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Editorial Contact

Review of European Administrative Law

S.H. Ranchordas, General Editor

Dept. of Constitutional Law, Administrative Law and Public Administration

University of Groningen

PO Box 716

9700 AS Groningen

The Netherlands

Email: REALaw@rug.nl

www.realaw.eu

Subscription and Pricing Information

Paris Legal Publishers

PO Box 4083

7200 BB Zutphen

The Netherlands

info@parislegalpublishers.com

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Book Reviews

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Dacian C. Dragos, Polonca Kovač, Albert T. Marseille, *The Laws of Transparency in Action, A European Perspective*, Cham: Palgrave Macmillan 2019, hardcover, ISBN 978-3-319-76459-7, xxi+666 pp., € 217,99

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**Christopher Bovis, *The Law of EU Public Procurement*, Oxford:
Oxford University Press 2015, 2nd edn, hardback,
ISBN 9780199684687, lxi+864 pp., £ 195.00**

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Editorial

This issue of the Review of European Administrative Law appears at a most crucial time for Europe and the entire world. While several of the restrictive measures taken by the national governments to prevent the spread of the COVID-19 virus are being gradually lifted, new legal questions arise, which are relevant for national, comparative and European administrative law. They range from the compatibility of national measures with EU State aid law, the legitimacy of governing through guidelines and other soft measures and the political desirability and feasibility of a European Health Union. Certainly, this crisis has shown many of the weaknesses of the European integration project and, at the same time, the need for more cooperation and coordination between the Member States when faced with wicked global challenges.

The COVID-19 pandemic has undoubtedly represented an unprecedented challenge to the European Union and its Member States. However, another challenge which is possibly just as violent – though certainly making fewer headlines than the sanitary crisis – is the 5th May ruling of the German Federal Constitutional Court which regarded a ruling of European Court of Justice on the European Central Bank's Public Sector Purchase Program as being *ultra vires*, and, consequently, not applicable in Germany.¹ This case calls into question the supremacy of EU law, a cornerstone of the complex system of relations between the EU and the Member States, and has the potential, if followed by the courts of other Member States, to shake the very nature of the EU legal order. It is precisely this multilayered web of relations between EU law and national law that is at the core of this issue of the Review of European Administrative Law, which contains a number of contributions showing the influence of the European case law on the development of the national general principles of administrative law. While the process of 'Europeanisation' of national public law (and general principles in particular) is an old and well-studied theme, several questions remain open.

As the article of Tridimas shows, key issues regarding the definition, nature and role as a source of law of general principles remain unresolved. Several contributions to this issue demonstrate, furthermore, that the interaction between European case law and general principles is a dynamic one, constantly in flux. Renewed attention on well-established principles of EU law such as the duty of care (Hofmann) and the principle of effective judicial protection (Prechal) are also offered in the issue. Finally, the issue contains a number of examples of the several 'shades of Europeanisation' of general principles: the principle of transparency (Drahmann) and the precautionary principle (Kegge) in Dutch law, the principle of legitimate expectations in Spanish law (Arroyo Jiménez), the principle of proportionality in the laws of Sweden, Finland and Denmark (Wenander) and in the Italian legal system (Borriello).

¹ BVerfG, Judgment of the Second Senate of 05 May 2020 - 2 BvR 859/15, ECLI:DE:BVerfG:2020:rs20200505.2bvro85915.

This issue is closed with three reviews of books which, again, examine questions going to the core of the decentralized system of implementation and application of EU law – public procurement, access to information, and the practical workings of the preliminary ruling procedure.

Because of its European and comparative focus, this issue is quite exemplary of what the Review of European Administrative Law aims to establish: a vibrant, passionate, broad community of European and comparative administrative lawyers.

Mariolina Eliantonio

Articles

The general principles of EU law and the Europeanisation of national laws

Takis Tridimas*

Professor of European Law, Dickson Poon School of Law, King's College London

Nancy A. Patterson

Distinguished Scholar, School of Law, Pennsylvania State University

Abstract

*Although the ECJ has used general principles of law as a source of rights and obligations from an early stage in the development of EU law, key issues regarding their definition, nature and role as a source of law remain unresolved. How can they be identified? What is their normative basis? Are there rules determining priorities among them and how do they relate to Charter rights? How has their role evolved? Diverse and often bewildering judicial terminology serves to obfuscate the role of principles which, in terms of positive law, stand at the apex of the EU law edifice. This article seeks to revisit some of those questions. It explores the meaning of 'Europeanisation'; it attempts a typology of general principles; it seeks to identify their normative basis, and assesses their role both as generators of *jus communae* and as a source of constitutional conflict.*

I. The Europeanisation of law

Academic literature defines Europeanisation in different way¹, but the term Europeanisation of law is here taken to refer to the convergence of national legal systems and cultures, primarily under the influence of supra-national processes and institutions. Europeanisation has two elements. One refers to supra-national law making. The European Union provides a governance

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¹ The term Europeanisation has been used mostly in political science and international relations in connection with the Europeanisation of politics. See, among others, PR Graziano and Maarten P Vink Europeanization: Concept, Theory, and Methods, in S Bulmer, C Lesquene (eds), *The Member States of the European Union* (2nd edn, Oxford University Press, 2013) 31-54, 37ff.; K Featherstone, Introduction: In the name of Europe in K Featherstone and CM Radaelli (eds), *The Politics of Europeanisation*, (Oxford University Press) 3-26; KH Goetz and J-H Meyer-Sahling, 'The Europeanisation of national political systems: Parliaments and executives' (2008) 3(2) *Living Reviews in European Governance* <<http://www.livingreviews.org/lreg-2008-2>> accessed 1 April 2020; M Green Cowles, JA Caporaso and T Risse (eds), *Transforming Europe: Europeanization and Domestic Change* (Cornell University Press, 2001). For a discussion from the legal perspective, see, *inter alios*, M Bobek, 'Europeanization of Public Law' in A Von Bogdandy and others (eds), *The Max Planck Handbook in European Public Law, Volume I: The Administrative State* (Oxford University Press, 2016) 631-673, available at SSRN: <https://ssrn.com/ab>

framework that stands above the sovereign state, claims a distinct identity, and generates a corpus of common rules or principles. This element entails a bottom-up process and engenders the Europeanisation of laws. It refers not only to political decision-making but also the courts. The national legal systems provide the raw materials for the articulation of judge-made principles that form part of a binding body of supra-national rules. The second element refers to the influence of supranational sources of law on national legal systems. That influence is not confined to policy outcomes and harmonised national laws but refers, more broadly, to the incremental change and convergence of national legal systems and cultures. Europeanisation here transcends specific areas of law and refers to the evolution, adaptation and convergence of processes, methodologies and institutional behaviour at the national level. It is a dialectical, iterative, and dynamic process that foments the Europeanisation of national legal systems. It is more subtle and unravels within a longer time span compared to the alignment of national laws in specific areas but is more powerful in its effects on legal culture.

There are two main sources of Europeanisation: the European Union and the European Convention for the protection of Human Rights. The first is a much stronger force. Compared to the subsidiary character of the Convention, primacy and direct effect grant EU law an intensity that is an attribute of federal polities. Also, EU law has a broader remit and can impose much wider positive duties on Member States. Whilst, in general, EU law is a much stronger convergence force, the picture is more nuanced in the field of public law. Some ten years after the EU Charter on Fundamental Rights became legally binding, the Convention rather than the Charter remains the primary point of reference for national courts in the field of fundamental rights protection. This may be explained by several factors. The Charter has a more limited scope of application covering only national measures which fall within the scope of EU law. It thus has a limited spillover effect. Also, in comparison to the Convention which is embedded in the national legal traditions, it remains a relative newcomer. Nonetheless, outside the specific field of fundamental rights and in respect of public law more generally, EU law has a far-reaching influence on national laws in relation to processes, substantive outcomes, and methodologies.

Europeanisation may result not only from vertical but also horizontal processes. Here, borrowing and lending between national legal systems occurs through cross-fertilisation generated via formal and informal channels. Import can take place through borrowing legislative solutions from foreign law, judicial

tract=2757116; F Snyder (ed), *The Europeanisation of Law: The Legal Effects of European Integration* (Hart 2000).

references to the law of another country, legal education, or institutional networks. In Europe, this form of cross-fertilisation is by no means new. The German and the French legal systems have had a powerful influence on the laws of many European countries already from the 19th century. Horizontal Europeanisation has also been nurtured by EU law and, to a degree, encouraged by the ECJ.² More recently, the principle of mutual trust has been interpreted to impose direct obligations on national courts to cooperate with each other with a view to applying EU law.³

Europeanisation may thus occur through hierarchical norm alignment as, for example, when EU provisions are transposed into national law. Directives are particularly important in this respect as they require a combination of EU and national decision making and often entail the incorporation of EU norms and concepts into the corpus of established national legislation. Europeanisation may also occur through the judicial application of EU law. It may take place through the infusion of good governance principles, such as transparency or the duty of good administration, or the introduction of methodological tools, such as the principle of proportionality or the protection of legitimate expectations. The process of Europeanisation is more visible in certain areas of law but absent in hardly any. It is evident in the field of regulation (specialized administrative law), and, in recent years, it has been particularly prominent in the field of financial regulation, as the financial crisis precipitated the colonization of this area of law by EU instruments. It has a strong presence in social law, and made intrusions into private law, especially, through consumer law. It has also had a profound effect on the protection of fundamental rights and the general administrative law of the Member States.

The general principles of law, as understood and applied by the ECJ, operate as strong forces of Europeanisation. First, they have ecumenical scope. Being reflections of constitutional values, they do not apply only in specific areas of law but permeate the EU and the national legal systems and provide standards for determining the legality not only of public action but also private conduct. Secondly, they engage primarily the courts who are the pivotal institutional actors in the application of justice. Through influencing judicial methodology, they may affect the national legal system as a whole. Thirdly, owing to their abstract nature, they promote a dialectical development of the law where national laws and EU law interchange roles as borrowers and lenders; and they are characterised by hybridity in their application as, under the preliminary reference

² See eg Case C-283/81 *CILFIT v Ministry of Health* [1982] ECR 3415, para 16.

³ See eg Joined Cases C-404/15 and C-659/15 *PPU Aranyosi v Generalstaatsanwaltschaft Bremen* EU:C:2016:198; Case C-216/18 *PPU LM*, EU:C:2018:586; and, from the perspective of a national court, *Minister for Justice and Equality v Celmer* (No 4) [2018] IEHC 484.

procedure, judicial outcomes are often the result of collaboration by the ECJ and the national courts. In a nutshell, general principles of law entail the convergence of national legal traditions using shared values as powerful reference points and thus nurturing a common constitutional conscience.

2. General principles: in search of a definition

Given the importance attached to the general principles by the case law, it is somewhat surprising that some 60 years after the establishment of the EEC the meaning of the term general principles still preoccupies us. Diverse and often bewildering terminology serves to obfuscate the role of principles which, in terms of positive law, stand at the apex of the EU law edifice or, at the very least, have enhanced interpretational authority. The case law refers to general principles,⁴ sometimes also general principles of law,⁵ principles,⁶ and even to ‘particularly important’⁷ or ‘essential’ principles.⁸ Sometimes, reference to the same concept may be made as a principle or a general principle.⁹ Semantically, the term principle refers to a proposition that bears legal value but operates at a level of abstraction that distinguishes it from a rule. A rule specifies an outcome or, at least, comes closer to determining one. A principle underlies a disposition. The idea of a principle already embodies a degree of generality both in the sense of abstraction as to its content and in the sense that it underlies several specific rules.¹⁰ The term “general principle”

4 See eg in relation to equality and non-discrimination, Joined Cases C-117/76 and C-16/77 *Ruckdeschel v Hauptzollamt Hamburg-St. Annen* [1977] ECR 1753, para 7, and in relation to proportionality, Case C-295/94 *Hüpeden & Co. KG v Hauptzollamt Hamburg-Jonas* [1996] ECR I-3375, para 23.

5 See eg in relation to fundamental rights Case 4/73 *Nold v Commission* [1974] ECR 491, para 13; and, more generally, in the context of limitation on the obligation to provide consistent interpretation, see eg Case C-282/10 *Dominguez v Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre* [2012] EU:C:2012:33, para 25.

6 See eg in relation to proportionality: Case 66/82 *Fromançais v Forma* [1983] ECR 395, para 8; and in relation to effectiveness: Case C-184/16 *Petrea v Ypourgos Esoterikon* [2017] EU:C:2017:684, para 65.

7 Thus, the Court has referred to the right to paid annual leave as ‘a particularly important principle of EU social law’, see eg C-569/16 *Stadt Wuppertal v Bauer* [2018] EU:C:2018:871, para 38; Case C-118/13 *Bollacke v K + K Klaas & Kock Bv* [2014] EU:C:2014:1755, para 15; the same in relation to the right to parental leave: C-385/17 *Hein v Albert Holzkamm GmbH & Co. KG* [2018] EU:C:2018:1018, para 22.

8 See, in relation to the right to annual leave, *Bauer* (n 7) [39].

9 See eg above in relation to proportionality and see also in relation to mutual trust: Case C-25/88 *Wurmser* [1989] EU:C:1989:187, para 18; Case C-284/16 *Achmea* [2018] EU:C:2018:158, para 34.

10 In the Oxford dictionary, principle is defined as ‘a general scientific theorem or law that has numerous special applications across a wide field’ or a fundamental truth or proposition that serves as the foundation for a system of belief or behaviour or for a chain of reasoning: see <www.oxforddictionaries.com> accessed 10 April 2020. See to the same effect, the definition in the Cambridge Dictionary: ‘a basic idea or rule that explains or controls how something

refers to a principle that is of fundamental value to the legal system as a whole or at least transcends a specific area and applies to several areas of law.¹¹

Without this taxonomy being exclusive, four different conceptions of principles can be identified in EU law. General principles for the protection of the individual deriving from the rule of law (liberal conception); principles that define the constitutional identity of the EU (structural principles); interpretational principles as maxims of justice; and a conception of principles as a juxtaposition to rights.

2.1. Liberal conception

The term general principle refers to principles of law extrapolated from the common constitutional traditions of the Member States, which define the limits of public power and seek to protect the individual. Thus understood, the term signifies *par excellence* the creation of constitutional doctrine and encompasses principles such as the right to non-discrimination, due process, proportionality, legal certainty, the protection of legitimate expectations, and the protection of fundamental rights. These general principles derive from the rule of law, as broadly understood in a liberal democracy, and now overlap with the EU Charter on Fundamental Rights. Prime examples of cases that establish such principles are *Internationale Handelsgesellschaft*¹² (protection of fundamental rights), which had a transformative effect on EU law, *Johnston*¹³ (right to judicial

happens or works' <<https://dictionary.cambridge.org/dictionary/english/principle>> accessed 10 April 2020.

- ¹¹ T Tridimas, *The General Principles of Law* (Oxford University Press, 2nd edn, 2006) 1; Note however that there can be general principles that characterize a specific area of law, i.e. apply to all sub-areas of that specific field, such as tax law.
- ¹² The term Europeanisation has been used mostly in political science and international relations in connection with the Europeanisation of politics. See, among others, PR Graziano and Maarten P Vink Europeanization: Concept, Theory, and Methods, in S Bulmer, C Lesquene (eds), *The Member States of the European Union* (2nd edn, Oxford University Press, 2013) 31-54, 37ff.; K Featherstone, Introduction: In the name of Europe in K Featherstone and CM Radaelli (eds), *The Politics of Europeanisation*, (Oxford University Press) 3-26; KH Goetz and J-H Meyer-Sahling, 'The Europeanisation of national political systems: Parliaments and executives' (2008) 3(2) *Living Reviews in European Governance* <<http://www.livingreviews.org/lreg-2008-2>> accessed 1 April 2020; M Green Cowles, JA Caporaso and T Risse (eds), *Transforming Europe: Europeanization and Domestic Change* (Cornell University Press, 2001). For a discussion from the legal perspective, see, *inter alios*, M Bobek, 'Europeanization of Public Law' in A Von Bogdandy and others (eds), *The Max Planck Handbook in European Public Law, Volume I: The Administrative State* (Oxford University Press, 2016) 631-673, available at SSRN: <https://ssrn.com/abstract=2757116>; F Snyder (ed), *The Europeanisation of Law: The Legal Effects of European Integration* (Hart 2000).
- ¹³ 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, para 18.

protection), and *Mangold*¹⁴ (prohibition of discrimination on grounds of age). The term ‘general principles of EU law’ should be confined to this category.

As a general guidance, to be recognized as a general principle, a precept must have the following attributes. First, it must incorporate a minimum ascertainable legally binding content.¹⁵ This is not to say that the principle may not be capable of legislative concretization. But it must have a minimum core content which cannot be interfered with or altered by the legislature or, at least, which is capable of being judicially enforceable in the absence of legislation. Understood in those terms, a principle must incorporate at the very least a negative right, i.e. a right to exclude certain action, and be capable of being used as a trump card by the claimant. Secondly, it must be general in its application, i.e. have a comprehensive coverage, transcend specific areas of law, and underlie the legal system as a whole. Finally, it must be sufficiently important to be awarded constitutional status. These attributes are easier to establish in theory than verify in practice. *Audiolux*¹⁶ suggests that the ECJ endorses the understanding of general principles suggested above. The Court held that EU law does not recognise a general principle of equality of shareholders under which a dominant shareholder has an obligation to acquire the shares of minority shareholders paying them a control premium. It stated that, although a number of provisions of EU law provided for the equal treatment of shareholders, they were limited to regulating specific situations. They did not “possess the general, comprehensive character ... naturally inherent in general principles of law”.¹⁷ It also held that establishing, by means of a general principle, an obligation on a dominant shareholder to treat all minority shareholders equally would require the determination of the situations where minority shareholders required protection, the articulation of specific conditions under which that obligation would apply, and the means by which protection should be offered. Such a decision would require the weighing of competing interests which could only be done through the legislative process.¹⁸ Still, in other cases the Court has done precisely that, anticipating or even altering legislative outcomes. *Audiolux* contrasts sharply with *Mangold*¹⁹ where the ECJ recognized the prohibition of age discrimination as a general principle of EU law.²⁰ There are two reasons for this differential

¹⁴ C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-9981.

¹⁵ See Case C-282/10 *Dominguez v CICOA* [2011] EU:C:2011:559, Opinion of AG Trstenjak, para 113.

¹⁶ Case C-101/08 *Audiolux SA v Groupe Bruxelles Lambert SA (GBL)* [2009] ECR I-9823.

¹⁷ *ibid* [42].

¹⁸ *ibid* [58].

¹⁹ Case C-144/04 *Mangold v Helm* [2005] ECR I-9981.

²⁰ See also for gender equality Case C-236/09, *Association Belge des Consommateurs Test-Achats* [2011] ECR I-773 and, more recently, in relation to the right to annual leave which was said to derive directly from the Charter and be horizontally applicable, Case C-569/16 *Bauer*, EU:C:2018:871.

attitude. First, in *Mangold* the ECJ relied for ascertaining the normative content of the general principle on the Framework Directive on Equality.²¹ Whilst the interaction between the general principle and the Framework Directive is based on shaky grounds, the case remains that the existence of the directive was essential to the outcome. There is also a second, more important, difference. In *Audiolux* the ECJ drew a distinction between principles of constitutional status and other principles. It held that the general principles of EU law have constitutional status while the principle claimed in that case was characterised by a degree of detail requiring the adoption of legislation. It could not therefore be regarded as an independent general principle of EU law.²² The distinction makes perfect sense. Given the normative power accorded to general principles, they must be confined to fundamental constitutional values which stand beyond the majoritarian bargain. If anything, the ECJ may be said to take too broad a view of general principles. In *Sturgeon*,²³ for example, it used the general principle of equal treatment to grant specific protection to air travel passengers disregarding in effect the precise directions provided by the applicable EU regulation.

The characterisation of a principle as a general principle of EU law has important legal consequences. It means that the principle applies irrespective of a specific written disposition. It entails duties and obligations and has constitutional status. It trumps non constitutional rules and also gains heightened force as a rule of interpretation. There is also strong presumption against its restrictive application.²⁴

The approach of the ECJ in extrapolating general principles is selective and creative. It does not look for a common denominator in the laws of the Member States. Nonetheless, to be elevated to the status of a general principle, a proposition must enjoy a degree of wide acceptance, i.e. represent 'conventional morality'.²⁵ In *D and Sweden v Council*,²⁶ decided in 2001, the ECJ felt unable to equate a same sex relation sanctioned by national law to a marriage but hinted that it would have been more adventurous if there had been support in the laws of the Member States.²⁷ Although the same facts would now be liable to be de-

²¹ Council Directive (EC) 2000/78 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

²² *Audiolux* (n 17) [63]. See to the same effect: Case C-174/08 *NCC Construction Danmark A/S v Skatteministeriet* [2009] ECR I-10567 (principle of fiscal neutrality).

²³ Joined Cases C-402/07 and C-432/07 *Sturgeon v Condor Flugdienst GmbH* [2009] EU:C:2009:716.

²⁴ See eg *H v Land Berlin*, Case C-174/16, ECLI:EU:C:2017:637, para 44.

²⁵ See J Hart Ely, *Democracy and Distrust* (Boston: Harvard University Press, 1980) 63, n. 97 and references provided therein.

²⁶ Joined Cases C-122 and C-125/99 *D and Sweden v Council* [2001] ECR I-4319.

²⁷ *ibid* [50]-[51].

cided differently, *D and Sweden* is an example of self-restraint in the absence of crystallised national views on same sex relations at the time that the judgment was delivered.

2.2. Principles as a form of constitutional identity (structural principles)

The ECJ has established certain distinct attributes of the EU legal order which define the integration paradigm. These include, among others, primacy, direct effect, autonomy, mutual trust, and institutional balance. They may be written, such as the duty of loyal cooperation provided for in Article 4(3) TEU, but are mostly unwritten and derived by the ECJ from the system and the underlying rationale of the Treaties. In recent years, such structural principles²⁸ have experienced resurgence as the ECJ has sought to provide a constitutional blueprint for contemporary EU law, stressing, in particular, the principles of effectiveness, autonomy, and mutual trust.

In Opinion 2/13,²⁹ the Court held that the specific characteristics of EU law cannot be affected by an international agreement concluded by the EU or the Member States. Those characteristics can only be altered by following the procedure for fully revising the Treaties. Those include features relating to the constitutional structure of the EU, namely the EU institutional framework and the principle of conferral, and characteristics arising from the very nature of EU law, namely the fact that EU law stems from the Treaties as an independent source of law, primacy and direct effect.³⁰ These essential characteristics give rise to a structured network of principles, rules and mutually interdependent legal relations based on the fundamental premise that Member States share with each other the common values of Article 2 TEU. That premise, in turn, implies and justifies the existence of mutual trust between the Member States that those values will be recognized.³¹ This theorization, which became the standard point of reference for subsequent case law, has important implications. By articulating the constitutional underpinnings of mutual trust, it has brought to the fore the legal prerequisites that must exist for it to take effect and, therefore, the obligations of Member States to fulfill them. Mutual trust is thus gradually being transformed from the underlying reason for legislative choices in specific areas,

²⁸ For a valuable discussion of structural principles in a specific field, see M Cremona (ed), *Structural Principles in EU External Relations Law* (Bloomsbury, 2018). Note however that the classification of principles as structural is made there in a different context and the definition of structural principles is broader than that provided in this article.

²⁹ Opinion 2/13 on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms EU:C:2014:2454.

³⁰ *ibid* [166].

³¹ *ibid* [167]-[168].

e.g. recognition of judgments or more broadly, freedom, security and justice, to a broader principle that requires Member States to uphold the bases for its existence. It has been elevated from a merely justificatory principle to a source of obligations, thereby acquiring the credentials of a constitutional principle.

The principle of autonomy must also be understood within the above constitutional blueprint. Its key requirements appear to be that the ‘essential character’ of the powers of the EU and its institutions must remain unaltered³² and the indispensable conditions for safeguarding that essential character must be respected.³³ The ‘essential character’ sets a qualitative and not a quantitative criterion although its specific content is difficult to pin down. The ‘indispensable conditions’ are found in the jurisdiction of the ECJ. As long as the Court remains the final arbiter of the interpretation of EU law in all its guises, this condition is satisfied. Autonomy can best be conceived as the capacity of EU law to define the division of competences, the role of the institutions, and, more broadly, the interpretation of the Treaties by endogenous processes. Whilst the emergence of autonomy can be seen as a sign of constitutional maturity, in contrast to other general principles, it has no direct affinity to the concept of the rule of law as traditionally understood. It entrenches the distinct features of EU law, has a somewhat self-referential blueprint, and is predisposed to asserting a form of EU constitutional exceptionalism.

Both from the perspective of the political and the legal identity of the EU, the two categories of principles discussed above, namely constitutional principles which derive from the rule of law and structural principles, are the most important. The first category is intrinsically linked to the values stated in Article 2 TEU. They evince a certain conception of political authority. The second category provide for a system of governance. They regulate relations between different levels of governance vertically, namely the EU and the Member States, and also among various institutions at a horizontal level. Those two sets of principles are closely connected but in a state of tense symbiosis. They are both defining constitutional attributes of the EU as a new polity and have both been established by the ECJ. It is not an accident that in *Internationale Handelsgesellschaft*,³⁴ the assertion of primacy of EU law over national constitutions went hand in hand with the establishment of fundamental rights as a source of EU law. The second would not have been possible without the first, since the first was necessary to

³² Opinion 1/00 on the Proposed agreement between the European Community and non-Member States on the establishment of a European Common Aviation Area EU:C:2002:231, para 12; Opinion 1/91 on the draft EEA Agreement ECLI:EU:C:1991:490, paras 61-65.

³³ (n 7)[183]; Opinion 1/09 on the Draft agreement on the creation of a European and Community Patents Court EU:C:2011:123, para 76.

³⁴ *Internationale Handelsgesellschaft* (n 13).

establish the authority of the Union as a source of rights and obligations. Yet, rule of law principles and structural principles of EU law may come into a trajectory of conflict. Thus, the principle of effectiveness of EU law or the principle of mutual trust may be perceived as lessening the protection of fundamental rights. Opinion 2/13³⁵ and judgments pertaining to the effects of mutual trust provide echoes of such potential conflict.³⁶

2.3. Fundamental maxims

General principles may also take the form of fundamental maxims that underlie the EU legal system. They apply in all areas of law and provide important interpretational guidelines which qualify legislative dispositions. The doctrine of abuse of right belongs to this category. According to it, individuals must not improperly or fraudulently take advantage of provisions of EU law.³⁷ The doctrine has been applied in particular in the field of VAT but in *Cussens*³⁸ the ECJ held that it transcends specific EU legislation and is a general principle of law that underpins the EU legal system. It applies both to rights and advantages provided by primary EU law and those arising from regulations or directives.³⁹ The characterization of abuse as a general principle has certain legal implications. First, it means that it underpins the EU legal order as a whole so that the abuse of EU rights or the circumvention of EU provisions is prohibited even where it is not expressly stated. It thus applies and may be invoked against a private party regardless of a national measure giving effect to it in the domestic legal order.⁴⁰ As a general principle, its nature is not derivative to that of the rank of the right which it underlies.⁴¹ It is not, in other words, subject to the limitations of the prohibition of horizontal effect of directives.⁴² The second implication is that it may take precedence over other principles such as the principle of legal certainty. The outcome of the balancing would depend on the specific circumstances of the case.

2.4. Principles versus rights

Somewhat ironically, the EU Charter uses the term principles as an anti-thesis to rights. Here, political compromise clashes with legal doctrine

³⁵ Opinion 2/13 (n 30)

³⁶ See the discussion below.

³⁷ Case C-321/05 *Hans Markus Kofoed v Skatteministeriet* [2007] ECR I-5795, para 37.

³⁸ Case C-251/16 *Cussens v T.G. Brosnan*, EU:C:2017:881.

³⁹ *ibid* [30].

⁴⁰ *ibid* [44].

⁴¹ *ibid* [30].

⁴² *ibid* [28].

to create confusion. Article 51(1) draws a distinction between rights and principles laid down in the Charter. Such a distinction is also made in Article 6(1) TEU and the Preamble to the Charter which in fact recognizes three categories, namely ‘rights, freedoms and principles’.⁴³ But the differences between rights and principles are not clear and, to the extent that they are, remain normatively unsatisfactory.

The distinction is material since some provisions of the Charter apply only to rights and freedoms but not to principles.⁴⁴ Rights are to be observed whilst principles are to be respected.⁴⁵ Under Article 52(5), Charter provisions which contain principles may be implemented by legislative and executive acts taken by Union institutions and bodies and by acts of Member States when they are implementing Union law. They are to be ‘judicially cognisable only in the interpretation of such acts and in the ruling on their legality.’⁴⁶ It is unsatisfactory however that the Charter attributes legal significance to a distinction which it assumes but does not explain.

Article 52(5) was inserted in the Charter during the Lisbon Treaty negotiations to limit the justiciability of social rights at the insistence, in particular, of the United Kingdom. It reflects a well-established distinction between so-called personal (or subjective) rights and programmatic constitutional norms which is found in many Member States although the meaning of that distinction is not uniform in the national legal systems.⁴⁷ Article 52(5) might be taken to mean that Charter principles cannot give rise to subjective rights. However, a narrower interpretation is also possible. Writing extra-judicially, President Lenaerts has suggested that Charter principles can be relied upon to set aside conflicting legislation but cannot impose positive obligations on the EU or Member States.⁴⁸ This does not exclude the possibility of principles being justiciable and leading to the setting aside of conflicting provisions. The Explanations accompanying the Charter are equivocal. According to them the difference is that, whilst rights give rise to ‘direct claims for positive action’ by the Union and national authorities, principles must be implemented by legislative or exec-

⁴³ See Preamble, recital 7.

⁴⁴ See Charter of Fundamental Rights of the European Union [2012] OJ C326/971 (Charter), art 52(1). This circumscribes the limitations on the rights defined by the Charter.

⁴⁵ *ibid* [51(1)]. This is reiterated in the Explanations Relating to the Charter of Fundamental Rights [2007] OJ C 303/17, 35.

⁴⁶ Charter (n 46), art 52(5).

⁴⁷ See S Peers and S Prechal, Commentary on Article 52 in S Peers, T Hervey, J Kenner, A Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart) 1506, para 52.161.

⁴⁸ K Lenaerts, ‘Exploring the limits of the EU Charter of Fundamental Rights’ *European Constitutional Law Review* (2012) 8(3) 399, 400-401, 403.

utive action at Union or State level and become material only for the purposes of the interpretation or judicial review of such acts.⁴⁹

The distinction drawn in the Charter is unsatisfactory. First, there is no reason why Charter provisions which incorporate principles rather than rights should be denied any interpretative value in the absence of implementing action, as Article 52(5) might suggest. Indeed, the value of constitutional principles is precisely to inform the interpretation of normative rules, including those that have not been adopted specifically in order to implement them. This is the case for example with the principle of environmental protection which is proclaimed in Article 37 of the Charter. It is doubtful however whether Article 52(5) precludes such interpretative function as all provisions of EU and those of national law which fall within the scope of EU law must be seen as a corpus under the constitutional aegis of EU primary law and be interpreted in its light.⁵⁰

Secondly, it may be difficult to ascertain whether a specific disposition provides for a right or a principle. Indeed, the terminology of the Charter is inconsistent as it refers to the ‘principles’ of legality and proportionality of criminal penalties, which undoubtedly give rise to enforceable rights.⁵¹ By contrast, Article 26, for example, refers to the rights of the elderly but operates in a sea of abstraction.⁵² Thus, the language of the Charter is not necessarily conclusive. Also, as the Explanations themselves acknowledge, articles of the Charter may incorporate elements of both principles and rights.⁵³ Whether a specific provision creates a right depends on its specificity, the context and the purpose for which it is invoked and is to be determined in the light of its wording and objectives. Some provisions of the Charter in the social sphere do give rise to rights. This is true, for example, for the right to annual leave⁵⁴ and the right to collective bargaining.⁵⁵

⁴⁹ Explanations (n 47) 35.

⁵⁰ See, in accord, Peers and Prechal (n 49) 1510 [52]-[182], deriving support, inter alia, from Case C-205/02 *Rinke* EU:C:2003:435, paras 24-28.

⁵¹ See the heading to Article 49.

⁵² Examples of provisions which, according to the Explanations, lay down principles rather than rights are Articles 25 (rights of the elderly), Article 26 (integration of persons with disabilities), Article 37 (environmental protection); see Explanations Relating to the Charter of Fundamental Rights (n 47) 35.

⁵³ This is the case, for example, in relation to Articles 23 (equality between men and women), 33 (family and professional life) and 34 (social security and social assistance). Article 34 was considered in Case C-571/10 *Kamberaj* [2012] EU:C:2012:233. see Explanations Relating to the Charter of Fundamental Rights, (n 47) 35.

⁵⁴ *Bauer* (n 7), art 31(2).

⁵⁵ Case C-438/05 *Viking* [2007] EU:C:2007:772, art 28.

Thirdly, the normative limitations imposed on principles by Article 52(5) appear somewhat contradictory. The case law has derived rights from general, unwritten, principles.⁵⁶ By virtue of Article 6(3) TEU, those principles continue to be a source of fundamental rights. The distinction drawn in the Charter therefore does not prevent the Court from ruling that a principle which is recognized as a general principle of law can give rise to enforceable rights. In other words, the term 'principle' as used in Article 52(5) does not have the same meaning as the general principles of law which are recognized as a source of fundamental rights under Article 6(3) TEU or even the premises which are recognized as principles by the ECJ, such as, for example, the principle of autonomy.

All in all, the distinction between rights and principles in the Charter provides political comfort. It has helped to facilitate agreement among Member States to make the Charter binding, but it is of limited use in determining the justiciability of the norms included therein in any specific case which remains a matter of judicial appreciation. It also leads to the fragmentation of the term principle as it bears a different meaning in the Charter from that which it has in the case law.

3. What are the normative bases of general principles?

In the early years of the development of the European Communities, general principles were conceived as principles of administrative law. Given the abstract character of the treaties and the lack of statutory dispositions at EU level, advocates general of the ECJ sought to cover the *lacunae* of written law by recourse to the general principles of law as they could be extrapolated from national legal systems. Advocates General Roemer and Lagrande were particularly instrumental in this respect. There was, in fact, little normative basis in the Treaties. The only express reference to general principles pertained to the non-contractual liability of the EEC⁵⁷ and not to judicial review. It was also of limited help since, traditionally, there have been wide differences among the laws of the Member States in relation to the liability of State authorities. Commonality therefore could be established only in the most abstract level. There were also two indirect references. Article 164 EEC (now Article 19(1) TEU) commanded that, in the interpretation and application of the Treaty, the law must be observed but said nothing about where the law could be found. It was reasonable, indeed necessary, for the judiciary that was charged with the task

⁵⁶ See eg *Mangold* (n 20).

⁵⁷ See Article 215(2) EEC, which is now Article 340(2) TFEU.

of applying the law to seek to gain inspiration from the normative postures of the constituent legal systems.⁵⁸ This provided value continuity and acted as a source of judicial legitimacy. Although, in seeking to establish general principles, the ECJ did not necessarily find expressly its inquiry on Article 164 EEC,⁵⁹ the latter provides an anchor for a task that the Court inevitably had to undertake. That Article by no means determines the methodology that the Court should adopt, for example, the level of commonality among national laws that must exist before a general principle is established, or rules of priority in case of conflict. It can legitimately be viewed, however, as an invitation to build EU law gaining inspiration from the standards of justice of national legal systems and thus as an authorization for judicial roaming. Another indirect reference was provided in Article 173(2) EEC (now Article 263(2) TFEU). By referring as a ground of review to the infringement of the treaty or ‘any rule of law relating to its application’, that provision could be taken to acknowledge judicial recourse not only to specific dispositions of written law but underlying principles that govern judicial review at national level.⁶⁰

In truth, none of the above provisions explain fully the development of general principles as important sources of primary law. The turning point came in *Internationale Handelsgesellschaft*.⁶¹ By binding the Community to respect unwritten fundamental rights as a *quid pro quo* for asserting the primacy of EU law over the national constitutions, *Internationale Handelsgesellschaft* propelled general principles to constitutional doctrine, elevating them to an integral part of the Treaties themselves. *Internationale* marked the transition of general principles from sources of administrative law to the defining pillars of constitutionality. In the Court’s conception, they derive not from any specific Treaty provision but from the nature of EU law in the light of a teleological and systematic interpretation. Their normative basis is thus inextricably linked to understanding the founding Treaties as a constitutional text. Once it is accepted that the treaties establish a constitutional order, as the Court did in *Van Gend en Loos*,⁶² recourse to the general principles of law becomes inevitable to fill the empty shell of the EU’s distinct constitutional space whilst ensuring value

⁵⁸ For an express reference to the need gain inspiration from the solutions provided in the national laws to fill the gaps of the EEC Treaty, see Joined Cases C-7/56 and C-3/57 to C-7/57 *Algeria and Others v Assemblée commune* [1957-1958] EU:C:1957:7.

⁵⁹ For an express link, see Case C-17/74 *Transocean Marine Paint Association v Commission* [1974] ECR 1063, Opinion of Warner AG.

⁶⁰ For the articulation of this argument, see P Craig, ‘General Principles of Law: Treaty, Historical and Normative Foundations’ in K Ziegler, P Neuvonen, and V Moreno-Lax (eds), *Research Handbook on General Principles of EU Law* (Edward Elgar Press, 2019), Oxford Legal Studies Research Paper No. 46/2019 <<https://ssrn.com/abstract=3414315>> accessed 10 April 2020.

⁶¹ Case C-11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

⁶² Case C-26/62 *Van Gend en Loos* [1963] ECR 1.

continuity and thus providing legitimacy. In a nutshell, teleology plus *ex post facto* acquiescence of judicial developments on the part of the Member States provide political, and ultimately legal, legitimisation of the general principles case law. These judicial developments, which had profound implications for the evolution of EU law, received express treaty endorsement in the Treaty of Maastricht which has now been carried through to Article 6(3) TEU by the Treaty of Lisbon despite the granting of binding effect to the Charter.

4. Relationship between the general principles and the Charter

Article 6 TEU recognizes essentially three sources of fundamental rights: the Charter, the European Convention on Human Rights, and the constitutional traditions common to the Member States. Fundamental rights, as guaranteed by the latter two, ‘shall constitute general principles’ of EU law.⁶³ Article 6 however does not provide any guidance as to the relationship among the different sources of fundamental rights. It does not draw a priority between them nor does it differentiate between the Charter and general principles of law as to their effects.⁶⁴ Following the entry into force of the Lisbon Treaty, the primary point of reference for the protection of fundamental rights should be the Charter. This is in keeping with the intentions of the treaty authors, which granted the Charter the same value as that of the Treaties, and also the objectives of the Charter as a document which concretises the values of the EU polity. Also, the Charter is the first source of fundamental rights protection referred to in Article 6. Furthermore, viewing the Charter as the primary source of EU fundamental rights is more in keeping with national constitutional cultures which, bred in a civil law tradition, feel more comfortable with written lists of rights, however indeterminate, than case law.⁶⁵ The case law of the ECJ confirms that the Charter is now the primary point of reference.⁶⁶ Nonetheless, the interpretation of the Charter will be informed by the general principles of law. The various sources of rights provided in Article 6 are inter-

⁶³ Article 6(3) TEU. This corresponds to the pre-Lisbon version of Article 6(2) TEU although the formulation of Article 6(3) as it currently stands is somewhat different.

⁶⁴ For a more expansive analysis, see T Tridimas, *The General Principles of Law: Who Needs Them?* [2016] *Cahiers de Droit Européen* 419.

⁶⁵ An example of this is provided by the attitude of the German Federal Constitutional Court towards EU law. See, in particular, the *Honeywell* judgment of the *Bundesverfassungsgericht*, BVERFG, 2 BvR 2661/06, 6 July 2010.

⁶⁶ See eg Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Commission et al v Kadi (Kadi II)* EU:C:2013:518; Case C-236/09 *Association Belge des Consommateurs Test-Achats* [2011] ECR I-773; Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland Ltd v Minister for Communications*, EU:C:2014:238.

related in a way which may make it difficult to ascertain the autonomous input of each source. Notably, in *Glatzel* the Court held that the principle of non-discrimination, laid down in Article 21(1) of the Charter, is a particular expression of the principle of equal treatment which is a general principle of EU and is enshrined in Article 20 of the Charter.⁶⁷ Similarly, the Court views Article 47 of the Charter as reaffirming the general principle of effective judicial protection⁶⁸ and continues to refer as general principles of law both to fundamental rights⁶⁹ and the rights of defence.⁷⁰ Along the same lines, *H.N.* held that, whilst Article 41 of the Charter is addressed solely to EU bodies, the right to good administration enshrined therein is a general principle of law which binds not only EU agencies but also national authorities⁷¹ and can be invoked against the latter even though Article 41 cannot.⁷² The ECJ has thus been keen to preserve the independent normative input of general principles although their concrete added value in a specific case may not always be easy to discern. One can expect that the general principles of law will, in most cases, be used to influence and morph the interpretation of the Charter rather than establish autonomous, self-standing rights. The provisions of the Charter are so abstract and all-embracing that it is more likely that the ECJ will bring within them any emerging general principles. Keeping things under one roof makes eminent sense. The Charter itself appears to require that its provisions must be interpreted in the light of general principles of law. In particular, the Charter does not intend to restrict or adversely affect fundamental rights as recognised by Union law,⁷³ and therefore detract from the level of protection afforded by general principles. It must also be interpreted in harmony with the national constitutional provisions and in concordance with the Convention.⁷⁴ The treaty setting therefore provides a framework for the integration of general principles into the interpretation of the Charter. Indeed, the post-Charter case law often assimilates fundamental

⁶⁷ Case C-356/12 *Glatzel v Freistaat Bayern*, EU:C:2014:350, para 43. This was reiterated in relation to the prohibition of discrimination on grounds of sexual orientation in Case C-528/13 *Léger v Ministre des Affaires sociales, de la Santé et des Droits des femmes* EU:C:2015:288, para 48.

⁶⁸ See Case C-64/16 *Associação Sindical dos Juizes Portugueses v Tribunal de Contas*, EU:C:2018:117, para 35; Case C-510/11 *P Kone Oyj and Others v Commission*, EU:C:2013:696, para 23.

⁶⁹ Joined Cases C-141/12 and C-372/12 *YS v Minister voor Immigratie, Integratie en Asiel* [2014] EU:C:2014:2081, para 54 and case law cited therein.

⁷⁰ Case C-166/13 *Mukarubega* [2014] EU:C:2014:2336, para 44.

⁷¹ Case C-604/12 *H. N. v Minister for Justice, Equality and Law Reform*, EU:C:2014:302; confirmed in Joined Cases C-141/12 and C-372/12, *YS v Minister voor Immigratie, Integratie en Asiel*, EU:C:2014:2081.

⁷² Case C-419/14 *WebMindLicenses* [2015] EU:C:2015:832, para 83.

⁷³ Charter of Fundamental Rights of the European Union [2012] OJ C326/391, art 53.

⁷⁴ *ibid* [52(4)].

rights as they are guaranteed by the Charter and as they derive from general principles of law.⁷⁵

Beyond the Charter, the general principles of law continue to serve a number of functions.

They continue to have a value as underlying principles of the constitution which influence the interpretation and application of the law and provide yardsticks for determining the validity of legislation. This applies for example to the principle of protection of legitimate expectations and the principle of legal certainty which have been used to annul EU measures or determine their interpretation and scope of application.⁷⁶ They serve to fill the lacunae of written law. They promote a systematic, teleological and consistent interpretation rationalizing polynomy and ensuring coherence. They serve to promote the development of a *jus communae* even in areas which hitherto have been largely untouched by EU law, namely private and criminal law. Furthermore, in many instances the Charter states that rights or principles are to be applied in accordance with national law.⁷⁷ In such cases, national law does not have a free hand but any limitations that it may provide must be compatible with the general principles of law, such as the principle of proportionality. Finally, general principles fulfill an important methodological function. Proportionality, in particular, has developed into a universal standard of constitutionality. The methodology followed by the ECJ in interpreting the Charter is no different from its traditional methodology in applying the general principles of law. If anything, the Charter appears to have inspired a somewhat more coherent rights-based analysis and a higher standard of review.⁷⁸ The judicial inquiry has become more structured but it is by no means obvious that cases decided before the Charter came into force would have been decided differently if the Charter was applicable at the time.

The scope application of general principles has broadened as the EU legal order has evolved. Thus, the expansion of EU law in the area of freedom, security and justice has provided fruitful ground for the application of fundamental

⁷⁵ See eg Case C-131/12 *Google Spain v AEPD*, EU:C:2014:317, para 68; Case C-176/12 *AMS v Union locale des syndicats CGT* [2014] EU:C:2014:2, para 42; Case C-555/07 *Seda Küçükdeveci v Swedex GmbH & Co. KG*, EU:C:2010:21, paras 21-22.

⁷⁶ See eg Case 120/86 *Mulder v Minister van Landbouw en Visserij (Mulder I)* [1988] ECR 2321; Case C-143/93 *Van Es Douane Agenten v Inspecteur der Invoerrechten en Accijnzen* [1996] ECR I-431.

⁷⁷ See eg Article 10(2) (right to conscientious objection is to be recognized in accordance with the national laws governing the exercise of the freedom of thought, conscience and religion), Article 14(3) (right to education), Article 16 (freedom to conduct a business); Article 52(1) (general restriction on limitations of rights which must, inter alia, be provided by law, which includes national law).

⁷⁸ See eg *Digital Rights Ireland* (n 68) and *Google Spain* (n 77).

rights and general principles, among others, in the field of immigration and criminal justice. New principles have been enunciated, such as the doctrine of abuse of rights, and there has been a growth spurt in structural principles, through the development of the principles of autonomy and mutual trust. A further change has been the transformation of effectiveness. Traditionally, effectiveness was conceived as an attribute of EU rights contributing to the enhancement of their scope, their substantive content and the remedies for their protection.⁷⁹ This function is now supplemented by an emphasis on effectiveness not as a property of rights but as a feature of all EU norms imposing obligations, thus enhancing their enforcement and acting as a countervailing force to the rights of the individual.⁸⁰ Despite the above changes, the Court's methodology in discovering and applying general principles has remained essentially the same. They are perceived as constitutional maxims that trump legislative choices at EU level and national action. Neither the Lisbon Treaty nor the financial crisis, both of which have led to important constitutional changes, have altered the essential function of general principles or the methodology in their application.

The inter-relationship among general principles, the values of Article 2 TEU, and the Charter is illustrated by *Portuguese Judges*.⁸¹ The ECJ breathed independent meaning to Article 19(1) TEU and elevated it to an overarching principle linked to Article 2 imposing autonomous substantive obligations. The Court held that the material scope of application of Article 19(1) is broader than the Charter in that it applies to 'the fields covered by Union law', irrespective of whether the Member States are implementing Union law within the meaning of Article 51(1) of the latter.⁸² Thus, Article 19(1) applied in the case not because the Portuguese measure reducing public sector salaries fell *ratione materiae* within the substantive scope of EU law but because it affected a judicial body which could be called upon to apply EU law. The jurisdictional link necessary to activate the application of Article 19(1) relies on potentiality and is much more tenuous than that required to trigger the application of the Charter. *Portuguese Judges* is first and foremost about institutional powers and government structures and not about substantive rights, processes or remedies. The Court essentially

⁷⁹ For a discussion of remedies, see, inter alia, M Eliantonio, *Europeanisation of Administrative Justice? The Influence of the ECJ's case law in Italy, Germany and England* (Europa Law Publishing, 2008).

⁸⁰ According to the established case law, Member States must provide for penalties for the enforcement of EU obligations which are not only proportionate but also sufficiently effective and dissuasive. See eg Case C-230/01 *Penycoed* [2004] EU:2004:20, para 36 and see further Case C-105/14 *Taricco* [2015] EU:C:2015:555, and Case C-42/17 *M.A.S.* [2017] EU:C:2017:936, discussed below.

⁸¹ Case C-64/16 *Associação Sindical dos Juizes Portugueses v Tribunal de Contas*, EU:C:2018:117.

⁸² *ibid* [29].

held that the values of the Union entail certain institutional guarantees, including judicial independence. National laws must protect those guarantees in relation to judicial institutions which in *abstracto* may apply EU law. With an eye on the rule of law crisis in Hungary and Poland, the Court embarked on laying down limits on majoritarianism. It follows from the judgment that Article 19(1) has a broader scope of application than Article 47⁸³ but its substantive content is informed and indeed coterminous with the latter. So, once a national measure falls within the scope of application of Article 19(1), the guarantees of Article 47 apply.

5. From convergence to conflict

Although all general principles of law emanate from the rule of law and, at an abstract level, can be seen as expressions of the same values, when applied concretely they may find themselves in a trajectory of conflict. One may identify, among others, three kinds of conflict: conflicts between general principles or constitutional rights *inter se*; conflicts between substantive principles, i.e. general principles emanating from the rule of law, and structural principles; and conflicts between general principles as understood in EU law and their counterparts as understood in national laws.⁸⁴

5.1. Conflicts between general principles or constitutional rights *inter se*

Constitutional rights, whether in the form of Charter rights or general principles of law, may point to opposite directions. For example, the freedom of expression may come into conflict with the right to privacy. Such conflicts are a well-established feature of constitutional law and may be managed at different levels. The constitution itself may recognize certain rights but not others or may draw, expressly or by implication, some form of ranking. Legislation may also seek to draw a balance between conflicting rights by concretising and providing for exceptions. Prioritization and balancing are standard features of constitutional adjudication.

⁸³ In contrast to Article 19(1) TEU, Article 47 of the Charter requires that the subject-matter of the dispute must be linked to EU law. See for example, Case C-457/09 *Chartry v État belge* [2011] ECR I-136.

⁸⁴ A further kind of conflict may lie in the way fundamental rights are understood by the ECJ and by the European Court of Human Rights. This is not addressed in this article.

Although some of the rights protected by the Charter are understood to be absolute,⁸⁵ EU written law tends to shy away from express ranking. Nonetheless, there is judicial ranking. The case law provides strong indications that the right to judicial protection stands at the very apex of the constitutional edifice. Some components of it, i.e. judicial independence, are part of the very essence of the rule of law as an EU value.⁸⁶ Furthermore, the need to comply with the right to judicial protection may lead to a highly partial reading of the Treaties. It may result in the availability of a procedure even in cases where it appears to be excluded by the Treaties⁸⁷ or even the extension of judicial review to acts whose judicial control the Treaties place beyond the Court's jurisdiction.⁸⁸

Rights, other than absolute ones, may be restricted subject to the safeguards of Article 52(1) of the Charter. Absent any formal or informal ranking, conflicts are to be resolved by drawing a fair balance between the competing rights. This balancing exercise has become more complex as integration has advanced. The expansion of EU competence, the growth of Union legislation, and the proliferation of EU constitutional rights has resulted in the EU embracing a wider spectrum of interests and the ensuing need to compromise them where they are in a trajectory of conflict. The Charter, being all embracing, protects a variety of principles, rights and freedoms which may be contradictory and priority may need to be given to one or other of them in specific circumstances. Also, EU directives increasingly cover diverse aspects of economic life and may protect opposing interests. Such statutory conflicts are often concretisations of tensions between clashing constitutional rights. In terms of political power, the colonization of rights and state imperatives by EU law has made the weighing game more horizontal, i.e. between competing EU rights and less vertical, i.e. between competing EU and national rights.⁸⁹ The ECJ has stressed that an assessment must be carried out in accordance with the need to reconcile the opposing rights

⁸⁵ These include at least human dignity (Article 1), the prohibition of torture and inhuman or degrading treatment or punishment (Article 4) and the prohibition of slavery and forced labour (Article 5). Note however that even in relation to absolute rights, the scope of application of the right and its substantive content, and therefore the recognition of possible limitations, is a matter of judicial interpretation.

⁸⁶ See eg Case C-64/16 *Associação Sindical dos Juizes Portugueses v Tribunal de Contas* [2018] EU:C:2018:117, para 36.

⁸⁷ See eg Case C-72/15 *Rosneft* [2017] EU:C:2017:236 holding that, irrespective of the terms of Article 275(2) TFEU, the ECJ has jurisdiction to examine the validity of restrictive measures imposed on individuals on a reference for a preliminary ruling and not only on a direct action under Article 263(4) TFEU.

⁸⁸ See Case C-294/83 *Les Verts v Parliament* [1986] ECR 1339 and, more recently, Case C-455/14 P *H v Council* [2016] EU:C:2016:569, holding that a decision of the EU Police Mission in Bosnia-Herzegovina to redeploy personnel seconded by a Member State and not by the EU was amenable to judicial review even though it had been taken on a CFSP legal basis.

⁸⁹ See eg Case C-544/10 *Deutsches Weintor eG v Land Rheinland-Pfalz* [2012] EU:C:2012:526 and Case C-283/11 *Sky Österreich GmbH v Österreichischer Rundfunk* [2013] EU:C:2013:28.

and strike a fair balance between them.⁹⁰ That duty is imposed on both the national authorities when they implement or apply a directive and the courts in interpreting the measures in issue.⁹¹ In general, rules which foreclose balancing are unlikely to find judicial favour.⁹² The gradual shift towards a more horizontal juxtaposition of conflicting EU interests, however, need not mean less involvement of national courts. The latter may also perform that balancing subject to oversight by the ECJ whose optimal intervention is one of providing guidance to the national courts rather than prescribing outcomes in preliminary references.

Conflicts may also occur at the level of abstract general principles. In *TWD*⁹³ and *AssiDoman*,⁹⁴ in assessing limitations on the right to judicial review and the right to obtain effective remedies against EU institutions, the Court gave priority to the principle of legal certainty over the principles of legality and judicial protection. Legislative determination may also determine the balance. In *Alimanovic*,⁹⁵ retreating from a broad reading of social rights for migrant workers, the ECJ held that, in the circumstances of the case, no individual assessment was necessary before deciding to refuse social assistance since the Citizenship Directive provided detailed conditions for entitlement giving precedence to legal certainty over proportionality.⁹⁶

5.2. Conflicts between general principles emanating from the rule of law and structural principles

Structural principles of EU law may come into conflict with, or condition, substantive ones. A prime example is provided by the principle of mutual trust which both in asylum law and the field of the European Arrest Warrant (EAW) may come into a trajectory of conflict with the protection of fundamental rights. In the area of freedom, security and justice, mutual trust imposes two obligations on Member States.⁹⁷ First, when implementing EU law, Member States may be required to presume that fundamental rights have been observed by the other Member States, so that they may not demand a

⁹⁰ See, eg Case C-275/06 *Promusicae* [2008] ECR I-271, paras 65 and 66; *Deutsches Weintor eG* (n 91) [47];

⁹¹ Case-12/11 *McDonagh v Ryanair Ltd*, EU:C:2013:43, para 43; *Promusicae* (n 92) [68].

⁹² See, Joined Cases C-468/10 and C-469/10 *Asociación Nacional de Establecimientos Financieros de Crédito (ASNEF) v Administración del Estado*, EU:C:2011:777.

⁹³ Case C-188/92 *TWD v Germany* [1994] ECR I-833.

⁹⁴ Case C-310/97 *Commission v AssiDöman Kraft Products AB (Woodpulp III)* [1999] ECR I-5363

⁹⁵ Case C-67/14 *Jobcenter Berlin Neukölln v Alimanovic* [2015] EU:C:2015:597.

⁹⁶ *ibid* [61];, Case C-299/14 *Vestische Arbeit Jobcenter Kreis Recklinghausen v Garcia Nieto* [2016] EU:C:2016:114, para 49; see also the earlier judgment in Case C-333/13 *Dano*, EU:C:2014:2358.

⁹⁷ Opinion 2/13 (n 30) [192]; Case C-216/18 *PPU LM*, EU:C:2018:586, para 37.

higher level of national protection than that provided by EU law. Secondly, save in exceptional cases, they may not check whether another Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU. The second obligation differs from the first in that it does not pertain to the level of protection but competence to verify whether that level is observed. It also differs in that it is casted in less absolute terms, being applicable ‘save in exceptional circumstances’.⁹⁸ This exception has been the subject of case law in the fields of asylum and the EAW.

In *N.S.*⁹⁹ the ECJ examined whether a Member State should send back asylum seekers to the Member State responsible for examining their application under the Dublin II Regulation,¹⁰⁰ if such return exposed them to inhuman or degrading treatment. The Court appeared to draw a distinction between mere infringements of fundamental rights in the Member State of return and systemic flaws in the conditions of asylum seekers resulting in inhuman or degrading treatment. Only where there is a substantial risk of such system flaws, the rules laid down in Dublin II can be displaced.¹⁰¹ *N.S.* confirms that, under the Dublin II system, mutual trust does not create a conclusive presumption that the Member State of return complies with fundamental rights. Nevertheless, the threshold of ‘systemic flaws’ may be far too stringent. It does not exist under the Convention.¹⁰² *N.S.* introduces a threshold that ‘exists nowhere else in refugee law’.¹⁰³ *N.S.* exposes, perhaps, not so much a flaw in the reasoning of the Court as in the mutual recognition principle which is aspirational in character and relies on commitment to fundamental rights protection rather than compliance with them.

⁹⁸ Opinion 2/13 (n 30) [192]; *LM* (n 99) [36]; Case C-452/16 PPU *Poltorak*, EU:C:2016:858, para 26.

⁹⁹ Joined Cases C-411/10 and C-493/10 *N.S. v Secretary of State for the Home Department* [2011] EU:C:2011:865.

¹⁰⁰ Council Regulation (EC) 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L50/1.

¹⁰¹ Confirmed in Case C-4/11 *Puid* [2013] EU:C:2013:740, para 30. See subsequently the amendments made in Dublin III (Regulation (EU) 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJ L80/31 and Case C-578/16 PPU *C.K., H.F., A.S. v Republika Slovenija*, EU:C:2017:127 and the discussion in T Tridimas, ‘Competence, Human Rights, and Asylum: What Price for Mutual Recognition?’ in I Goevare and S Garben (eds), *The Division of Competences in the EU Legal Order – A Post-Lisbon Assessment* (Hart Publishing, 2017) 151-170.

¹⁰² According to the judgment in *Soering v United Kingdom* (1989) 11 EHRR 439, the removal of a person from a member state of the Council of Europe to another country is forbidden if it is shown that there is a real risk that the person transferred will suffer treatment contrary to Article 3 of ECHR.

¹⁰³ See *R (on the application of EM (Eritrea) v Secretary of State for the Home Department* [2014] UKSC 12, para 39, per Lord Kerr.

The potential conflict between mutual trust and fundamental rights protection came to the fore in the field of the EAW in *Aranyosi*¹⁰⁴ and *LM*.¹⁰⁵ The issue in both cases was whether the courts of the State that has been asked to execute an EAW may refuse surrender on the ground that the fundamental rights of the person concerned may be violated in the Member State that issued it.¹⁰⁶ The ECJ introduced a two-step approach. It held that, as a first step, the judicial authority of the executing Member State must assess whether by virtue of systemic or generalized deficiencies in the places of detention of the issuing Member State, there is a real risk of inhuman or degrading treatment.¹⁰⁷ If such a real risk exists, the court must make a further assessment, specific and precise, of whether there are substantial grounds to believe that the individual concerned will be exposed to that risk.¹⁰⁸

Aranyosi is less strict than *N.S.* The term ‘generalised’ deficiencies, which was absent in *N.S.*, is an important gloss that does away with the need to define ‘systemic’ and provides a lower threshold.¹⁰⁹ Still, this line of case law is problematic. Since fundamental rights are centred on the individual treatment of a person, the first step seems otiose.

