WREAKING THE WRONGS: BALANCING RIGHTS AND THE PUBLIC INTEREST THE EU WAY

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1. INTRODUCTION

Constitutional courts engage in balancing conflicting rights, principles, and interests. This balancing exercise raises profound questions about the separation of powers and the proper limits of the judicial province. A distinct feature of the post-Second World War European constitutionalism is that such balancing is not the

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exclusive province of national courts but is also performed by the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR). When balancing takes place at a supra-national level, the judicial exercise acquires added dimensions of complexity. The ECJ, in particular, has the delicate task of overseeing the political bargain established by the EU Treaties which is incomplete, vigorously dynamic, and unstable. The Treaties together with the Charter and the general principles of law outline both an economic and a political constitution. The contours of the former are broadly delineated by the social market economy model.[2] The latter is defined by commitment to liberal democratic ideals which, whilst proclaiming representative democracy as the defining system of government, recognize limits to majoritarianism through commitment to respect fundamental rights.

This paper attempts to explore selected issues concerning the balancing exercise carried out by the ECJ. After introducing briefly the constitutional role of the ECJ, it defines the universe of conflicts that arise in EU law and seeks to provide a typology of conflicts. It then attempts to identify some of the factors that the ECJ takes, or should take, into account in resolving them, and delves into a discussion of each of them. These issues are directly relevant to the rule of law discourse. An appreciation of how a legal system understands the rule of law cannot be obtained without examining, inter alia, how its supreme court applies constitutional principles to concrete situations and balances opposing objectives and rights. Furthermore, the ECJ follows a substantive rather than a procedural version of the rule of law. Even before the introduction of the Charter, it had long recognised that EU and State action must observe fundamental rights as general principles of law.[3] Post-Charter, it refers to some of its provisions as being mere illustrations of general principles.[4] In a Sophoclean universe, the ECJ sides firmly with Antigone not with Creon, in that it seeks to uphold not merely procedural but also substantive constraints to authority. Thus, to determine how the Court understands the rule of law, one needs to venture beyond an examination of core principles and process standards. An inquiry into the

[2] *See* Treaty on European Union, art. 3(3), Jan. 3, 2020, 2016 O.J. (C 202) 13 [hereinafter TEU]. The term 'social market economy' is not defined in the Treaties. It refers broadly to a commitment to a market economy, i.e. the laws of supply and demand as principal allocators of resources, but one which recognizes that the state has an important role to play as the guarantor of economic and social order, accommodating social objectives, e.g. social welfare or high employment. The model is far from static, allowing for different ordering *inter tempore* and among the Member States. The EU may prioritise economic and social objectives differently from time to time and from sector to sector. The confluence of economic and social objectives also allows the coexistence of different models of capitalism at Member State level. For a discussion, *see*, *e.g.*, Norman Barry, *The Social Market Economy*, *in* LIBERALISM AND THE ECONOMIC ORDER 1, 1-25 (Ellen Paul et al. eds.,1993).

[3] *See*, *e.g.*, Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, Case C-11/70, EU:C:1970:114; Les Verts v. Parliament, Case C-294/83, EU:C:1986:166; Schmidberger v. Austria, Case C-112/00, EU:C:2003:333.

[4] *See*, *e.g.*, Glatzel v. Freistaat Bayern, Case C-356/12, EU:C:2014:350, ¶ 43 (referring to the principle of equality); Léger v. Ministre des Affaires Sociales, de la Santé et des Droits des Femmes, Case C-528/13, EU:C:2015:288, ¶ 48 (concerning non-discrimination on the grounds of sexual orientation); Centraal Israëlitisch Consistorie van België, Unie Moskeeën Antwerpen VZW and Others v. Vlaamse Regering (Animal Slaughter Case), Case C-336/19, EU:C:2020:1031, ¶ 85 (regarding religious equality); Minister for Justice and Equality (Deficiencies in the System of Justice), Case C-216/18 PPU, EU:C:2018:586, ¶50 (concerning the right to judicial protection) [hereinafter *L.M.*]; H. N. v. Minister for Justice, Equality and Law Reform, Case C-604/12, EU:C:2014:302 (regarding the right to good administration).

taxonomy of conflicts and the factors to be taken into account in resolving them becomes particularly important in the context of the Court's adherence to general principles-based reasoning.

2. THE SHIFTING INTEGRATION PARADIGM AND THE CONSTITUTIONAL NATURE OF THE ECJ'S JURISDICTION

The ECJ has increasingly assumed the role of a constitutional court. It is no accident that the majority of the most important judgments delivered in the last twenty or so years have not related to the internal market, the traditional paradigm of integration, but involved fundamental rights, i.e. civil liberties and social rights, and general principles of EU law.[5]

The reasons why the ECJ has assumed that role are many. Its constitutional function is, to a degree, self-generated. From an early stage, through bold rulings, it projected itself as the generator of constitutional doctrine. But it is owing mostly to other factors. It is the Member States who have vested the EU, and consequently the Court, with a role in vast areas of decision-making. The broadening of EU competences through successive Treaty amendments and the proliferation of EU laws leave virtually no area of national law unaffected. The expansion of EU presence in the area of freedom, security and justice and economic and monetary union has been particularly significant in this respect. The internal market is no longer the only gravitational force but one constellation in a multi-polar regulatory universe. Happenstance has also been a major factor: the world evolves, crises arise, and new problems emerge. The last twenty years have been turbulent. A series of crises have led the EU to take action in a way which is haphazard, incomplete and sometimes unprincipled. The ECJ has been drawn into ensuing controversies and has fallen upon it to try and accommodate resulting mutations of EU law within the bounds of constitutional integrity. The incomplete character of the bargain and the *ad hoc* character of EU intervention favours reliance on values and principles, which the Court has sought to articulate in the exercise of its function to ensure that in the interpretation and application of the Treaties the law is observed.[6]

In contemporary EU law, constitutional clashes may be said to occur in the backdrop of three developments: First, the proliferation of EU rights, mostly as a result of the Charter acquiring binding force and the adoption of many legislative measures in diverse areas of economic and social regulation. Secondly, the enhanced prominence of EU structural principles, namely principles which define the constitutional identity of the EU,[7] such as autonomy,[8] mutual trust,[9] effectiveness,[10]

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[5] What are the 'most important' judgments is, of course, open to question and opinions may differ. They can be determined by reference to quantitative or qualitative criteria or a mix of them, such as, the court formation that hears the case, the number of subsequent judgments referring to a judgment, the novelty of the ruling, or the way the ruling affects precedent. A relevant consideration may also be the Court's own perception of the importance of the judgment, which is manifested by whether it is discussed in the Court's annual report. Here, the terms most important judgments refer to those introducing new points of law or advancing existing case law.

[6] *See* TEU art. 19(1).

[7] For a valuable discussion of structural principles in a specific field, *see* Marise Cremona, *Structural Principles and their Role in EU External Relations Law*, *in* STRUCTURAL PRINCIPLES IN EU EXTERNAL RELATIONS LAW 3, 3-29 (Marise Cremona ed., 2018).

and, more recently, solidarity.[11] Thirdly, reliance on the values of Article 2 TEU as overarching legal principles. Starting with the *Portuguese Judges* case,[12] Article 2 TEU has been recognised normative effect going beyond that expressly recognized by the references made to it in Articles 7 and 49 TEU.

The values of Article 2 are legally material in a number of respects. First, they have a strong signalling and interpretational force, 'forming part of the very identity of the Union'.[13] Secondly, they have been used as one of the building blocks in the articulation of a distinct model of EU law autonomy. This understands the exclusivity of the ECJ jurisdiction widely and imposes limitations on the competence of the Union and the Member States to conclude international agreements.[14] In this respect, Article 2 enhances the blocking effect of EU law although it is, in fact, difficult to find a direct link between Article 2 and the outcomes reached by the Court in applying the principle of autonomy.

Thirdly, the rule of law as an Article 2 value, in combination with Article 19(1) TEU, has been used to impose obligations on Member States regarding their system of governance, especially judicial independence.[15] Here, commitment to Article 2 creates governance expectations that permeate the national legal system and apply beyond the material scope of the Charter. The normative effect of Article 2 lies primarily in its empowering role. The judicial independence principles pronounced by the Court are based on the twin pillars of Articles 2 and 19. The former empowers the latter but its role is more than supportive, both provisions being on an equal footing and conjointly generating obligations. Although the Court has not dealt with this issue, on the basis of the case law, it may be said that Article 2 has relative normative autonomy. Although it may not be easy to envisage a situation where a breach of Article 2 does not entail also a breach of another provision of the Treaties, the violation of Article 2 may be conceived as an autonomous one and not merely as derivative of the violation of another EU law provision. It could thus be envisaged that, in an enforcement action under Article 258 TFEU, the Court may make a

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[8] *Se,e e.g.*, Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Case C-2/13, EU:C:2014:2454 [hereinafter *ECHR*]; Slovak Republic v. Achmea, Case C-284/16, EU:C:2018:158.

[9] *See, e.g.*, *L.M.*, EU:C:2018:586.

[10] *See, e.g.*, Reference for Preliminary Ruling, Taricco and Others, Case C-105/14, EU:C:2015:555; Reference for Preliminary Ruling, M.A.S. and M.B., Case C-42/17, EU:C:2017:936.

[11] *See* Germany v. Poland and Comm'n (OPAL Pipeline Case), Case C-848/19 P, EU:C:2021:598, ¶ 38 (in relation to energy); Hungary v. Parliament and Council (Conditionality Case), Case C-156/21, EU:C:2022:97, ¶ 129 (in relation to the EU budget) [hereinafter *Hungary Conditionality Case*]. *See also* Poland v. Council (Conditionality Case), Case C-157/21, EU:C:2022:98.

[12] Associação Sindical dos Juízes Portugueses v. Tribunal de Contas, Case C-64/16, EU:C:2018:117 [hereinafter *Portuguese Judges*].

[13] Hungary v Parliament and Council C-156/21, ECLI:EU:C:2022:97, ¶ 232; Poland v. Parliament and Council, Case C-157/21, EU:C:2022:98, ¶ 264. *See also infra*, note 14.

[14] *ECHR*, EU:C:2014:2454; Achmea, Case C-284/16, EU:C:2018:158.

