COUR DE JUSTICE
DE L'UNION EUROPÉENNE

70 1952 – 2022

70e anniversaire de la Cour de justice de l'Union européenne

Une justice proche du citoyen

Forum des magistrats et Audience solennelle

Luxembourg, 4, 5 et 6 décembre 2022

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Programme

Dimanche 4 décembre 2022

19h00 Arrivée des invités

Mots de bienvenue de M. Koen Lenaerts, Président de la Cour de justice de l'Union européenne

Visionnage du film commémoratif du 70e anniversaire de l'installation de la Cour

Réception d'accueil dans la salle des Pas perdus

Lundi 5 décembre 2022

8h40 Accueil des invités

Matinée consacrée aux réunions plénières

9h00 Ouverture du Forum par M. Koen Lenaerts, Président de la Cour de justice de l'Union européenne

Première séance de travail :
« La procédure préjudicielle – évolutions récentes »

Séance présidée par M. Koen Lenaerts, Président de la Cour de justice
Orateurs :

- M. Koen Lenaerts, Président de la Cour de justice
- Mme Silvana Sciarra, Présidente de la Cour constitutionnelle de la République italienne

10h45 Pause-café

11h00 **Deuxième séance de travail :**

« La notion d'indépendance judiciaire en droit de l'Union »

Séance présidée par M. Lars Bay Larsen, Vice-président de la Cour de justice
Orateurs :

- M. Lars Bay Larsen, Vice-président de la Cour de justice
- M. Stephan Harbarth, Président de la Cour constitutionnelle fédérale de la République fédérale d'Allemagne
- M. Matej Accetto, Président de la Cour constitutionnelle de la République de Slovénie

12h45 Déjeuner dans les salons de la Cour

Après-midi consacré aux travaux en ateliers

14h10 Début des travaux en ateliers

Atelier I : « L'intelligibilité des décisions de justice »

Orateurs :

- M^me^ Ineta Ziemele, juge à la Cour de justice
- M^me^ Barbara Pořízková, Vice-présidente de la Cour administrative suprême de la République tchèque

Atelier II : « La distinctivité des affaires : dénommer les affaires sans révéler l'identité des parties »

Orateurs :

- M. Maciej Szpunar, premier avocat général de la Cour de justice
- M. Carlos Lesmes Serrano, juge et ancien Président de la Cour suprême du Royaume d'Espagne

Atelier III : « La communication juridictionnelle »

Orateurs :

- M^me^ Dineke de Groot, Présidente de la Cour suprême des Pays-Bas
- M^me^ Octavia Spineanu-Matei, juge à la Cour de justice

16h00 Fin des travaux en ateliers

Pause-café dans la salle des Pas perdus

16h30 **Troisième séance de travail :**

« Le Tribunal et les conflits en Europe : développements récents en matière de mesures restrictives contre la Biélorussie et la Russie »

Séance présidée par M. Marc van der Woude, Président du Tribunal
Orateurs :

- M^me^ Mirela Stancu, juge au Tribunal
- M. Roberto Mastroianni, juge au Tribunal

19h00 Concert à la Philharmonie : « Luxembourg Chamber Players »

20h15 Réception dînatoire au Grand Foyer de la Philharmonie

Mardi 6 décembre 2022

10h15	Accueil des invités
10h55	Arrivée de Son Altesse Royale le Grand-Duc Héritier
11h00	**Audience solennelle** Allocution de M. Koen Lenaerts, Président de la Cour de justice de l'Union européenne Allocution de M. Othmar Karas, Premier Vice-président du Parlement européen Intermède musical Allocution de M. Michal Šalomoun, Ministre de la Législation et Président du Conseil Législatif du Gouvernement de la République tchèque Allocution de M^me^ Věra Jourová, Vice-présidente de la Commission européenne Allocution de M^me^ Sam Tanson, Ministre de la Culture et Ministre de la Justice du Grand-Duché de Luxembourg
12h15	Réception dans la salle des Pas perdus
13h00	Déjeuner dans les salons de la Cour
15h00	Conférence « Bâtisseurs d'Europe » Rencontre interactive entre M. le Président Koen Lenaerts, M. le Premier Vice-président du Parlement européen Othmar Karas et M^me^ la Vice-présidente de la Commission européenne Věra Jourová et des groupes de lycéens originaires de différents États membres, présents *in situ* ou à distance
16h30	Rafraîchissements
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Audience solennelle

Grande salle d'audience de la Cour de justice lors de l'Audience solennelle

M. Koen Lenaerts,
Président de la Cour de justice de l'Union européenne

Foreword by Mr Koen Lenaerts, President of the Court of Justice of the European Union

A *Forum des magistrats* is always of great importance to me and my colleagues at the Court of Justice as it gives us the opportunity to exchange ideas and perspectives with our fellow judges from throughout the European Union.

The 2022 Forum was, however, special not only because of the presence of its distinguished guests, the Presidents of the Constitutional and Supreme Courts of the Member States. It was also special because we were celebrating the 70th anniversary of the Court of Justice of the European Union. Exactly 70 years to the day before the start of the Forum, on the 4th of December 1952, a formal sitting was held in the City Hall of Luxembourg during which the first Members of this Court took the oath of office.

But we did not only celebrate the anniversary of the institution. We also celebrated the anniversary of our shared judicial cooperation, of our dialogue with our judicial colleagues in the Member States, through the preliminary ruling mechanism.

Many of the most important rulings of our Court were made in preliminary ruling cases. Let me just mention two fundamental judgments from the early days of our Court, *Van Gend en Loos* [1] on direct effect and *Costa* [2] on the primacy of Union law and one recent important judgment, *Deutsche Umwelthilfe*, [3] on the interpretation of the Aarhus convention and the right of environmental associations to bring legal proceedings.

The preliminary ruling mechanism exists because national courts are the ones on the front line, interpreting and applying European Union law day in, day out. In their respective Member States, they are the guardians of the rule of law of the European legal order. Therefore, I cannot overemphasise how essential it is to the uniform application of Union law that courts

1 | Judgment of 5 February 1963, *Van Gend en Loos*, 26/62, EU:C:1963:1.

2 | Judgment of 15 July 1964, *Costa / E.N.E.L.*, 6/64, EU:C:1964:66.

3 | Judgment of 8 November 2022, *Deutsche Umwelthilfe (Réception des véhicules à moteur)*, C-873/19, EU:C:2022:857.

put questions to the Court of Justice where an issue concerning the validity or interpretation of that law needs to be clarified in order for them to deal with a case that comes before them. In fact, it is thanks to such questions that our Court can fulfil its task of ensuring the uniform interpretation and application of Union law, and thus of ensuring the equality of all citizens before the law.

An important anniversary is a good moment to reflect on the challenges that we will face in the future. The Court of Justice has taken all possible measures to increase its efficiency in the treatment of its cases, but the fact remains that the ever-increasing workload of that Court has become unsustainable. Structural measures need to be taken to resolve this issue as a matter of urgency. In that connection, on 30 November 2022, the Court of Justice submitted a legislative request to the EU legislator regarding the transfer to the General Court of jurisdiction to hear references for a preliminary ruling in certain specific areas. I would like to stress in this regard that the *only* criterion provided in the TFEU for the allocation of jurisdiction as between the Court of Justice and the General Court with respect to references for a preliminary ruling is that the General Court can hear such references in 'specific areas laid down by the Statute'. The Treaty does not allow for other criteria to be used such as, for example, a criterion relating to the identity of the referring court, drawing a distinction between referring courts of last instance and other referring courts.

Our judicial dialogue generally takes place through the formal channel of the preliminary ruling mechanism. That *formal* dialogue is complemented by means of the *informal* mechanism established under the Judicial Network of the European Union. The 2022 *Forum des magistrats* was also an opportunity to celebrate the fifth anniversary of this Network that was set up at the 2017 *Forum* held on the occasion of the 60th anniversary of the signature of the Treaties of Rome.

The Network has proved to be a very valuable channel for communication and for the exchange of information between participating courts. Since November 2019, most of the content made available on its website is now shared with the general public. That is one of the ways in which we seek to bring justice closer to the citizen.

Bringing justice closer to the citizen was the motto of the Court's anniversary celebrations. This is reflected in the choice of the topics for the panel discussions at the conference.

Recently, the Court of Justice took a major step to bring justice closer to the citizen. In April 2022, the Court began the streaming of the hearings of its Grand Chamber.

Ordinary citizens, students, academics but also referring judges no longer have to travel – often long distances – in order to attend a Grand Chamber hearing at the Court. They can follow the pleadings and the 'question and answer session' on their screens. This project has been shown to be a great success, with a clear interest on the part of the public to watch these hearings.

What follows is a collection of the speeches and presentations delivered by Presidents of the Constitutional and the Supreme Courts, Ministers of the Member States, High Representatives of the EU and my fellow colleagues of the Court of justice and the General Court during the course of the two-day Forum. These speeches, covering a wide range of topics reflecting the challenges faced by the EU's judicial architecture, formed the basis of interesting and in-depth discussions, furthering the dialogue between the Court of Justice and national courts.

I have little doubt that these texts will prove as interesting to the reader as they did to the participants of the Forum and that, even if in a small way, the publication of these texts contribute to bringing justice closer to the citizen.

Forum des magistrats

Allocution d'ouverture du Forum par M. Koen Lenaerts, Président de la Cour de justice de l'Union européenne

Chers Collègues,

Je vous souhaite à tous une cordiale bienvenue.

Jean Monnet a écrit dans ses mémoires : « Rien n'est possible sans les hommes, rien n'est durable sans les institutions » [1]. Si nous pouvons célébrer aujourd'hui le 70e anniversaire de la Cour de justice, c'est bien sûr grâce à la créativité des Pères fondateurs. Mais c'est aussi et surtout grâce à l'investissement de toutes celles et ceux qui ont donné à cette institution sa vitalité et lui ont permis d'acquérir son autorité dans l'espace judiciaire européen. Or, la Cour n'est pas seulement nourrie de l'intérieur, par ses membres et leurs collaborateurs, mais aussi par de précieux apports de l'extérieur. Je tiens à ce titre à saluer le rôle majeur des juridictions des États membres au soutien de la Cour de justice pour garantir les droits des citoyens et des entreprises découlant du droit de l'Union. Ensemble, nous œuvrons efficacement au développement et à la consolidation de l'ordre juridique de l'Union, au service des justiciables. Nous relevons les nombreux défis que soulèvent la multiplication et la complexification de la réglementation de l'Union dans des domaines qui étaient jusqu'il y a peu largement régis par le droit national, tels que l'asile et la migration, la coopération judiciaire pénale, le droit de l'environnement ou encore la protection des données à caractère personnel.

Ce serait toutefois une erreur que de regarder la confiance du citoyen dans l'Union en général, et dans sa justice en particulier, comme un acquis inébranlable. Nous sommes tous des juges du droit de l'Union. À ce titre, nous devons rester attentifs à ce que la justice européenne soit toujours plus proche des citoyens. Chacun des thèmes abordés lors de ce Forum des magistrats spécial examine une facette de ce nécessaire rapprochement :

1 | Jean Monnet, *Mémoires*, Hachette/Pluriel, 2022.

premièrement, la procédure préjudicielle, car cette dernière établit un lien direct entre la Cour de justice et une juridiction nationale saisie d'un litige pour la résolution duquel le droit de l'Union présente une pertinence ; *deuxièmement*, l'indépendance judiciaire, car il s'agit d'une condition sine qua non de la confiance des justiciables dans la protection effective de leurs droits découlant du droit de l'Union par les juridictions des États membres et de l'Union ; *troisièmement*, enfin, les thèmes abordés lors des ateliers, qui, au-delà de la qualité du raisonnement judiciaire, touchent à l'autorité des décisions de justice et à leur légitimité pour les justiciables et le public, à savoir la lisibilité de ces décisions, leur dénomination et la manière dont les juridictions communiquent sur leur activité.

Première séance de travail : « La procédure préjudicielle – évolutions récentes »


K. LENAERTS

Intervention de M. Koen Lenaerts, Président de la Cour de justice

La valeur de l'État de droit constitue le véritable socle sur lequel nos démocraties sont construites. Elle signifie en particulier que les citoyens et les entreprises doivent bénéficier de manière effective des droits que leur confère le droit de l'Union. Dans ses arrêts *Juízes Portugueses* [1] et *LM* [2], la Cour a établi un lien explicite entre cette valeur fondamentale, sur laquelle repose l'Union selon l'article 2 TUE, et le mécanisme du renvoi préjudiciel, décrit comme la « clef de voûte du système juridictionnel institué par les traités ». Les juridictions nationales jouent en effet un rôle central pour appliquer le droit de l'Union dans les États membres. Pour rapprocher la justice européenne des citoyens, il est donc essentiel que ces juridictions des États membres puissent, comme le prévoit le traité FUE, entrer en dialogue avec la Cour de justice ou avec le Tribunal dans des matières spécifiques déterminées par le statut de la Cour de justice de l'Union européenne (ci-après le « statut »), en cas de doutes sur l'interprétation du droit de l'Union ou la validité du droit dérivé de celle-ci.

Je souhaite tout d'abord évoquer la question du **transfert de certaines affaires préjudicielles au Tribunal.** Comme bon nombre d'entre vous le savent, la Cour de justice a préparé une demande législative visant un tel transfert dans des « matières spécifiques déterminées par le statut », ainsi que cela est permis par l'article 256, paragraphe 3, TFUE. Cette initiative est rendue nécessaire par l'accroissement significatif de la charge de travail de la Cour de justice depuis plusieurs années, notamment en matière préjudicielle. La Cour de justice a désormais atteint, voire dépassé un seuil critique, au-delà duquel sa capacité à assumer de manière optimale les missions essentielles qui lui sont confiées par les traités et par son statut n'est plus garantie.

C'est pour pouvoir continuer à se concentrer à l'avenir sur ses missions centrales de juridiction constitutionnelle et suprême de l'Union, qu'il est envisagé de modifier le statut pour transférer au Tribunal une compétence préjudicielle dans cinq « matières spécifiques ».

1 | Arrêt du 27 février 2018, Associação Sindical dos Juízes Portugueses, C-64/16, EU:C:2018:117, points 36 et 43.

2 | Arrêt du 25 juillet 2018, Minister for Justice and Equality (Deficiencies in the system of justice), C-216/18 PPU, EU:C:2018:586, point 54.

Ces matières sont : (i) la TVA ; (ii) les droits d'accise ; (iii) le code des douanes et le classement tarifaire de marchandises dans la nomenclature combinée ; (iv) l'indemnisation et l'assistance des passagers et, enfin, (vi) le système d'échange de quotas d'émissions de gaz à effet de serre. Ce choix est motivé par plusieurs considérations, guidées par le souci d'alléger de manière effective la charge de travail de la Cour en évitant toutefois des risques d'incohérences dans la jurisprudence des juridictions de l'Union. Ainsi, les matières que j'ai citées présentent quatre caractéristiques communes :

- elles sont régies par un nombre limité d'actes, ce qui facilite la classification d'une affaire préjudicielle comme relevant exclusivement ou non de l'une d'elles ;
- elles ne donnent que très rarement lieu à des arrêts de principe ;
- elles s'appuient sur un socle important de jurisprudence de la Cour ;
- elles représentent ensemble environ 20 % des renvois préjudiciels portés devant la Cour de justice, ce qui signifie que leur transfert constituerait un allègement suffisamment sensible de la charge de travail de celle-ci.

Par ailleurs, le risque de contradictions dans la jurisprudence sur renvoi préjudiciel et sur pourvoi est écarté dès lors que le Tribunal ne connaît pas de recours directs en ces matières. En outre, l'attribution des affaires préjudicielles à des chambres spécialisées constituera le gage d'une cohérence de la jurisprudence du Tribunal dans les matières spécifiques transférées.

La mise en œuvre pratique de cette réforme envisagée se caractérise par deux principes : d'une part, le principe du **« guichet unique »** et, d'autre part, celui d'un **transfert de toutes les affaires relevant exclusivement de l'une des matières spécifiques.** Le guichet unique vous intéressera tout particulièrement : il signifie que les demandes de décision préjudicielle continueront toutes à être adressées au greffe de la Cour de justice. C'est donc à cette dernière, et non aux juridictions nationales, qu'il incombera de déterminer si une demande relève exclusivement d'une ou plusieurs des matières spécifiques, ce qui facilite la saisine de la Cour et accroît la sécurité juridique pour ces juridictions.

Ce principe du guichet unique ne signifie pas que la Cour de justice pourra « retenir » une affaire relevant d'une matière spécifique simplement parce qu'elle la trouve intéressante, ce qui soulèverait d'ailleurs un problème de conformité à la garantie du « juge légal ». Le seul critère pertinent pour retenir une affaire est d'ordre matériel, et donc parfaitement neutre, à savoir que cette affaire ne concerne pas *exclusivement* une matière spécifique.

En cas de doute du Président de la Cour à ce sujet, après avoir entendu le Vice-président et le premier avocat général, le point sera discuté lors de la réunion générale, qui tranchera. Un exemple d'une telle affaire préjudicielle est celle ayant donné lieu à l'important arrêt *Vodafone*, prononcé en grande chambre le 3 mars 2020 [3]. Les doutes de la juridiction de renvoi dans cette affaire relative à l'impôt hongrois sur le chiffre d'affaires des opérateurs de télécommunications concernaient en effet tant la directive TVA [4], qui ferait partie des matières spécifiques, que la liberté d'établissement garantie aux articles 49 et 54 TFUE.

Je tiens encore à souligner que ce transfert envisagé ne prévoit pas d'opérer une distinction entre les juridictions des États membres soumises à l'obligation de renvoi préjudiciel en interprétation et celles qui ne le sont pas. Réserver à la Cour de justice le traitement des demandes préjudicielles émanant de juridictions constitutionnelles ou suprêmes des États membres ne serait en effet pas conforme au droit primaire puisque l'article 256, paragraphe 3, TFUE prévoit un transfert de compétence préjudicielle au Tribunal exclusivement fondé sur les matières spécifiques déterminées par le statut, sans permettre de distinguo à l'intérieur de ces matières selon un autre critère. La seule réelle nuance est celle prévue par le second alinéa de cette disposition, permettant au Tribunal de renvoyer l'affaire à la Cour de justice si elle « appelle une décision de principe susceptible d'affecter l'unité ou la cohérence du droit de l'Union ». De même, une ultime garantie est apportée par le réexamen par la Cour d'un arrêt préjudiciel rendu par le Tribunal, qui est prévu par le traité FUE en cas de risque sérieux d'atteinte à l'unité ou à la cohérence du droit de l'Union.

Ces perspectives étant esquissées, je vais maintenant revenir sur quelques développements récents concernant la procédure préjudicielle. Ils concernent la **protection de l'effectivité du mécanisme préjudiciel** par la Cour (I), la **protection de son intégrité** (II), et, enfin, la **portée de l'obligation de renvoi préjudiciel** pour les juridictions de dernier degré (III).

3 | Arrêt du 3 mars 2020, Vodafone Magyarország, C-75/18, EU:C:2020:139.

4 | Directive 2006/112/CE du Conseil, du 28 novembre 2006, relative au système commun de taxe sur la valeur ajoutée (JO 2006, L 347, p. 1).

I. La protection de l'effectivité du mécanisme préjudiciel par la Cour

Le renvoi préjudiciel revêt une importance toute particulière pour assurer que le droit de l'Union a le même effet dans tous les États membres et ainsi prévenir des divergences dans son interprétation par les juridictions nationales. Il ne surprend guère dans ce contexte que la Cour en promeuve l'effectivité, ce qu'illustre particulièrement bien l'arrêt *Getin Noble* du 29 mars dernier [5]. Dans cette affaire, la Cour était interrogée par la Cour suprême de Pologne, siégeant dans une formation à juge unique, au sujet de conditions de nomination de juges du fond. Le Médiateur polonais était toutefois intervenu à la procédure préjudicielle et soutenait que cette demande était irrecevable en raison de doutes qui, selon lui, pouvaient légitimement être nourris quant à l'indépendance et à l'impartialité du juge de renvoi lui-même. Cette argumentation s'appuyait sur la jurisprudence constante selon laquelle un organe ne peut adresser une question préjudicielle à la Cour que s'il est une « juridiction », au sens de l'article 267 du traité sur le fonctionnement de l'Union européenne, ce qui suppose, notamment, qu'il soit « indépendant », au sens de l'article 47 de la charte des droits fondamentaux de l'Union européenne. Tout en confirmant cette exigence, la Cour a écarté l'argumentation du Médiateur et répondu aux questions posées. Ce qui est intéressant est qu'elle ne l'a pas fait en rejetant les doutes soulevés par le Médiateur en tant que tels, mais sur la base d'une *présomption réfragable* précisément justifiée par la volonté de protéger l'effectivité du renvoi préjudiciel comme clef de voûte du système juridictionnel institué par les traités. Si le renvoi émane d'un organe juridictionnel, ce dernier est présumé être une « juridiction » d'un État membre au sens de l'article 267 TFUE [6]. Cela étant, cette présomption peut être renversée « lorsqu'une décision judiciaire définitive rendue par une juridiction nationale ou internationale conduirait à considérer que le juge constituant la juridiction de renvoi n'a pas la qualité de tribunal indépendant, impartial et établi préalablement par la loi » [7]. La Cour concilie ainsi l'effectivité du mécanisme préjudiciel avec l'exigence d'indépendance des juges, inhérente à la valeur de l'État de droit.

5 | Arrêt du 29 mars 2022, Getin Noble Bank, C-132/20, EU:C:2022:235.

6 | Ibid., point 69.

7 | Ibid., point 72.

Cette protection de l'effectivité du mécanisme préjudiciel va de pair avec le soin pris par la Cour, depuis les célèbres arrêts *Foglia et Novello* [8], d'éviter qu'il se transforme en une procédure consultative, ce qui dénaturerait tout simplement sa fonction juridictionnelle. En effet, ce mécanisme vise à apporter aux juridictions nationales un éclairage sur le sens ou la validité d'une disposition du droit de l'Union *pour autant que cela soit nécessaire* à la solution de *litiges réels* qu'elles ont à trancher.

La Cour reconnaît bien sûr une large marge d'appréciation aux juridictions nationales pour apprécier cette nécessité. Certaines affaires récentes rappellent toutefois que cette marge n'est pas illimitée. Ainsi, l'idée centrale qui se dégage des arrêts *Miasto Łowicz* [9] et *IS* (*Illégalité de l'ordonnance de renvoi)* [10] est que sont irrecevables des questions qui touchent à des problématiques générales d'indépendance judiciaire et d'État de droit ne présentant pas de lien direct avec les litiges au principal et dont la réponse n'apparaît pas nécessaire pour trancher des questions procédurales de droit national avant de pouvoir statuer sur le fond. L'arrêt *Prokurator Generalny* [11], prononcé le 22 mars de cette année, s'inscrit dans le prolongement direct de ces précédents. La Cour y a déclaré la demande de décision préjudicielle irrecevable car les questions soulevées, relatives à des déficiences alléguées dans la procédure de nomination du président de la chambre disciplinaire de la Cour suprême de Pologne, avaient « intrinsèquement trait » à un litige autre que le litige au principal, à savoir une procédure disciplinaire initiée contre la magistrate en cause devant une juridiction inférieure [12]. Nous aurons sans aucun doute l'occasion de revenir plus en détail sur ces arrêts lors de nos discussions. Je souligne simplement à ce stade que les limites qu'ils mettent en exergue sont, par leur nature même, spécifiques à la procédure préjudicielle et donc inapplicables à la procédure en manquement.

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8 | Arrêts du 11 mars 1980, Foglia, 104/79, EU:C:1980:73, points 10 à 13, et du 16 décembre 1981, Foglia, 244/80, EU:C:1981:302.

9 | Arrêt du 26 mars 2020, Miasto Łowicz et Prokurator Generalny, C-558/18 et C-563/18, EU:C:2020:234.

10 | Arrêt du 23 novembre 2021, IS (Illégalité de l'ordonnance de renvoi), C-564/19, EU:C:2021:949.

11 | Arrêt du 22 mars 2022, Prokurator Generalny e.a. (Chambre disciplinaire de la Cour suprême – Nomination), C-508/19, EU:C:2022:201. Dans cette affaire, une magistrate polonaise faisant l'objet d'une procédure disciplinaire avait introduit une procédure distincte devant la Cour suprême, visant en substance à contester la qualité de magistrat du président de la chambre disciplinaire de cette juridiction qui avait désigné la juridiction disciplinaire compétente.

12 | Ibid., points 71 et 72.

II. L'intégrité du mécanisme de renvoi préjudiciel

La Cour veille aussi à préserver l'intégrité du mécanisme préjudiciel.

De nombreux arrêts rendus ces dernières années mettent ainsi l'accent, sous cet angle, sur la **garantie d'indépendance** des juridictions nationales. Nous aurons l'occasion de revenir sur celle-ci lors de la seconde session de travail qui lui est consacrée ce matin. Je rappelle néanmoins le constat de la Cour dans des arrêts tels que *Banco de Santander* [13] et *Repubblika* [14], selon lequel cette indépendance est essentielle au bon fonctionnement de la procédure préjudicielle. Ainsi, les juridictions dont les décisions sont susceptibles de recours doivent disposer de la faculté la plus étendue de s*aisir* la Cour d'une demande d'interprétation du droit de l'Union lorsqu'elles éprouvent un doute à cet égard et qu'elles estiment la réponse de la Cour nécessaire à la résolution du litige [15]. La Cour a récemment apporté une importante clarification dans ses arrêts *Commission/Pologne (Régime disciplinaire des juges)* [16] et *IS (Illégalité de l'ordonnance de renvoi)* [17], à savoir que l'intégrité de ce mécanisme serait gravement menacée si le fait pour un juge national de saisir la Cour d'un renvoi préjudiciel était de nature à exposer celui-ci à des *poursuites disciplinaires*.

Il en va de même si le droit national **dissuade une juridiction nationale d'adresser des questions préjudicielles à la Cour en cas de doute sur la conformité du droit national au droit de l'Union** (*IS*), ou **empêche une telle juridiction d'écarter les dispositions nationales contraires au droit de l'Union** (*RS*) [18]. Dans cette dernière affaire était en cause une jurisprudence de la Cour constitutionnelle roumaine empêchant les juridictions roumaines d'écarter l'application d'une loi créant une section spécialisée du ministère public ayant une compétence exclusive pour enquêter sur des infractions commises par des juges ou procureurs, loi qui était pourtant incompatible avec le droit de l'Union selon la

13 | Arrêt du 21 janvier 2020, Banco de Santander, C-274/14, EU:C:2020:17, point 56.

14 | Arrêt du 20 avril 2021, Repubblika, C-896/19, EU:C:2021:311, point 51.

15 | Arrêt du 23 novembre 2021, IS (Illégalité de l'ordonnance de renvoi), C-564/19, EU:C:2021:949, point 68 et jurisprudence citée.

16 | Arrêt du 15 juillet 2021, Commission/Pologne (Régime disciplinaire des juges), C-791/19, EU:C:2021:596, point 227.

17 | Précité.

18 | Arrêt du 22 février 2022, RS (Effet des arrêts d'une cour constitutionnelle), C-430/21, EU:C:2022:99.

jurisprudence de la Cour. La Cour a considéré, dans cet arrêt *RS*, que le mécanisme préjudiciel est compromis si un juge ordinaire ne peut écarter une législation nationale contraire au droit de l'Union, au motif que la Cour constitutionnelle de l'État membre dont il relève a confirmé la constitutionnalité de cette législation, y compris avec l'article de la Constitution relatif à la primauté du droit de l'Union sur le droit interne, sans que cette Cour constitutionnelle ait soumis une question préjudicielle en interprétation du droit de l'Union à la Cour de justice [19].

III. L'obligation de renvoi préjudiciel pour les juridictions de dernier degré

Permettez-moi d'évoquer enfin l'obligation pour les juridictions de dernier ressort dans les États membres d'actionner le mécanisme préjudiciel lorsqu'une question d'interprétation du droit de l'Union est soulevée devant elles, obligation qui est cruciale pour garantir l'interprétation uniforme du droit de l'Union dans l'ensemble des États membres.

L'arrêt *Cilfit I* a formulé trois exceptions à cette obligation [20]. En premier lieu, lorsque la question soulevée n'est pas pertinente, c'est-à-dire qu'elle n'a aucune influence sur la solution du litige. En deuxième lieu, en présence d'un « acte éclairé » : la disposition du droit de l'Union en cause a déjà fait l'objet d'interprétation de la part de la Cour. En troisième et dernier lieu, en présence d'un « acte clair », à savoir lorsque l'interprétation de la part de la Cour ou l'application correcte du droit de l'Union s'imposent avec une telle évidence qu'elles ne laissent place à aucun doute raisonnable.

Dans l'arrêt *Consorzio Italian Management et Catania Multiservizi* (aussi appelé *Cilfit II*), du 6 octobre 2021 [21], la Cour a confirmé ces trois exceptions tout en clarifiant l'exception de l'acte clair sur trois plans.

19 | Ibid., points 67 à 77.

20 | Arrêt du 6 octobre 1982, Cilfit e.a., 283/81, EU:C:1982:335.

21 | Arrêt du 6 octobre 2021, Consorzio Italian Management et Catania Multiservizi, C-561/19, EU:C:2021:799.

Premièrement, l'absence de doute raisonnable ne doit porter que sur l'interprétation correcte du droit de l'Union [22], et non pas sur son application correcte au cas d'espèce, qui relève de la responsabilité des juridictions nationales.