The *Aranyosi* line of case law can be seen as a narrow judicial exception to the principle of mutual recognition. As the Court stated, mutual recognition is the cornerstone of the EAW system.¹¹⁰ The Framework Decision¹¹¹ provides for exhaustive lists of mandatory and optional grounds on the basis of which the executing court may refuse to execute an EAW. Seen in that light, any further exception would appear to run counter to the principle of *numerus clausus*. Notably, the Court founded the exception not directly on the need to comply with the Charter as a higher ranking source of law but on Article 1(3) of the

¹⁰⁴ Joined Cases C-404/15 and C-659/15 *PPU Aranyosi* [2016] EU:C:2016:198.

¹⁰⁵ Case C-216/18 *PPU LM* [2018] EU:C:2018:586.

¹⁰⁶ *Aranyosi* pertained to the risk of a breach of Article 4 of the Charter (prohibition of torture and inhuman or degrading treatment); *LM* pertained to the right to an independent tribunal under Article 47(2) of the Charter.

¹⁰⁷ *Aranyosi* (n 106) [89].

¹⁰⁸ *ibid* [92].

¹⁰⁹ In general, systemic might be taken to refer to weaknesses that are intrinsic to the system for the administration of justice whilst generalized refers to those which are widespread and may be operational albeit not inherent in the way the prison system is structured. See *R (on the application of EM (Eritrea) v Secretary of State for Home Department* [2014] UKSC 12, at paras 52 and 66 per Lord Kerr. Since *Aranyosi*, the case law refers disjunctively to ‘systemic or generalized deficiencies’: see *Dorobantu*, C-128/18, ECLI:EU:C:2019:857, at the dispositif and para 85.

¹¹⁰ *Aranyosi* (n 106) [79].

¹¹¹ See the Council Framework Decision 2002/584 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/1, recital 6; *Aranyosi* (n 106) [79].

Framework Decision which states the Framework Decision must not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 TEU. The exception is thus presented as emanating from the Framework Decision itself rather than as being imposed by the hierarchically superior command of Article 6 although it is difficult to see why the result should have been different in the absence of the Article 1(3) reservation. The recognition of mutual recognition as a principle has important repercussions in that exceptions to it must be narrowly construed.¹¹² It thus establishes a framework of analysis which is not rights-centred but rather seeks to accommodate fundamental rights concerns by causing as little disruption as possible to the EU criminal justice model. The underlying construct may be conceived as being that mutual recognition does not provide for a derogation from the protection of fundamental rights but rather establishes a rule of jurisdiction: it is for the courts of the issuing Member State and not those of the executing Member State to ensure compliance with EU fundamental rights and the latter courts must trust the former will do their job. A similar thread underlies the common asylum system. This however leads to an outsourcing of protection which abrogates the courts of the executing Member State of their jurisdiction to protect fundamental rights in the specific case and is liable to lead to a lower level of protection. Whilst *Aranyosi* and *LM* are receptive to a narrow interpretation,¹¹³ they do highlight that constitutional rights and structural principles of EU law may be in a trajectory of conflict.

5.3. Conflicts between EU and national law principles

A third type of conflict arises where an EU principle clashes with a countervailing principle provided by national law. This may occur, for example, where a fundamental freedom collides with a national constitutional principle, such as human dignity.¹¹⁴ It may also occur where a constitutional principle as recognised by EU law is interpreted differently from its counterpart as recognised by national law. In such a case, the national standard may be displaced by the EU one. The national standard may be preserved if the situation in issue does not fall within the scope of EU law (separation) or if the ECJ inter-

¹¹² *LM* (n 107) [41]; C-327/18 *PPU RO* [2018] EU:C:2018:733, para 37.

¹¹³ In both cases, the ECJ answered the questions posed by reference to the two-limbs test because of the circumstances giving rise to the reference. The referring court questioned whether surrender would be incompatible with Charter rights because of generalized problems in the issuing Member State. The judgments do not preclude the finding that surrender would be in breach of the Charter where there is evidence that there is a risk that the rights of the specific individual would be violated in the issuing Member State. In such a case, it is submitted, there would be no need to satisfy the first limb of the test.

¹¹⁴ See eg Case C-36/02 *Omega* [2004] ECR I-9609; Case C-244/06 *Dynamic Medien Vertriebs GmbH v Avides Media AG* [2008] EU:C:2008:85.

prets the EU principle in question so as to incorporate the national standard and thus a clash is avoided (incorporation) or if the Court considers that the application of the national standard is permissible even though the situation falls within the scope of EU law (tolerance). The incorporation of national standards into the definition of EU rights is rarely express. When defining general principles of law or Charter rights, the ECJ does not seek to establish a specific line of derivation from national constitutional principles. *Mangold* illustrates that the ECJ is not particularly concerned with anchoring general principles on commonality or specific provisions of national constitutions¹¹⁵ whilst *Melloni*, where the EU standard displaced the national one, testifies that the Court is committed to an autonomous interpretation of the Charter.¹¹⁶

*Taricco*¹¹⁷ and *M.A.S.*¹¹⁸ provide illustrations of a dialogic exchange leading to the third kind of preservation mentioned above, namely tolerance. The cases concerned Italian rules pertaining to the limitation periods for the prosecution of criminal offences. In *Taricco*, the ECJ held that, to comply with the obligation of Member States to combat fraud against EU finances, a national court must disapply national rules of criminal procedure which prevented the imposition of effective penalties in cases of serious fraud. Subsequently, in *M.A.S.*, the Italian Constitutional Court expressed doubts as to whether *Taricco* was compatible with the overriding principle of Article 25 of the Italian Constitution which requires that rules of criminal law are precise and cannot be retroactive. In its response, the ECJ held that, if the national court concluded that the obligation to disapply the provisions of the Criminal Code conflicted with the principle that offences and penalties must be defined by law, it would not be obliged to comply with that obligation. It would then be for the national legislature to take the necessary measures.¹¹⁹

M.A.S. raises a number of important constitutional issues. It may be said that, strictly speaking, the judgment is not a departure from *Taricco* as in the two cases the ECJ was dealing with different aspects of Article 49(1) of the Charter. In *Taricco*, it examined the prohibition on the retroactive application

¹¹⁵ Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-9981; for a discussion, see above, Chapter

¹¹⁶ Case C-399/11 *Melloni*, EU:C:2013:107. The ECJ held that Article 4a of the Framework Decision on the EAW, which requires a person convicted in absentia to be surrendered if he was properly informed of the trial and chose not to appear, was compatible with the right to an effective remedy and the right to a hearing as provided in the Charter. It then held that that interpretation foreclosed the possibility of a Member State refusing to execute the warrant on the ground that the standard of protection of the right to a fair trial is higher under the national constitution. Such a view would run counter to the primacy of EU law.

¹¹⁷ Case C-105/14 *Taricco*, EU:C:2015:555.

¹¹⁸ Case C-42/17 *M.A.S.* [2017] EU:C:2017:936.

¹¹⁹ *ibid* [60].

of criminal laws whilst in *M.A.S.* it focused mostly on the requirement that criminal penalties must be defined by law. Also, the questions asked in each case were different. Nonetheless, there is little doubt that in *M.A.S.* the ECJ backtracked in the light of circumspect but justifiable criticism by the Corte costituzionale. Also, it expressly accepted that the requirements of foreseeability, precision and non-retroactivity preclude the national court from disapplying the provisions of the Criminal Code in issue.¹²⁰

The key point from *M.A.S.* is that Member State obligations to comply effectively with EU law cannot take precedence over the need to observe the principles of legality and non-retroactivity of criminal penalties. There is however some uncertainty as to the source of fundamental rights that the Court applied. It referred to the importance of the principle that offences must be defined by law both in the EU legal order and the national legal systems.¹²¹ It also stated that Article 49 of the Charter must be observed by the Member States where they implement EU law as was the case in issue. Essentially, however, the ECJ allowed the national court to apply the higher constitutional standard provided by national law because there was no EU legislation governing the area. It held that the national authorities and courts remain free to apply national standards of protection of fundamental rights, on condition that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised.¹²² *M.A.S.* stands as authority that, where EU law has not specified the conditions for the punishment of a violation, the national rules applicable must comply with the national constitutional standards to the extent that they are higher than those applicable under the Charter.

Conclusion

The general principles of law are one of the strongest forces of the Europeanisation of national laws. There are three principal reasons for this. First, they have ecumenical scope and pervade, directly or indirectly, all areas of national law. They thus influence both substance and process not only in specific areas of regulation but also in general administrative law and, even, in the fields of private law and criminal law. Secondly, being an integral part of the EU Treaties, they have constitutional status. They form the most potent form of constitutional law outside the formal constitutions of the Member

¹²⁰ *ibid.*

¹²¹ *ibid* [51].

¹²² *ibid* [47].

States. Thirdly, they result from the interlocution of judicial actors, fostering a dialectical development of the law where national laws and EU law interchange roles as borrowers and lenders. In the post-Lisbon era, the general principles remain a potent source of law and an integral part of the Court's methodology. They are general in their scope, but they are much more than prefatory generalisations. Whilst the Charter is the primary point of reference for the protection of fundamental rights, the general principles endure not only as an interpretational tool and supplementary sources but also as the predominant methodological tool which shapes judicial reasoning and helps to morph outcomes. Their protean nature facilitates the ranking of constitutional imperatives and plays an important role not only in defining rights but also relations between the EU and its Member States.

The post-Lisbon era has also experienced a resurgence of structural principles through the judicial articulation of mutual trust, autonomy and effectiveness. Whilst these can be seen as attributes of the maturity of EU law, they are principles of organic entrenchment that, as Opinion 2/13, *N.S.* and *Taricco* suggest, may come into a trajectory of conflict with the rights-based outlook of general principles as traditionally understood. Judicial rhetoric vacillates between the overbearing importance of individual rights and the need to respect evolving models of integration. But the protection of fundamental rights must remain the overarching guiding consideration.

All in all, the Court's methodological addiction to general principles derives from its adherence to a substantive version of the rule of law. The general principles synergise the constitutional underpinnings of the EU polity, shape the normative content of EU values, and facilitate constitutional dialogue. Their ecumenical scope, high constitutional status, and value as tools of methodology which often shape the inquiry in constitutional adjudication grants them enormous power as generators of *jus communae*. Although they are by no means employed mechanically by the Court, they have an activist bias. But their omnipresence, their varying content, and the fact that they may be understood differently by different judicial actors may also generate conflict.

Finding a balance between equal treatment, transparency, and legal certainty when allocating scarce authorisations

Annemarie Drahmman*

Associate Professor at Leiden University

Abstract

The Dutch Council of State recently ruled that potential applicants should have the right to compete in a transparent procedure when scarce authorisations are allocated. This right to compete is based on the Dutch principle of equality, and is inspired by the European principles of equal treatment and transparency. Until this ruling, most scarce authorisations in the Netherlands were granted for an indefinite period of time, with no transparent allocation procedure. The question which follows is: should these scarce authorisations be withdrawn, or would this be contrary to the principle of legal certainty? By looking at the definition of a scarce authorisation and the development of the principles under EU, ECHR and Dutch case law, I conclude that competent authorities are allowed to withdraw the old scarce authorisations ex officio after a transitional period or payment of compensation. However, in my opinion, competent authorities are not obliged to withdraw old scarce authorisations, since old scarce authorisations cannot be amended substantially and therefore will become available in due time. In this way, old scarce authorisations remain intact for a longer period of time and, therefore, the infringement of the right of property is reduced. In other words, in the end, competent authorities should be allowed to decide what the best option is: either (1) withdrawing the authorisations ex officio after a transitional period or payment of compensation or (2) awaiting a request to amend the authorisation – with due regard to the circumstances of the case.

I. Introduction

In 2016, the Dutch Council of State ruled in the *Vlaardingen casino* case¹ that, when a scarce authorisation – in this case the scarce authorisation for a municipal casino – is allocated, potential applicants should be al-

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¹ *Vlaardingen casino* (Council of State, 2 November 2016) ECLI:NL:RVS:2016:2927 Wolswinkel AB 2017/426.

lowed to compete for such a scarce authorisation in a transparent procedure.² This right to compete is based on the Dutch principle of equality, and is inspired by the European principles of equal treatment and transparency. On the basis of these principles, scarce authorisations may only be granted for a limited period of time. In the past, however, scarce authorisations were granted for an indefinite time period and with no transparent procedure. As regards these scarce authorisations: can, or even must, they now be withdrawn, or would it be contrary to the principle of legal certainty? The contribution will be answering this research question in Section 4. For a better understanding of the issue, I will first define what a scarce authorisation is (Section 2) and then proceed to describe the scope of the European and Dutch principles of equal treatment and transparency (Section 3). In Section 5, I will conclude that, in my opinion, competent authorities are allowed, but not obliged, to withdraw scarce authorisations that are valid for an indefinite period of time. Since scarce authorisations cannot be amended substantially, they will in any case become available in due course. Moreover, competent authorities should be allowed to decide the best option in a specific case, which would be either withdrawing the authorisations *ex officio* after a transitional period or payment of compensation, or awaiting a request to amend the authorisation.

2. What is a scarce authorisation?

In accordance with the Services Directive,³ the term “authorisation” is used here as an umbrella term covering all permits, licences, approvals, concessions, and exemptions that entrepreneurs could need prior to the start of their business activities.⁴ Entrepreneurs are required to file an application for an authorisation with the competent authorities. A distinction must further be made between authorisations in relation to public procurement contracts or concession contracts. As will be explained in more detail in Section 3, under the Public Procurement Directive⁵ and the Concession Directive⁶, these contracts must be in accordance with the principles of equality and transparency. In general, an authorisation will not qualify as a “public contract”, since it is

² *ibid.*

³ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L376/36 [Services Directive].

⁴ See Services Directive, recital (39) and art 4-6.

⁵ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Text with EEA relevance [2014] OJ L94/65 [Public Procurement Directive].

⁶ Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts Text with EEA relevance [2014] OJ L94/1 [Concession Directive].

not a contract concluded for pecuniary interest.⁷ This contribution, however, specifically focuses on whether the principles of equality and transparency also apply to authorisations that are not covered by public procurement law. In the Netherlands, the qualification as a public contract or authorisation is also relevant when it comes to determining the competent court, since the award of public contracts is governed by civil law, whereas the granting of authorisations is governed by administrative law. As a consequence, the jurisprudence of the Dutch Supreme Court regarding the principles of equal treatment and transparency in public procurement cases was considered irrelevant in relation to administrative law cases.

Usually, if required, an operator can apply for an authorisation, and the competent authority will subsequently assess whether the operator fulfils the conditions; if so, the operator will receive the authorisation. In the case of scarce authorisations, the competent authority has set a maximum for the number of authorisations it intends to grant. Once that maximum – also referred to as a ceiling – has been reached, all applications will be refused from that moment on.⁸

Moreover, a scarce authorisation is also referred to as an authorisation ‘granting a limited public right’.⁹ One could say that this is a more accurate description, since it is the amount of rights (such as the right to operate a municipal casino) that is being limited. In this contribution, the term “scarce authorisations” is used because, firstly, it is the term used by the Council of State in the *Vlaardingen casino* ruling. Secondly, the scope of the right granted by an authorisation is always in some way limited, due to the authorisation requirements which must be observed. An authorisation for a municipal casino might, for instance, be limited to certain opening hours. The term “limited public right”, therefore, does not make it entirely clear that the actual number of authorisations is limited. Finally, the Services Directive also states that a selection procedure for potential candidates must be held if the ‘number of authorisations available for a given activity is limited’ because of the scarcity of the available natural resources or technical capacity.¹⁰

⁷ See, *inter alia*, Case C-220/05 *Auroux* [2007] EU:C:2007:31 and Case C-399/98 *Scala* [2001] EU:C:2001:401.

⁸ See, for a more extensive description of the concepts of scarcity and scarce authorisations that I refer to: Luis Arroyo and Dolores Utrilla, ‘Administrative allocation of limited public rights: some keystones for a general theory’ [2015] 2 *Ius Publicum Network Review* 1 and Johan Wolswinkel, ‘The Allocation of a Limited Number of Authorisations Some General Requirements from European Law’ (2009) 2 *REALaw* 61.

⁹ Paul C Adriaanse and others (eds), *Scarcity and the State I: The Allocation of Limited Rights by the Administration* (Intersentia 2016) and Johan Wolswinkel, ‘An Allocation Perspective to Public Law: Limited Public Rights and Beyond’ *ReM* 2014-05 <<https://www.bjutijdschriften.nl/tijdschrift/lawandmethod/2014/05/RENM-D-13-00006.pdf>> accessed 1 March 2020.

¹⁰ Services Directive, art 12.

Thus, to summarise this section, if the number of available authorisations is limited, it concerns a scarce authorisation. In the Netherlands, well-known examples of scarce authorisations are the following: public transport concessions; frequency permits; the exemption for the Sunday opening of supermarkets; terrace permits; event permits; market permits; operating permits for canal boats; gambling permits.

3. The principles of equal treatment and transparency

This section outlines the scope of the principles of equal treatment and transparency at both the EU and the national level. According to settled case law of the European Court of Justice and the Dutch Supreme Court, contracting authorities must respect the principles of equal treatment and transparency when awarding a public contract¹¹ or concession¹². The aim of the principle of equal treatment is to promote the development of healthy and effective competition between undertakings. All tenderers must be afforded equal opportunities when formulating their tenders, which therefore implies that the tenders of all competitors must be subject to the same conditions. The transparency obligation, on the other hand, arises from this principle of equal treatment, and its purpose is to guarantee the preclusion of any risk of favouritism and arbitrariness by the contracting authority. Further, it implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the notice or contract documents. This is done in order to ensure that, first, all reasonably informed tenderers exercising ordinary care can understand the exact significance of the conditions and rules and interpret them in the same way. Second, it ensures that the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applicable to the relevant public contract.¹³

3.1. Development of the EU principles of equal treatment and transparency

The EU principles of equal treatment and transparency are laid down in the Public Procurement Directive¹⁴, the Concession Directive¹⁵ and

¹¹ As defined in the Public Procurement Directive.

¹² As defined in the Concession Directive.

¹³ See, *inter alia*, Case C-496/99 P *Commission v CAS Succhi di Frutta* [2004] EU:C:2004:236 and *Ricoh vs Utrecht* (Supreme Court of the Netherlands, 9 May 2014) ECLI:NL:HR:2014:1078.

¹⁴ See, *inter alia*, Services Directive, ch III section 2.

¹⁵ Concessions Directive, art 3.

the Services Directive.¹⁶ However, it follows from case law of the Court of Justice, developed over the last 20 years,¹⁷ that these principles also apply outside the scope of these directives. Stergiou distinguishes three “generations” of case law from the Court of Justice on the topic of equal treatment and transparency.¹⁸ The first generation runs from 1998 to 2005 and concerns concessions; in that period, no directive existed to regulate concessions. Nevertheless, the Court of Justice ruled that, when awarding these concessions, the principles of equal treatment and transparency must be complied with.¹⁹ This is because the contracting entities are bound to comply, in general, with the fundamental rules of the Treaty on the Functioning of the European Union (TFEU)²⁰ and, in particular, with the principle of non-discrimination on the grounds of nationality. In the second generation of jurisprudence – from 2006 to 2008 – the Court of Justice ruled that the principles of equal treatment and transparency must be taken into account not only when awarding concessions, but also when awarding public contracts that fall outside the scope of the Public Procurement Directive.²¹ Although the EU legislature in its policy expressly chose to exclude public contracts under a certain threshold from the advertising regime in the Public Procurement Directive, the Court of Justice ruled that, if such a public contract is of a certain cross-border interest, the award must be in accordance with the transparency principle. A works contract could, for example, have a cross-border interest because of its estimated value in conjunction with its technical complexity or with the fact that the works are to be located in a place which is likely to attract the interest of foreign operators.²² In the third generation of case law – from 2008 onwards – the Court of Justice ruled that the principles of equal treatment and transparency apply also to national autho-

¹⁶ Services Directive, arts 11 and 12. See also Case C-340/14 *Trijber vs Amsterdam* [2015] EU:C:2015:641. Article 11 of the Services Directive states that an authorisation shall not be granted for a limited period, unless the number of available authorisations is limited. In *Trijber*, the Court of Justice ruled that no discretion may be conceded to competent national authorities, since this would undermine the objective of the Services Directive to secure service providers' access to the market in question.

¹⁷ See, for an overview of relevant case law, Johan Wolswinkel, Frank van Ommeren and Willemien den Ouden, 'Limited authorisations between EU and domestic law: comparative remarks from Dutch law' (2019) 25 *European Public Law* 559.

¹⁸ H M Stergiou, 'Het Hof van Justitie: Engelbewaarder van het transparantiebeginsel' (2011) 3 *NtER* 77.

¹⁹ See, *inter alia*, Case C-275/98 *Unitron Scandinavia* [1999] EU:C:1999:567, Case C-324/98 *Tel-austria and Telefonadress* [2000] EU:C:2000:669, Case C-231/03 *Coname* [2005] EU:C:2005:487, Case C-458/03 *Parking Brixen* [2005] EU:C:2005:605 and Case C-324/07 *Coditel Brabant* [2008] EU:C:2008:621.

²⁰ Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/49 [TFEU], arts 49 and 56 TFEU (formerly arts 43 and 49 EC Treaty).

²¹ See, *inter alia*, Case C-507/03 *Commission v Ireland* [2007] EU:C:2007:676 and Case C-412/04 *Commission v Italy* [2008] EU:C:2008:102.

²² Joined Cases C-147/06 and C-148/06 *SECAP and Santorso* [2008] EU:C:2008:277.

risation schemes and exclusive rights.²³ If an authorisation scheme grants an authorisation to one operator or a few, the transparency principle must be observed, because the effects of such a licence on undertakings established in other Member States and potentially interested in that activity are the same as those of a service concession contract.²⁴

It follows from the abovementioned case law that Member States must comply with the principles of equal treatment and transparency in order to comply with the fundamental rules of the TFEU. As a consequence, these EU principles can only be invoked if the public contract, concession or authorisation has a certain cross-border interest. To determine whether such a cross-border interest exists, it is not necessary that an operator has actually manifested its interest: once a certain cross-border interest has been established, the obligation of transparency benefits any potential tenderer, even where it is established in the same Member State as those authorities.²⁵

To conclude, if a public contract, concession or authorisation falls outside the scope of the Public Procurement Directive, Concession Directive or Services Directive²⁶ and there is no cross-border interest, the EU principles of equal treatment do not apply.

3.2. Development of the Dutch principles of equal treatment and transparency: the Vlaardingen casino case

The *Vlaardingen casino* case is about a municipal gambling authorisation. Such an authorisation falls outside the scope of the Public Procurement Directive, Concession Directive and Services Directive;²⁷ it is also considered to be an authorisation with no cross-border interest, since it has limited economic value. Therefore, the EU principles of equal treatment and transparency do not apply. In addition, the Vlaardingen municipal gambling authorisation is a scarce authorisation, since the Vlaardingen Slot Machines Regulation provides that only one gambling authorisation can be granted by the local authority. In *Vlaardingen casino*, the local authority granted the scarce authorisation to a gambling operator without respecting the principles of equal treatment and transparency, and a competitor appealed against this autho-

²³ Case C-203/08 *Sporting Exchange* [2010] EU:C:2010:307 and Case C-64/08 *Engelmann* [2010] EU:C:2010:506.

²⁴ Case C-203/08 *Sporting Exchange* [2010] EU:C:2010:307.

²⁵ Case C-221/12 *Belgacom* [2013] ECLI:EU:C:2013:736.

²⁶ Case C-360/15 *Visser Vastgoed vs Appingedam* [2018] EU:C:2018:44. Here, the Court of Justice ruled that Chapter III of the Services Directive also applies to a situation where all the relevant elements are confined to a single Member State.

²⁷ Article 2-2(h) of the Services Directive states that the Directive does not apply to 'gambling activities which involve wagering a stake with pecuniary value in games of chance, including lotteries, gambling in casinos and betting transactions'.

risation. The local authority argued that the EU principles of equal treatment and transparency did not apply and that no similar principles under Dutch law existed. In his opinion, Advocate General Widdershoven took the view that a legal standard should be recognised which implies that there should be some form of competition when granting scarce authorisations.²⁸ This national legal standard would be in line with EU law, because EU law already requires – for scarce authorisations for services with a cross-border interest and services within the scope of the Services Directive – that the competent authorities must apply some form of competition in their allocation. Secondly, in his view, the recognition of this legal standard also has a good reason in substance, since most scarce authorisations have asset value: it is a typical feature of the allocation of scarce authorisations that this asset value is granted to one or more applicants and not to others. According to Widdershoven, it is only logical that the municipality must give all potential applicants the opportunity to compete in one way or another. If it fails to do so, it will, for no apparent reason, favour one applicant over others, and the accusation of arbitrariness becomes imminent. Potential applicants should therefore have a chance to compete, so that the municipality does not favour certain applicants without a clear reason.²⁹

The Dutch Council of State followed the opinion of the Advocate General, and ruled that in Dutch law, when scarce authorisations are allocated, the legal standard where applicants and potential applicants must in some way be given the opportunity to compete for an available scarce authorisation applies. The Council of State explains that this right to compete follows from the Dutch principle of equality, which is considered an unwritten principle of good governance.³⁰ In the context of the allocation of scarce authorisations, this principle of equality is intended to offer equal opportunities.

The *Vlaardingen casino* case shows that two important obligations follow from the principle of equal treatment. Firstly, scarce authorisations cannot, in principle, be granted for an indefinite period of time, but only on a temporary basis. The Council of State ruled that the reason for this was that the authorisation holder would otherwise be given a disproportionate advantage, because it would then be virtually impossible for newcomers to enter the market. Secondly, in order to achieve equal opportunities, it is necessary for the competent authority to ensure an appropriate degree of publicity. This means that the competent authority must make the following information public: (1) the fact that a scarce authorisation is available; (2) the allocation procedure which will be followed; (3) the period when applications can be submitted; and (4) the

²⁸ Conclusie *Vlaardingen casino* (Council of State, 25 May 2016) ECLI:NL:RVS:2016:1421 Wolswinkel AB 2017/426.

²⁹ *ibid.*

³⁰ Under Dutch law, governing bodies are bound by these unwritten principles, and the principles can be invoked before the courts.

criteria that will apply. This information must be published in good time – before the start of the application procedure – using an appropriate medium.

Notably, the municipality argued that the criterion used for the granting of the scarce casino authorisation was the order in which applications were received. According to the Council of State this criterion is permitted, provided that all potential applications have had an equal opportunity to compete for the scarce authorisation. Furthermore, based on the obligation of transparency, an appropriate degree of publicity must be observed: each potential applicant should have an equal opportunity to be aware of the allocation procedure, the application period, and the criteria to be applied. Since the local authority in Vlaardingen did not publish an explicit invitation to tender (the authorisation was granted based on an application that was filed prior to the date that the Regulation entered into force), this transparency obligation had been violated. Thus, under Dutch law, scarce authorisations can be granted by means of various allocation methods. In addition to a tender, other permitted allocation methods are: allocation by the order in which applications are received; a drawing of lots; or an auction.

3.3. Interim conclusion

The *Vlaardingen casino* case is ground-breaking because the principles of equal treatment and transparency now also apply to scarce authorisations which fall outside the scope of the Public Contracts Directive, Concession Directive, and Services Directive, and to scarce authorisations that have no cross-border interest. Since the *Vlaardingen casino* ruling, the Dutch Council of State has ruled that competent authorities must also comply with these principles when granting scarce subsidies.³¹ The *Vlaardingen casino* case can therefore be considered as an example of 'voluntary' adoption of an EU principle into national law: the Dutch Council of State voluntarily Europeanised the Dutch principle of equality into a principle of equal treatment. Wolswinkel, Van Ommeren and Den Ouden rightly advocate that, instead of emphasizing the distinction between national and EU allocation regimes, the principle of equal treatment should be embraced as the underlying basis for some *ius commune* on allocation issues.³²

Although the *Vlaardingen casino* case provides clarity on the legal standards that apply when granting a scarce authorisation, the ruling has also raised new questions. One of these questions is how these new principles relate to the principle of legal certainty. In the next section, an attempt will be made to answer

³¹ *Geobox vs Noord-Brabant* (Council of State, 11 July 2018) ECLI:NL:RVS:2018:2310.

³² Also Johan Wolswinkel, Frank van Ommeren and Willemien den Ouden, 'Limited authorisations between EU and domestic law: comparative remarks from Dutch law' (2019) 25 *European Public Law* 559.

this question. In any case, it can be noted that the *Vlaardingen casino* case marks the starting point for a new doctrine in Dutch administrative law.

4. The principles of equal treatment and transparency versus the principle of legal certainty

The obligation requiring competent authorities to comply with the principles of equal treatment and transparency when allocating scarce authorisations is a new obligation under Dutch law. As a consequence, until 2016 competent authorities granted scarce authorisations with no transparent procedure and for an indefinite period of time. Can, or even must, such scarce authorisations be withdrawn, or would this be contrary to the principle of legal certainty? Now that it is clear that the Dutch principles of equal treatment and transparency were inspired by the EU principles of equal treatment and transparency, it is logical to also consider EU case law in answering this question. Another relevant aspect is whether the withdrawal of an authorisation infringes the right of property of the authorisation holder. In this section, I will first look at case law of the Court of Justice and case law of the European Court of Human Rights (ECtHR). Subsequently, I will compare this case law with case law in the Netherlands.

4.1. Five guidelines following from EU case law

Five guidelines on how to deal with old scarce authorisations can be derived from the case law of the Court of Justice. The first guideline is that national legislation must be amended so that scarce authorisations will be granted in accordance with the principles of equal treatment and transparency. According to settled case law of the Court of Justice, the TFEU precludes Member States from issuing or maintaining national legislation that is contrary to Articles 49 and 59 TFEU or to competition rules in the TFEU, especially with regard to the undertakings to which they grant exclusive or special rights.³³ In other words, national legislation in violation of EU law must be amended so that the issuance of new scarce authorisations is in accordance with EU law. This entails, for example, that an authorisation scheme which allows scarce authorisations to be granted for an indefinite period of time must be amended. However, this guideline only refers to future authorisations and does not answer the question of whether scarce authorisations that were granted in the past (hereafter also referred to as ‘old’ scarce authorisations) should be withdrawn.

³³ Case C-545/17 *Pawlak* [2019] EU:C:2019:260, referring to Case C-250/06 *United Pan-Europe Communications Belgium* [2007] EU:C:2007:783 and Case C-347/06 *ASM Brescia* [2008] EU:C:2008:416.

The second guideline is that there is no obligation to intervene, at the request of an individual, in existing legal situations where those situations came into being before the 2016 *Vlaardingen casino* ruling. This guideline can be derived from the *Tögel*³⁴ and *Belgacom*³⁵ cases. These cases concerned the question of whether, under the EC Treaty or the Public Procurement Directive in force at the time, an obligation exists for a Member State to intervene in existing public contracts concluded for an indefinite period that were not entered into in accordance with the Public Procurement Directive. In *Tögel*, the Court of Justice ruled that '[EU] law does not require an awarding authority [...] to intervene, at the request of an individual, in existing legal situations [...] where those situations came into being before the expiry of the period for transposition of [the Public Procurement Directive]'.³⁶ It could be argued whether the transposition of a directive into national law can be compared to the introduction of a new general principle in national law: this issue is, in fact, the subject of the *Belgacom* case. In this case, the Court of Justice ruled that 'The principle of legal certainty [...] provides ample justification for observance of the legal effects of an agreement [...] in the case of an agreement concluded before the Court has ruled on the implications of the primary law on agreements of that kind and which, after the fact, turn out to be contrary to those implications'.³⁷ In my opinion, the key question is: until what point in time can a person rely on an obligation that later turns out to be unlawful? In view of the *Tögel* and *Belgacom* cases, it can be argued that competent authorities do not have to intervene where a scarce authorisation was granted, prior to 2 November 2016, using no transparent procedure and for an indefinite period of time. Until that date, both the competent authorities and the applicants could not have known that they were obliged to comply with a national transparency obligation.

However, the fact that there is no requirement to intervene does not mean that old scarce authorisations can continue unconditionally. Indeed, the third guideline is that old scarce authorisations cannot be amended substantially: if a substantial amendment is required, a new award procedure should be started. This guideline also follows from the *Belgacom* case. After considering that the principle of legal certainty provides ample justification for observance of the legal effects of an agreement, the Court of Justice ruled that '[this principle of legal certainty] may not be relied upon to give an agreement an extended scope which is contrary to the principles of equal treatment and transparency [...]'.³⁸ Consequently, it can be concluded from the *Belgacom* case that an old scarce authorisation cannot be amended substantially. Moreover, a great deal of case

³⁴ Case C-76/97 *Tögel* [1998] EU:C:1998:432.

³⁵ Case C-221/12 *Belgacom* [2013] EU:C:2013:736.

³⁶ Case C-76/97 *Tögel* [1998] EU:C:1998:432, para 54.

³⁷ Case C-221/12 *Belgacom* [2013] EU:C:2013:736, para 40 and case law referred to therein.

³⁸ *ibid*, para 40.

law exists regarding when a public contract or concession is considered to be amended substantially. For instance, the *Wall AG* case³⁹ explains that ‘[i]n order to ensure transparency of procedures and equal treatment of tenderers, substantial amendments to essential provisions of a service concession contract could in certain cases require the award of a new concession contract’.⁴⁰ This is the case, for example, if the amendments differ materially from the original contract, and therefore demonstrate the intention of the parties to renegotiate the essential terms of that contract.⁴¹ If this guideline is applied to the allocation of scarce authorisations, it can be argued that irrevocable authorisations can remain in force until the authorisation holder wishes to change this authorisation – for example by amending authorisation requirements which provide a significant economic advantage, such as an extension of opening hours. The Dutch Council of State already ruled that both a change in the holder of the authorisation as well as the location where the activities take place can be considered to be substantial amendments.⁴² At that time, the scarce authorisation cannot be amended and a new allocation procedure will have to be initiated by the competent authority.

The fourth guideline is that a competent authority is allowed to withdraw an old scarce authorisation on its own initiative. However, should it decide to do so, compensation or a transitional period must be provided for. The transitional period must enable the contracting parties to untie their contractual relations on acceptable terms, both from the point of view of the requirements of the public service and from the economic point of view. In the *Berlington*⁴³ case, the Court of Justice ruled that ‘[a company] cannot place reliance on there being no legislative amendment whatever, but can only call into question the arrangements for the implementation of such an amendment’.⁴⁴ The principle of legal certainty does not require that there be no legislative amendment; it does, however, require that the national legislature take account of the particular situations of the companies and provide, where appropriate, adaptations to the application of the new legal rules.⁴⁵ Furthermore, it follows from the *ASM Brescia*⁴⁶ case that a termination of a concession is only possible if a transitional period is provided for. The *ASM Brescia* case concerns a concession granted in 1984, at a time when the Court of Justice had not yet held that, following from

³⁹ Case C-91/08 *Wall AG* [2010] EU:C:2010:182.

⁴⁰ *ibid.*, para 37.

⁴¹ *ibid.* Also relevant is Case C-454/06 *Pressetext Nachrichtenagentur* [2008] EU:C:2008:351.

⁴² *SSV vs Kansspelautoriteit* (Council of State, 13 March 2019) ECLI:NL:RVS:2019:774 and *Speelautomatenhal Helmond* (Council of State, 27 September 2017) ECLI:NL:RVS:2017:2611.

⁴³ Case C-98/14 *Berlington* [2015] EU:C:2015:386, para 78.

⁴⁴ *ibid.*

⁴⁵ *ibid.*

⁴⁶ Case C-347/06 *ASM Brescia* [2008] EU:C:2008:416.

primary Community law, contracts with a cross-border interest might be subject to duties of transparency. The Court of Justice ruled that the principle of legal certainty forms part of the EU legal order and is binding on every national authority responsible for implementing EU law.⁴⁷ This principle of legal certainty ‘not only permits but also requires that the termination of such a concession be coupled with a transitional period which enables the contracting parties to untie their contractual relations on acceptable terms both from the point of view of the requirements of the public service and from the economic point of view’.⁴⁸

The fifth and final guideline complements the fourth guideline, and stipulates that the protection of legitimate expectations entails an assessment on a case-by-case basis of whether the authorisation holder could reasonably expect its authorisation to be renewed or continued, and of whether they have made the corresponding investments. In the *Promoimpresa*⁴⁹ case – which concerned an authorisation within the scope of the Services Directive – it was claimed that an automatic renewal of authorisations, without a transparent tender procedure, was necessary in order to safeguard the legitimate expectations of the holders of those authorisations, in so far as their renewal enabled the cost of the investments made by those holders to be recouped. The Court of Justice ruled that ‘[T]he protection of legitimate expectations as a justification entails an assessment on a case-by-case basis whether the holder of the authorisation could reasonably expect its authorisation to be renewed and made the corresponding investments. Such a justification cannot therefore be relied on in support of an automatic extension enacted by the national legislature and applied indiscriminately to all of the authorisations at issue.’⁵⁰

If this guideline is applied to the withdrawal of old scarce authorisations, a case-by-case-assessment should be the starting point. This can be explained by the fact that it can be different for each authorisation holder when and for what amount their last investments were made, and thus how much damage they will suffer if their scarce authorisation is withdrawn.

Wollenschlager has rightfully advocated that it is worth continuing the endeavour of modelling an administrative procedure aimed at allocating scarce goods at the Member State and at the EU level of administrative law.⁵¹ It is therefore worth noting that Article III-35 of the non-binding ReNEUAL model

⁴⁷ *ibid*, para 65.

⁴⁸ *ibid*, para 71.

⁴⁹ Joined Cases C-458/14 and C-67/15 *Promoimpresa* [2016] EU:C:2016:558.

⁵⁰ *ibid*, para 56.

⁵¹ Ferdinand Wollenschlager, ‘EU Law Principles for Allocating Scarce Goods and the Emergence of an Allocation Procedure’ (2015) 8 *REALaw* 205.

rules⁵² contains a main rule similar to the case law of the Court of Justice.⁵³ The Article concerns the withdrawal of decisions which have an adverse effect, and could therefore also be applied to the withdrawal of scarce authorisations. Article III-35 states that if a decision has adverse effects on one party and is beneficial to another party, the authority must balance the conflicting interests of both parties. Even in the case of an unlawful decision that has an adverse effect, the authority is not strictly obliged to withdraw that decision. According to ReNEUAL, the authority has been left with discretion, since otherwise time limits for legal challenges of unlawful decisions would become meaningless.⁵⁴ On the other hand, the expiry of a time limit does not prohibit an authority from withdrawing an unlawful decision. Important criteria for this balancing test are: (i) the extent to which the illegality that besets the decisions is obvious; (ii) whether the beneficiary had provoked the earlier decision through false or incomplete information; and (iii) the extent to which the beneficiary undertook irreversible investments because he or she relied on the decision.⁵⁵ The application of the guidelines, which can be derived from the abovementioned Court of Justice case law and the ReNEUAL model rules, lead to the recommendation that old scarce authorisations can be withdrawn, but that compensation or a transitional period must be provided for. When withdrawing the authorisation, the competent authority must perform a balancing test that includes the extent to which the authorisation holder has made irreversible investments.

In summary, based on the abovementioned case law, I come to the following five guidelines on how to deal with old scarce authorisations:

1. National legislation must be amended if necessary, so that new scarce authorisations will be granted in accordance with the principles of equal treatment and transparency.
2. There is no obligation to intervene, at the request of an individual, in existing legal situations where those situations came into being before the introduction of the new legal standard in the 2016 Council of State ruling.

⁵² The Research Network on EU Administrative Law (ReNEUAL) has developed a set of model rules on EU Administrative Procedure which are designed to reinforce general principles of EU law and identify – on the basis of comparative research – best practices in different specific policies of the EU. The rules are non-binding.

⁵³ Book III of the ReNEUAL model rules concerns single case decision making and is therefore relevant for granting authorisations. Article III-6 states that ‘Where the number of applications to be granted is limited and a competitive award procedure is used the rules laid down in Book IV Chapter 2 Section 3 shall apply *mutatis mutandis*’. This Section of Book IV describes the competitive award procedure for the conclusion of EU contracts and includes the obligation that transparency and equal treatment are ensured during the procedure. Since Book IV concerns contracts, it is not relevant for withdrawing authorisations.

⁵⁴ ReNEUAL, ‘ReNEUAL Model Rules on EU Administrative Procedure. Book III – Single Case Decision-Making’, (ReNEUAL, 3 September 2014) 140-141 <http://www.reneual.eu/images/Home/BookIII-Single_CaseDecision-Making_individualized_final_2014-09-03.pdf> accessed 29 February 2020, para 137.

⁵⁵ *ibid.*, para 137.

3. Old scarce authorisations cannot be amended substantially. If a substantial amendment is required, a new award procedure should be started.
4. A competent authority is allowed to withdraw an old scarce authorisation; compensation or a transitional period must be provided for, should it decide to withdraw the authorisation. The transitional period must enable the contracting parties to untie their contractual relations on acceptable terms, both from the point of view of the requirements of the public service and from the economic point of view.
5. The protection of legitimate expectations entails an assessment on a case-by-case basis of whether the authorisation holder could reasonably expect its authorisation to be continued and whether they have made the corresponding investments.

4.2. Case law of the ECtHR

Article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms⁵⁶ (ECHR) protects the property of legal persons. It states that ‘No [person] shall be deprived of [their] possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law’. However, the provision continues by saying that this prohibition does not in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest. According to rulings of the ECtHR, an authorisation to run a business constitutes a possession and its withdrawal is an interference with the right guaranteed by Article 1.⁵⁷ The withdrawal of an authorisation is compatible with Article 1 if the following criteria are met: (i) it must comply with the principle of lawfulness and (ii) pursue a legitimate aim by (iii) means reasonably proportionate to the aim sought to be realised. The third criterion leads to a ‘fair balance test’.⁵⁸

A case showing how the restriction of an authorisation can form an interference with the right guaranteed by Article 1 is *O’Sullivan McCarthy Mussel Development Ltd vs Ireland*⁵⁹. In this case, a mussel seed fishing business had an authorisation to operate its business, however the company also needed a Natura permit due to new EU legislation. The ECtHR observed that, although the authorisation of the mussel seed fishing business was not actually withdrawn,

⁵⁶ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention of Human Rights, as amended) (ECHR).

⁵⁷ See, for an overview of this case law: ECtHR, ‘Guide on Article 1 of Protocol No 1 to the European Convention on Human Rights’ (ECtHR, 31 August 2019) <https://www.echr.coe.int/Documents/Guide_Art_1_Protocol_1_ENG.pdf> accessed 1 March 2020.

⁵⁸ *ibid.*

⁵⁹ *O’Sullivan McCarthy Mussel Development Ltd v Ireland* App no 44460/16 (ECtHR, 7 June 2018).

Article 1 applied since the temporary prohibition on mussel seed fishing forms a restriction placed on an authorisation connected to the usual conduct of its business.⁶⁰ The fishing business was not required to cease all of its operations, and was able to resume its usual level of business activity one year later. The ECtHR recognised the weight of the objectives pursued, and the strength of the general interest in achieving full and general compliance with its obligations under EU environmental law. The ECtHR was not persuaded that the impugned interference in this case constituted an individual and excessive burden for the mussel seed fishing business, or that the State had failed in its efforts to find a fair balance between the general interest of the community and the protection of individual rights. Consequently, it ruled that there had not been a violation of Article 1.⁶¹

However, in *Vékony*⁶² the ECtHR ruled that Article 1 had been violated. In this case, *Vékony* had a shop-keeping authorisation to sell alcohol and tobacco products. In 2012, the Hungarian parliament enacted an act on tobacco retail, according to which tobacco retailers would become authorised through a concession tender. *Vékony* applied for a concession, but was informed that he had not obtained a tobacco retail concession, and therefore his enterprise was obliged to terminate the sale of tobacco products. The remaining sales activities of his enterprise were no longer profitable, which led to the business being wound up. Under Hungarian law, no compensation was available for former holders of tobacco retail authorisations who, by not having been awarded a concession, lost part of their livelihood. According to the ECtHR, *Vékony* had to suffer an excessive individual burden due to the control measure: not only was his authorisation extinguished without compensation, but authorisation holders were also provided with very short notice to make adequate arrangements to respond to the impending change to their source of livelihood.⁶³

Based on the *Vékony* case, it can be concluded that the withdrawal of an old scarce authorisation must be in accordance with the three abovementioned criteria. The “fair balance test” might lead to the conclusion that the authorisation holder qualifies for compensation; such compensation can be paid with money, or by granting a transitional period in which the business can be continued. For the outcome of the fair balance test, also of relevance is whether the authorisation holder could reasonably have been aware of the legal limitations on his property. In *Fredin*⁶⁴, another case, *Fredin* had an authorisation to exploit a gravel pit. In 1973, an amendment to the Nature Conservation Act empowered the competent authority to withdraw authorisations that were more

⁶⁰ *ibid.*, para 89.

⁶¹ *ibid.*

⁶² *Vékony v Hungary* App no 65681/13 (ECtHR, 13 January 2015).

⁶³ *ibid.*, para 37.

⁶⁴ *Fredin v Sweden* App no 12033/86 (ECtHR, 18 February 1991).

than ten years old. Fredin initiated substantial investments in the gravel pit seven years after the entry into force of this amendment to the Act. According to the ECtHR, Fredin must therefore reasonably have been aware of the possibility that he might lose his authorisation after ten years. Although Fredin suffered substantial losses with regard to the potential exploitation of the gravel pit – had it been in accordance with the authorisation – account has to be taken also of the restrictions lawfully imposed on the use of the pit. When embarking on his investments, Fredin did not have any legitimate expectations of being able to continue exploitation for a long period of time; Fredin was moreover granted a three-year closing-down period. The ECtHR concluded that it cannot be said that the withdrawal of the authorisation was inappropriate or disproportionate.⁶⁵

Based on the *Fredin* case,⁶⁶ it can be argued that a lack of compensation is acceptable when the authorisation holder knew, or ought to have known, or could reasonably have been aware, of the possibility of future restrictions. This might be relevant in the case of old scarce authorisations, since it could be argued that, as of the date of the *Vlaardingen casino* ruling, Dutch authorisation holders should have been aware of the possibility of future restrictions to their scarce authorisation. This might limit their right for compensation for investments made after November 2016. On the other hand, it could be argued that it cannot be reasonably expected of, for instance, a local market vendor to be aware of the *Vlaardingen casino* ruling and subsequently understand that this ruling might have consequences for his scarce authorisation. From this point of view, it seems necessary for the competent authority to first inform the existing authorisation holders or to implement this ruling in local legislation *before* the right to compensation can cease to exist.

The European Court of Justice and the ECtHR are unanimous in their judgment that the sudden withdrawal of scarce authorisations without providing for either a transitional period or compensation is in breach of the law. However, the European Court of Justice bases its judgments on the protection of fundamental freedoms as laid down in the TFEU, whereas the ECtHR bases its judgments on the protection of human rights, i.e. the right to property. According to Den Ouden and Tjepkema, this different approach might lead to different outcomes.⁶⁷ In the *Vékony* case, the ECtHR found that

⁶⁵ *ibid*, para 55.

⁶⁶ See, for more case law: ECtHR, 'Guide on Article 1 of Protocol No 1 to the European Convention on Human Rights' (ECtHR, 31 August 2019) <https://www.echr.coe.int/Documents/Guide_Art_1_Protocol_1_ENG.pdf> accessed 1 March 2020.

⁶⁷ Willemien den Ouden and Michiel Tjepkema, 'The allocation of limited licences by the administration – requirements under the European fundamental right to property' in Paul C. Adriaanse and others (eds), *Scarcity and the State I: The Allocation of Limited Rights by the Administration* (Intersentia 2016) 277.

‘[T]he measure did not offer a realistic prospect to continue the possession because the process of granting of new concessions was verging on arbitrariness, given that (i) the existence of the previous [authorisation] was disregarded; (ii) the possibility of a former [authorisation holder] to continue tobacco retail under the changed conditions accommodating the policy of protection of minors was not considered in the new scheme [...]; (iii) the concession system enabled the granting of five concessions to one tenderer which objectively diminished the chances of an incumbent [authorisation holder] [...] and, finally, (iv) the lack of transparent rules in the awarding of the concessions, which took place (v) without giving any privilege to a previous [authorisation holder], such as limiting the scope of the first round of tendering to such persons.’⁶⁸

By taking the right to property as a starting point, it seems reasonable to give a privileged position to the existing authorisation holders in the procedure for granting new scarce authorisations. From the EU perspective that freedom to provide services should be restricted as little as possible, however, this view is less obvious.

Agreeing with Den Ouden and Tjepkema, I believe that it is not likely that the European Court of Justice will follow the stance of the ECtHR in this area, since the favouring of established parties in the internal market is severely frowned upon by the European Court of Justice. Nevertheless, since in the *Vlaardingen casino* case the Council of State introduced the principles of equal treatment and transparency as national principles when the corresponding EU principles are not applicable, Dutch competent authorities are not bound to the jurisprudence of the European Court of Justice, while they are still obliged to act in accordance with Article 1 of the First Protocol. This leads to possible tension, because the national principles of equal treatment and transparency are based on the EU principles, yet the competent authority is bound by the ECHR. In my opinion, this tension can be resolved if the competent authority offers compensation or a transitional period to the existing authorisation holders, but does not grant them a privileged position in the procedure for granting new scarce authorisations. This solution is in line with the case law of both the European Court of Justice and the ECtHR.

4.3. Dutch case law

There is little Dutch case law on the withdrawal of scarce authorisations. The present case law mainly concerns two questions: (i) is the competent authority allowed to revoke the old scarce authorisation?; and (ii) can an old scarce authorisation remain in place? Both rulings will be described below in more detail.

⁶⁸ *Vékony v Hungary* App no 65681/13 (ECtHR, 13 January 2015), para 36.

A power to revoke the old scarce authorisation?

The Dutch General Administrative Law Act does not have a general rule for the withdrawal of authorisations, but most individual laws do have a specific legal basis for the withdrawal of authorisations. Almost all legal provisions state that the competent authority can withdraw an authorisation on the grounds mentioned in that provision. This means that the authority is allowed, but not obliged, to withdraw an authorisation.⁶⁹ If a legal provision states that a competent authority is allowed to withdraw an authorisation, this competence is usually limited to the grounds mentioned in that provision. The Trade and Industry Appeals Tribunal ruled in the *Nieuwegein*⁷⁰ case that the amendment of a scarce authorisation for an indefinite period into a limited period is not allowed if no relevant ground can be found in the provision.⁷¹ In the case, a general ground that allowed the amendment or withdrawal of an authorisation due to a change of views or circumstances was not included, and the specific grounds – such as a negative influence on safety or public order – were not applicable.⁷² It can be deduced from this ruling that a legal provision can limit the competence of an authority to withdraw a scarce authorisation. This ruling has been criticised, since it is generally assumed in literature that the power to withdraw an authorisation is – if the law does not expressly grant it – a power that is implied in the power to grant an authorisation.⁷³ In 2019, the Council of State ruled in the *Amsterdam*⁷⁴ case that the ‘change of policy insight due to an interest for the protection of which the authorisation is required’ ground for amendment of an authorisation can justify the amendment of a scarce authorisation that is valid for an indefinite period of time. In *Amsterdam*, one of the objectives of the berth authorisation scheme was optimum use of the water, so the scarce berth authorisation could be amended by the municipality.⁷⁵ Based on these rulings, it is recommended that a relevant withdrawal ground is included in legislation concerning a scarce authorisation.

Can an old scarce authorisation remain in place?

In the *Apeldoorn*⁷⁶ case, the municipality of Apeldoorn introduced new policy rules on granting scarce authorisations for the exploitation of supermarkets on

⁶⁹ A rare example of a provision that forces an authority to withdraw a permit can be found in the Nature protection law. This provision states that a permit is withdrawn, if necessary, for the implementation of Article 6, paragraph 2, of the Habitats Directive.

⁷⁰ *Hoogzandveld vs Nieuwegein* ECLI:NL:CBB:2013:78 Wolswinkel AB 2013/294.

⁷¹ *ibid*, para 4.1.

⁷² *ibid*.

⁷³ *Hoogzandveld vs Nieuwegein* ECLI:NL:CBB:2013:78 Wolswinkel AB 2013/294. Wolswinkel refers to RJN Schlössels and SE Zijlstra, *Bestuursrecht in de sociale rechtsstaat* (Kluwer 2017) Section 8.3.8.

⁷⁴ *Rederij Lovers vs Amsterdam* ECLI:NL:RVS:2019:2892 Wolswinkel AB 2019/496, para 4.2.

⁷⁵ *ibid*, para 4.8.

⁷⁶ *Coop vs Apeldoorn* ECLI:NL:CBB:2013:BZ2025 Wolswinkel AB 2013/293.

Sunday. In the past, two permits for an indefinite period had already been granted. The new policy rules stated that new authorisations would be granted after a lottery and would be valid for only one year, and that the old authorisations would not be amended. The Trade and Industry Appeals Tribunal ruled that these policy rules were unlawful.⁷⁷ The Tribunal does not consider it justified that a permanent exception should be made for the two authorisation holders for the sole reason that these two companies requested such an authorisation sooner than the other companies.⁷⁸ Such a permanent exception goes beyond the limits of a reasonable policy provision.⁷⁹ This ruling is especially relevant in light of the guideline mentioned above in Section 4.1 (i.e. that an administrative authority is not obliged to withdraw an authorisation) since *Apeldoorn* follows a different line of reasoning. The case implicates that, if the legislation regarding scarce authorisations is amended, this amendment cannot create a permanent exception for old scarce authorisations. In addition, and this time in line with the aforementioned guidelines, in the *Apeldoorn* case the Tribunal recognises that the existing authorisation holders have a special position. Moreover, in order to do justice to such a special position, it will generally be necessary to create a transitional arrangement, possibly even a long-term one, so that the authorisation holder can prepare itself for the situation in which it must compete with others for scarce authorisations.⁸⁰ Such a transitional arrangement is a form of compensation for the authorisation holders; in practice, the authorisation holders are granted a transitional period in which they can earn back their investments.

4.4. Comparing the EU, ECtHR and Dutch case law

If we compare the previously mentioned case law, it is clear that all three courts ruled that a competent authority is *allowed* to withdraw an old scarce authorisation valid for an indefinite period; however, should it decide to do so, compensation or a transitional period must be provided for. There is little Dutch case law on the duration of the transitional period and it must also be noted that the abovementioned Dutch case law predates the *Vlaardingen casino* case. As regards the European Court of Justice and ECtHR case law, it is advisable that an assessment is made on a case-by-case basis, and that it is considered to what extent the authorisation holder undertook irreversible investments because they relied on the authorisation.

⁷⁷ *ibid.*, para 2.9.

⁷⁸ *ibid.*

⁷⁹ *ibid.*

⁸⁰ *ibid.*, para 2.10. See also *Coop vs Zwolle* ECLI:NL:CBB:2015:55 Wolswinkel AB 2015/307.

One notable difference seems to be whether competent authorities are *obliged* to withdraw an old scarce authorisation that is valid for an indefinite period. In the *Apeldoorn* case, the Tribunal ruled that, when introducing new legislation for allocating scarce authorisations, it is not justified to make a permanent exception for old authorisation holders based solely on the fact that these two companies requested such an authorisation sooner than the other companies. This seems to implicate, if legislation for allocating scarce authorisations is introduced or amended, that such legislation should also include a provision for the withdrawal of the old scarce authorisations after a transitional period. Looking at the EU case law, I wonder if another reasoning is also conceivable. Earlier, when the EU case law was discussed, it was concluded that there is no obligation to withdraw scarce authorisations; however, this does not mean that these old scarce authorisations will continue indefinitely, since they cannot be amended substantially. Therefore, I find it acceptable that old scarce authorisations remain unaffected: it is clear that, as soon as the authorisation needs to be amended, this amendment request is rejected and instead a transparent allocation procedure is set up. It still remains unclear when the scarce authorisation will become available, which can be seen as one disadvantage of this view. In such a situation, both the competitors and the competent authority are dependent on the current authorisation holder, and the latter may postpone investments if they require a change to the authorisation. Such an attitude may not be in the public interest. On the other hand, one advantage of this view is that the market can slowly become accustomed to the new and current reality where authorisations have to be competed for. At the moment, entrepreneurs in certain sectors are hesitant about this new development, and subsequently competent authorities face much resistance when they take the initiative to withdraw existing authorisations. If this is the case, a more reserved attitude might be justified. One could take, as an example to illustrate this, a situation where a municipality has granted scarce authorisations to sell products at the local market which are valid for an indefinite period of time. However, if it appears that there is a large natural flow of market vendors, it seems justified that the old scarce market authorisations are not withdrawn if they comply with the following conditions: (1) all future scarce authorisations are to be granted after a transparent procedure and for a limited period of time; and (2) the old scarce authorisations are not amended substantially. This will likely lead to a situation of more calm throughout the transitional period, allowing entrepreneurs to better prepare for a competitive procedure. The continuation of old scarce authorisations until they need a significant amendment also fits well with the *Vékony* ruling of the ECtHR: after all, under Article 1 of the First Protocol, scarce authorisations must not be revoked lightly, and competent authorities must consider whether it is proportionate to leave the scarce authorisations unaffected. Ultimately, in my opinion, both options – (1) withdrawing the authorisations *ex officio* after a transitional period or payment of compensation or (2) awaiting a request to amend the authorisation substantially – are acceptable. The compe-

tent authority should be allowed to decide what the best option is, given the circumstances of the case. In addition, the outcome can differ depending on the municipality and the scarce authorisation scheme.

5. Conclusion

The Dutch *Vlaardingen casino* case makes it clear that, under Dutch law, when scarce authorisations are allocated, the legal standard where applicants and potential applicants must in some way be given the opportunity to compete for an available scarce authorisation applies. This right to compete follows from the Dutch principle of equality and, in the context of the allocation of scarce authorisations, the principle is intended to offer equal opportunities. The *Vlaardingen casino* case can be considered to be an example of the voluntary adoption of an EU principle into national law: the Dutch Council of State voluntarily Europeanised the Dutch principle of equality into a principle of equal treatment.

Until 2016, competent authorities granted scarce authorisations for an indefinite period of time using no transparent procedure; a question which then arises is whether such old scarce authorisations should be withdrawn. If we compare the case law of the Court of Justice, ECtHR and Dutch courts, it is clear that a competent authority is allowed to withdraw such an old scarce authorisation; however, should it decide to do so, compensation or a transitional period must be provided for. Less clear is whether competent authorities are also obliged to withdraw these old scarce authorisations. From the Dutch *Apeldoorn* ruling, it could be deduced that – if legislation for allocating scarce authorisations is introduced or amended – such legislation should also include a provision for the withdrawal of the old scarce authorisations after a transitional period. Looking at EU case law, such as the *Belgacom* case, I would advocate that there is no obligation to withdraw old scarce authorisations, since these old scarce authorisations cannot be amended substantially and therefore will become available in due time. This approach would also be in line with ECtHR case law, as old scarce authorisations remain intact for a longer period of time and, therefore, the infringement of the right of property is reduced. In the end, competent authorities should be allowed to decide what the best option is: either (1) withdrawing the authorisations *ex officio* after a transitional period or payment of compensation or (2) awaiting a request to amend the authorisation – with due regard to the circumstances of the case.

The Europeanisation of Spanish Administrative Law through the Principle of Legitimate Expectations

Luis Arroyo Jiménez*

Professor of Administrative Law at University of Castilla-La Mancha

Gabriel Doménech Pascual

Professor of Administrative Law at University of Valencia

Abstract

This article describes the Europeanisation of Spanish administrative law as a result of the influence of the EU law general principle of legitimate expectations. It examines, firstly, whether the formal incorporation of the principle of legitimate expectations into national legislation and case law has modified the substance of the latter, and if so, secondly, whether this has led to a weaker or a more robust protection of the legal status quo. To carry out that examination, the article considers the influence of the principle of legitimate expectations in two different areas: in individual administrative decision-making, and in legislative and administrative rule-making. Our conclusion is that the Europeanisation of Spanish administrative law through the principle of legitimate expectations has been variable and ambiguous.