[15] *See, e.g., L.M.*, EU:C:2018:586; A.K. and Others, Joined Cases C-585/18, C-624/18 & C-625/1, EU:C:2019:982; Repubblika v. Il-Prim Ministru, Case C-896/19, EU:C:2021:311; Refererence for a Preliminary Ruling, Eurobox Promotion and Others, Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 & C-840/19, EU:C:2021:1034; *Hungary Conditionality Case*, EU:C:2022:97.

finding that a national law or practice is in breach of another provision of the Treaties and also of Article 2.[16]

3. THE CONFLICTS UNIVERSE

The conflicts universe is complex and diverse. Two general categories can be distinguished without them being exhaustive: conflicts between a fundamental right and a public interest objective and conflicts between two or more competing fundamental rights. This distinction is helpful for the purposes of systematization but it is important to stress that it is porous and relative. It would be misleading to suggest that there is a clear-cut distinction between the public sphere, encapsulated in the first category, and the private sphere, encapsulated in the second. The public interest can be conceived as the aggregate of citizen entitlements that the state is charged to safeguard. Also, the public interest, as incorporated in a given statute, will likely reflect the balance of competing private groups and their respective power to influence the law-making process. Thus, reference to the public interest as a force vis-à-vis which a private right needs to be balanced may not capture the nuanced character of the balancing exercise which may defy a strict public - private dichotomy.[17] Similarly, where the juxtaposition is between two competing constitutional rights, it does not pertain solely to the private sphere. The duty to respect the rights of others, as a limitation on one's right, is in itself a form of heeding collective choices. Furthermore, where the conflict is between an EU right and a juxtaposing right protected by national law, the latter is protected by a state measure, e.g. the constitution or statute, so the balancing will not be between rights in the abstract but between an EU right and a state act protecting a competing right.

The categories identified should not therefore be understood as being absolute or impermeable. This applies also to any sub-groups of each category that will be identified below. The bottom line is that conflicts are often multi-dimensional and one and the same litigation may involve more than one conflict categories.[18]

3.1. Conflicts between a fundamental right and a public interest objective

Within a domestic legal order, such conflicts are part and parcel of constitutional adjudication and may occur, for example, between the right to due process and the fight against terrorism. In EU law, several permutations may arise depending on the respective source of the right and the countervailing public interest. An EU fundamental right may conflict with the public interest as defined by EU law or with a national public interest. The converse juxtaposition may occur where a

[16] For this possibility in relation to the Charter, see below.

[17] Note also that non state actors may have quasi regulatory powers or be entrusted with the exercise of powers traditionally granted to state authorities or act as gate-keepers in balancing conflicting rights. The latter is particularly evident in the Digital Services Act, *see Commission Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services*, COM (2020) 825 final (Dec. 15, 2020) as adopted by European Parliament Resolution (COM (2020) 0825 – C9-0418/2020 – 2020/0361 (COD)) (Jul. 5, 2020). These factors further undermine the public-private distinction.

[18] For recent examples, *see, e.g.*, Ref. Prelim. Rlg., *Eurobox*, EU:C:2021:1034; *Animal Slaughter Case*, EU:C:2020:1031; A. v. Veselības Ministrija (Jehovah's Witness Case), Case C-243/19, EU:C:2020:872.

fundamental right as recognised by national law conflicts with the EU public interest.[19] We will examine briefly each of these cases.

3.1.1 Conflicts between fundamental rights recognised by EU law and the EU public interest

Such a conflict typically arises where an EU measure is challenged as being incompatible with EU fundamental rights. The dispute pertains to the legality of an EU act and, since national courts may not invalidate EU measures,[20] the ECJ has complete jurisdictional control as to the outcome. Successful challenges are statistically rare but they do occur. In recent years, the ECJ has found EU measures to run counter to the right to judicial protection and the rights of defence,[21] the right to personal data,[22] and the principle of non-discrimination.[23] These areas are characterised by judicial activism even though a selective one. The protection of an EU right may not necessarily take the form of annulment. It can also take the form of a broad interpretation of the Treaties, or the Charter or a general principle of law.[24] An extensive interpretation of primary law dispositions may have a significant foreclosure effect in that it precludes the EU legislature or the Member States from following a different interpretation or at least constrains legislative options.[25]

Conflicts of this category occur in the plane of EU law and, at least overtly, no national law considerations come into play. The focus is on balancing an EU public interest vis-à-vis a fundamental right guaranteed by EU law. However, even in these

[19] The remaining category, namely conflicts between a national public interest and fundamental rights recognised by national law is a matter of national law and, at least directly, does not have an EU dimension. It may do so indirectly to the extent that the interpretation of national law may be informed by EU law developments even in areas where national law does not fall within the scope of EU law. This may occur, for example, in order to avoid reverse discrimination, i.e. the case where purely internal situations are treated less favourably than cross-border situations or national rights receive less protection than EU rights under domestic law.

[20] *See* Reference for Preliminary Ruling, Foto-Frost v. Hauptzollamt Lübeck-Ost, Case 314/85, EU:C:1987:452, ¶ 1.

[21] For examples in the field of sanctions, *see, e.g.*, Kadi & Al Barakaat International Foundation v. Council and Comm'n (Kadi I), Joined Cases C-402/05 P & C-415/05 P, EU:C:2008:461, ¶ 352; Comm'n et al. V. Kadi (Kadi II), Joined Cases C-584/10 P, C-593/10 P & C-595/10 P, EU:C:2013:518, ¶ 103; Rotenberg v. Council, Case T-720/14, EU:T:2016:689, ¶ 188.

[22] Reference for Preliminary Ruling, Digital Rights Ireland Ltd v. Minister for Communications, Joined Cases C-293/12 & C-594/12, EU:C:2014:238; Reference for Preliminary Ruling, Maximillian Schrems v. Data Protection Commissioner (Schrems I), Case C-362/14, EU:C:2015:650, ¶ 106; Reference for Preliminary Ruling, Data Protection Commissioner v. Facebook Ireland Limited and Schrems (Schrems II), Case C-311/18, EU:C:2020:559, ¶ 203.

[23] Reference for Preliminary Ruling, Association Belge des Consommateurs Test-Achats v. Conseil des Ministres, Case C-236/09, EU:C:2011:100, ¶ 34.

[24] Reference for Preliminary Ruling, PJSC Rosneft Oil Company v. Her Majesty's Treasury and Others, Case C-72/15, EU:C:2017:236, ¶ 158.

[25] For an extensive interpretation of the principle of equality, *see* Reference for Preliminary Ruling, Sturgeon and Others v. Condor Flugdienst GmbH, Joined Cases C-402/07 & C-432/07, EU:C:2009:716, ¶ 60. A foreclosure effect may also occur where the ECJ interprets EU legislation not as creating new rights but giving effect to primary law rights. *See* Reference for Preliminary Ruling, Mangold v. Helm, Case C-144/04, EU:C:2005:709, ¶ 74; Reference for Preliminary Ruling, Stadt Wuppertal v. Bauer, Joined Cases C-569/16 & C-570/16, EU:C:2018:871, ¶ 86. Still, the extent of foreclosure effect and the options available to the EU legislature to reform the law in the future will need to be determined on a case by case basis.

cases, the dispute is not mono-dimensional. Both national interests and foreign relations aspects may be involved.[26] If the issue of validity of EU law arises in a preliminary reference, the background to the dispute and the question of validity is defined by national law and involves a national court. The Member States may well be involved as litigants. Also, the recognition of an EU right may be informed by considerations of national law. The enquiry may address, for example, either overtly or by implication, the question whether the laws of Member States recognize a similar right.[27]

3.1.2 Conflicts between fundamental rights recognised by EU law and a national interest

This is the archetypal conflict in EU law and the locus where the integration game is primarily played out. The dialogue typically takes place through the preliminary reference procedure.[28] This category juxtaposes supra-national rights with domestic democratic choices and, as such, it has added political sensitivity. As the remit of EU law has expanded beyond the internal market, an increasing number of contestations between EU rights and national objectives do not involve economic rights arising from the four freedoms but civil liberties and social rights. The advent of citizenship, rich legislative activity in the area of freedom security and justice, the EU economic governance, and the rule of law crisis, have provided fruitful grounds for disputes in this area.

3.1.3 Conflicts between fundamental rights recognised by national law and EU objectives

The converse juxtaposition may arise where a fundamental right as recognised by national law clashes with the EU public interest. *Meloni*[29] and the *Taricco – MAS* litigation[30] provide prominent examples. In recent years, such conflicts have been the result of the resurgence of structural principles, especially effectiveness, mutual trust, and autonomy. Structural principles 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.[31] Similarly, the

[26] *See, e.g.,* Ref. Prelim. Rlg., *Schrems I*, EU:C:2015:650, ¶102*;* Ref. Prelim. Rlg., *Schrems II*, EU:C:2020:559, ¶68; Parliament v Council, Joined Cases 317/04 and C-318/04, ECLI:EU:C:2006:346; *Kadi I*, EU:C:2008:461, ¶ 142; Venezuela v. Council, Case C-872/19 P, EU:C:2021:507.

[27] *See, e.g.*, D. & Kingdom of Sweden v. Council, Joined Cases C-122/99 P & C-125/99 P, EU:C:2001:304, ¶ 26; Ref. Prelim. Rlg., *Mangold*, EU:C:2005:709, ¶ 74.

[28] For a recent study on the degree of deference accorded to the Member States, *see* JAN ZGLINSKI, EUROPE'S PASSIVE VIRTUES: DEFERENCE TO NATIONAL AUTHORITIES IN EU FREE MOVEMENT LAW (2020).

[29] Reference for Preliminary Ruling, Melloni v. Ministerio Fiscal, Case C-399/11, ECLI:EU:C:2013:107, ¶ 49.

[30] Ref Prelim. Rlg., *Taricco*, EU:C:2015:555, ¶ 52-53; Ref. Prelim. Rlg., *M.A.S.*, EU:C:2017:936, ¶ 46-47.

[31] *See, e.g.*, Reference for Preliminary Ruling, N.S. v. Secretary of State for the Home Department, Joined Cases C-411/10 & C-493/10, EU:C:2011:865, ¶ 40; Reference for Preliminary Ruling, Jawo v. Bundesrepublik Deutschland, Case C-163/17, EU:C:2019:218, ¶ 87 (pertaining to conflicts between mutual trust and the need to avoid inhuman and degrading treatment of asylum seekers); Reference for Preliminary Ruling, Aranyosi & Caldararu v. Generalstaatsanwaltschaft Bremen, Joined Cases C-404/15 & C-659/15 PPU, EU:C:2016:198, ¶ 74; *L.M.*, EU:C:2018:586, ¶ 72 (pertaining to the conditions under

principle of autonomy conditions the right to judicial protection by limiting recourse to alternative judicial fora.[32] Furthermore, effectiveness is not only an attribute of rights but also an attribute of EU obligations which may come into conflict with national fundamental rights guarantees.[33] The net result of the resurgence of structural principles is that the application of EU law may lead to a lower protection of fundamental rights than that demanded by the national law of a Member State.