Deuxièmement, une comparaison de chacune des versions linguistiques des textes du droit de l'Union n'est plus possible dans une Union avec 24 langues officielles. Désormais, la juridiction nationale doit donc uniquement tenir compte des divergences entre les versions linguistiques « dont elle a connaissance, notamment lorsque ces divergences sont exposées par les parties et sont avérées » [23].

Troisièmement, le fait qu'une disposition du droit de l'Union se prête à plusieurs interprétations ne s'oppose pas à la constatation d'une absence de doute raisonnable, si la juridiction nationale parvient à la conclusion, au vu du contexte et de la finalité poursuivie par cette disposition, que ces autres interprétations ne sont pas suffisamment plausibles [24]. Cela étant, et c'est là un apport majeur de l'arrêt *Cilfit II*, une vigilance particulière s'impose pour constater l'absence de doute raisonnable si des jurisprudences divergentes sur l'interprétation de la disposition en cause se sont développées, au sein des juridictions d'un même État membre ou entre des juridictions d'États membres différents [25]. Avant de conclure à une absence de doute raisonnable, la juridiction nationale statuant en dernier ressort doit être convaincue que la même évidence s'imposerait également aux autres juridictions de dernier ressort des États membres et à la Cour [26].

Enfin, lorsque la juridiction nationale s'estime libérée de son obligation de renvoi, elle doit motiver sa décision en indiquant qu'elle se trouve en présence de l'une des trois exceptions à une telle obligation [27].

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22 | Ibid., point 39.

23 | Ibid., point 44.

24 | Ibid., point 48.

25 | Ibid., point 49.

26 | Ibid., point 40.

27 | Ibid., point 51.

J'en arrive à quelques mots conclusifs. Dans un contexte géopolitique où les fondements mêmes de nos sociétés démocratiques subissent des attaques de plus en plus fréquentes, il est de notre responsabilité commune de juges du droit de l'Union de travailler de concert et dans un esprit de coopération, à travers le dialogue préjudiciel, pour consolider notre Union comme une Union de droit. Les citoyens traversent en effet des temps incertains, caractérisés par une conjonction de crises entre autres géopolitique, énergétique, environnementale, sociale et migratoire. Dans ce contexte, la justice européenne doit être plus que jamais un phare pour ceux-ci.

M^me^ Silvana Sciarra,
Présidente de la Cour constitutionnelle de la République italienne

Contribution by Ms Silvana Sciarra, President of the Constitutional Court of the Italian Republic

Judicial activism and judicial wisdom

It is a great honour for me to speak at this opening session, during a most evocative celebration of the Court of Justice of the European Union ('the CJEU'). From personal experience, I can say without hesitation – despite some initial worry about increased wrinkles – that 70 is a wonderful age to be and is an age when you can continue to find out more about yourself and look forward to future achievements with greater confidence.

I argue in my presentation that this is the self-analysis the Court of Justice is currently undergoing. The outcome of such a complex exercise is also due to the cooperation of national courts in preliminary references, with a special emphasis to be acknowledged whenever constitutional and supreme courts take the lead.

Constitutional courts are in a position to create unforeseen threads of integration: as courts of last instance, they also act as guardians of national constitutional identities. They are the pillars supporting the European structure and, with this responsibility, they should spread the common European vision widely.

In particular, the 'identity clause' assigns national constitutional courts the highest level of responsibility in establishing the spirit of mutual cooperation. **The point to be made is that national identities are protected not against Europe, but because of Europe:** there is a need to open up a constant and evolving interaction, based on common values. Preliminary references must play a role in pushing the CJEU towards enhanced coherence, with a view to strengthening democracy and the rule of law.

Celebrations often involve a short analysis of the past, with an immediate projection into the future. Since we are discussing preliminary references, we will recall leading cases which have contributed to shaping the European legal order and have set the scene for the current discussion.

There is no need to quote them before such a distinguished audience. However, it is noteworthy that the Court itself quotes them in recent judgments, as if this thread of continuity should help to fortify its responsibility and display coherence as a qualifying element of its own reasoning.

In the judgment in *RS*, for example, *Van Gend & Loos* is mentioned as a reminder that 'unlike standard international treaties, the Community Treaties established a new legal order, integrated into the legal systems of the Member States on the entry into force of the Treaties and which is binding on their courts'. [1] *Costa* and the well-known passage mentioning the 'Community's own legal system' is also quoted, to remind all of us that reciprocity among Member states 'means, as a corollary, that they cannot accord precedence to a unilateral and subsequent measure over that legal system or rely on rules of national law of any kind against the law stemming from the Treaty establishing the European Economic Community'. [2]

In early discussions on preliminary references, commentators put forward concerns – as well as appreciation – for the innovative solutions brought forward by this original form of communication among courts. Some of that criticism can now be looked at from a different perspective, due to the different phase European integration is experiencing and to new challenges to the rule of law.

For example, judicial activism – which was in the past perceived as a potential problem with regard to specific fields, one of them in particular being social law and its balance with market values – now appears among the concerns of the Polish Constitutional Court in a completely different perspective. Following the CJEU's decision on interim measures, adopted in order to preserve the independent functioning of the judiciary, [3] the 'CJEU's

1 | Judgment of 22 February, *RS (Effet des arrêts d'une cour constitutionnelle)*, C-430/21, EU:C:2022:99, paragraph 47, where mention is made of recent cases in this line of reasoning.

2 | Ibid., paragraph 48.

3 | Judgment of 15 July 2021, *Commission* v *Poland (Régime disciplinaire des juges)*, C-791/19, EU:C:2021:596. This Grand Chamber judgment was delivered in an action brought by the Commission for failure to fulfil obligations under Article 258 TFEU. On 17 July 2019, the Commission had issued a reasoned, opinion, stating that the new measures on disciplinary actions for judges, adopted by Poland, were not in compliance with Article 19(1) TEU and the second and third paragraphs of Article 267 TFEU, despite the letter of formal notice sent by the Commission on 3 April 2019. Poland replied to this letter denying infringements of EU law.

progressive activism' – it is maintained – ends up interfering with the competence of state authorities and undermining the Polish constitution. [4] This point is accompanied by the description of a hierarchical system of sources, whereby the Treaty on European Union 'occupies a position which is lower than that of the Constitution, and just as any ratified international agreement [...] the Treaty on European Union ('TEU') must be consistent with the Constitution'. Furthermore, judgments delivered by the CJEU are 'hybrid in character' and are not necessarily to be deemed as binding sources of law. Hence, the criticism addressed to the CJEU for its invasion of national prerogatives.

Back in 1989 concerns about judicial activism inspired, among others, Judge Federico Mancini. In reply to the Court's fiercest critics, he wrote that the drafting of a constitution for Europe was the ultimate result of the case-law developed from the early days onwards. However, he specified that 'the Court would have been far less successful had it not been assisted by two mighty allies: the national courts and the Commission'. [5] Let us contextualise such a phrase in the current discussion.

Breaches of the rule of law in Hungary and Poland were at the core of two CJEU judgments dealing with access to European funds as provided for in Regulation 2020/2092. [6] The latter, according to the Court with regard to Hungary, satisfies the principle of legal certainty, since the Commission bases its assessments on objective opinions. Breaches of the rule of law are not raised as such, but to protect the Union budget, when those breaches affect the sound financial budget of the Union 'in a sufficiently direct way'. The Commission – as this example shows very clearly – was and continues to be a 'mighty' ally of the Court.

4 | Polish Constitutional Tribunal, Press Release after the Hearing, Ref. K 3/21, point 22. https://trybunal.gov.pl/en/news/press-releases/after-the-hearing/art/11664-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej.

5 | Mancini G. F., *Democracy & Constitutionalism in the European Union*, Collected essays, Oxford, 2000, p. 2.

6 | Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget (OJ 2020 L 433I, p. 1).

Arguing on similar grounds and addressing the Polish case, the Court underlined that measures taken to protect financial interests must be considered 'strictly proportionate to the effect of the breaches which have been determined of the principles of the rule of law on the Union budget'. [7]

In linking together respect for the rule of law and access to financial support, the Court is sending a message to Member States, underlining the many facets of membership of the Union. The Court, however, is not alone in playing this role; it is part of an interinstitutional strategy, whereby all other actors have been focussing on the same issues and trying to reach reluctant governments. The Commission is visible among those actors. The same is true for the European Parliament, which adopted several resolutions on the need to immediately apply the 'Rule of Law Conditionality Mechanism'. [8]

Let us now move to the other 'mighty allies' of the CJEU, namely national courts.

Over the years, national courts have become more experienced interlocutors and at times severe ones. **Lodging a preliminary reference does not necessarily mean that they will completely agree with the Court's answer,** it may imply a challenge, testing the ground for affirming a different point of view and bringing this result back into the national arena, to show the dominance of one discourse over the other. **This game is part of what I suggest to describe as 'institutional pluralism', an attempt to compare different experiences and to search solutions.**

However, should national identity be the crucial card in the game, played to deny European identity, this move could be a perilous path to follow. It would have been equally perilous, back at the origin of this debate among courts, to deny support to an emerging status of the European Court, acting as a quasi-federal court, choosing the tool of preliminary references whenever possible.

7 | Judgment of 16 February, *Poland* v *Parliament and the Council*, C-157/21, EU:C:2022:98, paragraph 359.

8 | European Parliament resolution of 25 March 2021 on the application of Regulation (EU, Euratom) 2020/2092, the rule-of-law conditionality mechanism (2021/2582(RSP)) (OJ 2021 C 494, p. 61); European Parliament resolution of 10 March 2022 on the rule of law and the consequences of the ECJ ruling (2022/2535(RSP)) (OJ 2022 C 347, p. 168).

In the early debate – the one Mancini refers to – the need to discover general principles of European law was preeminent. In the current discussion, we discover, in addition to that early approach, what the search for common values really means, in the prospect of preserving and even enriching the European integration process.

The notion of cooperation is momentous in the overall structure of preliminary reference procedures, enshrined in Article 267 TFEU. In its recent case-law the CJEU has emphasised such centrality even further, in the attempt to strengthen the principle underlying Article 19(1) TEU, namely its own task in ensuring 'that in the interpretation and application of the Treaties the law is observed'.

The CJEU clarified the connection between Article 267 and Article 19(1) in a renowned decision dealing with an association of Portuguese judges, which marks the beginning of a long chain of decisions. Ruling on the independence of judges and its compatibility with temporary wage reductions, due to constraints in the state budget, the Court stated that Article 19(1) TEU 'which gives concrete expression to the value of the rule of law stated in Article 2 TEU, entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals'. [9] The connection established among such articles is new and of extreme relevance, as it is linked, in a systematic interpretation of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

In that regard, collaboration with the CJEU is for national courts the fulfilment of a duty, peculiar to a system of effective legal remedies. The concretisation of a value – the rule of law – through a combined reference to Article 267 and Article 19(1), is not meant as mere symbolism. A preliminary reference, which is at the origin of the case previously quoted, promoted stronger commitments towards an even stronger collaboration of the two levels: the CJEU and national courts. Such a combined effort goes into the direction of enforcing common European values.

Furthermore, in *Repubblika,* [10] in response to a preliminary reference lodged by a Maltese court acting as a constitutional court, **the Court recalls Article 2 TEU and mentions trust among Member States and among their judges as a product of shared values,**

9 | Judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 32.

10 | Judgment of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311.

in particular the rule of law, as it is concretised in Article 19(1). Whenever changes are foreseen – the Court adds – national legislatures are bound by a clause of non-regression, [11] which, in the end, aims to guarantee a balance between effective judicial protection, as in Article 47 of the Charter, and the independence of the judiciary. There can be no regression from the founding values enshrined in Article 2 TEU.

In *RS*, the CJEU clarified even further the connection that keeps together the preliminary ruling procedure and the second subparagraph of Article 19(1) TEU, with regard to judicial independence, whenever the principle of primacy of EU law is at stake. Ordinary courts should not enforce national rules or national practices under which a national judge may incur disciplinary liability, for having applied EU law, as interpreted by the Court, and having left aside the case-law of the Constitutional Court, the one of Romania in the specific case. [12]

Although no precise constitutional model is imposed by EU law, it is important to underline that preliminary references in recent cases set in motion a cooperative mechanism, leading towards a forward-looking interpretation of Article 4(2) TEU. **Full respect of national identities strengthens the notion of a European identity.**

Cooperation prompted by preliminary references can also be mentioned in view of achieving further exploration of the impact of the Charter. Indeed, over the first ten-year period of the binding Charter, they have increased in a significant way (from 19 to 84). [13] It is sufficient here to recall two recent cases in which the contribution of this cooperative mechanism is particularly evident.

In *X* v *Staatssecretaris van Justitie en Veiligheid,* [14] upon request for an interpretative preliminary ruling from a Dutch District Court, the CJEU had the chance to highlight that the fundamental rights enshrined in the Charter lie at the core of the development of the Area of Freedom, Security and Justice, and, thus, of the EU integration process as a whole.

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11 | Ibid., paragraphs 62 to 63.

12 | Judgment of 22 February 2022, *RS (Effet des arrêts d'une cour constitutionnelle),* C-430/21, EU:C:2022:99.

13 | European Commission, Directorate-General for Justice and Consumers, *2018 report on the application of the EU Charter of Fundamental Rights*, 2019, Publications Office, 2019, p. 14.

14 | Judgment of 22 November 2022, *Staatssecretaris van Justitie en Veiligheid (Éloignement – Cannabis thérapeutique),* C-69/21, EU:C:2022:913.

In this judgment, rendered on 22 November 2022, the Grand Chamber reached the conclusion, inter alia, that some provisions of secondary law 'read in conjunction' with Articles 1, 4, and 19(2) of the Charter must be interpreted as precluding a Member State from adopting a return decision or removing a third-country national who is staying illegally and suffering from a serious illness, where there are substantial grounds for believing that that person will be, in that event, exposed to a real risk of a significant, permanent and rapid increase in his or her pain.

The Court points to the fact that **when the question submitted concerns the interpretation or the validity of a rule of EU law, it enjoys a 'presumption of relevance', so that the Court is bound to give a ruling.** [15] In this perspective, it is important to underline the expression **'read in conjunction', which links together the interpretation of secondary law with articles of the Charter.**

Amongst the passages of the Court's reasoning that would deserve to be recalled, it is worth mentioning the close tie found to exist between the principle of *non-refoulement* and the fundamental right to respect for private life protected in Article 7 of the Charter, [16] without – however – allowing an undue extension of the Charter beyond its scope of application. [17] In other words, this case is one of the many examples where the CJEU has been able to extensively, fruitfully, and wisely make use of the 'assist' on the Charter offered by the referring court in the context of the preliminary ruling procedure.

Moreover, in a preliminary reference lodged by the Italian Constitutional Court, dealing with maternity and childbirth allowances, Article 34 of the Charter is mentioned as an additional parameter to be taken into account, when interpreting EU secondary law. In relation to the latter, the emphasis placed on this provision of the Charter proves the constitutional significance that, *today*, preliminary reference questions, directly involving the Charter, have for the development of the Union legal order.

In the CJEU's response to this reference, **the spirit of mutual respect is exemplified by the 'presumption of relevance' granted to the referring constitutional court,** since the latter

15 | Ibid., paragraph 41.

16 | Ibid., paragraphs 92 to 94.

17 | Ibid., paragraphs 87 and 96 et seq.

'is not the court called upon to rule directly in the disputes in the main proceedings, but rather a constitutional court to which a question of pure law has been referred'. [18] Furthermore, the CJEU affirms that by the reference to Regulation No 883/2004, [19] Article 12(1)(e) of Directive 2011/98 [20] 'gives specific expression to the entitlement to social security benefits provided for in Article 34(1) and (2) of the Charter'. [21]

These two passages of the Court's judgment are instructive. The acknowledgement of the **special role performed by a constitutional court runs parallel to the exploration of synergies among national constitutional standards and Charter's rights.** The 'presumption of relevance' in this case, as compared to the other example I quoted, has an even more innovative significance, since it is meant to emphasise both the national and European dimension of preliminary references, when constitutional values are at stake.

After receiving the requested clarifications from the Court of Justice, the Italian Constitutional Court returned to its own case and ruled unconstitutional the provisions of national legislation which the CJEU had held incompatible with EU law. In confirming the necessary interaction with the Charter, in order to establish 'a systemic and unfragmented protection', the Court recalls that Article 34 of the Charter expressly refers to 'national laws and practices', when recognising the right of access to social security benefits. Hence, it cannot fail to take into account the guarantees enshrined in constitutions. [22]

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18 | Judgment of 2 September 2021, *INPS (Allocations de naissance et de maternité pour les titulaires de permis unique)*, C-350/20, EU:C:2021:659, paragraph 39.

19 | Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1, and corrigendum OJ 2004 L 200, p. 1).

20 | Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (OJ 2011 L 343, p. 1).

21 | Judgment of 2 September 2021, INPS (*Allocations de naissance et de maternité pour les titulaires de permis unique*), C-350/20, EU:C:2021:659, paragraph 46. In order No 182/2020, point of law 7.1, the Constitutional Court asked the Court of Justice 'whether Article 34 of the Charter must be interpreted as meaning that its scope includes the childbirth and maternity allowances'.

22 | Judgment of Corte costituzionale, No 54/2022 of 11 January 2022, point of law 10. https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/SENTENZA%20n.%2054%20del%202022%20-%20red.%20Sciarra%20EN.pdf.

Making entitlement to childbirth and maternity allowances conditional upon holding a long-term residence permit, Italian legislation arbitrarily discriminates against both mothers and the new-borns, bearing no reasonable relation to the purpose of the benefits in question.

In this judgment, which concludes a fruitful conversation with the CJEU, coinciding goals emerge, when addressing the principle of equality (Article 3) and providing support for families (Article 31), both enshrined in the Italian Constitution. Article 34 of the Charter is interpreted in close connection with European secondary law, functioning as a guide in ascertaining who the beneficiaries of social security allowances are, when all requirements of legal residence are met.

It is time to draw some conclusions and to underline again the importance of celebrations – such as the present one – which opens the door for a re-evaluation of the past, in order to look ahead and gain a positive understanding of progresses achieved.

Negative connotations have often been attributed to 'judicial activism'.

We could now explore the expression **'judicial wisdom'**, since we are celebrating the anniversary of a 70-year-old Court, namely a well-established institution and certainly a very active one, with an even greater ability to listen and build consensus.

It is now time to go further and put more fuel in the engine of integration.

The engine is mostly efficient when national courts – and constitutional courts in particular – collaborate in maximising the enforcement of common values, enhancing the 'principle of sincere cooperation' echoed in Article 4(3), which is intrinsic to the notion of 'full mutual respect'. This common effort – which characterises so vividly the current state of affairs within an open interinstitutional exchange – is made possible because, back in the past, the CJEU was active in creating a coherent environment, mostly insisting on the enforcement of structural European principles, such primacy and direct effect.

'Judicial wisdom' implies further responsibilities and further responsiveness towards all institutional actors.

De gauche à droite : M. Stephan Harbarth, Président de la Cour constitutionnelle fédérale de la République fédérale d'Allemagne; M. Lars Bay Larsen, Vice-président de la Cour de justice et M. Matej Accetto, Président de la Cour constitutionnelle de la République de Slovénie

Deuxième séance de travail : « La notion d’indépendance judiciaire en droit de l’Union »

M. Lars Bay Larsen,
Vice-président de la Cour de justice

Contribution by Mr Lars Bay Larsen, Vice-President of the Court of Justice

Introduction to the Notion of Judicial Independence in European Union Law [1]

Dear Presidents, dear colleagues, dear friends – old and new friends alike,

It is an honour for me to preside at this second working session and to introduce the subject of judicial independence to you together with President Harbarth of the *Bundesverfassungsgericht,* that is the German Constitutional Court, and President Accetto of the *Ustavno sodišče,* the Slovenian Constitutional Court.

The different elements of the Court of Justice case-law on judicial independence are probably fairly well known to most of you, and I will try to present them in a more general way without going into too much detail.

With this perspective, I will first briefly introduce the basic legal framework of Union Law on judicial independence.

I will then turn to the concrete content of the principle of judicial independence, by describing the obligations imposed by this principle on the national judicial systems – in all their (very legitimate) diversity.

Finally, I will argue that independence is regarded by the Court of Justice as a defining element of the very notion of 'jurisdiction' and 'judicial authority', a view that has some significant consequences in case of breach of the principle of judicial independence.

Once I have finished, I will give the floor to President Harbarth and President Accetto, so that they may introduce the topic from the perspective of national courts. We will all make an effort to leave time for a good discussion with all of you after our respective introductions.

1 | All opinions expressed herein are personal to the author.

I. The Legal Framework – definition of the principle of judicial independence

In Article 2 TEU, we find a list of the fundamental values on which the European Union is founded: respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.

It is further stated, in this article, that these values 'are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'

Obviously, being a Member State of the European Union is voluntary, and as we are now sadly all very well aware, it is possible to leave the Union. However, as long as you are a Member State, you are obliged to respect the fundamental values listed in Article 2 TEU, including the rule of law.

The concept of the rule of law entails several elements, among which I would like to highlight the judicial review of legislative and administrative action to ensure constitutionality of the legislation and legality of administrative acts. Such controls presuppose judicial independence from the executive and legislative branches of government.

A further concretisation of the principle of judicial independence flows from the second subparagraph of Article 19(1) of the TEU and from Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter') (corresponding to Articles 6 and 13 of the European Convention on Human Rights).

The second subparagraph of the Article 19(1) TEU obliges Member States 'to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.'

Article 47 of the Charter enshrines in primary EU law two fundamental rights: the right to a legal remedy (corresponding to Article 13 of the European Convention on Human Rights) and the right to a fair trial (corresponding to Article 6 of the European Convention on Human Rights).

These provisions represent the grounds on which the Court of Justice case-law on judicial independence is built.

This idea is underlined in a formula repeatedly used by the Court of Justice: the requirement 'that courts be independent, which is inherent in the task of adjudication, forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded.' [2]

II. The concrete content of the principle of judicial independence

In the second part of my presentation, I will sum up the main obligations stemming from the principle of judicial independence.

However, first I will say a few words on the scope of this principle. The leading case here is the judgment in the *Associação Sindical dos Juízes Portugueses* case. In this judgment, the Court of Justice stressed that judicial independence is required by EU law not only for the Judges and Advocates General at the Union Courts, but equally for national judges in the Member States, whenever they apply Union law. [3] This was essentially confirmed afterwards in the first infringement case against Poland concerning the Polish judicial reforms. [4]

In accordance with the settled case-law of the Court of Justice, judicial independence has both an external and an internal aspect. The court or judicial body and its individual members must be protected against external intervention and pressure. Internally the members should act impartially in order to provide a level playing field for the parties in the procedures before the body.

The Court of Justice constantly held that this necessitates rules on the composition of the body, on the qualifications and appointment of its members, their length of service, payment

2 | Judgment of 16 November 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim and Others*, C-748/19 to C-754/19, EU:C:2021:931, paragraph 66.

3 | Judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraphs 42 to 46.

4 | Judgment of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraphs 72 to 74.

and dismissal as well as internal rules on issues such as voting, quorum and abstention in case of conflicts of interest. [5]

Whereas this list was established by the Court of Justice long before the *Associação Sindical dos Juízes Portugueses* judgment, it was to a large extent concretised afterwards, through a series of decisions relating to judicial reforms essentially in Poland and in Romania.

A. Appointment conditions and procedures

The principle of judicial independence implies, above all, the existence of certain rules on conditions and procedures for the appointment of judges.

These rules should govern, firstly, the entry into function of judges. The Member States have a great deal of discretion in this domain, but the national rules on appointment should be such that they cannot give rise to reasonable doubts, in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to the interests before them, once they have been appointed as judges. [6]

Several cases on this subject have been brought before the Court of Justice the last couple of years.

In a preliminary ruling delivered on 19 November 2019 [7] the Court of Justice raised doubts on the new appointment procedures for members of the Disciplinary Chamber of the Polish Supreme Court. This was in particular due to the involvement of the new – and disputed – National Judiciary Council (KRS) and the fact that sitting judges of the Supreme Court, who had not been appointed with the involvement of KRS, could not be appointed for the Disciplinary Chamber.

5 | Judgment of 19 September 2006, *Wilson*, C-506/04, EU:C:2006:587, paragraphs 49 to 53.

6 | Judgment of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, paragraph 57.

7 | Judgment of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18, C-624/18 and C-625/18, EU:C:2019:982.

In the *Repubblika* case it was the Constitutional Court of Malta that referred questions on the procedure laid down in the Maltese Constitution giving the Prime Minister discretion to appoint members of the judiciary. In its judgment of 20 April 2021, the Court of Justice did not find that the Maltese law was contrary to EU law and emphasised in this respect a number of important constitutional and institutional measures that limited the Prime Minister's discretion. [8]

The judicial independence principle requires, secondly, the existence of rules that regulate the appointment of judges to a new jurisdiction during their career.

For example, this principle sets limits, when it comes to the transfer of judges against their will, as this type of transfer could be used to exert an influence on judges. The Court of Justice has, on 6 October 2021, rendered a judgment in the *W.Ż.* case, which confirms the existence of limits to the possibility of transfer judges. [9]

I will not go into the factual and procedural settings of this case, which are rather complex, in detail. Instead, I will simply mention that the Court of Justice made it clear that transfers of a judge to another court or between two divisions of the same court, without the consent of the judge concerned, are potentially capable of undermining the principles of the irremovability of judges and judicial independence. Consequently, the rules governing such transfers should provide the necessary guarantees to prevent any risk of that independence being jeopardised by direct or indirect external interventions.

Similarly, the Court of Justice held, on 16 November 2021, in the *Prokuratura Rejonowa w Mińsku Mazowieckim* judgment, that the second subparagraph of Article 19(1) TEU precludes provisions of national legislation pursuant to which the Minister for Justice of a Member State may, on the basis of criteria which have not been made public, second a judge to a higher criminal court, and may, at any time, by way of a decision, which does not contain a statement of reasons, terminate that secondment. [10]

8 | Judgment of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, paragraphs 63 to 65.

9 | Judgment of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, C-487/19, EU:C:2021:798.

10 | Judgment of 16 November 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim and Others,* C-748/19 to C-754/19, EU:C:2021:931.

B. Continuity of the exercise of duties

In addition to the requirement(s) already mentioned, in order to respect the principle of judicial independence national law should provide rules safeguarding the effective possibility for judges to exercise their functions.

In particular, it results from the Court of Justice case-law that rules on disciplinary procedures can jeopardise the principle of judicial independence. The Court of Justice found notably, in a judgment of 15 July 2021, that Poland had failed to fulfil its obligations under Article 19(1) TEU by inter alia failing to guarantee the independence and impartiality of the Disciplinary Chamber and by allowing the content of judicial decisions to be classified as a disciplinary offence. The Court of Justice also found that Poland had violated Article 267 TFEU by making it possible to trigger disciplinary procedures against Polish judges, who have used their right under Article 267 TFEU to make a preliminary reference to the Court of Justice. [11]

Romania is equally represented in our case-law on this subject. In the judgment, *Romanian Judges Forum*, which was delivered on 18 May 2021, the Court of Justice stressed the need for disciplinary chambers to be set up in such a way and in accordance with rules such as to safeguard the impartiality and independence of the chamber and its individual members. In this respect, the Court of Justice ruled that it is 'essential that the body competent to conduct investigations and bring disciplinary proceedings should act objectively and impartially in performance of its duties and, to that end, be free from any external influence.' [12]

The principle of judicial independence equally has consequences for the end of judges' careers. In fact, the first judgment on the Polish judicial reforms also contested legislation that combined a general lowering of the retirement age of Supreme Court judges from 70 to 65, leading to the removal of a significant number of judges, with a discretionary power of the Polish President to extend the employment period for selected judges for a second term after three years.

11 | Judgment of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)*, C-791/19, EU:C:2021:596.

12 | Judgment of 18 May 2021, *Asociaţia 'Forumul Judecătorilor din România' and Others*, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, paragraph 199.

On the basis of the context surrounding this legislation, the Court of Justice considered that there were 'serious doubts as to whether the reform of the retirement age of serving judges of the [Polish Supreme Court] was made in pursuance of [potentially legitimate objectives of harmonising legislation on retirement age], and not with the aim of side-lining a certain group of judges of that court.' [13]

The Court of Justice subsequently – on 5 November 2018 – in case C-192/18, applied a similar reasoning concerning a Polish law that reduced the mandatory retirement age from 70 to 65 for men and to 60 for women and combined this with a possibility for the Minister for Justice to authorise for selected judges a continuation in judicial functions after they had reached retirement age. [14]

In both cases, the Court of Justice ruled that Poland was in breach of Article 19(1) TEU and Article 47 of the Charter.

To conclude the first part of my presentation, I would like to stress a common point on the basis of the judgments of the Court of Justice, which I have just mentioned. As Article 19 TUE and Article 47 of the Charter provide only for general principles, the Member States retain a very large discretion in how to exercise their competence to organise their jurisdictional system. Therefore, it is not possible to infer from the Court of Justice case-law how the Member States should design their jurisdictional system.

In all of these cases, the Court of Justice limited itself to give indications to assess if the rules adopted by the national authorities are capable of giving rise to legitimate doubts, in the minds of subjects of the law:

- as to the imperviousness of the judges concerned to external factors, in particular, to the direct or indirect influence of the legislature and the executive, and
- as to their neutrality with respect to the interests before them, and
- thus, may lead to those judges not being seen to be independent or impartial,

with the consequence of prejudicing the trust that justice in a democratic society governed by the rule of law should inspire in subjects of the law.