I. Introduction

This article explores the Europeanisation of Spanish administrative law, in particular through the influence of the principle of legitimate expectations, a 'general principle' of EU law. Europeanisation is a process of transformation of national principles, rules and doctrines as a consequence of European – in this article mainly, EU law. Europeanisation can be seen as emerging for two different reasons. Firstly, it often arises from the duty to adopt or adapt domestic administrative law to be in line with EU legislation as it evolves, and to align with or comply with case law of the Court of Justice, in particular areas of administration. Secondly, through the application of general principles of EU law. General principles can lead to a broader and deeper influence in domestic legal systems because they are not restricted to particular areas of law or to a specific instrument of administrative action: they have horizontal and cross-sectional effects, and often apply abstractly, as part of a doctrine, and through administrative-instruments that have a structural nature.

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Both the legal value and content of any given EU law general principle is the same in all the EU Member States. This is a consequence of the requirement of uniformity in EU law. Nevertheless, in practice, Europeanisation occurs rather differently in each of the Member States; The same general principle of EU law can actually influence various national legal orders differently, not only in terms of the extent of transformation that it causes, but also in view of the pieces or building blocks of the domestic legal order that will possibly be affected. Those differences are not directly due to the principle; it ultimately depends on the particular nature of the national legal order which applies the principle. A plausible working hypothesis might be that the same general principle of EU law may produce different consequences in one Member State compared to another depending on the following criteria: (i) the degree to which domestic administrative law is constrained by constitutional law; (ii) whether administrative law is subject to a more or less formalistic legislative codification; (iii) how rigid or flexible both administrative law rule-making and judicial precedent are; and (iv) how open and cosmopolitan the administrative law system and its legal culture are.

This article is not intended to discuss the principle of legitimate expectations protection as a matter of EU law,¹ nor it is aimed at making a contribution in this latter field. Rather, we will describe the influence that EU law has had in Spanish administrative law. Taking this influence as a case-study is particularly useful because it allows more than just an observation of how it has unfolded in that Member State, it also makes possible to verify the said hypothesis more broadly, and ultimately to compare this particular experience with that of other Member States' legal orders. Turning to the structure, this article aims to answer two specific research questions. The first is whether the formal incorporation of the principle of legitimate expectations into Spanish administrative law has modified the substance of the latter. The second, if the answer to the latter is yes, is whether this has led to a weaker or to a more robust protection of the stability of the legal *status quo*. In order to address these two questions, this paper will assess the impact of the EU law principle of legitimate expectations in two different areas: when expectations are frustrated by individual administrative decisions (section 3), and when they are frustrated by legislative and administrative rules (section 4). Then the article will focus on a specific develop-

¹ See R Thomas, *Legitimate Expectations and Proportionality in Administrative Law* (Hart 2000) (Thomas); S Schönberg, *Legitimate Expectations in Administrative Law* (OUP 2000) (Schönberg); H-J Blanke, *Vertrauensschutz in deutschen und europäischen Verwaltungsrecht* (Mohr Siebeck 2001); T Tridimas, *The General Principles of EU Law* (OUP 2006); X Groussot, *General Principles of Community Law* (Europa Law Publishing 2006), 202-214; D Dero-Bugni, 'Les principes de sécurité juridique et de confiance légitime', in J-B Auby and JD de la Rochère (eds), *Traite du droit administrative européen* (Bruylant 2014), 651-670.

ment in Spanish (Supreme Court) case law in the area of State liability for damages caused by Parliamentary laws, where the EU law principle of legitimate expectations has allegedly played an important role (section 5). Before doing so, there must first be a preliminary discussion of how the principle was received in national administrative law (section 2).

2. Incorporation of the principle of legitimate expectations in Spain

Article 9.3 of the Spanish Constitution clearly lists the principle of legal certainty among a number of other principles, which have always been connected to the rule of law:

‘The Constitution guarantees the principle of legality, the hierarchy of legal provisions, the publicity of legal statutes, the principle of legal certainty and the non-retroactivity of both non-favourable punitive provisions and provisions restrictive of individual rights, the rule of law, the accountability of public authorities, and the prohibition of arbitrary action of public authorities’.

Nevertheless, there has never been any expression of legal certainty in the form of the legal protection of legitimate expectations in any statutory instrument or judgment. Not even the term ‘legitimate expectations’ itself, or others more or less equivalent to it, such as ‘legitimate confidence’, or ‘legitimate trust’ have appeared in that context.

The first time it was mentioned was in a judgment of the Supreme Court of 1989: a private school applied for a subsidy which was refused by the administrative authority in an administrative decision. However, it had in fact granted that subsidy to the same applicant in the previous period of the school year, which had created expectations for the school, and the rejection was therefore held to frustrate those expectations:

‘With the rejection of the subsidy application the ‘fides’ or trust of the applicant was broken in a case in which the latter was performing a burdensome activity of public interest under the expectation that the new subsidy was going to be granted just like the previous one [...] It is therefore a requirement of good faith to believe that once a subsidy for the first period of the school year has

been granted, the subsidy for the next periods of the same school year will also be granted, provided that circumstances remain the same'.²

Ultimately, the Supreme Court quashed the administrative decision and declared the right of the private school to receive the subsidy for the remainder of the school year. This ruling seems to ground the protection of the legal *status quo* on the notion of good faith – which had been traditionally proclaimed as a general principle of law in Article 6.1 of the Civil Code. It also seems to be based on the principle of *nemo auditur propriam turpitudinem allegans* – which has always been a *topos* used very widely in legal reasoning. However, there was no reference or basis on the constitutional principle of legal certainty. The expression 'legitimate expectations' is not even used by the Court. Nevertheless, the underlying principle is that an expectation which the applicant could reasonably rely on had been created by the previous administrative decision, and that it was unlawful for the same authority to frustrate those expectations.

This ruling was paid immediate attention in academic literature, and various case notes pointed to the German public law principle of *Vertrauensschutz* as the principle of law that was being applied in this ruling.³ Very shortly after, the Supreme Court handed down two new judgments that helped to consolidate the principle, as well as to clarify its legal context.⁴ One of them, also concerning an administrative decision rejecting a subsidy that a private school had applied for, said that:

'In the conflict between the principles of legality of administrative action and of legal certainty, the latter prevails by virtue of the protection of legitimate expectations, which has been implicitly proclaimed by this Court in its Judgment of 28 February 1989 (RJ 1989/1458). While having its origins in the law of the Federal Republic of Germany, it has also been recognised in the case law of the Court of Justice of the European Communities, of which Spain is a Member State. The principle does not depend on the mere psychological belief of the beneficiary, but rather requires the expectations to be based on external signs coming from the Administration that are conclusive enough to reasonably induce him to rely on the legality of the administrative action [and that the administra-

² Judgment of the Spanish Supreme Court (Administrative Law Chamber) of 28 February 1989 (RJ 1989/1458), para 2.

³ F Marín Riaño, 'La recepción del principio de la confianza legítima en la jurisprudencia del Tribunal Supremo' (1989) 2 *La Ley* 605.

⁴ Judgments of the Spanish Supreme Court (Administrative Law Chamber) of 26 January 1990 (RJ 1990/598), and of 1 February 1990 (RJ 1990/1258). J Quesada Lumbreras, 'Tres décadas de protección jurisprudencial de la confianza legítima' (2010) 146 *Revista Española de Derecho Administrativo* 417.

tive act] causes damage to the beneficiary due to the investments that he previously made'.⁵

Interestingly enough, the Supreme Court acknowledges the structure of the 'legal transplant' that is grounded in the authority of EC law, which can be traced back to German public law. As a matter of fact, subsequent academic scholarship has resorted directly to the latter,⁶ at least as much as it has to the case law of the Court of Justice,⁷ in seeking clarification of the factual conditions of application and the legal effects of this principle. It is uncertain which of these two sources was more influential in the development of the Supreme Court's doctrine on legitimate expectations in the three subsequent decades. In other words, while formally the legal influence has come through the case law of the Court of Justice, from a substantive perspective it is not at all clear whether we have witnessed a more horizontal (from a neighbouring Member State's legal order) than vertical (from the EU legal order) legal transplant. Indeed, as it will be demonstrated next, the respective importance of these sources might well vary depending on which is dimension of legitimate expectations' protection at stake.

The torch for the development of the principle was then taken by the Spanish Parliament. In 1999 it amended the 1992 Administrative Procedure Act,⁸ so that the new wording of Article 3 established that administrative bodies:

'shall comply with the principles of good faith and legitimate expectations'.

⁵ RJ 1990/1258 (n 4), para 2.

⁶ F Castillo Blanco, *La protección de la confianza en el Derecho administrativo* (Marcial Pons 1999) (Castillo Blanco); J García Luengo, *El principio de protección de la confianza en el Derecho administrativo* (Marcial Pons 2002) (García Luengo); S Díez Sastre, *El precedente administrativo* (Marcial Pons) 2008 (Díez Sastre); J García Luengo, 'El principio de protección de la confianza' in JA Santamaría Pastor (ed), *Los principios jurídicos del Derecho administrativo* (La Ley 2010), 1167-1205; T Müller, *Die Europäisierung der Verwaltungsverfahrensgesetze in Deutschland und Spanien* (Mohr Siebeck 2019), 44.

⁷ See R García Macho, 'Contenido y límites del principio de protección de la confianza legítima: estudio sistemático de la jurisprudencia del Tribunal de Justicia' (1987) 57 *Revista Española de Derecho Administrativo* 557, 557-571; S Muñoz Machado, 'Regulación y confianza legítima' (2016) 200 *Revista de Administración Pública* 141 (Muñoz Machado); R Alonso García, 'Treinta años de *ius publicum commune* en España' (2016) 200 *Revista de Administración Pública* 341.

⁸ Act No. 30/1992, of 26 November 1992, on Public Administration and Common Administrative Procedure (Official Journal No. 285, of 27 November 1992, 40300-40319) (Act No. 30/1992), as amended by Act No. 4/1999, of 13 January 1999 (Official Journal No. 12, of 14 January 1999, 1739-1755) (Act No. 4/1999).

The preamble of the 1999 amendment declared that it incorporates into the statute:

‘two new general principles of administrative action that stem from legal security. On the one hand, the principle of good faith, which had been applied by administrative law case law even before its inclusion in the Civil Code. On the other, the principle of legitimate expectations, which protects citizens against their arbitrary frustration by administrative authorities. The second one is well established in European administrative procedural law, as well as in national administrative law case law’.⁹

Since 1999, therefore, protection of legitimate expectations has been proclaimed as a general or horizontal principle of law which applies to statutes, as well as administrative rules and individual administrative decisions. The Administrative Procedure Act does not, however, define the conditions for the principle to apply, nor what remedies would apply in the event of a violation of the principle. In particular, it doesn’t specify when the latter could lead to an action for annulment and/or to a claim for damages – i.e., when the principle grants substantive or compensatory protection.¹⁰ Some authors consider that compensation should be the single effect of the violation of the principle of protection of legitimate expectations, especially when it collides with the principle of legality.¹¹ In turn, the mentioned rulings of the Supreme Court invalidate otherwise lawful administrative decisions by virtue of the principle of legitimate expectations. In these cases, the individual may additionally have a right to be compensated for damages caused by an unlawful administrative decision,¹² and compensation would thus not function as a substitute for annulment, but as an additional legal consequence arising from the principle of legitimate expectations. This implies that, under this case-law, the latter grants both substantive and compensatory protection. Moreover, some authors argue that the principle can also prevent the public administration from eliminating an illegal situation favorable to an individual, and even force it to maintain *contra legem* an illegal favorable act, either on a general basis,¹³ or exceptionally.¹⁴ German jurisprudence on the conservation of favorable illegal administrative acts, such as social secu-

⁹ Act No. 4/1999 (n 8), Preamble, Section II.

¹⁰ See Schönberg (n 1) *passim*.

¹¹ L Medina Alcoz, ‘Confianza legítima y responsabilidad patrimonial’ (2006) 130 *Revista Española de Derecho Administrativo* 290 (Medina Alcoz).

¹² 1978 Spanish Constitution (Spanish Constitution), art 106(2).

¹³ Castillo Blanco (n 6), 288; García Luengo (n 6), 430.

¹⁴ Díez Sastre (n 6), 400-404.

rity benefits,¹⁵ seems to have exerted more influence on Spanish case law and academic doctrine than the Court of Justice, at least in regards to the question of remedies.¹⁶

This is the story of the formal or apparent incorporation of the principle into the domestic legal order. Nevertheless, long before 1989, Spanish public law had already dealt with the whole set of problems typically connected to the principle of legitimate expectations, such as the withdrawal of administrative acts, self-limitation of administrative authorities, and retroactivity. As a matter of fact, within the different layers of Spanish public law, a thick and refined network of solutions to those problems could be found. One of the sources was Article 9.3 of the 1978 Constitution, which, along with the principle of legal certainty, also stated the non-retroactivity of both non-favourable punitive provisions and provisions restrictive of individual rights.¹⁷ As we will see later, the Spanish Constitutional Court initially reviewed legislation that had retroactive effect using a formalistic approach, by simply trying to determine the meaning of the terms ‘provisions’, ‘non-retroactivity’, and ‘restrictive of individual rights’. On another level, the 1958 Administrative Procedure Act already contained a detailed regulation of what would occur in the event of withdrawal of both adverse and favourable individual administrative decisions.¹⁸ The principle of legal certainty worked through this particular set of rules, and the courts did not use the constitutional principle of legal certainty in order to qualify them.¹⁹ Finally, despite lacking specific regulation by statute, the case law of administrative law courts had dealt with the typical forms of administrative self-limitation, such as administrative precedents,²⁰ and answers given by administrative authorities to consultations made by individuals or firms – which were subject to well-established case law, especially in the field of private-project develop-

¹⁵ The leading case, regarding the conservation of an illegal widow’s pension, is the Judgment of the Berlin OVG of 14.11.1956. See H Maurer, *Allgemeines Verwaltungsrecht* (C. H. Beck 2004) 274.

¹⁶ Díez Sastre (n 6), 401.

¹⁷ See M Azpitarte Sánchez, *Cambiar el pasado* (Tecnos 2008); M Vaquer Caballería, *La eficacia territorial y temporal de las normas* (Tirant lo Blanch 2010).

¹⁸ Act of 17 July 1958, on Administrative Procedure (Official Journal No. 171, of 18 July 1958, 1275-1287) (Act of 17 July 1958), arts 109-112. They were replaced, first, by Act No. 30/1992 (n 8), arts 102-106, and later by Act No. 39/2015, of 1 October 2015, on Common Administrative Procedure (Official Journal No. 236, of 2 October 2015, 89343-89410) (Act No. 39/2015), arts 106-111.

¹⁹ For a view of general administrative law statutes as an expression of legislative balancing among competing constitutional principles, where the latter operate through the former, see F Wollenschläger, ‘Verfassung im Allgemeinem Verwaltungsrecht: Bedeutungsverlust durch Europäisierung und Emanzipation?’ (2016) 75 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 184, 199-200; and L Arroyo Jiménez, ‘Derecho administrativo y Constitución Española’ (2019) 209 *Revista de Administración Pública* 155 (Arroyo Jiménez).

²⁰ LM Díez-Picazo, ‘La doctrina del precedente administrativo’ (1982) 98 *Revista de Administración Pública* 7, 7-46; Díez Sastre (n 6), 226-238.

ment.²¹ In view of this situation, it makes sense to assess whether the latter has made an actual difference in Spanish administrative law, and, if so, whether it has led to a higher or lower degree of legal protection of legitimate expectations generated by previous decisions of public authorities.

3. Legitimate expectations and individual administrative decisions

Legitimate expectations can be threatened and frustrated by individual decisions of administrative authorities. This can occur in two different types of cases, traditionally distinguished in general administrative law. First, rectification or withdrawal of previous administrative acts, and second, departure from individual representations and other previous non-binding administrative action (section 3.3). In turn, the first scenario can arise in different forms and thus different regimes may apply. Like other administrative legal orders,²² Spanish administrative law has different rules for rectification or withdrawal of previous individual decisions in view of two peculiar features of the latter, namely whether their content is favourable or adverse for their addressee, and whether they are lawful or unlawful. The implementation of these criteria give rise to different situations that are subject to a distinct legal regime: rectification and withdrawal of unlawful and favourable administrative acts (section 3.1), of lawful and favourable administrative acts (section 3.2), and of adverse – both lawful and unlawful – administrative acts. As the latter situation is not relevant in terms of protection of legitimate expectations, we will focus on the other. Finally, a part of this article will be devoted to a special case of unlawful and favourable acts: State aid that has to be recovered pursuant to a Commission Decision ruling that it was unlawfully granted (section 3.4).

3.1. Rectification and withdrawal of unlawful and favourable administrative acts

The first of these situations is rectification or withdrawal of unlawful and favorable acts. Under EU law, the principle of legitimate expectations qualifies the principle of legality, by restricting both administrative and judicial revocation of unlawful decisions. The Court of Justice has designed a balancing test which looks at the time that has elapsed between the initial act and its rectification or withdrawal, the discernibility of the illegality, the beha-

²¹ Díez Sastre (n 6), 381-382.

²² For a comprehensive review of eight EU Member States, see A Glaser, *Die Entwicklung des Europäischen Verwaltungsrechts aus der Perspektive der Handlungsgormenlehre* (Mohr Siebeck 2013).

viour of the addressee, and the effective emergence of legitimate expectations.²³ Conditions imposed on retroactive revocation are stricter than those on prospective revocation. If there is a breach of the principle, under EU law an annulment action can be brought, but compensation claims are not possible.

Spanish administrative law has had a specific regulation on revocation of unlawful and favourable acts – including administrative decisions with mixed or double effects²⁴ – since the 1958 Administrative Procedure Act. At present it can be found in Articles 106 and 107 of the 2015 Administrative Procedure Act. The starting point in positive law shows that there is a sharp distinction between ordinary and extraordinary grounds of illegality. This is notably different to EU law, which provides for a common balancing test irrespective of the seriousness of the illegality, while only discernibility might be of relevance.²⁵

In Spain, factual and legal errors that lead to the invalidity of an individual administrative decision belong, by default, to the first category (*anulabilidad*, or *nulidad relativa*). Legal certainty, and particularly legitimate expectations created by this first type of administrative decisions, are protected in a very robust manner: they cannot be revoked by the administrative authorities that made them. Instead, the authorities that adopted those acts have to challenge them before a court within a four-year period, thus seeking judicial review of their own decisions.²⁶ In turn, individuals or firms affected or harmed by them have to lodge their actions of annulment within two months.²⁷

Rectification or withdrawal may be ordered by an administrative authority only when there are particularly serious and manifest grounds of illegality (*nulidad absoluta*), that are specifically provided for by the law, such as violation of fundamental rights, manifest lack of competence, criminal offence, and so on.²⁸ Furthermore, this may be decided only after implementing a very detailed and complex administrative procedure that requires a favourable opinion from an independent consultative body (*Consejo de Estado*) regarding the existence of those serious grounds of illegality.²⁹ Finally, even if all these requirements

²³ Cases 7/56 and 3-7/57, *Algeria v Common Assembly* [1957] ECR 39 (*Algeria v Common Assembly*); Joined cases 42 and 49/59 *SNUPAT v High Authority* [1961] ECR 53; Case 14/61 *Hoogovens v High Authority* [1962] ECR 253; Case C-14/181 *Alpha Steel v Commission* [1982] ECR 749; Case 12/85 *Consorzio Cooperativo d'Abruzzo v Commission* [1987] ECR 1005; Case C-90/95, P *Henri de Compe v European parliament* [1997] ECRI-1999.

²⁴ M Sánchez Morón, *Derecho administrativo. Parte General* (Tecnos 2016) (Sánchez Morón), 582.

²⁵ P Craig, *EU Administrative Law* (3rd edn, OUP 2018) (Craig), 615-616.

²⁶ Act No. 39/2015 (n 18), art 107.

²⁷ Act No. 29/1998, of 13 July (Official Journal No. 167, of 14 July), art 46(1).

²⁸ Act No. 39/2015 (n 18), art 47(1).

²⁹ *ibid* art 106(1).

are met, a favourable administrative act can only be modified or withdrawn within a reasonable period of time.³⁰ The Supreme Court interprets this limitation according to the particular circumstances of the case and in a rather flexible manner, implementing it only when the authority revoked a previous decision after a very long period of time.³¹

The principles of legal certainty and legitimate expectations do not only limit the cases when administrative acts can be rectified or withdrawn. Rather, they can also qualify the content and effects of the withdrawal decision, from two different perspectives. On the one hand, since 1958,³² our different Administrative Procedure Acts have established that the power to withdraw may not be exercised when, in view of the circumstances at stake, «*this would be contrary to equity, good faith, the right of individuals or the law*». ³³ Courts often use this provision in order to decide not to order revocation – as has been said, for example, if a long period of time had passed. What they do not do is invoke it in order to qualify the annulment effects. Judicial annulments of administrative acts which are disputed on ordinary grounds of illegality always have mere prospective effect (*ex nunc*). Therefore, the legal effects of the decision between the enactment and the annulment of the act would be maintained. In turn, both judicial and administrative annulment of administrative acts incurring in serious and obvious grounds of illegality has retroactive effect (*ex tunc*), which means that there would no longer be any legal effects of the decision between the enactment and the annulment of the act.³⁴

Some authors have argued that the said general provision can be construed as allowing the granting, if the circumstances of the case require legitimate expectations to be protected, of only prospective effects to the annulment of a favourable, unlawful administrative decision, even if it presents a particularly serious and manifest illegality.³⁵ This would also be in line with the case law of the Court of Justice, which implements a balancing test that imposes more strict conditions for allowing retroactive revocation than for prospective revoca-

³⁰ *ibid* art 110.

³¹ Judgments of the Spanish Supreme Court (Administrative Law Chamber) of 23 October 2000 (RJ 2000/9001) – four years, of 30 September 2009 (RJ 2010/937) – 20 years; and of 19 February 2014 (2014/1650) – 10 years.

³² Act of 17 July 1958 (n 18), art 112.

³³ Act No. 39/2015 (n 18), art 110.

³⁴ Judgments of the Spanish Supreme Court (Administrative Law Chamber) of 26 September 1988 (RJ 1988/7262); of 28 November 1989 (RJ 1989/8359); of 20 March 1990 (RJ 1990/2243); of March 1998 (RJ 1998/1885); of 2 March 2015 (RJ 2015/1782). See J García Luengo, *La nulidad de pleno Derecho de los actos administrativos* (Civitas 2002); T Cano Campos, 'El laberinto de la invalidez: algunas pistas para no perderse' (2017) 4 InDret 10.

³⁵ Sánchez Morón (n 24), 584.

tion.³⁶ Spanish courts, in turn, acknowledge a strict connection between *nulidad absoluta* and retroactivity. If it is found that the legal *status quo* created by the administrative act must be maintained, the annulment will be rejected altogether.³⁷ Therefore, that provision is implemented in an all-or-nothing manner: either declaring the act valid, if courts believe that legal certainty must prevail over the principle of legality, or annulling it with retroactive effect, if the opposite is true. It is uncertain whether this case law grants more or less protection to those who have legitimate expectations. What is apparent though is that it leads to an overly rigid and crude solution.

There is a second perspective on how legal certainty and legitimate expectations can qualify the effects of a revocation decision. Since the 1992 Administrative Procedure Act,³⁸ if the circumstances of the case require it, the administrative authority may annul a favourable, unlawful decision that it had previously taken, while granting damages to its beneficiary.³⁹ This is another important difference when compared to EU law, where legitimate expectations are protected vis-à-vis revocation exclusively by annulment actions. Nevertheless, in order to decide when a claim for damages should be upheld, Spanish courts apply three criteria that have been traditionally connected to the principle of legitimate expectations in EU law and other national administrative legal orders. First, they assess how serious and manifest the illegality was, because if it was readily apparent that the previous administrative decision was illegal, there are no legitimate expectations to protect at all:

‘The fact that the illegality [of the subsidy] was so obvious, as well as the lack of any previous administrative procedure, force us to reject that the administrative withdrawal of the granting decision may have violated the principles of good faith or legitimate expectations’.⁴⁰

This criterion makes it very difficult to grant damages in cases concerning administrative decisions that withdraw previous favourable acts because, as has been said, for that to be possible, the latter have to show there is a particularly serious and obvious illegality. Therefore, damages provided for in Article 110.4 of Act No. 39/2015 of 1 October 2015 will normally be granted by a court in a judicial review procedure, and not by an administrative authority in the context of a revocation procedure. The second criterion relates to the role played by the

³⁶ Craig (n 25), 618.

³⁷ Judgments of the Spanish Supreme Court (Administrative Law Chamber) of 4 May 2017 (RJ 2017/2415); of 11 January 2017 (RJ 2017/42); and of 22 May 2019 (RJ 2019/2090).

³⁸ Act No. 30/1992 (n 8), art 102(4).

³⁹ Act No. 39/2015 (n 18), art 110(4).

⁴⁰ RJ 2017/2415 (n 37), para 9.

beneficiary of the act in its illegality: if the factual or legal error was provoked by the beneficiary, she will not be entitled to make a damages claim. There are simply no legitimate expectations to protect in this case.⁴¹ Finally, for compensation to be granted, the beneficiary must have actually made an investment in the belief that the legal *status quo* created by the administrative act would be maintained. As a matter of fact, under the principle of legitimate expectations, the damages that have to be paid are only damages directly linked with those investments and expenses, as well as with the loss of profit related to business opportunities that were rejected because the beneficiary trusted in the legality of the previous decision – often called ‘the negative interest’.⁴²

3.2. Rectification and withdrawal of lawful and favourable administrative acts

The degree of protection of legitimate expectations is greater in this scenario because, as the previous administrative act is lawful, the loss of legitimate expectations is not justified by the principle of legality. There are four different categories of cases to be distinguished under Spanish law.

The principle of legitimate expectations does not provide for annulment actions, nor for damages, in the first of them: when the favourable act is revoked by the administrative authority because the rights-holder no longer complies with the legal conditions.⁴³ The revocation of the right would be mandatory if compliance with those conditions was required by the law, and merely facultative if they were imposed in the administrative act on the basis of a discretionary power. The rights-holder will not have a right to be compensated in any of these cases, because she could not expect to continue to exercise the right without complying with the conditions established by the law or the decision granting it.⁴⁴ The same happens in the second category of cases: when the right was granted under the condition of possible revocation, something that can only happen if the conferral of the right was itself a discretionary prerogative.⁴⁵ Again, the rights-holder cannot argue that she reasonably relied on the stability of the

⁴¹ Craig (n 25), 613-618.

⁴² The concept was developed by R von Jehring, ‘*Culpa in contrahendo, oder Schadensersatz bei nichtigen oder nicht zur Perfection gelangten Verträgen*’ (1861) 4 *Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts* 1; see also F Kessler, ‘*Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*’ (1964) 77 *Harvard Law Review* 401. As for its reception in Spain, see Medina Alcoz (n 1).

⁴³ Craig (n 25), 610-611.

⁴⁴ Act No. 1/2001, of 20 July, on Waters (Official Journal No. 176, of 24 July) (Act No. 1/2001), art 105(3); Sánchez Morón (n 24), 587.

⁴⁵ Judgments of the Spanish Supreme Court (Administrative Law Chamber) of 7 June 1999 (RJ 1999/4264); and of 23 December 2010 (RJ 2011/1033).

legal situation created by the administrative act, because it was precarious from the outset.⁴⁶

In the third category, in certain areas of administrative law, revocation is allowed in emergency situations,⁴⁷ namely when new external circumstances arise, under which the right would have not been granted *ex ante*, either because the law would have prohibited it, or because the application would have been rejected on a discretionary basis. Compensation is generally excluded here,⁴⁸ normally by virtue of the fiction that the right was granted under a tacit *rebus sic stantibus* condition.⁴⁹ Nevertheless, economic arguments must be of particular importance given that what it is at stake is whether the risk of possible emergency situations has to be taken either by the public administration or by the rights-holder.

Finally, a fourth category of cases is that of rectification or withdrawal of lawful and favourable acts as a consequence of a new administrative assessment of the relevant public interest needs. Under EU law, revocation of these administrative decisions is generally forbidden.⁵⁰ Likewise, revocation is not allowed under Spanish law on a general basis, but only if expressly provided for by the law.⁵¹ Furthermore, when this is the case, compensation is definitely required by the courts.⁵² The constitutional basis of compensation in these cases is not the principle of legal certainty, under which the frustration of legitimate expectations would give rise to compensation for damages,⁵³ but rather the right to private property, because these cases of revocation are considered to be expropriations.⁵⁴ Indeed, under Spanish public law, the prerogative of expropriation can be exercised to take, not only real property, but any kind of property right. Accordingly, general administrative law statutes regulate the expropriation of administrative rights conferred by authorisations, concessions, and waivers.⁵⁵

⁴⁶ F Velasco Caballero, *Las cláusulas accesorias de acto administrativo* (Tecnos 1996) (Velasco Caballero), 262.

⁴⁷ Act No. 1/2001 (n 44), art 104.

⁴⁸ Sánchez Morón (n 24), 587.

⁴⁹ Velasco Caballero (n 46), 287-291.

⁵⁰ *Algera v Common Assembly* (n 23). See Craig (n 25), 612-613, 636-639.

⁵¹ Act No. 1/2001 (n 44), art 65(3) and Act No. 22/1988, of 28 July, on Coastline Protection (Official Journal No. 181, of 29 July), art 77.

⁵² Judgment of the Spanish Supreme Court (Administrative Law Chamber) of 18 March 1993 (RJ 1993/1773); and of 22 September 1999 (RJ 1999/6589).

⁵³ Spanish Constitution (n 12), arts 9(3) and 106(2).

⁵⁴ *ibid*, arts 33(1) and 33(3).

⁵⁵ Act of 16 December 1954 (Official Journal No. 351, of 17 December), art 41.

Interestingly enough, the fact that Spanish administrative law rationalises the right to be compensated within the conceptual and legal framework provided for by the law of expropriation, and not under the principle of legitimate expectations, confers a more robust protection upon the rights-holder. The reason is that the former guarantees the granting of complete compensation in the amount of both the actual damages and the loss of profit, whereas the latter only grants compensation for the negative interest, which excludes most future profits.⁵⁶ In sum, legitimate expectations are better preserved outside the realm of the EU law principle that requires their protection. This also shows that Europeanisation of national administrative legal orders can lead to a lower level of protection of the interests that lie behind that principle.

3.3. Departure from previous non-binding administrative action

A third situation arises in cases of departure from individual representations,⁵⁷ and other forms of self-limitation of administrative authorities (*Selbstbindung*), namely frustration of non-binding promises, departure from the criteria expressed in answers previously given by the public administration to a question referred by an individual or firm, and violation of administrative precedents. All these situations have a common structure that brings them under the light of the principle of legitimate expectations, both in EU⁵⁸ and in Spanish law.⁵⁹

First, the previous administrative action gives rise to a legitimate expectation of future administrative behaviour of a particular individual or firm. It can be a promise made by the authority, an answer given in the context of a question referred by individuals or firms, or an administrative practice that has consistently been followed in the past. For a legitimate expectation to arise, what is relevant is not the subjective trust of the individual or firm, but rather the existence of objective criteria that could plausibly lead to such trust and reliance existing.⁶⁰ Thus, the fact that the administrative precedent follows a criterion expressed in a *soft law* instrument might lead to this conclusion. Although it cannot be completely excluded,⁶¹ legitimate expectations only seldom arise from simple administrative inactivity, because these objective criteria normally require

⁵⁶ Craig (n 43).

⁵⁷ *ibid* 619-625.

⁵⁸ Craig (n 25), 619-625.

⁵⁹ Díez Sastre (n 6), 383.

⁶⁰ *ibid* 383-385.

⁶¹ Case 223/85 *Rijn-Schelde-Verolme (RSV) Machinefabrieken en Scheepswerven NV v Commission* [1987] ECR I-4617. Thomas (n 1), 54-55.

external signs that be sufficiently conclusive,⁶² if not unconditional, consistent and precise information.⁶³ Simple tolerance of the authorities with a manifestly illegal conduct would not give rise to protected legitimate expectations.⁶⁴ Unlike EU law, where unlawful representations are not protected under any circumstance,⁶⁵ Spanish law follows here the same criterion that applies to unlawful decisions: if the representation made to the individual was manifestly unlawful, it would not give rise to a legitimate expectation, while, if the illegality was not easy discernible, this is not excluded. Secondly, the previous action has no legally binding force vis-à-vis the administrative authority, whose subsequent action is not invalid simply because it disregards it. Otherwise, the principle of legality would provide for an action of annulment, and there would be no room left for the principle of legitimate expectations.⁶⁶ Finally, subsequent action that deviates from the announced or implied administrative behaviour must actually frustrate these legitimate expectations. Again, this means that the individual or firm must have actually made some investment or otherwise shown through her conduct that she actually relied on the promised, announced or implied administrative behaviour.⁶⁷

A good example of this can be found in the traditional case law of the Supreme Court on administrative consultations in the area of land development. Individuals and firms usually hold consultations with the municipal authorities before purchasing properties or investing in development projects, in order to learn the current legal status of the property or the way in which the authority will exercise its discretion in the future. Unlike what happens in other areas of law – such as tax law, the answers given to these consultations are not binding, so the municipal authority can disregard them if they were wrong, and even if it decides to use its discretion differently. In that case, a subsequent administrative act will not be illegal just because it does not follow them.⁶⁸ However, if this happens, the individual or firm can claim compensation for damages

⁶² Díez Sastre (n 6), 384.

⁶³ Cases T-273/01 *Innova Privat-Akademie v Commission* [2003] ECR II-1093, para 26; and T-290/97 *Mehibas Dordtselaan v Commission* [2000] ECR II-15, para 59; and T387/09 *Applied Microengineering Ltd v Commission* EU:T:2012:501, para 61.

⁶⁴ Judgment of the Spanish Supreme Court (Administrative Law Chamber) of 8 July 2002 (RJ 2002/7277).

⁶⁵ Cases 5/82 *Hauptzollamt Krefeld v Maizena GmbH* [1982] ECR 4601, para 22; Case T-2/93 *Societe Anonyme a Participation Ouvriere Compagnie Nationale Air France v Commission* [1994] ECR II-323, para. 102. Thomas (n 1), 62; Craig (n 25), 639-641.

⁶⁶ Medina Alcoz (n 11).

⁶⁷ Díez Sastre (n 6), 385-386.

⁶⁸ Judgments of the Spanish Supreme Court (Administrative Law Chamber) of 11 May 1978 (RJ 1978/2666); of 11 December 1978 (1978/4567); and of 10 April 2000 (RJ 2000/4931).

directly caused by the response of the administrative authority.⁶⁹ Compensation would only cover damages actually suffered by the claimant in view of the investments that she had made, but no loss of profit. In the words of the Supreme Court:

«Answers given to consultations on land development issues do not bind the municipality who has given them, so that the individual has no right to get a licence according to them, [nor can he seek] the annulment of the subsequent administrative decision that disregards their content. In spite of this, the individual does have a right to be compensated for the damages suffered because of them, such as the cost of the projects that might have been drafted following the consultation».⁷⁰

This was already a well-established doctrine before the accession of Spain to the European Communities, and its content has remained untouched after the formal adoption of the principle of legitimate expectations in 1989 through case law, and in 1999 by the Administrative Procedure Act. In the past, it was based directly on the principle of extracontractual liability of administrative authorities.⁷¹ Interestingly enough, this has always led to the same outcome that should be implemented under the principle of legitimate expectations because, as has been said, the latter provides a legal basis for compensating the negative interest, excluding any loss of profit related to the future exercise of the right.⁷² In sum, Spanish administrative law had already provided for the same solution, which has not been influenced in any relevant respect by the formal incorporation of the EU law principle of legitimate expectations.

3.4. Non-fiscal State aid recovery

Finally, a remark must be made about a special case of withdrawal of unlawful, favourable administrative acts where the influence of EU law has been particularly acute - and not precisely in line with the protection of legitimate expectations. The enforcement of Commission Decisions declaring a subsidy granted by an administrative act to be incompatible with the internal

⁶⁹ Judgments of the Spanish Supreme Court (Administrative Law Chamber) of 7 February 1978 (RJ 1978/582); of 3 July 1978 (RJ 1978/2835); and of 29 October 1980 (RJ 1980/3459).

⁷⁰ Judgment of the Spanish Supreme Court (Administrative Law Chamber) of 30 July 1986 (RJ 1986/7053), para. 2. This is now explicitly established by Legislative Decree 7/2015, of 30 October 2015, on Land Law (Official Journal No. 261, of 31 October 2015, 103232-103290), art 13(2) a).

⁷¹ Spanish Constitution (n 12), art 33(3).

⁷² Craig (n 43).

market has been always problematic in Spain.⁷³ According to the general view, before ordering the recovery of the subsidy, the administrative act had to first be formally annulled by the administrative authority. And this was not easy because under Spanish administrative law,⁷⁴ favourable administrative acts, such as those granting a subsidy and other State aid to an individual or firm, can only be withdrawn by the authority that adopted them if the ground of illegality was particularly serious and manifest, and after having implemented a particularly detailed administrative procedure.

These substantive and procedural conditions are aimed at protecting the stability of favourable administrative acts against an administrative declaration of invalidity, and therefore they protect the interest that lies behind the principle of legitimate expectations. But at the same time they have been hindering the effectiveness of Commission Decisions, and have been partly responsible for enforcement shortcomings. In this case, EU law did not promote, but rather opposed legal certainty, legitimate expectations and the protection of legal *status quo*. In order to comply with the primacy of Commission Decisions, national law on subsidies was modified to make it clear that State aid can be recovered following a Commission Decision whether or not the act granting State aid was being annulled. Since 2003, the Spanish Act on Subsidies states that:

‘The amounts received will be reimbursed, together with the corresponding interest from the moment of the payment of the subsidy until the date on which the reimbursement is agreed, in the following cases: [...] h) The adoption of a recovery order according to the provisions of Articles 87 to 89 of the Treaty on European Union [current Articles 107 to 109 TFEU].’⁷⁵

Since then, Spanish courts have been able to apply this specific provision of domestic law in order to recover illegal State aid, particularly non-fiscal State aid granted by individual administrative acts. If there is a Commission Decision declaring the illegality of the subsidy, it is no longer required that the administrative act be annulled. This is an exception to the general rule provided for by our Administrative Procedure Act,⁷⁶ and it is readily apparent that it does not contribute to a more robust protection of legitimate expectations.

⁷³ See L Arroyo Jiménez and P Pérez Fernández, ‘Private Enforcement in Spain’ in W Wurmnest, F Wollenschläger and T Möllers (eds), *Private Enforcement of European Competition and State Aid Law: Current Challenges and the Way Forward* (Kluwer Law 2020) forthcoming.

⁷⁴ See Section 3(1).

⁷⁵ Act No. 38/2003, of 17 November, on Subsidies (Official Journal No. 276, of 18 November), art 37(1).

⁷⁶ Judgment of the Supreme Court (Administrative Law Division), of 5 April 2018 (RC 3661/2015).

4. Legitimate expectations and legislative and administrative rules

4.1. The old approach: a narrow interpretation of the non-retroactivity principle

Article 9.3 of the 1978 Spanish Constitution establishes the ‘principle of non-retroactivity’ of both ‘non-favourable sanctioning provisions’, and provisions ‘restricting individual rights’. The first instance of this non-retroactivity principle is a fundamental piece of modern criminal law that has not raised that many questions. The second one, by contrast, has given rise to a number of controversies, in that the meaning of the expressions ‘retroactivity’, ‘rights’, and ‘individual’ not being clear at all.

During its earliest years (1981-1987), the Spanish Constitutional Court interpreted the second instance in a very narrow sense. Firstly, the Court distinguished different degrees of retroactivity (maximum, medium, and minimum), and declared that only the maximum retroactivity was constitutionally forbidden. According to this interpretation, the prohibition of retroactivity would apply only to those events and legal effects that were already concluded when the new legislation entered into force. In turn, it would not apply to future legal effects of decisions made before the new legislation was passed.⁷⁷ Secondly, the Constitutional Court declared that ‘rights’, in the sense of Article 9.3 of the Constitution, did not include ‘mere legitimate expectations’ (*expectativas legítimas*), nor ‘eventual, conditioned or future rights’, but only ‘vested rights’, namely rights that were already ‘acquired and consolidated’ before the new legislation was passed.⁷⁸ Thirdly, the Court considered that the expression ‘individual rights’ covered only a few core human rights, namely those enshrined in Articles 15-29 of the Constitution, but not economic or social rights, provided for in Articles 30-52 – for example, the right to private property (Article 33), and the freedom to conduct a business (Article 38).⁷⁹ This meant, for instance, that the resulting ‘non-retroactivity principle’ did not apply to economic regulation, nor to commercial and tax law. According to this early case law, it seemed that there were no constitutional limits to retrospective legislation in these and in other fields.

This interpretation was hard to accept, in particular after Spain joined the European Communities in 1986. Firstly, this was because retrospective legisla-

⁷⁷ See, eg, Judgments of the Constitutional Court No. 27/1981, of 20 July; No. 42/1986, of 10 April (Judgment No. 42/1986); and No. 65/1987, of 21 May.

⁷⁸ See, eg, Judgment of the Constitutional Court No. 99/1987, of 24 May.

⁷⁹ See, eg, Judgment No. 42/1986 (n 78).

tion might be extremely damaging in those fields, by substantially increasing the costs of and thereby adversely affecting investments, transactions and decisions made before that legislation had been passed. Secondly, in 1987 the European Court of Justice (as it was then known) had already delivered several judgments declaring that the application of retrospective rules in the abovementioned areas could violate Community law – in particular the general principles of legal certainty and legitimate expectations.⁸⁰ Thirdly, at that time, the Constitutional and Supreme Courts of other European countries had also established a similar legal doctrine. Lastly, as we will see in the following, the principle of legal certainty was and still is enshrined in the Spanish Constitution of 1978.

4.2. The new approach: legal certainty to limit retroactivity

It is not sheer chance that the Spanish Constitutional Court adopted a new approach to the retroactivity issue in 1987. As paradoxical as it may sound, the Constitutional Court did so not by changing its previous construction of the ‘principle of non-retroactivity’, but by declaring that some retroactive rules, although not incompatible with this constitutional provision, might violate other constitutional principles and, in particular, that of legal certainty, which is also explicitly mentioned by Article 9.3 of the Constitution.

This legal doctrine was first established by Judgment No. 126/1987 of 16 July.⁸¹ The Constitutional Court reviewed a legislative rule that had increased the tax to be paid for some gambling activities carried out during the year before the rule was passed. The Court confirmed its previous case-law, by declaring that the ‘principle of non-retroactivity’ did not apply here, as tax rules were not provisions ‘restricting individual rights’ in the sense of Article 9.3 of the Constitution. However, the Court also stated that retroactive tax legislation might be unconstitutional if it violates other constitutional principles and, in particular, that of legal certainty. In order to justify this statement, the Constitutional Court – as well as the lower courts that had brought the case before it – explicitly invoked the case law made in similar cases by the Italian Corte Costituzionale,⁸²

⁸⁰ Cases 98/78 *Firma A. Racke v Hauptzollamt Mainz* [1979] ECR I-69; and 224/82 *Meiko-Konservenfabrik* [1983] ECR I-2539.

⁸¹ Nevertheless, this doctrine could already be found in the dissenting opinion of Judge R Gómez-Ferrer to Judgment of the Constitutional Court No. 6/1983, of 4 February.

⁸² Judgments of the Constitutional Court No. 45/1964, 44/1966, 75/1969 and 54/1980.

the German Bundesverfassungsgericht,⁸³ and the Supreme Court of the United States.⁸⁴

This doctrine has been confirmed by a number of later judgments on retroactive legal changes concerning not only taxes,⁸⁵ but also social security contributions,⁸⁶ pension plans,⁸⁷ performance assessment of civil servants,⁸⁸ urban planning,⁸⁹ State aid for investment in renewable energies⁹⁰ or for housing,⁹¹ and economic regulation.⁹² Ironically, the principle of legal certainty has actually become more relevant than the ‘principle of non-retroactivity’ in order to review whether retroactive legislation is unconstitutional or not.

It must be noted that this was not a “dynamic” legal transplant, but a “static” one. The Spanish Constitutional Court imported that foreign doctrine as it arguably was in 1987 but did not consider how it evolved afterwards. In fact, since then, the Spanish Court has only twice mentioned the case law of the abovementioned foreign Courts on this topic. And, in both occasions, it just quoted the same old decision of the German Bundesverfassungsgericht that it had already quoted in 1987.⁹³

4.3. The new approach: the balancing test

In Judgment No. 126/1987, the Spanish Constitutional Court also pointed out that legal certainty did not imply an absolute prohibition on retroactive legislation, as that prohibition would ‘freeze’ the legal system and impede social progress. In order to determine whether the retroactive effects of a legal rule were compatible or not with that principle, a balancing test was

⁸³ Judgment of 19 December 1961 (BVerfGE 13, 261). On the German case law on this topic at that time, see K Vogel, ‘Rechtssicherheit und Rückwirkung zwischen Vernunftrecht und Verfassungsrecht’ [1988] *Juristen Zeitung* 833.

⁸⁴ *United States v. Hudson*, 299 U.S. 498 (1937); *Welch v. Henry*, 305 U.S. 134 (1938); and *United States v. Darusmont*, 449 U.S. 292 (1981).

⁸⁵ Judgments of the Constitutional Court No. 182/1997, of 28 October (Judgment No. 182/1997); No. 150/1990; No. 173/1996, of 31 October (Judgment No. 173/1996); No. 273/2000, of 15 November (Judgment No. 273/2000); No. 231/2001; No. 116/2009, of 18 May (Judgment No. 116/2009); No. 176/2011, of 8 November; and No. 121/2016, of 23 June (Judgment No. 121/2016).

⁸⁶ Judgment of the Constitutional Court No. 89/2009, of 20 April (Judgment No. 89/2009).

⁸⁷ Judgment of the Constitutional Court No. 90/2009, of 20 April.

⁸⁸ Judgment of the Constitutional Court No. 26/2016, of 18 February.

⁸⁹ Judgment of the Constitutional Court No. 141/2014, of 11 September.

⁹⁰ Judgment of the Constitutional Court No. 270/2015, of 17 December (Judgment No. 270/2015).

⁹¹ Judgment of the Constitutional Court No. 51/2018, of 10 May (Judgment No. 51/2018).

⁹² Judgments of the Constitutional Court No. 332/2005, of 15 December and No. 112/2006, of 5 April.

⁹³ Judgment No. 89/2009 (n 86) and Judgment No. 51/2018 (n 91).

to be carried out, where several factors, in particular, the ‘degree of retroactivity’ of the considered legal rule, had to be taken into account.

The Spanish Constitutional Court explicitly embraced the distinction made by its German counterpart between ‘actual’ and ‘apparent’ retroactivity.⁹⁴ In the former case, where a legal rule is applied to events that have already been concluded before it was passed (actual retroactivity), legal certainty will prevail *prima facie*, unless qualifying reasons of public interest justify such retroactive effects. In the latter case, where a rule produces legal effects with respect to events that have not been concluded yet (apparent retroactivity), protection of legal certainty is to be balanced with the relevant public interest in altering the law, with none of them prevailing *prima facie* over the other. In this particular case, the Court declared that the legislative provision at issue was not unconstitutional, taking into consideration the following: firstly, that the retrospective effects of the legislative provision at issue were limited to less than one year; and, secondly, that the legal change was necessary to ensure the principle of equality, namely to equate the tax burden on the concerned gambling activities with that imposed on similar gambling activities.

Subsequent judgments have refined this case-law and, in particular, the factors to be considered to strike a fair balance between legal certainty (namely the protection of legitimate expectations) and the public interests that require retroactivity. One of the most relevant factors in that regard is the foreseeability of the retrospective legal change. Legitimate expectations on the status quo not being retrospectively altered deserve protection if, and only if, such legal change was not foreseeable, meaning that it could not have been foreseen, from the point of view of a prudent and diligent agent (investor, trader, entrepreneur, taxpayer, and so on.).⁹⁵

In order to determine whether the legal change at issue was foreseeable or not, several circumstances are to be taken into account. Firstly, the nature of the sector where retrospective legal changes take place. Changes will be more foreseeable: (i) the more intensely regulated the considered sector is; and (ii) the more frequently circumstances change in that sector, which in turn makes legal changes aimed at adapting the law to new circumstances more necessary and frequent.⁹⁶

⁹⁴ As for the distinction in EU law, see Craig (n 25), 601-607.

⁹⁵ See, eg, Judgment No. 270/2015 (n 90).

⁹⁶ *ibid.*

Secondly, the extent to which new legislation deviates from the apparent legal *status quo* is also relevant. If there is no deviation at all, because the new rule confirms that *status quo*, one can hardly accept that such rule was unforeseeable at the time it was passed. This is what usually happens in cases of legislative validations (*'convalidaciones legislativas'*), where the Spanish Parliament establishes a new law which has content that reaffirms that of a previous (for example, administrative) rule that was illegal because of a mere formal or procedural defect. Under Spanish law, the previous rule enjoyed a presumption of validity,⁹⁷ and, *de facto*, was apparently valid. Therefore, the new legislation that reiterates the old one is not unforeseeable, and it does not frustrate legitimate expectations if it retrospectively enters into force when the previous rule did so.⁹⁸

Another relevant factor is the amount of the costs derived from the retroactive rule for citizens and undertakings that relied on previous legislation. The magnitude of retrospective tax increases, for instance, has been a crucial factor when determining whether they were unconstitutional or not.⁹⁹

Lastly, the Constitutional Court also considers to what extent specific public interests require the retroactive application of the rule at issue or, in other words, the magnitude of the social costs that non-retroactivity implies for those interests. For instance, in Judgment No. 270/2015 of 17 December, which upheld a substantial cutback in a very generous aid scheme established for investment in renewable energies, the Court took into account that such cutback was necessary to attain an overriding public interest (*'perentorios y superiores intereses públicos'*). That scheme had given rise to a huge tariff deficit of the Spanish electricity system, which had become financially unsustainable, especially after the 2008 global economic crisis broke out.

One can see that this case-law is, in general terms, quite similar to that established on the same topic by other European courts, in particular the Court

⁹⁷ For individual administrative decisions, see Act No. 39/2015 (n 18), art 39(1).

⁹⁸ See, eg, Judgment No. 182/1997 (n 85); and Judgment No. 273/2000 (n 85). However, Judgment No. 121/2016 (n 85), declared the retroactive validation of an administrative regulation whose 'nullity was foreseeable' to be unconstitutional; similarly, Judgment No. 116/2009 (n 85), quashed the retroactive validation of an administrative regulation that had already been annulled when the new law was passed.

⁹⁹ See Judgment No. 173/1996 (n 85) which declared a legal provision retroactively increasing a tax by more than 200 percentage points as unconstitutional.

of Justice of the European Union¹⁰⁰ and the German *Bundesverfassungsgericht*.¹⁰¹ It has been noted, however, that the Spanish case law in this realm is less nuanced than those of its counterparts and, moreover, not always fully consistent with that of the Court of Justice, even where EU law applies.¹⁰² Specifically, the Constitutional Court does not implement the more or less clearly structured standard of review that can be found in the Court of Justice's case law.¹⁰³ It is arguably still a work in progress.

5. Legitimate expectations and State liability

The Spanish Constitution explicitly provides that the government is liable, under certain circumstances, for damages caused either by the executive branch (Article 106.2) or by the judiciary (Article 121). It does not specifically refer to the scenario where damages result from legislative action or inaction. Nonetheless, the Spanish Supreme Court has declared that the Government might also be liable for damages caused by the legislative branch, in two types of cases. Firstly, when the legislature has passed an unlawful provision, which violates either EU law or the Spanish Constitution. Secondly, when the legislature has established a provision that, albeit being lawful *per se*, imposes a 'special sacrifice', namely a 'disproportionate burden', upon some individuals.

5.1. State liability for unlawful legislation

Constitutional Court's Judgment No. 173/1996 quashed a 1990 law that had established a tax with retroactive effects, thereby violating the principle of legitimate expectations. At that time, it seemed that most of the people that had paid that tax were not going to recover it. Indeed, when that Judgment was published, (i) the five-years limitation period established for requesting the refund of overpaid taxes had already expired, and (ii) many courts and administrative authorities had enacted decisions declaring that such law was not unconstitutional and, therefore, the plaintiffs were not entitled to such

¹⁰⁰ See, eg, J Raitio, 'Legal Certainty, Non-Retroactivity and Periods of Limitation in EU Law' (2008) 2 *Legisprudence* 9; Craig (n 25) 601-607.

¹⁰¹ See, eg, H Maurer, 'Kontinuitätsgewähr und Vertrauensschutz' in J Isensee and P Kirchhof (eds), *Handbuch des Staatsrechts für die Bundesrepublik Deutschland* (vol. III, 2nd edn, Müller 1996), 211-279.

¹⁰² See JF Alenza García, 'Las energías renovables ante la fugacidad legislativa: la mitificación de los principios de (in)seguridad jurídica y de (des)confianza legítima' (2016) 55 *Actualidad Jurídica Ambiental*, 3-22; Muñoz Machado (n 7); I Revuelta Pérez, 'Estándar del inversor prudente y confianza legítima' (2019) 208 *Revista de Administración Pública* 403.

¹⁰³ Craig (n 25), 603, 607.

refund. These decisions had become unappealable before the Constitutional Court's Judgment was published, and could not be reviewed anymore. Article 40.1 of the Organic Act 2/1979 of the Constitutional Court (*Ley Orgánica del Tribunal Constitucional*) establishes that judgments declaring the unconstitutionality of laws shall not provide grounds for review cases in which the unconstitutional provisions were applied if these cases ended with unappealable judicial decisions, save criminal proceedings where a criminal or an administrative sanction was imposed if, as a consequence of the nullity of the unconstitutional law, the sanction would be reduced, limited or excluded. Moreover, under the case law of the Spanish Supreme Court, this rule also applies to cases concluded with administrative decisions, if they were not appealed within the statutory deadline.

Despite (or precisely because) of that, many taxpayers brought actions against the State for the damages they have suffered as a result of such unconstitutional law. Surprisingly enough, the Supreme Court upheld their claims, although they had gotten an unappealable decision rejecting the overpayment refund or not even applied for this refund within time. The Court argued that the action for damages was different from and did not depend on the action for refund. Affected taxpayers have one year, from the date the judgment annulling the unconstitutional provision was published, to file a claim for damages.¹⁰⁴ Interestingly, the Supreme Court did not invoke the principle of legitimate expectations to justify this solution, although the unlawful legislation at issue had breached it.

This case law has been heavily criticized by several authors.¹⁰⁵ It has been argued that such doctrine: (i) offsets, de facto, the effects of administrative and judicial decisions that are unappealable and to be preserved for the sake of legal certainty; (ii) contravenes the spirit of the abovementioned Article 40.1 of the Organic Law of the Constitutional Court; and (iii) gives the opportunity to obtain a legal remedy to individuals that did not avail themselves in due time of the legal remedies at their disposal.

The scope of this doctrine has been subsequently restricted. On the one hand, the Supreme Court declared that it did not apply to: (i) cases where the unconstitutional provision at issue was annulled by the Constitutional Court

¹⁰⁴ See, for instance, Judgments of the Supreme Court (Administrative Law Chamber) of 29 February 2000 (RC 49/1998); of 13 June 2000 (RC 567/1998); and of 15 July 2000 (RC 736/1997).

¹⁰⁵ See G Doménech-Pascual, 'Responsabilidad patrimonial de la Administración por daños derivados de una ley inconstitucional' (2001) 110 *Revista Española de Derecho Administrativo* 275; E García de Enterría, 'Sobre la responsabilidad patrimonial del Estado como autor de una Ley declarada inconstitucional' (2005) 166 *Revista de Administración Pública* 99.

with prospective effects;¹⁰⁶ nor to (ii) cases where the legislation was unlawful as a consequence of breaching EU law. This second rule, nonetheless, was repealed after the European Court of Justice found that it was contrary to the principle of equivalence.¹⁰⁷

On the other hand, Articles 32 and 34 of Act No 40/2015 have subjected that State liability to very strict conditions: firstly, claimants have to have previously exhausted every remedy against the decisions made in application of the unlawful legislation and, moreover, alleged that such legislation was unconstitutional or contrary to EU law; secondly, claimants can only be compensated for damages suffered within a period limitation of five years before the unlawful legislative provision was declared unconstitutional or contrary to EU law. In addition, when it comes to breaches of EU law, it is established that: (i) the rule of EU law infringed must be intended to confer rights on individuals; (ii) the infringement must be sufficiently serious; and (iii) there must be a direct link between the infringement and the damage sustained by the injured claimants.¹⁰⁸

5.2. State liability for lawful legislation

The leading case on this issue was decided by the Supreme Court in its Judgment of 5 March 1993.¹⁰⁹ The Spanish Parliament had passed a law providing for certain State aid – mostly tax exemptions – to be granted to fisheries that would make certain investments. As a result of the Kingdom of Spain joining the European Communities, by virtue of a previous decision of the Spanish legislature, that aid scheme had to end. The Supreme Court declared that the affected firms were entitled to be compensated for the special sacrifice they suffered as a consequence of that.¹¹⁰

Subsequent case-law consolidated this doctrine. The Judgment of 17 February 1998 was passed on a case where the Balearic Islands Parliament had changed the legal regime of some pieces of land in order to preserve them from urban

¹⁰⁶ See G Doménech-Pascual, 'La responsabilidad patrimonial de la Administración por leyes declaradas inconstitucionales: las contradicciones del Tribunal Supremo' (2005) 11 *Impuestos* 13.

¹⁰⁷ See Case C-118/08 *Transportes Urbanos y Servicios Generales SAL v. Administración del Estado* EU:C:2010:39; C Plaza Martín, 'Member States Liability for Legislative Injustice' (2010) 3 *Review of European Administrative Law* 27.

¹⁰⁸ See G Doménech-Pascual, 'La menguante responsabilidad patrimonial del Estado por leyes contrarias a Derecho' (2018) 31 *Corts – Anuari de Dret Parlamentari* 411.

¹⁰⁹ Judgment of the Supreme Court (Administrative Law Chamber) of 5 March 1993 (RC 1318/1990).

¹¹⁰ See also Judgments of the Supreme Court (Administrative Law Chamber) of 27 June 1994 (RC 200 and 300/1988); of 16 September 1997 (RC 265/1988); and of 6 July 1999 (RC 308/1995).

development.¹¹¹ The Balearic legislature repealed the legal rule allowing development of that land for environmental reasons, thereby causing substantial costs to its owners, some of them being on the verge of developing it, or who had even already started to do so. After the Constitutional Court declared that such legal change was not unconstitutional, the affected owners filed a State liability claim, which the Supreme Court upheld. In its Judgment of 20 January 1999,¹¹² the Supreme Court resolved a similar case in the same way. The Parliament of Extremadura had changed the legal regime of some hunting grounds, making it virtually impossible for their owners to continue to make a profit from them. In its Judgment of 8 October 1998,¹¹³ the Supreme Court considered a case where the Canary Islands Parliament had imposed a new fuel tax, which affected existing fuel stocks. Thereafter, the claimant, an oil company, was not able to raise the price of those stocks when it sold them, given that such price was set by the Government. As a result, it suffered a substantial loss, insofar as the sale price was lower than the sum of the purchase price and the new tax. The Supreme Court declared it was entitled to be compensated for that loss.¹¹⁴

In these and in other analogous cases, the Supreme Court has given three main reasons in order to justify State liability. Firstly, it refers to the so-called principle of ‘responsibility of public authorities’ (*‘principio de responsabilidad de los poderes públicos’*), enshrined in Article 9.3 of the Constitution. It must be noted that, in Spanish, the term ‘responsabilidad’ is quite ambiguous, as it might mean ‘liability’, but also ‘accountability’ or ‘responsibility’. Secondly, the Court has argued that, if not compensated, that special sacrifice would violate the principle of equality of citizens before charges levied by the State (Articles 14 and 31.1 of the Constitution). Thirdly, it has invoked the principle of legitimate expectations in order to support the right to compensation.