3.2 Conflicts between fundamental rights inter se

Constitutional rights, whether in the form of Charter rights or general principles of law, may point to opposite directions. Such conflicts are a well-established feature of national constitutional law as, for example, when the freedom of expression comes into conflict with the right to privacy. They 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 reconcile them by concretising and providing for exceptions. Prioritization and balancing are standard features of constitutional adjudication.

Although some of the rights protected by the Charter are understood to be absolute,[34] EU written law tends to shy away from express ranking of rights. 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.[35]

According to the case law, where rights compete with each other, a fair balance must be reached. Normative basis for this can be found in Article 52(1) of the Charter which states that rights may be limited to accommodate the rights of others. This balancing exercise has become more complex as integration has advanced. In some respects, this complexity exists irrespective of EU law. New rights emerge which may compete with established ones. Changes in the economy, new challenges such as climate change, social and cultural evolution, and technological advances create new trajectories of conflict. In other respects, the complexity is specific to EU

which the surrendering state may refuse to execute a European arrest warrant on grounds of breach of fundamental rights).

[32] *ECHR*, EU:C:2014:2454 (where the ECJ found that the draft treaty governing the accession of the EU to the Council of Europe interfered with the system of judicial protection established by the EU treaties); Reference for Preliminary Ruling, Slovak Republic v. Achmea BV, Case C-284/16, EU:C:2018:158, ¶ 59-60 (where the ECJ found that arbitration clauses in bilateral investment treaties between Member States are precluded by the principle of autonomy).

[33] *See, e.g.*, Ref. Prelim. Rlg., *Taricco*, EU:C:2015:555, ¶ 53-54; Ref. Prelim. Rlg., *M.A.S.*, EU:C:2017:936, ¶ 46-47 (conflict between, on the one hand, the need to provide effective penalties against fraud affecting the EU financial interests and, on the other hand, the principle of non-retroactivity of criminal statutes and the principle that the rules governing criminal liability must be sufficiently precise); Ref. Prelim. Rlg., *Eurobox*, EU:C:2021:1034, ¶ 215 (conflict between, on the one hand, the need to take effective measures to counter fraud against the EU budget and, on the other hand, rules guaranteeing the independence of the judiciary).

[34] 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 (Article 5(1)). In relation to the latter, see Explanations Relating to the Charter of Fundamental Rights (2007/C 303/02) OJ 2007, C 303/17 at C 303/18. 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 which also entails balancing.

[35] *See infra*, notes 52 et seq. and accompanying text.

law. 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 rights and the ensuing need to compromise them. 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 measures 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.[36] The ECJ has stressed that an assessment must be carried out in accordance with the need to reconcile the opposing rights and strike a fair balance between them.[37] 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.[38] In general, rules which foreclose balancing are unlikely to find judicial favour.[39] 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.

Fair balance requires that the essence of each of the competing rights must be respected. It does not mean that the assessment starts from a position of complete equality among the juxtaposing rights. As stated above, the right to judicial protection stands at the apex, being the gateway for the exercise of virtually every other right.[40] The right to personal data enjoys an elevated rank. In *Google Spain*[41] the Court gave priority to that right and the right to private and family life over freedom of expression. Even where the scales are tilted in favour of one of the rights, the outcome will depend on considering all the facts and the nuances of the case. Even weaker rights may take precedence on the specific facts. It is unlikely that ranking itself, such as it might exist, would provide a definitive resolution. The bargain remains as incomplete as when a right needs to be balanced vis-à-vis the public interest.

Such horizontal conflicts may also take place between free movement rights, on the one hand, and civil liberties or social rights, on the other. *Schmidberger*[42] and

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[36] *See, e.g.*, Reference for Preliminary Ruling, Deutsches Weintor eG v. Land Rheinland-Pfalz, Case C-544/10, EU:C:2012:526, ¶ 54; Reference for Preliminary Ruling, Sky Österreich GmbH v. Österreichischer Rundfunk, Case C-283/11, EU:C:2013:28, ¶¶ 58-60.

[37] *See, e.g.*, Reference for Preliminary Ruling, Productores de Música de España (Promusicae) v. Telefónica de España, Case C-275/06, EU:C:2008:54, ¶¶ 65-66; Ref. Prelim. Rlg., *Deutsches Weintor*, EU:C:2012:526, ¶ 47.

[38] *Productores de Música de España (Promusicae)*, Case C-275/06, EU:C:2008:54, ¶ 68.

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

[40] See *Les Verts v Parliament*, C-294/83, ECLI:EU:C:1986:166, ¶ 23; *Johnston v. Chief Constable of the Royal Ulster Constabulary*, Case 222/84, EU:C:1986:206, ¶¶ 17-19.

[41] Google Spain v. AEPD, Case C-131/12, EU:C:2014:317.

[42] Schmidberger, Internationale Transporte und Planzüge v. Republik Österreich, Case C-112/00, EU:C:2003:333.

Omega[43] stand out as gestures of reconciliation with the national constitutional traditions. The latter, especially, illustrates a nation-state friendly view of integration: EU law does not dictate a uniform view of public policy and the integration paradigm can accommodate different balancing outcomes at national level.[44]

4. BALANCING FACTORS: WHAT FACTORS DOES THE ECJ TAKE INTO ACCOUNT IN RESOLVING CONFLICTS?

In resolving conflicts between countervailing interests or rights, the Court may take into account a number of factors. These factors, and the relative weight attached to each, may differ depending on a number of parameters. Although this is not an exhaustive list, the following factors may play a role in the judicial assessment:

1) The importance of the right at stake;

2) The extent to which the right has been the subject of legislative elaboration;

3) The seriousness and extent of its restriction;

4) Whether the restriction emanates from EU or national law;

5) The importance of the countervailing public interest or the countervailing right at stake;

6) Process considerations;

7) The perceived degree of consensus among the laws of the Member States on the issue at stake;

The above factors may also play a role in deciding whether, in a preliminary reference, the Court will reach an outcome itself or leave a matter to be decided by the national court. We will examine them briefly in turn.

1) The importance of the right in the EU normative hierarchy

Other things being equal, the level of constitutional tolerance is in inverse proportion to the ranking of the right in the normative hierarchy. In EU law, there is no tiered scrutiny as understood in US constitutional law. The ECJ itself rarely addresses the level of scrutiny that it applies, although there is more openness in recent years.[45] Nonetheless, it is reasonable to expect that the importance of a right will have an influence on the level of scrutiny that the ECJ will be prepared to exercise. The right to judicial protection, gender equality, non-discrimination irrespective of race or ethnic origin, and the right to personal data appear to be at the apex, although this list should not be treated as exclusive. As stated earlier,[46] some

[43] Omega Spielhallen- und Automatenaufstellungs GmbH v. Oberbürgermeisterin der Bundesstadt Bonn, Case C-36/02, EU:C:2004:614, ¶ ¶ 37, 41 [hereinafter *Omega*].

[44] *Compare* International Transport Workers Federation & Finnish Seamen's Union v. Viking Line ABP, Case C-438/05, EU:C:2007:772; Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet, Case C-341/05, EU:C:2007:809.

[45] *See, e.g.*, Digital Rights Ireland, Joined Cases C-293/12 & C-594/12, EU:C:2014:238, ¶ 47.

[46] Supra, n. 34 and accompanying text.

Charter rights are viewed as absolute: these will also deserve the highest level of scrutiny. The importance of the right will thus affect whether it will trump an EU or a national measure. It may also affect whether, in preliminary references, the ECJ will leave the balancing to the national court. In relation to key or new rights, the Court may wish to provide leadership setting a standard throughout the Union. It is no accident that, in many cases pertaining to civil liberties, the ECJ has provided not just guidance to the national court but a ready-made solution as to the effect of the right in issue in the national proceedings.[47]

Also, where two fundamental rights are in a trajectory of conflict and one of them is higher ranking, one would expect that such priority would influence the balancing exercise. Nonetheless, ranking is but one of the factors in the assessment and by no means conclusive as to the result. Thus, the right to judicial protection stands at the top of the edifice but cannot authorise a disproportionate interference with the right to property. An example of the fair balance approach is provided by *Scarlet Extended SA*.[48] A management company representing composers brought proceedings against Scarlet, an internet service provider (ISP), arguing that internet users using its services were downloading works illegally. It sought an injunction requiring Scarlet to install a mechanism making it impossible for its customers to have access to musical files without permission. The Court found that such an injunction would be incompatible with EU law. It reasoned, inter alia, that such an injunction would result in a serious infringement of the ISP's freedom to conduct its business under Article 16 of the Charter. Although the right to intellectual property is protected by Article 17(2) of the Charter, granting the injunction would not strike a fair balance between the protection of copyright and the SPI's protection of the right to trade. Furthermore, the injunction would infringe the fundamental rights of the ISP's customers, namely their right to protection of their personal data and their freedom to receive and impart information which are guaranteed by Articles 8 and 11 of the Charter.

The issue of prioritisation arises, more generally, in relation to Treaty provisions. Although all provisions included in the TEU and TFEU, in principle, have the same formal rank,[49] some of them are in substance more important than others in defining the EU blueprint. Notably, starting with Opinion 2/13,[50] the ECJ sought to articulate the salient features of the integration paradigm with a view to defining the autonomy of EU law. This provides a sense of prioritization which may also influence the level of judicial scrutiny. More generally, the heightened importance of some Treaty provisions has the following legal value: 'lesser' provisions must be interpreted in the light of the more important ones; and an amendment to a key Treaty provision should not be made surreptitiously by amending a 'lesser' one. There is, in other words, a presumption that a fundamental

[47] *See, e.g., Schmidberger*, EU:C:2003:333; *Omega*, EU:C:2004:614; Ref. Prelim. Rlg., *Mangold*, EU:C:2005:709; *Portuguese Judges*, EU:C:2018:117; Takis Tridimas, *Constitutional Review of Member State Action: The Virtues and Vices of an Incomplete Jurisdiction*, 9 INT'L J. OF CON. LAW 737 (2011).

[48] Scarlet Extended SA v. SABAM, Case C-70/10, EU:C:2011:771.

[49] Differences in formal rank are recognized by the fact that the TEU provides for simplified revision procedures under which certain Treaty provisions can be amended without the need to follow all the steps that apply under the ordinary revision process. *See* TEU art. 48.

[50] *ECHR*, EU:C:2014:2454.

Treaty principle could not be abrogated or restricted except with the clearest of languages.[51]

The right to judicial protection stands at the apex of EU fundamental rights. In no other area has the Court been more active. Some components of it, i.e. judicial independence, are part of the very essence of the rule of law as an EU value.[52] The case law places emphasis on the confirmatory function of Article 47 of the Charter:[53] it reaffirms but does not create a fundamental principle of law which had already been established by the Court.[54] It may be said that the salient features of that right are the following.