13 | Judgment of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531.

14 | Judgment of 5 November 2019, *Commission* v *Poland (Independence of ordinary courts)*, C-192/18, EU:C:2019:924.

III. Independence as a defining element of the notion of 'jurisdiction'

Judicial independence plays a rather complex role in the case-law of the Court of Justice. It is not only a **classical** principle, that is to say a rule that should be respected both by the Union and by the Member States, but also an element of definition of the very notion of **jurisdiction**. This specific function has significant consequences in various situations.

It is an old idea, indeed older than any judgment on the rule of law, as one finds it at first in the case-law on admissibility of preliminary references.

As you will know, Article 267 TFEU establishes a right to make preliminary references on the interpretation and validity of Union law that belongs to all national courts and tribunals in the Member States. For you – as presidents and members of courts of last instance – also an obligation to do so.

Normally, it does not give rise to great doubts, whether an order for reference arriving at the Court of Justice is made by a 'court or tribunal of a Member State' within the meaning of Article 267 TFEU. However, occasionally the question arises, when an order for reference arrives from a particular body or board, which does not appear to be a classical court or tribunal, but perhaps a sort of hybrid body that has some administrative features combined with some collegiate conflict solving elements.

In such cases, the Court will take into account a number of criteria and questions before deciding, whether the body is in fact to be considered as a court or tribunal within the meaning of Article 267 TFEU. It is thus a concept of EU law, implying that the national 'classification' of a body as a court or a tribunal is not decisive. I will not list all of the relevant criteria here, but I should stress that independence is one of them. The criterion of independence is quite often a turning point, whenever such discussions on admissibility take place.

The basic definition of judicial independence that was used in the *Associação Sindical dos Juízes Portugueses* judgment and in the subsequent judgments was largely taken from the case-law on Article 267 TFEU.

This 'import' was made although in the context of Article 267 TFEU the concept of judicial independence is not a standard to be respected by jurisdictions competent to apply Union Law, but a criterion, according to Union Law, permitting proper jurisdictions to be separated from other bodies with adjudicating powers.

A clear example of this classical kind can be found in the *Banco de Santander* judgment, which was recently delivered by the Grand Chamber of the Court. [15] In this judgment, it was decided that a Spanish body should not be regarded as a 'court or tribunal' within the meaning of Article 267 TFEU, due to its lack of independence, even if questions referred by this body had been declared admissible in a previous case.

In the last few years, the Court has applied this logic to two other fields than the application of Article 267 TFEU.

Firstly, in several recent cases concerning judicial reforms in Poland and in Romania, national judges have referred questions to the Court of Justice to find out their obligations under Union Law, when they are confronted with decisions adopted by national bodies exercising a jurisdictional role, but deprived of or affected by their independence. In this regard, the Court of Justice made it clear in the *AB* judgment that the second subparagraph of Article 19(1) TEU has direct effect. [16]

Consequently, national judges can rely directly on this provision, when confronted with complications deriving from the action of such bodies. Ultimately, it may imply that a national judge could consider that he or she is still competent to judge a case, when the competence to judge the case has been transferred to a national body, which does not respect the principle of judicial independence. [17]

15 | Judgment of 21 January 2020, *Banco de Santander*, C-274/14, EU:C:2020:17.

16 | Judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, paragraph 142.

17 | Judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153.

A national judge may also disregard the authority of a decision adopted by such a body. Thus, the Court of Justice held that national courts could not be bound by decisions of a constitutional court, which does not comply with the judicial independence principle. [18] Likewise, an order dismissing an action against the transfer of a judge, which could not be regarded as being made by an independent and impartial tribunal, should be declared null and void. [19]

Secondly, judicial independence was used as a defining element of the notion of 'judicial authority' for the purpose of the Framework Decision on the European arrest warrant ('EAW') in different situations.

The Court of Justice held that the term 'judicial authority', within the meaning of this Framework Decision, refers to the judiciary which must be distinguished, in accordance with the principle of separation of powers, from the executive. Thus, the term 'judicial authority' cannot be interpreted as covering an organ of the executive of a Member State, such as a ministry or police service. [20]

A similar question subsequently came back to the Court of Justice, but concerning the degree of independence of a public prosecutor. In its judgment *OG and PI* [21], the CJEU noted that the Framework Decision on the EAW entails a dual level of protection of procedural rights and fundamental rights from which the requested person may benefit. Thus, in addition to the judicial control, when a national arrest warrant is adopted, a further protection must be afforded at the second level at which an EAW is issued.

Given that it is the responsibility of the 'issuing judicial authority' to ensure that second level of protection, it must be capable of exercising its responsibilities objectively and without risking its decision-making power being made subject to external directions or instructions,

18 | Judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraph 230.

19 | Judgment of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, C-487/19, EU:C:2021:798, paragraph 155.

20 | Judgments of 10 November 2016, *Poltorak*, C-452/16 PPU, EU:C:2016:858, and *Kovalkovas*, C-477/16 PPU, EU:C:2016:861.

21 | Judgment of 27 May 2019, *OG and PI (Public Prosecutor's Offices, Lübeck and Zwickau)*, C-508/18, EU:C:2019:456.

in particular from the executive. That independence requires that the statutory rules and the institutional framework at hand guarantee that the issuing judicial authority is not exposed to such a risk.

The same solution should be applied, with some restrictions, in situations where the jurisdictional system of the issuing Member State is affected by systemic deficiencies. In its judgment in the *Minister for Justice and Equality* case of 12 March 2018 [22], the Court of Justice held that such deficiencies could lead to a refusal to surrender a person to another Member State.

However, referring to the *Aranyosi and Căldăraru* judgment [23], the Court of Justice told the executing judicial authority to *determine, specifically and precisely, whether, having regard to his personal situation, as well as to the nature of the offence for which he is being prosecuted and the factual context that form the basis of the European arrest warrant, and in the light of the information provided by the issuing Member State* [...] *there are substantial grounds for believing that* [the wanted person] *will run* [...] *a risk* [of breach of the fundamental right to a fair trial] *if he is surrendered to that state.*

Essentially the same question has come back to the Court of Justice in references mainly from Dutch courts. The answers given so far have been in line with the answers in *Minister for Justice and Equality*. [24]

I believe it is fair to say that the Court of Justice, particularly when it comes to the Framework Decision on the EAW, has given a certain amount of priority to the principle of mutual recognition based on mutual trust. The Court has accepted that the EU legislator has set the bar quite high before a general or individual (risk of) breach of the principle of the rule of law and of judicial independence in the issuing Member State obliges the executing Member State to not execute an EAW.

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22 | Judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586.

23 | Judgment of 5 April 2016, *Aranyosi and Căldăraru,* C-404/15 and C-659/15 PPU, EU:C:2016:198.

24 | Judgments of 17 December 2020, *Openbaar Ministerie (Independence of the issuing judicial authority)*, C-354/20 PPU and C-412/20 PPU, EU:C:2020:1033, and of 22 February 2022, *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*, C-562/21 PPU and C-563/21 PPU, EU:C:2022:100.

In this context it is also worth remembering, that we are, with the Framework Decision on the EAW, confronted with a kind of Goldilocks' squeeze. The administrative and judicial authorities 'have to get it just right'. They must surrender the requested person, unless a sufficiently qualified breach of fundamental rights exceptionally obliges them not to surrender.

Therefore, in this specific context, the lack of independence could admittedly lead to the status of 'judicial authority' being denied to an issuing authority from another Member State.

However, if this denial is based on systemic deficiencies, it also presupposes that the executing judicial authority directly assessed the concrete consequences of this lack of independence for the person concerned.

A similar logic was applied, in the *C and CD* judgment, to the executing judicial authority. [25] In this judgment, the Court of Justice stated that the executing judicial authority should also be independent. Therefore, a decision by this type of authority, but adopted by the police services, should be regarded as deprived of any effect per se, which implies that the time limits laid down in the Framework decision on the EAW will expire as if no decision was adopted at all.

Conclusion

Looking back, as I have done, in particular to the judgments rendered by the Court of Justice over the last few years and the fact that 2022 did not bring many new developments in this area, it does not seem unreasonable to consider that the Court of Justice's case-law on judicial independence is perhaps fairly consolidated.

25 | Judgment of 28 April 2022, *C and CD (Legal obstacles to the execution of a decision on surrender)*, C-804/21 PPU, EU:C:2022:307, paragraph 66.

De gauche à droite : M. Stephan Harbarth, Président de la Cour constitutionnelle fédérale de la République fédérale d'Allemagne et M. Lars Bay Larsen, Vice-président de la Cour de justice

M. Stephan Harbarth,
Président de la Cour constitutionnelle fédérale de la République fédérale d'Allemagne

Contribution by Mr Stephan Harbarth, President of the Federal Constitutional Court of the Federal Republic of Germany

The concept of judicial independence in European Union law [1]

Mr President,

Mr Vice-President,

Members of the Court of Justice of the European Union,

Ladies and Gentlemen,

We meet in turbulent times. External and internal threats are taking their toll on the European Union. Russia's war of aggression against Ukraine, which is contrary to international law, throws our own vulnerability into sharp relief. The recent disputes over the state of the rule of law in some Member States may therefore have somewhat faded into the background of public perception; however, they are far from having been resolved. But perhaps it is crises such as these that provide us with a strong reminder of the precious nature of a life lived in peace, freedom, democracy and under the rule of law.

We owe the gift of a life lived in peace and freedom within the European Union largely to the process of European integration and the formation of a European community based on the rule of law. That community would be inconceivable without the Court of Justice of the European Union ('CJEU'), to which I extend heartfelt congratulations on its 70th birthday, on behalf of both myself and the Federal Constitutional Court.

1 | The spoken word prevails.

Following the comprehensive overview of the case-law of the CJEU presented by Vice-President Bay Larsen, please allow me to highlight individual elements of the reasoning from the perspective of the Member States, which seem to me to be particularly significant in that regard. I would like to put my two core theses front and centre. My first thesis is as follows: the power of review exercised by the CJEU in the area of the organisation of the judiciary certainly carries the risk of an unwarranted erosion of limits, which means that this power and its exercise need to be limited appropriately. My second thesis is as follows: the previous decisions of the CJEU recognise that, and the case-law of the CJEU already offers a variety of starting points for the appropriate limitation. Let us look at that in more detail.

I. Competence

The first question that is significant from the perspective of the Member States relates to the competence (or powers) of the EU and its institutions, and thus also of the CJEU, in the area of the organisation of the courts and judicial proceedings; in that regard, I would like to distinguish between regulatory power and the power of review.

A. No regulatory power

As the CJEU has repeatedly pointed out, [2] the organisation of justice falls within the competence of the Member States, meaning that they enjoy autonomy in terms of proceedings and procedures, which also includes the organisation of the courts. The European treaty system, which is characterised by the principle of conferral (Article 5(1) and (2) TEU), does not provide for a regulatory power of the EU in that regard. From the perspective of German constitutional law, it should be added that the principle of conferral is not only a principle of EU law, but also a German constitutional principle that sets limits to the authorisation of German state institutions with respect to integration.

2 | See, by way of example, judgments of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, paragraph 48, and of 29 March 2022, *Getin Noble Bank*, C-132/20, EU:C:2022:235, paragraph 88.

B. Power of review

However, the CJEU does exercise a certain review with regard to the organisation of the judiciary and judicial proceedings, and measures those, in particular, against an EU concept of judicial independence inferred from primary law as part of the rule of law pursuant to Article 2 TEU. The CJEU has also repeatedly had the opportunity to rule on the independence of national authorities involved in the execution of a European arrest warrant; given the allocated time and because of the focus of recent case-law, I would like to concentrate on judicial independence today.

1. Derivation under EU law

The starting point for the review is the second subparagraph of Article 19(1) TEU, according to which 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'. The Court of Justice interprets that provision in the light of the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter') and refers in particular to the guarantees that are intrinsically linked with the right to an effective remedy enshrined in that article of the Charter, and, specifically, the guarantee of the independence of the courts which interpret and apply EU law.

In its interpretation with a view to the second paragraph of Article 47 of the Charter, the Court of Justice therefore finds that the second subparagraph of Article 19(1) TEU is applicable irrespective of whether the court whose independence is at issue is actually involved in the interpretation and application of EU law in the proceedings in question. Rather, it is sufficient that this is part of its general remit, that is to say, that questions of interpretation and application of EU law *could* arise within the scope of its jurisdiction. [3] The second subparagraph of Article 19(1) TEU requires in that regard that the Member States provide for a system of legal remedies and procedures that ensure effective legal protection.

3 | Judgments of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, C-487/19, EU:C:2021:798, paragraph 103; of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, paragraph 36; and of 29 March 2022, *Getin Noble Bank*, C-132/20, EU:C:2022:235, paragraph 90, with further references.

2. Concerns and risks regarding an erosion of limits

According to the wording of the second subparagraph of Article 19(1) TEU, the judicially-related obligation of the Member States to ensure effective legal protection is limited to the 'fields covered by Union law'. Against the background of the lack of original EU competence with respect to the organisation and regulation of judicial proceedings in the Member States, it may be argued that this could in fact mean nothing more than 'only when they are implementing Union law' in accordance with the delimitation in the first sentence of Article 51(1) of the Charter, by which Member States are bound under the Charter and, consequently, the fundamental right to justice guaranteed in Article 47 of the Charter.

If, in line with the CJEU, the second subparagraph of Article 19(1) TEU were found to be applicable for the very reason that questions relating to interpretation and application of EU law could arise for a national court within its general remit, that would, however, mean that the limitation to 'fields covered by Union law' would be largely meaningless. Given the state of European integration that has been reached to date, one would struggle to find a court that is not involved in some way with issues of EU law.

The second subparagraph of Article 19(1) TEU is thus used by the CJEU as a quasi conveyor belt to part of the content of Article 2 TEU and thus to a power of review. After all, the second subparagraph of Article 19(1) TEU provides a specific normative link, albeit one that has been broadly interpreted by the CJEU.

C. Tension between lack of regulatory power and broad power of review

There is an obvious tension between a lack of regulatory power under EU law as regards questions relating to the organisation of the judiciary and judicial proceedings, and the breadth of the power of review exercised by the CJEU.

II. Restricting the power of review

In order to resolve that tension, criteria are needed to properly contain the review of independence exercised by the CJEU. The foundation for that has already been laid in the case-law of the CJEU and applied on a case-by-case basis. I would like to categorise that case-law according to four factual aspects, namely the standard of review, its subject matter, its intensity and the legal consequences of any breaches for the Member States.

A. Standard of review

1. The need to define a standard that reflects restraint

The first thing to do is to define a standard that reflects restraint. That is the case not only in view of the EU's lack of regulatory power with regard to the organisation of the judiciary and judicial proceedings, but in particular because judicial independence is firmly enshrined in the constitutional traditions of the Member States, but its specific structure differs from Member State to Member State. Those are special features protected under Article 4(2) TEU, which must be taken into account when defining standards under EU law for the organisation of the judiciary and judicial proceedings. Standards under EU law for the organisation of the national judiciary in accordance with the rule of law therefore cannot go beyond fundamental minimum requirements which, according to the common constitutional tradition of the Member States, belong to the indispensable core of the rule of law principle and are essential to the functioning of the EU as a community based on the rule of law.

2. Option of using a standard that reflects restraint

It is inherent to the case-law of the CJEU to impose limitations on standards:

a) Principle of the presumption of conformity

I would like to call the first recurring argument the 'principle of the presumption of conformity'. In several cases, the CJEU has pointed out that respect for the values of Article 2 TEU is a pre-condition for accession to the EU and, therefore, at the time of the Member State's accession, it was assumed that its judicial system was in conformity with EU law. [4] (At least) two conclusions can be drawn from that principle:

First, the *status quo* of the national rule of law – and thus also the level of independence – at the time of accession is the reference and starting point for the CJEU's subsequent review. In view of the different judicial traditions in the Member States at the time of their respective accessions, that implies that the EU principle of the rule of law and independence is considerably amenable to Member State traditions, a fact that at the same time necessarily limits its standardising effect. That 'preservative' effect of the '*status quo* checked at accession' also in principle extends to processes that were completed prior to accession, as long as they are not still relevant to independence. On that basis, the CJEU has ruled that the appointment of a judge by an undemocratic regime prior to accession to the European Union may not be detrimental to judicial independence. [5]

Second, it can be inferred from the principle of the presumption of conformity that the mere maintenance of that *status quo* in the period after accession cannot, as a matter of principle, be capable of casting doubt on the adherence of the Member State to the rule of law or the independence of its judges within the meaning of Article 2 TEU or the second subparagraph of Article 19(1) TEU, even if further developments may be possible and desirable from the

4 | Judgments of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, paragraph 59 et seq.; of 18 May 2021, *Asociația 'Forumul Judecătorilor din România' and Others*, C-83/19 et al., EU:C:2021:393, paragraph 162; of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges),* C-791/19, EU:C:2021:596, paragraph 51; of 21 December 2021, *Euro Box Promotion and Others*, C-357/19 et al., EU:C:2021:1034, paragraph 160 et seq.; and of 29 March 2022, *Getin Noble Bank*, C-132/20, EU:C:2022:235, paragraph 104.

5 | Judgment of 29 March 2022, *Getin Noble Bank*, C-132/20, EU:C:2022:235, paragraph 104 et seq.

EU's point of view – incidentally not only at the level of the Member States, but also at the level of the EU itself. Therefore, the CJEU has in several decisions consistently placed great emphasis on the fact that Member States must '[prevent any] regression of their laws on the organisation of justice … by refraining from adopting rules which would undermine the independence of the judiciary'. [6]

b) Significance of the expectations of persons seeking justice

The second recurring argument can be referred to as the 'significance of the expectations of persons seeking justice'. The CJEU has repeatedly emphasised in its recent decisions that judicial independence must also take into account the expectations of persons seeking justice. [7] The very appearance that judges might be subject to pressure or intervention from the executive or the legislature must therefore be avoided.

However – to my knowledge – the CJEU has so far not set out how the relevant group of persons seeking justice is to be determined. It is possible, on the one hand, that the relevant expectations are those of persons seeking justice in the Member State concerned or, on the other hand, those of the public across the whole of Europe might be decisive. In my opinion, only the first option can be correct, at least as long as the CJEU also exercises the substantive power of review over the second subparagraph of Article 19(1) TEU in cases which are not determined by EU law at all, but which solely concern the law of a Member State. The wording used by the CJEU, which refers to doubts 'in the minds of individuals', is another argument in favour of the significance of expectations in accordance with national legal traditions. [8]

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6 | Judgments of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, paragraph 63 et seq.; of 18 May 2021, *Asociația 'Forumul Judecătorilor din România' and Others*, C-83/19 et al., EU:C:2021:393, paragraph 162; of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)*, C-791/19, EU:C:2021:596, paragraph 51; and of 21 December 2021, *Euro Box Promotion and Others*, C-357/19 et al., EU:C:2021:1034, paragraph 162.

7 | Judgments of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, paragraph 117; of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, paragraph 53; of 18 May 2021, *Asociația 'Forumul Judecătorilor din România' and Others*, C-83/19 et al., EU:C:2021:393, paragraph 196; of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)*, C-791/19, EU:C:2021:596, paragraph 59; of 21 December 2021, *Euro Box Promotion and Others*, C-357/19 et al., EU:C:2021:1034, paragraph 225; and of 29 March 2022, *Getin Noble Bank*, C-132/20, EU:C:2022:235, paragraph 105.

8 | See the references in footnote 7.

To the extent that a different wording may point more towards the expectations of the public across the whole of Europe – sometimes reference is also made to the expectations 'in a democratic society governed by the rule of law' [9] – that might not, at any rate, be convincing when it comes to detailed derivations. It is well known that the European public lags behind the respective national publics in terms of the breadth and depth of discourse, presentation in the media and other fundamental requirements. While that may be regrettable, it is clear that there is currently no uniform public expectation in the EU of the factors that make a court appear independent and therefore trustworthy to persons seeking justice. Rather, those expectations differ.

B. Subject matter of the review

Next, I want to turn to the subject matter of the review. The case-law of the CJEU clearly states that, firstly, it is not only the content of legal provisions that is important, but also their practical application, secondly, that the CJEU must not look at cases in isolation, but take all factors into account and, thirdly, that the discernible objective of a measure – namely the intention of the Member State – must also be taken into account.

1. Practical application

In certain decisions, the CJEU correctly refers not only to the content of Member State provisions, but also to their practical application. [10] That is correct because conventions may have been developed in Member States for a legal provision which, according to its wording, appears to be a threat to independence, with the result that those conventions may nonetheless preserve the rule of law *status quo* – see above [11] – or even promote it.

9 | Judgments of 19 November 2019, *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18 et al., EU:C:2019:982, paragraph 128, and of 21 December 2021, *Euro Box Promotion and others*, C-357/19 et al., EU:C:2021:1034, paragraph 226.

10 | Judgments of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, paragraphs 68, 71, and of 21 December 2021, *Euro Box Promotion and Others*, C-357/19 et al., EU:C:2021:1034, paragraph 207 et seq., 213.

11 | Section II. A. 2. a).

Of course, the reverse is also true: a provision that is not suspicious in itself can have an effect which endangers independence due to the way it is applied in practice.

2. Taking all factors into account

It must also be welcomed that the CJEU does not consider a single measure in isolation, but looks at the combination and interaction of several measures. [12] The judgments revolving around the premiss that all factors must be taken into account can be grouped into three types of cases:

Firstly, there are constellations in which several measures, which may still be within the rule of law when viewed in isolation, have a combined effect that is no longer compatible with judicial independence. [13] According to the case-law of the CJEU, the mere fact that the composition of a panel of judges is based on rules that later prove to be unconstitutional under national law, [14] the fact that judges are appointed by the legislature and the executive, [15] or that judges may be seconded, [16] does not imply a lack of judicial independence. However, that may be different in the context of other measures, for it is possible to construct a system from various individual components, each of which does not give rise to any concerns or is, at the very least, tolerable in terms of the rule of law, but which, viewed as a whole,

12 | Judgments of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, paragraphs 106, 129, 131 et seq.; of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)*, C-791/19, EU:C:2021:596, paragraph 107 et seq., 110, 112, 146 et seq.; and of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, C-487/19, EU:C:2021:798, paragraphs 134 et seq. and 150.

13 | Judgment of 19 November 2019, *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18 et al., EU:C:2019:982, paragraph 152.

14 | Judgment of 29 March 2022, *Getin Noble Bank*, C-132/20, EU:C:2022:235, paragraph 126 et seq.

15 | Judgments of 19 November 2019, *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18 et al., EU:C:2019:982, paragraph 133, and of 21 December 2021, *Euro Box Promotion and Others*, C-357/19 et al., EU:C:2021:1034, paragraph 233.

16 | Judgment of 16 November 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim*, C-748/19 et al., EU:C:2021:931, paragraphs 72 et seq., 74.

impairs judicial independence. [17] Accordingly, in order to answer the question of whether judges are prevented from making referrals to the CJEU in a manner incompatible with their independence, the CJEU has instructed the referring courts to take into account the context and possible systematic nature of various measures, such as declarations that there is no need to adjudicate in some cases and the threat of disciplinary action against judges willing to make referrals in others, or the combined effect of the lack of effectiveness of an appeal against Supreme Court judicial appointments in conjunction with the creation of an unusual number of new posts. [18] In assessing the independence of a disciplinary body, the CJEU has held that even if any one of the various facts discussed is not capable per se of calling into question the independence of the disciplinary chamber, that may, by contrast, not be true once they are taken together. [19]

Conversely, however – as the CJEU has also ruled in the past – a circumstance that is at least potentially problematic from the CJEU's point of view may not be a threat to independence when viewed as a whole in the light of 'all the relevant factors'. [20] Where the CJEU has identified such a circumstance whereby the judicial selection committees of individual states are mostly made up of members of the legislature, the following should be noted: a certain connection to the legislature can be conducive to democratic legitimacy and should not per se be seen as a threat to independence. Democratic legitimacy does not only take into account the value of democracy enshrined in the primary law of Article 2 TEU. Rather, separating the judiciary from the context of democratic legitimation could also come up against the limits of Member States' authorisation with respect to integration. In any event, from a German perspective, the democratic legitimacy of the judiciary is an application of a Member State tradition of the rule of law that must be respected.

Finally, other conceivable cases are those in which the clear wording of a provision creates such a great risk of a threat to independence that the practical application of the provision

17 | See Lübbe-Wolff, G., 'Das europäische Frankensteinproblem', Frankfurter Allgemeine Zeitung, 13 January 2022, p. 14.

18 | Judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, paragraph 156 et seq., in particular paragraph 163.

19 | Judgment of 19 November 2019, *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18 et al., EU:C:2019:982, paragraph 152.

20 | Judgment of 9 July 2020, *Land Hessen*, C-272/19, EU:C:2020:535, paragraph 56.

or other fundamental principles no longer matter. [21] That is what the CJEU ruled in the case of the Polish disciplinary law. That decision is convincing, as are all other CJEU decisions regarding the Polish judiciary.

The different lines pursued in the case-law, as illustrated above, certainly form a very good basis upon which to carry out the necessary assessment of all the factors of a case. Since the assessment of all the factors of a case can lead in different directions, as described above, there may be a desire from a Member State perspective for the development of even clearer standards. However, the diversity and complexity of the major cases to be assessed by the CJEU will probably set natural limits to an even stronger systematisation.

3. Discernible objective

Furthermore, in its assessment the CJEU also considers the regulatory intention and objective discernible from the regulatory content and practical application of the provision. Thus, a disciplinary provision that is legitimate in itself [22] or provisions regarding the secondment [23] or transfer [24] of judges cannot be used in order to politically control court decisions or to exert pressure on judges. There is a close connection in that regard with the 'regression argument': if, in the context of the necessary assessment of all the factors of a case, a judicial reform leads to the finding that there has been a regression in terms of the rule of law and independence compared with the previous legal *status quo*, that is likely to be an indication that the new law could be aimed at the political control of the judiciary in terms of content and practical application.

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21 | Judgment of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)*, C-791/19, EU:C:2021:596, paragraph 197 et seq., in particular paragraph 200.

22 | Judgments of 18 May 2021, *Asociația 'Forumul Judecătorilor din România' and Others*, C-83/19 et al., EU:C:2021:393, paragraph 200; of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)*, C-791/19, EU:C:2021:596, paragraphs 61, 138; and of 21 December 2021, *Euro Box Promotion and Others*, C-357/19 et al., EU:C:2021:1034, paragraph 239).

23 | Judgment of 16 November 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim*, C-748/19 et al., EU:C:2021:931, paragraph 73.

24 | Judgment of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, C-487/19, EU:C:2021:798, paragraph 118.

C. Depth of review / review of the evidence

In my opinion, that standard – which is already subject to the applicable and necessary limitations outlined above – should also be applied with restraint by the CJEU in order to do justice to the lack of competence under EU law, on the one hand, and the different constitutional traditions on the other. Statements to that effect, for instance, along the lines that the CJEU will only intervene in the event of evident or blatant breaches of the concept of independence under EU law, are rather reserved in the case-law, but they can certainly be identified. In particular, the CJEU has found a breach of the first sentence of the second paragraph of Article 47 of the Charter in an irregular composition of panels 'when that irregularity is of such a kind and of such gravity as to create a real risk that other branches of the State, in particular the executive, could exercise undue discretion undermining the integrity of the outcome of the appointment process … which is the case when what is at issue are fundamental rules forming an integral part of the establishment and functioning of that judicial system'. [25] Those criteria set out by the CJEU, the reference to the fundamental rules regarding the functioning of the judicial system, the requirement of a breach of a certain kind and gravity as well as the existence of a real risk of undue influence, should also be successfully transferable to other cases.

D. Consequences of a breach

Finally, I will address the legal consequences of breaches, which are principally a matter of procedural law rather than substantive primary law. The vast majority of the CJEU's decisions have been handed down in proceedings involving a request for a preliminary ruling under Article 267 TFEU. Those decisions by the CJEU are declaratory in nature with regard to the interpretation and application of EU law, that is to say, the Court does not place an obligation on Member States to remedy an identified breach in a specific way. Member States must generally retain considerable discretion with regard to the elimination of a breach to ensure

25 | Judgments of 26 March 2020, *Simpson*, C-542/18 RX-II et al., EU:C:2020:232, paragraph 75; of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, C-487/19, EU:C:2021:798, paragraph 130; of 21 December 2021, *Euro Box Promotion and Others*, C-357/19 et al., EU:C:2021:1034, paragraph 206; and of 29 March 2022, *Getin Noble Bank*, C-132/20, EU:C:2022:235, paragraph 122.

that the CJEU's power to conduct a review does not conflict with the lack of regulatory power or with national judicial traditions.

III. Dialogue on judicial independence in the multi-level system

We face a common challenge in safeguarding judicial independence, which requires joint efforts and a dialogue between the CJEU and national courts – on the basis of Article 267 TFEU and supported by the informal systems that have been established over time. As with the protection of fundamental rights in the European multi-level system, the relationship between the parties to the dialogue on judicial independence cannot be classified in the usual legal sense in terms of a system of superiority or subordination.

In my opinion, the review carried out by the CJEU based on the second subparagraph of Article 19(1) TEU can and will have a considerable effect on the political and social debate in the Member States, even with a well-understood limitation. By their very nature, the constitutional courts of the Member States are more closely embedded in that debate. [26] Similar to the dialogue being cultivated with regard to the protection of fundamental rights in the European multi-level system, we should also develop the standards and supervisory powers relating to judicial independence in a mutual exchange that takes into account both the need under EU law for uniform minimum requirements and the organisational diversity of the Member States which is reflected in the second subparagraph of Article 19(1) TEU itself.