It must be noted, however, that the government has rarely been held liable for such lawful legislative acts. The Supreme Court has dismissed the vast majority of claims for damages caused by the legislative branch in cases regarding deregulation of burial services,¹¹⁵ regulation of professional services,¹¹⁶

¹¹¹ Judgment of the Supreme Court (Administrative Law Chamber) of 17 February 1998 (RC 327/1993).

¹¹² Judgment of the Supreme Court (Administrative Law Chamber) of 20 January 1999 (RC 5350/1994).

¹¹³ Judgment of the Supreme Court (Administrative Law Chamber) of 8 October 1998 (RC 5578/1992).

¹¹⁴ See also Judgment of the Supreme Court (Administrative Law Chamber) of 9 October 1998 (RC 5609/1992).

¹¹⁵ Judgment of the Supreme Court (Administrative Law Chamber) of 27 April 2002 (RC 501/1998).

¹¹⁶ Judgments of the Supreme Court (Administrative Law Chamber) of 5 December 2000 (RC 4335/1996); and 16 December 2008 (RC 453/2006).

damages caused to some professionals as a consequence of Spain entering the European Community,¹¹⁷ a ban on advertising visible from public roads,¹¹⁸ civil service reforms,¹¹⁹ damages caused to municipalities as a result of a local tax being abolished,¹²⁰ a ban on smoking in enclosed public places,¹²¹ and more.

The Supreme Court is far from having a systematic doctrine in order to determine whether the State is liable or not for the legislature having placed a disproportionate burden upon some individuals. Nonetheless, one can notice that it has used, explicitly or implicitly, two main criteria with that regard. The first one is whether the legal change was foreseeable from the point of view of a prudent agent. The second one is the impact of the legal change on the rights and interests of the affected individuals. Here, the Supreme Court usually has taken into consideration, *inter alia*, whether the new legislation contained transition policies that mitigated its negative effects for the claimants.

This case law deserves to be remarked upon. Firstly, the legislative provisions that have been reviewed for arguably imposing a special sacrifice also had retroactive effect, insofar as they applied to – for example concerning increased costs – decisions, such as investments and acquisitions – made before such provisions were passed. What made these ‘State liability cases’ different from the ‘retroactivity cases’ considered above was not the retroactive effects of a legal change, but the remedy the claimants sought and which the courts eventually granted: either merely compensation for the damage caused by that legal change or the annulment of the change. However, neither Spanish courts nor Spanish legal scholars have yet developed any systematic and consistent criteria in order to determine in which circumstances one remedy is preferable to another.

Secondly, a legislative provision imposing a special sacrifice on particular individuals might well be deemed an expropriation, as it deprives those individuals from some rights – development rights, hunting rights, and so on – or legitimate interests. It must be noted that Spanish legislation defines ‘expropriation’ in a very broad sense, as a ‘singular deprivation from private property, or other property rights or legitimate interests’.¹²² And, needless to say, under

¹¹⁷ Judgments of the Supreme Court (Administrative Law Chamber) of 13 February 1997 (RC 399/1995); and 18 September 1997 (RC 1818/1990).

¹¹⁸ Judgment of the Supreme Court (Administrative Law Chamber) of 8 April 1997 (RC 7504/1992).

¹¹⁹ Judgments of the Supreme Court (Administrative Law Chamber) of 5 Mars 1993 (RC 3319/1991); of 30 November 1993 (RC 2156/1991), and 18 October 1997 (RC 223/1995).

¹²⁰ Judgment of the Supreme Court (Administrative Law Chamber) of 28 October 2009 (RC 755/2008).

¹²¹ Judgment of the Supreme Court (Administrative Law Chamber) of 29 April 2010 (RC 591/2008).

¹²² Act of 16 December 1954, on Expropriation, art 1.1.

Spanish law the State may only expropriate rights or legitimate interests if and only if the affected individuals are provided with fair compensation (Article 33.3 of the Constitution). However, neither the Spanish Constitutional Court nor the Supreme Court have considered those legal provisions as ‘regulatory takings’, unlike the United States Supreme Court which has done so in analogous circumstances.¹²³ Those cases have not been framed as ‘expropriation’ cases, but as ‘liability’ ones.

Thirdly, the Spanish Supreme Court invokes the principle of legitimate expectations -even noting its EU law source, with the aim to justify a remedy – State liability for lawful legislation – that can be found in the law of some of its Member States, but not in EU law itself.¹²⁴ Indeed, in *FIAMM* the Court of Justice considered whether the European Community might be held liable for damages caused by its lawful conduct.¹²⁵ After reviewing the principles of the non-contractual liability of the Community for damages caused by its institutions, the Court stated that:

‘while comparative examination of the Member States’ legal systems enabled the Court to [find the] convergence of those legal systems in the establishment of a principle of liability in the case of unlawful action or an unlawful omission of the authority, including of a legislative nature, that is in no way the position as regards the possible existence of a principle of liability in the case of a lawful act or omission of the public authorities, in particular where it is of a legislative nature’.¹²⁶

Therefore, the Court of Justice concluded that:

‘as Community law currently stands, no liability regime exists under which the Community can incur liability for conduct falling within the sphere of its

¹²³ See, eg, WA Fishel, *Regulatory takings* (HUP 1995).

¹²⁴ See the Opinion of Advocate General Maduro in cases C-120/06 P and C-120/06 P, *FIAMM and others v Council and Commission* [2008] (*FIAMM*), paras 62-63 and HJ Bronkhorst, ‘The valid legislative act as a cause of liability of the Communities’ in HG Chermers, T Heukels, and P Mead (eds), *Non-contractual liability of the European Communities* (Martinus Nijhoff Publishers 1988), 13-22; E Engelhard and others, ‘Let’s Think Twice before We Revise! Égalité as the Foundation of Liability for Lawful Public Sector Acts’ (2014) 10(3) *Utrecht Law Review* 55. See also the criticism from E García de Enterría, ‘El principio de protección de la confianza legítima como supuesto título justificativo de la responsabilidad patrimonial del Estado Legislador’ (2002) 159 *Revista de Administración Pública* 173.

¹²⁵ See K Arend, ‘EC Liability in the Absence of Unlawfulness’ (2009) 1 *Göttingen Journal of International Law* 199; D Utrilla, ‘La garantía patrimonial ante actos normativos lícitos en Derecho comunitario: entre la responsabilidad patrimonial objetiva y el derecho de propiedad’ (2010) 181 *Revista de Administración Pública* 219.

¹²⁶ *FIAMM* (n 124), para 175.

legislative competence in a situation where any failure of such conduct to comply with the WTO agreements cannot be relied upon before the Community courts'.¹²⁷

In *Holcim*,¹²⁸ the Court of Justice seemed to leave the door open to the possibility of the European Union being held liable for lawful acts, had they caused unusual and special damage. Nonetheless, it did not actually affirm that strict liability either. The Court of First Instance (the General Court), which does not close the door to that strict liability either, has defined unusual and special damage in *Förde-Reederei*, as that which:

'affects a particular class of economic operators in a disproportionate manner by comparison with other operators and unusual damage is that which exceeds the limits of the economic risks inherent in operating in the sector concerned, the legislative measure that gave rise to the damage pleaded not being justified by a general economic interest'.¹²⁹

In sum, the EU law principle of legitimate expectations has been used by the Supreme Court in order to support a right to be compensated for damages caused by lawful parliamentary statutes. This doctrine is controversial in and of itself, since it might well be argued that a statute imposing a disproportionate burden on an individual or firm without providing for fair compensation violates the right to private property (Article 33.1) and the constitutional discipline of expropriation (Article 33.3). Moreover, it is questionable to invoke EU law for that purpose, when the existence of such a rule in that legal order has been expressly rejected by the Court of Justice.

6. Conclusion

It is now time to look back at the research questions of this article. On a general basis, we observe that the impact of the EU law principle of legitimate expectations on Spanish administrative law has not been uniform, but rather differs depending on the area of law. On the other hand, even where this principle was at stake, EU law has not always pushed towards a more robust protection of legitimate expectations or – more broadly – of stability of the legal *status quo*. Therefore, Europeanisation of Spanish administrative law through

¹²⁷ *FIAMM* (n 124), para 176.

¹²⁸ Case C-556/14 P *Holcim v. European Commission* EU:C:2016:207.

¹²⁹ Case T-170/00 *Förde-Reederei v Council and Commission* [2002] ECR II-515, para 56.

the principle of legitimate expectations has been variable and ambiguous. More specifically, the following claims can be made.

Firstly, the disparate impact of EU law on different areas of Spanish administrative law can be partially accounted for in view of whether they are subject or not to formal legislative codification. On the one hand, such an impact has been low in those realms where there already was a pre-existing set of codified legislative rules. The most relevant instance is the revocation of favourable administrative acts.¹³⁰ The formal adoption of the principle of legitimate expectations has not led to a significant transformation of the pre-existing law in this field, which already provided for a high degree of stability of the rights and interests granted by them. Nevertheless, some exceptions can also be observed. One is the case law that, under certain circumstances, qualifies revocation of unlawful and favourable acts by granting compensation to the affected individuals. Spanish courts are here applying criteria used by both the Court of Justice of the European Union and German courts in legitimate expectation-cases. Another exception is the legislative reform of recovery of subsidies, in order to make it unnecessary to previously withdraw the granting decision.¹³¹ The influence of EU law here has definitely not increased the degree of protection of legitimate expectations.

On the other hand, the impact of the EU law principle of legitimate expectations has been generally high where there was no such set of codified rules. The main examples are the constitutional limits to retroactivity of tax and economic legislation, as well as State liability for damages caused by lawful legislative provisions. In the first case, the Spanish Constitutional Court has imported a substantial part of the balancing approach used by the Court of Justice of the European Union and its counterparts of other Member States in order to review the retroactive effect of legal rules.¹³² In the second case, the Spanish Supreme Court has invoked the principle of legitimate expectations as one of the main arguments supporting the possibility of the government being held liable for its lawful legislation.¹³³ Interestingly, in doing so, the Supreme Court has gone far beyond the case-law of the Court of Justice of the European Union, which has considered but not confirmed that strict liability yet, nor even examined the role that principle might play in that regard. Another relevant area of administrative law that has not been codified is that composed of situations of self-limitation of administrative authorities. This has traditionally been dealt with

¹³⁰ See Section 3(1).

¹³¹ See Section 3(4).

¹³² See Section 4(2) and 4(3).

¹³³ See Section 5.

by Spanish courts.¹³⁴ The EU law principle of legitimate expectations has not led to a significant evolution of the relevant case law. But this is probably due to the fact that the latter already protected legal certainty in a very similar vein – if not more generously. Hence, national administrative law was already aligned with EU law in terms of protection of legitimate expectations.

Secondly, another hypothesis of this article related to the role of the national Constitution as a competing driving force of administrative law, next to Europeanisation. Despite Spanish administrative law being highly constitutionalised,¹³⁵ this has not affected the influence of the EU law principle of legitimate expectations. Hence, retroactivity of legislative and administrative rules is one of the areas where the Spanish Constitution most resolutely limits and steers administrative law, and also where EU law has given rise to a most prominent process of transformation. It can be plausibly argued that, in Spain, constitutionalisation has not been an obstacle for the influence of EU law on administrative legislation and case law. The reason might be the decisive openness towards external and comparative influences of the Constitution itself, as well as of public law doctrine created in its interpretation.¹³⁶

A third suggested criterion pointed at how rigid or flexible both rule-making and judicial precedent are. Both administrative legislation and case law are quite flexible in Spain. And this has facilitated the incorporation of impulses coming from EU law. As for legislation, on the one hand, Act No. 4/1999 modified the 1992 Administrative Procedure Act in order to proclaim protection of legitimate expectations as a general principle of Spanish administrative law.¹³⁷ Despite it pushing in the opposite direction, Act No. 38/2003 ended the need for a previous withdrawal of the granting administrative act, in order to facilitate the implementation of Commission Decisions ordering the recovery of State aid.¹³⁸ On the other hand, the Supreme Court has been eager to modify its case law in order to implement the doctrine of the Court of Justice, especially when the latter was seen as being helpful from the perspective of its own agenda. Again, this has been the case of retroactive legislation, while in the area of rectification or withdrawal of administrative acts the Supreme Court has been more cautious.

¹³⁴ See Section 3(3).

¹³⁵ Arroyo Jiménez (n 19).

¹³⁶ A Gallego Anabitarte, 'La influencia extranjera en el Derecho Administrativo español desde 1950 a hoy' (1999) 150 *Revista de Administración Pública* 75; JA Santamaría Pastor, 'Spanien' in A von Bogdandy, S Cassese and PM Huber (eds), *Handbuch Ius Publicum Europaeum* (vol IV, C.H.Beck 2011), 323-364.

¹³⁷ See Section 2.

¹³⁸ See Section 3(4).

Finally, the Spanish case law on the principle of legitimate expectations is arguably still a work in progress, for several reasons. Firstly, it is less systematic and nuanced than that developed with respect to similar problems in other European legal systems. Secondly, it is not always fully consistent with that of the Court of Justice, even where EU law applies. Thirdly, it has several loose ends that need tying up. There is a lack of, for instance, any criteria to determine whether, why and when the retroactive effects of legislation are to be annulled, or they just need to be mitigated by means of compensation. Legal academics have not been very helpful in that regard. We have here a rather relevant theoretical job to be done.

The Duty of Care in EU Public Law – A Principle Between Discretion and Proportionality

Herwig C.H. Hofmann*

Professor of European and Transnational Public Law, University of Luxembourg, Faculty of Law Economics and Finance, Department of Law and Robert Schuman Initiative for European Affairs

Abstract

This article concentrates on the ‘duty of care’ or ‘diligence’, a principle that has become ubiquitous in CJEU case law due to its central role in calibrating the intensity of judicial review of EU acts on the legislative, regulatory and single-case decision-making levels. This article explores the development of the principle and critically reviews its use as well as whether it actually achieves the demands placed on it. The article further examines the tools developed and the emergence of the duty of care as a principle conferring individual rights in various procedural contexts. The article describes how the duty of care has become a central link between on the one hand, a separation of powers-inspired respect for discretion of the institutions and bodies of the EU and, on the other hand, ensuring a rule of law based effective review of the legality of acts – a central feature in the EU specific approach to developing proportionality.

I. Introduction

One of the central problems in establishing effective judicial remedies by EU courts is to find a balance between, on the one hand, a separation of powers-inspired respect for discretion of the institutions and bodies of the EU and, on the other hand, ensuring a rule of law based effective review of the legality of acts. This is a fundamental problem of any public law jurisdiction within a constitutionalised structure. More specifically, this article concentrates on the approach adopted by the Court of Justice of the European Union (CJEU) based on developing extensive case law on a little known – but highly versatile – legal principle: the ‘duty of care’, sometimes referred to as the duty of ‘dili-

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gence' in English language versions of CJEU cases.¹ Although ubiquitous in CJEU case law, the duty of care is not widely discussed or acknowledged for its central role in calibrating the intensity of judicial review of public action.

Understanding the role of the specific emanation of the 'duty of care', as developed in today's CJEU case law, is a task complicated by the fact that notions of care and diligence in case law of the CJEU refer to various concepts.² Some of these are related to the obligations of the EU as an employer requiring care for its personnel, sometimes also referred to as solicitude.³ Other cases where the CJEU reviews breaches of the duty of care are used to identify criteria for damages.⁴ There is, however, a third category, mentioning notions of care with origins in some of the earliest decisions of the Court of Justice, which has become a central balancing tool in judicial review. The latter concept of the duty of care is the topic of this article. It has been developed as an essentially information-based concept by which the CJEU attempts to uphold a rule of law-based judicial review whilst at the same time respecting discretion of decision makers.⁵

This outlines the purpose of this article: it introduces and explores the notion of the duty of care and asks whether the tests developed by the Court serves to achieve the balancing objectives. The article does so by introducing, in its first

¹ For one example, see Case T-108/08 *Davidoff v OHIM* [2011] EU:T:2011:391, para 19. Sometimes, both care and diligence are used together. See eg Case T-204/03 *Haladjian v Commission* [2006] EU:T:2006:273, para 29: 'when the Commission decides to proceed with an investigation, it must ... conduct it with the requisite care, seriousness and diligence so as to be able to assess with full knowledge of the case the factual and legal particulars submitted for its appraisal by the complainants.'

² See, for an overview, Bucura Mihaescu, *The right to good administration* (Nomos 2015) 394-405 with many further references.

³ Duties of 'solicitude' or 'care' in the context of EU staff cases are used as criteria to balance the reciprocal rights and obligations of the employer and the EU's staff: see eg Case C-321/85 *Schwiering v Court of Auditors* [1986] EU:C:1986:408, para 18. The CJEU obliges decisions concerning the situation of an official to be based on careful and impartial consideration of all the factors, especially taking into account not only the interests of the service, but also those of the official concerned: see eg Case T-203/97 *Forvass v Commission* [1999] EU:T:1999:135, para 3; Case C-181/03 P *Nardone v Commission* [2005] EU:C:2004:397, Opinion of AG Maduro, para 54).

⁴ See, for example, Joined Cases T-198/95, T-171/96, T-230/97, T-174/98 and T-225/99 *Comafrika v Commission* [2001] EU:T:2001:184, para 144 establishing that 'the finding of an error or irregularity on the part of an institution is not sufficient in itself to attract the non-contractual liability of the Community unless that error or irregularity is characterized by a lack of diligence or care' (emphasis added). This goes back to early cases granting damages where bodies 'gravely neglected the duties of supervision required by a normal standard of care' (Joined Cases 19/60, 21/60, 2/61 and 3/61 *Société Fives Lille Cail v High Authority* [1961] EU:C:1961:22, 297) or where the bodies had displayed an obvious lack of care (Joined Cases 29/63, 31/63, 36/63, 39/63 to 47/63, 50/63 and 51/63 *Providence and Others v High Authority* [1965] EU:C:1966:29, 937).

⁵ See, with further references, HCH Hofmann, 'Inquisitorial Procedures and General Principles of Law: The Duty of Care in the Case Law of the European Court of Justice' in L Jacobs (ed), *The Nature of Inquisitorial Processes in Administrative Regimes: Global Perspectives* (Ashgate 2013) 153-166; B Mihaescu Evans, *The right to good administration at the crossroads of the various sources of fundamental rights in the EU integrated administrative system* (Nomos 2015) 392-426.

part (1), the origins of the principle in the earliest case law of the CJEU, and the principle's re-emergence since the early 1990s. This part develops an understanding of its steady progress towards becoming near ubiquitous in the case law and examines the duty of care as a principle conferring individual rights in various procedural contexts. This exploratory part of the article will also look at which types of acts are reviewed under the duty of care, by screening various uses of the principle regarding single-case decision making by EU and Member States bodies acting in the scope of EU law as well as regulatory acts and legislative acts. Part (2) of the article then explores why the duty of care has spread into so many diverse aspects of review of acts: it asks for the purposes which the duty of care has been developed to serve, and analyses the relation between care and discretionary powers, the articulation of the public interests by public bodies and, importantly, the relation between care and proportionality review. The last part of the article (3) reviews whether the duty of care is a tool capable of fulfilling its purpose of undertaking the balancing between separation of powers and the control of legality, and between discretion and judicial review of proportionality. Is the duty of care the Goldilocks principle, allowing the Court to identify the sweet spot where the right balance between these principles can be found? On this basis, the article closes with some considerations on research questions to be asked in the context of the risks and rewards of applying the duty of care as an information based procedural principle to important matters of substantive justice.

2. Origins of Care as Information-Based Principle

The duty of care as an information-based principle, allowing for the balancing of various competing concepts of judicial accountability, has evolved from the early case law of the Court of Justice and is now a near ubiquitous feature of the CJEU's case law. This part outlines how it emerged in one of the earliest cases decided in the context of the European Coal and Steel Community (ECSC) and was redeveloped by the CJEU since the 1990s to and spread throughout the case law being now recognised as granting individual rights.

a) Origins and Development

The origins of the approach to the definition of duty of care as a court-developed principle reach back into the 1955 case of *Netherlands v High Authority*.⁶ In the case, the CJEU identified criteria for reviewing the legality of a regulatory decision of the High Authority of the European Coal and Steel Community (ECSC). It saw the necessity to balance, on the one hand, the High Authority's discretion as to the definition of maximum prices for certain steel products under specific market conditions with, on the other hand, its mandate to undertake judicial review of the legality of the High Authority's act. The balance was achieved by today's familiar concept of 'strict review of compliance' by the High Authority, with essential procedural requirements formulated in provisions that 'intended to ensure that the measures concerned were formulated with all due care and prudence'.⁷ The 'due care and prudence' requirement led to two separate criteria: first, whether the High Authority had exercised care and prudence by collecting the relevant information by means of the studies and consultations required under the legal basis Article 61 ECSC. Second, cognitively the Court reviewed whether the findings of the studies substantiated the High Authority's decision.⁸ The Court therefore reviewed not only the information-base of the High Authority's decision, but also the act for consistency with the facts so established. This two-step approach to addressing the difficulties in combining, on the one hand, respect by the Court for the broad discretion granted to the High Authority with, on the other hand, the obligation of the Court to ensure effective judicial review, had been outlined in the opinion of Advocate General (AG) Roemer. In formulating what later would become the CJEU's *Remia* formula,⁹ the AG found that, where the High Authority enjoyed wide discretion, such could be subject only to limited re-examination by the Court but such discretion needed to be counter-balanced by strict adherence to

⁶ Case 6/54 *Netherlands v High Authority* [1955] EU:C:1955:5, 112 (English language version) and 220 (French version). I thank Bucura Mihaescu Evans for having pointed out to me the origin of the duty of care in this case, and for the many discussions we have had about this during the past years.

⁷ *ibid.* See, for later case law qualifying provisions in EU law requiring the gathering and allowing for real taking into account of all relevant information prior to decision-making as essential procedural requirements: Case C-644/17 *Eurobolt* [2019] EU:C:2019:555, paras 50-51; Case C-183/16 P *Tilly-Sabco v Commission* [2017] EU:C:2017:704, para 114 and Case C-263/95 *Germany v Commission* [1998] EU:C:1998:47.

⁸ *ibid.*

⁹ Case 42/84 *Remia v Commission* [1985] EU:C:1985:327, para 34, stating in summary under what is now known as the '*Remia* formula': that the CJEU will limit judicial review of discretionary powers to verifying compliance with the relevant procedural rules, adequate reasoning and whether the act is beset by manifest errors of appraisal and whether there has been a 'misuse of powers'.

the procedural requirements for the adoption of regulatory decisions. The latter included, under Article 61 ECSC, a ‘particularly extensive duty of examination and consultation.’¹⁰

In *Netherlands v High Authority*, the CJEU outlined the basic approach by which an act adopted by the High Authority exercising regulatory discretion could be annulled if the Court found non-compliance with procedural obligations for identifying which information – and from what source – should be collected and considered. Little remarked and almost forgotten, most of the literature dates the emergence of this principle to its re-discovery by the Courts in the early 1990s, where the notion of care became more widely acknowledged as a principle of EU law and more broadly discussed following the CJEU’s 1991 *TU München*¹¹ and *Nölle* cases.¹² The case of the technical university of Munich – *TU München* – developed the formula for identifying the duty of care as the ‘the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case’¹³ prior to decision making. *Nölle* confirmed compliance with the duty of care as an individual right following from a clear, precise and unconditional obligation of the public decision maker. Review of discretion, it was set out in *Technische Universität München*,¹⁴ requires compliance with procedural rights and obligations. The more discretion a decision maker has, the ‘more fundamental importance’¹⁵ compliance with procedural obligations takes in order to ensure effective judicial review. Both *TU München* and *Nölle* confirmed the status of the duty of care as an essential procedural requirement in that the failure to comply with the obligations of the duty of care may lead such act to being declared void.¹⁶

The emergence in the 1990s of the duty of care in single-case decision making coincides with controlling administrative discretion of EU institutions and bodies: the development of EU law had advanced. Decision making in certain policy areas such as customs (*TU München*) and anti-dumping (*Nölle*)

¹⁰ Case 6/54 *Netherlands v High Authority* [1955] EU:C:1955:1, Opinion of AG Roemer, 133.

¹¹ Case C-269/90 *Technische Universität München v Hauptzollamt München-Mitte* [1991] EU:C:1991:438.

¹² See, especially, Case C-16/90 *Eugen Nölle v Hauptzollamt Bremen-Freihafen* [1991] EU:C:1991:233, Opinion of AG Van Gerven, para 28. An in-depth but pre-CFR assessment is given by H Peter Nehl, *Principles of Administrative Procedure in EC Law* (Hart 1999) 104–65. For a thorough discussion in various contexts of the notion of care, diligence and solicitude in the case law of the CJEU in relation to principles of good administration, rights to damages and personnel matters, see Bucura Mihaescu Evans, *The right to good administration at the crossroads of the various sources of fundamental rights in the EU integrated administrative system* (Nomos 2015) 392–426.

¹³ Case C-269/90 *Technische Universität München v Hauptzollamt München-Mitte* [1991] EU:C:1991:438, para 14.

¹⁴ Case C-269/90 *Technische Universität München v Hauptzollamt München-Mitte* [1991] EU:C:1991:438.

¹⁵ *ibid.*

¹⁶ See eg Case 6/54 *Netherlands v High Authority* [1955] EU:C:1955:5 and Case C-338/10 *GLS* [2012] EU:C:2012:158, paras 34 and 36–37.

had become more frequent, with increasing direct effect on individual rights. Individuals had the possibility of seeking review of decisions concerning technical discretion. In order to ensure legitimacy of its review procedures, the CJEU then linked the duty of care to procedural principles – such as the right to a fair hearing, as in the *TU München* case – and required the institutions to not just hear, but also to reflect in its decision making the points raised by the parties.

b) Care as a Concept of Judicial Review and a General Principle of EU Law

TU München and *Nölle* thus show an individual rights-based development which the case *Netherlands v High Authority* necessarily lacked, having been brought by a Member State. Therefore, while the 1955 case concerned a ‘regulatory act’ of general application, the cases from the 1990s concerned essentially single case decision making and challenges to those acts brought by individuals. Accordingly, these cases focussed on individual rights of the plaintiffs which led the General Court *Nölle* to find that the principle of care constitutes ‘a rule protecting individuals’.¹⁷ Since then, the case law of the CJEU has explicitly and implicitly described the principle of care as an ‘inherent’ sub-component to the principles of sound administration.¹⁸ Despite its initial hesitations in *max.mobil*,¹⁹

¹⁷ [1] Case T-167/94 *Nölle v Council and Commission* [1995] EU:T:1995:169, para 76.

¹⁸ See eg Case C-47/07 P *Masdar (UK) Ltd v Commission* [2008] EU:C:2008:726, para 92: ‘That duty of care is inherent in the principle of sound administration.’; Case C-556/14 P *Holcim (Romania) SA v European Commission* [2016] EU:C:2016:207, para 80: ‘It must be noted, first of all, that, in accordance with the principle of sound administration, the EU institutions must examine all the relevant particulars of a case with care and impartiality and gather all the factual and legal information necessary to exercise their discretion’ (making further reference to Case C-534/10 P *Brookfield New Zealand and Elaris v CPVO* [2012] EU:C:2012:813, para 51) and Case C-337/15 P *European Ombudsman v Claire Staelen* [2017] EU:C:2017:256, para 34: ‘It must also be borne in mind that the duty to act diligently which is inherent in the principle of sound administration and applies generally to the actions of the EU administration in its relations with the public requires that that administration act with care and caution.’ See also, for the General Court, eg Case T-286/09 *Intel Corp. v Commission* [2014] EU:T:2014:547, para 359: ‘In that regard, it should be noted that the guarantees afforded by the European Union legal order in administrative proceedings include, in particular, the principle of sound administration, enshrined in Article 41 of the Charter of Fundamental Rights, which entails the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case’ with reference to Joined Cases T-191/98, T-212/98 to T-214/98 *Atlantic Container Line and Others v Commission* [2003] EU:T:2003:245, para 404 and the case-law cited therein.

¹⁹ See especially the Court of Justice’s appeal decision in the *max.mobil* case, in which it overturned the General Court’s assessment of the obligation of ‘diligent and impartial treatment of a complaint is associated with the right to sound administration which is one of the general principles that are observed in a State governed by the rule of law and are common to the constitutional traditions of the Member States’ (Case T-54/99 *max.mobil v Commission* [2002] EU:T:2002:20, para 48) in Case C-141/02 P *Commission v max-mobil* [2005] EU:C:2005:98, paras 68–75.

the CJEU subsequently acknowledged the status of the duty of care as being protected amongst the general principles of EU law.²⁰ This recognition is not only relevant for actions of annulment but also for damages claims. As the case *Staelen* illustrates, the CJEU explicitly finds that the ‘duty to act diligently, which is inherent in the principle of sound administration’, is a right intended to protect individuals which can – in principle – give rise to damage claims if violated.²¹

Today, the sheer amount of cases invoking the duty of care-formula has led observers to state that care has become the core and essence of good administration²² – an observation which in turn has led to the criticism that the notion of good administration has become ‘often tautological of the principle of care’.²³ The latter criticism, in my view, risks overstating the duty of care’s role in view of the many other sub-principles within the umbrella concept of good administration, including those indicatively enumerated in Article 41(2) Charter of Fundamental Rights of the European Union (CFR).²⁴

One effect of the qualification of the duty of care as an inherent component of the general principles of good administration, and of defence rights protected as general principles of EU law, is its applicability to review the legality of acts of Member States when acting in the scope of EU law.²⁵ In *Mukarubega*,²⁶ for example, the CJEU recalled that the Member States were under the obligation to comply with general principles of EU law when taking decisions in the scope of EU law. Therefore, they are also under the obligation to ‘examin[e] carefully and impartially all the relevant aspects of the individual case’ and reason their decisions accordingly.²⁷ Further, the CJEU requires Member States to protect the duty of care in the context of the principle of effectiveness of EU law and

²⁰ See eg Case C-337/15 P *European Ombudsman v Claire Stehlen* [2017] EU:C:2017:256, para 34; Case C-556/14 P *Holcim (Romania) SA v European Commission* [2016] EU:C:2016:207, para 80; Case C-534/10 P *Brookfield New Zealand and Elaris v CPVO* [2012] EU:C:2012:813, para 51 and Case T-326/07 *Cheminova and others v Commission* [2009] EU:T:2009:299, para 228.

²¹ Case C-337/15 P *European Ombudsman v Claire Stehlen* [2017] EU:C:2017:256, para 34.

²² See eg J. Dupont Lassale, *Le Principe de Bonne Administration en Droit de l’Union Européenne* (Bruylant 2013) 92.

²³ H Peter Nehl, ‘Good administration as procedural right and/or general principle?’ in HCH Hofmann and AH Türk (eds), *Legal Challenges in EU Administrative Law* (Edward Elgar 2009) 322-351, at 350.

²⁴ J Ziller, *Droit à une Bonne Administration* (Juriclasseur Libertés 2007) 7-8.

²⁵ The result is that, while the right to good administration under Article 41 CFR is addressed only to EU institutions, bodies, offices and agencies as a general principle of law under Article 6(3) TEU, the duty of care is also applicable to Member States acting in the scope of EU law. See HCH Hofmann and Bucura Mihaescu, ‘The Relation between the Charter’s Fundamental Rights and the Unwritten General Principles of EU Law – Good Administration as the Test-Case’ (2013) 9 *European Constitutional Law Review* 73.

²⁶ Case C-166/13 *Sophie Mukarubega v Préfet de police, Préfet de la Seine-Saint-Denis* [2014] EU:C:2014:2336.

²⁷ *ibid*, para 48 with reference to Case C-269/90 *Technische Universität München* [1991] EU:C:1991:438, para 14 and Case C-349/07 *Sopropé* [2008] EU:C:2008:746, para 50.

also as an individual right under EU law, for the protection of which Member States must provide effective judicial remedies (Article 47 CFR). One example for the latter approach is *Schrems I*,²⁸ in which the CJEU required that a Member State body must comply with its obligations to act ‘with all due diligence’ when acting within the scope of the powers conferred to it by EU law.²⁹

c) Care as Review-Criteria in Regulatory and Legislative Acts

The principle of care defined as a part of defence rights protected as general principles of EU law and as being inherent to good administration does not limit the duty of care to single-case decision making. According to the case law of the CJEU, the duty of care is a principle which is equally applicable in the review of acts of general application.³⁰ Not coincidentally was the very first case of the CJEU addressing the duty of care a case in which an act of general, normative content was subject to review: *Netherlands v High Authority* of 1955, in fact, concerned general regulatory powers under Article 61 ECSC. Since then, the CJEU has consistently applied the duty of care to review acts of regulatory nature in the context of actions for annulment brought by individual companies. Examples include cases in the area of monetary policy,³¹ anti-dumping cases,³² and cases in the context of the regulation of the Common Agriculture Policy.³³ Especially in risk-regulation matters, the duty of care has been applied as a criteria of review for acts of general application with respect

²⁸ Case C-362/14 *Schrems v DPC* [2015] EU:C:2015:650.

²⁹ Case C-362/14 *Schrems v DPC* [2015] EU:C:2015:650, para 63.

³⁰ D. Ritleng, ‘Judicial Review of EU Administrative Discretion: How Far Does the Separation of Powers Matter?’ in J. Mendes and I. Venzke, *Allocating Authority: Who Should Do What in European and International Law?* (Bloomsbury 2018) 183-216.

³¹ See eg Case C-62/14 *Gauweiler and Others v Deutscher Bundestag* [2015] EU:C:2015:400, para 69 (regarding an ECB purchase programme to be implemented by individual acts under Article 18 of the ESCB Statutes) and Case T-333/10 *Animal Trading Company (ATC) and Others v Commission* [2013] EU:C:2013:451, paras 84-94 (concerning a general decision by the Commission addressed at the Member States which had negative effects on the plaintiffs). See also Joana Mendes, ‘Discretion, Care and Public Interests in the EU Administration: Probing the Limits of Law’ in HCH Hofmann and Jacques Ziller (eds), *Accountability in the EU – The Role of the European Ombudsman* (Edward Elgar 2017) 156.

³² See Joined Cases C-191/09 P and C-200/09 P *Council v Interpipe Niko Tube and Interpipe NTRP* [2012] EU:C:2012:78, para 113.

³³ See Case T-285/03 *Agraz and others v Commission* [2005] EU:T:2005:109, at para 49.

to plant-protection products,³⁴ additives in animal foods,³⁵ and, more generally, the regulation of dangerous substances.³⁶

Concepts underlying the duty of care are also present in the Court's case law on the review of acts of a legislative nature. Examples for this approach arose in the *Luxembourg Airport*³⁷ and *Vodafone* cases,³⁸ where the CJEU reviewed questions on the legality of legislative acts in view of whether, in the exercise of legislative discretion, all relevant factors necessary under the proportionality review had been considered.³⁹ This approach was confirmed in 2019 in *Poland v EP and Council*⁴⁰ where the Court found that a properly conducted legislative impact assessment report may serve as indication that the institutions had exercised their legislative discretion taking into account the available scientific data and information.⁴¹ The relevance of the concept of 'care' as the obligation to collect and take into account all relevant facts and interests prior to decision making is also subject to obligations in the 2016 Interinstitutional Agreement on Better Law-Making,⁴² which requires the Commission to conduct an impact assessment on legislative and non-legislative initiatives in cases where a planned EU legal act is likely to have significant impact.⁴³

³⁴ See Case T-475/07 *Dow AgroSciences and others v Commission* [2011] EU:T:2011:445, para 154.

³⁵ See Case T-13/99 *Pfizer Animal Health v Council* [2002] EU:T:2002:209, para 171 and Case T-70/99 *Alpharma v Council* [2002] EU:T:2002:210, para 182.

³⁶ See Case C-425/08 *Enviro Tech (Europe)* [2009] EU:C:2009:635, para 62 and Case T-369/03 *Arizona Chemical and others v Commission* [2005] EU:T:2005:458, para 85.

³⁷ Case C-176/09 *Luxembourg v EP and Council* [2011] EU:C:2011:290, para 65.

³⁸ Case C-58/08 *Vodafone and Others* [2010] EU:C:2010:321, para 55.

³⁹ This approach was highlighted as the leading model of review by Koen Lenaerts, writing extra-judicially in Koen Lenaerts, *The European Court of Justice and Process-oriented Review*, *College of Europe, Department of European Legal Studies, Research Paper in Law* 01/2012.

⁴⁰ Case C-128/17 *Poland v European Parliament and Council* [2019] EU:C:2019:194.

⁴¹ *ibid.*, paras 45, 100, 136. See, in broader terms and including questions of systematised information gathering through impact assessments in judicial review: A Alemanno, 'Impact Assessment before Courts' in C Radaelli and C Dunlop (eds), *Handbook of Regulatory Impact Assessment* (Edward Elgar 2016) 127-141.

⁴² Interinstitutional Agreement between the European Parliament, the Council of the EU and the European Commission of 13 April 2016 on Better Law-Making [2016] OJ L123/1.

⁴³ *ibid.*, stating in point 12: 'Impact assessments are a tool to help the three Institutions reach well-informed decisions (...). Impact assessments should cover the existence, scale and consequences of a problem and the question whether or not Union action is needed. They should map out alternative solutions and, where possible, potential short and long-term costs and benefits, assessing the economic, environmental and social impacts in an integrated and balanced way and using both qualitative and quantitative analyses. (...) Impact assessments should be based on accurate, objective and complete information and should be proportionate as regards their scope and focus.'

d) Reasons for the Spread of the Duty of Care

The overview above on the duty of care shows that it is a principle with roots in the very earliest case law of the CJEU. The duty of care contains a now widely applied concept which can be traced across types of act, and which is applicable from single-case decision making by EU institutions and Member State bodies to regulatory acts of general content and legislative acts of the Union. Although diverging terminology across different language versions can obscure the spread of the principle, the duty of care is applied to serve the same basic requirements of the EU's legal system across different types of act of single-case decision making, regulatory acts or legislative nature. The duty of care is designed to ensure that competing requirements of, on the one hand, exercising judicial review with the necessary restraint in view of discretionary powers conferred on the executive or legislative branches of powers and, on the other hand, upholding effective judicial protection, can be balanced. The importance of this distinction is rooted in the very constitutional basis of the Union: ensuring such effective judicial review is, in the words of the Court of Justice, one of the essential components of a system under the rule of law.⁴⁴ Upholding the separation of powers-inspired concept of 'institutional balance', by contrast, is a principle central to the legal system of the EU. Having one basic concept to structure this balancing process strengthens the coherence of the constitutional system of the EU and makes the conditions under which review takes place less prone to specificities of each individual policy area. The duty of care could thus be understood as a procedural meta-principle for the review process of the procedural legality of acts.

Another factor which might contribute to explaining the spread of the duty of care as a legal principle in EU law, especially since the 1990s, is the deepening of legal integration and the increase in legal review of EU acts used to implement EU law. At the time, much focus was placed on studying the effectiveness of EU law and its implementation in various contexts leading also to a heightened understanding of transparency of decision making by questions of information and informational input into decision making. Judicial review of informational input into decision-making, however, risked requiring a limitation on the traditionally broad notion of discretion applied in EU law, which was based on a technocratic vision of broad socio-economic discretion conferred on the institutions in effect shielding acts of EU institutions and bodies from detailed judicial review. The increasing sensitivity towards the protection of individual rights in view of regulatory powers of the EU and towards the growing relevance of pro-

⁴⁴ Case C-72/15 *Rosneft* [2017] EU:C:2017:236, para 73; Case C-362/14 *Schrems I* [2015] EU:C:2015:650, para 95 and Case C-562/13 *Abdida* [2014] EU:C:2014:2453, para 45.

portionality-based review of rights heightened the need for a formula to balance these various requirements. In this context, the duty of care appears as a useful tool of procedural review, allowing the Court to abstain neither from proportionality review, nor from the respect for the conferral of discretion on EU institutions and bodies.

An additional factor for the explicit formulation of the duty of care in EU law might have been furthered by the diverging approaches of various Member States to the protection of procedural principles. By explicitly outlining its principle of care, the CJEU identifies procedural rights as enforceable institutional obligations. Therefore, the CJEU's position as to procedural rights is made clear in contrast to some trends in the Member States. Germany, for example, despite respecting the 'Sorgfaltsgrundsatz', had enacted legislation barring administrative courts from annulling administrative acts in cases where the violation of procedural provisions would have no effect on the substantive content of the final act. Under German law, this exclusion also applies to acts with administrative discretion.⁴⁵ The approach of the CJEU under the duty of care can thus be understood as an explicit statement of a significantly higher procedural protection offered in EU law, more in line with the higher level of protection offered in some national legal orders⁴⁶ – such as guaranteed in some national Administrative Procedural Acts.⁴⁷

In view of these discussions on the development, use, and possible motivation for development of the duty of care, the question arises whether the principle can achieve the task for which it has been deployed and whether the move towards stronger proceduralisation of review can do justice to both notions of respect for discretion and proportionality review as required by EU law.

⁴⁵ § 46 of the German administrative procedure act (Verwaltungsverfahrensgesetz, VwVfG). Despite criticism in the legal literature, this legislation has been upheld by the highest administrative court, the Bundesverwaltungsgericht (BVerwGE 70, 143, 147) which did not question the constitutionality of the provision and allowed for review concentrated on substantive grounds. Judicial review of violations of procedural provisions are relegated to review by declaratory action irrespective of the validity of the administrative act beset by the procedural irregularities. See, with further references, Stelkens, Bonk and Sachs (eds) *Verwaltungsverfahrensgesetz* (9th edn, Beck 2018) § 46 paras 5-6.

⁴⁶ See, for some further considerations, the comparative studies prepared for the Seminar of the Association of High Administrative Courts and Conseils d'Etat (ACA-Europe) in Cologne, 2-4 December 2018.

⁴⁷ See eg Section 3.2. (entitled 'Duty of care and weighting of interests') of the Dutch General Administrative Law Act (*Algemene Wet Bestuursrecht*), AWB of June 4, 1992, *Staatblad*, 1992, 315.

3. Elements of the Duty of Care – Solving the Goldilocks Problem?²

The discussion of the scope and role of the duty of care raises two questions, firstly whether the duty of care's procedural criteria can support the exercise of balancing requirements between discretion and proportionality. Secondly, do they allow reaching a 'sweet-spot' between too much discretionary leeway or too overburdening judicial review replacing decision making?³ *Netherlands v High Authority* had already introduced two separate aspects to be revisited in this part: here, section (a) looks at the factual elements of care and (b) at the cognitive requirements of reviewing whether the information collected sustains the decision.

a) Factual Elements – Quantitative and Qualitative

A central feature of the duty of care has been its use as a tool to revise the factual bases of decisions.⁴⁸ The facts-related approach consists of a set of obligations identifying two aspects of the information to be taken into account in decision making. *Quantitatively*, criteria exist as to which amount of information should be collected prior to decision-making; *qualitatively*, the test defines the nature and the source from which such information should arise. Both elements of the information-collection are related to the investigatory concept underlying EU public decision-making procedures, under which in principle all relevant facts of a decision-making procedure must be assembled by the decision maker.⁴⁹

The quantitative element of the obligations defined by the CJEU under the duty of care requires the collection and examination of all relevant aspects⁵⁰ of a case which may have a bearing on the adoption of a measure,⁵¹ including in cases where the decision maker has discretion.⁵² According to the CJEU in *Tetra*

⁴⁸ J Mendes, 'Discretion, Care and Public Interests in the EU Administration: Probing the Limits of Law' in HCH Hofmann and J Ziller (eds), *Accountability in the EU – The Role of the European Ombudsman* (Edward Elgar Publishing 2017) 156.

⁴⁹ Case C-367/95 P *Commission v Sytraval and Brinks France* [1998] EU:C:1998:154, para 60, 62 (referring also to the obligation to take into account *ex officio* also matters not expressly raised by parties to a procedure if foreseeably relevant to a decision taken by a public body).

⁵⁰ Case C-269/90 *Technische Universität München v Hauptzollamt München-Mitte* [1991] EU:C:1991:438.

⁵¹ Case C-408/04 P *Commission v Salzgitter* [2008] EU:C:2007:491, Opinion of AG Bot, para 265.

⁵² Case C-405/07 P *Netherlands v Commission* [2008] EU:C:2008:613, para 56: 'where a Community institution has a wide discretion, the review of observance of guarantees conferred by the Community legal order in administrative procedures is of fundamental importance. The Court of Justice has had occasion to specify that those guarantees include, in particular for the competent institution, the obligations to examine carefully and impartially all the relevant elements of the individual case and to give an adequate statement of the reasons for its decision (see

Laval, the decision maker must especially analyse ‘all the information which must be taken into account in order to assess a complex situation’.⁵³

The notion of ‘relevance’ can either arise from explicit obligations listed in the legal basis of an act or may arise from general principles of EU law or from Treaty provisions, including non-policy specific ‘horizontal clauses’.⁵⁴ Under the investigatory principle, a decision maker may not necessarily limit an investigation to the information provided by individual parties in the investigation,⁵⁵ but has the obligation to examine also ‘matters not expressly raised’ by parties to a procedure,⁵⁶ and the decision maker may be expected to have access to.⁵⁷ The obligation to investigate under the duty of care also requires acquiring knowledge about individual interests potentially affected by a decision under the ‘obligation to obtain all the necessary points of view’.⁵⁸ These elements of the duty of care are not only applicable to information which is explicitly listed in positive law to be collected: the obligation also exists where a decision maker has discretion as to the methods of collecting information for decision making. Judicial review of the quantitative element of the duty of care is thus strongly linked to reviewing the input into discretionary decision making.

In addition to the *quantitative* element of the duty of care obliging a decision maker to rely on ‘the most complete’ information, the duty of care also has a *qualitative* element consisting of the obligation for a decision maker to base decision making on the most ‘reliable information possible’.⁵⁹ The notion of reliability is defined by the nature of the source and the type of procedure used to obtain the information. This might include the requirement of obtaining scientific expertise for decision making, irrespective of whether such is explicitly or implicitly required in the legal basis of a decision.⁶⁰

Case C-269/90 *Technische Universität München* [1991] ECR I-5469, paragraph 14; Joined Cases C-258/90 and C-259/90 *Pesquerías De Bermeo and Naviera Laida v Commission* [1992] ECR I-2901, paragraph 26; and *Spain v Lenzing*, paragraph 58’.

⁵³ Case C-12/03 P *Commission v Tetra Laval* [2005] EU:C:2005:87, para 39.

⁵⁴ See eg Article 11 TFEU, which requires that ‘environmental protection requirements . . . be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development’ or Article 168(1) first paragraph TFEU, which requires that ‘a high level of human health protection . . . be ensured in the definition and implementation of all Union policies and activities’. See, in that respect, the findings of the General Court in eg Case T-13/99 *Pfizer Animal Health v Council* [2002] EU:T:2002:209, para 158.

⁵⁵ See Case C-338/10 *GLS* [2011] EU:C:2011:636, Opinion of AG Bot, paras 98ff.

⁵⁶ Case C-367/95 P *Commission v Sytraval and Brinks France* [1998] EU:C:1998:154, paras 60, 62 – linking this duty to the principle of sound or good administration.

⁵⁷ See Case C-338/10 *GLS* [2011] EU:C:2011:636, Opinion of AG Bot, paras 103-105 – referring to relevant statistics published by Eurostat.

⁵⁸ Case T-369/06 *Holland Malt v Commission* [2009] EU:T:2009:319, para 195.

⁵⁹ Case C-525/04 P *Spain v Lenzing* [2007] EU:C:2007:698, para 57.

⁶⁰ Reference to independent scientific expertise may, in certain cases, be protected in the framework of fundamental rights, especially the right to a fair hearing: see eg Case C-276/01 *Steffensen* [2003] EU:C:2003:228, paras 73, 80.

The qualitative obligation to have recourse to expertise had already been at the heart of the development of the duty of care in the seminal cases. For instance, *Netherlands v High Authority* addressed the need to conduct studies, *inter alia* about pricing in certain markets prior to taking a decision as to maximum prices in the steel industry. The obligation to seek expertise was further spelt out in *TU München*, and has been reconfirmed in subsequent case law.⁶¹ Under this case law, even in the absence of a statutory requirement, the duty of care obliges a decision maker to consult external scientific expertise where sufficient knowledge is not available in-house, and where such proves necessary for the collection of all necessary information.⁶² In risk-regulation matters, the CJEU quite broadly states that, under the duty of care, ‘the Commission is, as a rule, obliged to take account, in its decisions in the field of the environment, of all new scientific and technical data’.⁶³ This implies that the institutions ‘ensure that their decisions are taken in the light of the best scientific information available and that they are based on the most recent results of international research’,⁶⁴ an obligation the General Court explicitly links to compliance with the rule of law.⁶⁵

Together, the quantitative and the qualitative element of the duty of care ensure that the decision maker will have at its disposal, in the words of the CJEU, the most complete ‘factually accurate, reliable and consistent’⁶⁶ information possible.⁶⁷ By invoking the rule of law to justify its requirements of collection of quality information-input into decision making, the Court increases the review of the exercise of powers, linking the avoidance of arbitrary decision making with requirements of necessity based not on decision makers’ beliefs, but on reviewable facts. These are factors ensuring also impartiality of the administration and informed decision making of a legislature.

⁶¹ See eg Case C-439/05 P and C-454/05 P *Land Oberösterreich and Austria v Commission* [2007] EU:C:2007:510, para 32.

⁶² Case C-269/90 *Technische Universität München v Hauptzollamt München-Mitte* [1991] EU:C:2009:438; Case C-212/91 *Angelopharm* [1994] EU:C:1994:21 and Case C-405/07 P *Netherlands v Commission* [2008] EU:C:2008:613, paras 56 and 67.

⁶³ Case C-405/07 P *Netherlands v Commission* [2008] EU:C:2008:613, paras 56 and 61.

⁶⁴ Case T-326/99 *Fern Olivieri v Commission* [2003] EU:T:2003:351, para 68; Case T-13/99 *Pfizer Animal Health v Council* [2002] EU:T:2002:209, para 158 and Case T-70/99 *Alpharma v Council* [2002] EU:T:2002:210, para 171. This approach is in compliance with Art 114 TFEU (Art 95(3) EC), which obliges the Commission, in the case of legislative proposals in these matters, to take into ‘account in particular any new development based on scientific facts’.

⁶⁵ Case T-13/99 *Pfizer Animal Health v Council* [2002] EU:T:2002:209, para 172 and Case T-70/99 *Alpharma v Council* [2002] EU:T:2002:210, para 183.

⁶⁶ Case C-525/04 P *Spain v Lenzing* [2007] EU:C:2007:698, para 57.

⁶⁷ Case C-290/07 P *Commission v Scott* [2010] EU:C:2010:480, para 90.

b) Cognitive Elements of the Duty of Care Test

The duty of care has, additionally, a cognitive element looking at which information has been considered in reaching the decision to adopt an act and whether that act can logically be based on the information it relies on. The objective to examine and scrutinize, carefully and impartially,⁶⁸ the aspects of a case ‘in order to make a finding in full knowledge of all the facts relevant at the time of adoption’⁶⁹ ensures a link between the factual basis collected during the investigation and preparation of an act and the final decision. Fulfilling these requirements requires judicial review beyond a mere plausibility-test, in that a Court needs to be satisfied that the facts established by the decision-maker are actually ‘capable of substantiating the conclusions’⁷⁰ and thus sustain the decision taken. The test is how, cognitively speaking, the information collected in a decision-making procedure was considered in the outcome, the final act. This test had been initiated by the Court in *Netherlands v High Authority*, where the CJEU controlled whether a decision maker could have drawn the decision from its own findings of facts.⁷¹ The cognitive part of the test conducted in review of the duty of care is to this day very much at the heart of decision making with the CJEU reviewing this requirement by scrutinising whether a decision is *de facto* compatible with the facts evoked either in the operational part of an act or within its reasoning. Prohibiting in-compatibilities between underlying facts and real-life acts has a central function within a system under the rule of preventing arbitrariness of decision-making. Beyond plausibility, the CJEU looks for a *de facto* possibility to base a decision on the collected facts.

Therefore, this element of the duty of care can be potentially regarded to be the one linked the closest with controlling discretionary powers under the principle of proportionality. Under the CJEU’s three step proportionality test, the appropriateness of an act is ensured where the decision maker can show that the information collected supports that the outcome will be suitable for achieving a legislative objective. The cognitive element of the duty of care also plays an important role in reviewing whether, in the presence of several appropriate approaches to achieving a legislative objective, the approach chosen was the one limiting competing rights or public interests the least. The comparative nature of this second level of the proportionality test can turn out to be particu-

⁶⁸ Case C-269/90 *Technische Universität München v Hauptzollamt München-Mitte* [1991] EU:C:1991:438 and Case C-16/90 *Nölle v Hauptzollamt Bremen-Freihafen (Nölle I)* [1991] EU:C:1991:402, para 29.

⁶⁹ Case C-367/95 P *Sytraval* [1998] EU:C:1998:154, para 60, 62 – referring also to the obligation to take into account *ex officio* also matters not expressly raised by parties to a procedure.

⁷⁰ Case C-12/03 P *Commission v Tetra Laval* [2005] EU:C:2005:87, para 39.

⁷¹ Case 6/54 *Netherlands v High Authority* [1955] EU:C:1955:5, 112 (English language version) and 220 (French version).

larly fact intensive: competing scenarios must be investigated and evaluated. Given that the intensity of judicial review on the substance of the outcome is limited by the potential discretion of a decision maker, transparency as to the information on which the balancing was based and as to the balancing process is an essential procedural tool. The latter allows respect for the decision-maker's choices within legal limits, whilst, at the same time, allowing for an in-depth judicial review.⁷²

4. The Role of Care in Judicial Review of Discretionary Decisions

The discussion under the second part of this article shows that, in judicial review, the duty of care serves as a principle to 'calibrate' the intensity of oversight. In this context, two basic questions arise, one, addressed below in a) concerns the question of the nature of the duty of care as an individual right and an 'objective' criteria of legality. The second, addressed below in b) concerns the notion of balancing of interests and the role of the public interest therein. The latter is an issue which has come to great prominence recently with the German Constitutional Court's (GCC) ruling on the European Central Bank's (ECB) *PSPP* programme. These discussions, it is argued below under c) explain also the increasing importance of the duty of care in core inter-institutional agreements and drafts for an EU regulation on administrative procedures.

a) The Duty of Care as Individual Right and Objective Criteria of Legality

The status of 'care' as one of the general principles of EU law 'inherent'⁷³ in the principles of good administration and amongst rights of defence leads *inter alia* to the conclusion that the duty of care conferring individual rights in the sense of Article 47 CFR.⁷⁴ Nonetheless, some formulations in the case law

⁷² This is the point explicitly contested by the German Constitutional Court's (Bundesverfassungsgericht) explicit expression of discontent with the CJEU's approach to review of proportionality leading to an *ultra vires* act in its decision of 5 May 2020 joined cases 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16 *PSPP*. English version at: <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvro85915en.html>.

⁷³ See eg Case C-47/07 P *Masdar (UK) Ltd v Commission* [2008] EU:C:2008:726, para 92.

⁷⁴ See eg Case C-337/15 P *European Ombudsman v Claire Stehlen* [2017] EU:C:2017:256, para 34; Case C-556/14 P *Holcim (Romania) SA v European Commission* [2016] EU:C:2016:207, para 80; Case C-534/10 P *Brookfield New Zealand and Elaris v CPVO* [2012] EU:C:2012:813, para 51 and Case T-326/07 *Cheminova and other v Commission* [2009] EU:T:2009:299, para 228.

of the General Court (GC), notably in *Arizona Chemical*, in which the GC stated that care constituted ‘essentially an objective procedural guarantee’,⁷⁵ might give rise whether care is an individual right only in the context of single case decision-making. Is the same also true in the context of regulatory acts of general content? Upon close review of the case law, it would appear that the notion of an ‘objective’ guarantee is not used in opposition to the notion of care as an ‘individual right’. The GC used the word ‘objective’ guarantee in the context of the General Court reviewing standing requirements of an individual plaintiff in an action for annulment. The Court held that, as regards the question of admissibility of an action for annulment against an act of regulatory nature with general content, the violation of the individual right arising from the ‘general principle’ of the duty of care of one party does not make them ‘individually concerned’ under what is now Article 263 paragraph 4 TFEU, since an unknown number of individuals could claim those individual rights. Although violation of procedural principles protecting individuals would generally have the possibility to evoke individual concern, violation of the duty of care as such, despite being an individual right, was not ‘capable of distinguishing that person individually in relation to the measure in question’.⁷⁶ Thus, the General Court classified the duty of care (there referred to as the ‘duty of diligence’) as a procedural obligation which did not give rise to individual concern.⁷⁷ Given that this statement was easily misunderstood, the Advocate General, in *Arizona Chemical* as well as in other cases, went on to explain that a lack of standing in annulment procedures does not put into question the individual rights under the duty of care or diligence. In *Arizona Chemical*, *Pfizer*,⁷⁸ and *Alpharma*,⁷⁹ as well as in the subsequent case *Agraz*,⁸⁰ the General Court thus explicitly clarified the difference between standing and substance-review of an individual right. It stated that standing issues can not preclude plaintiffs from pleading ‘an infringement of that obligation by a Community institution, provided that the conditions for the admissibility of an action for annulment or an action for damages are met’.⁸¹ Accordingly, the duty of care can also be enforced as a principle intended to protect individuals in the context of damages claims under Article 340 TFEU⁸² as recognised in *Staelen* and *Dyson*, where the Court reviewed

⁷⁵ Case T-369/03 *Arizona Chemical and others v Commission* [2005] EU:T:2005:458, para 86.

⁷⁶ *ibid*, para 71.

⁷⁷ *ibid*, para 86.

⁷⁸ Case T-13/99 *Pfizer Animal Health v Council* [2002] EU:T:2002:209, para 171.

⁷⁹ Case T-70/99 *Alpharma v Council* [2002] EU:T:2002:210, para 182.

⁸⁰ Case T-285/03 *Agraz and Others v Commission* [2005] EU:T:2005:109.

⁸¹ Case T-369/03 *Arizona Chemical and Others v Commission* [2005] EU:T:2005:458, para 88 and Case T-285/03 *Agraz and Others v Commission* [2005] EU:T:2005:109, paras 49-54.

⁸² Case C-337/15 P *European Ombudsman v Claire Staelen* [2017] EU:C:2017:256, para 41.

whether the act of an institution may have constituted a sufficiently serious breach of the duty of care as a right designed to protect the individual.⁸³

Therefore, the issue regarding regulatory acts, is generally that many individuals have rights arising from the duty of care. They are thus not affected ‘individually’ in the sense of Article 263 TFEU. Their individual rights can be protected by courts, for example in the context of damages claims and their rights remain ‘individual rights or freedoms’ recognised by EU law under Article 47 CFR, resulting in the requirements of ensuring effective judicial remedies on the European and Member State levels.⁸⁴

b) The Public Interest in Effective Judicial Review – the German Constitutional Court’s Critique

AG Kokott stated a decade ago in *SPCM*, that the relation between the two concepts of proportionality and discretion remain ‘liable to be misunderstood’.⁸⁵ Without full judicial review probing as to the decision-makers analysis into whether ‘there are clearly less oppressive measures available which are equally effective, or if the measures adopted are obviously out of proportion to the aims pursued’,⁸⁶ proportionality risks, according to AG Kokott being ‘deprived of its practical effect’ as one of the Treaty’s central criteria of legality of an act.⁸⁷

In this context, the duty of care’s basic relevance lies in identifying whether the various factors that need to be balanced in the context of proportionality have been properly analysed and taken into account in decision making – irrespective of whether a decision maker enjoys discretion in adopting the final act or not.⁸⁸

Gauweiler,⁸⁹ decided upon a request for a preliminary ruling by the German Constitutional Court (GCC), gives a practical example of this approach. There, the CJEU reviewed the duty of care in the context of its proportionality review

⁸³ *ibid.* See, for clarification, Case C-44/16 P *Dyson v Commission* [2017] EU:C:2017:357, para 49, 50. The complexity of cases in the constellation of *Staelen* nonetheless arises from the fact that not only the violated individual right is a right under the duty of care, but also the question of the breach of duties contains a care-related analysis.