It is universal, in that it is enjoyed by anyone subject to EU law and, in relation to third countries, at least some aspects of it are not subject to reciprocity.[55] It is bifurcated, in that it is guaranteed by both the CJEU and the national courts which together are said, albeit optimistically, to guarantee a complete system of remedies.[56] It has reached an almost supra-constitutional status, in that the ECJ has engaged in a procrustean interpretation of the Treaties to accommodate it, departing from its text for this purpose more than it has done for any other. It may result in the availability of a procedure even in cases where it appears to be excluded by the Treaties,[57] the extension of judicial review to acts whose judicial control the Treaties place beyond the Court's jurisdiction,[58] or the extension of standing to parties beyond those stated in Treaty text.[59] Finally, it is conceived within a distinct EU constitutional design which is premised on the autonomy of EU law and the exclusivity of the jurisdiction

[51] Support for this proposition can be derived from Opinion 1/91 [1991] ECR I-6079, where the ECJ appeared to suggest that the Member States may not amend the system of judicial protection provided in the Treaties by amending Article 238 EEC (now Article 272 TFEU) which relates to association agreements. It seems that such an amendment can only be made by express revision of the Treaty provisions that govern the ECJ. Creation of the European Economic Area, Document 61991CV0001, EU:C:1991:490, ¶¶ 71-72 [hereinafter *EEC*]. *See also Kadi I*, EU:C:2008:461, ¶¶ 303-04 (where the Court held that Article 307 EC (now Article 351 TFEU), which provides for respect of commitments undertaken by Member States under international law prior to joining the EU, could not curtail the Court's jurisdiction to review the compatibility of EU law with fundamental rights). The TEU also recognizes a form of express prioritization by providing that some provisions but not others are subject to a simplified amendment process. *See* TEU art. 48.

[52] *See, e.g., L.M.*, EU:C:2018:586, ¶ 48; *Portuguese Judges*, EU:C:2018:117, ¶ 36 and ¶ ¶ 41-43.

[53] *See, e.g.*, The Queen, on the Application of PJSC Rosneft Oil Company v. Her Majesty's Treasury, Case C-72/15, EU:C:2017:236, ¶ 73; Chartry v. État Belge, Case C-457/09, EU:C:2011:101, ¶ 25; Masdar v. Comm'n, Case C-47/07 P, EU:C:2008:726, ¶ 50.

[54] *Kadi I*, EU:C:2008:461, ¶ 335; Unibet (London) Ltd. And Unibet (International) Ltd. v. Justitiekanslern, Case C-432/05, EU:C:2007:163; Johnston v. Chief Constable of the Royal Ulster Constablery, Case 222/84, EU:C:1986:206, ¶¶ 18-19.

[55] *Venezuela*, EU:C:2021:507, ¶ 52.

[56] *See, e.g.*, Les Verts, EU:C:1986:166, ¶ 23; Inuit Tapiriit Kanatami and Others v. European Parliament and Council, Case C-583/11 P, ¶ 92, EU:C:2013:625.

[57] *See, e.g.*, Rosneft, Case C-72/15, 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).

[58] *See* Les Verts, EU:C:1986:166; *see also* H. v. Council, Case C-455/14 P, EU:C:2016:569, ¶ 30 (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).

[59] *See* Parliament v. Council (Chernobyl Case), Case C-70/88, EU:C:1991:373.

of the ECJ. This may in fact limit rather than expand its ambit. *Achmea*[60] held that investor-state arbitration clauses in intra-EU BITs are incompatible with EU law. In *Komstroy*,[61] the foreclosure effect of EU law was expanded. Member States may not allow any *inter se* disputes relating to the interpretation or application of EU law to be submitted to any investment arbitration tribunal set up by an international treaty, including mixed agreements concluded with third countries. Essentially, the right to judicial protection stands at the apex of EU law but it is conditioned by the EU integration project.

Outcomes reached in the case law suggest that the principle of non discrimination and the right to personal data also enjoy enhanced status. Quantitatively, reliance on those rights enjoys more success than reliance on others fundamental rights. *Test Achat*[62] and *Google Spain*[63] provide testament to that. Also, as *Mangold*[64] and *Bauer*[65] testify, some social rights may take centre stage. By contrast, freedom of religion, whilst recognised as fundamental rights, appear to be more relative.[66]

Notably, where a case concerns both the compatibility of a national measure with a fundamental freedom of movement and with an overlapping Charter right, the judicial enquiry is conflated and the standard of scrutiny appears to be the same. The case law here has evolved. In *SEGRO*,[67] the Court found Hungarian law which abolished acquired rights of usufruct over agricultural land to be in breach of the free movement of capital. Once it made the finding that the law could not be justified either by overriding reasons in the public interest or on the basis of Article 65 TFEU, it considered it unnecessary to examine whether it also violated Article 17 (right to property) and Article 47 (right to a fair trial) of the Charter.[68] In more recent case law, the Court has taken a different view making separate fundings that a measure is incompatible both with the free movement of capital and rights enshrined in the Charter.[69] This has an important signalling effect. It increases the resonance of the Charter and stresses that a Member State is in breach not only of economic freedoms but also civil liberties. However, in the above cases, the establishment of an independent violation of a Charter right was not preceded by a separate proportionality analysis. Once it was established that the national measure was not justified as a restriction on the free movement of capital, the finding that there was a

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[60] *Achmea*, EU:C:2018:158.

[61] République de Moldavie v. Komstroy LLC, Case C-741/19, EU:C:2021:655.

[62] Association Belge des Consommateurs Test-Achats ASBL and Others v. Conseil de Ministres, Case C-236/09,
EU:C:2011:100.

[63] Op.cit. supra, n.41.

[64] Ref. Prelim. Rlg., *Mangold*, EU:C:2005:709 (pertaining to the prohibition of discrimination on grounds of age).

[65] *Bauer*, EU:C:2018:871 (pertaining to the right to annual leave).

[66] *Centraal Israëlitisch Consistorie van België, Unie Moskeeën Antwerpen VZW and Others v Vlaamse Regering*, Case C-336/19, ECLI:EU:C:2020:1031.

[67] SEGRO, Joined Cases C-52/16 & C-113/16, EU:C:2018:157.

[68] SEGRO, op.cit, supra, ¶ 128.

[69] *See* Comm'n v. Hungary (Rights of Usufruct Over Agricultural Land), Case C-235/17, EU:C:2019:432 (finding a breach of both Article 63 TFEU and Article 19 of the Charter); Comm'n v. Hungary (Transparency Case), Case C-78/18, EU:C:2020:476 (finding a breach of both Article 63 TFEU and Articles 7, 8 and 12 of the Charter).

breach of the Charter ensued on the strength of the same analysis: proportionality as a constitutional principle for the protection of the individual and as a market integration principle go hand in hand. On the same vain, it was held in *Pfleger*[70] that where a national restriction on inter-state trade fails the test of proportionality and is therefore found to be in breach of the free movement of services, it is also an impermissible restriction on Article 15 (freedom to conduct a business) and Article 17 (right to property) of the Charter. The reverse is also true. Where a restriction is found to be justified by an express derogation to a fundamental freedom or an imperative requirement in the national interest, it is also proportionate under Articles 15 and 17 of the Charter.[71] *Pfleger*, however, does not mean that the standard of proportionality is always uniform. It does not exclude the possibility that the standard of protection might be higher under free movement that it is under the Charter. It is possible that a national measure which *per se* is not a disproportionate restriction on the freedom to conduct a business may nonetheless be a disproportionate restriction on access to the market, for example, because it may favour local suppliers.

2) Legislative elaboration

Whether the right exists merely at the constitutional plane or has been articulated by EU legislation is a relevant factor in many respects. It is of relevance when the ECJ assesses the compatibility of a national measure with EU law. Where EU legislation exists, assessment of national law does not occur by reference to a general principle, a Charter right or a Treaty provision but by reference to a specific legislative text.[72] The greater the degree of specificity of the right and the restrictions imposed on it, the less the margin of discretion left to the Member States. Primacy and pre-emption take over. Nonetheless, the underlying primary law right that the EU legislation operationalises is still relevant since the legislation must be read in its light. The judicial inquiry therefore is likely to contain two steps although they may be implicit. First, the EU legislation must be interpreted in the light of the primary EU law right in issue; then the national measure has to be assessed in the light of the EU legislation thus interpreted.[73]

The existence of legislation is also important from the point of view of legitimacy. If the EU legislature has spoken, this means that the Member States have exercised a collective choice having considered the issues involved, and the outcome enjoys, such as they are, the democratic credentials of the legislative process. The legitimating function of legislative designation is illustrated by *Mangold*[74] and *Bauer*.[75] Both cases were striking for attributing horizontal effect to the general principles and the Charter respectively and for viewing directives as the mere

[70] Pfleger and Others, Case C-390/12, EU:C:2014:281, ¶¶ 57-60.

[71] *See* Opinion of Advocate General Sharpston, Pfleger and Others, EU:C:2013:747, ¶¶ 69-70.

[72] In the same vein, a Member State may not rely on a Treaty provision derogating from a fundamental freedom to protect an interest insofar as the interest has been protected by EU legislation: *see, e.g,* Reference for Preliminary Ruling, The Queen v. Ministry of Agriculture, Fisheries and Food (Lomas), Case C-5/94, EU:C:1996:205.

[73] *See, e.g.,* A v. Veselības Ministrija, (jehovah's Witness Case), Case C-243/19, EU:C:2020:872.

[74] Ref. Prelim. Rlg., *Mangold,* EU:C:2005:709.

[75] *Bauer*, EU:C:2018:871.

concretization of pre-existing constitutional rights. Nonetheless, in both cases the Court gave legal effect to an outcome that had already been endorsed by the legislature and not merely a vague constitutional right. Although methodologically unpersuasive, the Court's reasoning in both cases illustrates the legitimating effect of legislating. In more general terms, the relationship between constitutional rights and legislation in EU law remains problematic.[76] The ECJ does not hesitate to supplement legislation on the basis of general principles[77] or even amend it in the light of the putative objectives of the legislature in circumstances where they are far from clear or even contradict the legislative outcome.[78]

It will be noted, however, that the adoption of legislation does not necessarily work to the advantage of fundamental rights. The concretization of the bargain may lead the ECJ to take a narrower view of their scope or content. *Dano*[79] and *Alimanovich*[80] provide testament to that approach signalling retreat from previous case law in the field of social rights in the context of free movement.