With that in mind, let us continue our fruitful dialogue within the European judicial network on the central question of judicial independence too. I look forward to our discussion and wish to once again congratulate the CJEU and its members on the 70th anniversary of this important court.

26 | Huber, Peter M., *Warum der EuGH Kontrolle braucht*, Jan Sramek Verlag, Vienna, 2022, p. 17, on 'embeddedness'.

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Contribution by Mr Matej Accetto, President of the Constitutional Court of the Republic of Slovenia

Judicial Independence and Interdependence in European Union Law

I. Introduction

Judicial independence is a key element of, if not an indispensable prerequisite, for the operation of the rule of law, enshrined as a fundamental value and general principle of EU law in Article 2 and Article 19(1) of the Treaty on the European Union (TEU) as well as Article 47 of the Charter of the Fundamental Rights of the European Union ('the Charter'). Over the past several years, recognised and developed by the jurisprudence of the Court of Justice, judicial independence has emerged as one of the key constitutional principles of the EU legal order. The latter is increasingly operating as a constitutional order to safeguard the basic tenets of the rule of law in the face of political tensions and legal challenges.

This paper wishes to highlight a related point: that when it comes to its operation in EU law, judicial independence cannot be fully understood, or indeed safeguarded, without appreciating judicial *inter*dependence, as well as the types of judicial interactions or dialogue between the European and national counterparts that underpin it. Both of these aspects are addressed in turn.

II. Judicial independence and interdependence

Judicial independence comes in different guises. A familiar distinction is made between individual and institutional aspects, sometimes also referred to as internal and external aspects, [1] or indeed the subjective and objective components of independence: [2] the former, as also enshrined in Article 6 of the European Convention on Human Rights and Article 47 of the Charter, concerns the individual right to an independent and impartial tribunal as a component of the right to a fair hearing; while the latter, implied in Article 19(1) TEU, concerns the institutional or structural independence of the judiciary as manifested in the separation of powers principle and the role of judicial review in the operation of the rule of law. Both aspects are entailed in and indispensable for the correct application of the rule of law as enshrined in Article 2 TEU. A third conceptual strand has been posited, focusing on the individual rights of judges to their independence. [3]

As an aside, one might add that judicial independence as a concept also comprises different elements, with one possible distinction to be made between three related but separate notions: *independence* vis-à-vis outside influence, *impartiality* vis-à-vis the parties, and *objectivity* vis-à-vis the applicable law. [4] Per this taxonomy, independence presupposes rules and mechanisms that protect the courts against external pressures that may influence their decisions, [5]

1 | See for example (same throughout) judgment of 19 September 2006, *Wilson*, C-506/04, EU:C:2006:587, paragraphs 49 to 52.

2 | See for example Bustos Gisbert R., 'Judicial Independence in European Constitutional Law', *European Constitutional Law Review*, Vol. 18(4), 2022, pp. 591-620, at 602-612.

3 | Bustos Gisbert R., 'Judicial Independence in European Constitutional Law', *European Constitutional Law Review*, Vol. 18(4), 2022, pp. 591-620, at 612-619.

4 | See for example Papayannis D. M., 'Independence, Impartiality and Neutrality in Legal Adjudication', *Revus*, No. 28, 2016, pp. 33-52. Meanings may differ depending on the context. Papayannis terms the third notion as *neutrality*, while in international arbitration, neutrality is said to refer to the use of the arbitration as a neutral forum distinct from the national courts of either party, as well as to the third-country nationality of the arbitrator – see Feehily R., 'Neutrality, Independence and Impartiality in International Commercial Arbitration', *Penn State Journal of Law & International Affairs*, Vol. 7(1), 2019, pp. 88-114, at 91. Neutrality has also been used in the sense of impartiality by the Court of Justice – see footnote 8 below.

5 | See for example judgment of 4 February 1999, *Köllensperger and Atzwanger*, C-103/97, EU:C:1999:52, paragraph 21, and judgment of 6 July 2000, *Abrahamsson and Anderson*, C-407/98, EU:C:2000:367, paragraph 3.

in particular in relation to the legislature and the executive; [6] impartiality presupposes a decision-making process that is neutral or unbiased as concerns the interested parties in dispute; [7] and objectivity the judicial reasoning wholly governed by a neutral consideration of applicable law. [8] Put a little bluntly, one might surmise that full independence requires the judge to be independent from the others, independent from the parties to the dispute and independent from herself or himself.

In any event, judicial independence is of accentuated significance for the European Union, a polity that Walter Hallstein once termed a *Rechtsgemeinschaft*, which he intended to signify not only that it was a 'community of law' based on respect for the rule of law but also, lacking the usual substrate of people and territory, as a 'creation of law'. [9] Certainly, one may question whether the latter point so clearly distinguishes the Union from a Nation State, [10] but not the significance of the rule of law for the Union, and in that context one cannot gloss over the significant role of the Court of Justice for the development and safeguarding of its legal order. [11]

6 | See for example judgment of 19 November 2019, *A.K. and Others* (*Independence of the Disciplinary Chamber of the Supreme Court*), joined cases C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraph 124; judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, paragraph 118; judgment of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, paragraph 54.

7 | See for example *Abrahamsson and Anderson*, footnote 5 above, paragraph 32; and more directly *Wilson*, footnote 1 above, paragraph 52.

8 | Papayannis, footnote 4 above, at 43-47. I am leaving aside the issue of what is considered to be a proper appreciation of legal considerations in the face of the need for statutory interpretation.

9 | Hallstein W., *Der unvollendete Bundesstaat*, Econ Verlag, Düsseldorf and Vienna, 1969, at 33-38.

10 | See for example von Bogdandy A., 'A Bird's Eye View on the Science of European Law: Structures, Debates and Development Prospects of Basic Research on the Law of the European Union in a German Perspective', *European Law Journal*, Vol. 6(3), 2000, pp. 208-238, at 226-227.

11 | On how it has engaged in 'community building using the tools of legal integration', see for example Gaja G., Hay P. and Rotunda R. D., 'Instruments for Legal Integration in the European Community – A Review', *Integration Through Law: Europe and the American Federal Experience*, Book 2, M. Cappelletti, M. Seccombe, J. H. H. Weiler (eds), Walter de Gruyter, Berlin and New York, 1985, pp. 113-160, at 115 et seq.

However, I would dare posit that judicial independence cannot be fully comprehended without appreciating the various guises of judicial *inter*dependence. [12] In the national context, this is seen in the interplay of checks and balances: while the courts are independent as concerns the decision-making and judicial administration, the other branches of government exert influence in other ways such as, notably, budgetary considerations and judicial appointments. [13] A significant approach to addressing judicial independence may thus focus on implementing, monitoring and improving the mechanisms of interdependence.

This, again, has an added significance in the context of the Court of Justice of the European Union, where there are several pertinent layers of interdependence: vis-à-vis the other institutions at EU level, both in terms of facilitating the operation of the Court and in terms of compliance with its judgments; vis-à-vis the Member States, notably as concerns compliance, but also judicial appointments; and vis-à-vis the national courts. It is this latter aspect, which one might term the *internal* judicial interdependence, that I particularly wish to deal with.

The significance of this judicial interdependence may very well be appreciated in both directions, and shows how both counterparts have to perform their role properly in order for the rule of law to function.

It is likely that the understanding of this interdependence has evolved in recent years. Traditionally, one could say that the national courts have needed the input of the Court of Justice in order to achieve a coherent interpretation of EU law and the appropriate protection of individuals' rights within their jurisdiction, while the Court of Justice also needed the engagement of the national courts, not only by bringing the preliminary references but also by lending its decisions the authority of the established domestic judicial power. The increased attention to the notion of judicial independence in the recent years, however,

12 | This notion has been explored with regard to different jurisdictions, including the international courts, sometimes linked to the notion of judicial accountability. See for example Peake J., 'Interdependence at the International Criminal Court: Reconceptualizing our Understanding of the Court and its Failures', *UCLA Journal of International Law and Foreign Affairs*, Vol. 26(2), 2022, pp. 79-130; Torres Pérez A., 'From Judicial Independence to Interdependence in the International Sphere', *Maastricht Journal of European and Comparative Law*, Vol. 24(4), 2017, pp. 462-483; Follesdal A., 'Independent Yet Accountable: Stress Test Lessons for the European Court of Human Rights', *Maastricht Journal of European and Comparative Law*, Vol. 24(4), 2017, pp. 484-510.

13 | See for example Resnik J., 'Interdependent Federal Judiciaries: Puzzling about Why & How to Value the Independence of Which Judges', *Daedalus*, Vol. 137(4), 2008, pp. 28-47.

shows that this interdependence also works inversely: the national courts need or welcome the input of the Court of Justice, coming with its own judicial weight, in protecting their judicial authority; while the Court of Justice recognises the need for independent national courts in order for EU law to be effective.

In both aspects, the national courts and the Court of Justice thus depend on each other to help safeguard their respective roles and insulate them against the undue influence of the other actors in their legal orders.

This notion may have also gained further significance with the changed judicial landscape in which the Court of Justice operates. I cannot help but find it significant that the speakers at the plenary sessions this morning include, next to the President and the Vice-President of the Court of Justice, the presidents of three constitutional courts. Some time ago, this might not be the most logical choice, as constitutional courts were neither frequent nor particularly interested interlocutors with the Court of Justice. [14] However, times have changed.

One is reminded of how, back in 1981, Eric Stein described the Court of Justice fashioning a constitutional structure 'tucked away in the fairyland Duchy of Luxembourg and blessed, until recently, by the benign neglect of the powers that be and the mass media'. [15] That benign neglect, or the 'extended honeymoon' of the Court of Justice and its frequent interlocutors, [16] is a thing of the past. Perhaps somewhat paradoxically, the more the Court of Justice has evolved into a constitutional court in its own right, including but not limited to its fundamental rights jurisprudence, the more it has been exposed to the critical glare of observers and tensions vis-à-vis the other actors in the legal order. That may well go with the territory and also show that, celebrating its 70th anniversary, it has achieved full maturity not only as the supreme court of the Union but also as a constitutional court.

14 | I have written more on this point in Accetto M., 'Constitutional Courts and EU Law', in Abrantes M. L. Amaral and Pedroso Bettencourt S. (eds), *Estudos em Homenagem ao Conselheiro Presidente Rui Moura Ramos, Vol. I (Direito constitucional, direito constitucional europeu e direito europeu)*, Almedina: Coimbra, 2016, pp. 767-800.

15 | Stein E., 'Lawyers, Judges, and the Making of a Transnational Constitution', *American Journal of International Law*, Vol. 75(1), 1981, pp. 1-27, at 1.

16 | See Weiler J. H. H., 'Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration', *Journal of Common Market Studies*, Vol. 31(4), 1993, pp. 417-446, at 432.

This does, of course, also come with new tensions vis-à-vis its national counterparts, and new types of judicial interactions between them. They do not, however, diminish the significance of judicial interdependence, but may rather strengthen it even further.

III. The various guises of judicial dialogue [17]

Judges communicate in different ways. They may do so directly, extrajudicially, which is not only helpful in fostering the exchange of ideas when facing similar challenges but may also help safeguard judicial integrity and independence in the face of internal or extraneous pressures. [18] Here, however, I wish to focus on the dialogue conducted from the bench, through the courts' written decisions.

In that sense, as well, judicial dialogue comes in various guises. In various constitutional and other high courts, such a dialogue may already take place between the majority and the minority in any given case, or even within the majority itself, expressed in the form of dissenting and concurring separate opinions that engage with the court's dispositive decision. There is a dialogue taking place between the courts and political branches of government (for examples at EU level, consider the interpretation by the Court of Justice of the requirements of individual and direct concern for direct access of individuals to the Court and the amendment to what is now Article 263(4) TFEU in the Treaty of Lisbon, or the decision in the *Barber* case leading to a special protocol in the Treaty of Maastricht). [19] There is also an ongoing dialogue, notwithstanding the uneven power dynamic, between the apex and inferior courts within national legal systems. Most pertinently for present purposes, finally,

17 | In this part, I draw on and reproduce parts of the text in Accetto M., 'Pride and Precedent: On Judicial Interpretation and Dialogue in European Law', *International Conference 'Europeanization of Constitutional and Constitutionalization of European Law: Challenges for the Future'* (25th anniversary of the Constitutional Court of the Republic of Albania), Tirana, 2017, pp. 133-152.

18 | See, for example, the cautiously hopeful thoughts of the UN special rapporteur on the independence of judges and lawyers in 2006 in Despouy L. O., 'Perspectives on Judicial Dialogue and Cooperation: Keynote Address', *Harvard International Law Journal Online*, Vol. 48, 2007, pp. 48-53.

19 | See Arnull A., 'Judicial Dialogue in the European Union', in Dickson J. and Eleftheriadis P. (eds), *Philosophical Foundations of European Union Law,* Oxford University Press, Oxford, 2012, pp. 109-133, at 114-117.

there is the transnational judicial dialogue between courts from different states, or between national and international courts, a dialogue which is perhaps particularly well suited to constitutional courts and international courts dealing with the protection of human rights. [20]

In this sense, I wish to briefly address three modalities of judicial dialogue taking place in the European context: *judicial dialogue as inspiration*, courts looking beyond their borders for inspiration or comparative experiences of other jurisdictions in solving the challenges they face; *judicial dialogue as instruction*, direct conversations intended to obtain authoritative guidance on the interpretation of the law to employ in a given case; and *judicial dialogue as disagreemen*t, the confrontation of arguments designed to advance one's own interpretation of the law in the face of the counterparts' divergent positions. I will proceed to briefly highlight each of the three.

The transnational constitutional dialogue in the shape of voluntarily drawing inspiration from 'precedents' in other legal systems has been a staple diet for constitutional courts around the world for some time, albeit not always to the same extent. A well-known example is the 1995 the *Makwanyane* case, [21] a judgment of the South African Constitutional Court that has often been at the vanguard of the transnational constitutional dialogue as inspiration, with personal testimonials underlining its significance. [22] However, similar examples can be found elsewhere. In the European context, for instance, even the more reluctant German Federal Constitutional Court has, as highlighted by Mayer, [23] on occasion conducted a thorough comparative review, as in the *Iranian Embassy* case, for example. [24]

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20 | See the point made in connection with the role of the Inter-American Court of Human Rights in Carozza P. G. and González P., 'The Final Word? Constitutional Dialogue and the Inter-American Court of Human Rights: A Reply to Jorge Contesse', *International Journal of Constitutional Law*, Vol. 15(2), 2017, pp. 436-442, at 436.

21 | Judgment of the Constitutional Court of the Republic of South Africa of 6 June 1995, *S v Makwanyane and Another*, CCT/3/94 [1995] ZACC 3.

22 | See for example Sachs A., *The Strange Alchemy of Life and Law*, Oxford University Press, Oxford, 2011, pp. 113-124, on his personal and judicial interactions with judges in other jurisdictions.

23 | Mayer F. C., 'Constitutional Comparativism in Action – The Example of General Principles of EU Law and How They Are Made – A German Perspective', *International Journal of Constitutional Law*, Vol. 11, 2013, pp. 1003-1020, at 1011-1012.

24 | Judgment of the Federal Constitutional Court of Germany of 30 April 1963, BVerfGE 16, 27-64, 2 BvM 1/62.

In EU law, notably, a comparative outlook is also relevant to the work of the Court of Justice of the European Union itself. Member states' legal systems are a necessary source of inspiration in the crafting of the European legal order, [25] but also no more than an inspiration when having to reconcile the national variations into common European concepts and norms. This 'drawing of inspiration' from the national constitutional traditions, as well as sources of international law, was particularly pronounced in the development of human rights in EU law as enshrined in the 'unwritten' general principles of EU law, which the Court of Justice justified precisely by means of such a comparative exercise, drawing inspiration from constitutional traditions common to the Member States. [26]

Of course, once adorned at the European level as general principles of EU law, many such nationally conditioned principles then return to their domestic shores as the 'higher law of the land' to guide, shape and control the development and application of national law. [27] At times, that may have resulted in the national courts changing their own practice of their own volition – thus, for instance, the success of the general principles at the European level was said to have contributed to an increase in their use in the Swedish legal system. [28] In any event, however, it also affects the national legal orders, considering the many obligations incumbent on the national legal orders and national courts derived from the principle of loyal cooperation, including the right or – for apex courts – the duty to refer unresolved questions on the interpretation of EU law to the Court of Justice for a preliminary ruling to provide an answer to them.

This is the second modality of judicial dialogue – the communication between the national courts and the European courts whereby the former ask for the authoritative guidance of the latter. The notion has long been present in EU law, with the preliminary ruling procedure established by the Treaty in what is now Article 267 TFEU. A similar arrangement has also

25 | Dehausse R., 'Comparing National and EC Law: The Problem of the Level of Analysis', *American Journal of Comparative Law*, Vol. 42, 1994, pp. 761-781, at 771-772.

26 | Mayer, footnote 23 above, at 1005-1010.

27 | Koopmans T., 'General Principles of Law in European and National Systems of Law: A Comparative View', in Bernitz U., and Nergelius J. (eds), *General Principles of European Community Law*, Kluwer Law International, The Hague, 2000, pp. 26-34, at 25.

28 | Nergelius J., 'General Principles of Community Law in the Future', in ibid., pp. 223-233, at 226.

become relevant with regard to the European Court of Human Rights (ECtHR), with Protocol No. 16 to the ECHR introducing the possibility for the highest national courts to request the Court to issue advisory opinions, adding to the existing – but practically never used [29] – possibility under Articles 47 to 49 of the ECHR for the Committee of Ministers to request the Court to issue an advisory opinion on the interpretation of the Convention or its protocols.

As for the preliminary ruling procedure of the Court of Justice itself, one hardly needs to reiterate its significance for the system of judicial review in EU law and that it has led to the judicial elaboration of some of the key doctrines of EU law as a supranational legal order, such as the doctrines of direct effect and supremacy, as well as having come to represent the bulk of the workload of the Court of Justice in numerical terms, greatly surpassing the number of direct actions. [30] The preliminary ruling procedure has also introduced a complex dynamic to the relationship between the Court of Justice and the apex national courts, as well as to the comparative outlook of national courts in general. [31]

However, one element of this complex dynamic of the second modality of judicial dialogue described above is the threat to shape the interactions between the European court and their national counterparts in the spirit of a monologue, or some sort of a hapless inverted version of a Socratic dialogue, with the Court of Justice responding to earnest questions by the national courts with authoritative pronouncements that the national courts must follow. To critics, and at times national courts, such a conception of judicial dialogue would belie the use of the term. After all, a dialogue implies (occasional) disagreement.

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29 | So far, to my knowledge, the ECtHR has only issued two such advisory opinions, in 2008 and 2010, dealing with the election of its judges.

30 | I have provided a more detailed account of the Union's judicial architecture in Accetto M., 'The Past and Possible Futures of European Union Judicature', *Czech (& Central European) Yearbook of Arbitration, Vol. I: The Relationship between Constitutional Values, Human Rights and Arbitration*, 2011, pp. 3-22.

31 | Again, in the context of this contribution and in light of the space limitations, I will not enter here into a more detailed debate of the intricacies of the preliminary rulings procedure, including the sometimes controversial tenets and limits of the apex courts' duty to refer questions of EU law to the Court of Justice under Article 267(3) TFEU. For more on this with the appraisal of the decisions of the Court of Justice in judgment of 9 September 2015, *Ferreira da Silva e Brito and Others*, C-160/14, EU:C:2015:565, and judgments of 9 September 2015, *X and van Dijk*, joined cases C-72/14 and C-197/14, EU:C:2015:564, see Accetto, footnote 17 above, at 140-145.

This concern has been expressed, in one way or another, by various national courts. In the context of EU law, for instance, the overall story of the national 'rebellions' against an unfettered application of the doctrine of supremacy of EU law, starring the German Federal Constitutional Court, is well known and need not be rehashed here. [32] However, disagreement may also arise in connection with particular issues, and in those cases the dialogue may well be expressed in the interlocutors adopting differing views on the solution warranted by a specific type of dispute or interpretative question posed. Such a disagreement may be seen as an attempt at 'strategic adjudication', [33] intended to persuade the European counterpart to change its own position (the power of the argument), or perhaps as a statement demarcating the national court's own lines of jurisdictional sovereignty (the argument of power). Either way, it challenges the image of the judicial dialogue as monologue, flowing only in the direction from the European court(s) to the national judiciary.

In recent years, EU law has seen a few strong, even if controversial and not always persuasive, expressions of such discontent, which I will not rehash here, but rather address their significance for the interdependence of the European judiciaries. Certainly, there is a sense that the instances of judicial discontent expressed by the national courts may permanently affect the nature of judicial dialogue in Europe, or indeed the relationship of the Court of Justice and its national counterparts. And yet, such an expression of discontent may also be seen as a willingness to participate in an earnest judicial dialogue and for the national apex courts to become actively involved in the European judicial multilogue, with their respective roles and voices still to be found and fine-tuned. That may also explain the recently bolstered interest of the constitutional courts in making preliminary references themselves. In any event, judicial dialogue, properly conducted, can perhaps never be considered a particularly short-term affair or a one-off transaction, but is already by definition always a rather lengthy, ponderous exchange.

32 | See Accetto, footnote 30 above, at 778-788.

33 | To adapt the term 'strategic litigation', used to denote the strategic use of the court system by those advocating for a change in the policy or interpretation of the law concerning a particular legal or societal phenomenon.

Consider the examples offered by the other European court and its national interlocutors. In the *Von Hannover* line of cases [34] spanning twenty years, the European Court of Human Rights and the German Federal Constitutional Court ultimately reconciled their positions on assessing the applicants' privacy rights in cases involving the unwanted publication of images. Another example is the dialogue between the ECtHR and the Latvian Constitutional Court on the lawfulness of different approaches to calculating old-age pensions for non-citizens of Latvia, a dialogue comprising several decisions of the two courts since 2001 and perhaps not yet concluded. [35]

It need not always take two decades, but such a judicial dialogue will necessarily involve several cases. The dialogue taking place between the ECtHR and the UK Supreme Court concerning reliance on hearsay evidence is another apt example from that court, spanning several decisions between 2009 and 2014, [36] with the ECtHR's press release after its last decision describing it as the '[c]onclusion of judicial dialogue between ECHR and UK courts on use of hearsay evidence'. [37] The so-called *Taricco* saga involving the Italian Constitutional Court and the Court of Justice [38] is an apt example in the EU context. [39]

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34 | The two pertinent ECtHR decisions were handed down in judgment of 24 June 2004, *Von Hannover v. Germany (No. 1)*, Application no. 59320/00; judgment of 7 February 2012, *Von Hannover v. Germany (No. 2)*, Applications nos. 40660/08 and 60641/08; see also judgment of 19 September 2013, *Von Hannover v. Germany (No. 3)*, Application no. 8772/10.

35 | Ziemele I., 'The Significance of the European Convention for the Protection of Human Rights and Fundamental Freedoms in the Case-Law of the Constitutional Court of the Republic of Latvia', during the visit of the court's delegation to the Slovenian Constitutional Court in October 2017, available via shortened URL at https://goo.gl/2QMMbU.

36 | Decision of the ECtHR of 20 January 2009, *Al-Khawaja and Tahery v. UK*, Application nos. 26766/05 and 22228/06; UK Supreme Court 2009 decision, *R.* v. *Horncastle and others*, [2009] UKSC 14; Decision of the ECtHR of 15 December 2011, *Al-Khawaja and Tahery v. UK*, Application nos. 26766/05 and 22228/06; Judgment of the ECtHR of 16 December 2014, *Horncastle and others v UK*, Application no. 4184/10.

37 | ECHR, Press release no. 376 of 16 December 2014.

38 | Involving two preliminary rulings by the Court of Justice in judgment of 8 September 2015, *Taricco and Others,* C-105/14, EU:C:2015:555, and judgment of 5 December 2017, *M.A.S. and M.B.* (*Taricco II*), C-42/17, EU:C:2017:936.

39 | See for example Piccirilli G., 'The "Taricco Saga": The Italian Constitutional Court Continues its European Journey', *European Constitutional Law Review*, Vol. 14 (4), 2018, pp. 814-833.

The intended point here is to say that in the appraisal of the European judicial landscape, these three modalities of judicial dialogue need to be taken into account. A number of further questions may very well remain, such as to what extent the transnational judicial dialogue of national courts is driven by their internal objectives or parochial interests, and to what extent by the more cosmopolitan desire to play a role in the common global or European judicial enterprise. In any event, however, the European context with its (ever more) closely intertwining national orders in a common European framework, either in the area of fundamental rights under the European Convention on Human Rights or more generally within the scope of application of European Union law, certainly fosters both directions of this dialogue: national legal orders are inevitably conditioned and governed by the common legal framework, but in turn also help shape its development and application.

IV. Concluding remarks

The discussion on the modalities of judicial dialogue perhaps also helps explain the greater involvement of the constitutional courts (and other comparable apex courts) in this dialogue and in the construction of the European judicial landscape: not only are they vested with the duty to safeguard the domestic constitutional order, they are also particularly well placed to help resolve the tensions between the national constitutional orders and the common transnational legal framework and standards, to help find the appropriate balance between the national 'bedrooms of the established habits of mind' [40] and the common living space. With both of these spaces undergoing constant transformation, the delicate balance between them must also be continually reviewed and refined.

Transnational judicial dialogue is an indispensable feature of this endeavour. The fact that it may sometimes lead to disagreement between the various judicial actors should be deemed to be as understandable and unproblematic, as a feature rather than a bug of the mechanism of European judicial interactions. However, echoing yet again the old but undiminished entreaty, it should be seen not as an end in itself but rather as the means to a common end. Judicial interactions are a feature of judicial interdependence, and judicial

40 | To borrow a phrase from another discipline in Kegan R., Laskow Lahey L., *How the Way We Talk Can Change the Way We Work*, Josey-Bass, San Francisco, 2001, at 70.

interdependence a feature of safeguarding the rule of law, including judicial independence as its indispensable prerequisite. In this sense, also, the Court of Justice and its national counterparts (should) pursue a common purpose.

M. Koen Lenaerts, Président de la Cour de justice,
et M[me] Küllike Jürimäe, Présidente de la III[e] chambre à la Cour de justice

De gauche à droite : M^me^ Barbara Pořízková, Vice-présidente de la Cour administrative suprême de la République tchèque et M^me^ Ineta Ziemele, juge à la Cour de justice

Atelier I : « L’intelligibilité des décisions de justice »

M^me^ Ineta Ziemele,
Juge à la Cour de justice

Contribution by Ms Ineta Ziemele, Judge at the Court of Justice

Readability of the judgments of the Court of Justice

I.

Ladies and gentlemen,

More than ever before, in the modern digital age, citizens demand accessible and understandable justice, and the readability of judgments has everything to do with ensuring this. One can address the readability of the Court of Justice's decisions from several perspectives. My introduction will not focus on the matters of language, terminology, presentation and concision, or the translation aspects of the judgments of the Court in all the official languages, the latter in particular is a substantial topic, and we are all aware of the challenges multilingualism brings to the functioning of the Union. It must be emphasised, however, that the principle of multilingualism is one of incredible value and depends on the work of many people, all of whom need to be thanked today for making 'United in diversity' achievable.

I will focus on another aspect that I believe is relevant to the readability of judgments, that is, their consistency and coherence. While it is not immediately clear how the readability of judgments is linked to their consistency and why casuistic case-law may not be readable, I think it is a valid point that a consistent and coherent line of judicial reasoning, following an accepted structure and based on a consistent method of legal interpretation, makes the case-law of any court more accessible and readable.

II.

The Court of Justice faces a specific challenge in this context that stems particularly from the degree of technicality of Union law. I should underline, however, that it is only normal that each of our courts follows its long-established traditions, and that the practices differ among our Member States. At a European level, the traditions of the two European courts in the structure of their judgments and the method of their reasoning are evidently different and stem from the specific characteristics of the legal texts that both courts interpret. The Court of Justice's rulings are shaped by the Union's history and the Union's nature as a 'new legal order of international law', which, while based on international law, has consolidated into a constitutional-type legal order. [1] It is clear that the Court of Justice's structure of reasoning and presentation of the judgments has evolved considerably over time and (continues to do so) in response to multiple triggers. It is a valid observation as concerns the method and structure of reasoning in the judgments adopted both in direct action cases and in preliminary ruling cases, but I shall only refer to preliminary ruling cases today. It is rather fitting for such an anniversary to compare some early judgments with more recent ones to establish a general overview of the evolution of the reasoning in preliminary rulings.

For example, in 1976 the Court ruled in *Defrenne* v *SABENA*, [2] which dealt with the matter of equal pay between men and women in the private sector. The Court, presenting the arguments of the Member States (of which at the time there were not many) and the Commission in much greater detail than it would today, based its reasoning primarily on the analysis of the ordinary meaning of the terms. The Court held that, under Article 119 of EEC (now Article 157 TFEU), the principle of equal pay could be directly invoked in domestic courts and private law contractual relations. While the actual opinion of the Court is concise, it is easy to see how the factual details, including those of relevant legal contexts, shaped the Court's succinct interpretation of the relevant treaty article.

1 | Weiler, J.H.H., *Revisiting Van Gend en Loos: subjectifying and objectifying the individual,* 50th Anniversary of the Judgment in *Van Gend en Loos*: 1963–2013, Conference Proceedings, Office des publications de l'Union européenne, Luxembourg, 2013.