⁸⁴ See, as an example, the facts underlying Case C-104/13 *Olainfarm* [2104] EU:C:2014:2316 and the Court’s view in paras 35-41.

⁸⁵ Case C-558/07 *SPCM and others* [2009] EU:C:2009:142, Opinion of AG Kokott, paras 73-77.

⁸⁶ *ibid.* AG Kokott’s statements made with respect to legislative acts are equally relevant to the review of non-legislative activity of executive actors.

⁸⁷ *ibid.*

⁸⁸ See, for example, Case T-333/10 *Animal Trade Company (ATC)* [2013] EU:T:2013:451, para 103. Here the General Court concludes that violation of the principle of care results in a violation of the principle of proportionality.

⁸⁹ Case C-62/14 *Gauweiler and Others v Deutscher Bundestag (OMT)* [2015] EU:C:2015:400.

of the exercise of very broadly defined discretionary powers of the European Central Bank's (ECB) in matters of monetary policy.⁹⁰ Setting monetary policy requires large quantities of statistical information and economic expertise, two factors which make the exercise of judicial review of the legality of a decision particularly problematic. Accordingly, in *Gauweiler* a key concept in the review of whether the ECB had complied with its obligations under the principle of proportionality while exercising its broad discretion is was the duty of care, requiring the ECB 'to examine carefully and impartially all the relevant elements of the situation in question' and to document this in an 'adequate statement of the reasons for its decisions'.⁹¹ Equally in *Weiss and Others*, the CJEU reviewed the proportionality of the ECB's discretionary decision from the point of the qualitative, quantitative and cognitive elements of the duty of care.⁹² Central to the approach is that the nature of monetary policy is that it has potential effects in all walks of life having to deal with money and its availability. It is thus intricately connected with economic effects of monetary policy decisions, as is recognised in the Treaty's definition of secondary goals of EU monetary policy. Thus, the more effects to be taken into account in the more policy considerations, which must include balancing fundamental and fundamental social rights such formulated in the Charter, the broader the legislative, or in the case of the ECB executive discretion is.

Quite strikingly the GCC in *PSPP*⁹³ then dismissed this approach as 'incomprehensible', accusing the CJEU of having, by applying this test, allowed *ultra vires* acts by the ECB.⁹⁴ Two key criticisms stand out: Without further explanation as to the sources of such claim, the GCC claims in *PSPP* that amongst the factors to be taken into account should have been also direct and indirect 'economic policy effects resulting from the programme'. The GCC in *PSPP* claims that 'the review of proportionality would be rendered meaningless'⁹⁵ violating *inter alia* standards of an effective judicial protection (Article 47 CFR),⁹⁶ if a court were not to review whether all factors of a decision have been taken

⁹⁰ *ibid.*

⁹¹ *ibid.*, paras 66-69.

⁹² C-493/17 *Weiss and Others* ECLI:EU:C:2018:1000 (Grand Chamber), paras 36-42.

⁹³ German Constitutional Court (Bundesverfassungsgericht) of 5 May 2020 joined cases 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16, para 156. English version at <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/1820200505_2bv085915en.html>.

⁹⁴ German Constitutional Court (Bundesverfassungsgericht) of 5 May 2020 joined cases 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16, para 155. Therefore, the GCC held that it was not bound by the CJEU findings of the legality of the ECB action established in *Weiss and Others*.

⁹⁵ German Constitutional Court (Bundesverfassungsgericht) of 5 May 2020 *PSPP* joined cases 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16, paras 133.

⁹⁶ German Constitutional Court (Bundesverfassungsgericht) of 5 May 2020 *PSPP* joined cases 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16, para 144.

into account and, additionally, weighed in an overall assessment by the decision-maker.⁹⁷ This was all the more necessary, the GCC states, where democratic accountability to a parliament is limited by independence of a body such as the ECB and the broad discretion conferred on it.⁹⁸

Interestingly, the notion of *full* review required under Article 47 CFR, has only rarely been addressed by the case law of the CJEU, stating only that with reference to Articles 6(1) and 13 ECHR judicial review should be offered on points of law and fact.⁹⁹ Mere cassation-style review limited to points of law would not suffice.¹⁰⁰ Full judicial review further requires that judicial review ‘examine both the evidence which the determining authority took into account or could have taken into account’ if it had properly taken a decision.¹⁰¹ Expertise such as technical and scientific specialist knowledge can not, according to the CJEU, be subject to judicial review *per se* but must be framed in procedural terms. Although therefore the duty of care standards allow for deep and far reaching probing, there seems to be no specific criteria in the principle of effective judicial remedies forcing a court to go further and substitute its assessment for that of an institution constitutionally empowered to assess a situation.

Review, however, will be necessary when the presence of horizontal clauses in EU law,¹⁰² or the obligation to ensure balancing of fundamental rights positions, will require broader probing into the effects of the case to be done on a case by case assessment. Therefore also the critique of the GCC that the CJEU has been inconsistent in not sufficiently assessing the direct and indirect additional of the monetary policy decision of the ECB whilst generally doing so seem unwarranted. The GCC claims that the CJEU in *Weiss and Others* deviated from its well-established standards of judicial review including an overall weighing also of indirect and remote aspects which economists might refer to as opportunity costs of measures and their redistributive effects. Yet, despite the GCC claiming that an ‘overall assessment’ by the CJEU of even fairly remote

⁹⁷ In this article this had been described as reviewing whether quantitatively and qualitatively and cognitively.

⁹⁸ German Constitutional Court (Bundesverfassungsgericht) of 5 May 2020 *PSPP* joined cases 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16, *PSPP* paras 123, 141, 160. In applying this standard, referred to as “wertende Gesamtbetrachtung”, the GCC then based its rejection of the CJEU’s approach on the fact that the CJEU had not properly balanced secondary economic effects of the ECB’s monetary policy acts in the decision on the choice of the legal basis, declaring a measure as an act of monetary policy, or in the exercise of its monetary policy powers. The GCC thus requests from the CJEU a level of review going beyond the assessment of the relevant facts and cognitively basing its judgement on the facts so established as would be the case under the duty of care.

⁹⁹ C-506/04 *Wilson* [2006] ECR I-8613, para 62.

¹⁰⁰ See eg C-69/10 *Diouf v Ministre du Travail, de l’Emploi et de l’Immigration* ECLI:EU:C:2011:524, paras 56, 57 with reference to C-506/04 *Wilson* [2006] ECR I-8613, paras 60-62.

¹⁰¹ C-585/16 *Alheto* EU:C:2018:584 (Grand Chamber), paras 113, 114.

¹⁰² Such as eg the requirement to ensure high levels of health and environmental protection in Article 114(3) TFEU.

secondary effects of a measure is standard in various policy areas,¹⁰³ the CJEU case law cited by the GCC to support its argument naturally displays great diversity as to the cut-off point of direct or indirect the effects of the factors to be taken into account can influence the decision. These vary, not surprisingly, according to the factual situation in each case. They however also vary, and that becomes clear from looking at the GCC's claims, according to certain assumptions and economic and political beliefs.¹⁰⁴

Therefore, the set of values to be pursued by EU law must be carefully be understood as those defined by EU law in the Treaties and EU legislation. Where the CJEU takes into account legal and *de facto* effects of a measure,¹⁰⁵ it finds that where a detrimental effect of a measure on a fundamental right 'is merely an indirect consequence of a policy with which aims of general public interest are pursued' their relevance may 'vary greatly, depending on the economic factors affecting market trends' and thus do not necessarily lead to the annulment of an act.¹⁰⁶ The CJEU generally refuses to take factors into account that 'do not have any sufficiently direct and specific links' to the rights or freedoms in balance in a proportionality review.¹⁰⁷ This is not to say, that the CJEU could not be criticized for imposing more strict standards towards the proportionality in the justification of Member State measures limiting EU freedoms than those required of EU institutions and bodies.¹⁰⁸ But more generally, where the CJEU cannot itself identify which factors will have a sufficiently direct link to the matter, because of necessary scientific or economic expertise,

¹⁰³ German Constitutional Court (Bundesverfassungsgericht) of 5 May 2020 *PSPP* joined cases 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16, paras 146-153.

¹⁰⁴ To illustrate this point, I refer to the GCC's considerations as to whether 'economically unviable companies' would be artificially kept afloat. How the idea of economic viability can be detached from market and regulatory conditions is not clear and is not explained by the GCC. Further the GCC requests a proportionality review to consider that some Member States may not implement the 'necessary consolidation and reform measures,' 'increase new borrowing', conduct 'investment programmes' and refrain from pursuing 'a sound budgetary policy'. (German Constitutional Court of 5 May 2020 *PSPP* joined cases 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16, paras 170, 171). Each display a certain undisclosed but underlying political and economic belief, which could be anchored in constitutional choices but then needs to be counter-balance with other elements including provisions of the Charter and of horizontal provisions in the Treaties. See for a discussion of these dangers: Dariusz Adamski, 'The Faustian bargain. How evolving economic and political beliefs have redefined the European economic constitution', in: HCH Hofmann, Katerina Pantazatou and Giovanni Zaccaroni (eds), *The Metamorphosis of the European Economic Constitution* (Edward Elgar 2019), 25-57.

¹⁰⁵ Especially in single market matters (eg Case 8/74 *Dassonville* ECR 1974, I-838, para 5) and anti-discrimination cases where the discrimination arises not by law but from the factual circumstances of a case (eg Case 14/83 *Colson and Kamann* [1984] ECR I-1892 para 18; C-300/06 *Voß v Land Berlin* [2007] ECR I-10592, para 38).

¹⁰⁶ C-59/83 *Biovilac* ECLI:EU:C:1984:380, para 22.

¹⁰⁷ C-435/02 *Springer v Zeitungsverlag Niederrhein and Others* ECLI:EU:C:2004:552, para 49

¹⁰⁸ As an example for many: C-110/05 *Commission v Italy* ECLI:EU:C:2009:66, paras 37-40

it must review whether the institutions in charge of the question have done so with all due care.

Criticism of the duty of care related approach by the CJEU voiced in the literature, for example, by Mendes is often aimed in a distinctively different direction than the GCC's concerns voiced in *PSPP*. The fact that the duty of care allows a court to assess 'the plausibility of the decisions in view of the facts that grounded the choices ultimately made'¹⁰⁹ in this view renders the CJEU's approach to the principle of care is too fact-based, not sufficiently acknowledging the obligation of decision makers to ultimately serve the public interest and therefore obfuscating whether such forms of control preserve the space of discretion conferred on decision makers by law.¹¹⁰ This criticism of the Court's approach appears centred on the decision makers' freedoms to identify approaches in defining a public interest ultimately allowing a more broad freedom to identify what the 'relevant' facts to be taken into account are.

These two positions illustrate quite opposite approaches to identifying the public interest within a system with, on one hand, between a separation of powers inspired respect for discretion and, on the other, a rule of law based concern for effective judicial review of the legality of acts using the principle of proportionality. One position assumes the public interest to be best defended by independent authorities acting in the context of their specific expertise. The other considers that the public interest is best protected by full judicial review of the overall assessment of the relevant factors relevant in a decision. In this sense, the CJEU's identification of the duty of care containing quantitative, qualitative, and cognitive elements under the duty of care point in the direction of a procedural, process-oriented understanding for controlling whether a decision maker is acting in the public interest identified by the legal system. The duty of care, in this view, is a tool to ensure that a decision maker has in fact undertaken to establish the public interest, and that its measures chosen by the decision maker can serve it. On the other hand, it does not attempt to require a full *de novo* assessment of the factors and their balancing by the reviewing Court, as the GCC in *PSPP* would seem to require by making the claim that such is a pre-condition for ensuring that effective judicial review under Article 47 CFR and is required under EU law from under Article 19(1)2nd sentence TEU.

¹⁰⁹ Joana Mendes, 'Discretion, Care and Public Interests in the EU Administration: Probing the Limits of Law' in HCH Hofmann and Jacques Ziller (eds), *Accountability in the EU – The Role of the European Ombudsman* (Edward Elgar 2017) 156.

¹¹⁰ *ibid*, 156-159.

c) The Duty of Care in Codification of Procedures

The central role of the duty of care as a procedural, information-based approach to ensuring accountability of public action has been reflected not only in attempts at codifying EU administrative law of the past years, but is also reflected in the 2016 Inter-institutional Agreement (IIA) on Better Regulation. The latter contains self-obligations of the Commission to undertake full review of all relevant factors through legislative impact assessment procedures and cost-benefit-analysis,¹¹¹ although such obligations can be hardened in case law, as the above discussed case *Poland v EP and Council* illustrates.¹¹² With regard to non-legislative administrative rule making, the Research Network on EU Administrative Law (ReNEUAL) model rules on EU administrative procedure¹¹³ outline the basic principles of the duty of care, and take on this principle as lynchpin for regulatory approaches. The explanations to the model rules state that the role of structured procedures – such as impact assessments for compliance with care-related obligations – is to take into account and weigh relevant information. Finally, with respect to unilateral single-case decision making and decision making by contractual means, the duty of care is used both in the ReNEUAL model rules¹¹⁴ as well as in the European Parliament’s 2016 draft on a regulation for EU administrative procedures.¹¹⁵ In these documents, care is de-

¹¹¹ See the discussion above on the Inter-institutional Agreement between the European Parliament, the Council of the EU and the European Commission of 13 April 2016 on Better Law-Making [2016] OJ L123/1, stating in point 12: ‘Impact assessments should cover the existence, scale and consequences of a problem and the question whether or not Union action is needed. They should map out alternative solutions and, where possible, potential short and long-term costs and benefits, assessing the economic, environmental and social impacts in an integrated and balanced way and using both qualitative and quantitative analyses. ... Impact assessments should be based on accurate, objective and complete information and should be proportionate as regards their scope and focus’.

¹¹² See, for a more recent example, the above cited Case C-128/17 *Poland v European Parliament and Council* [2019] EU:C:2019:194.

¹¹³ See, for abstract general administrative rule making procedures, Article II-3 ReNEUAL model rules and, for single-case decision making, Article III-10 ReNEUAL model rules, linking the principle of investigation with the duty of care. See, for the online 2014 version of the model codes, HCH Hofmann and others, ‘ReNEUAL Model Rules on EU Administrative Procedure’ (*reNEUAL*, 2014) <https://www.reneual.eu/images/Home/ReNEUAL-Model_Rules-Compilation_BooksI_VI_2014-09-03.pdf> accessed 16 March 2020 and Paul Craig, HCH Hofmann, J-P Schneider, Jacques Ziller (eds.) *ReNEUAL Model Rules on EU Administrative Procedure* (2017 version of model codes, Oxford University Press 2017).

¹¹⁴ See Article III-10(1) on the principle of investigation.

¹¹⁵ See ‘Proposal for a Regulation of the EP and of the Council for an open, efficient and independent European Union administration’ (*European Parliament*, 6 June 2016) <https://www.europarl.europa.eu/doceo/document/TA-8-2016-0279_EN.html> accessed 16 March 2020, especially Article 9(1) stating: ‘The competent authority shall investigate the case carefully and impartially. It shall take into consideration all relevant factors and gather all necessary information to adopt a decision’.

scribed as a ‘counterpart to the principle of investigation’ found in national legal orders, and is applied as a tool to set a procedural framework for the exercise of discretionary powers describing the duty of careful investigation as ‘a centre-piece of procedural impartiality and fairness’.¹¹⁶

Together these examples show that awareness is rising as to the balancing force of the duty of care in practice. Given the spread of the principle of care in the case law of the CJEU and the increasing references to it in the IIA on Better Regulation and draft legislation, it would appear necessary for legal doctrine to begin to address the underlying concepts more readily.

5. Outlook

This article looked into how the duty of care has developed as a procedural principle helping to ensure, on the one hand, accountability and compliance with the rule of law inspired legality concepts and, on the other hand, recognition of the need to respect the delegation of decision making powers and discretion. The overarching question this article is pursuing is whether the duty of care is a principle capable of providing criteria by which the CJEU can undertake the balancing requirements between discretion and proportionality. To do so, the details of the test developed by the CJEU were analysed both from an information-based approach – looking at quantitative and qualitative elements of matters to be taken into account – as well as from a cognitive approach – looking at whether the facts so collected were *de facto* weighed in decision making and whether they substantiate the content of the final act. It was found that this is a concept applied in single-case decision making, as well as in regulatory and legislative acts. The duty of care is recognised both as an individual right and as an essential procedural requirement in the case law of the CJEU.

In summary, the Court insists on compliance with the duty of care in the context of what might be referred to as a ‘deep procedural’ review, looking especially at whether the quantity and quality of information used for decision-making was adequate, and whether the latter was actually taken into account in decision-making. Depending on which kind of information is to be taken into account, facts can also be facts presented in the context of scientific expertise, also in the context of economic law and regulation of economic theory.¹¹⁷It

¹¹⁶ Paul Craig, HCH Hofmann, J-P Schneider and Jacques Ziller (eds.) *ReNEUAL Model Rules on EU Administrative Procedure* (2017 version of model codes, Oxford University Press 2017) 111.

¹¹⁷ The notion of facts in the case law of the CJEU was developed with respect to the classification of non-legal theories, including economic theory, as facts in the case law of the CJEU. Thereby, the scope of the matters subject only to limited review has become more circumscribed than in earlier case law. The first wave of cases where economic theory, and its conclusions as well as technical assessments were subject to the same review as facts was in the early 2000s in: *max.mobil* (Case T-54/99 *max.mobil v Commission* [2002] EU:T:2002:20), *Airtours* (Case T-342/99 *Airtours v Commission* [2002] EU:T:2002:146), *Tetra Laval* (Case T-5/02 *Tetra Laval v*

is within this latter context that the rule of law-related proportionality aspect can be effectively reviewed without taking away from the policy-related freedom granted by the conferral of discretionary powers on a body or institution. This approach strikes a balance between an empty procedural review and a full review of substance which would risk the exercise of discretionary powers. The approach can be adapted to allow the *ex post* judicial review of even wide discretionary powers conferred within EU law. Since the latter is not beyond the law, the duty of care offers a legality review by the CJEU, a factor the GCC does not seem to recognise or to appreciate in its blunt *PSPP* ruling.

This article further found that the spread of the duty of care can be explained by the fact that it does allow balancing for effective judicial review. In the words of the Court of Justice, effective judicial review is one of the essential components of a system under the rule of law,¹¹⁸ with respect to the conferral and delegation of discretionary decision-making powers on non-judiciary bodies. This is the reason for the centrality and ubiquitous nature of duty of care-related review. Care has thus become a central principle in ensuring effective judicial review within the EU's system, a system highly dependent on the delegation of discretionary powers.

Despite the amount of case law on this matter, this article has shown that there are many questions left to explore within academia. Not only are notions of discretionary powers conceptually poorly developed when it comes to EU law, but also key elements of the distinction between the CJEU's powers to investigate facts and its required deference in matters of the discretion of decision makers require further clarification and systematisation. This article is a contribution to the exploration of tools to undertake these distinctions and to overcome conflicts between concepts of judicial review and discretion. Even so, many questions remain unanswered. Further discussions and further conceptual research are needed for the exploration of the duty of care as an individual right. How far does this require care-related review also in general legislative and non-legislative procedures? How does one distinguish questions of standing from substantive matters in various types of procedures, from actions for annulment to claims for damages? This does not take away from the fact that compliance with the duty of care may also be an essential procedural requirement, and thus the requirements arising from this classification need to be developed regarding legal remedies offered within the EU legal system.

There are several timely aspects of exploring concepts of the duty of care. One was already addressed. It is the GCC's request that the CJEU follow its

Commission [2002] EU:T:2002:264, upheld on appeal in Case C-12/03 P *Commission v Tetra Laval* [2005] EU:C:2005:87) and also *Schneider* (Case T-351/03 *Schneider Electric v Commission* [2007] EU:T:2007:212)

¹¹⁸ Case C-72/15 *Rosneft* [2017] EU:C:2017:236, para 73; Case C-362/14 *Schrems I* [2015] EU:C:2015:650, para 95 and Case C-562/13 *Abdida* [2014] EU:C:2014:2453, para 45.

lead in defining conditions of proportionality review. Another important aspect of the developing duty of care is very different: Due to its nature as an information-related concept of decision-making accountability, research into the duty of care as a legal concept might prove central to discussions about the accountability of automated decision making procedures using artificial intelligence or machine learning tools. Questions of input of information and explainability of outputs might prove to become central elements in holding decision making to account, irrespective of whether decision making is undertaken by humans or machines.

In short, with the duty of care, the CJEU has created an information-based tool which allows it to fine-tune the exercise of judicial accountability. A coherent development of this tool by academic research and future case law is an important element for further understanding the review of public action in the EU. This is as important for EU courts as it is for national courts reviewing Member State administrations acting in the scope of EU law.

The precautionary principle and the burden and standard of proof in European and Dutch environmental law

Rogier Kegge*

Assistant Professor Administrative and Environmental Law at the Department of Constitutional and Administrative Law of Leiden University

Abstract

This article offers an analysis of the application of the precautionary principle by European courts and the highest Dutch administrative courts in environmental cases. The precautionary principle is one of the leading principles in EU environmental law, but it has no unequivocal meaning. This makes the principle difficult to apply and the allocation of the burden of proof and the level of standard of proof complex matters. In the context of the allocation of the burden of proof, it is essential to make the distinction between the precautionary principle invoked as an obligation or a justification for protective measures. A realistic level of standard of proof is also essential. Without a fair allocation of the burden of proof and a realistic level of standard of proof, either the authorities or the appellants may be exposed to unequal procedural positions and unsolvable evidentiary problems. Analysis of the case law leads to the conclusion that the principle sometimes is misapplied by the Dutch administrative courts.

I. Introduction

This article offers an analysis of the application of the precautionary principle by the Court of Justice of the European Union (CJEU), the General Court (EGC), The European Court of Human Rights (ECtHR) and the highest Dutch administrative courts in environmental cases, the Administrative Jurisdiction Division of the Council of State (in Dutch: *Afdeling Bestuursrechtspraak van de Raad van State*, ABRvS) and the Trade and Industry Appeals Tribunal (in Dutch: *College van Beroep voor het bedrijfsleven*, CBb). In this article, the term ‘environmental’ in relation to environmental law will be used in the broadest sense of the word, and it will also include cases concerning public health protection. Although there are significant differences between the various fields of environmental law – such as nature conservation, public health and food safety – and the precautionary principle can have different functions in its specific context, this does not mean that no parallels in the application of

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the precautionary principle can be found.¹ Because of the various legal bases, objectives, and the fact that the precautionary principle is a *principle* of law, it does not have an unequivocal meaning. This makes the precautionary principle, the allocation of the burden of proof, and the level of the standard of proof, complex matters in environmental cases and difficult to apply for authorities and judges. This complexity has resulted in divergent case law and can lead to unequal procedural positions in environmental cases. This raises the question of whether these differences in the allocation of the burden of proof and in the level of standard of proof can be justified.

This article intends to outline the differences between the precautionary principle based on Articles 2 and 8 of the European Convention on Human Rights (ECHR) and the precautionary principle based on EU law in environmental cases, paying particular attention to the allocation of the burden of proof and the level of standard of proof. First, I will describe the precautionary principle, the allocation of the burden of proof and the level of standard of proof (section 2). Subsequently, I will analyse recent case law of the ECtHR (section 3) and of the CJEU and EGC (section 4) on the precautionary principle in environmental cases. In section 5, recent Dutch case law on the precautionary principle in environmental cases will be analysed. In section 6, conclusions will be drawn.

2. The precautionary principle and proof

The precautionary principle is considered one of the leading principles in international and EU environmental law.² In EU law, the precautionary principle is sometimes even described as a general principle of law;³ however, as it is a principle and not a rule, there is no uniform definition of the precautionary principle.⁴ Tridimas clarifies that principles must be implemented by legislative or executive action and become material only for the purpose of

¹ N de Sadeleer, 'The Precautionary Principle in EC Health and Environmental Law' (2006) vol 12 *European Law Journal*, 139.

² In EU law, the precautionary principle is more established and specified than in international environmental law. See S Kingston, V Heyvaert and A Cavoski, *European Environmental Law* (Cambridge University Press 2017) 94. See also O McIntyre and T Mosedale, 'The precautionary principle a norm of customary international law' (1997) 9(2) *Journal of Environmental Law*, 221.

³ Joined cases T-429/13 and T-451/13 *Bayer and Syngenta v European Commission* [2018] EU:T:2018:280, para 109.

⁴ Ph Sands and others, *Principles of International Environmental Law* (Cambridge University Press 2018) 234.

the interpretation or judicial review of such actions.⁵ The precautionary principle is intended as a method to cope with scientific uncertainty on the effects of decisions on the environment, and aims to regulate potential environmental risks.⁶ Therefore, the precautionary principle is a risk management tool for decision-making in complex environmental situations with scientific uncertainty. Risk management relates to the (political) decision how much risk is acceptable, and this decision may need a prior risk assessment to determine the risks.⁷ De Sadeleer calls this a two-step process of risk analysis which aims to provide a scientific base for decisions,⁸ where the first step consists of a scientific risk assessment and the second step is the decision on the acceptability of the risks by the competent authority. This latter step refers to risk management, and implies an evaluation of relevant interests.

Of course, not every decision has to be preceded by a risk assessment: such an assessment is required only if it is plausible that there is a potential and serious threat to the environment. In this context, Foster points out that there must be some minimum threshold in order for the precautionary principle to be applied.⁹ De Sadeleer distinguishes residual risks, certain risks and uncertain risks.¹⁰ Residual risks are small or very hypothetical risks and do not require a prior risk assessment. Certain risks do not require a risk assessment, since these risks are already known – such risks are covered by the preventive principle. Only uncertain risks with some significance should fall under the scope of the precautionary principle. Or, as Sunstein puts it:

[N]o sensible person believes that an activity should be banned merely because it presents “some” risk or harm. Some threshold degree of evidence should be required for costly measures of risk avoidance, in the form of scientifically supported suspicion or suggestive evidence of significant risk.¹¹

If this threshold of uncertain risk with some significance is exceeded, the authority that wants to allow – or the initiator that wants to undertake – the

⁵ T Tridimas, ‘The general principles of law, who needs them?’ (Conclusion) (2016) 1 Cahiers de Droit Européen, 19.

⁶ F M Fleurke, ‘De lange mars van het voorzorgsbeginsel: de redding van de bij?’ (2018) 7/8 NtEr, 248.

⁷ A Randall, *Risk and Precaution* (Cambridge University Press 2011) 43-55.

⁸ N de Sadeleer, ‘Precautionary principle in EU Law’ (2010) AV&S, 24.

⁹ CE Foster, *Science and the Precautionary Principle in International Courts and Tribunals: Expert Evidence, Burden of Proof and Finality* (Cambridge University Press 2011) 257.

¹⁰ N de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (Oxford University Press 2002) 156-157.

¹¹ CR Sunstein, *Laws of Fear: Beyond the Precautionary Principle* (Cambridge University Press 2005) 120.

potentially harmful activity or activities bears the burden of proof. Instead of allowing these activities because their potentially harmful effects are not known and the possible damage has not (yet) occurred, the authority or party must submit scientific proof on the potential magnitude of the effects of these activities before they are allowed and can be undertaken. The application of the precautionary principle should therefore start with a scientific evaluation, as complete as possible, and, where possible, identifying the degree of scientific uncertainty.¹² Scientific uncertainty comes in multiple forms. Aven distinguishes uncertainty between the activity and its possible effects on the environment (cause-effect relationship), uncertainty about the probability of the risk, and uncertainty about the accuracy of the prediction model.¹³ A proper risk assessment distinguishes between these forms of uncertainty and enables the authority to make an informed decision on the acceptability of the risks. Scientific uncertainty must be distinguished from plain ignorance.¹⁴ In contrast to scientific uncertainty, ignorance implies unawareness of the existing body of knowledge, while scientific uncertainty refers to the many things we do not (yet) know. Environmental scientific uncertainty is often due to the complexity and variability of ecosystems, which makes long-term predictions, based on models, intrinsically difficult. However, this does not release authorities from their duty to examine the existing body of scientific data and is no licence for ignorance. As a result, the precautionary principle is inextricably linked to the burden of proof to substantiate the potential risks, as well as the probability and the magnitude of those risks. The principle requires the best available scientific data to manage the acceptable risks and a cautious worst-case scenario approach to avoid underestimating potential environmental risks. This also means that the known gaps in the available scientific body of knowledge must be recognized and addressed.

On the one hand, the precautionary principle allows the authorities to take protective measures without having to wait until the reality and seriousness of those environmental risks become fully apparent.¹⁵ On the other hand, the precautionary principle may result in the refusal or even the revoking of permits of initiators – if those permits allow potential harmful activities for the environment. In the context of the allocation of the burden of proof, Ambrus makes the distinction between the precautionary principle invoked as an obligation or

¹² Commission, 'Communication from the Commission on the precautionary principle' (Communication) COM(2000) 1 final, 3 and 16.

¹³ T Aven, 'On Different Types of Uncertainties in the Context of the Precautionary Principle' (2011) 31(10) Risk Analysis, 1515.

¹⁴ A Trouwborst, *Precautionary Rights and Duties of States* (Koninklijke Brill N.V. 2006) 71-99.

¹⁵ Case T-31/07 *Du Pont de Nemours v Commission* [2013] EU:T:2013:167.

a justification.¹⁶ In dispute settlement, appellants may argue that, by approving certain potentially harmful activities, the authorities have breached the obligation to respect the precautionary principle. Then again, the precautionary principle can also be used as a justification by the competent authorities to take protective measures, like a ban, to protect the environment. In both situations, a fair allocation of the burden of proof and a realistic level of standard of proof is essential. Without a fair allocation of the burden of proof and a realistic level of standard of proof, either the competent authority or the appellants may be exposed to unequal procedural positions and unsolvable evidentiary problems. If the competent authority wants to take protective measures on the basis of the precautionary principle, it needs to prove that the threshold of uncertain risk with some significance for the environment will be exceeded in the case of inactivity. If the authority wants to allow a potentially harmful activity, it (or the initiator) needs to prove that the environmental risks of that activity, given the available scientific data, are acceptable. This assessment should take into account both the probability and the magnitude of the risks.¹⁷ The allowed acceptability of this risk must be laid down in legislation in the form of an authorization criterion. Hence, not only the allocation of the burden of proof is relevant, but also the legal level of the standard of proof.¹⁸ Both situations require a prior scientific assessment on the environmental risks, but do not require absolute certainty on the absence of all harmful effects, which has rightly been described as a utopian concept by Trouwborst.¹⁹ He claims that the precautionary principle has lowered the standard of proof for taking protective measures, but has not shifted the burden of proof.²⁰ In the case of protective measures, it depends on the abovementioned threshold what the level of the standard of proof is for the authority. In the case of allowing potentially harmful activities, the level of the standard of proof on the competent authority (or the initiator) tends to be much higher, because the question is no longer whether the threshold has been crossed. At this stage, the question becomes whether the assessment of the risks involved with those activities provides a level of scientific certainty that justifies a positive decision, because the adverse effects of that decision on the environment are considered acceptable. This evidential framework based on

¹⁶ M Ambrus, 'The Precautionary Principle and a Fair Allocation of the Burden of Proof in International Environmental Law' (2012) 21(3) *Review of European, Comparative and International Environmental Law*, 259.

¹⁷ CR Sunstein, *Laws of Fear: Beyond the Precautionary Principle* (Cambridge University Press 2005) 117.

¹⁸ D Hamer, 'Presumptions, standards and burdens: managing the cost of error' (2014) 13 *Law, Probability and Risk*, 221.

¹⁹ A Trouwborst, 'The Precautionary Principle in General International Law: Combating the Babylonian Confusion' (2007) 16(2) *Review of European, Comparative and International Environmental Law*, 185.

²⁰ *ibid.*

the precautionary principle means that environmental law is marked by heavy reliance on science.²¹ However, it also recognizes that absolute scientific certainty does not exist: a proper application of the precautionary principle should therefore not lead to a level of standard of proof that entails proving the absence of all risks, since nobody should be bound to the impossible. In this context, Sunstein distinguishes between a weak and a strong version of the precautionary principle.²² The strong version of the precautionary principle means that when there is a risk of significant health or environmental damage, and when there is scientific uncertainty as to the nature of that damage or the likelihood of the risk, decisions should be made as to prevent such activities from being conducted unless and until scientific evidence shows that the damage will not occur. The words ‘will not occur’ seem to require proponents of an activity to demonstrate that there is no risk at all – often an impossible burden to meet.

3. The precautionary principle applied by the ECtHR

The ECtHR has applied the precautionary principle – or at least elements of it – within the scope of Articles 2 and 8 of the ECHR in several environmental cases.²³

In *Hatton a.o. v UK*²⁴, the ECtHR does not explicitly mention the precautionary principle. It does, however, note that a governmental decision-making process concerning complex issues of environmental and economic policy, such as in the present case, must necessarily involve appropriate investigations and studies in order to allow a fair balance to be struck between the various conflicting interests at stake²⁵. This does not mean that decisions can only be taken if comprehensive and measurable data is available in relation to each and every aspect of the matter to be decided.²⁶ In this case, the appellants lived in London, near Heathrow airport, and claimed that their rights under Article 8 ECHR had been violated due to increased noise pollution from aircrafts as a result of a new scheme for night flights. The ECtHR determined that a series of investigations had been carried out over a long period of time, that the appellants had

²¹ N de Sadeleer, ‘The Precautionary Principle as a Device for Greater Environmental Protection: Lessons from EC Courts’ (2009) 18(1) *Review of European, Comparative and International Environmental Law* (2009), 3.

²² CR Sunstein, *Laws of Fear: Beyond the Precautionary Principle* (Cambridge University Press 2005) 18-19.

²³ DGJ Sanderink, *Het EVRM en het materiële omgevingsrecht* (Dissertation Radboud University Nijmegen, Wolters Kluwer 2015) 119-121.

²⁴ *Hatton v UK* App no 36022/97 (ECtHR, 8 July 2003).

²⁵ *ibid.*

²⁶ *ibid.*

been involved in the procedure, and that the State has a wide margin of appreciation to strike a fair balance between the conflicting interests. Under these circumstances, the authorities did not overstep their margin of appreciation.

In *Taşkin a.o. v Turkey*²⁷, the ECtHR considered, in the context of Article 8 ECHR, that where a State must determine complex issues of environmental and economic policy, the decision-making process must firstly involve appropriate investigations and studies. This will allow them to predict and evaluate in advance the effects of those activities which might damage the environment and infringe individuals' rights, as well as enabling them to strike a fair balance between the various conflicting interests at stake. The importance of public access to the conclusions of such studies and to information which would enable members of the public to assess the danger to which they are exposed is beyond question; the ECtHR further added that the individuals concerned must also be able to appeal to the courts against any decision, act or omission where they consider that their interests or their comments have not been given sufficient weight in the decision-making process.²⁸

In *Budayeva a.o. v Russia*²⁹, Budayeva and others claimed that the Russian authorities had failed to heed warnings about the likelihood of large-scale mudslides, and had failed to implement protective measures against these yearly mudslides in the mountainous area adjacent to Mount Elbrus.³⁰ The ECtHR considered that Article 2 ECHR entails the obligation to put in place a legislative and administrative framework that is designed to provide effective deterrence against threats to the right of life, and added that the positive obligations under Article 2 largely overlap with those under Article 8. Consequently, the principles developed in the Court's case law relating to planning and environmental matters affecting private life and the home may also be relied on for the protection of the right to life. As to the choice of measures, in principle this is a matter that falls within the State's margin of appreciation, however the ECtHR continued by saying that no impossible or disproportionate burden must be imposed on the authorities, given the choices they must make in terms of priorities and resources.³¹

In *Tătar v Romania*³², the ECtHR ruled that Article 8 ECHR lays down a positive obligation for Member States to inform the public about potential en-

²⁷ *Taşkin a.o. v Turkey* App no 46117/99 (ECtHR, 10 November 2004).

²⁸ *ibid.*

²⁹ *Budayeva a.o. v Russia* App no 15339/02 (ECtHR, 20 March 2008).

³⁰ *ibid.*

³¹ See also *Kolyadenko a.o. v Russia* App no 17423/05 (ECtHR, 28 February 2012).

³² *Tătar v Romania* App no 67021/10 (ECtHR, 27 January 2009).

vironmental risks and, on the basis of a prior risk assessment, to take those measures that are reasonably necessary to prevent serious damage to the environment and the private and family life of citizens.³³ Although a preliminary impact assessment had already highlighted the serious risks of operating a gold mine, the Romanian authorities had granted a permit and even allowed the mining company to continue its activities after causing serious environmental contamination. The impact assessment was not made public. In this context, the ECtHR concluded that the Romanian authorities had failed to take appropriate measures to protect the right to enjoy a healthy and protected environment, and ruled that the precautionary principle had not been complied with. In this case, the ECtHR explicitly derived for the first time the precautionary principle from Article 8 ECHR, with reference to the precautionary principle based on international environmental law and EU law.³⁴ The ECtHR explicitly rules that the precautionary principle demands that States do not wait with taking effective and proportional measures to prevent serious and irreversible damage to the environment because of the absence of scientific certainty, and stresses the importance of this principle as a method to protect the environment.

Noteworthy is that, to my knowledge, in more recent cases the ECtHR does not mention the precautionary principle explicitly anymore. Pedersen points out that even a slight retreat in the progressive jurisprudence of the ECtHR on the protection of the environment could be detected.³⁵ He refers to *Hardy and Maile v The United Kingdom*³⁶, in which the ECtHR applicants argued that Article 8 of the ECHR had to be applied in a precautionary way.³⁷ Although the ECtHR refers to *Tătar v Romania* in the case, it limits its judgement to a more procedural approach, stressing that an extensive legislative and regulatory framework was in place to assess and manage the potential environmental risks posed by the LNG terminal, and that applicants had, at the time, the possibility to seek judicial review of the grants and of planning permissions. This more procedural approach can also be found in the even more recent case *Cordella v Italy*³⁸. Here, the ECtHR places particular importance on the gross negligence of the Italian authorities in providing any information and effective legal remedy for the applicants to appeal against the lack of protective measures against the environ-

³³ *ibid.*

³⁴ T Barkhuysen and F Onrust, 'De betekenis van het voorzorgsbeginsel voor de Nederlandse (milieu)rechtspraak' in A W Heringa and others, *Bestuursrecht beschermd* (SDU 2006) 62.

³⁵ O W Pedersen, 'The European Court of Human Rights and International Environmental Law' in JH Knox and R Pejan, *The Human Right to a Healthy Environment* (Cambridge University Press 2018).

³⁶ *Hardy and Maile v The United Kingdom* App no 31965/07 (ECtHR, 14 February 2012).

³⁷ *ibid.*

³⁸ *Cordella v Italy* App no 54414/13 and 54264/15 (ECtHR, 24 January 2019).

mental risks posed by the steel factory, while the substantial risks were assessed and not contested. Though the precautionary principle has not been mentioned anymore in recent case law and the ECtHR seems to follow a more restrictive procedural approach, in my view this does not mean that the ECtHR does not recognise the precautionary principle anymore. However, recently the ECtHR seems to choose a more restrictive interpretation of this principle.

In short, in the case law of the ECtHR, the precautionary principle applies in the context of the positive obligations of the State under Articles 2 and 8 ECHR to provide suitable measures, necessary to prevent serious damage to the environment *and* to the private and family life of citizens. Regardless, due to the objectives of Article 2 and 8 ECHR, the environment as such is not protected. When the State grants permission for potentially harmful activities, the decision-making process must involve a prior risk assessment in order to predict and evaluate in advance the effects of those activities, and this assessment must be made public. The individuals concerned must also be able to appeal to the courts against the decision based on the assessment; the authorities bear the burden of proof to substantiate that they have done the appropriate investigations on the potential environmental hazards. If the investigations indicate that there are real and immediate environmental risks to private and family life, the authorities must take timely and suitable measures to minimize the risks to a reasonable minimum. In this context, immediate does not mean that only short-term environmental risks should lead to measures: long-term environmental risks also fall within the scope of the precautionary principle.³⁹ Furthermore, the ECtHR places much emphasis on the wide margin of appreciation of the Member State to strike a fair balance between the often conflicting interests, and stresses that no impossible or disproportionate burden must be imposed on the authorities. The standard of proof consists of proving that the required due diligence has been met. This means that the State has to prove that, on the basis of a prior scientific assessment, timely and effective measures have been taken to minimize a real environmental risk to an acceptable level. The available means and the policy priorities can also play a role in the decision as to which measures could be taken. The counterevidence for the appealing party boils down to making it plausible that the State has not adequately complied with its due diligence.

³⁹ Conclusion of the Attorney General of the Supreme Court in The Urgenda Case, 13 September 2019, ECLI:NL:PHR:2019:887.

4. The precautionary principle applied by the CJEU and EGC

In EU law, the legal basis for the precautionary principle is Article 191 of the Treaty on the Functioning of the European Union⁴⁰ (TFEU). Article 191(1) TFEU states that union policy on the environment is aimed *inter alia* at preserving, protecting and improving the environment and protecting human health. In Article 191(2) TFEU, a high level of protection of the environment is the objective of this union policy. The same objective is also mentioned in Article 37 of the Charter of Fundamental Rights of the European Union⁴¹ (the Charter), which has the same legal value as the Treaties as mentioned in Article 6(1) of the Treaty on European Union⁴². The Article reiterates the programmatic statement embodied in the TFEU and does not lay down a right in the sense of an individual entitlement.⁴³ As the Charter draws a clear distinction between rights and principles, and Article 37 is positioned as a principle, it serves mainly as an interpretative tool in reviewing acts.⁴⁴ Article 52 defines only the legal status of rights in the Charter, and Article 51 limits the scope of the Charter to Member States implementing Union law. This requires a certain degree of connection between the national legislation and a provision of EU law.⁴⁵ In the case law of the CJEU and the EGC, the precautionary principle and the aimed high level of protection of the environment is therefore derived from Article 191 TFEU and from specific Directives and Regulations concerning public health or the protection of the environment. As a result of this framework, the precautionary principle is applied based on secondary EU law in several different environmental disciplines, such as food and safety law and nature conservation law.

In *Du Pont de Nemours*⁴⁶, the EGC ruled that the adoption of a preventive measure or, conversely, its withdrawal or relaxation on the basis of the precautionary principle, cannot be made subject to proving the lack of any risk, in so far as such proof is generally impossible to give in scientific terms since zero

⁴⁰ Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/49.

⁴¹ Charter of Fundamental Rights of the European Union [2016] OJ C202/389.

⁴² Consolidated version of the Treaty on the European Union [2016] OJ C202/15.

⁴³ N de Sadeleer, 'Enforcing EUCHR Principles and Fundamental Rights in Environmental Cases' (2012) 81 *Nordic Journal of International Law*, 39.

⁴⁴ S Bogojević, 'EU human rights law and environmental protection: the beginning of a beautiful friendship?' in S Douglas-Scott (ed), *Research Handbook on EU law and Human Rights* (Edward Elgar Publishing 2016) 466-467.

⁴⁵ Case C-206/13 *C. Siragusa v Regione Sicilia* [2014] EU:C:2014:126.

⁴⁶ Case T-31/07 *Du Pont de Nemours a.o. v European Commission* [2013] EU:T:2013:167.

risk does not exist in practice.⁴⁷ In *Pillbox 38*⁴⁸, the CJEU considered that, where there is uncertainty as to the existence or extent of risks to human health, protective measures may be taken without having to wait until the reality and seriousness of those risks become fully apparent.⁴⁹ Where it proves to be impossible to determine with certainty the existence or the extent of the alleged risk because of the insufficiency, inconclusiveness or imprecision of the results of studies conducted – but the likelihood of real harm to public health persists should the risk materialize – the precautionary principle justifies the adoption of restrictive measures. In *Fipronil*⁵⁰, the EGC provides a detailed explanation of the precautionary principle and distinguishes three successive stages:⁵¹ first, the identification of the potentially adverse effects arising from a phenomenon; second, the assessment of the risks to public health, safety and the environment; and third – when the potential risks identified exceed the threshold of what is acceptable for society – risk management by the adoption of appropriate protective measures. The EGC noted that the second stage requires a scientific assessment to identify and characterize a certain risk. When the available data is inadequate or inconclusive, a prudent and cautious approach to environmental protection, health, or safety could be to opt for the worst-case hypothesis. When such hypotheses are accumulated, this will probably lead to an exaggeration of the real risk, but it also gives some assurance that the risk will not be underestimated. The scientific risk assessment, were that risk to become a reality, is not required to provide conclusive evidence of the reality of the risk and the seriousness of the potential adverse effects. Moreover, a situation in which the precautionary principle is applied by definition coincides with a situation in which there is scientific uncertainty. With reference to the *Du Pont de Nemours* case, in *Fipronil* the EGC further noted that a preventive measure may be taken only if the risk – even though the reality and extent of the risk have not been fully demonstrated by conclusive scientific evidence – appears to be adequately backed up by the scientific data available at the time when the measure was taken. The EGC then considered that the responsibility for determining the level of risk which is deemed unacceptable for society lies with the institutions responsible for the political choice of determining an appropriate level of protection for society, yet the EGC also added that these institutions are bound by their obligation to ensure a high level of protection of public health, safety, and the environment.

⁴⁷ *ibid.*

⁴⁸ Case C-471/14 *Pillbox 38 (UK) Ltd v The Secretary of State for Health* [2016] EU:C:2016:324.

⁴⁹ *ibid.*

⁵⁰ Case T-584/13 *BASF Agro B.V. v European Commission* [2018] EU:T:2018:279.

⁵¹ *ibid.*

In the case law concerning the Habitats Directive, the precautionary principle also plays a major role. In the *Waddenzee*⁵² case, the CJEU ruled that the authorization criterion laid down in Article 6(3) of the Habitats Directive integrates the precautionary principle, and makes it possible to effectively prevent adverse effects on the integrity of protected sites as the result of the plan or projects considered.⁵³ In the *Briels* and *Grüne Liga* cases⁵⁴, the CJEU noted that the assessment carried out under the first sentence of Article 6(3) of the Habitats Directive cannot have lacunae, and must contain complete, precise, and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned.⁵⁵ In the *Orléans* case⁵⁶, the CJEU stressed that the precautionary principle requires the competent national authority to assess the implications of the project for the site concerned – in view of the site’s conservation objectives and taking into account the protective measures forming part of that project aimed at avoiding or reducing any direct adverse effects on the site – in order to ensure that it does not adversely affect the integrity of the site.⁵⁷ Lees points out that the CJEU will allow decision makers to take very little account of any development, whatever its intended purpose or likely outcome, where there is no absolute certainty as to these expected outcomes; she further notes that this strict treatment of the precautionary principle places a lot of weight on irrefutable scientific evidence.⁵⁸ With reference to the precautionary principle, the CJEU recalls in the *PAS* case⁵⁹ that the assessment carried out under the first sentence of Article 6(3) of the Habitats Directive cannot have lacunae, and must contain complete, precise, and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the plans or the projects, and concludes that the appropriate assessment for the PAS as a whole must also meet these requirements.⁶⁰ This means that a so-called programmatic approach with a wide range of projects and a long time span has to meet the same requirements as the appropriate assessment for an individual project. In the *PAS* case, the CJEU adds that the national court must ascertain that there is no reasonable

⁵² Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee a.o. v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* [2004] EU:C:2004:482.

⁵³ *ibid.*

⁵⁴ Case C-521/12 *Briels a.o. v Minister van Infrastructuur en Milieu* [2014] EU:C:2014:330 and Case C-399/14 *Grüne Liga Sachsen a.o. v Freistaat Sachsen* [2016] EU:C:2016:10.

⁵⁵ *ibid.*

⁵⁶ Joined Cases C-387/15 and C-388/15 *Orléans a.o. v Vlaams Gewest* [2016] EU:C:2016:583.

⁵⁷ *ibid.*

⁵⁸ E Lees, ‘Concretising the precautionary principle in habitats protection – *Grüne Liga Sachsen v Freistaat* and *Orléans v Vlaams Gewest*’ (2017) 19(2) *Environmental Law Review*, 126.

⁵⁹ Joined Cases C-293/17 and C-294/17 *Coöperatie Mobilisation for the Environment UA a.o. v College van gedeputeerde staten van Noord-Brabant* [2018] EU:C:2018:882.

⁶⁰ *ibid.*

scientific doubt as to the absence of adverse effects of each plan or project on the sites, and that the national court has to carry out a thorough and in-depth examination of the scientific soundness of the appropriate assessment.

In short, the precautionary principle in EU law means that the authority or the initiator bears the burden of proof if the threshold of uncertain and significant environmental risks has been exceeded. The standard of proof varies depending on the situation. If protective measures are taken based on the precautionary principle, there must be a sufficient evidentiary basis for the conclusion that real harm to the environment is likely, but scientific certainty is not required. If, on the other hand, the authority wants to allow an activity with potential environmental risks, the standard of proof becomes more substantial. In particular, the Habitats Directive and the case law require a prior risk assessment without lacunae which must contain complete, precise, and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of those activities. There is very little room for scientific uncertainty: appealing parties must make it plausible that the risk assessment is incomplete or inconclusive with the consequence that the level of scientific uncertainty becomes too high to base a positive decision on that assessment.

5. The precautionary principle applied by Dutch administrative courts

In Dutch administrative law, the precautionary principle has no direct national legal basis and is not recognized as a general national principle of law.⁶¹ If appellants invoke this principle, the court has to put these grounds of appeal into the right context. If the grounds of appeal refer to the implementation of environmental EU law, like the Habitats Directive, the precautionary principle must be applied according to the case law of the CJEU and ECG. If there is no reference to EU secondary law, the precautionary principle is usually applied according to the case law of the ECtHR. In the recent case *Windpark Greenport Venlo*⁶², however, the ABRvS seemed to recognise a broader application of the precautionary principle extending beyond the boundaries of the case law of the CJEU, ECG and the ECtHR.⁶³ This distinction is of importance, because it can lead to different procedural positions and outcomes.

⁶¹ MGWM Peeters, 'Het voorzorgsbeginsel en de rechtsvormende taak voor de (Nederlandse) bestuursrechter' in AW Heringa and others, *Het bestuursrecht beschermd* (Sdu Uitgevers 2006) 189.

⁶² ABRvS 18 December 2019, ECLI:NL:RVS:2019:4210.

⁶³ *ibid.*

In the case *Windpark Drentse Monden and Oostermoer*⁶⁴, the appellants referred to the precautionary principle as mentioned in Article 191 TFEU.⁶⁵ They argued that the lack of scientific evidence on the possible health risk of low frequency noise of wind turbines must lead to the application of the precautionary principle and the subsequent annulment of the decision. Within the context of the environmental impact assessment that had already been carried out, the ABRvS pointed out that the precautionary principle does not imply that the competent authorities had to refuse their authorization because some scientific reports referred to a possible link between wind turbines and health risks. The ABRvS thereafter puts the burden of proof on the appellants, given the fact that the competent authorities had already provided elaborate research on the effects of the wind park. Thus, if the appellants refer to the precautionary principle based on EU law, the competent authorities first bear the burden of proof. However, if the required prior risk assessment has been made by the authorities, the appellants will bear the burden of proof to disprove the soundness of this assessment. Under those circumstances, they will have to make it plausible that this risk assessment is flawed to the extent that the assessment cannot form the basis for the decision. It is insufficient to merely point out that scientific counterevidence exists. Only if this counterevidence leads to the conclusion that the potential risks have been underestimated in the risk assessment, and the decision on the acceptability of the adverse effects could be unreasonable, does the court have to annul the positive decision made on the basis of this assessment.

In the context of the Habitats Directive, the level of standard of proof on the appellants is lower because of the fact that the national court has to carry out a thorough and in-depth examination of the scientific soundness of the appropriate assessment made by the authorities or the initiator of the project. This appropriate assessment must contain complete, precise, and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the plan or project proposed on the protected site concerned. A plan or project may only be authorized if it will not adversely affect the integrity of the protected site concerned. This leaves very little room for scientific uncertainty, and the margin of appreciation on the acceptability of the effects is non-existent in the context of Article 6(3) of the Habitats Directive. Given the complexity and vulnerability of ecosystems and the rapid decline of biodiversity in Europe, this strict application of the precautionary principle is understandable. However, it also imposes a serious obligation on the competent authorities and on the initiator, as their burden and level of standard of proof prior to deciding on the

⁶⁴ ABRvS 21 February 2018, ECLI:NL:RVS:2018:616.

⁶⁵ *ibid.*

plan or project is rather high. If appellants cast some relevant doubt as to the scientific soundness of the appropriate assessment and the potential risks involved, this will be sufficient to fulfil their burden and standard of proof.⁶⁶

In the *Chickfriend* case⁶⁷, the authorities referred to the precautionary principle as a basis for the decision to ban the export of contaminated poultry and eggs.⁶⁸ The CBB noted that this protective measure, based on the precautionary principle as mentioned in Article 7 of the Food Safety Regulation⁶⁹ and resulting from the suspicion of exposure to the harmful substance fipronil, is inextricably linked with scientific uncertainty in the scientific assessment of the risk for public health. Due to this scientific uncertainty, the authorities have discretion in the application of the precautionary principle as well as the chosen measures, according to the CBB. This means the authorities do not have to wait until the risk becomes real, and even if the scientific uncertainty were to be eliminated at a later moment, this does not mean that the protective measure – given the available scientific data at that stage in the procedure – was disproportionate.

If, on the other hand, appellants refer to the precautionary principle based on Articles 2 and 8 ECHR, their burden and standard of proof is much higher. In the *UMTS-mast* case⁷⁰, the ABRvS concluded, on the basis of a report of the Health Council, that there are no indications that electromagnetic fields in the vicinity of telecommunication masts cause unacceptable health issues. However, the ABRvS added that later research has shown that some scientific uncertainty still remains on the possible health effects of electromagnetic fields due to the increasing use of mobile phones. This modified exposure pattern might lead to serious health risks, and this uncertainty therefore leads to a requirement of further research for the authorities. However, given the available reports in this case, the precautionary principle did not mean that the permit for the telecommunication mast had to be annulled.⁷¹ In this case, the level of standard of proof for the appellants is excessive and requires more than the plausibility that the prior risk assessment does not justify a positive decision because of too much scientific uncertainty.

⁶⁶ ABRvS 29 May 2019, ECLI:NL:RVS:2019:1603.

⁶⁷ CBB 15 October 2019, ECLI:NL:CBB:2019:494.

⁶⁸ *ibid.*

⁶⁹ Regulation (EC) No 178/2002 of The European Union and of The Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety [2002] OJ L31/1.

⁷⁰ ABRvS 5 December 2018, ECLI:NL:RVS:2018:3979.

⁷¹ *ibid.*

In two cases concerning permits for the expansion of existing livestock farms, the appellants referred to the precautionary principle and argued that the local authorities had to refuse the permits.⁷² According to them, there was sufficient scientific evidence demonstrating that intensive livestock farms may cause serious health problems, like Q fever, for local residents. The ABRvS concluded that there is no binding legal assessment framework on this topic, so the local authorities have some discretion on how to deal with these environmental risks. In these two cases, the authorities had chosen to use the recommended non-binding standard for endotoxin of the Health Council to assess the applications. The ABRvS judged, in the context of the precautionary principle based on Articles 2 and 8 ECHR, that it is up to the appellants to substantiate their argument that the local authorities can no longer rely on the available scientific research because of new and accepted scientific research on this topic. Even though the ABRvS stressed that there were still numerous questions on the health risks requiring further scientific research, the local authorities could rely on the limited available scientific research. The level of standard of proof for most appellants will be excessive, because they have to substantiate their grounds of appeal with extensive and generally accepted scientific data on a complex environmental topic. The lack of a legal framework on the subject of Q fever becomes an evidentiary disadvantage for the appellants, because it results in a margin of appreciation for the authority, according to the ABRvS. This translates into a strong evidentiary disadvantage for the appellants, because the ABRvS fails to assess whether, with the limited available scientific evidence, the State has met its due diligence requirement. It simply raises the level of standard of proof, while at the same time concluding that there still is substantial scientific uncertainty on serious health risks. This application of the precautionary principle leads to the authorization of a potential harmful activity on the basis of substantial scientific uncertainty only because appellants cannot meet the excessive level of standard of proof. The ABRvS takes insufficient consideration of the fact the precautionary principle in these cases is not used as justification of a protective measure, but as an obligation that has to be met before authorizing potentially harmful activities. This leads to an unrealistic level of standard of proof for the appellants which goes beyond making plausible that the degree of scientific uncertainty is too high and entails substantial scientific counterevidence. This application of the precautionary principle ignores the positive obligation of the State to provide effective deterrence against threats to private and family life within a sufficient legislative framework designed to do so.

⁷² ABRvS 25 July 2018, ECLI:NL:RVS:2018:2395 and ABRvS 27 February 2019, ECLI:NL:RVS:2019:644, *Milieu & Recht* 2019/76, with comment BAH Bleumink en KJ de Graaf and *Tijdschrift voor Agrarisch recht*, volume 4, April 2019, nr. 5980, with comment PPA Bodden.

In the abovementioned case *Windpark Greenport Venlo*, the ABRvS notes that Article 191(2) TFEU relates to union policy on the environment, and that this Article may not be invoked by individuals.⁷³ As the relevant topic of health risks related to low frequency noise is not regulated by secondary EU law, this means the application of the precautionary principle on the basis of Article 191(2) is not applicable. In *Windpark Greenport Venlo*, Articles 2 and 8 of the EHRM were not invoked. Nevertheless, the ABRvS judged that the precautionary principle applied as part of the balance of spatial interests, required by the Dutch Spatial Planning Act. For the application of the precautionary principle merely based on the Dutch Spatial Planning Act, the ABRvS refers to the Communication from the Commission on the precautionary principle from 2000. This is a landmark judgment because it means that the precautionary principle based on Article 191(2) TFEU now applies in all spatial planning cases based on the Dutch Spatial Planning Act – even those cases without any connection to EU secondary law. However, it remains to be seen whether this will become fixed case law of the ABRvS.

6. Conclusions

The application of the precautionary principle and the distribution of the burden and standard of proof in environmental cases is not univocal. The precautionary principle as applied by the CJEU and the EGC has different objectives than the precautionary principle as applied by the ECtHR, which is limited to the human rights of Articles 2 and 8 ECHR; this means that its scope is different. Only if real and immediate environmental risks can be linked to the right to respect for private life and family life will the ECtHR apply the precautionary principle. Furthermore, the positive obligation to adopt appropriate protective measures in the context of these human rights comes with a wide margin of appreciation for the authorities. The standard of proof consists of proving that the required due diligence has been met. This means that the State has to prove that, on the basis of a prior scientific assessment, timely and effective measures have been taken to minimize a real environmental risk to an acceptable level. The available means and the policy priorities can also play a role in the decision on which measures could be taken, because the precautionary principle cannot lead to an impossible or disproportionate burden for the State.

⁷³ ABRvS 18 December 2019, ECLI:NL:RVS:2019:4210, para 29 – 29.3.

The precautionary principle applied by the CJEU and EGC has a much broader scope, because it aims to protect the environment as well as public health. Although the CJEU and the EGC also recognize some discretion for the competent authorities at the stage of determining the acceptable risks and by choosing the suitable measures, the case law is much more detailed and stricter. This margin of discretion is reduced by the pursued high level of protection of the environment and public health and by the specific requirements of EU secondary law. The standard of proof varies depending on the situation: if protective measures are taken based on the precautionary principle, there must be a sufficient evidentiary basis for the conclusion that real harm to the environment is likely, but absolute scientific certainty is not required. If, on the other hand, the authority or the initiator wants to allow an activity that has potential environmental risks, then the standard of proof becomes more substantial; a risk assessment is required, based on the best available scientific data, with the conclusion that the risks are acceptable in the context of a high level of protection of the environment.