The existence of EU legislation may also be relevant in determining whether a national right may trump an EU interest. In *M.A.S.*,[81] retreating from its earlier ruling in *Taricco*,[82] the Court held that the principle that the rules on criminal liability must be sufficiently precise, which is guaranteed by Article 49(1) of the Charter, meant that a rule of national criminal procedure could not be disapplied by a national court even if its application resulted in fraud against EU finances not been pursued effectively. It would be for the national legislature to take the necessary measures.[83] In the absence of such measures, the certainty of criminal laws could not be sacrificed in the interests of fighting fraud against the EU budget. In reaching that conclusion, the Court took into account that, at the material time, the limitation rules applicable to criminal proceedings relating to VAT had not been harmonised by the EU. Italy was thus free to consider that those rules form part of substantive criminal law, and were thereby subject to the principle that offences and penalties must be defined by law.[84] The implication of the Court's reasoning is that, if the EU had validly adopted a regulation in that area, any conflicting provisions by Italian law would need to be set aside by a domestic court.[85]

3) The seriousness and extent of the restriction

Other things being equal, the level of constitutional tolerance is also in inverse proportion to the seriousness of the restriction on the right in issue. In this context, Article 52(1) of the Charter, in line with the constitutional traditions of many

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[76] For as full discussion, *see* Elise Muir, *The Fundamental Rights Implications of EU Legislation: Some Constitutional Challenges*, 51 COMMON MKT. L. R. 219 (2014).

[77] *Sturgeon*, EU:C:2009:716.

[78] See *Association Belge des Consommateurs Test-Achats*, EU:C:2011:100.

[79] Reference for Preliminary Ruling, Dano v. Jobcenter Leipzig, Case C-333/13, EU:C:2014:2358.

[80] Reference for Preliminary Ruling, Jobcenter Berlin Neukölln v. Alimanovich and Others, Case C-67/14, EU:C:2015:210.

[81] *M.A.S.*, EU:C:2017:936.

[82] *Taricco*, EU:C:2015:555.

[83] *M.A.S.*, EU:C:2017:936, ¶ 60.

[84] *Id*. ¶ 45.

[85] *Compare Eurobox*, EU:C:2021:1034, ¶ 209 (distinguishing *M.A.S.*).

Member States, draws a distinction between the essence and the periphery of rights. Whilst intrusions on the essence are beyond balancing, restrictions on the non-essential elements are subject to proportionality review. The concept of essence, however, is highly elusive. Whilst the distinction is logical, in practice it is extremely difficult to draw. This, in turn, limits the functionality of 'essence' as a judicial tool.[86]

Subject to the protection of essence, a serious interference would call for a higher level of justification. Conceptually, it may be said that a more serious interference does not entail a higher level of scrutiny. The latter depends on the importance of the right affected rather than the intensity of restriction. On this understanding, the Court may find a measure to be unacceptable not because it applies a higher level of scrutiny but because the interference is more serious and lacks justification. Nonetheless, in practice, the distinction is very difficult to draw.[87] Balancing takes place through the application of proportionality which is understood to entail a three-part test:[88] first, it must be established whether the measure is suitable to achieve a legitimate aim (test of suitability); secondly, whether the measure is necessary to achieve that aim, namely, whether there are other less restrictive means capable of producing the same result (the least restrictive alternative test); and thirdly, even if there are no less restrictive means, it must be established that the measure does not have an excessive effect on the applicant's interests (proportionality *stricto sensu*). Under the third test, the authority may be required to adopt a less restrictive measure even if the latter is less effective in attaining the objective in question.[89] *Stricto sensu* proportionality is a head-on balancing act where two competing interests are weighted. However, its relationship with 'essence' remains conceptually problematic. The assumption is that there are core elements of the right which are beyond balancing; but also that there are interferences with non-core elements which are too excessive and thus cannot be tolerated even though they do not affect the essence. This is a valid logical construction but asks too much from the court. In the context of dispute resolution, the essential elements of a right cannot be determined in *abstracto* but only by reference to the severity of the specific restriction claimed. The two elements are, in fact, impossible to separate so that, in practice, the force of the restriction serves as an important determinant of the definition of the right. A court has to provide a concrete solution to specific facts avoiding as much as possible general pronouncements. Thus, in most cases, it makes sense to resolve the case on the basis of whether the restriction is excessive rather than on fine conceptual definitions of the elements of a right.

Also, the *stricto sensu* proportionality test must be seen in context. First, it is conditioned, like the other tests of proportionality, by the applicable level of

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[86] For a rare case where the ECJ found breach of essence, *see Schrems I*, EU:C:2015:650. For a wider discussion of the issue, *see* P. Takis Tridimas and Giulia Gentile, *The Essence of Right: An Unreliable Boundary?* 20 GER. L. J. 794 (2019).

[87] AGET Iraklis v. Minster of Labour, Case C-201/15, EU:C:2016:972, ¶ 99.

[88] Gráinne de Búrca, *The Principle of Proportionality and its Application in EC Law*, *in* 13 YEARBOOK OF EUROPEAN LAW 105, 113 (1993).

[89] *See* Opinion of Advocate General Maduro, Ahokainen and Leppik, Case C-434/04, EU:C:2006:462, ¶ 26.

scrutiny. Where the EU legislature enjoys broad discretion, *stricto sensu* proportionality is limited to assessing whether the contested measure leads to disadvantages which are manifestly disproportionate to the aims pursued.[90] Secondly, the second and third tests of proportionality are often inextricably linked and their separation may not be able to capture the essence of the judicial enquiry. Thirdly, the difficulty with balancing is that the interests in issue may well exist in different plains in a way that makes their juxtaposition non amenable to an objective rational analysis: how is it possible to measure the need to ensure protection of public security or public health vis-à-vis commercial freedom or the right to judicial protection? Nonetheless, it is difficult to see how balancing can be avoided. Although it may be carried out under different guises, in constitutional adjudication, and indeed more generally in law,[91] balancing is omnipresent and a necessary element of rights review. In general, whilst Advocates General are more willing to separate the three aspects of proportionality,[92] the ECJ tends to structure its analysis under the twin principles of suitability and necessity without separating between the second and the third test of proportionality, thus leaving itself more discretion. Nonetheless, in more recent case law relating to the Charter, the analysis has become more structured addressing separately each limb of proportionality.[93]

The importance attached to *stricto sensu* proportionality depends on the level of judicial scrutiny and on whether the measure stems from the EU or a national decision maker. Where the Court assesses the proportionality of an EU measure in the field of economic regulation where the EU has broad discretion, it applies a manifest error test which allows limited scope for a *stricto sensu* proportionality analysis. In particular, in relation to the objective of public health, it has been held that it takes precedence over economic interests[94] and may justify even substantial negative economic consequences for certain economic operators.[95] According to Øe AG, this essentially means that the other elements of proportionality absorb the *stricto sensu* test. Once a measure intended to protect public health has passed the first and the second elements of proportionality, it necessarily complies with the third test as far as commercial interests are concerned.[96]

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[90] See Reference for Preliminary Ruling, Opinion of Advocate General Øe, Swedish Match v. Secretary of State for Health, Case C-151/17, EU:C:2018:241, ¶ 84; Gauweiler and Others v. Deutscher Bundestag, Case C-62/14, EU:C:2015:400, ¶ 91.

[91] Robert Alexy, *On Balancing and Subsumption: A Structural Comparison*, 16 RATIO JURIS 433, 436 (2003).

[92] *See, e.g.,* The Queen v. The Minister for Agriculture, Fisheries and Food and the Secretary of State for Health, Case C-331/88, EU:C:1990:391 [hereinafter *FEDESA*]; *Leppik*, EU:C:2006:462; Opinion of Advocate General Jääskinen, Novo Nordisk AS v. Ravimiamet, Case C-249/09, EU:C:2010:616; *Swedish Match*, EU:C:2018:241. By implication, *see also* Opinion of Advocate General Sharpston, Volker und Markus Schecke GbR, Joined Cases C-92/09 & C-93/09, EU:C:2010:353, ¶120.

[93] *See, e.g.*, Schwarz v. Stadt Bochum, Case C-291/12, EU:C:2013:670, ¶ 64 (which gave a clean bill of health to the storage of fingerprints in passports under Council Regulation No 2252/2004). For an early example where the Court annulled an EU measure on the basis of the *stricto sensu* proportionality test, *see* Bela-Mühle v. Grows-Farm (Skimmed Milk Case), Case C-114/76, EU:C:1977:116, ¶ 7.

[94] *See* Artegodan v. Comm'n, Case C-221/10 P, EU:C:2012:216, ¶ 99.

[95] *See Swedish Match*, EU:C:2018:241, ¶ 54. *See also Nelson and Others*, Joined Cases C-581/10 & C-629/10, EU:C:2012:657, ¶ 81.

[96] *See Swedish Match*, EU:C:2018:241, ¶ 87.

The systemic or otherwise character of the restriction on a right may also be a relevant factor. The case law does not define the term 'systemic'. It may be taken to refer to a deficiency in the protection of rights which derives from intrinsic weaknesses in the system of justice,[97] and has a generalized rather than ad hoc character. The characterisation of a deficiency as systemic may be relevant in many respects. First, it becomes material in tempering the application of mutual trust in the context of freedom, security and justice.[98] Secondly, a restriction or violation of a right that can be characterized as systemic is more likely to be considered as serious and thus less likely to be tolerated. Thirdly, it becomes important in activating the application of Article 19(1) TEU, and thus bringing within the jurisdictional control of the CJEU, national measures which do not fall within the scope of EU law in the traditional sense. In the *Portuguese Judges* case,[99] the ECJ breathed independent meaning to Article 19(1) and elevated it to an overarching principle linked to Article 2 TEU, holding that the two provisions taken together impose obligations which are autonomous in the sense that they go beyond the reach of the Charter. Although the Court did not use the term systemic, *Portuguese Judges* is first and foremost about institutional powers and government structures and not about substantive rights in concrete situations. The Court essentially 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.

It will be noted that not every restriction of an important right is a severe restriction. In *Eurobox*,[100] the Romanian Constitutional Court had quashed convictions of a number of high officials for fraud against EU finances on the ground that they had been made by judicial panels that had been improperly constituted: under a law passed in 2004, all five members of the panel ought to have been selected by the drawing of lots but, in the cases in issue, only four members had been so selected. Also, under Romanian law, the judicial panels ought to have been composed of specialist judges but some were not. According to the Constitutional Court, these violations entailed the absolute nullity of the convictions. That court also decided that its decision was applicable to pending cases and cases which had been ruled upon, in so far as there was still time for individuals to exercise extraordinary legal remedies. The result of that approach was that a number of prosecutions for the misfeasance of EU funds were likely to be barred.

The ECJ held that the decisions of the Constitutional Court might create a systemic risk of serious fraud affecting the EU's financial interests going unpunished. If the national court determined that such a risk indeed existed, the penalties provided for in national law to counter such offences could not be regarded

[97] *See* R (on the application of EM (Eritrea)) v. Secretary of State for the Home Department, [2014] UKSC 12, [52], [66].

