiate a constructive dialogue.[71] This appears fairly cumbersome, but does not impose hard limits on a Member State's ability to bring an action for unjust enrichment. This is different with the review procedure. A Member State wishing to initiate a review procedure has to do so within six months of receipt of the Commission's comments.[72] The mandatory participation in the review procedure as a condition for

[67] Cf. M Kianička, 'The conditional payment of EU's own resources: from tales to clearly defined tool' (*EU Law Live*, 14 July 2020) 3 <https://eulawlive.com/op-ed-the-conditional-payment-of-eus-own-resources-from-tales-to-clearly-defined-tool-by-michal-kianicka/> accessed 19 March 2024.

[68] Case C-575/18 P (n 14) para 72. See also Kianička (n 67)

[69] Cf. Council Regulation No 609/2014 (n 6) art 13b(1).

[70] See Bačić Selanec (n 63).

[71] Kianička (n 67).

[72] Council Regulation No 609/2014 (n 6) art 13b(1).

bringing an action for unjust enrichment implies then that the failure of a Member State to initiate the review procedure within six months of receipt of the Commission's comments causes that Member State to lose the right to bring an action for unjust enrichment all together.

We can only assume that the Council did not intend to create extra hurdles for the Member States when seeking judicial protection in the area of traditional own resources. Indeed, the objective of the reform was to strengthen the judicial protection of the Member States. In this regard, a more appropriate reading of the Court's judgment in Case C-595/18 P would take into account that the review procedure has replaced the constructive dialogue and that the nature of the review procedure in Article 13(b) of Council Regulation No 609/2014 is incompatible with a requirement of mandatory participation as a prerequisite for bringing an action for unjust enrichment. That being said, an optional review procedure does not sit well with the language of Article 13(b) of Council Regulation No 609/2014, which imposes various time-limits and other obligations on the Member States and the Commission. Moreover, taking into account that the action for unjust enrichment in these circumstances is a kind of reversed infringement procedure, but also for reasons of efficiency of judicial proceedings, consultation between the Commission and a Member State prior to bringing an action for unjust enrichment in the area of traditional own resources seems appropriate – and perhaps something the Court wants in any constellation.

8. Final observation

There is probably much more to say about the solutions offered in the Court of Justice's judgment in C-587/15 P and in Council Regulation No 2022/615. For example, does the activation of the review procedure suspend the limitation period of the action for unjust enrichment? But also: can a Member State withdraw from the review procedure and bring an action for unjust enrichment?[73] What is apparent, however, is that the solution to the gap in the system of judicial protection in the area of traditional own resources resulting from the combined reading of the Court of Justice's judgment in C-587/15 P and Council Regulation No 2022/615 raises many questions. Perhaps more than it answers. This may have to do with the quality of the solutions offered, but more so with the method traditionally used to resolve gaps in the legal protection system.

Gaps in the system of judicial protection of the European Union appear from time to time. They become visible when parties are searching for judicial protection but cannot find a proper route to the EU Courts. Parties without a proper remedy available to them often try to access the EU Courts by creatively using existing remedies. The EU Courts usually respond to such actions by maximising the potential of the existing procedural framework, in particular by creating improved or new remedies. Creative use of the existing procedural framework allows for a quick fix to a problem in the course of proceedings. It is not intended to be a durable solution because it complicates existing proceedings, often creating new problems. Moreover, diverting procedures from what they are intended for can lead to them being less effective or producing purely symbolic results. While creative use of procedures may be necessary in certain cases, it should be done with moderation and for as short a period as possible. Where a problem is discovered, a more general adjustment should follow after a careful assessment of the wider implications. This sentiment was also echoed by Advocate General Sharpston in her opinion in *Czech Republic v Commission*:[74]

> *In the future, it is plainly desirable that the legislature should itself address this issue and improve the functioning of the TOR system by providing for an adequate judicial review mechanism. Pending that initiative, however, it is for the Court to decide the matter before it by relying on the procedural tools that exist in EU law.*

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[73] Kianička (n 67).

[74] Case C-575/18 P (n 21) point 135.

It is clear that the Council did not take into account Advocate General Sharpston's sound advice when adopting Regulation 2022/615. The reform has the hallmark of a quick fix and may have created more problems than it solved. Unfortunately, this is indicative of how the EU legislature responds to gaps in the EU's legal protection system. It is often patchwork, filling gaps and adding bits and pieces, but with no overall reflection on how to organise judicial protection properly. Thus, it will not be long before further adjustments are needed. The quest for judicial protection in the field of traditional own resources is far from over.

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