When Dutch administrative courts apply the precautionary principle, it is important to define the legal basis of the precautionary principle. Unfortunately, the courts sometimes fail to do so, and even when they do define the legal basis, this sometimes leads to divergent applications of the principle. What stand out is that the precautionary principle based on EU law seems to be applied rather consequently and correctly, because the case law on the precautionary principle of the CJEU and the EGC is more advanced and detailed. In this context, it is also worth noting that the ABRvS has recently ruled that the precautionary principle based on Article 191(2) TFEU also applies in spatial planning cases without any link to EU secondary law – which means that the scope of the EU precautionary principle has been significantly widened in the Netherlands. The burden of proof and the standard of proof do not usually lead to unacceptably unequal procedural positions, both in cases concerning protective measures as well as cases concerning the authorization of potential harmful activities. In the latter category, it will be sufficient if appellants cast some relevant doubt as to the scientific soundness of the appropriate assessment and the potential risks involved, to fulfil their burden and standard of proof. The precautionary principle based on the case law of the ECtHR, on the other hand, seems to cause more problems for Dutch administrative courts. The wide margin of appreciation, in combination with a too limited judicial review of the due diligence requirement, means that appellants can face unsolvable evidentiary problems, as illustrated by the UMTS and Q fever cases. As a result of this national application of the precautionary principle, the appellants were placed in unequal procedural positions, which was unacceptable given the fact that substantial scientific uncertainty was determined by the Court and that serious risks to the environment as a result of the positive decision on the activities could not be ruled out. The appellants were faced with an unrealistic level of standard of proof which went

far beyond making plausible that the degree of scientific uncertainty was too high for a positive decision and entailed complex substantial scientific counterevidence.

In short, when applying the precautionary principle, the national courts have to determine what is the legal basis of the principle, because there are substantial differences between the precautionary principle based on EU law and based on the ECHR. Furthermore, it is important to distinguish between taking protective measures justified by the precautionary principle, or allowing potential harmful activities in compliance with this principle, with it functioning as an obligation for the authority. This distinction should be decisive for the level of standard of proof for appellants. If they appeal against a positive decision concerning a potential harmful activity, the level of standard of proof should not exceed casting some relevant doubts as to the scientific soundness of the prior risk assessment executed by the authority or the initiator. If they make plausible that the risk assessment exceeds the level of scientific uncertainty to make a reasonable decision on the acceptability to environmental risks, their standard of proof should be fulfilled. A higher level of standard of proof leads to unacceptably unequal procedural positions for appellants in complex environmental cases.

Europeanisation of the Proportionality Principle in Denmark, Finland and Sweden

Henrik Wenander*

Professor of Public Law at Lund University, Sweden

Abstract

Under the influence of EU law and the ECHR, proportionality has developed into a central feature of contemporary European administrative law, at both national and Union level. The article examines this development with respect to the three EU Member States, namely Denmark, Finland, and Sweden. These Nordic legal systems share certain fundamental conceptions of law, such as: the limited importance of legal formalities and the associated 'pragmatism'; the more limited role of all-embracing legal principles; and the central role of and trust in the legislator. These Nordic experiences may therefore differ from both continental ('civil law') and Anglo-Saxon ('common law') attitudes to proportionality, and may contribute to the bigger picture of some features of the Europeanisation phenomenon. The main question for the article is how the principle of proportionality in administrative law has developed and responded to this European influence in the three states.

I. Introduction

Proportionality in a broad sense is closely related to the very concept of law. We need only think of Iustitia – the personification of law – with her scales, balancing interests against each other.¹ Although the terms and concepts in this field have varied and developed over time, some requirements of reasonableness and similar notions have existed in Western legal thinking for a very long time.² Proportionality in the modern sense is also undoubtedly a central feature of contemporary European administrative law, at both national and Union level. Furthermore, the concept is enshrined on the constitutional level in many legal systems. The principle today is often described as consisting of three elements: a measure must be suitable for achieving its (legitimate)

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¹ See, generally, B Schlink, 'Proportionality (1)' in M Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Law* (OUP 2012) 719.

² J Schwarze, *European Administrative Law* (rev 1st edn, Sweet & Maxwell 2006) 678f.

purpose; it must be necessary in the sense that less restrictive measures are not sufficient for this purpose; and it is proportional in the strict sense, i.e. that the general good outweighs the restriction involved.³

As is well known, the concept of proportionality relates to concrete decision-making in administrative matters, for example when an authority considers what coercive means to use to carry out a decision effectively. Already in this scenario, the use of a proportionality principle in individual cases could, of course, be a matter of discussion. However, even more importantly, proportionality has also a constitutional dimension, as it relates to questions on the division of constitutional powers. For instance, who should be primarily responsible for balancing interests to decide which ends to reach, and the means to be used to reach those ends – the court or the legislator? In the European Union context, this constitutional question has yet another dimension, viz the distribution of competences between the EU and the Member State institutions. Developing Europeanisation, therefore, has the potential of being very controversial when it comes to the principle of proportionality. This may be the case especially in legal systems which traditionally focus on the role of the legislator as the democratically legitimate *locus* of public power, with courts taking a more deferential role.

In this contribution, I will examine how Europeanisation of the concept of proportionality has developed with respect to three legal systems of precisely this kind, namely in Denmark, Finland and Sweden. These Nordic experiences may differ from both continental ('civil law') and Anglo-Saxon ('common law') attitudes to proportionality, which have been treated extensively in European legal literature,⁴ and may therefore contribute to the bigger picture of some features of the Europeanisation phenomenon. By Europeanisation, I understand the continuous process of EU law and the European Convention on Human Rights (ECHR) influencing national administrative law.⁵ The main question for this contribution is how the principle of proportionality has developed and responded to European influence in the three Nordic EU Member States.

As a background, some comments are made on the concept of Nordic legal systems, especially concerning administrative law. Research in comparative law often discusses the five Nordic states – Denmark, Finland, Iceland, Norway and Sweden – as a distinct group of the continental legal family, or even as a

³ Concerning EU law Schwarze (n 2) 854ff; cf, however, with the four-pronged description in A Barak, 'Proportionality (2)' in M Rosenfeld and A Sajó (eds), *The Oxford Handbook of Comparative Law* (OUP 2012) 743ff.

⁴ Schwarze (n 2) 680ff. See, especially on English law, Robert Thomas, *Legitimate Expectations and Proportionality in Administrative Law* (OUP 2000) 285ff.

⁵ S Prechal, R Widdershoven and JH Jans, 'Introduction' in JH Jans, S Prechal and R Widdershoven (eds), *Europeanisation of Public Law* (2nd edn, Europa Law Publishing 2015) 4.

separate legal family.⁶ The term ‘Nordic’ normally refers to these five states, whereas ‘Scandinavian’ refers only to Denmark, Norway and Sweden, although the usage is not entirely consistent in international discourse.⁷ As Norway and Iceland are not members of the EU, they will not be dealt with in the following section. It should be borne in mind, however, that these states are parties to the EEA Agreement; therefore, they too are influenced by EU law principles, including the proportionality principle.⁸

Although Nordic legal thinking would be considered closer to continental law, not least German legal tradition, than to the common law originating from England, it still retains certain special features characteristic of the Nordic system.⁹ Among those special features, one can first mention the limited importance of legal formalities and the associated ‘pragmatism’ (implying a less conceptualised view of the law than in continental Europe). On a very general level, Nordic legal discourse prefers practical solutions to theoretical and abstract reasoning, although this preference may play out differently in different Nordic countries and in different fields of law. Furthermore, it has been argued that all-embracing legal principles have a more limited role in the Nordic legal systems, which rather seem to focus on solving legal problems on a lower level of abstraction. Generally, the Nordic countries have not adopted large codifications of the kind found in continental Europe. Finally, the high degree of trust in the legislator may be emphasised, whereas the courts have a more limited role.¹⁰

On this last point, one might use the legal historian van Caenegem’s idea of judges, legislators or professors being ‘the essential makers of the law’ for a legal system at a certain point in time.¹¹ Taking this perspective, the Nordic systems traditionally have focused on democratically legitimised legislators, including such practices as the use of *travaux préparatoires* indicating the ‘will

⁶ K Zweigert and H Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, OUP 1998) 273; M Bogdan, *Concise Introduction to Comparative Law* (Europa Law Publishing 2013) 76; J Husa, *A New Introduction to Comparative Law* (Hart 2015) 228.

⁷ U Bernitz, ‘What is Scandinavian Law?’ (2007) 50 *Scandinavian Studies in Law* 14, 15f.

⁸ C Baudenbacher and Theresa Haas, ‘Proportionality as a Fundamental Principle of EEA Law’ in C Baudenbacher (ed), *The Fundamental Principles of EEA Law* (Springer 2017) 195ff. See, as regards Norwegian law, K Harald Søvig, ‘Avslutning’ in K Harald Søvig (ed), *Forholdsmessighetsvurderinger i forvaltningsretten* (Fagbokforlaget 2015) and C C Eriksen and H H Fredriksen, *Norges europeiske forvaltningsrett. EØS-avtalens krav til norske forvaltningsorganers organisering og saksbehandling* (Universitetsforlaget 2019) 75ff.

⁹ J Husa, K Nuotio and H Pihjalämäki, ‘Nordic Law – between Tradition and Dynamism’ in J Husa, K Nuotio and H Pihjalämäki (eds), *Nordic Law – between Tradition and Dynamism* (Intersentia 2007) 7ff.

¹⁰ Bernitz (n 7) 15ff; J Husa, ‘Constitutional Mentality’ in P Letto-Vanamo, D Tamm and B Gram Mortensen (eds), *Nordic Law in European Context* (Springer 2019) 58 and H Krunke and B Thorarensen, ‘Introduction’ in H Krunke and B Thorarensen (eds), *The Nordic Constitutions. A Comparative and Contextual Study* (Hart 2018) 7.

¹¹ R C van Caenegem, *Judges, Legislators & Professors. Chapters in European Legal History* (CUP 1987) and P Koskelo, ‘Domare, lagstiftare och professorer’ [2014] *Svensk Juristtidning* 619.

of the legislator'.¹² Against this background, it comes as no surprise that none of the Nordic countries have established a constitutional court – a feature that could be seen as limiting the discretion of democratically elected and accountable politicians.¹³

Although there are strong common features, there are also important differences among the countries, owing to their differing historical and political developments. These differences are especially visible in the field of administrative law, where Denmark (as well as the other 'West-Nordic' states of Iceland and Norway) features a state administration mainly organised hierarchically under a minister in the governmental ministries. In the 'East-Nordic' states of Finland and Sweden, on the other hand, the central administration is organised as separate public bodies, which make decisions independently of the ministers to a considerable degree. These differences are linked to the varying legal structures for accountability and appeal of administrative decisions. Whereas Danish administrative decisions may be challenged before a general court, which conducts a rather strict legality review, the administrative courts of Finland and Sweden have a wider mandate, even including the possibility of amending the appealed decision in substance.¹⁴ These differences provide slightly different preconditions for the influence of European law in these countries.

Another difference, which may be linked to the historical and political developments during the twentieth century, is the constitutional role of the courts. Although the legal thinking of all three countries is based on trust in the legislator, Sweden has had an exceptionally strong political tradition of limiting the influence of judges on decisions made by elected politicians. The background to this has been an uninterrupted constitutional development based on structures which in part predate the ideas on separation of powers, and which therefore never held a strong position in Swedish legal thinking.¹⁵ Furthermore, and equally important, was the sceptical stance taken by the Social Democratic party regarding the protection of individual rights in courts; the party was the dominant political force in Sweden during most of the twentieth century.¹⁶ In combination with Scandinavian legal realism, the scepticism towards judicial

¹² J Husa, *Nordic Reflections on Constitutional Law. A Comparative Nordic Perspective* (Peter Lang 2002) 158.

¹³ H Krunke and B Thorarensen, 'Concluding Thoughts' in H Krunke and B Thorarensen (eds), *The Nordic Constitutions. A Comparative and Contextual Study* (Hart 2018) 206f.

¹⁴ N Fenger and O Mäenpää, 'Public Administration and Good Governance' in P Letto-Vanamo, D Tamm and B Gram Mortensen (eds), *Nordic Law in European Context* (Springer 2019) 174ff.

¹⁵ H Wenander, 'Geschichte der Verwaltungsgerichtsbarkeit in Schweden' in K Sommermann and B Schaffarzik (eds), *Handbuch der Geschichte der Verwaltungsgerichtsbarkeit in Deutschland und Europa* (Springer 2018) 1166.

¹⁶ I Cameron, 'Protection of Constitutional Rights in Sweden' [1997] *Public Law* 488, 504.

power has affected the constitutional thinking in the three countries.¹⁷ Although the Swedish constitution protects the independence of the judiciary, the *Regeringsform* 1974 (Instrument of Government) – the central constitutional act – is not explicitly based on the idea of separation of powers. In comparison, the constitutions of Denmark and Finland, although also based on the idea of trust in the legislator, provide a slightly clearer role for the courts. In Finland, the experiences from Russian rule and the Finnish civil war meant that the *Hallitusmuoto/Regeringsform* 1919 (Instrument of Government, the central constitutional act of the newly independent Republic) provided substantial legal mechanisms for the protection of individual rights.¹⁸ In Denmark, the *Danmarks Riges Grundlov* 1953 (the Constitution of Denmark) is also clearly based on a separation of powers, with a clear role for the judiciary in controlling the executive.¹⁹ These differences are of some importance for the impact of the proportionality principle and the division of tasks between the courts and the legislator.

Concerning methodology, the article aims at describing the legal changes – labelled ‘Europeanisation’ – in the three countries, as those changes are manifested in constitutions, legislation, case-law and academic legal discourse. It should be noted that it is very difficult to establish clear causal relations in the field of law by such study. For example, other factors besides the influences of EU law and the ECHR may account for different national legal systems following similar paths.²⁰ Of course, legal research using socio-legal methods to explore ‘legal cultures’ and similar, as well as research in political science, may contribute to the bigger picture of Europeanisation. Given the format of the article, the focus here is on the more central legal discussions.

As to the material for the article, I have primarily used documents in Scandinavian languages, which are mutually understandable, and English. When it comes to Finland, I have used materials in English and Swedish (an official language in Finland)²¹, as I do not read Finnish. Although the three legal systems resemble each other, I am grateful for the help from colleagues in assisting me in navigating these similar yet sometimes very different waters in the neighbouring countries.

¹⁷ J Reichel, ‘European Legal Method from a Swedish Perspective – Rights, Compensation and the Role of Courts’ in Ulla Nergaard, Ruth Nielsen and Lynn Roseberry (eds), *European Legal Method – Paradoxes and Revitalisation* (DJØF 2011) 250ff.

¹⁸ L Ervo, ‘Comparative Analysis Between East-Scandinavian Countries’ (2015) 61 *Scandinavian Studies in Law* 135, 144 and H Wenander, ‘Varför en rätt till domstolsprövning av förvaltningsbeslut? – Utvecklingslinjer i svensk och finsk rätt mot bakgrund av Europakonventionen’ in Richard Arvidsson and others (eds), *Festskrift till Wiweka Warnling Conradson* (Jure 2019) 446.

¹⁹ cf the Constitution of Denmark 1953, art 63.

²⁰ cf N Fenger, *Forvaltning og Fællesskab: Om EU-rettens betydning for den almindelige forvaltningsret: Konfrontation og frugtbar sagskkestens* (DJØF 2005) 153.

²¹ Suomen Perustuslaki/Finlands Grundlag (Constitution of Finland, 731/1999) art 17.

In the following section, I turn to the question of the Europeanised proportionality principle in the three Nordic EU states by first looking at the emergence of the principle in national law (Section 2). After this, I explore the tendencies of Europeanisation from around the beginning of the 1990s (Section 3). The developments in the early 1990s are central to the understanding of Europeanisation of Nordic public law, because this was when Finland and Sweden joined the EU. As will be dealt with there, this argument could also be made for Denmark, even though Denmark has been an EEC member since the early 1970s. In Section 4, I provide some concluding remarks and return to certain unresolved questions and possible future developments.

2. The Emergence of the Principle in National Law

To a certain extent, the Nordic legal systems have always been Europeanised. It is true that one of the defining features of Nordic law is the lack of a comprehensive reception of Roman law.²² Still, nowadays the importance of legal concepts from continental Europe for the development of Nordic legal traditions since the Middle Ages is clear:²³ research in legal history has shown that there is no substance in nineteenth-century romantic ideas of a pure Nordic tradition without external influences.²⁴ For example, the medieval laws of Sweden (which at that time also included today's Finland) included provisions requiring fairness in the use of public (royal) power. Such rules were most likely inspired by canon law.²⁵ Later on, various kinds of administrative ordinances could require a balance between ends and means, also through inspiration from continental theories.²⁶ Needless to say, these kinds of – possible – limitations to public power could not be equalled to contemporary requirements of proportionality. However, they illustrate that Nordic law has always been interlinked with continental European developments.²⁷

²² Krunke and Thorarensen, 'Introduction' (n 10) 7.

²³ P Letto-Vanamo and D Tamm, 'Cooperation in the Field of Law' in Johan Strang (ed), *Nordic Cooperation. A European Region in Transition* (Routledge 2016) 95f.

²⁴ S Strömholm, 'General Features of Swedish Law' in M Bogdan (ed), *Swedish Legal System* (Norstedts Juridik 2010) 10.

²⁵ Art. V § 3 Konungsbalken (The Book on the King) of Magnus Erikssons landslag (the Land Code of King Magnus Eriksson). Published in English in Ruth Donner (ed), *King Magnus Eriksson's Law of the Realm: a Medieval Swedish Code*, (Ius Gentium 2000).

²⁶ See, on early modern Sweden (including today's Finland), T Kotkas, *Royal Police Ordinances in Early Modern Sweden. The Emergence of Voluntaristic Understanding of Law* (Brill 2014) 209ff; cf with the reference to a kind of proportionality requirement in the 1771 ordinances from the Governor of Stockholm (*Överståthållaren*) by Ingrid Helmius, 'Proportionalitetsprincipen' in L Marcusson (ed), *Offentlighättsliga principer* (3rd edn, Iustus 2017) 134.

²⁷ D Tamm, 'How Nordic are the old Nordic Laws?' in D Tamm (ed), *The History of Danish Law. Selected Articles and Bibliography* (DJØF 2011).

To find the roots of today's proportionality principle in the EU Nordic countries, one has to look to much more recent history. As is well known, ideas of proportionality developed in German police law in the nineteenth century, and later expanded into other fields of administrative law as a separate principle. In the time after World War II, the principle also gained importance on a constitutional level in several legal systems.²⁸

This development was reflected in the laws of the Nordic countries, which at the time were under considerable influence from German law. Given the slightly different political and legal circumstances, the reception of the idea of proportionality was not identical in Denmark, Finland and Sweden. However, in all three countries, the idea of a principle of proportionality first appeared in the law regulating the police and their keeping of public order.

In Denmark, Poul Andersen – regarded as the founder of the academic study of administrative law in Denmark – concluded in 1936 that:

- the police may only use coercive means when it is necessary (that is, when other means are not sufficient);
- the limited use of force must be preferred over more far-reaching methods; and
- the use of force may not be disproportional, considering the public interest calling for protection.

Andersen referred here to previous legal discussions in Finland and Sweden, as well as to provisions in the police legislation of Prussia.²⁹

In Finland, the leading scholar of early administrative law, Kaarlo Juhani Ståhlberg (also the first President of independent Finland in 1919), pointed out that the use of force was limited by the requirement of support in legislation. For situations not regulated in legislation, he referred to a general principle of proportionality limiting the use of coercive means.³⁰

In Sweden, one of the early scholars of administrative law, Carl Axel Reuter-skiöld, claimed already in 1919 that the public-sector use of force was limited by a requirement of necessity.³¹ Later on, Nils Herlitz – one of the leading scholars of Swedish twentieth-century public law – acknowledged the existence of a proportionality principle, which limited the administrative authorities' use of discretion within the framework prescribed by legislation.³² Various Swedish

²⁸ Schwarze (n 2) 685ff.

²⁹ P Andersen, *Dansk Forvaltningsret. Almindelige emner* (Nyt Nordiskt Forlag – Arnold Busck 1936) 378f, with reference to the Preussisches Polizeiverwaltungsgesetz from 1931.

³⁰ K J Ståhlberg, *Finlands förvaltningsrätt. Allmänna delen* (Norstedts 1940) 432.

³¹ CA Reuterskiöld, *Föreläsningar i svensk stats- och förvaltningsrätt. II. Förvaltningen, 1 Politiförvaltningsrätt* (Almqvist & Wiksell 1919) 15.

³² N Herlitz, *Föreläsningar i förvaltningsrätt III. Förvaltningsrättsliga plikter* (Norstedts 1949) 545f. See also Halvar GF Sundberg, *Allmän förvaltningsrätt* (Institutet för offentlig och internationell rätt 1955) 669.

terms were – and to some extent still are – used for the elements of proportionality, such as the principle of necessity (*behovsprincipen*) or the principle of the least interference (*det lindrigaste ingreppets princip*).³³

As these references show, a principle of proportionality was clearly established in the administrative law of the three countries by the middle of the twentieth century. It should be noted that, since at least the late nineteenth century, Nordic legal scholarship had maintained contacts and discussions across borders, including the recurrent meetings of scholars and practitioners at the Nordic Lawyers' meetings (*Nordiska Juristmöten*) and other fora.³⁴ Therefore, to some extent, the developments in the three countries could be seen as a result of common Nordic discussions. In all three countries, references to proportionality in the works of this time were rather brief, and the principle was not frequently invoked in reported case-law.

It is possible that the wider scope of scrutiny available to parliamentary ombudsmen – an office established in all the three countries by the middle of the century – could have provided more room for considering the impact of the principle in individual matters.³⁵ In Sweden and Finland, the wide scope for assessment by the administrative courts may also have given room for pragmatic methods of coping with disproportionate measures.

When the principle of proportionality was established in this way in Denmark, Finland and Sweden, it was clearly a general principle of administrative law and not of constitutional law. The requirements of proportionality in the use of public power were not thought to generally limit the legislator by virtue of a general constitutional principle. There was, quite simply, no support for such a general principle in the written constitutions. Later, in the spirit of the developing welfare states of the 1960s and 1970s, it would have been problematic to think in terms of general principles limiting the scope for legislation. Rather, the focus was on the thorough process of democratically founded legislation, which was thought to provide reasonable results.³⁶ In this way, the legal culture of all three countries was based on a far-reaching trust in the mechanisms of the democratic system – in other words, an idea of 'the good state'.³⁷ In addition to this, the impact of Scandinavian Legal Realism in Denmark and Sweden meant that the very idea of legal principles existing beyond the written

³³ H Strömberg and Bengt Lundell, *Allmän förvaltningsrätt* (27th edn, Liber 2018) 74.

³⁴ P Letto-Vanamo and Ditlev Tamm, 'Nordic Legal Mind' in Pia Letto-Vanamo, Ditlev Tamm and Bent-Ole Gram Mortensen (eds), *Nordic Law in European Context* (Springer 2019) 2.

³⁵ N Herlitz, *Nordic Public Law* (Norstedts 1969) 189ff.

³⁶ Husa (n 10) 43. See, on the example of the Constitutional Law Committee of the *Eduskunta/Riksdag* (Parliament of Finland), M Hidén, 'Constitutional Rights in the Legislative Process' [1973] 17 *Scandinavian Studies in Law* 95, 123ff.

³⁷ Letto-Vanamo and Tamm, 'Nordic Legal Mind' (n 34) 8.

legislation could be criticised as metaphysical speculations about natural law without any value.³⁸

The use of the proportionality principle in administrative law was thus confined to the use of force, primarily by the police. The assessment of proportionality, then, concerned the use of discretion by the authorities within the scope provided by legislation.

Especially in the field of taxation, the demands of the expanding welfare state came to be at odds with ideas of fairness and proportionality in the 1970s: taking Sweden as a clear example, this tension was highlighted by certain events relating to tax law. In 1975, the world-famous director Ingmar Bergman was arrested for alleged tax fraud in front of his actors during rehearsals at the Royal Dramatic Theatre. He was later acquitted, but Bergman took offence and decided to emigrate. In the following year, the children's book author Astrid Lindgren found herself being taxed with 102 percent of her income, and wrote a satirical fairy-tale which spurred further political debate.³⁹ Although not necessarily acknowledged at the time, both situations actually encompassed aspects of proportionality, or rather the lack thereof, *viz* in the choice of means by the police and in the legislation.

From the 1970s and during the 1980s, there were tendencies to give more attention to matters of protection of individual rights and proportionality. This development was inspired in part by the developments in Western Europe, notably under the European Convention for Human Rights (ECHR) and under EU law.⁴⁰

Concerning Denmark, the country had been a member of the EU since 1973. Despite this, EU law and the EU principle of proportionality seem to have had relatively little impact on Danish legal thinking in constitutional and general administrative law until the 1990s. When it comes to the proportionality principle, the focus was very much on the domestic variety of the principle in administrative law. This may be explained by both a possible tendency of reluctance towards Europeanisation in Danish law and by the fact that the concept of European administrative law was first established in the late 1980s, especially following Jürgen Schwarze's seminal work (published in German in 1988 and some years later in English).⁴¹

In Finland, the traditional scepticism to constitutional protection beyond legislation slowly gave way during the late 1980s to an emerging human rights

³⁸ Reichel (n 17) 246ff and I Carlson, *The Fundamentals of Swedish Law* (2nd edn, Studentlitteratur 2012) 51ff.

³⁹ K Östberg and J Andersson, *Sveriges historia 1965–2012* (Norstedts 2012) 248f.

⁴⁰ For the sake of convenience, the contemporary term EU is used also for the time of the EEC and the EC.

⁴¹ On the attitudes in Danish Law, see Jürgen Schwarze, *Europäisches Verwaltungsrecht: Entstehung und Entwicklung im Rahmen der Europäischen Gemeinschaft* (Nomos 1988) and Jürgen Schwarze, *European Administrative Law* (Sweet & Maxwell 1992).

culture and to ideas of a ‘rights-based constitutionalism’.⁴² This development in academic discourse paved the way for subsequent changes in the written constitution (see below).

The Swedish constitutional reform of the 1970s included provisions on fundamental rights, with proportionality requirements for restrictions, similar to the provisions of the ECHR.⁴³ Traditional Swedish administrative structures, with their limited access to the administrative courts in matters considered to be better suited for a political balancing of interests, were challenged by a series of judgments against Sweden in the European Court of Human Rights (ECtHR).⁴⁴ However, following the pattern of deference to the legislator that was common to all three countries, constitutional review on grounds of proportionality was still very limited in Sweden.⁴⁵ On the administrative level, there were references to proportionality in the legislation regulating special administrative fields. A prominent example from Swedish law is the 1984 Police Act, which requires that a police officer exercising an official duty shall intervene in a way that is justifiable in view of the object of the intervention and other circumstances, and that the use of force shall be limited to what is necessary to obtain the intended result.⁴⁶

The Western European trend of awarding a greater degree of judicial and constitutional protection may be labelled constitutionalism or judicialisation; this development was not greeted with enthusiasm by all commentators in the Nordic countries. In 1990, Professor Bent Christensen, a leading scholar of Danish administrative law, concluded that the distribution of roles between the legislator and the courts was being challenged. He described how courts adjudicating administrative cases traditionally had taken a deferential position in relation to the legislator. Taking this view, it was not for the courts to put themselves in the place of the elected politicians and balance interests beyond what could be concluded from the established sources of law. However, Christensen noted, the development in Western Europe during the preceding decade – especially as regards the jurisprudence of the ECtHR – had gradually shifted the distribution of roles: courts, especially the constitutional courts in

⁴² Tuomas Ojanen, ‘The Europeanization of Finnish Law’ in Kimmo Nuotio, Sakari Melander and Merita Huomo-Kettunen (eds), *Introduction to Finnish Law and Legal Culture* (Forum Iuris 2012) 102ff.

⁴³ The provisions are now found in the Instrument of Government 1974, ch 2 art 21. See further Joakim Nergelius, *Constitutional Law in Sweden* (2nd edn, Wolters Kluwer 2015) 109f.

⁴⁴ Henrik Wenander, ‘Sweden: European Court of Human Rights Endorsement with some Reservations’ in P Popelier, S Lambrecht and K Lemmens (eds), *Criticism of the European Court of Human Rights Shifting the Convention System: Counter-dynamics at the National and EU Level* (Intersentia 2017) 242.

⁴⁵ Cameron, ‘Protection of Constitutional Rights in Sweden’ (n 16) 503ff.

⁴⁶ *Polislag* (Police Act, Swedish Code of Statutes [*Svensk författningssamling, SFS*] 1984:387) s 8; H Ragnemalm, ‘Administrative Justice in Sweden’ in A Piras (ed), *Administrative Law: the Problem of Justice. Vol. 10 Anglo-American and Nordic systems* (Giuffrè 1991) 421.

some countries, no longer hesitated to assess the choices of the legislator in a way alien to traditional constitutional arrangements. He criticised this development, because he held that the political arena was better suited for solving societal conflicts than the courts.⁴⁷ In much the same way, Antero Jyränki, Professor of Public Law at Turku University, expressed concerns, describing the acceptance of the ECHR as a distrust of Finnish democracy.⁴⁸ In Sweden, the same kind of arguments were put forward in legal and political debate.⁴⁹

This critique reflected the traditional far-reaching trust in the legislator to act within constitutional boundaries, and the scepticism to judicial power, existing in all three countries. It also relates to the separation of powers, or more pragmatic division of labour, between the legislator and the courts.

3. Tendencies of Europeanisation – from the 1990s onward

From the early 1990s, development continued, focusing on increased constitutional protection of individual rights towards the state and on judicial review. This development was spurred by the constitutional Europeanisation through the influence of the ECHR and EU law.⁵⁰ As is often the case in legal development, the direct causal relations are not easy to follow.

When it comes to the ECHR, Denmark and Sweden have been parties to the convention since the early 1950s.⁵¹ However, in the dualist tradition of the two legal systems, the convention had not been considered as directly applicable in legal proceedings in national courts, and therefore its impact on case-law had been fairly limited.⁵² In the 1990s, both Denmark and Sweden incorporated the convention as national acts of law.⁵³ For Sweden, the reason was its approaching accession to the EU: because the ECHR formed part of EU law, it was deemed necessary to award it a corresponding status under domestic Swedish

⁴⁷ See, for this discussion, B Christensen, 'Domstolene af lovgivningsmagten' [1990] Ugeskrift for Retsvæsen B 73, 81ff.

⁴⁸ A Jyränki, 'Taking Democracy Seriously. The Problem of the Control of the Constitutionality of Legislation. The Case of Finland' in M Sakslin (ed), *The Finnish Constitution in Transition. Finnish Contributions to the Third World Congress of the International Association of Constitutional Law, Warsaw, 2–5 September 1991* (The Finnish Society of Constitutional Law 1991) 14f.

⁴⁹ Reichel (n 17) 258.

⁵⁰ For an early account of the challenges of Europeanisation in Sweden, see H Vogel, 'Svensk allmän förvaltningsrätt och den västeuropeiska integrationen' [1989] Förvaltningsrättslig Tidskrift 159.

⁵¹ Sweden ratified the convention in 1952 and Denmark in 1953.

⁵² See, concerning Sweden, Wenander (n 44) 241f.

⁵³ In Denmark: Lov nr. 285 af 29. april 1992 om Den Europæiske Menneskerettighedskonvention. In Sweden: Lag (1994:1219) om den europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna.

law.⁵⁴ The incorporation made it easier for the Swedish Parliamentary Ombudsman, as well as for the courts, to refer to the articles of the convention in their decisions.⁵⁵

In Denmark, the incorporation had a similar effect. Legal scholarship has subsequently observed how the Supreme Court used the wording from the European Court of Human Rights (ECtHR) case-law in a case relating to the proportionality of restrictions on the freedoms of speech, association and assembly, but adapted the reasoning to the context of the Constitution of Denmark.⁵⁶ This clearly indicates a certain extent of Europeanisation.

The Finnish experience is somewhat different, as Finland could not sign the convention until 1989. The reason for the late accession was the previous delicate relation to the Soviet Union; Finland later incorporated the ECHR in its domestic legal system in 1990.⁵⁷ The introduction of the convention into Finnish law was later labelled ‘one of the most important turns in Finnish constitutional history’.⁵⁸ This change (as well as the EU accession, see below) coincided and was in interplay with a major constitutional reform strengthening the protection of individual rights under the new Constitution of Finland, which entered in force in 2000.⁵⁹

Concerning the impact of EU law, Denmark, as mentioned, had been a member since 1973, whereas Sweden and Finland joined the union in 1995. At this time, the impact of EU law on national administrative law had not yet been acknowledged in the Nordic countries. However, the 1990s witnessed a rather drastic development in the three legal systems here discussed. This also applied to the proportionality principle, which gained more interest than it had held in previous years.

In Denmark, in 1994, Michael Hansen Jensen (later Professor of Constitutional Law at Aarhus University) highlighted the role of the proportionality principle under EU law as a limitation on the national legislator, parallel to the

⁵⁴ I Cameron, *An Introduction to the European Convention on Human Rights* (8th edn, Iustus 2018) 195f.

⁵⁵ Cameron, ‘Protection of Constitutional Rights in Sweden’ (n 16) 502, 512.

⁵⁶ H Krunke and T Baumbach, ‘The Role of the Danish Constitution in European and Transnational Governance’ in A Albi and S Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (TMC Asser Press 2019) 283, with reference to the Danish Supreme Court Case U 1999.1798 H.

⁵⁷ Laki ihmisoikeuksien ja perusvapauksien suojaamiseksi tehdyn yleissopimuksen ja siihen liittyvien lisäpöytäkirjojen eräiden määräysten hyväksymisestä/Lag om godkännande av vissa bestämmelser i konventionen om skydd för de mänskliga rättigheterna och de grundläggande friheterna samt i tilläggsprotokollen till konventionen: 438/1990.

⁵⁸ T Ojanen and J Salminen, ‘Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism’ in A Albi and S Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (TMC Asser Press 2019) 363.

⁵⁹ T Ojanen, ‘The Impact of EU Membership on Finnish Constitutional Law’ (2004) 10 *European Public Law* 531, 558.

limitations applicable to restrictions of fundamental rights. In this context, he also discussed whether there was a domestic Danish constitutional principle of proportionality, also limiting the legislator's choices beyond EU law and restriction of fundamental rights.⁶⁰ This was clearly a break from older traditions. Although the Danish Administrative Procedure Act lacked – and still lacks – a provision on the proportionality principle, it has seemingly been viewed as being rather unproblematic in the Danish legal discourse of the last few decades. In the case-law of the Supreme Court and of High Courts (appeal courts), there are several examples of proportionality assessments, also in situations when EU law or the ECHR are not applicable.⁶¹

It may be noted that the Danish and the European principle are not considered to be identical.⁶² For example, legal scholarship has discussed the extent to which the Danish proportionality principle requires a measure to be suitable in the same way as the proportionality principle under EU law does (the first element of the traditional proportionality principle).⁶³

In Finland, the EU accession (and the incorporation of the ECHR, see above) coincided with a constitutional reform, which reinforced protection of individual rights. In this way, the role of the courts under EU law meant that the traditional restrictive view on constitutional review had to be abandoned in purely internal situations as well. The new Constitution of 1999, which entered in force in 2000, introduced a written rule on constitutional review.⁶⁴ Finnish legal scholarship has, moreover, generally concluded that EU membership greatly strengthened the role of the courts.⁶⁵ Furthermore, in 1994, the Constitutional Committee of the *Eduskunta/Riksdag* (the Finnish Parliament) – the central body for interpreting the Constitution, in some respects parallel to a constitutional court – established the principle that restrictions on constitutional rights must fulfil a criterion of proportionality.⁶⁶ It should be noted that the Constitutional Committee regularly hears experts, including those from professors of

⁶⁰ See, for this discussion, M Hansen Jensen, 'Proportionalitetsprincippet i forfatningsretlig belysning' [1994] Ugeskrift for Retsvæsen B 335, 340f.

⁶¹ See examples in N Fenger (ed), *Forvaltningsret* (DJØF 2018) 361f, with reference to the Supreme Court case U 2003.1660 H concerning public employment.

⁶² N Fenger, 'Europarettens indflydelse på nordisk forvaltningsret' in *Det 41 nordiska juristmötet i Helsingfors* (41 nordiska juristmötet 2018) 147f.

⁶³ Fenger (ed), *Forvaltningsret* (n 61) 362.

⁶⁴ Constitution of Finland 1999, art 106; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' (n 59) 558.

⁶⁵ Ojanen and Salminen (n 58) 363.

⁶⁶ GrUB (*Grundlagsutskottets betänkande*, Report of the Constitutional Law Committee) 25/1994 om regeringens proposition med förslag till ändring av grundlagarnas stadganden om de grundläggande fri- och rättigheterna 4 f; Ojanen and Salminen (n 58) 379f.

constitutional and administrative law, meaning that there is room for direct influence from academia on constitutional interpretation.⁶⁷

In 2003, a provision on the principle of proportionality was introduced in the Finnish Administrative Procedure Act.⁶⁸ One of the main reasons for adopting a new act of law had to do with the requirements of EU law.⁶⁹ The Supreme Administrative Court has referred to the provision and the principle in several cases; notably, the Supreme Administrative Court has held that the use of the principle is limited by applicable legislation in the individual situation. In a case on an excess emissions penalty fee under the framework for greenhouse gas emission allowance trading (KHO 2009:78), the Supreme Administrative Court stated that the provision in the relevant Finnish Act was absolute, and did not support any adjustment of the fee.⁷⁰ The latter statement would seem to imply that the principle cannot be used to set aside requirements in Finnish legislation (save for situations where European law takes precedence). In contrast with Danish law, Finnish law does not seem to treat domestic and European proportionality principles as being different in substance.

Perhaps the clearest impact of the principle is found in Sweden, motivating a more detailed account in this article of the developments. A number of cases before the Supreme Administrative Court highlighted the growing importance of the proportionality principle from the mid-1990s. At this point in time, there was no general provision on proportionality in the Swedish Administrative Procedure Act, and although the principle was mentioned in legal literature (see Section 2), it was rarely used in case-law.⁷¹ As stated above, the principle was primarily relevant in interventions for maintaining public order and safety. Legal scholarship therefore concluded that wider use of the principle constituted a challenge for the Swedish public administration.⁷²

In 1996, however – one year after Sweden joined the EU – the Supreme Administrative Court expressly confirmed that a more general principle of

⁶⁷ J Lavapuro, T Ojanen, and M Scheinin, 'Rights-based Constitutionalism in Finland and the Development of Pluralist Constitutional Review' (2011) 9 *International Journal of Constitutional Law* 505, 510f.

⁶⁸ Hallintolaki/Förvaltningslag (Administrative Procedure Act, 434/2003) s 6. See further O Mäenpää, 'The Rule of Law and Administrative Implementation in Finland' in K Nuotio, S Melander and M Huomo-Kettunen (eds), *Introduction to Finnish Law and Legal Culture* (Forum Iuris 2012) 194f.

⁶⁹ M Niemivuo, 'The Finnish Administrative Procedure Act' (2004) 10 *European Public Law* 461, 463.

⁷⁰ A summary of the case has been published in Swedish as HFD (*Högsta förvaltningsdomstolens årsbok*, Yearbook of the Supreme Administrative Court) 2009:78, whereas the full judgment is published in the Finnish version *Korkein hallinto-oikeuden vuosikirja*, KHO. See also Heikki Kulla, *Förvaltningsförfarandets grunder* (Talentum 2014) 116ff.

⁷¹ X Groussot, 'Proportionality in Sweden: The Influence of European Law' (2006) 75 *Nordic Journal of International Law* 451, 452.

⁷² H Vogel, 'Förvaltningslagen, EG:s förvaltningsrätt och EG:s "allmänna rättsprinciper"' [1995] *Förvaltningsrättslig Tidskrift* 249, 258.

proportionality existed in Swedish law. The court based this finding on previous case-law and on the incorporation of the ECHR in Swedish law. In two of these cases, which concerned measures for the protection of nature, it quashed decisions that were too far-reaching in limiting the use of land in relation to the aims of the legislation.⁷³ In another such case, the court further held that a decision not to grant exemption from a statutory rule on land protection was disproportionate and should be changed.⁷⁴ In this way, the use of the proportionality principle, by force of both domestic law and the ECHR, had clearly moved beyond the traditional function of limiting the use of force by the police and similar authorities.⁷⁵

The impact of a Europeanised proportionality principle (as well as several other public law principles) was highlighted further in the *Barsebäck* case, which dealt with the Governmental decision to close a nuclear plant. The background was that for decades, the use of nuclear energy had been a highly controversial matter in Swedish politics. In the case, the applicant energy company put forward a number of legal arguments relating to Swedish constitutional law, the ECHR and EU Law. When assessing the legality of the Governmental decision in the matter, the Supreme Administrative Court conducted a proportionality test, explicitly discussing the three elements of proportionality – *viz* suitability, necessity, and proportionality in the strict sense. Concerning proportionality, the court held that it should only depart from the assessment by the Government if the relation between the public interest and the limitation on the individual was clearly disproportionate. The court concluded that this was not the case.⁷⁶ A significant number of leading Swedish public law scholars of the time were involved as experts on either side, and the case highlighted the commercial role of public law in Sweden. Moreover, The case serves as an example of how EU law and the proportionality principle bring about judicialisation, with legal discourse taking over fields previously considered as political in nature. The Supreme Administrative Court was criticised for its perceived deference to the Government.⁷⁷

The impact of EU law also made it necessary for Swedish law to consider proportionality. Of particular interest here are the politically sensitive areas of monopolies for alcohol and gaming. In the *Franzén* and *Rosengren* cases (concerning the private selling of alcohol and the private import of wine, respectively), the Court of Justice of the European Union (CJEU) found various aspects of

⁷³ RÅ (*Regeringsrättens Årsbok*, The Yearbook of the Supreme Administrative Court) 1996, ref 40 and RÅ 1996, ref 56.

⁷⁴ RÅ 1996, ref 44.

⁷⁵ See further on the cases Groussot (n 71) 466f.

⁷⁶ RÅ 1999, ref 76 under the heading 5.5.

⁷⁷ Groussot (n 71) 460ff and J Nergelius, 'Constitutional Law' in M Bogdan (ed), *Swedish Legal System* (Norstedts Juridik 2010) 62f.

Swedish alcohol legislation disproportionate.⁷⁸ In a few cases, the Supreme Administrative Court also assessed the proportionality of Swedish legislation under EU law. In the 2004 *Wermdö Krog* case on gaming monopoly, as well as in a 2009 case on the commercial import of alcohol, the Supreme Administrative Court – without reference to the CJEU – concluded that the Swedish measures were not violating the principle of proportionality. The Supreme Administrative Court took into account that the case-law of the CJEU allows for limitations of the freedoms under the EU Treaties in these sensitive fields.⁷⁹ The reasoning of the Court may be seen as opening for a form of sector-specific application of the principle of proportionality. Especially the assessment in the *Wermdö Krog* case concerning the gaming monopoly was critically discussed in legal discourse as an example of how Europeanisation blurs the traditional line between law and policy, and makes it necessary for courts to assess controversial matters previously seen as political questions.⁸⁰ In general, Swedish legal scholarship has noted that the proportionality principle, as well as other aspects of EU and ECHR law, requires a more complex balancing of interests than the traditional application of clear, written rules.⁸¹ Taking this kind of role could be awkward for a judge who is accustomed to a clearer legal role of applying rules where the difficult balancing act is left to the politicians and machinery of legislative drafting.

Notably, the Swedish courts – still without a provision in written legislation – started to make proportionality assessments outside the traditional field of police law and the more recent fields of fundamental rights, the ECHR or EU law. Examples include decisions on repayment of housing allowance, the adoption of a local plan (for land-use planning), and the duty of a liquidator of a company to pay the company's remaining taxes. In all these cases, the Supreme Administrative Court could apply the principle by referring to the scope for discretion in the applicable legislation, with wordings such as 'special circumstances' etc.⁸² Consequently, the link to the scope for discretion provided by the applicable legislation would seem to provide a basis for adapting the use of the principle to sector-specific considerations.

⁷⁸ Case C-189/95 *Franzén* [1997] EU:C:1997:504, para 76 and Case C-170/04 *Rosengren* [2007] EU:C:2007:313, para 58.

⁷⁹ RÅ 2004, ref 45 ('*Wermdö Krog*', on gaming monopoly) and RÅ 2009, ref 83 (on the commercial import of alcohol).

⁸⁰ N Wahl, 'Vad är oddsden för att det svenska spelmonopolet är förenligt med EG-rätten? – Regeringsrättens dom i *Wermdö Krog*' [2005] *Europarättslig Tidskrift* 119, 127f and O Wiklund and H Bergman, 'Europeiseringstendenser och domstolskritik i svensk rätt – Regeringsrättens domar i spelmålen' [2005] *Europarättslig Tidskrift* 713, 727.

⁸¹ cf C Moëll, *Proportionalitetsprincipen i skatterätten* (Juristförlaget i Lund 2003) 304f.

⁸² RÅ 2003, ref 41 and RÅ 2012, ref 12. See further Henrik Wenander, 'Proportionalitetsprincipen i 2017 års förvaltningslag' [2018] *Förvaltningsrättslig Tidskrift* 443, 447ff.

The limits of the principle were made clear in a case from 2015 on the revocation of a driving licence owing to drink-driving.⁸³ The relevant legislation allowed for the more lenient measure of requiring an alcolock instead of revoking the driving licence, provided that the driver did not also consume narcotics. This legislation did not lay down any exceptions to this rule. In the case, however, the applicant had taken medicines that were classified as narcotics, according to a physician's prescription. One judge held that, in such a case, the court could deviate from the written legislation with reference to the proportionality principle, particularly as the lack of exceptions in legislation was likely a mistake in the drafting of the relevant act of law. The majority of the court, contrastingly, did not comment on the proportionality principle and decided that the driving licence should be revoked.⁸⁴ The dissenting judge, writing extra-judicially, later concluded that the outcome of the case clarifies that the scope for proportionality assessments is limited by the relevant legislation, and the principle is therefore of limited use to courts as a constitutional principle.⁸⁵ In 2017, the legislation was amended so that an alcolock would be allowed in such situations,⁸⁶ and the Government referred to the Supreme Administrative Court judgment in its proposal.⁸⁷ This illustrates the traditional distribution of roles between the legislator and the courts.

In 2011, in the revision of the *Regeringsform* (Instrument of Government), Sweden introduced the proportionality principle in a new area on the constitutional level. Now, in a new chapter on the constitutional position of local government (municipalities and regions), a special provision on proportionality requires that restrictions in local self-government 'should not exceed what is necessary with regard to the purpose of the restriction'.⁸⁸ This proportionality assessment, however, is intended to be carried out by the *Riksdag*, and not in constitutional review by courts.⁸⁹

Furthermore, the proportionality principle was also important for the new Swedish Administrative Procedure Act of 2017. One of the leading ideas behind

⁸³ HFD 2015, ref 16.

⁸⁴ A Jonsson Cornell in cooperation with Thomas Bull, Lars Karlander and Anna-Sara Lind, 'Developments in Swedish Constitutional Law: The Year 2015 in Review' (*Blog of the International Journal of Constitutional Law*, 2 November 2016) <www.icconnectblog.com/2016/11/developments-in-swedish-constitutional-law-the-year-of-2015-in-review/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+I-CONnectBlog+%28I-CONnect+Blog%29> accessed 11 November 2019.

⁸⁵ T Bull and A Jonsson Cornell, 'Sweden: Developments in Swedish Constitutional Law' in R Albert et al (eds), *The I-CONnect – Clough Center 2016 Global Review of Constitutional Law* (I-CONnect & The Clough Center for the Study of Constitutional Democracy at Boston College 2017) 202 <ssrn.com/abstract=3014378> accessed 11 November 2019.

⁸⁶ *Körkortslag* (Driving Licence Act, SFS 1998:488), ch 5 s 19 as amended by SFS 2017:272.

⁸⁷ Prop (*Proposition*, Government Bill) 2016/17:83 *Några körkortsfrågor*, 19f.

⁸⁸ Instrument of Government 1974, ch 14 art 3.

⁸⁹ SOU 2008:125 *En reformerad grundlag*, 539 and Prop 2008/09:80 *En reformerad grundlag*, 213.

this act was to adapt Swedish general administrative legislation to the requirements of EU law (and of the ECHR): in this way, it was thought, it would not be necessary to distinguish between cases that did or did not involve EU law.⁹⁰ Here, Sweden has taken a different path compared to Denmark (see above), since a provision on proportionality was introduced in the new act, thus following the Finnish example.⁹¹ This requirement applies not only to the formal decision-making of the public authorities, but also to other, more practical administrative activities.⁹² Interestingly, the provision was put under the heading *Good Administration*, an expression previously used only in relation to EU Administrative Law in Swedish legal discourse. Furthermore, the *travaux préparatoires* highlighted both the domestic development of the principle and the influence of the ECHR and EU law as reasons for this codification of the principle.⁹³

4. Concluding Remarks

Undoubtedly, the three legal systems discussed in this article have undergone far-reaching changes owing to Europeanisation. This development has been especially visible since the 1990s, and the proportionality principle provides a good example of it. As was shown above, Swedish law has been particularly affected by these changes.

Relating to the proportionality principle – and, I dare say, to most other principles of public law – this Europeanisation did not mean the introduction of entirely new concepts for the Nordic legal systems. The European principles did not arrive on an empty shore. Rather, as shown above, the principle of proportionality had already been established in the first decades of the twentieth century. This development took place under strong inspiration from German public law, but it also related to even older conceptions of law and fairness. These concepts, in turn, may be traced far back in Nordic legal history, but are also linked to influence of European law. As stated above, and contrary to nationalist romantic beliefs, Nordic law has always been a part of European developments.

The principle of proportionality, as established by the mid-twentieth century, was limited in scope and intensity, since it related predominantly to the use of

⁹⁰ SOU (*Statens offentliga utredningar*, Swedish Government Official Reports Series) 2010:29 *En ny förvaltningslag*, 91ff and 589.

⁹¹ M Niemivuo, 'Har Sveriges förvaltningslag påverkat Finlands motsvarande lag – eller tvärtom?' [2018] *Förvaltningsrättslig Tidskrift* 623, 637.

⁹² *Förvaltningslag* (Administrative Procedure Act, 2017:900), s 5.

⁹³ SOU 2010:29 (n 90) 181ff and Prop 2016/17:180 *En modern och rättssäker förvaltning – ny förvaltningslag*, 60ff.

force by the police and did not take a central place in descriptions of administrative law. Through the developments described above, the principle moved beyond the rather limited field of police law to administrative law in general, and to constitutional law concerning limitations on fundamental rights. Recently, it has even influenced the relations between the central state and local government in Sweden. Europeanisation, then, can be seen as the combined effects of the ECHR and EU law on existing domestic rules and principles. European law has thereby functioned as a catalyst, reinforcing the pre-existing national administrative legal concepts and expanding them well beyond administrative law.

The preceding account includes some examples of criticism of the changed balance between the legislator and the courts. Furthermore, Danish law has been clear on the distinction between domestic and European principles, and that they are applicable in different situations. The discussions on the possible differences between Danish law and EU law in terms of the suitability criterion (Section 3) may be seen as an indication of a traditional idea: it is normally not the courts' place to decide on the means to be used to reach an end, because this responsibility should lie on the political level. At the same time, it should be noted that this trust in the legislator may put the individual in a less favourable position, as compared to a wider scope of assessment for the courts.

To a certain extent, the principle of proportionality has been adopted in the national systems to a degree beyond what is required by European law. Once again, here the constitutional provision requiring proportionality for limitation of local self-government in Sweden is a clear example. In this way, the concept of proportionality has influenced legal thinking beyond EU and ECHR requirements. As was stated at the outset, the causal relations in legal developments are not easy to distinguish from general societal changes. It may only be noted here that the expansion of the principle coincided with a greater focus, in the three countries, on the position of the individual with respect to the public sector.

In light of the development during the last few decades, today the proportionality principle is undoubtedly well established as a general principle in Danish, Finnish and Swedish law. There are, however, unresolved questions as to the understanding of the principle and the effects of Europeanisation. Here, we also see certain differences among the three EU Nordic States.

First, a matter of discussion is the relation between the domestic proportionality principle and the principle as established under EU or ECHR law. This question has primarily been discussed in Danish and Swedish law, whereas Finnish law seemingly has not devoted as much attention to the matter. As mentioned, Danish legal discourse has underlined that the principles are not necessarily identical, whereas Swedish law has taken a different path, aiming for the Swedish principle to be adapted to the European one, also in situations outside the scope of European law. The Danish viewpoint fits with the idea of procedural autonomy, in the sense that national administrative rules and prin-

ciples should be applied in the absence of EU law on a certain matter. The Swedish position, in contrast, could be defended by emphasising the practical difficulties for national authorities and courts of applying different principles depending on whether or not the case falls within the scope of EU law.⁹⁴ In the perspective of the individual, the use of a single standard could be preferable. In this regard, the different positions of Denmark and Sweden could be explained by differences in legal culture, with Swedish law being more ‘pragmatic’ (or, indeed, primitive) in its conceptualisation of administrative law, and Danish law taking a more principled position, which also fits with a view of Danish law being more reluctant to Europeanisation.

Second, the more specific content of the principle may still need to be elaborated in the national legal systems, especially considering that the role of judges in assessing politically controversial matters is relatively new to the three legal systems. As has been touched upon, the content of the three elements of proportionality – suitability, necessity and proportionality in the strict sense – may be understood differently in different contexts. This highlights the question on the scope, especially as regards using the principle in a sector-specific way. The Swedish example of the *Barsebäck* and *Wermdö Krog* cases could be seen in this light, since they concerned special fields of law that were politically sensitive. At the same time, the idea of the principle as a protection for legal certainty would speak against such differentiation between different sectors.

Third, the constitutional position of the principle is still uncertain. As described above, the principle has moved from being relevant primarily to police law to being relevant to some aspects of constitutional law. In all three countries, Europeanisation has contributed to the establishment of proportionality as a central part of the constitutional protection for fundamental rights. Swedish constitutional law also uses a form of the proportionality requirement for legislation limiting local self-government. Further, The supremacy of EU law means that national acts of law shall be set aside if they do not fulfil proportionality requirements under EU law. These developments change the role of the judge and of the civil servant making the original administrative decision.

Despite these developments, Europeanisation has not led to the establishment of a general domestic constitutional principle on proportionality, limiting the choices of the legislator, in any of the countries. In Finland and Sweden, the Supreme Administrative Courts have held that the proportionality assessment needs to be carried out within the given legal framework, i.e. the written legislation. This was made clear in the Finnish case on the excess emissions penalty fee under the framework for greenhouse gas emission allowance trading (KHO 2009:78); also the Swedish *alcolock* case relies on this kind of reasoning

⁹⁴ See further, on the principle of legitimate expectations in Swedish law under European influence, H Wenander, ‘Skydd för berättigade förväntningar i svensk förvaltningsrätt? – Negativ rättskraft, EU-rätt och styrning av förvaltningen’ [2017] *Förvaltningsrättslig Tidskrift* 637, 648f.

(HFD 2015 ref 16). In other words, the courts have not yet been ready to assess the general political choices using proportionality as a yardstick. This reluctance could be linked to the traditional Nordic scepticism as regards limiting the power of democratically elected and accountable legislators. At the same time, there are signs that this clear distinction between law and politics is breaking up: in Denmark, it has been discussed whether there is a general constitutional principle, requiring all legislation to be proportionate; in Sweden, the dissenting opinion in the *alcolock* case (HFD 2015 ref 16) may indicate that a change in attitude is taking place.

The development of the proportionality principle has meant that the distribution of roles between legislator and judges has changed, and the expanding role of the judiciary is a clear effect of Europeanisation in all three countries. This means that the traditional trust in the legislator – the elected politicians and the legislative machinery – has had to give way to a more complex situation, where the judges are also important societal actors. The categories ‘law’ and ‘politics’ have become more blurred since the 1980s, as have the roles of judges, legislators, and professors. This more complex landscape thus needs developed roadmaps for understanding what has come to replace earlier, clearer division of functions. In this changed landscape, legal scholarship has a central function in mapping the terrain and suggesting ways forward.

Principle of Proportionality and The Principle of Reasonableness

Filippo Borriello*

Lawyer, PhD in Administrative Law, Doctor Europaeus Dept of Law – University of Naples “Federico II”

Abstract

This paper examines a principle of particular relevance for administrative action and the concept of good administration, namely the principle of reasonableness, at the EU level, from the point of view of the Italian administrative doctrine, and jurisprudence of the Council of State. Specific attention will be paid to the many faces and functions of reasonableness, in administrative proceeding as well as in judicial review of discretion, and its connection with the idea of proportionality. Moreover, this article will discuss the influence and effects of the application of general principles of EU law on the Italian legal order. Finally, it will describe the EU principle of reasonableness has influenced the Italian administrative (case) law. This article aims to show that on the one hand the European principles of reasonableness and proportionality seem to be smoothly absorbed in the Italian administrative case law; on the other, the Europeanisation process still encounters resistance from a part of the Italian doctrine that persists in categorizing reasonableness as a principle different from proportionality.

I. Reasonableness in European Union law

Reasonableness is one of the general principles which in various ways provide the framework for action by the European Union public administration.¹ This principle is applicable not just to administrative actors, but to all authorities, both of the EU and of its Member States (when implementing EU law). Reasonableness is a principle of specific application to the administration itself (as the principle of good administration, data protection, acting within power and good faith). This principle provides the basis for efficient and fair administrative decision-making by ensuring that officials arrive at decisions in a rational way. Indeed, reasonableness operates as a guarantee for individuals against arbitrary decisions. On this point, Article 11 of European Code of Good

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¹ As in the case of Italian administrative law, such principles should be familiar with the constitutional principles underlying national legal systems. On this point, see HCH Hofmann, GC Rowe, AH Turk (eds), *Administrative Law and Policy of the European Union* (Oxford University Press 2011) pt 2, ch 7, 143-221.

Administrative Behaviour states that the official shall act impartially, fairly and reasonably, without giving a specific definition of reasonableness.

As we will see shortly in the Italian legal order, and also at the EU level, reasonableness is considered as an unwritten² general principle of law,³ invoked under the heading of broader constitutional principles.⁴

General principles of law perform an important function in – and can be regarded as the commonly accepted legal foundations of – EU administrative law. Surely, such general principles, including proportionality and reasonableness, have mainly been developed by the European Court of Justice.⁵ These principles are very relevant for Italian administrative law pursuant to Article 1(1) Law No. 241/1990 (the Italian Administrative Procedure Act), setting that administrative action shall be also founded on the principles underpinning the EU legal order.⁶ Indeed, following the amendment made by Article 1(1), letter

² Aside from the Article 6 ECHR, which protects the right to a hearing within a reasonable time; although this provision is currently interpreted in a broad sense, so as to also include adversary administrative procedures, this aspect is irrelevant in this regard because the requisite of reasonable time of a fair process does not concern the reasonableness as procedural or substantive ground of judicial review of administrative action covered by this paper. Moreover, on the EU level – unlike reasonableness – proportionality is frequently enounced in positive law, eg as a corollary of subsidiarity.