2 | Judgment of 8 April 1976, *Defrenne* v *SABENA*, 43/75, EU:C:1976:56.

Over 30 years later, but in the same domain of employment discrimination, we can look at the *Raccanelli* case to see that there was already a considerable change in terms of the presentation and general structure of the judgment. [3] Moreover, and generally, the framework and the logic that *Raccanelli* followed continue to be applied today. In the preliminary rulings, the Court has abandoned the robust and expanded presentation of the details of the parties' submissions, thus rendering the judgments more concise. At the same time, this concision presents a challenge to the outside reader, as it is no longer possible to know in detail what the parties have submitted in the proceedings. Nevertheless, this development can be viewed as justified as it underlines the fact that in the preliminary rulings the Court of Justice does not deal with the facts and national law. Its focus is on the interpretation of relevant provisions of EU law, and over the decades, the search for a better method of doing so has been ongoing.

Today one of the main methods used in the structuring of the Court's judgments is based on the classical methods of interpretation of a legal provision. The grammatical method of interpretation, that is, analysis of the ordinary meaning of the terms, constitutes an entry point in the structure in the majority of judgments and has been a frequent and long-established technique for determining the nature of EU law. In the words of the Court in case C-511/18 (*La Quadrature du Net and Others*): [4] 'it is settled case-law that, in interpreting a provision of EU law, it is necessary not only to refer to its wording but also to consider its context and the objectives of the legislation of which it forms part, and in particular the origin of that legislation'. [5]

3 | Judgment of the Court of 17 July 2008, *Raccanelli*, C-94/07, EU:C:2008:425.

4 | Judgment of 6 October 2020, *La Quadrature du Net and Others*, C-511/18, EU:C:2020:791, paragraph 105.

5 | See, to that effect, judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 44.

However, when the Court has already established a line of case-law in which it has interpreted a concept in at least some relevant aspects, the Court refers to that case-law as having indicated the meaning of the concept at issue, which the Court does also in *Raccanelli*. If the reader would like to better understand how the Court's interpretation of 'worker' came about, they must consult the cross-referred cases, such as *Lawrie-Blum*, [6] *Collins*, [7] and *Trojani*. [8] In these earlier judgments, the reader can find the elements that prompted the Court to determine that the concept of a 'worker' covers anyone performing any work in return for remuneration. The second question in this case concerns the application of the non-discrimination principle in private-law associations. On this question, the judgment referred to previous case-law, which had already determined that 'the prohibition of discrimination applies equally to all agreements intended to regulate paid labour collectively, as well as to contracts between individuals' (see case 43/75 *Defrenne* [1976] ECR 455, paragraph 39, and C-281/98 *Angonese*, paragraphs 34 and 35). [9]

III.

Over the years, there has been some scholarly analysis of the methods of interpretation used in the Court's judgments and thus the relevant structure of the judgment. [10] First, I will refer to the observations in a study, which by now is quite old, but the case-law continues to show that the conclusions drawn are still valid.

The 2003 study of Dr Dederichs confirms that the Court naturally uses the classical praetorian interpretation methods, namely grammatical, teleological, systematic and so-called historical interpretation.

6 | Judgment of 3 July 1986, *Lawrie-Blum* v *Land Baden-Württemberg*, 66/85 EU:C:1986:284, paragraph 16-17.

7 | Judgment of 23 March 2004, *Collins*, C-138/02 EU:C:2004:172, paragraph 26.

8 | Judgment of 7 September 2004, *Trojani*, C-456/02 EU:C:2004:488, paragraph 15.

9 | Judgment of the Court of 17 July 2008, *Raccanelli*, C-94/07, EU:C:2008:425, paragraph 45.

10 | Dederichs, M., 'Methodik des EuGH. Häufigkeit und Bedeutung methodischer Argumente in den Begründungen des Gerichtshofes der Europäischen Gemeinschaften', *EuR 2004*, 2004, S. 345, concerning the year 1999; Müller F., *Untersuchungen zur Rechtslinguistik*, Berlin, 1989, concerning the year 1989.

However, the most common method is to refer to the Court's previous case-law. The author of the study considered at the time that in more than 70% of the Court's judgments, the reasoning contains at least one reference to case-law as an element of interpretation. I am sure that the percentage today is higher. While one reference is perfectly normal and does not, on its own, confirm such a conclusion, this method is used twice as frequently as the grammatical interpretation method and even five times as often as the teleological and systematic interpretation methods. Indeed, empirical evidence shows that the referral technique is the one that occurs most frequently in a single judgment and that predicates the structure of the judgment.

In a more recent study, it is argued that the method of referring to the previous case-law impacts both the readability and the clarity of judgments. While referencing case-law is often seen as a feature of the 'stability and constraint' of the Court, a more recent study argues that, in contrast, references have a 'transformative effect' on the law. [11] The method for referring to previous case-law allows for conscious or subconscious alteration by interchangeably using expressions directly in the case-law and close renditions of them, and separating statements from the legal context 'in which they initially appeared.' [12] Moreover, its transformative quality can cause contradictory interpretations or judgments and reduce the stature of 'the normative force and the relevance of the acquis', which results in a diminution of the authority of the law and of the previous judgments, in addition to clouding the public's ability to easily see a natural progression in the case-law. [13]

This predominance of the referral technique is indeed not without ambiguity. For example, the Court has interpreted Article 7(1) of Directive 2003/88 as guaranteeing that the worker can 'effectively benefit' from the right to paid annual leave. [14] Subsequently, referring to its case-law, the Court has interpreted that very interpretation, defining what is to be understood by 'effectively benefiting'. [15] In this case, the Court first interprets the provision of an act

11 | Sadl U., 'Old is New: the Transformative Effect of References to Settled Case Law in the Decisions of the European Court of Justice', *Common Market Law Review*, Volume 58, Issue 6, 2021, p. 1761.

12 | Ibid.,

13 | Ibid.,

14 | Judgment of 30 June 2016, *Sobczyszyn*, C-178/15 EU:C:2016:502, paragraph 26.

15 | Judgment of 4 June 2020, *FETICO and Others*, C-588/18 EU:C:2020:420, paragraph 34.

of the Union, then proceeds to a second stage, in which it interprets this interpretation. This practice may result in a statement of reasons for the judgment, which the reader may perceive as a 'circular' argument. Accordingly, such a practice leads to an interpretation that could be described as 'second-tier.'

IV.

I believe we all know the difficulty of ensuring the consistency and readability of judgments in the courts with many years of jurisprudence, and that fact requires us to adopt specific approaches that would enable the reader to continue to follow our case-law. The Court of Justice's approach is a periodic synthesis of the case-law in a judgment called 'l'arrêt récapitulatif'. I believe this method should be one of the privileged approaches to building the transparency and accessibility of the Court's case-law and it should be practiced in the formation of a Grand Chamber. Moreover, such recapitulation is the means of disclosing and consolidating the general principles developed in the case-law. Naturally, such judgments require the Court to conduct itself more openly and lead the reader through its process. It is important to avoid the risk of applying the principles developed regarding a specific legal and factual situation to an entirely different one. This would be rightly criticised as an erroneous reproduction, change or adaptation of the previous case-law. I would also welcome a more open disclosure when the Court decides to depart from its previous case-law. Any evolving legal system requires adaptation and sometimes departure from the previous solutions. The departure from the previous case-law should be made carefully and used with the necessary restraint. Far from undermining the authority of the Court, a clear and motivated statement about departure would be beneficial to the consistency of the case-law and would guide the reader in a transparent manner.

V.

The issue of readability naturally needs to be addressed within the context of the development of EU law. The most notable development is the Charter of Fundamental Rights and the

articulation between the Charter and EU primary and secondary law continues to be a work in progress. A reader of our judgments may question from time to time the added value of the reference to the Charter and how that ties into the interpretation of the EU legal act.

For example, in cases where national courts have asked for an interpretation of Directive 2003/88/EC and Article 31 of the Charter, to confirm with reference to the previous case-law that Article 31 enshrines an important general principle of EU law raises a question as to the real interpretative impact this confirmation has on the interpretation of that directive. As explained above, the reader needs to go back to the seminal or original judgment, which explained and articulated the impact of Article 31 of the Charter. Indeed, the Court should guide the reader to this judgment.

The Charter in Article 52 sets forth the methodology that the Court has to follow, therefore the structure of judgments is increasingly based on this methodology. In our example of the articulation between Directive 2003/88 and Article 31 of the Charter, the Court in the case of *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* leads the reader through Articles 51 and 52 of the Charter methodology. **First**, it establishes that the national legislation at issue is an implementation of Directive 2003/88 and draws the conclusion that Article 31(2) of the Charter is intended to apply to the main proceedings. [16] **Second**, it conducts a grammatical reading of Article 31(2) and concludes that it enshrines the 'right' of all workers to have an 'annual period of paid leave'. [17] **Third**, the Court resorts to the contextual method in its external aspect and points to internal and external sources of law that inspired the EU legislator to introduce Article 31 into the Charter. [18]

16 | Judgment of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, C-684/16, EU:C:2018:874, paragraph 50.

17 | Ibid., paragraph 51.

18 | Ibid., paragraph 52.

The Charter, in turn, is part of the contextual interpretation of the directive and is brought in through reference to the first recital of Directive 2003/88. Bringing in the Charter for interpretation of a directive allows us to switch to the methodology of examining limitations on fundamental rights. The Court explains that:

> 'In that context, it should, finally, be recalled that limitations may be imposed on the fundamental right to annual paid leave affirmed in Article 31(2) of the Charter only in compliance with the strict conditions laid down in Article 52(1) thereof and, in particular, the essential content of that right. Thus, Member States may not derogate from the principle flowing from Article 7 of Directive 2003/88 read in the light of Article 31(2) of the Charter, that the right to paid annual leave acquired cannot be lost at the end of the leave year and/or of a carry-over period fixed by national law, when the worker has been unable to take his leave' (see, to that effect, judgment of 29 November 2017, *King*, C-214/16, EU:C:2017:914, paragraph 56). [19]

Another example, contrasting with the *Max-Planck-Gesellschaft* case, is *Association de médiation sociale*, in which the Court decided that 'it is … clear from the wording of Article 27 of the Charter that, for this article to be fully effective, it must be given more specific expression in European Union or national law'. [20] In other words, the Court's grammatical interpretation led to the conclusion that Article 27 did not have direct applicability.

The Court confirms that the provisions of the Charter have a different legal nature, scope and consequences, and that this needs to be disclosed as the Court proceeds, following the methods enshrined in Articles 51 and 52 of the Charter.

I would also like to emphasise that the Court is clearly tasked to do this when the national courts decide to ask a question about the Charter. When asked accordingly, there is no doubt that a more precise explanation as to the different legal nature of fundamental rights set forth in the Charter would only help the reader.

19 | Ibid., paragraph 54.

20 | Judgment of 15 January 2014, *Association de médiation sociale*, C-176/12, EU:C:2014:2.

VI.

To conclude:

Applying the methods of interpretation and following the different stages of classical interpretation (grammatical, teleological, and systemic) contributes to the readability of the Court's judgments, but there are cases in which their didactic application is not possible and such judgments are not easy to follow from a reader's point of view. [21] The readability of a Court of Justice judgment also depends on how national courts have formulated their questions and conceptualised the issue they have with EU law. In the system of preliminary rulings so much depends on our joint efforts. More than ever, we are in it together.

In the digital age, when justice, for reasons of swift communication, is felt more immediately, the demand for accessibility and, therefore, clarity or readability of judgments appears even greater. If people can access and understand the law better, this can 'improve the democratic legitimacy and public acceptance of the law, … ensure legal certainty and equality before the law, and/or … maximise the efficacy of the law and minimise the costs associated with administering it'. [22] I would like to submit that, as judges and courts, we have a heightened responsibility in this age to make our judgments readable and in that sense accessible beyond our usual professional circle and the legal landscape as a whole. Taking special care of the readability of our decisions builds the resilience of our democratic values and can continue to pave the way forward for progress in Europe.

21 | For an example of such an application, see judgment of 5 April 2022, *Commissioner of An Garda Síochána*, C-140/20, EU:C:2022:258, paragraphs 32 to 51.

22 | Höfler S., 'Making the Law More Transparent: Text Linguistics for Legislative Drafting', *Legal Linguistics Beyond Borders: Language and Law in a World of Media, Globalisation and Social Conflicts: Relaunching the International Language and Law Association (ILLA)*, Ed. Duncker & Humblot, 2019, p. 229.

M^me^ Barbara Pořízková,
Vice-présidente de la Cour administrative suprême de la République tchèque

Intervention de M^me^ Barbara Pořízková, Vice-présidente de la Cour administrative suprême de la République tchèque

L'intelligibilité des décisions de justice

Chers collègues,

Je suis vraiment ravie d'avoir l'occasion de m'exprimer lors de cet extraordinaire Forum des magistrats. Je tiens à remercier M. le Président Koen Lenaerts de m'avoir invitée et je voudrais le féliciter, ainsi que son équipe, pour la généreuse hospitalité lors de cette célébration mémorable. En outre, c'est un grand honneur pour moi de co-ouvrir et co-modérer cet atelier avec Ineta Ziemele, juge éminente de cette Cour.

Il convient de préciser dès le départ que la question de notre atelier n'est pas le sujet d'un, mais de plusieurs ateliers. Cependant, il s'agit certainement d'une question à laquelle nous sommes tous confrontés au quotidien. Chacun d'entre nous a son propre style de rédaction et il serait faux de penser que si nous suivons un « manuel » ou un modèle unique dans tous les cas, toutes nos décisions seront lisibles et compréhensibles. Ce n'est pas ainsi que les choses fonctionnent. Néanmoins, il existe des propositions générales que l'on devrait aborder.

La question « comment rendre des décisions judiciaires plus intelligibles » présuppose au moins deux choses : qu'elles *devraient être intelligibles* en général et qu'elles devraient être intelligibles *pour quelqu'un* de concret. Les capacités de la compréhension et de la lecture diffèrent considérablement d'une personne à l'autre. Naturellement, il y a une grande différence entre un professeur de droit à l'université et une personne qui n'a jamais fait d'études supérieures. Ils diffèrent par leur formation, leur expérience et peut-être même leurs capacités intellectuelles. La question se pose donc de savoir à qui s'adressent nos décisions. Qui les *lit* ? Qui *a besoin* de les lire ? Et par conséquent, pour qui devraient-elles être intelligibles ? S'agit-il des participants, des juridictions inférieures, des juridictions supérieures, de nos collègues, des universitaires ou de quelqu'un d'autre ? La réponse à cette question affecte radicalement la manière dont nous devons rédiger les décisions.

À mon avis, nous devrions toujours nous rappeler qu'un jugement est une réponse à un problème de la vie réelle. Et ce problème est celui des citoyens, pas des juristes. Les cours ne sont saisies que si l'on s'adresse à elles et croyez-moi – j'ai travaillé en tant que conseillère juridique – nombreux sont ceux qui essaient de diverses façons d'éviter la saisine des juridictions. Nos affaires ne sont donc pas des litiges abstraits, nous statuons sur le sort de personnes tout à fait concrètes. Notre objectif est de faire respecter la loi et, en même temps, de chercher et de créer la justice. La résolution des litiges est un service public. Ce service n'a aucun sens si les parties ne comprennent pas ce qui s'est passé. Elles doivent savoir pourquoi l'affaire a été jugée d'une façon et pas d'une autre. C'est cette approche qui peut garantir que la décision sera acceptée par les parties. L'époque où les personnes acceptaient les choses uniquement sur la base de l'autorité est révolue depuis longtemps. La décision doit être motivée et le raisonnement doit être lisible et compréhensible, donc intelligible. Personne ne peut accepter quelque chose qu'il ne comprend pas.

Les décisions de justice doivent également être perçues comme justes. Sans cet élément, nous perdons la confiance et le respect des gens dont nous avons besoin. À l'ère de la raison que nous vivons, *juste* se confond avec *bien raisonné*. C'est particulièrement important pour le camp des perdants. Même le perdant doit comprendre pourquoi il a perdu. Et croyez-moi, il ne lira pas la décision d'une manière tolérante. Mon conseil est donc d'essayer de lire nos décisions avec les lunettes de la partie perdante.

Les décisions sont adressées non seulement aux parties, mais aussi aux juridictions supérieures et inférieures. Les juridictions supérieures doivent les accepter et les juridictions inférieures doivent les suivre. Le raisonnement d'un juge est différent de celui du citoyen non-juriste. Parfois, nous cherchons des difficultés là où il n'y en a pas. Pour éviter de semer la confusion chez les autres juges, nous devrions nous limiter à la réponse au problème posé. Nous ne devons pas essayer de couvrir l'ensemble des questions et de montrer tout ce que nous savons. Cela laisse également une place à l'activité des juridictions inférieures. Elles ne sont pas inférieures sur le plan intellectuel et elles ont même parfois une meilleure idée de l'affaire d'un point de vue factuel. Nous, en tant que cours supérieures, devrions donc leur laisser une certaine marge de manœuvre.

Du point de vue de la juridiction inférieure, ce que la Cour administrative suprême représente par rapport à la Cour constitutionnelle ou – d'une manière différente – à cette Cour, la Cour de justice, il semble parfois que nous écrivions nos décisions principalement pour elle, pour vous. Cependant, comme je l'ai déjà évoqué, nous ne devons jamais perdre de vue

les parties. Que nos décisions soient soutenues devant une cour supérieure n'est pas une vraie victoire, mieux vaut qu'elles ne soient pas contestées du tout et que les parties les comprennent et les acceptent. Face aux juridictions supérieures, nous devons faire preuve de respect intellectuel, ne pas être arrogants, mais aussi ne pas être serviles.

Ce qui s'est avéré bénéfique à mon avis, c'est l'utilisation d'alternatives. Parfois, lorsque j'annule une décision, j'esquisse également des solutions possibles pour la juridiction inférieure, à la manière d'un « si-alors ». J'écris que si une situation A se produit, alors faites ceci et cela, et ainsi de suite. Je ne dicte pas à la juridiction inférieure ce qu'elle doit faire, mais je lui propose une sorte de feuille de route. Ceci est également bénéfique pour les parties, elles savent à quoi s'attendre et comprennent mieux la situation d'ensemble.

Essayer d'écrire des décisions intelligibles ouvre également la voie à de meilleures décisions. On peut dire qu'il s'agit de vases communicants. Si nous voulons décrire clairement une solution, nous devons y réfléchir. Et même si nous avons de grandes idées, nous devons être capables de les expliquer. Cela nous permet ainsi d'affiner la réflexion et le raisonnement.

À cet égard, la volonté de rédiger une décision intelligible apporte une valeur ajoutée – si nous ne parvenons pas à exprimer clairement une idée, il convient de réfléchir à nouveau pour savoir si la solution choisie est réellement correcte. Cette réflexion peut alors nous amener à approfondir notre argumentation et donc à nous exprimer plus clairement. Ou, à l'inverse, nous donner l'impulsion nécessaire pour envisager la question sous un angle différent. Comme j'aime bien dire : *le papier doit supporter l'idée*.

Comme nous parlons des langues différentes, nous commettons des fautes linguistiques qui sont propres à notre langue. Cependant, je pense qu'il existe certains principes qui, quelle que soit la langue dans laquelle nous écrivons, conduisent à une meilleure clarté des décisions. Écrire des phrases plus courtes au lieu de phrases compliquées, éviter les constructions absurdes et les mots de remplissage, c'est la base absolue de la rédaction de ce type de textes.

Lorsque nous travaillons quotidiennement avec des textes, nous pouvons facilement nous montrer réticents à l'idée de reconsidérer nos formulations à plusieurs reprises pour exprimer nos idées plus simplement, plus directement, plus clairement. Nous devrions faire preuve d'autocritique et nous demander si nous n'avons pas sombré dans des platitudes ou dans un jargon juridique vide de sens, ou même si nous n'essayons pas de dissimuler les défaillances de notre raisonnement derrière de nombreux mots. Si des *disputes* académiques ou des *processus* de pensée décrivant toutes les « voies sans issue » que nous avons empruntées

apparaissent dans le raisonnement, la décision finit généralement par être peu claire et par ne plus remplir sa fonction essentielle. Le lecteur – qu'il s'agisse d'un juriste ou d'un non-juriste – a besoin que le texte juridique soit concis et compréhensible. En d'autres termes, notre tâche consiste à aider les non-juristes à comprendre le droit et, surtout, à aider les juristes à se comprendre entre eux.

Je pense que nous sommes tous d'accord sur le fait qu'une justification longue n'est pas automatiquement meilleure qu'une justification courte. Même si les destinataires attendent de la juridiction qu'elle traite leurs objections, cela ne signifie pas que la juridiction doit traiter chaque argument en détail. Parfois, cela exige d'avoir la volonté de renoncer à un texte déjà préparé.

Le paradoxe est que des raisonnements plus courts ne représentent généralement pas un gain de temps. Se concentrer sur l'essentiel demande plus d'efforts pour organiser les différentes idées et un travail intensif, souvent chronophage, sur le texte du raisonnement. Ce que l'on nous demande de faire, c'est de nous concentrer sur les points essentiels et sur la substance de notre argumentation. Une telle organisation améliore généralement le caractère persuasif du raisonnement et son intelligibilité.

Le dernier aspect de l'intelligibilité que je voudrais mentionner est celui de la tension existante entre la précision et la clarté. Il nous semble parfois plus important d'être clair et précis que lisible, car le sujet traité est difficile et technique. Nous avons envie d'expliquer chaque petit détail et de distinguer les plus petites différences dans les concepts, afin de ne pas être mal compris. Paradoxalement, cette approche conduit à de fréquents malentendus. Les phrases complexes avec des phrases enchâssées sont illisibles et risquent d'être mal comprises.

Pour conclure, je nous souhaite à tous de réussir à rédiger nos décisions de manière claire, lisible et compréhensible. Je souhaite également que nos décisions ne fassent plus l'objet de mauvaises interprétations et que même nos adversaires intellectuels soient obligés d'admettre que nos décisions sont faciles à lire et à comprendre.

Je vous remercie pour votre attention.

Participation et discussions lors du premier atelier

Salle d’audience de la Cour de justice lors du deuxième atelier

Atelier II :
« La distinctivité des affaires : dénommer les affaires sans révéler l'identité des parties »

M. Maciej Szpunar,
Premier avocat général de la Cour de justice

Intervention de M. Maciej Szpunar, Premier avocat général de la Cour de justice

Dénomination d'affaires : comment différencier les affaires sans révéler l'identité des parties au litige ?

En dépit de son caractère technique, la problématique liée à la différenciation d'affaires contentieuses s'avère plus intéressante que ce que l'on pourrait en penser à première vue. Notre Forum des magistrats a la particularité de réunir les représentants des juridictions suprêmes. Celles-ci rendent des décisions dont l'importance dépasse considérablement le cadre d'un litige particulier. Je laisserai de côté les controverses liées à la dimension créatrice des jugements rendus par les instances suprêmes, qui ne sauraient être tranchées dans le cadre du présent atelier. Indépendamment de nos convictions personnelles en la matière, il est évident que la connaissance et l'accessibilité de la jurisprudence demeurent cruciales pour le bon fonctionnement des systèmes juridiques respectifs. Le problème concerne non seulement les magistrats et les autres praticiens, qui accompagnent les justiciables dans la réalisation de leurs droits devant les tribunaux des États membres, mais aussi les chercheurs, les enseignants et les étudiants, qui abordent la jurisprudence d'une manière plus systématique, contribuant à la cohérence et à une meilleure compréhension du système juridique dans l'ensemble. Et même si l'idéal d'un droit proche et connu du citoyen semble difficile à réaliser en pratique, nous devrions viser à ce que notre jurisprudence soit portée à la connaissance du plus grand nombre.

Les défis qui surgissent sur ce terrain pour les juridictions sont liés à deux facteurs concomitants. D'une part, la numérisation de la jurisprudence et son accessibilité en ligne permettent au grand public de prendre connaissance de nos décisions, surtout dans les affaires qui bénéficient d'un large suivi médiatique. D'autre part, le développement de la protection des données à caractère personnel conduit à l'anonymisation de l'identité des parties au litige, ce qui est nécessaire pour éviter la violation du droit à la vie privée.

En guise d'introduction au présent atelier, j'aimerais vous faire part des expériences de la Cour en matière d'anonymisation et de différenciation des affaires contentieuses. L'accessibilité de la jurisprudence revêt pour la Cour une importance particulière, ce qui conduit inévitablement à nous interroger sur la protection de l'identité des justiciables impliqués.

Tous ceux qui s'intéressent au droit de l'Union savent que le principe de la primauté a été dégagé dans la célèbre affaire *Costa / E.N.E.L* [1]. D'aucuns savent que cette affaire faisait suite à un refus de M. Flaminio Costa de payer sa facture d'électricité, ce qui avait conduit à un litige porté devant le *Giudice Conciliatore* de Milan. Les noms tels que Andrea Francovich, Paola Faccini Dori ou Gerhard Köbler sont immanquablement associés à des décisions concrètes de la Cour et à une problématique juridique bien déterminée. La référence faite à ces noms facilite grandement toute discussion sur le droit de l'Union, peu importe s'il s'agit d'une audience devant la Cour, devant une juridiction nationale, d'un débat académique, ou d'un échange entre l'enseignant et l'étudiant à l'occasion d'un examen.

Il ne fait aucun doute que la seule référence au numéro de l'affaire (tel C-576/20) n'assure pas la distinctivité adéquate. Tous les ans, la Cour examine 800 affaires environ, et il serait très difficile d'identifier une affaire et les enjeux juridiques qu'elle soulève uniquement par référence à l'ordre de son enregistrement.

L'entrée en vigueur de la réglementation relative à la protection des données à caractère personnel [2] conduit la Cour à adapter ses propres pratiques, mais en même temps, l'oblige à prendre en compte l'anonymisation assurée par les juridictions nationales qui lui soumettent des questions préjudicielles.

1 | Arrêt du 15 juillet 1964, Costa / E.N.E.L., 6/64, EU:C:1964:66.

2 | Règlement (UE) 2018/1725 du Parlement européen et du Conseil, du 23 octobre 2018, relatif à la protection des personnes physiques à l'égard des traitements des données à caractère personnel par les institutions, organes et organismes de l'Union et à la libre circulation de ces données, et abrogeant le règlement (CE) n° 45/2001 et la décision n°1247/2002/CE (JO 2018, L 295, p. 39).

Concernant ce dernier aspect, je ne doute pas qu'il existe, dans les systèmes juridiques des États membres, des procédés variés qui permettent d'anonymiser les parties au litige conformément aux exigences découlant du règlement général sur la protection des données [3]. Je souhaiterais que nos discussions soient concentrées sur cette question : comment assurez-vous l'anonymat des parties et quelles en sont les conséquences, d'une part, pour la clarté du débat juridique, et d'autre part, pour l'accessibilité de la jurisprudence ?

En amont des échanges sur cette question, permettez-moi de présenter brièvement le système d'anonymisation appliqué actuellement au sein de la Cour (I), puis le procédé qui sera adopté à partir de l'année prochaine (II). Dans le cadre de ma modeste contribution, je ferai référence surtout aux procédures de renvoi préjudiciel. Pour ce qui concerne les procédures sur pourvoi, la Cour n'introduit pas d'anonymat si l'affaire n'a pas été préalablement anonymisée par le Tribunal de l'Union statuant en premier ressort.

I. Le système appliqué à l'heure actuelle

La nécessité d'anonymisation concerne les affaires qui opposent des personnes physiques, ainsi que les litiges dont l'une des parties est une personne morale ou un organe, dont le nom est insuffisamment distinctif au regard du nombre important d'affaires impliquant la partie en question (par exemple *Prokuratuur*, ou *Staatssecretaris van Justitie*). L'anonymisation est en outre nécessaire dans le cas où le nom d'une personne morale correspond à celui d'une personne physique.

En amont de l'entrée en vigueur du règlement (UE) 2018/1725, en décembre 2018, la Cour a décidé de protéger de manière systématique l'identité de toutes les personnes physiques impliquées dans les affaires préjudicielles, en remplaçant leurs noms par des initiales fictives choisies de manière aléatoire. Dans certains cas, au regard de la spécificité du dossier et des éléments susceptibles de révéler l'identité des parties, cette pratique s'accompagne de la neutralisation des éléments sensibles de l'affaire.

3 | Règlement (UE) 2016/679 du Parlement européen et du Conseil, du 27 avril 2016, relatif à la protection des personnes physiques à l'égard du traitement des données à caractère personnel et à la libre circulation de ces données, et abrogeant la directive 95/46/CE (JO 2016, L 119, p. 1).

Le système actuel s'applique à tous les stades de la procédure, dès l'introduction jusqu'à la clôture de l'affaire et concerne tous les documents publiés.

Ces pratiques ne permettent cependant pas d'assurer la distinctivité satisfaisante des affaires. Pour cette raison, la Cour a décidé en parallèle, en juillet 2018, de compléter le nom usuel – souvent réduit à des initiales fictives et peu spécifiques –, par un nom conventionnel. Ce dernier consiste en une mention supplémentaire, révélant l'aspect factuel ou juridique caractéristique pour l'affaire en question (par exemple : « Données personnelles et lutte contre la contrefaçon », « Enregistrement de données biométriques et génétiques par la police », ou « Demande d'extradition vers la Bosnie-Herzégovine »).