[98] *See, e.g.*, N.S. v. Secretary of State for the Home Department, Joined Cases C-411/10 & C-493/10, EU:C:2011:865, ¶ 106; *L.M.*, EU:C:2018:586, ¶ 79; Abubacarr Jawo v. Bundesrepublik Deutschland, Case C-163/17, EU:C:2019:218, ¶ 90; Ref. Prelim. Rlg., *Aranyosi and Căldăraru*, EU:C:2016:198, ¶ 104.

[99] *See Portuguese Judges*, EU:C:2018:117, ¶ 32.

[100] *See Eurobox*, EU:C:2021:1034.

as effective and would be incompatible with EU law.[101] The ECJ accepted that the irregular composition of a judicial panel would entail an infringement of Article 47 of the Charter but, in the cases in issue, the infringements were minor: it did not appear that there was 'a manifest breach of a fundamental rule of Romania's judicial system', such as to call into question the fact that the panels hearing cases were not tribunal 'previously established by law'.[102] The judgment might appear to relativize the independence of the judiciary going against the grain of the ECJ's powerful rule of law jurisprudence. However, it has to be seen in the context of the legal and factual background of the cases in issue, the undertakings given by Romania upon accession to provide effective prosecution of corruption, and the underlying tensions between the Romanian High Court of Cassation that made the reference and the Constitutional Court.

4) Whether the restriction emanates from EU or national law

A relevant consideration is the EU or national origin of the measure. Where the Court assesses the compatibility of an EU policy measure, it will strike it down only if it is 'manifestly inappropriate'.[103] This test delineates what the Court perceives to be the limits of judicial function with regard to review of measures involving choices in areas where the EU institutions have wide discretion. It applies virtually in all fields where economic, social or political choices are to be made, including, for example, agriculture and fisheries,[104] transport,[105] social policy,[106] health protection,[107] measures to combat fraud against EU finances,[108] customs and the common commercial policy,[109] and foreign relations such as the decision whether to adopt economic sanctions and the general rules governing the sanctions regime.[110] It has also been applied to monetary policy measures[111] and the EU's asylum policy.[112]

By contrast, as a general rule, national decision makers do not benefit from such deference. The reason is that, when they act within the scope of EU law, they do not act as primary legislature and are constrained by the applicable EU rules. The difference in the standard of review evinces the different roles of proportionality. Where it is invoked as a ground for review of EU policy measures, the principle fulfils a dual objective. First, it seeks to protect the rights of the individual *vis-à-vis*

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[101] *Id.* ¶ 203.

[102] *Id.* ¶ 207.

[103] *See, e.g.*, *FEDESA*, EU:C:1990:391, ¶ 14; The Queen, on the Application of Vodafone Ltd. and Others v. Secretary of State for Business, Enterprise and Regulatory Reform, Case C-58/08, EU:C:2010:321, ¶ 52.

[104] *See, e.g.*, *FEDESA*, EU:C:1990:391, ¶¶ 12-18; AJD Tuna Ltd. v. Direttur tal-Agrikoltura u s-Sajd and Avukat Generali, Case C-221/09, EU:C:2011:153, ¶ 81.

[105] *See* Omega Air and Others, Joined Cases C-27 & C-122/00, EU:C:2002:161, ¶ 63.

[106] *See* United Kingdom v. Council, Case C-84/94, EU:C:1996:431, ¶ 58.

[107] *See, e.g.*, The Queen v. Secretary of State for Health, Case C-491/01, EU:C:2002:741, ¶ 126.

[108] *See* Comm'n v. ECB, Case C-11/00, EU:C:2003:395, ¶ 157.

[109] *See* Chabo v. Hauptzollampt Hamburg-Hafen, Case C-213/09, EU:C:2010:716, ¶ 31.

[110] *See* Melli Bank Plc v. Council, Joined Cases T-246 & T-332/08, EU:T:2009:266, ¶ 45; *affirmed in* Bank Melli Iran v. Council, Case C-548/09P, EU:C:2011:735.

[111] *See, e.g.*, *Gauweiler*, EU:C:2015:400, ¶¶ 91-92; Weiss and Others, Case C-493/17, EU:C:2018:1000, ¶ 24.

[112] *See* Slovak Republic and Hungary v. Council, Joined Cases C-643/15 & C-647/15, EU:C:2017:631, ¶¶ 207-08.

public intervention. Secondly, under Article 5(4) TEU, it also serves to protect the powers of the Member States vis-à-vis unwarranted EU centralization. In both roles, the standard of review appears to be the same and searches for a manifest error. The reasons which justify deference are the separation of powers and a pro-integration bias which is said to be grounded on the objectives and the provisions of the Treaties. In some respects, any doubting of EU competence, appears to be viewed by the ECJ as an existentialist threat. By contrast, where proportionality is invoked to challenge the compatibility with EU law of national measures affecting one of the fundamental freedoms, the Court is called upon to balance an EU *vis-à-vis* a national interest. The first role of proportionality outlined above, namely to protect the individual *vis-à-vis* public authorities, is traditionally less prominent and has a somewhat collateral character. The principle is applied primarily as a market integration mechanism and, as a general rule, the intensity of review is much stronger.

The difference in the standard of scrutiny is illustrated by contrasting the approach of the Court to restrictions on free movement imposed by national measures and such restrictions imposed by EU measures. Where EU measures restrict fundamental freedoms, the Court is more readily prepared to defer to the discretion of the EU institutions.[113] Indeed, there does not appear to be any case where an EU measure has been annulled for breach for the Treaty provisions on free movement. The difference in the standard of review is evident, for example, in the field of public health. EU interventions to protect it benefit from the manifestly inappropriate test.[114] By contrast, Member State measures which restrict the free movement of goods on grounds of national health receive closer scrutiny.[115] The reason is that national measures, by the very reason of their effects on market integration, have traditionally been viewed as suspect. National law makers are preoccupied with pursuing the national interest and more susceptible to succumbing to protecting in state interests. Even if they do not intend to pursue protectionism, any negative effects of policy making on out of state interests are unlikely to be a matter of concern. By contrast, in the case of EU action, there are both objectives-based and institutional safeguards. The very goal of the EU is to dismantle barriers to inter-state trade so any restriction that EU law imposes on free movement benefits

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[113] *See e.g.*, Pfeifer & Langen GmbH & Co. KG v. Bundesanstalt für Landwirtschaft und Ernährung, Case C-51/14, EU:C:2015:380, ¶¶ 37-38; The Queen on the Application of Alliance for Natural Health and Nutri-

link Ltd. v Secretary of State for Health, Joined Cases C-154 & C-155/04, EU:C:2005:449, ¶ 130; Meyhui NV v. Schott Zwiesel Glaswerke AG, Case C-51/93, EU:C:1994:312, ¶¶ 19-20. *Compare with* Fietje, Case 27/80, EU:C:1980:293, ¶ 15; Piageme and Others v. BVBA Peeters,

Case C-369/89, EU:C:1991:256, ¶ 17; Safety Hi-Tech Srl. v. S & T Srl., Case C-284/95, EU:C:1998:352, ¶ 62.

[114] *See e.g., FEDESA*, EU:C:1990:391; Jippes and Others v. van Landbouw, Natuurbeheer en Visserij, Case C-189/01, EU:C:2001:420; The Queen v. Secretary of State for Health (British American Tobacco), Case C-491/01, EU:C:2002:741; Portugal v. Comm'n, Case C-365/99, EU:C:2001:410. In *Jippes*, the Court held that in assessing the proportionality of a health protection measure, the criterion to be applied is not whether the measure in question was 'the only one or the best one possible' but whether it was manifestly inappropriate. *Jippes*, EU:C:2001:420, ¶ 83 (*affirmed by* Agrana Zucker GmbH v. Bundesminister für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft, Case C-309/10, EU:C:2011:531, ¶ 44).

[115] *See, e.g.*, De Peijper, Case C-104/75, EU:C:1976:67; Comm'n v. United Kingdom (UHT Milk), Case 124/81, EU:C:1983:30.

from a presumption that the law intends to achieve as much liberalisation as possible. Also, all Member States have had the opportunity to have an input in law-making. The EU law makers are thus presumed to have taken into account the EU interest as a whole and any externalities caused by the measure.

It is doubtful whether such sharp distinction would be merited in relation to the application of the Charter. Both Union institutions and Member States should, in principle, be subject to the same accountability standard in relation to respect for fundamental rights. This is for a number of reasons. First, the concentration of more powers at EU level makes judicial vigilance necessary. In particular, EU competence in the field of freedom security and justice, including criminal law, empowers the Union to affect not only economic liberties but core aspects of civil rights.[116] Secondly, the main purpose of the Charter was to ensure that the EU institutions are constrained by a written catalogue of rights and thus mirror national constitutional safeguards. This is not to say that the Charter should not apply on Member States when they act within the scope of EU law. It rather recognizes that Member States had already been subject to fundamental rights safeguards provided by the national constitutions and the ECHR. Even if the EU institutions are not viewed as the primary addressees of the Charter, they are at the very least co-addressees on an equal footing with national governments. Thirdly, in contrast to restrictions on free movement, the EU law making process and the applicable institutional safeguards cannot be trusted to internalize fundamental rights externalities, at least not to the same extent as ones on free trade. It is not doubted that there is a genuine effort to take into account fundamental rights concerns in EU policy making. However, in contrast to free trade, they feature less as an objective and more as a constraint on reaching regulatory goals. They need to be balanced with a host of other interests, and the EU and the national interest may be aligned in seeking to restrict them e.g. to fight terrorism.

5) The importance of the countervailing public interest or the countervailing right at stake

It is evident that, in assessing the compatibility of a restriction with a right, consideration will be given to the interests that it seeks to pursue. The TFEU provides for a number of grounds which may justify restrictions on free movement.[117] These have been supplemented by judge-made derogations, the so called mandatory requirements or imperative reasons in the public interest. There is however no evidence that the case law will necessarily rank those interests differently in terms of the intensity of review. In general, it would not be correct to say that the level of scrutiny applied depends on the ground of derogation invoked. Each ground seeks to protect distinct interests although, inevitably, there is

[116] *See, e.g., Digital Rights Ireland*, EU:C:2014:238; *Tele2 Sverige AV v.* Post-Och Telestyrelsen, Joined Cases C-203/15 & C-698/15, EU:C:2016:970; *L.M.*, EU:C:2018:586 ; and the extensive economic sanctions case law starting with *Kadi I*, EU:C:2008:461.