³ On the general principles in the EU legal order, see T Tridimas, *The General Principles of EU Law* (3rd rev edn, Oxford University Press 2019); Hofmann, Rowe, Turk (n 1); RJGM Widdershoven, M Remac, 'General Principles of Law in Administrative Law under European Influence' (2012) 2 *European Review of Private Law* 381; GL Goga, 'The Significance of the General Principles in European Union Administrative Law' (2012) 8 *Acta Universitatis Danubius* 63; HCH Hofmann, 'General Principles of EU law and EU Administrative Law' in C Barnard, S Peers (eds), *European Union Law* (2nd edn, Oxford University Press 2017) ch 8.

⁴ G Della Cananea, 'Reasonableness in Administrative Law' in G Bongiovanni, G Sartor, C Valentini (eds), *Reasonableness and Law* (Springer 2009) 306.

⁵ On this point see A Adinolfi, 'The Principle of Reasonableness in European Union Law' in G Bongiovanni, G Sartor, C Valentini (eds), *Reasonableness and law* (Springer 2009) 383-404; G Tesauro, 'Reasonableness in the European Court of Justice Case-Law' in A Rosas, E Livits, Y Bots, *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-Law* (Springer 2013) 307-327; J Wouters, S Duquet, 'The principle of reasonableness in global administrative law' (2013) Jean Monnet Working Paper 12/2013 <<https://ssrn.com/abstract=2867419>> accessed 14 November 2019.

⁶ According to Article 1(1) Law No. 241/1990, in addition to those already mentioned, there are other principles upon which administrative action is founded, eg economy, effectiveness, impartiality, publicity and transparency. On the application of general principles of EU law to administrative activity see Council of State, Section V, 19 June 2009, n. 4035, in <www.giustizia-amministrativa.it>. According to this judgment, the general principles of EU law consistently used by the European Court of Justice (principle of competition, equal treatment, transparency, non-discrimination, mutual recognition, proportionality) not only can be applied directly in the Italian legal system but they must also regulate the administrative activity. On this point, G Carlotti, A Clini, *Diritto amministrativo*, Vol 1 (Maggioli 2014) 169, point out that article 1(1) Law No. 241/1990 contains a dynamic reference to the general principles of EU law which are constantly evolving; G Pepe, *Principi generali dell'ordinamento comunitario e attività amministrativa* (Eurilink 2015) 241, even goes so far as to say that Article 1(1) Law No. 241/1990 includes not only the principles already recognised but also those that will be developed by the European Court of Justice in the future. See also F Spagnuolo, 'Il richiamo ai principi dell'ordinamento comunitario nella nuova legge sull'azione amministrativa' in A Massera (ed), *La riforma della Legge 241/1990 sul procedimento amministrativo: una prima lettura*, (2005) Astrid <www.astrid-

a), Law No. 15/2005 to Article 1(1) Law No. 241/1990, those principles become directly applicable and immediately effective in the Italian legal order. According to the case law of the Regional Administrative Courts⁷ and the Council of State,⁸ the need to give priority to the application of European principles in administrative activity is a «corrective interpretation of the system»⁹ imposed by «the need to interpret the law in accordance with the general principles of EU law».¹⁰

The ECJ's established case law reveals that the essence of reasonableness as standard of judicial review lies in balancing interests.

Moreover, in the ECJ case law, reasonableness often ends by being absorbed in the proportionality test;¹¹ it also occurs when the applicants expressly invoked reasonableness as standard of legality of state measures derogating from rules on free movement of goods, people and services.¹²

On the other hand, reasonableness is often used by the EU Court of Justice as a tool to operationalize other general principles of law. A relevant example is provided by the ECJ case law on principle of legitimate expectations.¹³ According to this jurisprudence, the interested parties must be able to count on the maintenance of a legal situation with respect to a sudden change that they could

online.it>, 14-17 accessed 14 November 2019; L Ferrara, 'Il rinvio ai principi dell'ordinamento comunitario nella disciplina del procedimento amministrativo' in G Clemente Di San Luca (ed), *La nuova disciplina dell'attività amministrativa dopo la riforma della legge sul procedimento* (Giappichelli 2006) 39-73; D U Galetta, 'L'art. 21 octies della novellata legge sul procedimento amministrativo nelle prime applicazioni giurisprudenziali: un'interpretazione riduttiva delle garanzie procedurali contraria alla costituzione e al diritto comunitario' in MA Sandulli (ed), *Riforma della L. 241/1990 e processo amministrativo* (Giuffrè 2006) 111; A Valletti, 'Il Subappalto' in R De Nicololis (ed), *I contratti pubblici di lavori, servizi e forniture* (Vol 3, Giuffrè 2007) pt 7, ch 3, 189-190; F Caringella, *Corso di diritto amministrativo: profili sostanziali e processuali* (Vol 1, Giuffrè 2011) pt 1, ch 4, para 6, 138-139; A Bartolini, A Pioggia, 'La legalità dei principi di diritto amministrativo e il principio di legalità' in M Renna, F Saitta (eds), *Studi sui principi del diritto amministrativo* (Giuffrè 2012) 86-88.

⁷ In the Italian legal order, the Tribunale Amministrativo Regionale (hereafter referred to as "TAR") is the regional administrative court (administrative judge of first instance).

⁸ In Italy, the Council of State acts both as legal advisor of the executive branch and as the supreme court for administrative justice (administrative judge of second and last instance).

⁹ TAR, Puglia, Section I, Lecce, 21 May 2008, n. 1812, in <www.giustizia-amministrativa.it>.

¹⁰ Council of State, Section V, 31 May 2007, n. 2825, in <www.giustizia-amministrativa.it>.

¹¹ Wouters, Duquet (n 5) 29, point out that «the ECJ's long-standing practice to review administrative action using a proportionality standard complicates the successful use of reasonableness as a standard of review. The reasoning in EU case-law is to such an extent permeated with proportionality that, even where applicants invoke a violation of the reasonableness standard, the EU courts are inclined to translate that claim into the proportionality test. An interesting illustration thereof can be found in the 2008 *Moreno* judgment of the EU's Civil Service Tribunal».

¹² Case C-34/08 *Azienda Disarò v Milka*, [2009] European Court Reports (English Edn.) I- 4023, points 73 and 82-83.

¹³ G Strozzi, R Mastroianni, *Diritto dell'Unione Europea. Parte istituzionale* (Giappichelli 2014) 217.

not *reasonably* expect;¹⁴ or when the conduct of Union Institutions created a *reasonably* founded expectations in the interested parties.¹⁵ In these cases, in order to verify the legitimate expectation claimed by the applicant, the Court carries out the reasonableness test (whose formula can be reconstructed as follow: could the interested parties *reasonably* expect a sudden change of legal situation? Is *reasonably* founded the expectation that conduct of Union Institutions created in the interested parties?). Therefore, reasonableness is interpreted also as a tool and condition for implementing other general principles of law (in the above example, the legitimate expectations).¹⁶

¹⁴ Case 111/63 *Lemmerz-Werke v. High Authority* [1965] ECR 677; Case 84/78 *Tomadini v Amministrazione delle finanze dello Stato* [1979] ECR 1801; Case 90/77 *Stimming CG v Commission*, [1978] ECR 995; Case 235/82 *Ferriere San Carlo v Commission*, [1983] ECR 3949; Case 223/85 *RSV v Commission* [1987] ECR 4617; Case C-316/86 *Hauptzollamt Hamburg-Jonas v Krüken* [1988] ECR 2213; Case C-104/89 *Mulder v Council of the European Communities and Commission of the European Communities* [1992] ECR I-3061; Case C-81/91 *Twijnstra v Minister van Landbouw* [1993] ECR I-2455. However, the principle cannot be invoked when the change in the legal situation is predictable or expression of a discretionary power of Institutions: Case C-22/94 *Irish Farmers Association and others v Minister for Agriculture, Food and Forestry, Ireland and Attorney General* [1997] ECR I-1809; Joined Case C-37 and 38/02 *Di Leonardo Adriano and Dilexport*, [2004] ECR I-6911; Case C-168/09 *Flos v Semeraro Casa e Famiglia SpA* [2011] ECR I-181.

¹⁵ Case 74/74 *CNTA SA v Commission*, [1975] ECR 533; Case 289/81 *Mavridis v Parliament* [1983] ECR 1731; Case 223/85 *RSV v Commission* [1987] ECR 4617; Case C-63/93 *Fintan Duff v Minister for Agriculture and Food and Attorney General* [1996] ECR I-569; Case C-51/95 *Unifruit Hellas v Commission* [1997] ECR I-727; Case T-105/96 *Pharos v Commission* [1998] ECR II-285; Case T-222/99 and T-329/99 *Martinez* [2001] ECR II-2823; Case C-179/00 *Weidacher v Bundesminister* [2002] ECR I-501; Case C-14/01 *Molkerei Wagenfeld v Bezirksregierung Hannover* [2003] ECR I-2279.

¹⁶ It's also true for other examples, like the precautionary principle. On this point see the Communication from the Commission on the Precautionary principle COM/2000/0001 final, point 3, according to which, the precautionary principle is not defined in the Treaty, and prescribes it only once – to protect the environment. However, in practice, its scope is much wider, and specifically where preliminary objective scientific evaluation, indicates that there are *reasonable* grounds for concern that the potentially dangerous effects on the environment, human animal or plant health may be inconsistent with the high level of protection chosen by Community. See also, Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris*, [2004] ECR I-7405, para 59, according to which, pursuant to Article 6(3) of the Habitats Directive, the competent national authorities, taking account of the conclusions of the appropriate assessment of the implications of mechanical cockle fishing for the site concerned, in the light of the site's conservation objectives, are to authorise such activity only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no *reasonable* scientific doubt remains as to the absence of such effects; C-236/01 *Monsanto Agricoltura Italia v Presidenza del Consiglio dei Ministri and Other* [2003] ECR I-8105, points 106 and 113; Joined Cases C-293/17 and C-294/17 *Coöperatie Mobilisation for the Environment UA, and Vereniging Leefmilieu* [2018] EU:C:2018:882, points 98, 104 and 112. On the relation between precautionary principle and reasonableness, see F De Leonardis, 'Tra precauzione e ragionevolezza' (2006) 21 *Federalismi.it Rivista di diritto pubblico italiano, comunitario, comparato* <www.federalismi.it> accessed 14 November 2019; on the reasonableness standard of proof for the application of precautionary principle, see C Weiss, 'Scientific uncertainty and science-based precaution' (2003) 3(2) *International Environmental Agreements: Politics Law and Economics* 3, 157-159.

Finally, reasonableness is «invoked in order to interpret EC legislation or to assess its validity, or to ascertain whether national legislation is in compliance with a given EC obligation».¹⁷

2. An Italian perspective. Reasonableness as proportionality?

The devil is in the details. On the level of Italian administrative law, part of the national doctrine considers reasonableness¹⁸ a principle different from proportionality¹⁹ and endowed with its own autonomy with respect to the latter, reconnecting to each of them specific fields of action and peculiarities.²⁰

The fields of action of the two principles (reasonableness and proportionality) refers to different phases of the administrative decision-making process.

¹⁷ Adinolfi (n 5) 386.

¹⁸ For an historical frame of the traditional Italian reconstruction of the principle of reasonableness in the administrative action, see G Lombardo, 'Il principio di ragionevolezza nella giurisprudenza amministrativa' [1997] *Rivista trimestrale di diritto pubblico* 421ff; G Corso, 'Il principio di ragionevolezza nel diritto amministrativo' (2002) 7 *Ars Interpretandi* 437; Della Cananea (n 4) 295-310; F Merusi, *Ragionevolezza e discrezionalità amministrativa* (Editoriale Scientifica 2011); F Astone, 'Il principio di ragionevolezza' in M Renna, F Saitta (eds), *Studi sui principi del diritto amministrativo* (Giuffrè 2012) 371-388; F Nicotra, 'I principi di proporzionalità e ragionevolezza dell'azione amministrativa' (2017) 12 *Federalismi.it Rivista di diritto pubblico italiano, comunitario, comparato* <www.federalismi.it> accessed 14 November 2019; F Astone, 'Principio di ragionevolezza nelle decisioni giurisdizionali e giudice amministrativo' (2018) 17 *Federalismi.it Rivista di diritto pubblico italiano, comunitario, comparato* <www.federalismi.it> accessed 14 November 2019.

¹⁹ The literature on proportionality is vast. Specifically on the principle of proportionality in the administrative action, see A Sandulli, *La proporzionalità nell'azione amministrativa* (Cedam 1998); DU Galetta, *Principio di proporzionalità e sindacato giurisdizionale nel diritto amministrativo* (Giuffrè 1998); A Sandulli, 'Proporzionalità' in S Cassese (ed), *Dizionario di Diritto Pubblico* vol. V (Giuffrè 2006) 4643ff; S Villamena, *Contributo in tema di proporzionalità amministrativa. Ordinamento comunitario, italiano e inglese* (Giuffrè 2008); DU Galetta, 'Il principio di proporzionalità' in MA Sandulli (ed), *Codice dell'azione amministrativa* (Giuffrè 2010) 110ff; S Cognetti, *Principio di proporzionalità. Profili di teoria generale e di analisi sistematica* (Giappichelli 2011); DU Galetta, 'Il principio di proporzionalità' in M Renna, F Saitta (eds), *Studi sui principi del diritto amministrativo* (Giuffrè 2012) 389-412; M D'Alberty, 'Transformations of administrative law: Italy from a comparative perspective' in S Rose-Ackerman, PL Lindseth, B Emerson, *Comparative Administrative Law* (2nd edn, Edward Elgar Publishing 2017) ch 7, 102-118; Nicotra (n 18).

²⁰ Some other scholars state that the principle of proportionality belongs to the principle of reasonableness, because of their relationship of *species a genus*. On this point see PM Vipiana, *Introduzione allo studio del principio di ragionevolezza* (Cedam 1993) 69ff; G Morbidelli, 'Il principio di ragionevolezza nel procedimento amministrativo' in *Scritti in onore di G. Guarino* vol 3 (Cedam 1998) 97-99; G Morbidelli, 'Il procedimento amministrativo' in L Mazzaroli and others (eds), *Manuale di diritto amministrativo* (2nd edn, Il Mulino 1998) 1187.

In particular, reasonableness concerns the administrative proceeding, especially the preliminary phase; proportionality concerns the administrative measure, as a concrete balancing of interests at stake.²¹

The principle of reasonableness operates a weighting of interests inspired by the criterion of logic and congruity of the choice made by the public authority; it is independent of assessments regarding the person who suffers the administrative decision and its application involves an objective test, taking the position of a neutral person (the “reasonable man”).

However, the principle of proportionality implies a more complex evaluation, based on a three-stage scheme, testing for adequacy (which requires that a measure must be suitable to achieve a given aim.), necessity (which implies that the least oppressive measure should be used) and proportionality *stricto sensu*²² (which prevents a measure imposing unreasonable burdens on the sacrificed individual interests.); it directly compares the costs suffered by private interest and the pursued public interest.

Proportionality is the principle on the basis of which a public authority, in the decision-making process, must choose the most appropriate and adequate solution (from all available options) with the least sacrifice for the opposite interest. In other words, proportionality concerns the quantitative balancing and the correct measure of the exercised administrative power. In this way, according to the theory of the three-pronged test, the administrative measure should be necessary, suitable and adequate to pursue the public interest, imposing reasonable burdens on affected individuals.

Instead, reasonableness concerns the qualitative balancing of interests; it involves the plausibility of the effects²³ and has a limited range because it excludes only decisions that are so unreasonable that no reasonable man could ever have come to it.

²¹ On this point, R Ferrara, *Introduzione al diritto amministrativo* (Laterza 2014) 192, argues that «the reasonableness of the administrative proceeding, and in particular of the preliminary investigation, measures the rationality of the procedure, and therefore the fact that it was conducted by resorting to rules and regularity according to logic and knowledge (according to science and experience), in the framework of a process of formation of the knowledge of the factual reality and the will characterized by information and rational evaluation, while the proportionality of the final statement, based on the principle of adequacy, gives an account of how the care of the public interest identified by the law (or more precisely, interpreted in the proceeding) is concretely satisfied with the least possible sacrifice of private interests» (my translation).

²² This component of proportionality is also called *reasonableness*. See JE Van Den Brink and others, ‘General principles of law’ in JH Jans, S Prechal, RJGM Widdershoven (eds), *Europeanisation of public law* (2nd edn, Europa Law Publishing 2015) 184.

²³ C Malinconico, ‘Il principio di proporzionalità’ in *Autorità e consenso nell’attività amministrativa. Atti del 47° Convegno di studi di scienza dell’amministrazione*. Varenna, Villa Monastero, 20-22 settembre 2001 (Giuffrè 2002) 69.

Of course, the proportionality test involves a more intensive judicial control of administrative action than the reasonableness one.²⁴ Indeed, proportionality implies the three-stage test mentioned above (checking for adequacy, necessity, proportionality *strictu sensu*); however, reasonableness implies a «must less structured test, one that is not only broader but also much vaguer».²⁵

In the Italian administrative law, the origins of these two principles are also different. Originated at the beginning of the 20th century²⁶ in the German legal system²⁷ and integrated into the EU legal order through the case law of the European Court of Justice,²⁸ the general principle of proportionality became a source of inspiration for the national judge,²⁹ spontaneously and without notable resistance.³⁰

Until the nineties, there was no real proportionality test in Italian administrative law. The only judicial review standard that could conceptually be considered similar to the content of the proportionality test was that of reasonableness. However, the principle of reasonableness is characterized by a large degree of indeterminacy; it does not correspond to any well-defined concept and does not contain a fixed and certain criterion of judicial review. Therefore, until the nineties, Italian judges did not exercise control that took into consideration the elements of judgment which instead already characterized the European principle of proportionality. The use of the reasonableness test only created unsatisfactory results and lack of judicial protection for the individual interests compared to the public interest.

Starting from the first half of the nineties, to meet the aforementioned need of individual judicial protection, a proportionality test also began to be applied, first in areas deeply regulated by EU law, namely in: financial market regulation

²⁴ A Barone, GA Ansaldi, 'The European "nomofilachia" and the principle of proportionality' (2009) 28 *Transylvanian Review of Administrative Sciences* 210, 222-223, point out the vagueness of reasonableness.

²⁵ Della Cananea (n 4) 304.

²⁶ In the specific context of *polizierecht*, F Fleiner, *Institutionen des Deutschen Verwaltungsrechts* (Mohr 1912) 354, used a fortunate expression, according to which the principle of proportionality implies that "the police should not use cannons to shoot at sparrows" (my translation). On the principles of reasonableness and proportionality in the police law, F Rota, 'Full jurisdiction e diritto di polizia' (2018) 2 *P.A. Persona e Amministrazione* 285, 293.

²⁷ The principle of proportionality was first developed in German constitutional and administrative case law. See on this point Galetta, *Principio di proporzionalità e sindacato* (n 19) *iff*; Sandulli (n 19) 4644ff.

²⁸ Since its birth and mainly in the matter of sanctions, State aid and derogations from the competition rules. See eg European Court of Justice, Case C-8/55 *Fédération Charbonnière de Belgique v High Authority of the European Coal and Steel Community*, [1954-1956] ECR 291, the first case in which the ECJ dealt with the principle of proportionality; Case C-5-11 & 13-15/62 *Società Industriale Acciaierie San Michele v High Authority of the European Coal and Steel Community* [1962] ECR 449; Case C-18/63 *Schmitz v European Economic Community* [1964] ECR 85.

²⁹ See M Clarich, *Manuale di diritto amministrativo* (Il Mulino 2013) 150.

³⁰ D De Pretis, 'Italian administrative law under the influence of european law' (2010) 1 *Italian Journal of Public Law* 6, 13.

(law no. 262/2005, according to which the public authority must apply the principle of proportionality in defining the content of the general regulatory acts); environmental protection (legislative decree no. 152/2006, according to which waste management must respect the principle of proportionality); public procurement (Legislative Decree no. 163/2006); free movement of persons within the territory of the Member States (Legislative Decree no. 32/2008, which provided that removal orders are taken in compliance with the principle of proportionality). Subsequently, the principle of proportionality begins to be applied by judges even in purely internal situations. For instance, the principle also applies to administrative action that is directed towards the issue of measures having a regulatory, general administrative, town planning or programming function.

After the described historical development in relation to the context or the nature of the power, the Italian administrative courts have often ruled that proportionality test must be carried out according to the three-stage scheme.³¹ Now, to apply the principle of proportionality according to the three-stage scheme, it is not necessary for the dispute to concern Europeanised legal relation. Even in the case of a purely internal situation, Italian judges use the proportionality test as interpreted by the Court of Justice. Indeed, the difference between areas deeply regulated by EU law and purely internal situations is not considered significant in the Italian legal system: pursuant to the aforementioned Article 1(1) Law No. 241/1990, the general principles of EU law must in any case be applied by both the public authority and the judge. According to the Italian Council of State, the European principle of proportionality must always be applied in administrative activity.³²

However, the principle of reasonableness, which has been primarily used by the common law systems,³³ has successively been applied also in the continental legal orders; as for Italy, administrative law borrowed the concept of reasonableness from national constitutional law.³⁴ In constitutional law, rea-

³¹ This is made explicit in Council of State, Section VI, n. 1736/2007, in <www.giustizia-amministrativa.it>; Council of State, Section V, n. 2087/2006, *ivi*; Council of State, Section VI, 22 March 2005, n. 1195, *ivi*; Council of State, Section IV, n. 6410/2004, *ivi*; Council of State, Section VI, 1 April 2000, n. 1885, *ivi*.

³² Council of State, Section V, 20 February 2017, n. 746, in <www.giustizia-amministrativa.it>.

³³ On this point see HWR Wade, CF Forsyth, *Administrative Law* (Oxford University Press 2000) 353ff. One of the first judgments in this matter was the leading case *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* EwCA [1948] 1 KB 223. According to the Court, judicial intervention is allowed only if a decision is so unreasonable as to be aberrant. The literature on *Wednesbury* case is vast. See, among the newest, ACL Davies, JR Williams, 'Proportionality in English Law' in S Ranchordás, B De Waard (eds), *The Judge and the Proportionate Use of Discretion* (Routledge 2018) 75ff; K Thompson, 'Administrative law in the United Kingdom' in R Seerden (ed) *Comparative administrative Law. Administrative law of the European Union, its Member States and the United States*, (4th edn, Intersentia 2018) 247.

³⁴ In the Italian legal order, constitutional law and administrative law are closely linked (as two fields of public law) but different.

onableness is indeed a standard for reviewing laws.³⁵ This use of reasonableness emerged in a recent case³⁶ brought before the Constitutional Court.³⁷ The Legislative Decree 14 March 2013 no. 33, reordered obligations of disclosure, transparency and dissemination of information by public authorities. In detail, Article 14 of the Legislative Decree no. 33/2013 provides for holders of political offices some transparency measures on asset, interest and financial data. The Legislative Decree 25 May 2016, no. 97, amending Article 14 of the Legislative Decree no. 33/2013, extended the asset and income disclosure to executive officials.³⁸ Following the amendment, the obligation applied to holders of political offices of State, Regions and Local entities, holders of administrative, direction or Government offices, however named, except in the case of appointments without remuneration, holders of management positions, granted for whatever reason, including any appointment granted at the discretion of the political bodies without resorting to public selection procedures. This category included managerial senior positions such as Secretary General, Head of Department, General Manager and any other managerial position, also those conferred on subjects who do not possess the rank of employees of public administrations (external appointments).

Public officials, as above identified and without any distinction, were subject to disclosure and publishing on the websites of the administrations where they

³⁵ Specifically on this point, without claiming to be exhaustive, see C Lavagna, 'Ragionevolezza e legittimità costituzionale' in *Studi in memoria di Carlo Esposito* (Vol 3, Cedam 1973) 1573-1578, currently in C Lavagna, *Ricerche sul sistema normativo* (Giuffrè 1984) 637; AM Sandulli, 'Il principio di ragionevolezza nella giurisprudenza costituzionale' (1975) *Diritto e Società* 561, currently in *Scritti giuridici* (Vol 1, Jovene 1990) 665; G Zagrebelsky, 'Su tre aspetti della ragionevolezza' in *Il principio di ragionevolezza nella giurisprudenza della corte costituzionale* (Giuffrè 1994) 179-192; G Scaccia, *Gli "strumenti" della ragionevolezza nel giudizio costituzionale* (Giuffrè 2000); F Modugno, *la ragionevolezza nella giustizia costituzionale* (Editoriale Scientifica 2007); A Marrone, 'Constitutional adjudication and the principle of reasonableness' in G Bongiovanni, G Sartor, C Valentini (eds), *Reasonableness and law* (Springer 2009) 215-241; M Cartabia, 'I principi di ragionevolezza e proporzionalità nella giurisprudenza costituzionale italiana' (2013) <www.cortecostituzionale.it> accessed 14 November 2019; M Fierro, 'La ragionevolezza nella giurisprudenza costituzionale italiana' in *I principi di proporzionalità e ragionevolezza nella giurisprudenza costituzionale, anche in rapporto alla giurisprudenza delle Corti europee* (2013) <www.cortecostituzionale.it>, accessed 14 November 2019; N Stamile, 'Ragionevolezza e giustizia costituzionale' (2001) 2 *Sociologia. Rivista Quadrimestrale di Scienze Storiche e Sociali*; I Rivera, 'Il sindacato di ragionevolezza quale strumento di controllo della razionalità (formale e pratica) della norma. Brevi osservazioni a margine della sentenza n. 113 del 2015' (2016) *Forum di Quaderni Costituzionali* <www.forumcostituzionale.it> accessed 14 November 2019.

³⁶ Constitutional Court, 21 February 2019, n. 20, in <www.cortecostituzionale.it>. See A Corrado, 'Gli obblighi di pubblicazione dei dati patrimoniali dei dirigenti' (2019) 5 *Federalismi.it Rivista di diritto pubblico italiano, comunitario, comparato* <www.federalismi.it> accessed 14 November 2019.

³⁷ According to Article 134 of the Italian Constitution, the most important task of the Italian Constitutional Court is to rule on controversies or disputes regarding the constitutional legitimacy of the laws and acts having the force of law issued by the State and Regions.

³⁸ M Lunardelli, 'The reform of Legislative Decree no. 33/2013 in Italy: a double track for transparency' (2017) 9 *Italian Journal of Public Law* 143-188.

hold offices the following information related to their income and asset: a) remuneration of whatever type related to the acceptance of the office included the public money spent on business travels and missions; b) data related to the acceptance of other offices, both in public and private bodies, and the relevant remuneration received on any ground; c) other appointments, if any, remunerated with public money with an indication of the relevant amount; d) copy of the latest tax return (annually); e) a statement on his/her real rights on immovable properties and movable properties recorded in a public register, ownership of company shares and equity participations, ownership of companies, any company directorships or posts as internal company auditors (within three months from the appointment and then annually to communicate any variation).

The Constitutional Court has declared the constitutional illegitimacy of Article 14 of Legislative Decree n. 33/2013, in the part which obliges – without distinction – each civil servant holder of an executive appointment in public entities or bodies to disclose asset and income data. According to the Court, this provision violates the Italian Constitution and EU Law, in particular the right to privacy, the protection of personal data and the principles of proportionality and reasonableness, as interpreted in the light of the case law of the European Court of Justice.³⁹

According to the Court, the legislator should have made exceptions, because a provision stating the disclosure for all the subjects of the category (including holders of management positions granted at the discretion of the political bodies without resorting to public selection procedures) is unreasonable, disproportionate, unnecessary and entails an excessive burden. In other words, in this case the Constitutional Court carried out a balancing test, which involved both proportionality and reasonableness as standards of reviewing law. Indeed, the court balanced the public interest of transparency and preventing corruption with the rights of privacy and data protection of individuals. Furthermore, the court established that the imposed obligation was excessively burdensome and disproportionate when balanced with the aim of preventing corruption as predefined by the legislator. For present purposes, the focal point of this judgment is paragraph 3, according to which the scrutiny of reasonableness as standard for reviewing laws makes use of the proportionality test. Therefore, from the Court's point of view, reasonableness and proportionality are two different grounds of judicial review but the latter is a component of the former; at the same time, proportionality is considered as a tool for testing reasonableness.

An equally important case in which the Constitutional Court used the principle of proportionality and the three steps is the judgment n. 16/2017, re-

³⁹ See point 3.1 of the decision. The Constitutional Court recalls the principle of proportionality expressed in Case C-465/00, C-138/01 and C-139/01 *Rechnungshof v Österreichischer Rundfunk and Others and Christa Neukomm and Joseph Lauerermann v Österreichischer Rundfunk*, [2003] ECR I-4989; Case C-92/09 and 93/09 *Volker and Markus Schecke and Eifert* [2010] ECR I-11063.

garding financial incentives for energy efficiency.⁴⁰ This case concerned the question of constitutional legitimacy of a provision contained in the law no. 116 of 2014 on environmental protection and energy efficiency. This regulation provides for the re-modulation – starting in 2015 – of the tariffs relating to the energy produced by photovoltaic systems with a power greater than 200 kW on the basis of three predetermined options, all of which are worse than the previous regimes regulated by special agreements with the GSE – Gestore dei Servizi Energetici (the Italian company for electric services). According to the referring judge, this provision would have been constitutionally illegitimate for: a) unreasonableness of unjust penalty of producers (of greater dimensions) of alternative energy to that coming from solar source; b) unequal treatment of applicants compared to local authorities and schools, owners of energy plants of equal power, exempted from the remodeling of financial incentives; c) violation of the principle of competition and freedom of individual economic initiative, due to the damage caused to the abovementioned producers unable to operate on the market on equal terms with the other solar energy producers.

The Court declared unfounded the question of constitutional legitimacy of the mentioned provision of the law no. 116 of 2014. According to the Court, the legislation aim was to achieve a fairer distribution of tariff charges among the various categories of electric consumers. Furthermore, the different size of the energy plants, with power respectively less than or greater than 200 kW, justifies the remodulation of the tariffs only in relation to producers with a capacity exceeding 200 kW, which absorb the greatest amount of financial incentives. Therefore, the Constitutional Court established that the contested provision is justified by the pursuit of a prevailing public interest involving a reasonable and proportionate sacrifice of the opposing individual interests. This results from a balanced weighing of the interests at stake and, in any case, from a reasonable link between the legislation aim (of finding financial resources) and the regulatory state intervention.

Reasonableness is classified by Italian scholars⁴¹ in the group of typical unexpressed principles. These principles are not laid down in an explicit constitutional or legislative provision but were elaborated and developed by the doctrine and jurisprudence. Indeed, reasonableness is (not a written constitutional principle but) an unwritten principle of a constitutional nature; it means that the principle of reasonableness cannot be derogated by an act of Parliament. Not by chance, reasonableness is also defined as an «absolute principle»,⁴² that is without exceptions. In detail, in Italian administrative law, the principle of

⁴⁰ Constitutional Court, 24 January 2017, n. 16, in <www.cortecostituzionale.it>.

⁴¹ V Crisafulli, 'Disposizione (e norma)', *Enciclopedia del Diritto XIII* (1964) 197; R Guastini, 'Principi di diritto', *Digesto delle discipline civilistiche XIV* (1996) 341; F Nicotra (n 18) 3; F Astone (n 18) 3.

⁴² S Cassese, *Istituzioni di diritto amministrativo* (Giuffrè 2006) 248.

reasonableness is a corollary of three constitutional principles, namely equality⁴³ (as contained in Article 3), impartiality and good administration⁴⁴ (laid down in Article 97).

In this regard, the Constitutional Court recognised that the principle of reasonableness, acting as a limit to the exercise of the administrative discretion, guarantees the protection of individuals affected by law, by an administrative decision, and more generally, by the legal order.⁴⁵

Moreover, the principle of reasonableness is indirectly recognised by the Italian Administrative Procedure Act (Law No. 241/1990), setting in Article 3(1), that almost⁴⁶ all the administrative measures must include a statement of reasons.⁴⁷ Indeed, the statement of reasons must set out the factual premises and the points of law that determined the authority's decision, as these emerge from the preliminary investigation; through it, the judge carries out the reasonableness test.

Since the origin of Italian administrative law, general principles of law have represented an important feature in its development. Despite the lack of rules on the binding value of the precedent (*stare decisis*), Italian administrative courts have played and still play an important role in the development of these principles and in bringing them to life; the same applies to the principle of reasonableness.

⁴³ Nicotra (n 18) 8, links reasonableness to the constitutional principle of equality. Such a relation is also recognized by the Italian Constitutional Court. This is made explicit in Constitutional Court, 4 May 2009, n. 137, in <www.cortecostituzionale.it>.

⁴⁴ Vipiana (n 20) 135, 152, notes that the basis of the principle of reasonableness of administrative measures is founded on the values of impartiality (as a prohibition of unequal treatment and as an obligation to weigh all the interests at stake) and sound administration (suitability, as a component of the reasonableness, relative to the choice of the most suitable means to achieve the purpose); Astone (n 18) 388, states that reasonableness ensures the implementation of the constitutional principle of sound administration. On the relation between reasonableness, impartiality and good administration see Morbidelli (n 20) 1251ff; Barone, Ansaldo (n 24) 223.

⁴⁵ Constitutional Court, 4 November 1999, n. 416, in <www.cortecostituzionale.it>. On this point see MTP Caputi Jambrenghi, 'Il principio del legittimo affidamento' in M Renna, S Saitta (eds), *Studi sui principi del diritto amministrativo* (Giuffrè 2012) 171.

⁴⁶ A statement of reasons shall not be required for normative measures or for those of general application. See Article 3(2) of Law No. 241/1990 in relation to the duty to state reason.

⁴⁷ On this point see Nicotra (n 18) 10.

3. The many faces of the principle of reasonableness in Italian administrative law

Reasonableness is a substantive and procedural standard at the same time.⁴⁸ It is interesting to note the new and growing attention being shown by Italian scholars to the reasonableness as standard of judicial review of administrative discretion. There are substantially three reasons for this renewed interests: firstly, the Italian crisis of the rule of law, which leaves a large margin of maneuver to the public authority for the exercise of discretionary administrative powers; secondly, the necessity of a judicial review of those discretionary powers, exercised by testing also the reasonableness of administrative action; lastly, the necessity to respect the principle of separation of powers between the executive, legislative and judicial authorities.

Indeed, in the Italian legal system, administrative power – which is manifested through administrative measures – is subordinate to legislative power and the principle of legality.⁴⁹ In other words, an administration can exercise only the powers explicitly provided for by specific law.⁵⁰ However, this positivistic theory does not reflect the reality. Excessive recourse to soft-law instruments, existence of new legal sources alien to national legal order and loss of centrality of Parliament produced a crisis of the rule of law. In this context, administrative action becomes increasingly autonomous (in the truest etymological sense of the word).

Therefore, whereas judicial review of administrative action is becoming increasingly full, thus «the question becomes (more accurately, necessarily implies) the identification of parameters of judgment defined by their reasonableness and proportionality, insofar as reasonableness, according to Ledda's well-known definition,⁵¹ pertains “to the world of values, and therefore to the fundamental need for justice”».⁵²

⁴⁸ In this regard Vipiana (n 20) 8, makes a distinction between reasonableness as principle of administrative action (called “reasonableness-standard”) and reasonableness as ground of judicial review (called “reasonableness-parameter”).

⁴⁹ On this point De Pretis (n 30) 10, states that «the subordination of the administration to the law is obviously in order to permit judicial review of administrative action and, as such, the justiciability of right and legitimate expectations of private parties affected by it. In this context, the notion of lawfulness of administrative action extends beyond simple compliance with the law, to include conformity of the administrative decisions to the criteria of logic, reasonableness, correspondence with the facts and substantial equity».

⁵⁰ G Zanobini, ‘L’attività amministrativa e la legge’ in G Zanobini (ed), *Scritti vari di diritto pubblico* (Giuffrè 1956) 25.

⁵¹ F Ledda, ‘L’attività amministrativa’ in *Il diritto amministrativo degli anni ’80* (Giuffrè 1987) 109.

⁵² R Spagnuolo Vigorita, ‘Public enemy: the effectiveness of administrative judicial protection’ (2011) 3(2) *Italian Journal of Public Law* 245.

3.1. Reasonableness in the administrative proceeding

The fundamental principle of reasonableness conditions administrative activity. It is an absolute principle of administrative proceeding, because it does not tolerate exceptions by other principles. Primary meaning of reasonableness as principle of administrative action implies a correspondence between the choice made and the rules of the reason.

Moreover, reasonableness is a criterion imposing the duty to weigh all interests,⁵³ including private ones, characteristic of the exercise of discretionary powers, and preventing the sacrifice of those interests, unless it is strictly necessary to do so. Therefore, reasonableness requires public authority to carry out a full assessment of all options at stake. From this point of view, «the principle of reasonableness finds advanced expression in the principle of proportionality».⁵⁴

Always referring to the administrative proceeding, reasonableness is a procedural criterion that allows to verify the completeness of the preliminary investigation, the adequacy between the preliminary investigation and the final decision, the internal consistency, the non-arbitrariness in weighing of interests at stake and therefore the logic and the coherence of the decision-making process.⁵⁵ In other words, reasonableness indicates «the plausibility and the justifiability of the choice made by the public authority».⁵⁶

Lastly, reasonableness is the basis of some legal provisions on the timeframes for concluding procedures.⁵⁷

3.2. Reasonableness in judicial review of administrative discretionary power

From a substantial point, reasonableness is a criterion for judicial review of administrative discretion. Indeed, reasonableness is a standard of conduct which the public authority need to follow in the administrative action. According to this criterion, administrative measure must not be vitiated by a lack of logic or congruity.

As for the relation between reasonableness and administrative discretion, the former is the content and the limit of the latter at the same time. The essence of discretionary power is that a public authority can weigh public and private

⁵³ In this respect, it is evident that reasonableness is a corollary of the constitutional principle of impartiality, in its objective meaning (while impartiality in its subjective meaning indicates prohibition of unequal treatment).

⁵⁴ De Pretis, 'Italian administrative law' (n 30) 40.

⁵⁵ On this point see Morbidelli (n 20) 1257.

⁵⁶ Cassese (n 40) 248 (my translations).

⁵⁷ See Article 21-*nonies* of Law no. 241/1990.

interests,⁵⁸ because the legislator did not pre-establish the prevailing interest; as unanimously stated by the Italian doctrine and jurisprudence, if discretion is particularly out of bounds, the judge may quash the administrative measure only in case of manifest unreasonableness, that is when the standards of logic or coherence⁵⁹ are manifestly breached. Nevertheless, according to the principle of proportionality, a public authority must also make the decision that imply the least burden on the private interest at stake. The issue thus concerns the relation between reasonableness and proportionality as standard of judicial review.

Since the second half of the last century, the Italian doctrine⁶⁰ linked the manifest inconsistency and illegality of administrative measure with the concept of reasonableness. Recently, excess of power⁶¹ has become associated (if not confused) with an illogical or manifestly unreasonable decision.⁶² Therefore, in case of a violation of the principle of reasonableness, the administrative

⁵⁸ The late thirties was the defining moment for scholarly discussions on administrative discretion in Italy. In Mortati's broad reading, discretion is the room for choice left by law to the decision-maker by using open-ended and/or vague legal and/or factual words (discretion in broad sense); however, according to Giannini's stricter view, discretion is the power to choose between conflicting (primary and secondary) interests (proper discretion). On the Italian scholarly discussion about discretion see M S Giannini, *Il potere discrezionale della pubblica amministrazione* (Giuffrè 1939); C Mortati, 'Potere discrezionale', *Nuovo Digesto Italiano X* (1939) 76; G Azzariti, 'Discrezionalità, merito e regole non giuridiche nel pensiero di Costantino Mortati e la polemica con Massimo Severo Giannini' (1989) 20 *Politica del Diritto* 347; F G Scoca 'La discrezionalità nel pensiero di Giannini e nella dottrina successiva' (2000) 4 *Rivista trimestrale di diritto pubblico* 1045.

⁵⁹ In a number of cases, reasonableness is conceived as logic or coherence by the Italian courts. On this point see Della Cananea (n 4) 298-299. *Contra*, S Civitaresse Matteucci 'Ragionevolezza (dir. amm.)', *Enciclopedia Treccani* (2017) <<http://www.treccani.it>> accessed 14 November 2019, states that reasonableness used as standard of judicial review of administrative discretion does fill different from mere logic and more closely reflects a sense of justice or the concept of proportionality.

⁶⁰ F Benvenuti, 'Eccesso di potere per vizio della funzione' (1950) *Rassegna di Diritto Pubblico* 1.

⁶¹ In Italian administrative law, originally excess of power corresponded to the *détournement de pouvoir* of French law, that is the perverse use of official powers to attain illegitimate ends; therefore, initially excess of power was – and in part it still is – a deviation of the power, consisting in the use of power for a different purpose than that contemplated by the law (more exactly, the latter definition now indicates a misuse of power, that is only one of the many forms of excess of power classified by scholars). For an historical frame of this concept see G Treves 'Judicial Review in Italian Administrative Law' (1959) 26 *The University of Chicago Law Review* 432-433; G Corso, 'The Principle of Reasonableness in Administrative Law' in *Reasonableness and interpretation*, 2003, 387ff; R Caranta, *On discretion*, in S Prechal, B Van Roermund (eds), *The coherence of EU Law. The search for unity in divergent concepts* (Oxford University Press 2008) 191-192.

⁶² On this point see R Caranta, B Marchetti, 'Judicial review of regulatory decisions in Italy; changing the formula and keeping the substance?' in O Essens, A Gerbrandy, S Lavrijssen, *National courts and the standard of review in competition law and economic regulation* (Europa Law Publishing 2009) 151.

measure is considered affected by excess of power,⁶³ with particular reference to some form of the excess of power, the so-called “symptomatic figures” (figure sintomatiche),⁶⁴ classified by Italian administrative doctrine and jurisprudence, namely: conflict with standards of consistency, logic and reasonableness in administrative choices; unwarranted unequal treatment (when comparable situations are treated differently, unless such treatment is objectively justified); insufficiency or inconsistency in the statement of reasoning.⁶⁵

As established recently by the Council of State,⁶⁶ the administrative judge can review technical discretion⁶⁷ also intrinsically (*id est*, making use of the same technical knowledge of the specialist science applied by public authority, especially by independent agencies) but he cannot go beyond the scrutiny of logic and reasonableness of administrative decision, otherwise he would infringe the principle of separation of powers.

In detail, the most recent administrative case law⁶⁸ – after getting passed several lexical disagreements concerning the first difference between weak and *de novo* (strong) judicial review – affirmed the possibility for the administrative judge to have access to the disputed facts and the formation process of the public will;⁶⁹ however, the Council of State ruled that the judge (although on the outcome of “intrinsic” scrutiny) cannot always be entitled to substitute its own construction to that of the public authority, when it comes to a complex evaluation on a questionable technical problem (in particular, on the so-called “contextualization” of vague and imprecise legal terms and their comparison with the established facts). If this is the case, the intervention by the judge should be limited to verifying whether the complex technical evaluation made by public authority is plausible, reasonable and proportional in the light of the technique, the appropriate science and all the relevant facts. Such a kind of judicial review has been defined “of technical reliability” and “non-substitute”.

⁶³ On this point see F Bassi, *Lezioni di diritto amministrativo* (Giuffrè 2008) 19ff.

⁶⁴ This expression indicates that an excess of power may have occurred.

⁶⁵ In addition to those already mentioned, there are other forms of excess of power, eg the lack of a proper preliminary investigation (when the process of discovery of relevant facts is deemed inadequate) and, of course, the misuse of power.

⁶⁶ Council of State, Section V, 31 July 2019, n. 5434, in <www.giustizia-amministrativa.it>.

⁶⁷ For an historical frame of the traditional Italian reconstruction of the administrative technical evaluation activity see D De Pretis, *Valutazione amministrativa e discrezionalità tecnica* (Cedam 1995); S Cassese, *Valutazioni tecniche della pubblica amministrazione* in S Cassese (ed), *Dizionario di diritto pubblico*, (Giuffrè 2006) 6176; Caranta, Marchetti (n 60) 150-153.

⁶⁸ Council of State, Section VI, 5 August 2019, n. 5562, in <www.giustizia-amministrativa.it>; Council of State, Section VI, 15 July 2019, n. 4990, *ivi*.

⁶⁹ On this point De Pretis, ‘Italian administrative law’ (n 30) 33 argues that «naturally, a definition of the regimen and an analysis of the defective course of the administrative decision also implies an evaluation of the respect paid to the rules regarding the formation of the public will (*volontà pubblica*) under which the decision to act was taken by the administrative authority».

4. Lights and shadows of Italian administrative jurisprudence. The influence of the European Court of Justice on the Italian administrative (case) law

If most Italian scholars agree on reasonableness and proportionality to be two different and autonomous principles, in the Italian administrative case law the mentioned distinction is full of lights and shadows; sometimes, this difference is so blurred that reasonableness and proportionality are confused. In other words, in many of its judgments, national administrative jurisprudence uses reasonableness and proportionality without distinction.⁷⁰

An example of these difficulties and uncertainties encountered in interpreting such standards of judicial review of administrative discretion is provided by a dispute on derogations from an administrative measure imposing a limited-traffic zone in historic center of Rome.⁷¹ In the case at hand, the Plenary Assembly of Italian Council of State ruled that the weighing of the opposing interests at stake should be the outcome of a reasonable evaluation, according to which a public authority, when taking a discretionary decision, must choose the most reasonable solution (among the other available options) with the least sacrifice for the opposite interest. Therefore, as can be seen, in the present case the Court used the notion of reasonableness in a meaning that scholars usually give to proportionality.⁷²

Italian administrative law – as we know it today – is clearly influenced by the EU legal system. As it has been mentioned in the first paragraph, the ECJ's established case law reveals that the essence of reasonableness as yardstick of judicial review lies in balancing interests. And, of course, this point of view has influenced also Italian courts. A recent example⁷³ is provided by a dispute on environmental standards in Italy. Since the 1973, a company used to operate a chemical plant for the production of detergents with the necessary authorizations. Following the entry into force of Legislative Decree 3 April 2006, no. 152

⁷⁰ This is made quite explicit in Council of State, Section VI, 27 July 2015, n. 3669, in <www.giustizia-amministrativa.it>; Council of State, Section VI, 11 January 2010, n. 14, *ivi*. On this point see, Villamena (n 19) 100 who argues that in administrative case law reasonableness and proportionality are used confusedly; also Barone, Ansaldi (n 24) 222 state that «only during the last years has Italian jurisprudence acquired the Community principle of proportionality even if sometimes it confuses this principle with the reasonableness one»; Cognetti (n 19) 168 affirms that the principle of proportionality has entered the Italian jurisprudential language, although not until very recently (precisely with case Council of State, Section V, 18 February 1992, n. 132), overlapping and intertwining in an approximate and confused manner with the principle of reasonableness, interpreted in a double sense: as non-contradiction and suitability between means and ends.

⁷¹ Council of State, Plenary Assembly, 6 February 1993, n. 3, in <www.giustizia-amministrativa.it>.

⁷² It is highly significant that the word 'proportionality' is never used by the Court in the case at hand.

⁷³ TAR Lazio, Latina, Section I, 18 April 2018, n. 205.

approving the Italian Code on the Environment, to carry out polluting activities became obligatory to obtain an Integrated Environmental Authorization. In 2012, the local government administration had issued the authorization requested by the company in 2007 but decided to impose on the company some conditions designed – from the point of view of local government – to raise environmental standards. In details, the company – to verify the environmental impact of road traffic resulting from the exercise of business activity around the production plant – should have notified within 180 days: number and type of vehicles arriving and departing from the plant as a whole; for each vehicle, power supply and emissions classification according to European standards (Euro 2, 3, 4 etc.); distribution of arrival and departure of vehicles in the space of a weekday, pre-holiday and festive day; average distance (km/journey) of the various means of transportation.

The company claimed that these conditions were unreasonable, disproportionate, unnecessary and that they entailed an excessive burden. The claim was recognized as valid by the regional administrative court, precisely on the basis of both the proportionality test and the reasonableness test. In other words, in this case the regional administrative court carried out a balancing test, which involves both proportionality and reasonableness as standards of judicial review. Indeed, on the one hand, the judge balanced the public interest of environmental protection with the individual interest in conducting business activity. Furthermore, the court established that the imposed conditions were excessively burdensome and disproportionate to the limits prescribed by law and more generally to the environmental protection aim predefined by the legislator; on the other hand, the judge ruled that the imposed administrative requirements were unreasonable because the data collected on monitoring and control of emissions were of no use to the environmental protection. Finally, the challenged administrative conditions were considered unreasonable as a consequence both of their difficult implementation and of the specificity of the required information, the majority of which was not directly available and easily accessible for the claimant.

In this case, European influences are clear in two respects: first, the Court implicitly recognizes that the essence of both reasonableness and proportionality lies in the balance of interests at stake;⁷⁴ second, the Court, while explicitly claiming to have applied the standards of reasonableness and proportionality, used them in a vague and indistinct manner.⁷⁵ Moreover, the Court has not

⁷⁴ This is made explicit in TAR Sardegna, Cagliari, Section II, 7 November 2019, n. 824, according to which the EU principles of reasonableness and proportionality always require to achieve a balance between public and private interests.

⁷⁵ D'Alberti (n 19) 109 highlights that in some cases, Italian Courts have quashed administrative measures that were deemed to be manifestly disproportionate. Obviously, to assess the manifest disproportion entails a marginal review. According to the author, in this case, the proportionality test resembles a control on reasonableness.

specified, in practice, how the application of each of these two principles affects the disputed administrative act, as we have seen often happen in the European Court of Justice case law. Instead, if the national administrative judge had wanted to follow the teaching of classical Italian doctrine, he probably would have specified which administrative prescriptions were disproportionate and which were unreasonable, diversifying the application of the criteria of judicial review, based on a precise and clear categorization of the same.

Moreover, as sometimes happens in the ECJ case law, reasonableness often ends by being absorbed in the proportionality test also in Italian administrative case law.⁷⁶ This obviously does not mean that proportionality and reasonableness express the same principle. Indeed, this case law, that often uses together reasonableness and proportionality or sometimes uses them interchangeably, doesn't convince the Italian doctrine, because such a judicial control does not seem particularly rigorous.

On the other hand, the influence of EU law – as interpreted by the Court of Justice – on the Italian administrative (case) law, is clear with regard to the relation between reasonableness and other general principles of law. Indeed, in the ECJ case law, reasonableness is seen as a key tool and condition for implementing other general principles of law (in the examples given in the first paragraph, the legitimate expectations and precautionary principle). In the same way, in the Italian legal order, the Constitutional Court stated that the tool able to give general application to the principle of legitimate expectations is exactly the reasonableness, understood as core value of legal culture, inherent in all public law relations;⁷⁷ according to the Court, indeed, the principle of legitimate expectations has its roots in the standard of reasonableness, especially in terms of legal certainty, fundamental element of the rule of law.⁷⁸ On the same topic, under the influence of the ECJ case law, the Italian Council of State also ruled that, according to the standard of reasonableness, in case of merely formal de-

⁷⁶ De Pretis (n 30) 13, points out that «the reasonableness principle, in its traditional implementation, already allowed the [Italian] Council of State to question administrative choices in some sensitive areas, such as the protection of property and the environment, using standards that were not very different from those involved in the proportionality test under Community law»; on this point see also Astone (n 18) 4.

⁷⁷ Constitutional Court, 4 November 1999, n. 416, in <www.cortecostituzionale.it>. On the relation between the principle of legitimate expectation and reasonableness see G Grasso, 'Sul rilievo del principio del legittimo affidamento nei rapporti con la Pubblica Amministrazione' in A Di Taranto (ed), *Il nuovo modello di amministrazione tra il principio di autoritarità ed unilateralità ed i moduli consensuali nella organizzazione e nell'esercizio delle potestà pubbliche*, (2005) <www.sna.gov.it> 30; A Giurickovic Dato, 'Sul principio del legittimo affidamento' (2018) 1 Diritto e processo amministrativo 338.

⁷⁸ Constitutional Court, 23 February 2011, n. 71, in <www.cortecostituzionale.it>.

fects and in presence of long-established legal position, judicial protection should be given to the *reasonably* founded expectations.⁷⁹

In conclusion, in Italian and EU administrative law, reasonableness is a very broad⁸⁰ principle of law designed to ensure the fairness of administrative decisions; it is often used as a canon of interpretation and a tool to operationalize other general principles of law. In any case, it is clear that reasonableness is a basic and fundamental principle of legal system, parameter of supreme importance in order to protect individuals against administrative arbitrariness. On the other hand, as anticipated above, according to the majority of Italian scholars, the principle of proportionality must be distinguished from that of reasonableness. This division certainly has positive aspects. Indeed, the proportionality test, taking into account three elements of judgment, made judicial review of administrative discretion more intense than that of reasonableness; it is a further tool to control the proper use of administrative power; it ensures a wider judicial protection for the individual interests compared to the public interest.

⁷⁹ Council of State, Section IV, 14 November 2014, n. 5609, point 6, in <www.giustizia-amministrativa.it>; Council of State, Section IV, 18 August 2009, n. 4958, *ivi*; Council of State, Section IV, 2 October 2007, n. 5074, *ivi*.

⁸⁰ Adinolfi (n 5) 401, notes that reasonableness «is a manifold principle playing different roles, and in playing these roles it changes its meaning and content, like a chameleon».

Effective Judicial Protection: some recent developments – moving to the essence

Sacha Prechal*

*Judge at the Court of Justice of the EU and honorary professor of European law at
Utrecht University*

Abstract

This article looks briefly into the evolution of the principle of effective judicial protection in EU law and into the relationship between the different manifestations of that principle, which is by now given expression in Article 47 CFR, Article 19 TEU and various provisions of secondary law. Next, it focusses on recent developments in the case law of the Court of Justice of the EU, which concern two central aspects of the principle of effective judicial protection: the compliance with court judgments and the independence of the judiciary. As far as the first topic is concerned, two rather extreme cases addressed the issue what should be done, as a matter of EU law, in situations where a public authority refuses to comply with a final judicial decision. Then the article continues by discussing the independence of the judiciary as a key rationale for the principle of effective protection. In particular, it summarizes the increasingly detailed requirements to be satisfied in order to protect the independence of judges and indicates how an alleged lack of independence should be assessed in a concrete case.

I. Introduction

Ever since its ‘discovery’ in 1986,¹ the principle of effective judicial protection has expanded enormously in various respects. First, the content of the principle has been elaborated over the years in both the case law of the Court of Justice and in written primary and secondary EU law; by now, it covers a whole panoply of refined rules and ‘sub-principles’. Second, the principle does not only apply to the judicial protection offered by national courts, but also to the judicial protection ensured by the Union courts. Third, it became an important yardstick for national procedural, remedial and sometimes substantive law. Fourth, the principle makes inroads into various classical legal disciplines – administrative law, civil law, criminal law and constitutional law.

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¹ Case C-222/84 *Johnston* EU:C:1986:206 and Case C-222/86 *Heylens* EU:C:1987:442.

A recent special issue of REALaw² has vividly illustrated many of these aspects of the principle, particularly as regards the interplay between its manifestations³ in a number of specific areas of EU law, such as environmental law, immigration law, public procurement and EU criminal justice. In these – and other – fields, effective judicial protection is elaborated to different degrees of detail in secondary law, but written and unwritten primary law also plays an important part. In Section 2, I will briefly set out the main lines governing these relationships.

Recent case law of the Court of Justice seems to put in the limelight the constitutional dimension of the principle of effective judicial protection. Arguably, primary considerations behind this principle have always been intimately linked to fundamental rights and to the idea of the rule of law.⁴ Still, many questions that were raised were primarily of a procedural nature, such as the issue of reasonable time limits, standing rules, right of the defence, evidential rules and interim relief. These are indeed vital issues for judicial protection and the case law has incited changes in national legal systems. In recent cases, however, the emphasis seems to shift to the core of the right to effective judicial protection and the relationship with the rule of law is brought to the fore more explicitly than ever before.

The very existence of effective judicial protection⁵ has been clearly linked to the rule of law and declared to be of the essence of the latter principle.⁶ In turn, a part of the essence of the principle of or right to effective judicial protection is, according to the case law, in the first place, the independence of the judiciary.⁷ In the second place, a national legal system that allows a judgment of a court to remain ineffective fails to comply with the essential content of the right to

² Issue 2019/2.

³ It may be questioned to what extent we may speak of different sources: if the secondary law provisions are considered to be reaffirmation of Article 47 Charter of Fundamental Rights of the European Union, OJ C202/389 [CFR], while Article 47 CFR reaffirms the principle of effective judicial protection, it is submitted that the ultimate source is the principle. cf for instance Joined Cases C-585/18, C-624/18 and C-625/18, *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* EU:C:2019:982, para 163 and Case C-752/18, *Deutsche Umwelthilfe* EU:C:2019:1114, para 34.

⁴ cf S Prechal and R Widdershoven, 'Redefining the relationship between 'Rewe-effectiveness' and Effective Judicial Protection' (2011) 4 *Review of European Administrative Law* 31.

⁵ Sometimes slightly different terms are used, like effective judicial review or right to an effective remedy. These differences in wording do not imply difference in substance.

⁶ Case C-64/16 *Associação Sindical dos Juizes Portugueses* EU:C:2018:117, para 36, referring to Case C-72/15 *Rosneft* EU:C:2017:236, para 73. See also Case C-362/14 *Schrems* EU:C:2015:650, para 95.

⁷ Case C-216/18 *PPU – Minister for Justice and Equality (Deficiencies in the system of justice)* EU:C:2018:586, para 63 and Case C-619/18 *Commission v Poland (Independence of the Supreme Court)* EU:C:2019:531 para 58. See, for a broader discussion of the very core of effective judicial protection, K Gutman, 'The Essence of the Fundamental Right to an Effective Remedy and to a Fair Trial in the Case-Law of the Court of Justice of the European Union: The Best Is Yet to Come?' (2019) 20 *German Law Journal* 884.

effective judicial protection.⁸ The underlying rationale of both findings is, indeed, that a *meaningful* access to justice requires independent courts and compliance with the courts' judgments.

In Section 3, I will focus on this – at least from the perspective of the Court of Justice - new phenomenon of non-compliance by the executive branch with national courts judgments and the question of how to respond to this in terms of effective judicial protection.

Section 4 will deal with the independence of the judiciary. Indeed, much has been written about this topic ever since the seminal judgment *Associação Sindical dos Juizes Portugueses (Portuguese Judges)*. However, instead of concentrating on the constitutional importance of this judgment and the requirement of independence in general, I will discuss the conditions this requirement imposes in an ever more detailed fashion. This latter issue raises the question as to the limits of Europeanisation through the principle of effective judicial protection. I will finish with a brief conclusion.

2. How to handle overlap

As was already observed in the Introduction, effective judicial protection which, as such, is an *unwritten* general principle of EU law, is also increasingly provided for in secondary law, though the detail of elaboration differs: the spectrum moves from some very rudimentary and sometimes not entirely clear provisions,, through more robust texts to entire directives aimed at effective protection of certain rights.⁹ Furthermore, the principle has been *reaffirmed* as a fundamental right in Article 47 of the Charter of Fundamental Rights of the European Union (CFR).

Primary law may indeed serve as a standard for review of the validity of secondary law. However, more often than not it guides the interpretation of the secondary law provisions and in this process, primary law may fill the gaps. A good example of this is case C-348/16 *Sacko*.¹⁰

⁸ Case C-556/17 *Torubarov* EU:C:2019:626, para 72 and Case C-752/18 *Deutsche Umwelthilfe* EU:C:2019:1114, para 35.

⁹ cf Directive 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303/16, Article 9 (1), Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ L 180/60, Article 46 and Directive 2004/48 of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ L 157/45.

¹⁰ Case C-348/16 *Sacko* EU:C:2017:591.