L'expérience en la matière montre pourtant que l'identification de l'aspect caractéristique de l'affaire, qui serait susceptible d'inspirer le nom conventionnel, n'est pas toujours aisée. Dans certains cas, en cherchant à abréger le nom conventionnel, il s'avère impossible d'éviter des redondances et la confusion avec des affaires passées, qui présentent des enjeux similaires. Par ailleurs, des difficultés spécifiques résultent de la nécessité de traduire le nom conventionnel dans toutes les vingt-quatre langues officielles de l'Union. La traduction dans certaines langues peut être particulièrement difficile. Il arrive ainsi que la traduction du nom conventionnel dans une langue ne permette pas de distinguer l'affaire à suffisance dans une autre langue officielle de l'Union.

Pour toutes ces raisons, la Cour a décidé d'introduire un nouveau système de dénomination d'affaires.

II. Le système applicable à partir du 1er janvier 2023

Désormais, le nom conventionnel ne sera utilisé que dans le cadre des litiges interinstitutionnels, des procédures en manquement visant les États membres, ainsi qu'à l'occasion des avis rendus par la Cour en vertu de l'article 218, paragraphe 11, TFUE.

Le système à venir reposera sur l'attribution systématique d'un nom usuel fictif. Depuis de nombreuses années, une méthode similaire est à l'œuvre au sein de la Cour suprême des États-Unis d'Amérique. On se souvient que, dans la célèbre affaire concernant l'avortement, *Roe v. Wade* [4], le véritable nom de la requérante, Norma McCorvey, a été remplacé par un nom fictif, celui de Jane Roe.

Dans le cas de notre Cour, le nom fictif servant de nom usuel sera utilisé uniquement dans l'en-tête de la décision ou des conclusions de l'avocat général, tandis que les initiales seront utilisées dans le corps du texte.

La Cour prendra également soin de préciser systématiquement que la dénomination usuelle de l'affaire procède d'un nom fictif. Il s'agira d'éliminer tout doute possible dans l'éventualité où la dénomination fictive correspondrait à une identité réelle.

Un défi particulier résulte pour la Cour du régime linguistique de l'Union européenne, reposant sur vingt-quatre langues officielles. On souhaite que le futur système prenne en compte l'aspect multilingue du contentieux de l'Union. En particulier, il s'agira d'assurer que le nom usuel possède une consonance plausible, proche de la langue de l'État ayant donné lieu au litige. D'une manière similaire, dans des affaires telles que celles impliquant des demandeurs d'asile, le nom fictif devrait correspondre à la consonance spécifique de la langue du demandeur.

À l'heure actuelle, il semble difficile de prévoir toutes les conséquences du système à venir. Très certainement, son application provoquera des difficultés imprévues, auxquelles la Cour devra faire face en pratique. Nous ne doutons cependant pas que l'identification facile de notre jurisprudence demeure essentielle pour son rayonnement. Le jeu en vaut donc la chandelle.

4 | Arrêt de la U.S. Supreme Court, 22 janvier 1973, *Roe v. Wade*, 410 U.S. 113.

M. Carlos Lesmes Serrano,
Juge et ancien Président de la Cour suprême du Royaume d'Espagne

Intervention de M. Carlos Lesmes Serrano, Juge et ancien Président de la Cour suprême du Royaume d'Espagne

« Une justice proche du citoyen »

I.

Je souhaite commencer mon intervention en remerciant le président de la Cour de justice de l'Union européenne, M. Koen Lenaerts, d'avoir eu l'amabilité de m'inviter à participer à ce Forum des magistrats à l'occasion du 70e anniversaire de la Cour. C'est un honneur de participer, aux côtés des membres de la Cour ainsi que de toutes les personnes participant à ce Forum, à un événement si important pour tous les juges européens.

Comme l'intitulé même du Forum le souligne, il s'agit de rapprocher la justice des citoyens, et c'est là que s'inscrit ma brève intervention, dans laquelle j'analyserai l'aspect relatif à la citation de la jurisprudence du point de vue du juge national et, en particulier, à l'incidence sur cette question de la protection des données à caractère personnel.

Il serait erroné de considérer que cette question est peu pertinente ou dépourvue d'intérêt juridique en ce qu'il s'agirait d'une question réservée au domaine des traditions juridiques nationales. Rien n'est plus faux.

La citation des décisions de justice et sa standardisation constituent un élément fondamental pour que les citoyens puissent avoir connaissance des décisions des juridictions, c'est-à-dire avoir accès au noyau essentiel de l'application du droit. Cette matière n'est pas réservée aux documentalistes ou aux bibliothécaires et présente un intérêt juridique certain.

La citation devient ainsi la référence à une autorité juridique – dans ce cas, la juridiction concernée ; sa standardisation sera donc essentielle pour pouvoir trouver la source citée et accéder à l'information. En d'autres termes, la citation de la jurisprudence doit devenir le système permettant aux professionnels du droit d'identifier les décisions des juridictions.

Dans certains cas, cela est obtenu en identifiant la décision au moyen de son insertion dans une collection officielle. Dans d'autres, en revanche, la citation doit être suffisamment neutre ou ouverte pour que la décision de justice puisse être identifiée quel que soit l'endroit où elle a été publiée. Cette dernière tendance, qui est celle étant actuellement prépondérante, est connue sous le nom de « citation neutre ».

Dans le paysage actuel, il existe des publications spécialisées consacrées à ce thème, comme par exemple les guides juridiques de citation, dont certains ont acquis une autorité particulière. Tel est le cas, par exemple, des guides publiés par les éditeurs de prestigieuses revues juridiques – comme la *Harvard Law Review,* la *Columbia Law Review* et le *Yale Law Journal* – « The Bluebook : A Uniform System of Citation » (21e édition, 2020) ou le « Bluebook Guide », publié par la bibliothèque de droit de l'université de Georgetown (États-Unis).

En réalité, la citation de la jurisprudence est intimement liée à l'une des garanties de l'État de droit, la transparence. Cela implique, s'agissant des décisions des juridictions, que celles-ci doivent être publiées et diffusées de manière à ce que les citoyens puissent facilement accéder à leurs contenus. N'oublions pas que la publicité des procédures judiciaires est prévue par les textes constitutionnels eux-mêmes, comme c'est le cas, par exemple, à l'article 120, paragraphe 1, de la Constitution espagnole, outre qu'elle constitue un droit fondamental conformément à l'article 24, paragraphe 2, de la Constitution espagnole, qui est donc susceptible de faire l'objet d'un *recurso de amparo* (recours en protection des droits et libertés fondamentaux).

Il est ainsi satisfait à une double finalité, la première consistant à protéger les parties d'une justice qui échapperait au contrôle public et la seconde visant à ce que cette garantie permette de maintenir la confiance du public dans les juridictions, ainsi que l'exige la procédure équitable et, en définitive, l'État de droit lui-même, le tout sans oublier le droit à un procès public, comme le prévoit l'article 6, paragraphe 1, de la convention de sauvegarde des droits de l'homme et des libertés fondamentales du 4 novembre 1950.

Dans ce contexte, la diffusion de la jurisprudence se constitue ainsi en exigence de tout système judiciaire dans les pays démocratiques. Par conséquent, on ne saurait douter de l'importance de faciliter autant que possible l'accès aux décisions rendues par les juridictions en établissant des systèmes et des critères de citation de ces décisions qui soient neutres et fiables.

En outre, aux fins de l'identification des décisions judiciaires, il est nécessaire que la citation soit correcte, ordonnée et systématique, a fortiori face aux défis découlant de la coexistence de plusieurs juridictions, tant au niveau national qu'européen, ainsi que du nombre croissant de décisions que leur activité engendre.

II.

La citation de la jurisprudence présente un autre volet auquel je souhaite également faire référence. Ainsi, sur le fondement de l'article 16 du traité sur le fonctionnement de l'Union européenne et des articles 7 et 8 de la charte des droits fondamentaux de l'Union européenne, il est nécessaire de garantir l'application du droit fondamental à la protection des données à caractère personnel.

À des fins systématiques, nous distinguerons deux aspects. Le premier concerne l'incidence de la réglementation en matière de protection des données sur le contenu de la décision de justice dans son ensemble. Nous nous concentrerons ensuite spécifiquement sur l'incidence en matière de citation, compte tenu de l'utilisation fréquente du nom des parties afin d'identifier le cas concret, notamment dans les traditions juridiques anglo-saxonnes.

La nécessité de nous référer à cette question est justifiée par l'important cadre réglementaire que l'Union européenne a développé afin de renforcer la protection des données à caractère personnel. À cet égard, on peut citer le règlement général sur la protection des données (ci-après, « RGPD ») [1], la directive relative à la protection des données dans le domaine pénal [2], la directive « vie privée et communications électroniques » [3] (qui sera bientôt abrogée, après

1 | Règlement (UE) 2016/679 du Parlement européen et du Conseil, du 27 avril 2016, relatif à la protection des personnes physiques à l'égard du traitement des données à caractère personnel et à la libre circulation de ces données [et abrogeant la directive 95/46/CE].

2 | Directive (UE) 2016/680 du Parlement européen et du Conseil, du 27 avril 2016, relative à la protection des personnes physiques à l'égard du traitement des données à caractère personnel par les autorités compétentes à des fins de prévention et de détection des infractions pénales, d'enquêtes et de poursuites en la matière ou d'exécution de sanctions pénales, et à la libre circulation de ces données, et abrogeant la décision-cadre 2008/977/JAI du Conseil.

3 | Directive 2002/58/CE du Parlement européen et du Conseil, du 12 juillet 2002, concernant le traitement des données à caractère personnel et la protection de la vie privée dans le secteur des communications électroniques (directive « vie privée et communications électroniques »), modifiée par la directive 2009/136/CE, du 25 novembre 2009.

la fin des négociations et l'adoption du règlement *ePrivacy* [4]), le règlement relatif au traitement des données à caractère personnel par les institutions et les organes de l'Union [5] ainsi que d'autres réglementations sectorielles, par exemple concernant les données des dossiers passagers (PNR) [6], Europol [7] ou le Parquet européen [8].

L'ensemble de cette réglementation a permis de renforcer les droits des titulaires des données à caractère personnel ainsi que les obligations des responsables du traitement et des sous-traitants, les principes et les garanties exigibles, incluant, entre autres, le renforcement des pouvoirs de contrôle des autorités compétentes.

L'incidence de cette nouvelle réglementation s'étend aux différents domaines juridiques, ce qui, en toute logique, a également un effet sur le sujet que nous traitons ici.

Selon moi, l'approche retenue dans ce domaine par la législation espagnole, qui conduit à ce que la *Ley Orgánica del Poder Judicial* (loi organique relative au pouvoir judiciaire, ci-après la « LOPJ ») distingue clairement le traitement de données à des fins juridictionnelles, c'est-à-dire ceux effectués au cours des procédures menées par les juridictions et les parquets, des autres traitements effectués à des fins non juridictionnelles (article 236 bis de la LOPJ), est correct.

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4 | Je me réfère à la nouvelle proposition de règlement du Parlement européen et du Conseil concernant le respect de la vie privée et à la protection des données à caractère personnel dans les communications électroniques.

5 | Règlement (UE) 2018/1725 du Parlement européen et du Conseil, du 23 octobre 2018, relatif à la protection des personnes physiques à l'égard du traitement des données à caractère personnel par les institutions, organes et organismes de l'Union et à la libre circulation de ces données, et abrogeant le règlement (CE) nº 45/2001 et la décision nº 1247/2002/CE.

6 | Directive (UE) 2016/681 du Parlement européen et du Conseil, du 27 avril 2016, relative à l'utilisation des données des dossiers passagers (PNR) pour la prévention et la détection des infractions terroristes et des formes graves de criminalité, ainsi que pour les enquêtes et les poursuites en la matière.

7 | Chapitre VI (sur les garanties relatives à la protection des données) du règlement (UE) 2016/794 du Parlement européen et du Conseil, du 11 mai 2016, relatif à l'Agence de l'Union européenne pour la coopération des services répressifs (Europol) [et remplaçant et abrogeant les décisions du Conseil 2009/371/JAI, 2009/934/JAI, 2009/935/JAI, 2009/936/JAI et 2009/968/JAI].

8 | Chapitre VIII (sur la protection des données) du règlement (UE) 2017/1939 du Conseil, du 12 octobre 2017, mettant en oeuvre une coopération renforcée concernant la création du Parquet européen.

En ce qui concerne ces derniers, il est expressément indiqué que le RGPD et la réglementation adoptée en vue de son exécution s'appliquent. Cela ne signifie évidemment pas que les autres traitements (à savoir ceux effectués à des fins juridictionnelles) s'inscrivent hors du cadre de la protection du droit fondamental, mais que la surveillance relève non pas de l'autorité de contrôle nationale, mais du pouvoir judiciaire lui-même.

Cette distinction est pleinement compatible avec le RGPD et sa réglementation complémentaire applicable dans notre pays [9].

Ce critère, fondé sur la distinction entre la finalité et son exigence correspondante de fondement légal pour le traitement [10], conduit à ce que, dans le cas de décisions de justice, la justification se trouve dans l'exercice même du pouvoir juridictionnel. C'est ce pouvoir qui définit les raisons et le but de la collecte des données des parties et des autres personnes intervenant dans le cadre d'une procédure juridictionnelle. En résumé, la finalité du traitement définit les raisons et les objectifs de celui-ci et entraîne en outre sa licéité conformément à l'article 6 du RGPD.

C'est donc aux juridictions elles-mêmes qu'il appartient en premier lieu de mettre en balance et de protéger le droit à la protection des données ; elles peuvent même disposer d'une autorité de contrôle « ad hoc », comme c'est le cas dans notre pays, avec la *Dirección de supervisión y control de protección de datos respecto de los tratamientos de datos personales realizados con fines jurisdiccionales por los Juzgados y Tribunales* (Direction chargée de la surveillance et du contrôle de la protection des données en ce qui concerne les traitements de données à caractère personnel effectués à des fins juridictionnelles par les juridictions) (articles 236 bis et suivants de la LOPJ).

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9 | Voir la Ley Orgánica 3/2018 de Protección de Datos Personales y garantía de los derechos digitales (loi organique nº 3/2018 relative à la protection des données à caractère personnel et à la garantie des droits numériques), du 5 décembre 2018, et la Ley Orgánica 7/2021 de protección de datos personales tratados para fines de prevención, detección, investigación y enjuiciamiento de infracciones penales y de ejecución de sanciones penales (loi organique nº 7/2021 relative à la protection des données à caractère personnel traitées à des fins de prévention et de détection des infractions pénales, d'enquêtes et de poursuites en la matière et d'exécution de sanctions pénales), du 26 mai 2021.

10 | En effet, le principe de finalité implique, d'une part, l'obligation que les données soient traitées pour une ou plusieurs finalités déterminées, explicites et légitimes et, d'autre part, que les données collectées soient traitées ultérieurement d'une manière [compatible] avec ces finalités.

Toutefois, en ce qui concerne les traitements des données à des fins non juridictionnelles, parmi lesquels figure la diffusion des décisions de justice, en ce qu'elle s'étend au-delà des parties et des personnes ayant un intérêt légitime en vertu des règles de procédure, la protection des données doit être abordée sous un autre angle [11].

Pour poursuivre avec l'exemple de l'Espagne, la publication officielle de la jurisprudence constitue l'une des compétences attribuées au *Consejo General del Poder Judicial* (Conseil général du pouvoir judiciaire) et est donc soumise à la législation en vigueur en matière de protection des données à caractère personnel.

Ainsi, conformément à l'article 560, paragraphe 1, point 10, de la LOPJ, les attributions du Conseil général du pouvoir judiciaire comprennent celle consistant à :

« 10. veiller à la publication officielle des jugements et des autres décisions ayant été déterminées rendus par le *Tribunal Supremo* (Cour suprême, Espagne) et par les autres autorités judiciaires.

À cette fin, le Conseil général du pouvoir judiciaire, sur rapport des administrations compétentes, établit par voie réglementaire les modalités de collecte, de traitement, de diffusion et de certification des jugements, afin de veiller à leur intégrité, authenticité et accès ainsi que garantir le respect de la législation en matière de protection des données à caractère personnel. »

Par conséquent, un traitement de données à des fins juridictionnelles ne saurait permettre l'insertion de décisions de justice dans des bases de données ou dans d'autres répertoires d'informations, et ce même si l'on pouvait justifier que la collecte de données des parties ne cause pas de préjudice direct aux titulaires de ces données, puisqu'il est clair que faciliter la

11 | En ce qui concerne le *Tribunal Constitucional* (Cour constitutionnelle, Espagne), il convient de tenir compte de la décision de ce dernier du 18 février 2021, dont l'article 5, paragraphe 3, fait également référence aux traitements étrangers à la procédure, lorsqu'il indique que « [l]es responsables des différents services et unités du *Tribunal Constitucional* (Cour constitutionnelle) garantissent la protection des données à caractère personnel dans les traitements qu'ils doivent effectuer, eu égard à leurs tâches respectives, conformément aux principes de protection des données établis dans la loi organique nº 3/2018 et dans le règlement (UE) 2016/679 ». Dans ce cas, le traitement des données à caractère personnel est effectué par le personnel du service Jurisprudence Constitutionnelle aux fins de la publication et de l'édition des décisions de justice au moyen d'un moteur de recherche de jurisprudence disponible sur internet et ouvert au public.

collecte de ces dernières en masse et, le cas échéant, leur stockage en vue d'un traitement futur entraîne un risque potentiel que ces données puissent être exploitées ultérieurement.

C'est là que nous devons rester vigilants, étant donné que la protection des données à caractère personnel repose sur les valeurs de vie privée, d'autonomie, de transparence et de non-discrimination, sans oublier le contrôle que les personnes physiques doivent avoir – et maintenir, si l'on m'autorise la formule – sur ces données, qui est mentionné, par exemple, au considérant 7 du RGPD.

En définitive, il s'agit d'appliquer une procédure rendant impossible l'identification d'une donnée déterminée avec son sujet déterminé ; c'est là que réside la justification de la procédure de dissociation * utilisée en Espagne lors de l'insertion des décisions des juridictions dans les bases de données ou les répertoires d'informations à caractère officiel ou lorsque cette information est donnée aux éditeurs juridiques afin de leur permettre d'élaborer leurs produits.

Sont ainsi rendues compatibles la nécessité de rapprocher la justice du citoyen et de faciliter l'accès et la connaissance des critères appliqués par les juges et les magistrats, dans le respect des droits des parties au litige ainsi que des tiers, experts, témoins et autres intervenants à la procédure, tous en tant que titulaires de droits à caractère personnel.

* Note du traducteur : traitement des données à caractère personnel de telle sorte que les informations obtenues ne puissent pas être liées à une personne déterminée ou déterminable (voir note de bas de page n° 12).

III.

Dans le cas de l'Espagne, il existe un fondement juridique clair pour ce qui est indiqué ici. Ainsi, l'article 235 bis de la LOPJ impose de rendre les décisions de justice anonymes, indiquant que « l'accès au texte des jugements ou à certains points de ceux-ci ou à d'autres décisions rendues dans le cadre de la procédure ne peut avoir lieu qu'après dissociation des données à caractère personnel qu'ils contiennent et dans le plein respect du droit à la vie privée, des droits des personnes nécessitant une protection spéciale ou de la garantie de l'anonymat des victimes ou des personnes lésées, le cas échéant ».

L'Agencia Española de Protección de Datos (agence de protection des données), en tant qu'autorité de contrôle, se prononce dans le même sens. Dans son rapport du 23 juin 2000, qui est même antérieur au RGPD, elle indique, relativement à la diffusion de données de jugements de condamnation pour négligence médicale, que « la finalité de la création de la base de données est de permettre à l'utilisateur d'accéder à la connaissance de la manière dont le *Tribunal Supremo* (Cour suprême) ou les autres juridictions ont interprété les dispositions de l'ordre juridique, sans qu'il soit possible que cette finalité puisse être envisagée dans un sens plus large, avec pour conséquence la limitation des droits fondamentaux des personnes intervenant dans le litige, comme cela serait le cas si les données à caractère personnel relatives à ces personnes étaient connues, données qui n'apportent aucune information supplémentaire sur le contenu juridique du jugement ».

En définitive, il ne s'agit pas ici de limiter de quelque manière que ce soit la publicité des procédures judiciaires ni d'affecter le caractère public des jugements, mais d'adopter les garanties prévues par la réglementation en vigueur en matière de protection des données aux fins de la diffusion des décisions des juridictions au-delà des parties à la procédure ou des personnes ayant un intérêt légitime à accéder aux jugements et aux autres décisions de justice dans leur intégralité.

Je n'examinerai pas ici les aspects techniques des modalités de dissociation des données, car cela m'amènerait à m'étendre sur les points relatifs à l'anonymisation et à la pseudonymisation, que le RGPD lui-même se charge de définir à son article 4 [12] et dont la distinction est fondée sur la réversibilité des données [13]. Il suffit de signaler ici que, dans le cas de l'Espagne, nous avons choisi d'appliquer la pseudonymisation à toutes les décisions de justice publiées dans le recueil national de jurisprudence – fonds documentaire géré par le CENDOJ (*Centro de Documentación Judicial*), l'organe technique du Conseil général du pouvoir judiciaire –, qui contient déjà plus de huit millions de décisions de justice émanant de toutes les juridictions collégiales du pays et d'une large sélection d'organes unipersonnels.

Dans notre expérience nationale s'appliquent des règles d'occultation qui ne se limitent pas à l'identification des noms et prénoms des personnes physiques, mais s'étendent également à d'autres éléments pouvant permettre la traçabilité des titulaires des données (tels que les adresses, les plaques d'immatriculation des véhicules, etc.) ; ces règles ne concernent toutefois pas les données relatives aux membres de la juridiction, aux personnes exerçant des fonctions publiques ou relevant de l'autorité publique (par exemple les notaires, les autorités administratives) ou aux personnes morales, qui n'entrent pas dans le champ d'application de la protection des données à caractère personnel.

Il est ainsi en outre satisfait à un autre principe fondamental applicable en matière de protection des données, à savoir la minimisation des données à caractère personnel. En vertu de ce principe, des mesures techniques et organisationnelles doivent être prises afin de garantir que seules les données qui sont nécessaires au regard de chaque finalité spécifique du traitement sont traitées. Cet objectif est atteint en réduisant l'étendue du traitement, en limitant la durée de conservation des données et leur accessibilité à ce qui est nécessaire.

12 | Ainsi, on entend par « pseudonymisation » « le traitement de données à caractère personnel de telle façon que celles-ci ne puissent plus être attribuées à une personne concernée précise sans avoir recours à des informations supplémentaires, pour autant que ces informations supplémentaires soient conservées séparément et soumises à des mesures techniques et organisationnelles afin de garantir que les données à caractère personnel ne sont pas attribuées à une personne physique identifiée ou identifiable ». L'anonymisation, en revanche, ne permet pas la réversion des données.

13 | Cela n'est pas non plus justifié aux fins du sujet traité ici, dans la mesure où, pour le tiers qui n'a pas accès aux clés permettant la réversion des données, les données ayant fait l'objet d'une pseudonymisation sont considérées comme étant également anonymes.

IV.

À ce stade, il convient de se demander si ce qui a été dit a une incidence sur la citation des décisions de justice, eu égard, notamment, au fait que certaines traditions de pays européens et internationales reposent sur l'identification du précédent par la mention du nom des parties.

Il est clair que les systèmes juridiques du common law (notamment aux États-Unis, au Royaume-Uni et au Canada) reposent sur un système juridictionnel de type accusatoire ou contradictoire (« *adversarial procedure* »), conduisant à utiliser les noms des parties, séparés dans le titre de la décision par l'abréviation *v.* (du latin *versus*).

Toutefois, les citations dans ces pays connaissent également une certaine évolution. Ainsi, traditionnellement, la citation se référait à un jugement déjà publié, indiquant non seulement le nom de l'affaire, mais aussi la série de la collection, l'année et le volume, et même la première page de la publication. Actuellement, ces systèmes ont évolué vers des citations neutres, étant donné que les décisions de justice sont mises à disposition très rapidement sur internet ; il n'est donc pas fait référence à la collection, mais au jugement lui-même [14]. On ne saurait exclure qu'une tendance similaire apparaisse en vue de respecter les garanties découlant de la protection des données à caractère personnel.

En revanche, dans d'autres pays [15], des voix critiques s'élèvent à l'encontre de l'anonymisation des jugements. Des arguments tels que la nécessité de préserver l'intelligibilité des décisions ou la transparence de l'action du pouvoir judiciaire sont souvent avancés. Une solution intermédiaire est celle adoptée par la Suède, qui lie le traitement de données à caractère personnel dans les décisions de justice aux finalités de recherche visées à l'article 89, paragraphe 1, du RGPD, exigeant une approbation éthique de la protection des données sensibles dans la jurisprudence [16].

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14 | Une citation neutre de ce type indique le nom de l'affaire, la juridiction, l'année du jugement et le numéro de l'affaire.

15 | Voir Michal Bobek, « Data protection, anonymity and courts », *Masstricht Journal of European and Comparative Law 2019*, vol. 26 (2), p. 183-189, se référant entre autres au Luxembourg et à la République tchèque.

16 | Cette solution a été contestée par des juristes suédois, comme l'indique M^me^ Jane Reichel, professeure à l'université de Stockholm, dans son article « The GDPR and Processing of Personal Data for Research Purposes : What About Case Law ? », *European Public Law 27*, n° 1, 2021, p. 167-190.

Cela étant, les arguments d'ordre pratique ne semblent pas suffisants pour ignorer la protection que l'ordre juridique en vigueur confère aux données à caractère personnel. Dans les pays qui suivent ce type de tradition et, à tout le moins, dans les pays membres de l'Union européenne, qui sont dès lors soumis à ses règles en matière de protection des données, une réflexion devrait être menée sur le point de savoir dans quelle mesure la dénomination des affaires au moyen du nom des parties est conforme aux principes régissant la protection des données à caractère personnel, notamment à celui de la minimisation des données.

Il en va d'autant plus ainsi si l'on considère que les possibilités offertes par les technologies de rupture actuelles et les techniques analytiques avancées au moyen du *big data*, y compris la tendance à utiliser des algorithmes pour prédire des crimes futurs, des situations de solvabilité ou des décisions d'entreprise telles que l'admission à un emploi, perpétueraient les éventuelles discriminations. Cela constituerait un risque supplémentaire pour les personnes impliquées dans des procédures judiciaires si leur identité était librement offerte sans restriction et donc pleinement accessible aux tiers. Du point de vue des juridictions, je crois que nous ne pouvons pas rester en marge de cette réflexion.

À cet égard, il est positif que les systèmes modernes de citation, parmi lesquels figure, entre autres, l'identifiant européen de la jurisprudence qui a été intégré tant au niveau national qu'à celui de l'Union européenne – European Case Law Identifier (ECLI) [17] –, ne contiennent pas de données à caractère personnel. Cela n'est pas non plus nécessaire pour connaître la portée et la diffusion des critères juridiques contenus dans les décisions de justice.

Toute la jurisprudence espagnole est publiée avec cet identifiant, comme le font d'autres pays et la Cour de justice de l'Union européenne elle-même, de sorte qu'il ne serait pas nécessaire que la citation de la jurisprudence révèle le nom des parties en tant qu'élément d'identification. Toutefois, cette solution est loin d'être acceptée par tous, si l'on observe

17 | Cet identifiant, créé à l'initiative du Conseil de l'Union européenne, permet de donner une référence non ambiguë tant au niveau de la jurisprudence nationale qu'au niveau des juridictions de l'Union. Cela facilite la consultation et la citation de la jurisprudence au sein de l'Union européenne. L'ECLI est composé de quatre éléments obligatoires : 1) le code correspondant à l'État membre ou à l'Union européenne, 2) l'abréviation de la juridiction, 3) l'année de la décision, 4) le numéro d'ordre, de 25 caractères alphanumériques maximum, présenté selon un format décidé par chaque État membre ou par la juridiction supranationale concernée.

la réalité actuelle, où les affaires sont souvent mentionnées en faisant référence au nom des parties.

V.

Je souhaiterais terminer mon exposé en soulignant la nécessité de disposer de règles communes pour la citation des décisions de justice, tant au niveau national qu'à celui de l'Union européenne, afin de mettre un terme aux divergences indésirables en la matière.

Il est peu compréhensible pour le citoyen que des asymétries subsistent dans l'anonymisation des données et que, par exemple, dans le cas de la Cour européenne des droits de l'homme, les références aux personnes morales soient rendues anonymes, mais pas celles relatives aux personnes physiques, sauf si la Cour en décide autrement, bien que ce soit ces dernières qui ont la qualité de titulaires des données à caractère personnel.

Il est également tout à fait illogique, si l'on analyse le déroulement procédural d'une même affaire, avec ses éventuelles ramifications tant au niveau national que supranational, que les critères d'anonymisation appliqués soient distincts, ce qui nuit à l'intelligibilité même des décisions de justice.

Il ne fait aucun doute que la Cour de justice de l'Union européenne peut jouer un rôle de premier plan dans ce domaine, aux côtés des juridictions suprêmes des États membres et avec la collaboration de l'ensemble des institutions compétentes au niveau national. Des voies d'action communes qui rapprocheraient, sur ce point également, la justice des citoyens européens, peuvent être établies.

Ainsi le requièrent l'existence d'un cadre réglementaire harmonisé au niveau de la protection des données et l'obtention souhaitable d'un véritable espace judiciaire européen.

Merci beaucoup.