[117] *See* Treaty on the Functioning of the European Union, art. 36, 45(3), 52, and 62, Oct. 26, 2012, 2012 O.J. (C 326) 1. Public security is also recognised as a ground of derogation from the free movement of capital: *see* TFEU art. 65(1)(b).

overlap.[118] All grounds of derogation listed in Article 36 TFEU, as exceptions from the fundamental freedoms are to be interpreted restrictively.[119] One would expect that deference would be greater if the national measure pursues goals which are an integral part of the EU objectives, e.g. public health or environmental protection. The Court will also take into account whether the measure has protectionist objectives or whether, irrespective of its objectives, it produces serious detrimental effects on inter-state trade. Thus, a measure which is protectionist of national economic or professional interests will receive little sympathy,[120] whilst a measure which has limited effect on inter-state trade will be easier to justify.[121] The subject-matter of the measure is also relevant. Thus, in the field of lotteries and gaming the ECJ has followed a hands-off approach recognising the diversity of national cultures.[122]

In a similar vein, Article 52(1) of the Charter requires as one of the conditions that must be satisfied for a limitation on a right to be legal that it must be necessary and genuinely meet objectives of general interest recognized by the Union (or the need to protect the rights and freedoms of others). There is no express ranking of general interest objectives. Each of them has to be assessed in the light of its specific attributes and the context of the case. The *Kadi* line of case law[123] testifies that, even in areas of high political sensitivity where public security is at stake, the ECJ does not favour executive unilateralism. Perhaps, the first judicial reaction to the War in Ukraine might suggest an approach more accommodating to the EU institutions.[124]

The more severe the impact on the rights of the individual, the greater the importance of the public interest needs to be to justify the measure.[125] The link between the severity of rights interference and the importance of the aim pursued was made clear in *Ministerio Fiscal*[126] in relation to the protection of the right to personal data. As the Court put it, a serious interference with that right can only be justified for the investigation and prosecution of serious criminal offences. By contrast, when access to personal data does not entail a serious interference, it is capable of being justified by the objective of investigating criminal offences generally. *Ministerio Fiscal* is distinct in that the ECJ, unusually, limited the types of objectives which could justify a restriction. A serious interference with the right to personal data could be justified in the interest of preventing serious crime. By

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[118] *See, e.g.,* Van Gennip BVBA and Others, Case C-137/17, EU:C:2018:771 (where the ECJ justified the requirement to hold authorization to purchase pyrotechnics both on grounds of public policy and public security); Cullet v. Leclerc, Case C-231/83, EU:C:1985:29 (invoking those two grounds).

[119] *See, e.g.,* Comm'n v. United Kingdom, Case C-124/81, EU:C:1983:30, ¶ 13.

[120] Deutscher Apothekerverband eV v. 0800 DocMorris NV, Case C-322/01, EU:C:2003:664.

[121] *See* Aragonesa de Publicidad Exterior SA and Publivía SAE v Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluña, Joined Cases C-1/90 & C-176/90, EU:C:1991:327, ¶ 17.

[122] *See, e.g.,* Sporting Exchange Ltd. v. Minister van Justitie, Case C-203/08, EU:C:2010:307; Placanica and Others, Joined Cases C-338/04, C-359/04 & C-360/04; Liga Portuguesa de Futebol Profissional and Bwin International Ltd. v. Departamento de Jogos da Santa Casa da Misericórdia de Lisboa, Case C-42/07, EU:C:2009:519.

[123] *See Kadi I,* EU:C:2008:461; *Kadi II,* EU:C:2013:518.

[124] RT France v. Council, Case T-125/22, EU:T:2022:483.

[125] ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 102 (2002).

[126] Ministerio Fiscal, Case C-207/16, EU:C:2018:788, ¶¶ 56-57.

contrast, as a matter of principle, it could not be justified in the interest of preventing non-serious crime and no balancing was required in that respect.

A discussion on balancing inevitably brings to the fore the national identity clause of Article 4(2), under which the EU is to respect the national identities of the Member States, inherent in their political and constitutional fundamental structures. To what extent is that clause a suitable instrument to trump EU rights or, more generally, limit the imposition of obligations on Member States? Article 4(2) requires the EU to respect certain essential state functions and defer to the way a Member State organizes internally the allocation of power among its authorities.[127] It imposes limitations on both the scope and the intensity of EU action and serves as a boundary but is ring fencing effect is limited. It may inform the interpretation of Treaty provisions and the general principles of law both in relation to their scope of application and their substantive content. It may thus provide an important weighing factor in assessing the proportionality of a national restriction on free movement where it is imposed to protect a constitutional value.[128] It does not, however, operate as a limit to the primacy of EU law. A Member State may not invoke it to avoid observance of EU fundamental rights or justify disrespect for the values of Article 2 TEU.[129] The national identity clause is intended to form part of the integration outlook as it emerges from a systematic interpretation of the Treaties rather than be exogenous, or an alternative, to it. Indeed, the case law suggests that it has had little influence in tempering the application of general principles of law and has not led to a broad interpretation of Treaty derogations.[130] The rule of law conditionality cases suggest that Article 4(2) takes effect within a tree of normative hierarchy recognizing as its apex Article 2 which defines the 'very identity of the European Union as a common legal order'.[131] Compliance with the essence of Article 2 values is the minimum obligation of membership that cannot be questioned on the basis of respect for national identity. The judgments however do not indicate an unduly restrictive interpretation of Article 4(2). It is in fact difficult to see how the arguments of Hungary and Poland could have succeeded without compromising fundamental premises of the integration model.[132]

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[127] *See, e.g.*, Digibet Ltd. and Gert Albers v. Westdeutsche Lotterie GmbH & Co. OHG, Case C-156/13, EU:C:2014:1756, ¶ 34; Remondis GmbH & Co. KG Region Nord v. Region Hannover, Case C-51/15, EU:C:2016:985.

[128] *See, e.g.*, Sayn-Wittgenstein v. Landeshauptmann von Wien, Case C-208/09, EU:C:2010:806, ¶ 92. *Compare with* Bogendorff von Wolffersdorff v. Standesamt der Stadt Karlsruhe and Zentraler Juristischer Dienst der Stadt Karlsruhe, Case C-438/14, EU:C:2016:401; *Omega*, EU:C:2004:614.

[129] For a discussion of abuses of the national identity clause by national courts, *see* Oreste Pollicino, *Metaphors and Identity Based Narrative in Constitutional Adjudication: When Judicial Dominance Matters*, IACL-IADC BLOG, (Feb. 27, 2019), https://blog-iacl-aidc.org/2019-posts/2019/2/27/metaphors-and-identity-based-narrative-in-constitutional-adjudication-when-judicial-dominance-matters.

[130] *See, e.g.*, Coman and Others, Case C-673/16, EU:C:2018:385.

[131] Hungary v. Parliament and Council, Case C-620/18, EU:C:2020:1001, ¶¶ 127, 232; Poland v. Parliament and Council, Case C-401/19, EU:C:2022:297, ¶¶ 145, 264.

[132] In *Hungary v Parliament and Council*, Hungary argued that the mechanism introduced by the rule of law conditionality regulation infringed Article 4(2) on the grounds that it permitted the Commission to control the compatibility of national laws and practices with EU law even where they fell outside the scope of EU law and the obligation to protect national identities, rule of law conditions must be assessed differently in each Member State. *Hungary v. Parliament and Council*, EU:C:2020:1001, ¶¶

A countervailing national interest recognised by EU law does not provide a *carte blanche* to the Member States. Attention has focused in recent years on the reservation clause of Article 72 TFEU which states that the powers of the EU in the area of freedom security and justice 'shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.' The basic conclusions that derive from the case law in relation to that provision may be summarised as follows. As a derogation clause, it must be interpreted narrowly.[133] Measures for the maintenance of law and order do not fall entirely outside the remit of EU law. Article 72 does not confer on Member States the power to depart from EU law provisions merely by relying on the interest of law and order and internal security without proving that it is necessary to have recourse to the derogation in order to exercise its responsibilities in those areas.[134] The ECJ has refused the invitation to interpret Article 72 as authorising Member States to set aside EU measures,[135] or abrogate asylum rights.[136] The state powers protected therein are subject to a proportionality analysis and have to be seen in the context of EU measures that balance the need to maintain law and order and protect internal security with other objectives rather than superimposed on them.

6) Process considerations

What is the relative weight of substantive and procedural considerations in reviewing the compatibility of EU and national measures with EU law? Process is a *sine qua non* for any polity that claims to respect the rule of law. It also defines consent within the integration through law narrative: not all Member State may be committed to the same end but they are all committed to the same political structures and processes, which, as the EU legal order has evolved, have reached a level of high complexity and unusual sophistication. Legitimacy is defined to a large extent by reference to these processes[137] which, to some extent, replace national constitutional guarantees.[138]

Although in judicial review process considerations play a particularly important role, their significance is calibrated depending on a number of factors. Suffice it to make here the following observations.

202, 211, 222. For the Court's reasoning, *see id.*, ¶¶ 226 et seq. *Compare with Poland v. Parliament and Council*, EU:C:2022:297, ¶¶ 267-68.

[133] *See e.g.*, Comm'n v. Poland and Others (Temporary Mechanism for the Relocation of Applicants for International Protection), Joined Cases C-715/17, C-718/17 & C-719/17, EU:C:2020:257, ¶ 144.

[134] *Id.* ¶ 152.

[135] *See, e.g., id.* (Council relocation decisions following the migration crisis of 2015); NW v. Landespolizeidirektion Steiermark ,Joined Cases C-368/20 & C-369/20, EU:C:2022:298 (the Schengen Borders Code); WM v. Stadt Frankfurt am Main, Case C-18/19, EU:C:2020:511 (Return Directive).

[136] M.A. v. Valstybés Sienos Apsaugos Tarnyba, Case C-72/22 PPU, EU:C:2022:505.

[137] These include, for example, the procedures for adopting legislative and other acts and appointing members of the EU institutions, and, in the judicial plane, the preliminary reference procedure.

[138] This is, of course, not to deny the importance of the Article 2 TEU substantive values in the integration paradigm.

In those areas where the EU institutions enjoy ample discretion, process requirements assume 'even more fundamental significance'.[139] The idea is that where the Treaties give EU institutions ample discretion to make choices, the Court's power to review their merits is limited but this should, in turn, be compensated by strict adherence to process. The manifest error test does not apply to procedural requirements and in relation to them the standard of scrutiny, although not uniform, tends to be higher. Process requirements include the obligation for the enacting authority to examine carefully and impartially all the relevant elements of the situation in question and to give an adequate statement of reasons.[140] The juxtaposition between process and merits review reveals in some respects the civil – common law divide. In *Technische Universität München*,[141] which proved influential in the development of the law, the strengthening of process rights was the Court's response to calls by the referring German court for a thorough substantive review of the Commission's decision-making powers.