Directive 2013/32 ('Procedure Directive')¹¹ provides in Article 46 that the Member States must ensure that applicants have the right to an effective remedy before a court or tribunal against a number of decisions listed in that article. It also states, *inter alia*, that the Member States 'shall ensure that an effective remedy provides for a full and *ex nunc* examination of both facts and points of law, [...] at least in appeals procedures before a court or tribunal of first instance.'¹² In contrast to the procedures before the competent administrative authorities,¹³ this provision is silent on the question of whether a hearing must be held before the court deciding on the appeal against a decision of the administration. In this respect, the Court pointed out that 'the characteristics of the remedy provided for in Article 46 of Directive 2013/32 must be determined in a manner that is consistent with Article 47 of the Charter, which constitutes a reaffirmation of the principle of effective judicial protection'.¹⁴ Next, the Court recalled that that principle comprises various elements, in particular, the rights of the defence, the principle of equality of arms, the right of access to a tribunal and the right to be advised, defended and represented. The right to be heard in any procedure, is inherent to the rights of the defence.¹⁵ Therefore, not hearing an applicant for international protection in an appeal procedure 'constitutes a restriction of the rights of the defence, which form part of the principle of effective judicial protection enshrined in Article 47 of the Charter'.¹⁶

This case does not only show how primary law functions *vis-à-vis* secondary law (the relevant articles of the Procedure Directive are 'read in the light of Article 47 of the Charter')¹⁷: it also illustrates the relationship between Article 47 CFR and the principle of effective judicial protection.

While the text of Article 47 CFR explicitly lists various components of effective judicial protection, it implies more: other unwritten requirements, such as the rights of the defence and the principle of equality of arms, are part and parcel of effective judicial protection. This symbiosis between Article 47 CFR and the pre-existing principle of effective judicial protection is, in fact, expressed in the case law with the words that Article 47 CFR *reaffirms* the principle. This points to the continuity between the pre-Charter and post-Charter understanding of effective judicial protection; after all, Article 47 should be interpreted in ac-

¹¹ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ L180/60.

¹² Article 46(3).

¹³ cf for instance Article 14 of Directive 2013/32, providing for a personal interview.

¹⁴ Case C-348/16 *Sacko* EU:C:2017:591, para 31.

¹⁵ *ibid*, paras 32 and 34.

¹⁶ *ibid*, para 37.

¹⁷ *ibid*, para 49.

cordance with the Court's previous case law.¹⁸ However, this new constellation also means that if, for whatever reason, gaps occur in judicial protection, the unwritten principles will be the fall back option.¹⁹

How does a relative newcomer, Article 19 Treaty on the European Union (TEU), fit into this picture? Paragraph 1, second sentence of this Article provides that 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.'

Interestingly, the English version uses the terms 'effective legal protection', whilst the French version speaks of 'protection juridictionnelle effective'. Arguably, legal protection is a broader notion than judicial protection;²⁰ in any case, the Article covers judicial protection.²¹

As the case law has made clear, Article 47 CFR and Article 19(1) TEU have different scopes of application. While the former applies only if the specific case is within the scope of Union law as defined by Article 52(1) CFR,²² the latter applies to national courts in general in so far as they *may be called upon* to apply or interpret Union law.²³ The precise delimitation of and the respective roles these different provisions have to play are matters that need further clarification. However, as far as the content of effective judicial protection is concerned, it seems that the content is the same: Article 19 (1) TEU, second sentence, refers to the general principle of EU law which is now reaffirmed by Article 47 CFR.²⁴

3. Effective judicial protection and public authorities

Effective judicial protection concerns, in the first place, the procedure before the courts. However, it has certain implications for the administration. One of these is the obligation to give reasons for the decisions they take, so that the person concerned is enabled to defend his or her rights under

¹⁸ cf, in the CFR, the Preamble of and Article 53, which provides that '[n]othing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law (...)'.
¹⁹ cf S Prechal, 'The Court of Justice and Effective Judicial Protection: What Has the Charter Changed?' in C Paulussen and others (eds), *Fundamental Rights in International and European Law. Public and Private Law Perspectives* (TMC Asser Press 2015) 143-157.

²⁰ Also many other language versions use expressions broader than 'judicial protection'.
²¹ cf for instance Case C-64/16 *Associação Sindical dos Juizes Portugueses* EU:C:2018:117, para 34.
²² The same holds in principle also for general principles of EU law : see Case C-206/13 *Siragusa* EU:C:2014:126, paras 34-35.

²³ Case C-64/16 *Associação Sindical dos Juizes Portugueses* EU:C:2018:117, para 40 and Case C-619/18 *Commission v Poland (Independence of the Supreme Court)* EU:C:2019:531, para 51.
²⁴ See, for instance, Case C-348/16 *Sacko* EU:C:2017:591 paras 29-30 and Case C-619/18 *Commission v Poland (Independence of the Supreme Court)* EU:C:2019:531, para 49. cf also Joined Cases C-585/18, C-624/18 and C-625/18, *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* EU:C:2019:982, paras 114 and 168-169.

the best possible circumstances and may decide, with full knowledge of the relevant facts, whether it is worth applying to the courts.²⁵ Furthermore, the reasons given are necessary to enable the court to review the legality of the decision at issue. The case law also makes clear that the way in which the evidence was taken in administrative procedure may impact fairness of judicial procedure²⁶ and that an obligation to exhaust administrative remedies before turning to a court of law constitutes a limitation on the right to effective judicial protection. Still, this limitation may be justified under Article 52(1) CFR.²⁷

A quite recent phenomenon brought before the Court of Justice concerns cases where the administration or even the local government refuses to give effect to a national court judgment that relates to EU law.

For instance, in contrast to previous legislation, a new Hungarian law which entered into force on 5 September 2015 prohibits a court from varying an administrative decision on an application for international protection: the court may only annul the decision and the authority competent in matters of asylum must in principle conduct a new procedure. It is then bound by the operative part and by the reasons stated in the court's decision and must proceed accordingly in the new proceedings. However, this is not what happened in the case of Mr. *Torubarov*. While the national court found, as a result of the 'full and *ex nunc* examination',²⁸ that the applicant for international protection qualified for it and therefore annulled the decision of the Immigration Office, by a new decision this Office rejected again the application. After this had happened three times, the national court turned to the Court of Justice with the question whether, under Article 46(3) of the Procedure Directive in conjunction with Article 47 CFR, the Hungarian courts have the power to vary administrative decisions of the competent asylum authority refusing international protection and whether the courts may grant such protection themselves. In the opinion of the referring court, the national legislation effectively deprives applicants for international protection of an effective judicial remedy, since the courts can do nothing else than annul the decision of the Immigration Office and refer it back for a new decision. If the Office again refuses to follow the court, this game of 'ping-pong'²⁹ can be prolonged indefinitely, contrary to the rights of the applicant.

²⁵ This has been standard case law ever since Case C-222/86 *Heylens* EU:C:1987:442.

²⁶ Case C-276/01 *Steffensen* EU:C:2003:228.

²⁷ Case C-73/16 *Puškar* EU:C:2017:725.

²⁸ According to Article 46 (3) of Directive 2013/32, referred to above.

²⁹ cf Case C-556/17 *Torubarov* EU:C:2019:339, Opinion of AG Bobek, Introduction.

The Court held that the right to an effective remedy would be illusory if a Member State's legal system were to allow a final, binding judicial decision to remain inoperative to the detriment of one party.³⁰ In fact:

'A national law that results in such a situation in practice deprives the applicant for international protection of an effective remedy, within the meaning of Article 46(3) of Directive 2013/32, and fails to comply with the essential content of the right to an effective remedy enshrined in Article 47 of the Charter, since the judgment of a court, delivered after an assessment complying with the requirements of Article 46(3) and following which that court decided that the applicant satisfied the conditions laid down by Directive 2011/95 to be granted the status of refugee or person eligible for subsidiary protection, remains ineffective, for lack of any remedy whatsoever by means of which that court may ensure compliance with its judgment.'³¹

The Court continued by recalling its case law, according to which a national court must be able to set aside national provisions that would withhold from it the power to do everything necessary to give full force and effect to directly effective EU law provisions;³² the Court then concluded by stating that, in order to guarantee an applicant for international protection an effective judicial remedy within the meaning of Article 46(3) of Directive 2013/32 and Article 47 CFR, a national court is required to vary a decision of the administrative body that does not comply with its previous judgment and to substitute its own decision by disapplying, if necessary, the national law that prohibits it from proceeding in that way.

These are indeed far reaching dicta: what the national court is not allowed to do under national law, it is obliged to do as a matter of EU law in order to safeguard effective judicial protection. Indirectly, the judgment also underlines the obligation of national administration to actually give effect to judicial decisions. This may seem rather obvious but apparently it is not, as the next case also illustrates.

The case of *Deutsche Umwelthilfe*³³ concerned the non-compliance with the obligations flowing from Directive 2008/50,³⁴ more precisely the very fact that the prescribed limit value for nitrogen dioxide (NO₂) had been exceeded, sometimes to a very considerable extent, at numerous locations in Munich.

The *Verwaltungsgericht München* (Administrative Court), as well as the *Bayerischer Verwaltungsgerichtshof* (Higher Administrative Court of Bavaria), had

³⁰ Case C-556/17 *Torubarov* EU:C:2019:626, para 57.

³¹ *ibid*, para 72.

³² Case C-106/77 *Simmenthal* EU:C:1978:49, para 22 and Case C-573/17 *Popławski* EU:C:2019:530, paras 52-62.

³³ Case C-752/18 *Deutsche Umwelthilfe* EU:C:2019:1114.

³⁴ Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe OJ L152/1.

threatened the *Land* of Bavaria with financial penalties if it did not take the measures necessary to comply with the limit values set by the Directive 2008/50, including the imposition of traffic bans in respect of certain diesel vehicles in various urban zones. The *Land* of Bavaria at some point paid the penalty, but it still did not comply in full with the terms of the injunction granted against it by *Bayerischer Verwaltungsgerichtshof*. Instead, representatives of the *Land* of Bavaria, including its Minister-President, publicly stated their intention not to comply with the obligations relating to the imposition of traffic bans. *Deutsche Umwelthilfe* applied for fresh measures, one of these being coercive detention of certain members of the government of Upper Bavaria (Germany) – the Minister for the Environment and Consumer Protection of the *Land* of Bavaria or the Minister-President of that *Land* – provided for by the Code of Civil Procedure. However, the referring court – *Bayerischer Verwaltungsgerichtshof* – observed that, in the case of office holders involved in the exercise of official authority, such a detention was not possible for reasons of constitutional law. The court nevertheless wondered whether the assessment of the legal situation at issue should not be different as a matter of EU law.

The Court of Justice relied indeed on *Torubarov* and found that where under national legislation a judgment of a court remains ineffective because that court does not have any means of securing observance of the judgment, this legislation fails to comply with the essential content of the right to an effective remedy enshrined in Article 47 CFR.³⁵ In this respect the Court also pointed out that, according to the case law of the European Court of Human Rights relating to Article 6(1) of the ECHR, the fact that the public authorities do not comply with a final, enforceable judicial decision deprives that provision of all useful effect.³⁶ The Court added that '[t]he right to an effective remedy is all the more important because, in the field covered by Directive 2008/50, failure to adopt the measures required by that directive would endanger human health.'³⁷

Next, the Court recalled the obligation of consistent interpretation and, if that would not be possible, the obligation to set aside any provision of national law which is contrary to a provision of EU law with direct effect in the case pending before that national court, the two avenues the national court can follow in order to give effect to the findings of the Court of Justice. However, the Court also recalled the limits of effective judicial protection: the right to effective judicial protection is not an absolute right and, as Article 52(1) CFR makes clear, it may be restricted, in particular in order to protect the rights and freedoms of others. A measure such as coercive detention entails a limitation on the right to liberty, guaranteed by Article 6 CFR. The Court looked into the limitation

³⁵ Case C-752/18 *Deutsche Umwelthilfe* EU:C:2019:1114, para 35.

³⁶ *ibid*, para 37 with reference to *Hornsby v Greece* App no 18357/91 (ECtHR, 19 March 1997), paras 41 and 45.

³⁷ *ibid*, para 38.

under Article 51(1) CFR. While various elements of the examination of the limitation – pertaining in particular to the interpretation of national law – had still to be determined by the referring court, the Court of Justice held that if the referring court were to conclude that, in the context of the balancing exercise between the right to effective remedy and the right to liberty, the limitation on the latter resulting from coercive detention complies with Article 52(1) CFR, EU law would not merely authorise but *require* recourse to such a measure.³⁸

These two cases illustrate that actions in court, the Court of Justice included, may provide some relief in cases where recalcitrant public authorities refuse to give effect to earlier judgements. In any case, from the point of view of the rule of law, one of the values ‘which are common to the Member States in a society in which, inter alia, justice prevails’,³⁹ it is distressing that judicial interference in such situations is apparently necessary.

4. Independence of the judiciary

The question of the independence of the judiciary is not entirely new. Already in 2006, in *Wilson*,⁴⁰ the Court had to interpret the concept of ‘remedy before a court or tribunal’ provided for in Article 9 of Directive 98/5,⁴¹ which concerned the independence of the body called upon to hear appeals against decisions refusing registration with the Luxembourg Bar. Furthermore, the requirement of independence comes on a regular basis to the fore in relation to the question whether a certain body qualifies as a court or tribunal in the sense of Article 267 TFEU. The requirement that such a body be independent and impartial appeared in the case law of the Court in 1987⁴² and has in principle been applied ever since.⁴³ As a recent judgment confirms, the notion of independence is essentially the same in the context of the principle of effective judicial protection or Article 47 CFR as it is in Article 267 TFEU.⁴⁴ It is, however,

³⁸ Finally, the Court also recalled the option of state liability as a remedy for breaches of EU law which applies irrespective whichever public authority is responsible for the breach.

³⁹ Case C-64/16 *Associação Sindical dos Juizes Portugueses* EU:C:2018:117, para 30.

⁴⁰ Case C-506/04 *Wilson* EU:C:2006:587.

⁴¹ Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, OJ L77/36.

⁴² Case C-14/86 *Pretore di Salò* EU:C:1987:275, para 7.

⁴³ See, for instance, Case C-222/13 *TDC* EU:C:2014:2265.

⁴⁴ Case C-274/14 *Banco de Santander* EU:C:2020:17. Moreover, since Article 47 and therefore also the problem of independence of the judiciary, corresponds to Article 6 ECHR, the Court may also rely on the case law of the ECtHR. In any case, the interpretation by the Court of Justice may not fall below the level of protection established in Article 6 ECHR, as interpreted by the ECtHR. cf Joined Cases C-585/18, C-624/18 and C-625/18 *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* EU:C:2019:982, para 118.

striking that only recently the independence of the judiciary has gained much more interest than ever before, with as a starting point the *Portuguese Judges* case.⁴⁵ Meanwhile, it has also been ‘upgraded’ to the status of principle of judicial independence⁴⁶.

The requirement that courts be independent forms part of the essence of the right to effective judicial protection, it is inherent in the task of adjudication and it has two aspects. The first is an *external* one, meaning that the body is protected against external intervention or pressure liable to impair the independent judgment of its members as regards proceedings before them. This implies that the body (or its members) should not be subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever,⁴⁷ not only any direct influence should be avoided, but also types of influence which are more indirect and which are liable to have an effect on the decisions of the judges concerned.⁴⁸ Furthermore, in accordance with the principle of the separation of powers, the independence of the judiciary must, in particular, be ensured in relation to the legislature and the executive.⁴⁹

The second aspect is *internal* and is very closely linked to impartiality. It seeks to ensure an equal distance of the body (and its individual members) from the parties to the proceedings and their respective interests; what is required is objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law.⁵⁰

What these rather general and abstract requirements mean has been subsequently translated into more concrete standards. Guarantees of independence and impartiality require more specific rules as to the composition of the body concerned and the appointment, length of service and the grounds for abstention, rejection and dismissal of its members. These rules must be such as to ‘dispel any reasonable doubt in the minds of individuals as to the imperviousness’⁵¹ of that body to external factors and its neutrality with respect to the interests before it. In other words, an appearance of a lack of independence must be avoided.

⁴⁵ Case C-64/16 *Associação Sindical dos Juizes Portugueses* EU:C:2018:117.

⁴⁶ Case C-64/16 *Associação Sindical dos Juizes Portugueses* EU:C:2018:117, para 27 and Case C-619/18 *Commission v Poland (Independence of the Supreme Court)* EU:C:2019:531, para 92.

⁴⁷ Case C-216/18 *PPU – Minister for Justice and Equality (Deficiencies in the system of justice)* EU:C:2018:586, para 63.

⁴⁸ Joined Cases C-585/18, C-624/18 and C-625/18 *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* EU:C:2019:982, para 125.

⁴⁹ *ibid.*, para 124.

⁵⁰ See, for instance Case C-216/18 *PPU – Minister for Justice and Equality (Deficiencies in the system of justice)* EU:C:2018:586, para 65.

⁵¹ Case C-619/18 *Commission v Poland (Independence of the Supreme Court)* EU:C:2019:531, para 74.

In relation to guarantees against removal from office, the Court has formulated the principle of irremovability⁵²: judges may remain in post provided that they have not reached the obligatory retirement age or until the expiry of their mandate (where that mandate is for a fixed term). The principle is however not absolute; strict exceptions are allowed, but these must be warranted by legitimate and compelling grounds and subject to the principle of proportionality. This implies that dismissals of members of the jurisdictional body must be determined by express legislative provisions, which go beyond ‘normal’ administrative or employment law standards.⁵³ Moreover, it is widely accepted that the only reason for removal may be incapacity to carry out their duties or a serious breach of their obligations by the judges concerned.⁵⁴

The latter point leads to another set of specific guarantees, namely those relating to disciplinary procedures. These guarantees must prevent any risk of that disciplinary regime being used as a system of political control of the content of judicial decisions. There must be a clear definition of conduct amounting to disciplinary offences and the penalties applicable; the rules must provide for the involvement of an independent body in accordance with a procedure which fully safeguards the rights enshrined in Articles 47 and 48 CFR, in particular the rights of the defence and for the possibility of bringing legal proceedings in which the disciplinary bodies’ decisions can be challenged.⁵⁵ This implies a guarantee of not being exposed to disciplinary measures for making a reference for a preliminary ruling to the Court of Justice.⁵⁶

As the case law illustrates, lowering the retirement age of judges may raise concerns from the perspective of the principle of irremovability.⁵⁷ As such, it does not mean that the retirement age cannot be changed. Even so, in accordance of what has been said above, also the lowering of the retirement age must be justified by a legitimate objective, it must be proportionate in the light of that objective and it may not give rise to reasonable doubts in the minds of individuals as to the lack of independence of the courts. Furthermore, and in any case, lowering the age limit for retirement must be accompanied by adequate transitional measures which protect the legitimate expectations of the persons concerned.⁵⁸

⁵² *ibid*, para 76.

⁵³ Case C-222/13 *TDC* EU:C:2014:2265, paras 32 and 35.

⁵⁴ Case C-619/18 *Commission v Poland (Independence of the Supreme Court)* EU:C:2019:531, para 76.

⁵⁵ Case C-216/18 *PPU – Minister for Justice and Equality (Deficiencies in the system of justice)* EU:C:2018:586, para 67

⁵⁶ Case C-8/19 *PPU* EU:C:2019:110, para 47.

⁵⁷ Case C-286/12 *Commission v Hungary* EU:C:2012:687, Case C-619/18 *Commission v Poland (Independence of the Supreme Court)* EU:C:2019:531 and Case C-192/18 *Commission v Poland (Independence of the ordinary courts)* EU:C:2019:924.

⁵⁸ Case C-619/18 *Commission v Poland (Independence of the Supreme Court)* EU:C:2019:531, para 91.

Unsurprisingly, the composition of a judicial body and the mode of appointment of its members have to meet comparable requirements: the conditions and the procedural rules governing the adoption of appointment decisions must be drafted in a way which guarantees that judges are protected from external intervention or pressure liable to jeopardise their independence. In particular, they must be such as to preclude ‘not only any direct influence, in the form of instructions, but also types of influence which are more indirect and which are liable to have an effect on the decisions of the judges concerned’.⁵⁹

Another strand of the case law concerns the powers vested in officials or institutions in relation to the nomination of judges, their career progress and the ending of the career. While some discretion can be left to these bodies, the substantive conditions and detailed procedural rules governing the adoption of such decisions must – again – be such that they cannot give rise to reasonable doubts, in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to the interests before them.⁶⁰ This means, *inter alia*, that objective and verifiable criteria should be provided to be applied in the respective procedures and decision-making processes, as well as the obligation to state reasons, in particular by making reference to those criteria. The possibility to challenge the decisions at issue in court proceedings – which should at the very least include an examination of whether there was no *ultra vires* or improper exercise of authority, error of law or manifest error of assessment – can be equally important.⁶¹

In so far as bodies such as a Council for the Judiciary⁶² are involved in the decision making processes, the Court admitted that their role may certainly contribute to the objectivity of the procedures. However, the proviso is that the body itself is independent of the legislative and executive authorities and, in so far as the body advises another authority or makes appointment (or other) proposals, it should also be independent of the authority which it assists.⁶³

⁵⁹ Joined Cases C-585/18, C-624/18 and C-625/18 *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* EU:C:2019:982, para 135.

⁶⁰ Case C-619/18 *Commission v Poland (Independence of the Supreme Court)* EU:C:2019:531, para 111.

⁶¹ Case C-619/18 *Commission v Poland (Independence of the Supreme Court)* EU:C:2019:531, para 114 and Joined Cases C-585/18, C-624/18 and C-625/18 *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* EU:C:2019:982, para 145.

⁶² While their organisation and competencies may differ, the Council for the Judiciary organisations are responsible for the support of the judiciary in the independent delivery of justice. They may be competent with regard to the recruitment of judges, career decisions and disciplinary actions. See, as to the appointment of members of these Councils: Commission, ‘the 2019 EU Justice Scoreboard’ (Communication) COM(2019) 198 final, 49-50.

⁶³ Case C-619/18 *Commission v Poland (Independence of the Supreme Court)* EU:C:2019:531, para 116 and Joined Cases C-585/18, C-624/18 and C-625/18 *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* EU:C:2019:982, para 138.

Finally, another aspect that has been touched upon in the case law is the level of remuneration. This must be commensurate with the importance of the function the persons, i.e. the judges, carry out.⁶⁴

What we see happen in this ‘independence of the judiciary’ litigation is that a general principle is given more precise substance in concrete cases and is refined so that it goes increasingly into details. Although the organisation of justice in the Member States falls within the competence of those Member States, when exercising that competence, the Member States must comply with their obligations under EU law. This is, as such, not a new phenomenon.⁶⁵ The fact is, however, that the net of redlines for the Member States is getting dense. This begs the following question: to what extent can findings in one case, as a general standard, be transposed to other cases?

An issue like the independence of the judiciary operates in a specific institutional, political, legal and cultural context. What is unacceptable in one system may seem rather normal in another.⁶⁶ There should certainly not be ‘one-size-fits all solutions’; space should be left to the Member States to make their choices.⁶⁷ However, what matters is a concrete and global assessment and this in two respects.

In the first place, the various elements to be taken into account in the assessment should not be considered in isolation but placed in the broader context. It might be that, when considered separately, the elements would not seem objectionable, whereas their cumulated effect may point to a lack of independence.⁶⁸ It might also be the other way round: while certain rules or practices might be questionable from the perspective of independence when taken separately, they might, in the bigger picture, be outweighed by other factors in the system. So, while for instance certain modes of appointment of judges may not

⁶⁴ Case C-64/16 *Associação Sindical dos Juizes Portugueses* EU:C:2018:117, para 45.

⁶⁵ Joined Cases C-585/18, C-624/18 and C-625/18 *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* EU:C:2019:982, para 115. cf also for instance Case C-438/05 *Viking* EU:C:2007:772, para 40.

⁶⁶ cf J Bell, ‘Judicial Cultures and Judicial Independence’ (2001) 4 *Cambridge Yearbook of European Legal Studies* 47.

⁶⁷ cf in comparable sense case law of the ECtHR, according to which ‘... neither Article 6 nor any other provision of the ECHR requires States to adopt a particular constitutional model governing in one way or another the relationship and interaction between the various branches of the State, nor requires those States to comply with any theoretical constitutional concepts regarding the permissible limits of such interaction. The question is always whether, in a given case, the requirements of the ECHR have been met (see, inter alia, ECtHR, 6 May 2003, *Kleyn and Others v. Netherlands*, CE:ECHR:2003:0506JUD003934398, § 193 and the case-law cited; 9 November 2006, *Sacilor Lorminesv. France*, CE:ECHR:2006:1109JUD006541101, § 59; and 18 October 2018, *Thiamv. France*, CE:ECHR:2018:1018JUD008001812, § 62 and the case-law cited)’ cited in Joined Cases C-585/18, C-624/18 and C-625/18 *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* EU:C:2019:982, para 130.

⁶⁸ See, to this effect, Joined Cases C-585/18, C-624/18 and C-625/18 *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* EU:C:2019:982, para 152.

be objectionable *per se*, they may become problematic when taking place upon a recommendation of a body which is itself not independent, or when they occur in a system with serious structural deficiencies.

In the second place, an overall assessment requires not only a close scrutiny of the rules alone, but also of the way they are applied and how this application works out. Obviously, perfectly neutral or even laudable rules may, depending on the circumstances, be used in a less laudable fashion and impair the independence of the judiciary. Likewise, the reasons and objectives to justify the measures play an important role in this assessment, although sometimes it might be difficult to distinguish between the alleged and real reasons. Here, once again, the context is crucial. For instance, in Poland, the alleged goal of the reform on the retirement age of serving judges of the Supreme Court was to standardise the retirement age of those judges with that applicable to all workers and to improve the age balance among senior members of that court. These are, as such, legitimate objectives of employment policy. However, the documents submitted to the Court contained information that gave rise to serious doubts as to whether the reform genuinely sought such legitimate objectives and was not made with the aim of side-lining a certain group of judges of that Supreme Court. The arguments brought forward by Poland did not dispel these doubts.⁶⁹

5. Conclusion

The proliferation of different manifestations of effective judicial protection and their subtle interplay may not be easy to grasp, but they often have considerable effects. As regards the different manifestations, the *Sacko* case has illustrated the use of three – secondary EU law, Article 47 CFR and the principle of effective judicial protection. In other cases, we see a combination of secondary EU law and Article 47 CFR,⁷⁰ Article 47 CFR only⁷¹ or Article 19 TEU⁷². In all those cases, the principle of effective judicial protection played a central role in the reasoning of the Court. While the *Banco de Santander* case,⁷³ which was as such not discussed in the present contribution, focused directly

⁶⁹ Case C-619/18 *Commission v Poland (Independence of the Supreme Court)* EU:C:2019:531, paras 80-96. cf also Case C-192/18 *Commission v Poland (Independence of the ordinary courts)* EU:C:2019:924, paras 126-131.

⁷⁰ *Torubarov* was decided on basis of Article 46 of Directive 2013/32 and Article 47 CFR; the *AK-case (Independence of the Disciplinary Chamber of the Supreme Court)* was about interpretation of Article 9 of Directive 2000/78 and Article 47 CFR.

⁷¹ Case C-752/18 *Deutsche Umwelthilfe* EU:C:2019:1114 and LM (in the context of EAW FD)

⁷² Case C-619/18 *Commission v Poland (Independence of the Supreme Court)* EU:C:2019:531 and Case C-192/18 *Commission v Poland (Independence of the ordinary courts)* EU:C:2019:924.

⁷³ Case C-274/14 *Banco de Santander* ECLI:EU:C:2020:17.

on the principle of independence, it built indeed upon the recent case law about judicial independence in the context of effective judicial protection. Unlike the other cases, this case concerned the interpretation of Article 267 TFEU, which implies, in so far as the question whether a body is to be considered as a ‘court or tribunal’ is concerned, that the principle of independence must be satisfied.

It would seem that bringing to life the effective judicial protection enshrined in Article 19 TEU in the *Portuguese Judges* case, in combination with serious problems regarding the independence of the judiciary reported in certain Member States, adds a new and crucial dimension to the already rich case law about the principle of effective judicial protection.

Recent case law of the Court has brought into light some aspects of the essence of the right to effective judicial protection in two respects: both the compliance with court judgments and the independence of the judiciary belong to the very core of effective judicial protection.

Under Article 52 (1) CFR, limitations of fundamental rights cannot affect the essence of a right – the essence is in this sense absolute. However, the conditions and requirements that guarantee independence, for instance, are not absolute. The discussion in the present contribution has shown that a principle like the irremovability of judges can be limited for legitimate purposes and provided that proportionality is observed. Comparable considerations hold true in relation to the obligation to comply with judicial decisions. There must be compliance, but the way to realize it may imply that the right to effective judicial protection may be balanced against other fundamental rights.

In a system governed by the rule of law, it is not only widely accepted but the very essence of such a system that the executive complies with judicial decisions. The appropriate way to deal with dissatisfaction with judicial decisions is to change the applicable rules through a democratic process, while respecting other – international or EU – obligations entered into. In order to avoid the right to effective judicial protection from being deprived of all useful effect by the very fact that a public authority refuses to comply with a final judicial decision, EU law may oblige national courts to set aside national rules or national case law that precludes the court in the case before it from guaranteeing that the protection is effective. In any case, this new line of case law applies only in rather extreme situations where the executive has persistently refused to comply with judicial decisions.

While attacks on the judiciary are usually blunt, tampering with their independence is often subtle and not easy to identify. Recent case law of the Court of Justice provides rather detailed requirements to be satisfied in order to protect the independence of judges in various respects. The requirements pertain to the removal of judges, the disciplinary regime applicable to them, their appointment and the discretionary powers of officials or institutions involved in nomination of judges, their career progress and the ending of the career. These powers must be clearly and strictly circumscribed; the ultimate overall test is that an appearance of a lack of independence must be avoided.

This case law has sparked debates about independence of the judiciary in various Member States, as *inter alia* the references to the Court of Justice illustrate. The assessment of the lack of independence is a delicate and contextual exercise: it should not consider the relevant elements in isolation and while it should start with the examination as to whether the rules as such are ‘independence-proof’, an assessment of their actual application and the effects they produce – alone or in combination – is crucial.

Book Reviews

Rob van Gestel and Jurgen de Poorter, *In the Court We Trust: Cooperation, Coordination and Collaboration between the ECJ and Supreme Administrative Courts*, Cambridge University Press 2019, ISBN: 9781108481274, 256 pp., € 128,99

The preliminary reference procedure laid down in Article 267 of the Treaty of the Functioning of the EU, under which national courts are entitled and sometimes obliged to refer questions concerning the interpretation or validity of EU law to the Court of Justice, has often been described in legal scholarship (also by the present reviewer) as an exercise in judicial dialogue. While many have expressed doubt as to the adequacy of this designation, citing both the limited exchange that the procedure provides for, and the sparse and occasionally cryptic style in which the Court drafts its judgments, the label has proven persistent. Against this background, Rob van Gestel's and Jurgen de Poorter's effort to empirically analyse the exchange taking place within the preliminary reference procedure and conceptually relate it to the elusive dialogue concept, speaks to a long-standing conundrum of EU legal scholarship, convincingly demonstrating what has previously only been intuited, and coupling it with firm recommendations as to the future of the procedure and indeed of the Court itself.

The book centres around an empirical study of the preliminary reference exchanges between the Court of Justice and ten selected Member State supreme administrative courts. The authors rely on quantitatively oriented case law analysis methods as well as interviews with judges on the selected courts. The findings of this study – in themselves an important contribution to the growing field of legal empirical research about the Court of Justice – form the basis of the book's theoretical and conceptual parts.

The book is divided into six chapters. The first chapter succinctly presents the puzzle that the authors set out to address: on the one hand, the Court's insistence that it is engaged in a dialogue with national courts based on mutual cooperation; on the other, previous observations by fellow scholars that the interactions between the courts is far removed from what in ordinary language would be termed a 'dialogue'. The chapter also reveals that while the preliminary reference procedure takes centre stage for their enquiries, van Gestel and de Poorter do not limit their focus to the formal starting and ending times of the procedure but includes considerations and actions taken by (predominantly) national courts both before a reference is sent and after the Court of Justice's ruling has been delivered.

Chapter 2 delves into the concept of dialogue. Here, the authors provide an overview of the concept of judicial dialogue as developed in legal scholarship. It traces its origins to Canadian constitutional law before exploring a variety of settings for inter-court communication, primarily following the taxonomy of Alan Rosas' influential article 'The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue' (*European Journal of Legal Studies* 2008). The chapter does not, however, offer a conclusive or even working definition of what

judicial dialogue is, or which criteria an exchange between courts needs to fulfil in order to qualify as one. Instead, it focuses on the functions of judicial dialogue, noting in particular, its legitimacy-enhancing potential. While one might agree that this perspective is more fruitful, the absence of a definition is nevertheless surprising in a book that aims to ‘establish the extent there actually is a judicial dialogue between the CJEU and highest administrative [courts]’ (p 20). A clearer characterization of the minimum requirements of judicial dialogue could have functioned as a benchmark for the empirical study, rendering the analysis more robust and adding to the weight of the ultimate conclusion.

The third and fourth chapters present the empirical study of the interactions between the Court of Justice and the supreme administrative courts of ten Member States: Germany, France, the UK, Spain, Austria, the Czech Republic, Poland, Denmark, the Netherlands, and Belgium. Here, the contentious reader might protest that these are not all specialised administrative courts. For instance, both the Danish and the UK supreme courts have general jurisdiction, and the authors do not explain how non-administrative cases from these courts are identified and excluded from the dataset or, alternatively, how the inclusion of civil and criminal cases from these jurisdictions may affect the findings. A more generous reader might however point out that the significance of the research question addressed in the book is by no means confined to administrative law.

Chapter 3 is dedicated to the analysis of the preliminary reference cases referred by the selected courts. The analysis is largely focused on two issues: first, the types of questions asked and the type of answers received, where the authors develop their own taxonomy of questions and answers; second, the use of what the authors term provisional answers, i.e., a discussion in the orders for reference on how the referring court considers that the questions could or ought to be answered. In the former category, the authors attach particular importance to the proliferation and *de facto* acceptance of questions concerning national provisions’ compatibility with EU law – a matter that is, according to long-standing case law, not for the Court of Justice to decide (van Gestel and de Poorter discuss them under the provocative heading ‘Questions that should not be asked’). In the latter, they note significant variations between national courts’ practices of providing provisional answers, with some courts doing so routinely and others consistently abstaining. The value of such answers are however called into question by the observation that the Court of Justice only very rarely enters into open discussion about the solutions suggested by the referring courts.

Chapter 4 offers a qualitative complement to the case law study by reporting the conclusions of an interview study with judges and, in the case of the Court of Justice, Advocates General of the selected courts. The findings are rich and

cover a wide range of issues associated to the use of the preliminary ruling procedure and to inter-judicial communication generally. The insights from the interviews are also interspersed with the authors' own reflections as to the implications and causes of the choices revealed.

A recurring theme in the book is the Court's use of requests for clarification from the referring court as provided for in the Rules of Procedure, which the authors appear to consider one of the most promising dialogical tools in the Court of Justice toolbox. The empirical study indicate, however, that such requests are very rare in practice. Upon enquiring on the reasons for this reticence, the authors take a critical position as regards the purported explanation – perceived procedural obstacles and negative experiences with previous requests – and instead theorise that refusal to ask the referring court for clarification of the questions leaves the Court with more leeway to interpret and reformulate the questions as it sees fit.

The fifth chapter returns to the concept of dialogue, which is now coupled with the notion of trust. Van Gestel and de Poorter argue that a key reason for the low levels of interaction revealed by the empirical study is a mutual lack of faith in the abilities and intentions of the other court, leading judges at both national and EU level to question the benefit of increased dialogue. Instead of earnestly trying to understand one another, the authors argue, both courts use unclarities to twist the questions or answers to fit their own needs or preferences. While still not providing a conclusive definition, the authors conclude that the current practice does not meet even the 'bare minimum of a judicial dialogue' (p 196). On this basis, the sixth and final chapter outlines three possible futures for the preliminary reference procedure, ranging from a status quo improved only by increased transparency and information sharing on both sides (cooperation) to an ambitiously revised preliminary reference procedure where the authors envision national supreme courts stepping up as auxiliary courts with powers to filter references from lower courts, prepare preliminary answers in a 'green light procedure' or even themselves exercise decentralised EU jurisdiction in certain cases (collaboration).

Reading the book, one is tempted to wonder why an entire scholarly work is dedicated to the question as to whether the interaction between the Court of Justice and national courts under the preliminary reference procedure should or should not be considered a dialogue. If the concept is so problematic, why not just discard it? The rose's scent does not depend upon its name, as Shakespeare teaches us, and the preliminary reference procedure's faults would hardly be worsened, nor its merits diminished, by another label. However, as the authors observe early in their work, the concept of judicial dialogue is not only a description. It is also (among other things) an ideal. The authors state that they refrained from relying on a definition of judicial dialogue as a bench-

mark for their empirical study, as they ‘do not believe it is up to [them] to determine what the relationship between the CJEU and highest national administrative courts should be’ (p 146). Their fear that a definition would immediately become prescriptive is illustrative of the entanglement between the descriptive and the normative side of the concept.

The conclusion that the practice of requesting and delivering preliminary rulings is not a dialogue is thus more than the neutral observation that the procedure does not fit the definition – whatever it is – of a dialogue. It is not the botanist declaring a specimen to be not a rose, but a peony. It must be understood as a critique. This begs the question what it is a critique for; what are the problems of the preliminary reference procedure that a dialogue could remedy, or that were created by its non-dialogical features?

For van Gestel and de Poorter, the answer appears to be connected to the purpose of the preliminary reference procedure. They identify three competing aims: securing the uniformity of EU law, developing EU law through precedents and judicial law-making, and upholding EU law by protecting the individual rights it creates. For the first and the last purpose, they argue, there is no particular need for judicial dialogue; it is only when the Court of Justice engages in judicial law-making that national courts (and, arguably, other actors as well, including national governments) have an interest in sharing the burden. But unless it is to see itself and its authority drowned in the increasing inflow of cases, the Court of Justice will have to choose, they argue, which of these purposes the preliminary reference procedure should serve. Their own preference, it seems, lays with the law-making purpose – thus making the failure of judicial dialogue critical.

Judicial law-making, however, is not an exclusive trait of the Court of Justice, but an unavoidable feature of adjudication itself – especially on the peak levels of the judiciary. Indeed, the Court of Justice does in this regard not appear to be drastically unlike its national counterparts, neither in methods nor in mandate. Is judicial dialogue yet another infant disease of European law – a sign that the Court of Justice does not command sufficient authority to gain acceptance for its judgments without drawing on the legitimacy of its more venerable colleagues in the Member State judiciaries? And if so, how do we move beyond it, to graduate into a discussion about the independence, authority and proper functioning of the European judiciary, however described?

Van Gestel’s and de Poorter’s book is not the final word; not on judicial dialogue, not on the preliminary ruling procedure, nor on national courts’ relations to each other or to the Court of Justice. However, it certainly increases our knowledge about what goes on behind the closed doors of the judicial chambers. It answers some of the questions raised in previous scholarship, but more im-

portantly, it allows us to formulate new and more insightful questions. Upon those questions, the debate is certain to continue.

*Anna Wallerman Ghavanini**

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Anna Wallerman Ghavanini is an Associate Professor of EU Law, Department of Law, University of Gothenburg, Sweden

Dacian C. Dragos, Polonca Kovač, Albert T. Marseille, *The Laws of Transparency in Action, A European Perspective*, Cham: Palgrave Macmillan 2019, hardcover, ISBN 978-3-319-76459-7, xxi+666 pp., € 217.99

In the United States and in most European countries, public access to documents is considered a necessary right to guarantee the democratic character of institutions and allow the clear formation of public opinion. Therefore, in many legal systems, the so-called 'Freedom of Information Act' (FOIA) has emerged as a model of legislation which aims to affirm the exercise of 'public power in public', in that it should support the democratic processes, namely those of participation and accountability.

Also, in the European Union, the right of access to documents – now expressly required by Article 42 of the Charter of Fundamental Rights of the European Union and by Article 15 TFEU – is conceived as a right strictly connected to the democratic principle.

In light of these considerations, this book analyzes the structural elements of the right of access to documents and the practical application of this model of decentralized and individualistic transparency. In particular, the book plays an important part in the academic debate, by engaging in a comparative assessment of the implementation challenges facing FOIAs in the administrative law of several European jurisdictions and at the level of European Union law.

The starting point for the authors' investigation is that the progressive proliferation of the right of access to public documents can stimulate a comparative analysis between the various laws on administrative transparency, including the European regulation on public access (in particular, Regulation (EC) 1049/2001). However, there are many reasons that would suggest particular caution in this type of analysis, taking the peculiarities – including constitutional – of the various European legal systems into consideration. In this vein, it is good to point out that authors are aware that 'the problems that occur in the implementation of FOIAs are different due to the legal and institutional context; nevertheless, patterns of best practices and malfunctioning are comparable'.

First of all, comparing FOIAs in different legal models is not a simple operation. Although the 'Freedom of Information Act' often presents common features (access granted to 'anyone', absence of reason for the request of access, categories of absolute and relative exceptions, etc.), in reality the laws are subject to a specific rationale in their application in the individual legal system. For example, the peculiar path of affirming the right of access to EU documents is due to the important and original relationship it had with the problem of the 'democratic deficit' of the European Union.

In the light of this premise, the greatest value of this book lies in its conclusive findings, where it is stated that '...although modern FOIAs are comparable in terms of structure, parties, procedure, and exceptions covered, they are still not uniform in their interpretation and application. The specifics of the legal system in which these rules apply still play a significant role in their interpretation,

and the administrative practice is also different. However, the comparative law finds here a fertile ground for assessment, as the legal institutions enabling freedom of information are in large part similar, and thus they can be compared, so that good practices from one country can be easily shared and referred to by other countries’.

The authors are aware of these difficulties and – without underestimating the relevance of the different legal contexts in which FOIA is placed – seek to carry out a detailed analysis of ‘the empirical evidence of enforcement of the main elements of the freedom of information laws in 13 jurisdictions from continental Europe and in the EU legal system’.

In the book, all contributions follow a similar structure, which analyzes: 1) the beneficiaries of access to public documents and the notion of public authority (with specific focus on the number, type and content of the request for access); 2) the relationship between public access and proactive publication of documents; 3) the exceptions to public access (with a specific analysis of the annual reports of public authorities, which shows the type of exceptions most used, such as ‘privacy’); 4) the special type of access to environmental information; 5) the legal protection against the refusal to provide information (in the form of both administrative and judicial remedies).

All these topics are described in depth, with an accurate analysis of the law and, above all, the case law and various sources of soft law (such as, for example, the important opinions of the European Ombudsman).

The conclusions of the book are very interesting in the light of this comparative analysis. Although each domestic arrangement has its own peculiarities, the book highlights that on at least three points (parties, procedures and exceptions) it is possible to discern some common trends. In this direction, tables, graphs, and careful analysis of the annual reports published in the various legal systems greatly help the reader to understand the phenomenon and its application.

With reference to the ‘parties’, it was pointed out that in all FOI legislation, the right of access is open to very large groups. In this sense, many contributions also reveal the important use that NGOs make of freedom of information. The book also underlines the particular aspects of some systems, such as the Italian one, in which for a long time (from 1990 to 2016) the right of access has been conditioned by the demonstration of a direct, concrete and currently existing interest corresponding to a legally protected position linked to the requested document.


Regarding the ‘procedures’, the book highlights how an important guarantee of the effectiveness of the law is at stake. The book claims that the comparative analyses reveals that the legal remedies are the very essence of the right of information law as well as a tool for enforcing such rights. In the various systems examined, legal protection is provided either in a formal sense – with direct appeal to the court or with an administrative appeal to an independent state body or through a non-formal instance to the head of the body at issue – or via

the Ombudsman. All these defined procedures give substantive content to the right of access. In fact, procedural issues are of paramount importance with a view to turning a theoretical entitlement into an actual right, that may be effectively enforced. In this sense, it is clearly stated that 'legal remedies can support an effective RTI [right to information] only if and when there is some minimal (administrative) procedure formalized and pursued as such in practice'.

Finally, one of the most important aspects of all compared countries' legal frameworks for providing access to public information, is the theme of 'exceptions'. That is, the issue of the limits that prevent the disclosure of information. Indeed, in every legal system transparency is not of absolute value, but must be balanced with other public and private interests. In this area, the authors identify that in most FOI legislation the exceptions revolve around the use of two criteria, commonly called "harm test" and 'public interest test', which limit the discretion of the administration in the decision of access to public documents. The harm test and public interest test can have different definitions and aims. In an attempt to provide a general definition, it is possible to argue that, based on the criteria of the harm test, the administration can refuse access if it proves that the dissemination of the document could cause concrete and highly probable damage to other private or public interests protected. On the other hand, the public interest test requires the administration to ground its decision on a real balance of interests. It considers the relationship between the disclosure public interest and the interest protected by the exception (for example, commercial interest, court proceedings and legal advice, data protection, etc.).

The application of these criteria results in the concrete limitations of access to documents. Therefore, it would have been interesting to have, in the conclusion of the book, a further and more in-depth analysis on two related topics: 1) the discretion of the administration in the application of these criteria; 2) the specific role of the 'public interest test' in the distinction between absolute and relative exceptions. Indeed, a clearer result in comparative terms on the role played by public interest in the disclosure of documents in balancing with the 'protected' interests would have been interesting, since this interest can condition both in a restrictive and extensive sense the guarantee of the individual right of access.

In general, because of its extensive comparative analysis of the topic, the book deserves to become a point of reference for comparative research on FOIAs model, thanks to its coherence, linearity of analysis and application of legal method.

*Tommasi Cosimo** 

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Tommasi Cosimo, University of Ferrara

Christopher Bovis, *The Law of EU Public Procurement*, Oxford: Oxford University Press 2015, 2nd edn, hardback, ISBN 9780199684687, lxi+864 pp., £ 195.00

There are two types of academic books: the first one is accessible to all readers, based solely on the text. The second intends to provide the specialist with the tools he/she needs to delve into the many subjects that need to be dealt with. This second type of work has thorough footnotes, which gives an account on the sources, literature, discussion and opinions. ‘The Law of EU Public Procurement’ satisfies the needs of both readers, assuming a double theoretical and judicial perspective.

As the Author states, the book “aims to provide the reader with a comprehensive analysis of the law, jurisprudence, and regulation of public procurement in the European Union” (p. 18, § 1.47), as provided in the directives package (2014/23-24-25/EU). The aim is amply achieved by means of the integral application of the *ordo-liberal* theoretical system (taken as a whole), revealing assumptions and backgrounds of the public procurement legal framework design, in continuity with his previous monographs. Notably, Chris Bovis is a well-known expert and a Professor of Business Law at University of Hull, as well as founder and editor-in-chief of the ‘European Procurement & Public Private Partnership Law Review’.

i. Structure

The volume unfolds in fourteen chapters (twelve on the substantial discipline), and the Author suggests (pp. 18–21) an organic reading in four-parts. According to his partition, (i) “[p]art one comprises of three chapters which offer the reader a trajectory of the development, evolution, and application of the public procurement *acquis*” (basically Ch. 2–3–4); (ii) the second part relates to the principles of public procurement (Ch. 5) and the so-called judicial doctrines (Ch. 6); (iii) the third covers the jurisprudential analysis regarding the basics of the notions of contracting authorities (Ch. 7), public contracts (Ch. 8), selection and qualification (Ch. 9), award procedures (Ch. 10), award criteria (Ch. 11); finally, (iv) the fourth part concentrates on redress and remedies (Ch. 12), and on the link between public partnerships and public procurement regulation (Ch. 13). To these parts is added the transcript of the Directives in force in 2014 (pp. 681–864). This transcript does not include the useful and cited recitals, which allow the combined reading of the text through the provisions. At a formal level, it should be noted that there are a few textual repetitions, which unfortunately do not strengthen the exposure of the specific subject matter (for example, §§ 1.27-1.41 is similar to §§ 5.30-5.44).

The book is very useful for those looking for key notions, thanks to the valuable table of cases (pp. xxv-xlv) and index (pp. 851-864), facilitating intra-textual research and transversal and integral study of the work. The structure of the volume corresponds substantially to the logic model of the first edition,

published in 2006 by the same publishing house, but with a different title, ‘The EC Public Procurement: Case Law and Regulation’. The book has been fully updated and revised to incorporate the established case law and the adoption of the European directives package on public contracts and concessions in the public sectors and utilities sectors (dir. 2014/23-24-25/EU), which reformed the law of public procurement, repealing the earlier directives of 2004 and introducing for the first time a European regulation of concessions.

The exposition has a circular, sometimes recursive development, which could be qualified as a research textbook. Indeed, ‘Foreword’ (pp. v–xiii), ‘Introduction’ (pp. 1-21, corresponding to a previously published essay), and ‘Conclusions’ (pp. 667-679) can be read in a unified way, separate from the rest of the volume, which requires the subsequent explanation. The book covers the whole subject of public procurement, except for the defense sector and green procurement. The exposition does not follow the order of the titles of the Directives n. 2014/23-24-25/EU. Moreover, it mistakenly recalls directives 2004/17-18/EC, as if they were “the current public procurement *acquis*”, as defined at p. xi, fn. 20 and p. 61, ft. 129, *Italics in original*). For that reason, concessions (Directive n. 2014/23/EU) have no autonomous explicitly devoted section, despite the two other directives on public procurement and utilities (Ch. 3 and 4) but they are part of the public-private partnership scheme. This is stimulated by the inner opinion that “there is no overriding legal definition of a public services concession under EU law or international law” (p. 593). This is a precise choice of the author.

2. Content

Under the procurement system regime, “[t]he European Institution through the enactment of the Single Market Act have identified public procurement reforms as essential components of competitiveness and growth and as indispensable instruments of delivering public services” (p. vi and p. 306, § 6.72). Hence, the public procurement regulation (such term stands out even in the title of twelve out of fourteen chapters) is necessary for the market integration, as “the identification of public procurement as a major non-tariff barrier has revealed the economic important of its regulation” (p. v and p. 667, § 14.01). However, this kind of economic regulation is not exhaustive; notably, the author distinguishes public market mechanism and market forces from the judicial doctrine and the legal integration, which comply with the system, even if is not necessarily consistent. In practice, the volume is concentrated on the EU case law and on the regulation of public procurement as a managerial tool available to the public sector.

Behind the insight of Bovis there is the awareness that “[t]he concepts of public procurement regulation refer to the mechanism for the applicability and engagement of the relevant rules and provide for different notions and definitions which are necessary for the harmonization of national legal and political

systems with a view to integrating their respective public markets” (pp. 18–19, § 1.53), but these legal concepts are not self-sufficient. Hence, the author highlights wisely the relevance of the “doctrines which the Court established and had recourse to its attempt to develop public procurement law as the conduit for the delivery of public services in EU Member States” (p. 19, § 1.54). The judicial approach to public procurement principles is viewed as a collection of “doctrines”, but the book is not less doctrinal in their reconstruction, as repeated in another study. Those principles are transparency and accountability, as properly regarded by public procurement law. Apparently, just for doctrinal reasons, the non-discrimination and the equal treatment principles are not covered, because they are comprised by the primary law.

In other words, the procurement system is not so much the sum of legal concepts, political doctrines and economic policies, but it is the reconstruction of a higher structure paradoxically lying underneath the system itself. It is posed on the institutional and ideological dogmas which lead the legal interpretation in order to define the conditions triggering the scope of the EU law.

Within the public procurement, the governance is not completely codified, rather it is implemented by soft regulation and grounded on the well-known principles of transparency and non-discrimination, which remain open textured, permeable and suffering from “porosity”, with the words of the author (pp. 672 and 673, § 14.11 e 14.13). For that, “[p]ublic procurement is the regime that can provide for transparency, objectivity and non-discrimination as well as insert elements of competition in the provision, organization, and delivery of public services” (p. 263, § 5.88, *desinit* of the chapter).

The uncertainty issue is well faced when the author delves into the public-private partnership, to which he devotes an entire monograph: indeed, “the procurement of public-private partnership must adhere to the newly adopted Concession Directive which has enshrined the principles of transparency, and non-discrimination that underpin the public procurement regime” (p. 21, § 1.62). To complete this view, even before the adoption of concessions directive (2014/23/EU), the public-private partnership would have been conceived as an instrument of public procurement pursuant to the “fundamental change in perceptions about the role and responsibilities expected from governments in delivering public services” (p. 11, § 1.26).

In short, the author claims that “[s]uch changes, in practical terms viewed through the evolution of public-private partnership, are translated into a new contractual interface between public and private sectors, which in turn encapsulates an era of *contractualized governance*” (p. 11, § 1.26, *Italics in original*).

3. Some critical remarks from an administrative law perspective on public services

The explained conceptual framework provided by Bovis engaging public procurement regime as a tool to provide public services could be

understood as the result of the axiomatic overlap between service contract and public service contract. According to the author, “[t]he Service Directive [dir. 92/50/EEC, then Directives 2004/18/EC and 2014/24/EU] is the first legal instrument which attempts to open the increasingly important public services sector to intra-community competition” (p. 43, § 2.52). Actually, the services covered under the first public sector directive were specifically listed in annexes I (branches A and B) and II (branches A and B), hence no EU rule can justify any mutual equivalence between service (even delivered to the public) and public services (*i.e.*, to be carried out by the law by the public sector). Moreover, the notion of the main purpose of the contract has not been decisive to trigger the EU law, when the service was delivered to serve public and also to benefit the public authorities.

Notably, the volume does not remark public services from a regulatory point of view (according to the economic approach, inherent to the author), but it only postulates the positive effects stemming from the recourse of the public procurement law for the liberalization of the public market, only developed in another essay.

Indeed, the services provided by the public sector are opposite to the regime provided by the (effective) Service Directive, *i.e.* dir. 2006/123/EC (in the jargon the Bolkestein directive), thereby it should not be found logically the *rationale* of the public service market openness in the notion of service itself, without considering any administrative matters and therefore that of the national reserve of the public sector to define and organise the public service delivery. Otherwise the complete liberalisation of the notion of public service should be useful only in order to define the public service obligation.

If we take a closer look, the purpose of the book seems to be to give the reader a comprehensive analysis, almost holistic, of the public procurement law. The purpose of the author seems to be directed to demonstrate that the public procurement as such is a sector governed by market forces (called “competitive pressures” at p. 1, § 1.02), before and beyond the law, up to point out that “there is strong evidence that the existence of competitive conditions within public markets would disengage the applicability of the relevant Directives” (p. 17, § 1.45 and p. 676, § 14.18), up to state that “the Court also suggested that commerciality and competitiveness might lift the veil of compulsory tendering, thus rendering the public procurement rules inapplicable” (p. 671, § 14.08, *Italics in original*).

Bovis argues that “[j]ustifications for its regulation are based on the assumption that by introducing competitiveness into the relevant markets of the Member State, their liberalization and integration will follow” (p. 668, § 14.02). According to the author, the idea of public procurement regulation may seem to be based on an *a priori* assumption, as liberalization and integration between public sector and private market become ends rather than means.

From this topic it follows the need for public procurement regulation, which is justified by the existence of a “*sui generis* market place often referred to as

marchés publique (public markets)” (p. 668, § 14.03, Italics in original), according to the French law meaning of public procurement system, and would justify the creation of the public markets law (*marchés publique*, as the author states on p. 668, § 14.03), with the intent to emulate the regulation of private markets.

Bovis states that “[p]ublic procurement regulation has also an introvert focus on the internal market. It envisages bringing the respective behaviour of the public sector in parallel to the operation of private markets. Public procurement regulation reveals distinctive sui generis markets which function within the EU internal market and have their main feature the pursuit of public interest” (p. 239, § 5.47). It follows that “the economic approach to the regulation of public procurement aims at the integration of public markets across the European Union” (p. 667, § 14.01), which implies the need to argue that “[p]ublic markets require a positive regulatory approach in order to enhance market access” (p. 668, § 14.04) and that “[p]ublic markets are fora where the structural and behavioural remedial tools of competition law also apply” (p. 6, § 1.16).

The statements transcribed here are not the synthesis, perhaps expressed in a non-perspicuous way, of the results of a previous analysis suitable to specify its meaning. All these are functional to demonstrate that the current EU directives and the public procurement *acquis* admit and nudge the decisions-making driven by a case-by-case approach.

Actually, before evaluating the directives objectives, it must be asserted whether the implementation of the single market and the application of competition rules, which design private markets, can justify the automatic extension of the public procurement law to the provision of public services, without undermining the dogma of the “principle of free administration of public authorities”, set out in the art. 2, dir. 2014/23/EU, of which there is no mention in the book. This analysis is far from being reached, representing the counterpart of the original concern of the EU law to give access to public markets, through public procurement regime, to firms established in Member States and non-Member countries, as already examined by the authors in the beginning of his research path.

4. The dogmatic approach to supranational administrative law

The author states that “[t]he Public Sector Directive represents a notable example of codification of supranational administrative law” (p. 677, § 14.20, and p. 306, § 6.72) and that “[t]he objective of simplification has materialized through the codification of supranational administrative law in the form of an EU Directive which covers all public sector procurement” (p. ix), which sounds like an admission that the law of public procurement, including the Public Sector Directive (2014/24/EU), finds in administrative law (albeit supranational), but certainly not in competition law, its legal basis.

The study lacks any evaluation of the influence of the public procurement law compared to global administrative law. To be understood as supranational

law *à regime administratif*, it is necessary to provide an administrative regime addressing the procurement system when public entities act not as purchasers, but rather as regulators, facing this field from a regulatory (not of compliance) perspective.

On a closer inspection, what looks like a postulate for a scholar of administrative law can be simply seen as an example of another point of view, and vice versa, requiring an ample dialogue between the two classes of scholars: in fact, the effort to rebuild the regulation of public procurement by using the economic approach as a tool of interpretation of the general *rationale* of such a system of rules can be understood as the natural choice for an academic with roots in business law. This characterizes well the background of Professor Bovis.

The analysis provided by the book goes beyond the legal framework and its legal interpretation, but it should be integrated with further reflections in the development of the internal market design along the path paved by the four directives generations. This is what the newest literature has done, pushed somehow by the Brexit.

The reasons for the overall view of this book are twofold: on the one hand, “[p]ublic procurement as a discipline expands from a simple topic of the common market, to a multi-faceted tool of European regulation and governance covering policy choices and revealing an interesting interface between centralized and national governance systems”, on the other, the judicial development of the scope of the EU in case of defeat of competitive conditions “indicates the referral of public markets to anti-trust, perhaps the ultimate regulatory regime” (p. 676, § 14.18), so that the internal market principles are simple intermediary tool to ensure market access in a competitive manner.

Therefore, the work is characterized as a doctrinal study, which takes part in the recent debate on the foundations and purposes of the public procurement regulation as a whole. The book, actually, presupposes economic expertise and certainly assumes, not always in a critical way, the adherence to a specific ideological apparatus, congruent to the European Commission papers, which is confirmed by the Europe 2020 Strategy and reaffirmed in the editorials of the author written for the ‘European Procurement & Public Private Partnership Law Review’

5. Final remarks

In conclusion, the work under review assumes the traits of the monograph, in terms of a treaty (not a simple commentary) and shows its value through the conceptual analysis of the foundations of economic regulation of public procurement and the identification of the relationship between antitrust law and public markets. The book presents by itself, given the authority of the author, the vastness of the research field and depth of the analysis. The former observations are, therefore, valid for the reader who wants to approach the text with the aim of a unified and reflective reading. The textbook is certainly the

opus magnum of Professor Bovis, which crowned his over twenty-year career, punctuated by a series of monographs containing the same economic approach. It is easy to guess that this work will require a new edition of the book to become a classic among the classics of the matter, providing autonomous treatment to the concessions directive and difference between the forms of management of the public services (including externalizations) and the method of award of the public contracts from a regulatory point of view.

*Livio Girgenti**

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Livio Girgenti is a lawyer with a PhD in Administrative Law, Milan (Italy). Visiting Scholar, PPRG, University of Nottingham (2016) and, METRO, Maastricht University (2019), Editor of his blog on EU administrative law at publicgarden.home.blog. Any inquiry to liviogirgenti@hotmail.com.