M. SZPUNAR
Cam 2
Cam 4

Salle d'audience de la Cour de justice lors du troisième atelier sur « La communication juridictionnelle »

Atelier III : « La communication juridictionnelle »

De gauche à droite : M[me] Octavia Spineanu-Matei, juge à la Cour de justice et M[me] Dineke de Groot, Présidente de la Cour suprême des Pays-Bas

Contribution by Ms Dineke de Groot, President of the Supreme Court of the Netherlands and Ms Octavia Spineanu-Matei, Judge at the Court of Justice

How should courts communicate what they do? [1]

Communication is a concept that exists in virtually every language. Therefore, looking up the verb **to communicate** in order to see how it sounds in various official languages of the European Union was an interesting exercise. As illustrated here, in the vast majority of these languages it sounds similar, as it has the same etymological root, namely the Latin word *communicare.*

In Latin, the initial meaning of *communicare* was **to be in relation with.** Over time, the term has evolved and nowadays it has different meanings, such as *to share*, to *exchange, to transmit, to connect, to make known, to report, to reveal, to announce,* etc.

1 | The opinions expressed in the framework of this document are personal and not of the institutions.

What kind of activities do courts communicate about?

What kind of activities do Courts communicate about?

- Pending cases
- Hearing cases
- Delivering judgments
- Doing justice

In order to answer the question 'How should courts communicate what they do?', one should first define *what* the courts do and, in this respect, it may be stated that they mainly **hear cases** and **deliver judgments.** Both activities imply communication in different forms and meanings and with different stakeholders: first and foremost with the parties and their representatives, but also with the public at large, since the oral hearings are public and the judgments are delivered in open court.

At the Colloquium of the Network of the Presidents of the Supreme Courts of the European Union held in Brno in October 2022, it was discussed how to bring justice closer to the citizen by communication, as well as whether it is important and/or useful that courts make public the list of cases pending before them. For the Court of Justice of the European Union ('CJEU'), it is common practice to share such information, but for many national courts and for the highest courts in the Member States it is not.

Doing justice is an overriding objective of communication of courts and it provides the context in which all the above-mentioned activities of the courts are performed.

How should courts communicate what they do?

This question implies a presumption that courts should communicate and this is something they actually do by the mere fact that they hear cases and deliver judgments. However, the communication activity of courts goes beyond these activities and raises a series of questions: *Why* communicate? *How* to communicate? *With/to whom*?

- Why communicate?
- How to communicate?
- With whom?
- To whom?

While the CJEUs website offers different types of information about the cases pending before the EU courts, many national courts in the Member States do not share such information or they share it to varying degrees. The question is: Should they share more? And if the answer to this question is *yes*, then the subsequent questions are *why*, *how* and *with whom*?

Why communicate?

Some possible answers to this question relate to the need or the aim to:

- Provide unrestricted access to justice;
- Increase the transparency of the judicial system(s) and of judicial proceedings;
- Increase the credibility of the judicial system and the level of trust therein;
- Provide all stakeholders with accurate information regarding the activities of the courts/judges and the content of their decisions;
- Justify the use of public funds;
- Raise awareness about the content of the judgments delivered by the courts, as well as about pending cases related to subjects of interest for the legal/professional community and/or the media and/or the general public, etc.

How to communicate? With whom? To whom?

Communicating information about the activities of the courts to different types of audiences implies the use of different and adequate means of communication. Amongst these are *dedicated databases, platforms and networks* for the legal community and academia, as well as *websites*, *press releases, press conferences, broadcasting, social media accounts and platform*s (LinkedIn, Twitter, Mastodon, Instagram, Facebook, YouTube, etc.) for the broader audiences, such as the media and the general public.

Oral hearings

- Public (as a matter of principle)
- Dealing with a case justly
- Face-to-face vs online
- To broadcast or not to broadcast?

As far as oral hearings are concerned, their role in communication obviously relates to their public nature since, as a matter of principle, anyone has the right to attend a public hearing. However, the limited number of places in the courts' premises and other logistic or technical issues may de facto limit access to such hearings in some cases and encourage courts to resort to technology in order to be able to reach broader audiences. Thus, the possibility to turn from face-to-face to online hearings became a reality for many courts during the health crisis provoked by the COVID-19 pandemic. An important issue in this context is the differences between the two types of hearings, particularly the possibility of online hearings being recorded and kept for an indefinite time.

Broadcasting the oral hearings is a means of communication that courts have at their disposal, but one that often raises various issues related to privacy, protection of personal data, 'the right to be forgotten' in the online environment, etc. Despite these issues, an increasing number of courts have decided to record and broadcast their oral hearings for various reasons related not only to communication, but also to the functioning of the courts (for example archiving for further consultation). The European Court of Human Rights in particular has a long and fruitful experience in this field.

The cassation procedure in the Netherlands is almost entirely a written procedure. However, an oral hearing is an opportunity for the public to see that courts are dealing with a case justly.

Recently, the Presidents of the Network of the Supreme Courts of the European Union shared the observation that 10 out of 30 respondents considered streaming of hearings on the internet to be a good way of bringing courts closer to the citizens, although some of them with notable restrictions (for example, only in cases with a broad public interest). Eleven respondents thought there was no actual reason why these hearings should be streamed to a wider public. Specific questions were raised about the protection of privacy and personal data of the parties, unwanted recordings of the hearings and technical resources available to the courts.

CJEU Streaming

- Since 26 April 2022
- Hearings of cases assigned to the Grand Chamber – the same day, from 14.30, or the following day from 9.30

Since 26th April 2022, the CJEU has been streaming some of its hearings for the general public, more precisely the hearings of the cases assigned to the Grand Chamber. Any interested person may see the recordings of these hearings either the same day from 14.30 for the hearings that take place in the morning or the following day from 9.30 for the hearings that take place in the afternoon or last the entire day. However, those recordings are only streamed once and cannot be consulted afterwards.

In contrast, the delivery of the judgments of the Court and the reading of the opinions of the Advocates General are streamed live.

Judgments

Improving the drafting of judgments in order to make them more legible, more comprehensible or to reduce their length is also a topic related to the means used by courts to communicate with stakeholders and the general public.

However, this workshop concentrates on the importance of the publication of case-law in the larger context of public access to justice. Besides the publication of judgments, in full or in abstracts, such publication can also take the form of annual reports and printed or electronic materials on different topics including relevant case-law, in various areas of European Union Law.

Important topics to discuss in this context:

- Freely-accessible publication of case-law;
- Publication of judgments on a website that is independent from other State powers;
- Digitalisation as a key factor in increasing public trust in the judiciary by providing an effective database that enables various users to have free access to judgments;
- Rapid and up-to-date publication of judgments to reduce the risk of diverging decisions (essential element of an efficient and reliable judicial system).

CJEU – Press and Information Unit

Press releases and newsletter are important tools of communication used by the CJEU for communicating with the general public.

Press releases are intended to give readily comprehensible information on the essential points of the most important and/or impactful judgments and Advocate General's opinions.

- Public access to justice
- Publication: entirely/abstracts
- Annual reports
- Brochures on different topics including relevant case-law (equal treatment, consumer rights, rights of the air passengers)

They are also used to announce or communicate about important events related to the judicial or extrajudicial activities of the institution.

While the press release is essentially a tool for informing about judgments and opinions of advocates general, the newsletter is a document that each section of the Press Unit produces on a regular basis containing highlights of the main cases scheduled to be decided or heard in the next two weeks.

Topics to discuss in this context are related to the importance of:

- A pro-active and open attitude of court members towards publicity;
- Being the first and the authentic source in explaining a judgment;
- The availability of a spokesperson;
- Communication skills of judges, most notably of those with an official role of which informing the public is a natural part;
- Prompt responses to media/public crises that could damage trust in the court, as swift communication sends a clear message and could prevent misleading headlines or comments in the media or public opinion.

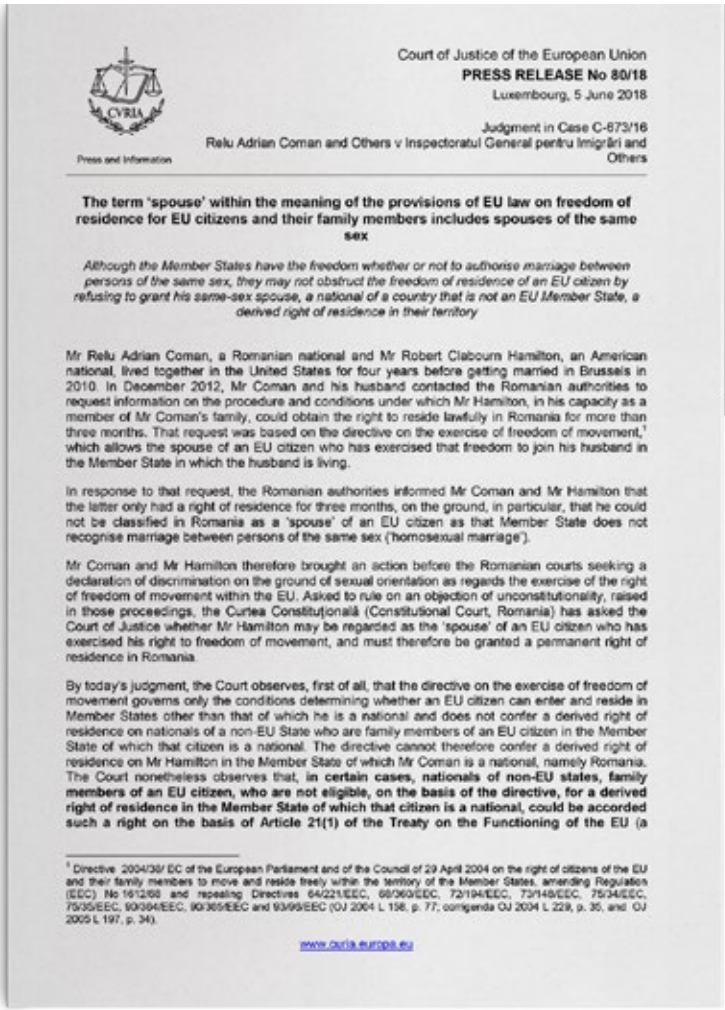
Press release examples

The judgment of 5 June 2018 in the case of *Coman and Others* [2] and the judgment of 26 April 2018 in *Messi* v *EUIPO* [3] are two examples of how legal terminology is simplified in a press release in order to make the message shorter and clearer for the general public.

Judgment of 5 June 2018, *Coman and Others*, C-673/16

Judgment keywords

- Reference for a preliminary ruling – Citizenship of the Union – Article 21 TFEU
- Right of Union citizens to move and reside freely in the territory of the Member States – Directive 2004/38/EC – Article 3
- Beneficiaries – Family members of the Union citizen – Article 2(2)(a)
- Definition of 'spouse' – Marriage between persons of the same sex – Article 7
- Right of residence for more than three months – Fundamental rights



Court of Justice of the European Union
PRESS RELEASE No 80/18
Luxembourg, 5 June 2018

Press and Information

Judgment in Case C-673/16
Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Others

The term 'spouse' within the meaning of the provisions of EU law on freedom of residence for EU citizens and their family members includes spouses of the same sex

Although the Member States have the freedom whether or not to authorise marriage between persons of the same sex, they may not obstruct the freedom of residence of an EU citizen by refusing to grant his same-sex spouse, a national of a country that is not an EU Member State, a derived right of residence in their territory

Mr Relu Adrian Coman, a Romanian national and Mr Robert Clabourn Hamilton, an American national, lived together in the United States for four years before getting married in Brussels in 2010. In December 2012, Mr Coman and his husband contacted the Romanian authorities to request information on the procedure and conditions under which Mr Hamilton, in his capacity as a member of Mr Coman's family, could obtain the right to reside lawfully in Romania for more than three months. That request was based on the directive on the exercise of freedom of movement,[1] which allows the spouse of an EU citizen who has exercised that freedom to join his husband in the Member State in which the husband is living.

In response to that request, the Romanian authorities informed Mr Coman and Mr Hamilton that the latter only had a right of residence for three months, on the ground, in particular, that he could not be classified in Romania as a 'spouse' of an EU citizen as that Member State does not recognise marriage between persons of the same sex ('homosexual marriage').

Mr Coman and Mr Hamilton therefore brought an action before the Romanian courts seeking a declaration of discrimination on the ground of sexual orientation as regards the exercise of the right of freedom of movement within the EU. Asked to rule on an objection of unconstitutionality, raised in those proceedings, the Curtea Constituțională (Constitutional Court, Romania) has asked the Court of Justice whether Mr Hamilton may be regarded as the 'spouse' of an EU citizen who has exercised his right to freedom of movement, and must therefore be granted a permanent right of residence in Romania.

By today's judgment, the Court observes, first of all, that the directive on the exercise of freedom of movement governs only the conditions determining whether an EU citizen can enter and reside in Member States other than that of which he is a national and does not confer a derived right of residence on nationals of a non-EU State who are family members of an EU citizen in the Member State of which that citizen is a national. The directive cannot therefore confer a derived right of residence on Mr Hamilton in the Member State of which Mr Coman is a national, namely Romania. The Court nonetheless observes that, **in certain cases, nationals of non-EU states, family members of an EU citizen, who are not eligible, on the basis of the directive, for a derived right of residence in the Member State of which that citizen is a national, could be accorded such a right on the basis of Article 21(1) of the Treaty on the Functioning of the EU (a**

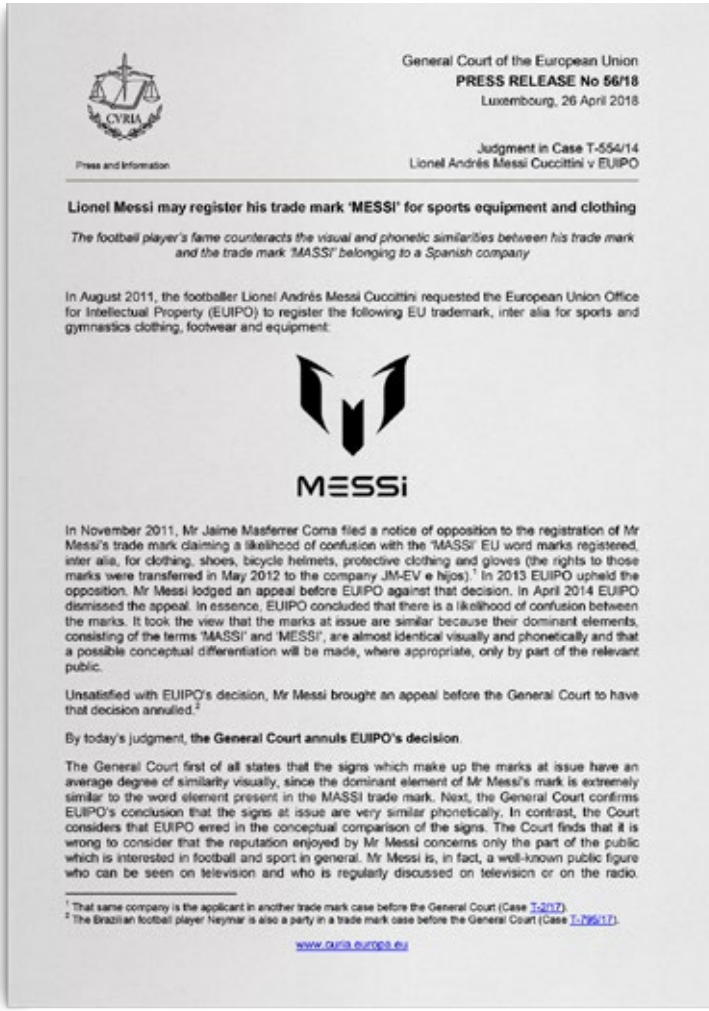
[1] Directive 2004/38/ EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the EU and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77; corrigenda OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34).

www.curia.europa.eu

2 | Judgment of 5 June 2018, *Coman and Others*, C-673/16, EU:C:2018:385.

3 | Judgment of 26 April 2018, *Messi Cuccittini* v *EUIPO – J-M.-E.V. e hijos (MESSI)*, T-554/14, EU:T:2018:230.

The substance of the information must not be altered in any way, but the message should be simplified and made comprehensible even for readers who are not law graduates.



General Court of the European Union
PRESS RELEASE No 56/18
Luxembourg, 26 April 2018

Press and Information

Judgment in Case T-554/14
Lionel Andrés Messi Cuccittini v EUIPO

Lionel Messi may register his trade mark 'MESSI' for sports equipment and clothing

The football player's fame counteracts the visual and phonetic similarities between his trade mark and the trade mark 'MASSI' belonging to a Spanish company

In August 2011, the footballer Lionel Andrés Messi Cuccittini requested the European Union Office for Intellectual Property (EUIPO) to register the following EU trademark, inter alia for sports and gymnastics clothing, footwear and equipment:

MESSI

In November 2011, Mr Jaime Masferrer Coma filed a notice of opposition to the registration of Mr Messi's trade mark claiming a likelihood of confusion with the 'MASSI' EU word marks registered, inter alia, for clothing, shoes, bicycle helmets, protective clothing and gloves (the rights to those marks were transferred in May 2012 to the company JM-EV e hijos).[1] In 2013 EUIPO upheld the opposition. Mr Messi lodged an appeal before EUIPO against that decision. In April 2014 EUIPO dismissed the appeal. In essence, EUIPO concluded that there is a likelihood of confusion between the marks. It took the view that the marks at issue are similar because their dominant elements, consisting of the terms 'MASSI' and 'MESSI', are almost identical visually and phonetically and that a possible conceptual differentiation will be made, where appropriate, only by part of the relevant public.

Unsatisfied with EUIPO's decision, Mr Messi brought an appeal before the General Court to have that decision annulled.[2]

By today's judgment, **the General Court annuls EUIPO's decision**.

The General Court first of all states that the signs which make up the marks at issue have an average degree of similarity visually, since the dominant element of Mr Messi's mark is extremely similar to the word element present in the MASSI trade mark. Next, the General Court confirms EUIPO's conclusion that the signs at issue are very similar phonetically. In contrast, the Court considers that EUIPO erred in the conceptual comparison of the signs. The Court finds that it is wrong to consider that the reputation enjoyed by Mr Messi concerns only the part of the public which is interested in football and sport in general. Mr Messi is, in fact, a well-known public figure who can be seen on television and who is regularly discussed on television or on the radio.

[1] That same company is the applicant in another trade mark case before the General Court (Case T-2/17).
[2] The Brazilian football player Neymar is also a party in a trade mark case before the General Court (Case T-796/17).

www.curia.europa.eu

Judgment of 26 April 2018, *Messi*, T-554-14

Judgment keywords

- EU trade mark – Opposition proceedings – Application for EU figurative mark MESSI
- Earlier EU word marks MASSI
- Relative ground for refusal – Likelihood of confusion – Article 8(1), under b), of Regulation (EC) No 207/2009 [now Article 8(1)(b) of Regulation (EU) 2017/1001]

The cases in which a press release is considered to be necessary are the cases where the judgment has an impact on a large number of people or where the subject matter of the case is of interest to a wide public.

Observations

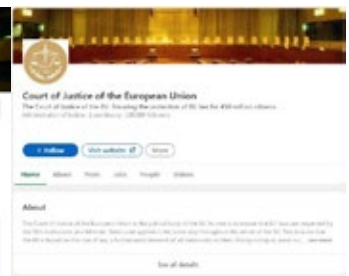
Recently the Presidents of the Supreme Courts of the Member States shared the following observations:

- Most of them have a special press office or a communication structure responsible for reporting on judgments and for interacting with the media. In Albania, Estonia, France, Latvia, Montenegro and Spain there is also a special legal information department or a research department, responsible for drafting press releases, providing summaries of decisions in newsletters and analysis of case-law of the CJEU, the European Court of Human Rights and the national courts. Croatia, Cyprus, Ireland, Malta and Sweden reported that they do not have a special department for issuing press releases or summaries of judgments. In Ireland, this is done by judicial assistants, while in Sweden it is done by the court.
- Press conferences are quite rarely used to comment on judgments. In some Member States this instrument is used in particularly high-profile cases, to explain the decision and its implications in cases where there is a great deal of media or public interest.
- In the Member States, a spokesperson can be a judge, the head of the communication department, a press officer or an advocate general.
- It is not common practice in Member States for judges to comment on judgments, although no restrictions are imposed on them. Hence, ordinarily, judges do not give comments. The judgment should speak for itself. Subsequent comments might be interpreted as a supplement to the reasoning of the judgment. In some Member States, if a judge were to comment on a judgment, this may result in disciplinary proceedings.

CJEU – Social media

Nowadays no one can deny the role of social media not only in the daily life of people, but also of an institution.

twitter	mastodon	LinkedIn
@EUCourtPress (in English) @CourUEPresse (in French)	@Curia	Court of Justice of the European Union
Activity of the Court and important events	Activity of the Court and important events	Press releases, research notes, summaries, Reports for the Hearing, job offers, events



The CJEU has two Twitter accounts – **@EUCourtPress** (EN) and **@CourUEPresse** (FR) – where it posts the latest information on the activity of the Court and important events. The audience is broad and consists mainly of journalists, but also of legal professionals, law students or regular citizens interested in legal topics.

Mastodon is a free and open-source social network made up of independent servers organised around specific themes, topics, or interests, similar to Twitter. The content published by the Court on Mastodon is the same as that published on Twitter.

The Presidents of the Supreme Courts have recently shared the information that not all Supreme Courts of the Member States consider social media platforms essential for sharing information about the court or the court system. About 80% of the Supreme Courts use one or more social media platforms for sharing information about judgments, press releases or the activity of the courts. This concerns Twitter, Facebook, LinkedIn, YouTube and Instagram.

On its YouTube channel, the Court has the complete series of animations about its activity, all of which are accessible in 23 official languages of the European Union, videos of conferences, a film dedicated to the 30 years anniversary of the General Court, etc.

YouTube	facebook
Court of Justice of the European Union Animations, videos	Cour de justice de l'UE – Journée Portes Ouvertes Event page – Open Day
	

The Court does not have a Facebook account of its own, but it uses Facebook event pages to promote the Open Day event organised every year: useful information, registrations, videos of volunteers, sneak peaks of the event, etc. The LinkedIn page is a source of information for legal developments at the Court, as well as a means of learning about the latest job opportunities and traineeships. The audience consists mainly of academics and legal professionals.

A very delicate topic, at least in some Member States, is whether judges as individuals should be active on social media? If yes, to what extent?

Other media tools

- Videos about the functioning of a court (system)
- Presentations on the website of a court
- Virtual tour of a court (building)
- Discussion events in open access

Within the Network of the Presidents of the Supreme Courts of the Member States, respondents pointed out some other tools Supreme Courts use with the aim of bringing the judiciary closer to citizens. Media presence tends to be the main media-related tool in this respect. These are some of the examples that were mentioned:

- Giving interviews (by court presidents) and presentations on various topics at conferences;
- Participating in radio programmes or round-table discussions;
- Appearing in explanatory videos addressed to the public.

Remote and face-to-face visits

Remote and face-to-face visits

- Court's website
- Remote / Face-to-face visits
- Open Day annual event (guided/ individual tours, photo booth, kids' corner)
- Group visits

The CJEU literally opens its doors to the general public annually for its Open Day. The purpose is to let people discover the buildings of the Court and to discover its mission and how it works. The participants follow a specially tailored programme, which is offered in several languages, aimed to explain the progress of a case, from its introduction to the delivery of the judgment. Apart from that, the numerous works of art, donated by or on loan from the Member States to the institution, can be admired by the public.

It is also possible to visit the Court at any other time of the year, but the visit must be carefully scheduled and prepared in advance. In this respect, the Visits Service offers two types of activities: visits and seminars. Both activities are available in face-to-face and virtual formats. Interested groups can register via an application called 'My visit'.

Overall around 15 000 people visit the CJEU every year.

Students' remote visits

- Secondary school students in the Member States
- Approximately 2.5 hours
- Virtual visit of the Court's premises
- Online meeting with a Judge/ Advocate General/legal secretary
- Two films about the CJEU followed by question and answer sessions

In the framework of a relatively recent programme, remote visits are open to high schools or secondary schools in the Member States. Each visit involves several schools from the same Member State and lasts approximately two and a half hours. It consists of interactive elements, such as a presentation on judicial activities and one or more specific cases by a legal secretary, a virtual guided visit of the institution's buildings and a meeting with a Judge or an Advocate General. Two films made especially for this programme are also presented, followed by 'questions and answers' sessions. So, although is a virtual visit, the visitors are not left alone. They are welcomed and accompanied throughout the visit by a host and they have the opportunity to interact with various speakers. In order to facilitate access of students from all Member States, the entire visit is conducted in the language chosen by the participants and the videos are subtitled.

Judicial dialogue

Ultimately, the topic of this workshop 'How should Courts communicate what they do' is about the way courts communicate about the fulfilment of their judicial tasks. In this respect, judicial dialogue between the CJEU and Member States' Courts is also an instrument to discuss this communication and to share best practices.

A relevant perspective in this debate could be the similarities and differences between the tasks of the CJEU and the Member State Courts as stated in Article 19(1) TEU and the importance of the preliminary ruling mechanism provided by Article 267 TFEU.

Article 19 TEU and Article 267 TFEU

- 'The CJEU (...) shall ensure that in the interpretation and application of the Treaties the law is observed.'
- 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.'

Extrajudicial dialogue

- The CJEU conferences, seminars, forums etc.
- Judicial Network of the European Union
- Network of the Presidents of Supreme Judicial Courts of the EU

Dialogue between judges must go beyond their formal cooperation through the reference for a preliminary ruling mechanism provided by Article 267 of TFEU. Face-to-face meetings, discussions and debates enhance cooperation and mutual trust.

Every year a forum of judges is organised by the CJEU and takes place in its premises. Judges from the supreme and constitutional courts on one hand, and judges from the other ordinary courts of all Member States on the other hand are alternately invited to take part in this prestigious event.

The Judicial network of the European Union was created on the initiative of the President of the CJEU and the Presidents of the Constitutional and Supreme Courts of the Member States on the occasion of the Meeting of Judges organised by the CJEU on 27 March 2017 to celebrate the 60th anniversary of the signing of the Treaties of Rome.

The Presidents of the Supreme Judicial Courts of the Member States of the European Union decided to form an Association whose Constituent Assembly was held on 10 March at the French *Cour de cassation* with the financial support of the European Commission (AGIS programme). Please refer to the Network of the Presidents of the Supreme Judicial Court of the European Union. [4] This Network is a network of Supreme Courts, not of Constitutional Courts. The CECC is the network of European Constitutional Courts, but this network is not limited to EU Member States; please refer to Conference of European Constitutional Courts – CECC 2017–2020.

4 | network-presidents.eu

Conclusion

'Justice should not only be done, but should manifestly and undoubtedly be seen to be done.'

This is actually the original phrase, used by Lord Chief Justice Hewart, in *R* v *Sussex Justices, ex parte McCarthy*. [5]

Even though this well-known quotation is normally used in relation to the impartiality of the judge and the appearance of impartiality, it is also suitable as a conclusion for this workshop.

The fact that Courts communicate what they do in so many different ways increases the transparency of judicial activity as a public service, as well as the level of trust in our national courts and EU courts.

'Justice should not only be done,
but should be seen to be done'

5 | Judgment of High Court of Justice, *R* v *Sussex Justices, ex parte McCarthy* ([1924] 1 KB 256, [1923] All ER Rep 233).

Troisième séance de travail : « Le Tribunal et les conflits en Europe : développements récents en matière de mesures restrictives contre la Biélorussie et la Russie »

M. Marc van der Woude,
Président du Tribunal

Introductory speech to the third working session by Mr Marc van der Woude, President of the General Court

I would like to thank you for coming to Luxembourg in the context of the 70th anniversary of the European Court of Justice.

As discussed in the context of this Forum of Magistrates, the project of partial transfer of the competencies enshrined within Article 267 TFEU to the General Court is under discussion, which means that the General Court might be ruling on preliminary reference proceedings in not too distant future. This is not, however, the theme of our gathering today. At this stage, we are still an administrative court, in fact the administrative judge of the EU. This implies that our activity mostly reflects what the Union does. If you have a look at the actions of the Institutions, agencies and organs, they will, in one way or another, end up on our desk.

For example, in 2010, the financial crisis led to a surge of state aid cases and thereafter a huge package of legislations – regulations of financial services and the banking sector – which created a new stream of cases. That is now a significant part of our activity. So in one way or another, for every Union action, there is a case at the General Court.

Last year, when we had the Forum of Magistrates, the hot topic was COVID and, unfortunately, today there is an altogether different issue before us. That is of course the issue of the conflict in Ukraine and the problems in Belarus. Fortunately, we are a peace institution, as was mentioned also by one of our German colleagues this morning. Our very purpose is to serve peace. However, even if we do not wage war, the Union cannot let things happen. It reacts, inter alia, by adopting sanctions. Such measures may be taken against those states that do not respect the principles upon which our Union is based. Even so, as a community of law, persons and entities targeted by these sanctions should benefit from effective judicial review against the sanctions imposed on them.

One first example that we can take is Myanmar, as it gives an idea of the type of action that has been taken by the Union. These are low-ranging actions, which essentially have a limited scope and therefore aim to have a limited effect on the population affected by them. As a means to describe them: the situation in Myanmar is an example of sanctions that aim to affect a limited amount of the population and not the country as a whole. This does not apply

to other countries, where there is an entirely different magnitude such as the Belarussian situation, where there is a whole list of sanctions taken.

It is these types of sanctions that we will address today, with the help of two specialists who will provide in-depth analysis of the matter.