The truth however is that process and substance are closely intertwined. For one thing, the former shapes the latter. For another, the conceptualization of process requirements is driven by underlying tenets that often rely on substantive preferences. The requirement of reasoning, although in form purely procedural, if applied strictly, may unravel the decision-making process in a way that expresses substantive preferences. The distinction between giving reasons and giving good reasons is very thin.[142] The close connection between substance and process is evident in *Gauweiler*, where as part of the proportionality inquiry the CJEU examined closely the ECB's statement of reasons.[143] Proportionality review merged with process review. In any event, the distinction is relative: what one legal system may view as process, another may view as substance.[144]

An area where the CJEU has applied a high level of process scrutiny is the imposition of economic sanctions on individuals.[145] At different times, the EU has made extensive use of sanctions, among others, against Iran, Syria and Russia, non-state actors associated with the governments of those states, and person suspected of being associated with terrorism. Although the Court will not review the expediency of sanctions, which is a political question, the circumstances under which they are imposed on specific individuals is subject to judicial review. Economic sanctions are not criminal in nature and therefore the panoply of criminal due process is not available. Nonetheless, the CJEU has held that the imposition of freezing on individuals must respect the rights of defence and must be supported by a statement of reasons. Sanctions are subject to review of legality which in principle it has to be

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[139] *See* Crédit Agricole SA v. ECB, Case T-576/18 EU:T:2020:304, ¶ 31; Organisation des Modjahedines du Peuple d'Iran v. Council, Case T-228/02, EU:T:2006:384, ¶ 154.

[140] *See, e.g.*, *Gauweiler*, EU:C:2015:400, ¶ 69; *Weiss*, EU:C:2018:1000, ¶ 30; Technische Universität München v. Hauptzollampt München-Mitte, Case C-269/90, EU:C:1991:438, ¶ 14 [hereinafter *TUM*].

[141] *TUM*, EU:C:1991:438.

[142] *See* Martin Shapiro, *The Giving Reasons Requirement*, 1992 UNIV. OF CHICAGO LEGAL F. 179, 192 (1992). For a distinction, *see Rotenberg*, EU:T:2016:689.

[143] See *Gauweiler*, EU:C:2015:400.

[144] *See Taricco*, EU:C:2015:555; *M.A.S.*, EU:C:2017:936.

[145] Legal basis for the imposition of restrictive measures, including economic sanctions, on individuals is provided by Article 215(2) TFEU.

'full review'.[146] Although it is not the Court's task to substitute its own assessment of what is appropriate for that of the competent EU institution, it will not only establish whether the evidence relied on is factually accurate, reliable and consistent, but must also ascertain whether that evidence contains all the relevant information to be taken into account in order to assess the situation and whether it is capable of substantiating the conclusions drawn from it.[147]

Where the CJEU reviews the compatibility of a national measure with EU law, in some respects, process may be less important. Whether a measure was adopted by the national parliament, and thus benefits from a high level of legitimacy, or the executive or an institutionally independent national authority does not appear to affect the standard of scrutiny in carrying out proportionality review. In *Mangold*,[148] the Court found German law to be in breach of the general principle of non discrimination on grounds of age, exercising a high level of scrutiny, despite the fact that the German parliament had exercised a clear and rational choice. Under *Factortame*,[149] liability for breach of EU law is a universal principle and attaches also to acts of the legislature. Primacy is process blind in that it does not matter whether the offending measure is adopted by the national parliament or a lower level of authority or whether it has impeccable process credentials. In some cases, EU procedural expectations may even interfere with conceptions of democracy at national level and preciously held constitutional principles.[150]

This is not to say however that process at the national level is irrelevant. The general principles of EU law impose procedural expectations on state action going beyond express requirements imposed in the Treaties. In *Heylens*[151] the Court held that, to be compatible with the Treaties, a decision refusing a free movement right must be accompanied by reasoning. The *Beer case*[152] made it clear that a restriction on the free movement of goods can only be tolerated if it is accompanied by the right to judicial review: the economic constitution goes hand in hand with the substantive constitution. Process considerations may influence the Court's assessment of proportionality. In the *Animal Slaughter case*,[153] in finding the Flemish decree to be compatible with the freedom of religion, the CJEU took into account the fact that it had been adopted following wide consultation.

7) The degree of consensus among the laws of the Member States

Judicial balancing may be influenced by the perceived degree of consensus among the laws of the Member States. Such consensus may be a relevant consideration in deciding whether a premise is recognised as a general principle of

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[146] *Kadi II*, EU:C:2013:518, ¶ 132.

[147] *Id.* ¶ 142.

[148] *Mangold*, EU:C:2005:709.

[149] Brasserie du Pêcheur SA v. Bundesrepublik Deutschland (Factortame), Joined Cases C-46/93 & C-48/93, EU:C:1996:79.

[150] *See* R (HS2 Action Alliance Ltd.) v. Secretary of State for Transport [2014] UKSC 3 (Supreme Court of the United Kingdom expressing criticism in relation to the ECJ's interpretation of the Impact Assessment Directive).

[151] UNECTEF v. Heylens and Others, Case C-222/86, EU:C:1987:442.

[152] Comm'n v. Germany (German Beer Case), Case C-178/84, EU:C:1987:126.

[153] *Animal Slaughter Case*, EU:C:2020:1031.

EU law; whether a national solution is found to be compatible with the Treaties; or whether the matter is left to the national court to decide. The first case where the expression 'constitutional traditions common to the Member States' appeared was *Internationale Handelsgesellschaft* where the Court referred, in general, to the protection of fundamental rights.[154] It has since accepted that a variety of principles stem from the common constitutional traditions, including, the principle of effective judicial protection and effective remedies,[155] equal treatment irrespective of age,[156] the right to freedom of conscience and religion,[157] and the principle of fiscal legality.[158] Such judicial pronouncements tend to have the character of an assumption rather than a conclusion that results from a painstaking comparative law analysis. They also operate at a level of abstraction that enable the Court to reach outcomes that are not path dependent on national law.

The expression constitutional traditions common to the Member States received Treaty endorsement by the Maastricht Treaty.[159] The truth is that the Court does not systematically engage in consensus seeking. It appears that where it comes to important constitutional matters, it prefers to lead than to follow. A criticism which has been levelled against the EU judiciary is that it does not take comparative law sufficiently seriously. For example, in the first generation of cases establishing the liability of Member States in damages,[160] the Court referred to the laws of the Member States with a view to articulating the conditions of liability, but did not make a serious attempt to derive truly common principles from the national legal systems regarding the right to reparation.[161] In *Mangold* the Court invoked the constitutional traditions common to the Member States to establish a general principle of non discrimination on grounds of age whilst in fact the national constitutions provided scant support for this.[162] Still, the reference to the common constitutional traditions in Article 6(3) cannot be understood as an expectation that the ECJ should conduct a thorough comparative analysis of all national laws or constitutions. In most cases, that would be as impractical as it would be unnecessary. Despite its resources, it would be very difficult for the Court to do so and its analysis would open itself to criticism by national law experts. It is also doubtful whether such an exercise would dictate a solution. It is impossible to second guess how a

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[154] *Internationale Handelsgesellschaft*, EU:C:1970:114, ¶ 4.

[155] *See, e.g., Johnston*, EU:C:1986:206, ¶ 18; *Deficiencies in the System of Justice*, Case C-216/18 PPU, EU:C:2018:586, ¶ 100.

[156] *Mangold*, EU:C:2005:709, ¶ 74.

[157] Bougnaoui and ADDH v. Micropole SA, Case C-188/15, EU:C:2017:204, ¶ 29.

[158] Związek Gmin Zagłębia Miedziowego w Polkowicach v. Szef Krajowej Administracji Skarbowej, Case C-566/17, EU:C:2019:390, ¶ 39. Reference to the common constitutional traditions has also been made in the negative sense, i.e. to deny that a principle can be derived from them. *See* Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland, Case C-279/09, EU:C:2010:811, ¶ 44 (the right of legal persons to receive legal aid); Opinion of Advocate General Sharpston, Czech Republic v. Parliament and Council, Case C-482/17, EU:C:2019:321, ¶ 104 (right to possess guns).

[159] *See* TEU art. 6(3).

[160] *See Factortame*, EU:C:1996:79, note 100; Ref. Prelim. Rlg., *Lomas*, EU:C:1996:205; Dillenkofer and Others v. Bundesrepublik Deutschland, Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 & C-190/94, EU:C:1996:375 .

[161] For a critique, *see* Walter van Gerven, *Taking Article 215 EC Seriously, in* NEW DIRECTIONS IN EUROPEAN PUBLIC LAW 35, 47 (Jack Beatson and Takis Tridimas eds., 1998).

[162] Ref. Prelim, Rlg., *Mangold*, EU:C:2005:709.

national constitutional court would decide similar facts. Counting, i.e. looking at all national laws and trying to establish a majority, cannot be the solution.[163] The purpose of the exercise is to provide value continuity and ultimately judicial legitimacy in view of the principle of primacy. Roaming into national laws can only be selective. Recourse to general principles of law is intended to anchor judicial solutions to common values rather than make EU law a prisoner of the past. Furthermore, there are serious conceptual difficulties: the meaning of the common constitutional traditions is notoriously difficult to define.

CONCLUSIONS

The rule of law forms the foundation of the EU and is the overarching value of Article 2 TEU. An understanding of how the Court of Justice applies it, however, can only be obtained by looking more closely at the way it manages conflicts between countervailing rights and interests. The present paper sought to provide a taxonomy of such conflicts and examine some of the factors which the Court takes into account in resolving them. Given that the EU polity structures political power at different levels, it is inevitable that most conflicts that reach the Court involve multi-dimensional balancing. The EU judiciary has to engage in a composite conciliation exercise drawing a balance between two competing interests and also, at the same time, deciding whether that balance, or how much of it, has to be settled at EU level or be left to the discretion of national institutional actors. The judicial inquiry will take on board a number of criteria but the relative weight of each will depend on several factors. Dispute resolution entails an anthropomorphic conception of justice and an inevitable degree of anarchy. This is not a mechanical exercise but a judicial assessment steeped into a process of rationalization and positivism: as Oliver Wendell Holmes famously put it, the life of the law is experience, not logic.[164]

[163] In many cases, advocates general engage in comparative analyses. *See, e.g.,* Opinion of Advocate General Sharpston, Simpson v. Council, Joined Cases C-542/18 RX-II & C-543/18 RX-II, EU:C:2019:977, ¶¶ 98 et seq. Note also that now the reports of the Research and Documentation Department of the Court, which examine how specific legal questions are treated in the laws of the Member States, are made publicly available.

[164] *See* Anonymous [Oliver Holmes, Jr.], *Book Notices*, 14 AM. L. REV. 233, 234 (1880).