My colleague judge Mirela Stancu is specialised in that area of EU law, and has vast experience with the sanctions at hand. She is thus able to attest that it was in 2014 that the sanctions against Belarus started. Since then, they have increased considerably, as you may have noticed. An illustrative example of that trend can be observed with the sanctions being imposed on Russia. This is an all-encompassing list of sanctions, which accounts for a significant part of the work of my colleague Roberto Mastroianni and his team, who are essentially in the First Chamber.

Now the idea is to have a chat amongst us, and hopefully an informed one, which will provide insight in the type of work that we are doing and the difficulties we face. This session will consist of four parts: identifying what the sanctions regimes are, both in Belarus and in Russia, understanding what kind of cases we have in front of our Court, identifying how these cases come to us, and what is the type of judicial control we exercise once they are here. These shall all be illustrated with some examples from our recent case-law.

Troisième séance de travail : « Le Tribunal et les conflits en Europe : développements récents en matière de mesures restrictives contre la Biélorussie et la Russie », présidée par M. Marc van der Woude (au milieu), Président du Tribunal, en présence de M. Roberto Mastroianni (à gauche) et M[me] Mirela Stancu (à droite), juges au Tribunal

M^me^ Mirela Stancu,
juge au Tribunal

Intervention de M^me^ Mirela Stancu et M. Roberto Mastroianni, Juges au Tribunal *

Développements récents en matière de mesures restrictives prises en raison de la situation en Biélorussie et en Russie

I. Les régimes contre ces deux pays

A. Brève description des deux régimes de sanctions

1. Les objectifs poursuivis

En Biélorussie, les mesures restrictives [1] ont été adoptées à compter de l'année 2004, en raison de la détérioration de la situation, dans ce pays, en ce qui concerne la démocratie, l'État de droit et les droits de l'homme.

* | M^me^ la juge Mirela Stancu s'exprime en langue française, M. le juge Roberto Mastroianni en langue anglaise.

1 | Dans le cadre de la politique étrangère et de sécurité commune (PESC), l'article 29 du traité sur l'Union européenne (traité UE) confère au Conseil de l'Union européenne le droit d'adopter une décision afin d'imposer des mesures restrictives, également dénommées « sanctions », à l'encontre de pays tiers, d'entités non étatiques ou d'individus.

Actuellement, les mesures restrictives sont adoptées conformément à la décision 2012/642/PESC concernant des mesures restrictives en raison de la situation en Biélorussie et de l'implication de la Biélorussie dans l'agression russe contre l'Ukraine [2].

Les dernières vagues de mesures restrictives ont été adoptées depuis octobre 2020 dans le contexte des élections présidentielles du 9 août 2020, qui ont été jugées incompatibles avec les normes internationales et entachées par la répression de candidats indépendants et une répression brutale de manifestants pacifiques à la suite du scrutin, du détournement du vol Ryanair 4978, le 23 mai 2021, de l'instrumentalisation de la migration à des fins politiques en 2021 et de l'implication de la Biélorussie dans l'invasion militaire de l'Ukraine en février 2022.

The general aim of the sanctions recently adopted as a response to the military operations in Ukraine is to exert all possible pressure on the Russian Federation and thwart its ability to continue with what the Council qualifies as an act of aggression in patent violation of international law. In practice, such sanctions must fit within the framework of the wider policy of the European Union, as developed since 2014, concerning the situation in Ukraine.

Within this general framework, it is possible to distinguish **three main categories of measures**:

a. Restrictive measures adopted in view of Russia's actions destabilising the situation in Ukraine (Decision 2014/512/CFSP [3] and Regulation (EU) No 833/2014 [4]);
b. Restrictive measures in respect of actions undermining and threatening the territorial integrity, sovereignty and independence of Ukraine (Decision 2014/145/CFSP [5] and Regulations (EU) No 269/2014 [6]);

2 | Décision 2012/642/PESC du Conseil du 15 octobre 2012 concernant des mesures restrictives à l'encontre de la Biélorussie (JO 2012, L 285, p. 1), telle que modifiée par la décision d'exécution (PESC) 2022/1243 du Conseil du 18 juillet 2022 concernant des mesures restrictives en raison de la situation en Biélorussie et de l'implication de la Biélorussie dans l'agression russe contre l'Ukraine (JO 2022, L 190, p. 139).

3 | Council Decision 2014/512/CFSP of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ 2014 L 229, p. 13).

4 | Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ 2014 L 229, p. 1).

5 | Council Decision 2014/145/CFSP of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2014 L 78, p. 16).

6 | Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2014 L 78, p. 6).

c. Restrictive measures in response to the illegal annexation of the Autonomous Republic of Crimea and the city of Sevastopol (Decision 2014/386/CFSP [7] and Council Regulation (EU) No 692/2014 [8]).

Following the military attack on Ukraine in February 2022, the Council adopted **eight 'packages of sanctions'** (the latest dated 6 October 2022 [9]) that do not have an ad hoc legal basis but have been introduced by progressively modifying the basic acts of 2014. In the same political context, the Council has also adopted sanctions against Belarus, in response to its involvement in the invasion of Ukraine, and against Iran, in relation to the use of Iranian drones during Russian military operations.

2. Catégories et types de sanctions

Deux types de mesures restrictives ont été adoptées à l'encontre de la Biélorussie, à savoir, les mesures générales et les mesures individuelles.

Les premières visent des restrictions liées au commerce de certains biens [interdictions d'exportation – armements ; équipements, technologies ou logiciels principalement destinés à être utilisés pour la surveillance ou l'interception d'internet et des communications téléphoniques via des réseaux mobiles ou fixes ; interdictions à l'importation – combustibles minéraux, matières bitumineuses et produits hydrocarbures gazeux en provenance de Biélorussie, produits à base de chlorure de potassium (potasse), produits de bois, produits de ciment, produits sidérurgiques et produits en caoutchouc] ou l'interdiction à tout aéronef exploité par des transporteurs aériens biélorusses, y compris en tant que transporteur contractuel, d'atterrir sur le territoire d'un État membre, d'en décoller ou de le survoler.

7 | Council Decision 2014/386/CFSP of 23 June 2014 concerning restrictions on goods originating in Crimea or Sevastopol, in response to the illegal annexation of Crimea and Sevastopol (OJ 2014 L 183, p. 70).

8 | Council Regulation (EU) No 692/2014 of 23 June 2014 concerning restrictions on the import into the Union of goods originating in Crimea or Sevastopol, in response to the illegal annexation of Crimea and Sevastopol (OJ 2014 L 183, p. 9).

9 | Council Regulations (EU) of 6 October 2022 and Council Decisions (CFSP) of 6 October 2022 (OJ 2022 L 259I, p. 1).

Les secondes mesures consistent en l'interdiction d'entrer ou de passer en transit sur le territoire de l'Union, ainsi que le gel des fonds et des avoirs.

In the case of measures against Russia, it is possible to identify **three main categories** that correspond to the powers attributed to the Council by Article 215 TFEU, as well as several types of sanctions.

a) Individual sanctions for natural or legal persons

The main types of sanctions used against Russia are the freezing of assets and the prohibition of entering or transiting the territory of the European Union.

b) Economic and financial sanctions

These types of sanctions include inter alia: a ban on accession to the SWIFT system; a ban on European entities from granting credit and loans to the Central Bank of Russia; a ban on buying, selling, and providing investment, issue of services, or any other trading in securities and money market instruments ('financial transactions'); a series of bans on investing in the Russian energy sector and a ban on awarding any procurement or concession contract or on continuing the performance thereof.

c) Trade restrictions

The European Union has imposed the following bans: a ban on European entities selling, supplying, transferring or exporting cash to Russia; a ban on importing or transferring crude oil or petroleum products; a ban on selling, supplying, transferring, or exporting firearms or parts thereof, as well as essential components and ammunition, to persons in Russia or for use in Russia. It is also prohibited to sell, supply, transfer or export goods that could contain chemicals or agents, or goods that could be used for the purpose of inflicting capital punishment, torture or other cruel, inhuman or degrading treatment.

B. Différences en termes de critères et de problématiques

Dans le cas de la Biélorussie, les mesures restrictives individuelles peuvent être adoptées en application de l'un des trois critères généraux prévus par la décision 2012/642. Ainsi, peuvent être visés les personnes, entités ou organismes :

- responsables de violations graves des droits de l'homme ou de la répression à l'égard de la société civile et de l'opposition démocratique, ou dont les activités nuisent gravement, d'une autre manière, à la démocratie ou à l'État de droit en Biélorussie,
- qui soutiennent ou tirent profit du régime du président Lukashenko,
- qui organisent les activités du régime du président Lukashenko facilitant le franchissement illégal des frontières extérieures de l'Union ou le transfert de marchandises interdites et le transfert illégal de marchandises faisant l'objet de restrictions, y compris des marchandises dangereuses, sur le territoire d'un État membre ou qui contribuent à ces activités.

Il est important de mentionner que la définition de critères généraux a évolué depuis 2004. En effet, en réponse au non-respect persistant des droits de l'homme, de la démocratie et de l'État de droit, l'Union européenne a élargi le régime de sanctions adoptées à l'encontre de la Biélorussie. Ainsi, si en 2004, les mesures restrictives (interdiction de voyage) visaient exclusivement certains fonctionnaires (quatre personnes) considérés comme étant des acteurs clés dans les disparitions de quatre personnalités en Biélorussie en 1999–2000, et comme responsables de l'entrave au bon fonctionnement de la justice qui s'en est suivie, à présent, 195 personnes et 35 entités sont inscrites sur les annexes de la décision 2012/642 et du règlement 765/2006 [10]. En outre, le régime de mesures restrictives a été élargi aux particuliers comme les hommes d'affaires et les journalistes, les dirigeants des entreprises publiques et aux entreprises et organismes publics ou privés. On retrouve également des parlementaires et des recteurs d'université parmi les personnes visées par les mesures restrictives actuelles.

10 | Règlement (CE) nº765/2006 du Conseil du 18 mai 2006 concernant des mesures restrictives à l'encontre du président Lukashenko et de certains fonctionnaires de Biélorussie (JO 2006, L 134, p. 1), tel que modifié par le règlement d'exécution (UE) 2022/1231 du Conseil du 18 juillet 2022 (JO 2022, L 190, p. 5).

The fact that the measures against Russia concern an unprecedented and exceptional situation of armed conflict has two important consequences.

The first concerns the extent of those measures, which are designed, according to the intention of the Council, to weaken Russia's economic base, depriving it of critical technologies and markets and significantly curtailing its ability to wage war; therefore, the measures in question cover a very wide range of activities, some of which are very specific, such as the trafficking of weapons or the diffusion of war propaganda by media outlets. Also specific to the situation is the case of a paramilitary organisation or of an armed separatist group active in the Donbass region. There are also measures concerning visas: in February 2022, the Council decided that Russian diplomats, other Russian officials and businesspersons may no longer benefit from visa facilitation provisions, which allow privileged access to the European Union [11]. In addition, in September 2022, the Council adopted a decision fully suspending the visa facilitation agreement between the European Union and Russia [12]. Consequently, the general rules of the Visa Code apply to Russian citizens.

The second important consequence relates to the number of individuals and entities involved, which, as we will see later on, is very large in comparison to the restrictive measures adopted in other international crisis scenarios. The list of sanctioned persons and entities is subject to periodic scrutiny, and was last updated by the Council at the end of July 2022.

11 | Council Decision (EU) 2022/333 of 25 February 2022 on the partial suspension of the application of the Agreement between the European Community and the Russian Federation on the facilitation of the issuance of visas to the citizens of the European Union and the Russian Federation (OJ 2022 L 54, p. 1).

12 | Council Decision (EU) 2022/1500 of 9 September 2022 on the suspension in whole of the application of the Agreement between the European Community and the Russian Federation on the facilitation of the issuance of visas to the citizens of the European Union and the Russian Federation (OJ 2022 L 234 I, p. 1).

II. Les recours portés devant le Tribunal

En tout, plus d'une centaine d'affaires de mesures restrictives sont pendantes devant le Tribunal.

A. Quelques chiffres

Si l'on parle des mesures adoptées à l'encontre de la Biélorussie à partir de 2020, on compte 30 affaires introduites entre le 16 février 2021 et le 30 août 2022 qui sont encore pendantes devant le Tribunal. Sur ces 30 affaires, 2 concernent les mesures générales et 28 des mesures individuelles.

The number of Russian cases currently pending before the General Court is around 60, that is more than half of the cases concerning the lawfulness of restrictive measures before the General Court. To date, only one of these cases has been the subject of a final decision by the General Court, namely the *RT France* case [13], decided on 27 July 2022 and currently pending before the Court of Justice following an appeal lodged by the broadcasting company [14]. I will analyse this judgment in more detail later on. If we consider the total number of persons and entities directly targeted by the restrictive measures (1 241 persons and 118 entities), and the fact that some measures are 'general', that they are applicable to an indistinct number of subjects (for instance, trade measures prohibiting exports to Russia, or measures, as in the case of Regulation 2022/334 [15] prohibiting the activities in the Union of any Russian-registered aircraft, or of any non-Russian-registered aircraft which is owned or chartered, or otherwise controlled by any Russian natural or legal person, entity or body), the number of cases is so far relatively low.

13 | Judgment of 27 July 2022, *RT France* v *Council*, T-125/22, EU:T:2022:483.

14 | Pending case, *RT France* v *Council*, C-620/22 P.

15 | Council Regulation (EU) 2022/334 of 28 February 2022 amending Council Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ 2022 L 57, p. 1).

B. Typologie des recours

1. Des entreprises et des particuliers, auteurs de l'introduction de ces recours

In the majority of Russian cases, it is an individual bringing such actions before the General Court, but this is not always the case. Regarding **individuals**, it is interesting to note that some cases concern persons who object to being labelled as 'oligarchs' and rely on their distance from the ruling class of the Russian Federation. Regarding **legal entities**, I have already mentioned the specific case [16] of a broadcasting company whose activity was suspended in March 2022 because of its alleged propaganda in favour of the Russian intervention in Ukraine. In a similar case which is still pending (*A2B Connect and Others* v *Council* [17]), the applicants are internet providers that, although they are not listed, contest the impact of the same regulation on their business. Regarding measures imposing economic and financial sanctions, actions have been brought, for instance, by a Russian investment fund [18], a Russian bank (*Sber* v *Council and Others* [19]) and a licensed depositary that provides recordkeeping and safekeeping services for securities and acts as the central depositary using the SWIFT technology (*NSD* v *Council* [20]).

Sur les 30 affaires ayant pour objet des recours contre les mesures restrictives adoptées à l'encontre de la Biélorussie, 15 ont été introduites par des entreprises publiques ou privées et 15 par des particuliers.

16 | Judgment of 27 July 2022, *RT France* v *Council*, T-125/22, EU:T:2022:483.

17 | Pending case, *A2B Connect and Others* v *Council*, T-307/22.

18 | Pending case, *Russian Direct Investment Fund* v *Council*, T-235/22.

19 | Pending cases, *Sber* v *Council and Others*, T-523/22 and T-524/22.

20 | Pending case, *NSD* v *Council*, T-494/22.

2. Nationalité des particuliers

In the vast majority of cases, individuals and entities involved have Russian nationality or are registered in Russia respectively, but in some cases applicants who are persons have a double nationality. For instance, there is a pending case (*Islentyeva* v *Council* [21]) involving a Russian national, who also has European citizenship, challenging Regulation 2022/334 [22] in brief, the applicant submits that the restrictive measures prohibiting the use of a private pilot licence by any European citizen who is also a Russian national are disproportionate, since they are not necessary in the light of the objectives pursued. In another case, concerning an application lodged by a Russian businessman, his second, EU nationality was withdrawn by the Member State involved following the adoption of the measures in question (*OT* v *Council* [23]).

Dans le cas des affaires de mesures restrictives concernant la Biélorussie, il est intéressant de noter que parmi les hommes d'affaires, certains ont d'autres nationalités – russe ou serbe – et qu'une compagnie aérienne syrienne et un service de passeports et de visas situé à Istanbul (Turquie) ont également fait l'objet de mesures restrictives en raison de la situation en Biélorussie.

3. Demande d'anonymat des particuliers

Jusqu'à présent, dans les affaires de mesures restrictives concernant la Biélorussie, aucun requérant n'a demandé l'anonymat.

Concerning Russian cases, in general, it is worth recalling that, according to Article 66 of its Rules of Procedure, where a request for anonymity has been lodged together with a reasoned separate application or *ex officio*, the General Court may adopt a decision balancing, on the one hand, the reasons put forward by the applicant (for instance, a material risk to his or her life or to his or her family if his or her identity is disclosed), and on the other hand, the requirement that judicial activity is to be carried out in a fully transparent manner and the

21 | Pending case, *Islentyeva* v *Council*, T-233/22.

22 | Council Regulation (EU) 2022/334 of 28 February 2022 amending Council Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ 2022 L 57, p. 1).

23 | Pending case, O*T* v *Council*, T-193/22.

requirement that the right of the general public to be informed is sufficiently protected. The latter requirement is particularly important in situations, such as those currently at stake, of extremely high public interest. In practice, of the various Russian disputes currently pending, it is only in a few cases that the applicants concerned have requested the omission of their names, addresses or other information, enabling them to be identified; therefore I would not consider anonymity as something frequently requested in the Russian cases. To date, the General Court has upheld the request for anonymity in three cases: both in the final judgment, and in the publication of the notice of the case in the Official Journal, the name of the party concerned has been replaced by two letters and other information has been omitted, as in pending case *QF* v *Council* [24].

4. Des problématiques récurrentes ou des arguments types

Effectivement, dans le cas des affaires relatives aux mesures restrictives à l'encontre de la Biélorussie, comme, en général, dans ce type d'affaires, on peut déceler au moins un moyen récurrent : celui tiré de l'erreur d'appréciation. Dans la plupart des affaires, la violation de l'obligation de motivation et celle du principe de proportionnalité sont souvent invoquées.

The recurring arguments in the Russian cases concern both procedural and substantive issues. Regarding the former, applicants often invoke an infringement of the right to good administration [Article 41 of the Charter of Fundamental Rights of the European Union ('the Charter')], since the Council did not communicate in advance the reasons for the listing of the person or entity concerned and/or did not proceed with a hearing of the subject in question. Applicants also allege infringement of the obligation to state reasons, as imposed by Article 296 TFEU and Article 41 of the Charter. More precisely, they claim that the Council failed to provide specific and concrete reasons for the contested measures, for instance where the listing of an applicant allegedly has an insufficient factual basis.

The obligation to state reasons must be distinguished from the issue of whether the reasoning is ill founded, which concerns the substantive legality of the measure in question. Here, the applicants in the Russian cases – as is often the case in litigation concerning restrictive measures – argue that the Council committed a (manifest) error of assessment, since

24 | Pending case, *QF* v *Council*, T-386/22.

their inclusion in the list is (allegedly) unsubstantiated, factually incorrect or unfounded. They often claim that they are not involved in any decisions of the Russian Government. In addition, applicants allege a breach of the principle of proportionality (since, in their view, the measures taken are neither appropriate nor necessary for the aims pursued by the Council), or of the principles of equality and non-discrimination.

Moreover, on several occasions the applicants also allege infringement of the substantial part of the Charter in order to contest the legality of individual restrictive measures such as the freezing of assets and economic resources. The articles of the Charter most often invoked in this context are Article 17, concerning right to property, and Article 16, concerning the freedom to conduct a business.

5. Particularité de ces affaires vis-à-vis des autres affaires de mesures restrictives

Dans le cas de la Biélorussie, on peut remarquer une approche particulière en ce qui concerne la situation des hommes d'affaires. En effet, contrairement à d'autres régimes de mesures restrictives, notamment celui à l'encontre de la Syrie, la qualité d'homme d'affaires ne justifie pas en soi l'inscription sur les listes des personnes visées par les mesures restrictives. Il n'y a pas de présomption de soutien au régime. Il faut encore la preuve que la personne visée soutienne le régime du président Lukashenko ou en tire profit. Toutefois, dans sa jurisprudence, le Tribunal a admis que le fait d'être un homme d'affaires important puisse justifier que la personne concernée apporte un soutien au régime en présence d'autres éléments pertinents [25]. En outre, il a déjà été considéré que certaines activités économiques d'une ampleur significative en Biélorussie ne sont pas possibles sans l'aval du régime du président dudit pays [26].

In the Russian cases the questions at stake are not very different from those at stake for other restrictive measures adopted by the Council. In the vast majority of cases, the main issue is the legality of inclusion in a list of persons that the Council considers directly or indirectly involved with the aggression of Ukraine and the consequent freezing of the assets

25 | Arrêt du 12 mai 2015, Ternavsky/Conseil, T-163/12, non publié, EU:T:2015:271, points 102 à 126.

26 | Arrêt du 27 septembre 2017, BelTechExport/Conseil, T-765/15, non publié, EU:T:2017:669, point 93.

of the person listed. Nevertheless, the wide range of the measures and activities involved is unprecedented, and this has resulted in the General Court dealing with arguments and pleas that are relatively new or have not previously been sufficiently addressed by the Court, such as the conformity of the measures with freedom of expression as protected by Article 11 of the Charter, or the specific situations of persons who are related (wife, children, and so on) to oligarchs or high-ranking politicians and are thus accused, with them, of involvement in actions undermining and threatening the territorial integrity, sovereignty and independence of Ukraine (*Prigozhina* v *Council* [27]).

C. Capacité d'intervention du Tribunal en temps utile en cas de prise de mesures pour des durées courtes de six mois, renouvelable

Dans le cas de la Biélorussie, les mesures restrictives sont prises pour une durée d'un an. Toutefois, même dans ces conditions, la durée de la procédure ne permet pas de clôturer une affaire avant la prochaine prolongation des mesures contestées. Dans la plupart des affaires, les requérants adaptent leurs conclusions en cours d'instance. Il faut mentionner également l'impact de la connexion étroite entre plusieurs affaires sur la durée de la procédure. En effet, il est fréquent que le ou les propriétaires d'une entreprise et l'entreprise elle-même soient, en raison du profit tiré par cette entreprise du régime du président Lukashenko, inscrits sur les listes et qu'ils introduisent des recours devant le Tribunal.

In the case of restrictive measures against Russia, the average duration of the sanctions is six months, after which the measures may be renewed. Keeping up with the six-month time limit is a real challenge for the General Court; almost a *mission impossible*. Mission exceptionally accomplished in the *RT France* case [28], decided by the Court sitting as the Grand Chamber and following an expedited procedure decided on of its own motion. The duration of the procedure, four months and 19 days, can be considered a record given the complexity of the legal issues at stake, the number of the interveners in the proceedings

27 | Pending case, *Prigozhina* v *Council*, T-212/22.

28 | Judgment of 27 July 2022, *RT France* v *Council*, T-125/22, EU:T:2022:483.

(six Member States, the Commission and the High Representative of the Union for Foreign Affairs and Security Policy) and the composition of the Court.

In any case, in the course of the proceedings, the parties may modify their heads of claim to extend their application or appeal to include the new measure. In six of the new Russian cases [29], the applicants also submitted an application for interim measures, requesting the suspension of the contested measure, but to date, the President of the General Court has not granted any of these requests. More rarely, applicants request an expedited procedure, but the Grand Chamber has also not accepted this.

III. Le rôle du juge de l'Union

A. Une vérification de l'existence d'une base factuelle suffisamment solide des motifs d'inscription

Dans les affaires biélorusses, comme dans le cas de toutes les affaires de mesures restrictives individuelles, les actes par lesquels des mesures restrictives individuelles sont adoptées ou maintenues sont soumis à un contrôle entier du juge. Selon la jurisprudence, l'effectivité de ce contrôle, garanti par l'article 47 de la charte des droits fondamentaux de l'Union européenne, exige notamment que le juge de l'Union s'assure que la décision par laquelle des mesures restrictives individuelles ont été adoptées ou maintenues, qui revêt une portée individuelle pour la personne, le groupe ou l'entité visé, repose sur une base factuelle suffisamment solide. Cela implique une vérification des faits allégués dans l'exposé des motifs qui sous-tend ladite décision, de sorte que le contrôle juridictionnel ne soit pas limité à l'appréciation de la vraisemblance abstraite des motifs invoqués, mais porte également sur le point de savoir si ces motifs – ou, à tout le moins, l'un d'entre eux – sont considérés comme suffisants en soi pour fonder cette même décision.

29 | See orders of 30 May 2022, *OT* v *Council*, T-193/22 R, not published, EU:T:2022:307; of 21 June 2022, *Ismailova* v *Council*, T-234/22 R, not published, EU:T:2022:377; of 21 June 2022, *Narzieva* v *Council*, T-238/22 R, not published, EU:T:2022:378; of 27 June 2022, *Usmanov* v *Council*, T-237/22 R, not published, EU:T:2022:401; see also pending cases, *Mazepin* v *Council*, T-743/22 R; *Cogebi and Cogebi* v *Council*, T-782/22 R.

I agree in full with the statements made by Judge Stancu. In litigation concerning the restrictive measures taken in respect of the situation in **Ukraine before February 2022**, it is not uncommon to find judgments where the General Court has held that the decision to list or to maintain the listing of a given person was not taken on a 'sufficiently solid factual basis', and has therefore annulled the measure in so far as it included the applicant in the list (this is the case for instance with the *Rotenberg* judgment [30]). In *RT France* [31], the only judgment issued so far in the new wave of cases, the Court conducted an in-depth analysis of the evidence, adduced by the Council, of propaganda in favour of the aggression and considered that evidence to be a solid factual basis for the contested measure.

B. Typologie des preuves

Dans les affaires biélorusses, les éléments de preuves sont très divers, tels que des articles de presse, des rapports d'organismes et organisations internationaux [Groupe d'États contre la corruption (GRECO), Commission de Venise, Organisation de l'aviation civile internationale, déclarations de témoins dans le cadre des enquêtes menées par les organes d'enquête pénale nationaux, etc.], sites internet, etc.

Here, again, I fully agree with my colleague. Given the difficulties of finding evidence in complex geopolitical environments, the Council makes regular use of public sources such as press and internet-based information, but it is the task of the Court to decide on their relevance, veracity and reliability, as well as on the independence of those sources. In addition, presumptions, 'rules of experience' and *faits notoires* may be accepted by the Court, for instance, in cases where the applicant is a member of (or is closely linked to) a government accused of violations of international law or humanitarian law.

C. En cas d'insuffisance des preuves

De façon générale, effectivement, les informations ou les éléments produits doivent étayer les motifs retenus à l'encontre de la personne ou de l'entité visée par les mesures restrictives.

30 | Judgment of 30 November 2016, *Rotenberg* v *Council*, T-720/14, EU:T:2016:689.

31 | Judgment of 27 July 2022, *RT France* v *Council*, T-125/22, EU:T:2022:483.

La charge de la preuve revient au Conseil. Ce dernier satisfait à la charge de la preuve qui lui incombe s'il fait état devant le juge de l'Union d'un faisceau d'indices suffisamment concrets, précis et concordants, permettant d'établir l'existence d'un lien suffisant entre l'entité sujette à une mesure de gel de ses fonds et le régime ou, plus généralement, les situations combattues. En outre, l'appréciation du caractère suffisamment solide de la base factuelle retenue par le Conseil doit être effectuée en examinant les éléments de preuve et d'information, non de manière isolée, mais dans le contexte dans lequel ils s'insèrent et en tenant compte du fait que le Conseil n'a pas de pouvoir d'enquête et que, même si les mesures restrictives ne sont pas des mesures de nature pénale, les personnes visées n'ont pas l'obligation d'apporter la preuve négative de l'absence de bien-fondé desdits motifs.

If the evidence adduced by the Council is considered not to be sufficient, or if the Council has relied on irrelevant or imprecise information, the Court will annul the measure or measures concerned. The issue may arise as to whether and, if so, to what extent the Council may present the evidence for the first time before the General Court. This is generally admitted by the Court, provided that the elements of proof were in the Council's possession before the adoption of the contested measure listing that specific person or entity, and provided that the other party had an opportunity to exercise its right of defence, in order to contest the reliability and relevance of those items of evidence.

D. En cas de preuves à caractère confidentiel

La question des « preuves qui ne peuvent pas être communiquées » se pose lorsque la décision d'inscription est fondée sur des éléments d'information et des documents qui ne peuvent pas être communiqués à la personne concernée pour des raisons impérieuses touchant à la sûreté de l'Union ou de ses États membres ou à la conduite de leurs relations internationales.

Par dérogation aux règles applicables à d'autres procédures administratives, le Conseil peut refuser de communiquer de tels éléments à l'intéressé, que ce soit dans le cadre de la motivation ou de l'exercice des droits de la défense, sans que ce refus constitue une violation des droits procéduraux de l'intéressé. Cette particularité renforce l'importance du contrôle

juridictionnel, dès lors que cette confidentialité ne peut pas être opposée par le Conseil au juge de l'Union (voir notamment l'arrêt *Commission e.a./Kadi* [32] et la jurisprudence citée).

Cet aspect est désormais réglé par le nouvel article 105 du règlement de procédure du Tribunal, qui a mis en œuvre un système selon lequel, lorsque, à l'issue de la procédure prévue par cette disposition, le Tribunal considère que des renseignements ou pièces, qui n'ont pas été, en raison de leur caractère confidentiel, communiqués à l'autre partie principale, sont indispensables pour statuer sur le litige, il peut, par dérogation à l'article 64 dudit règlement de procédure et en se limitant à ce qui est strictement nécessaire, fonder son jugement sur de tels renseignements ou pièces, en tenant compte du fait qu'une partie principale n'a pas pu faire valoir ses observations sur ceux-ci.

La question des preuves secrètes ne s'est pas posée, pour l'instant, dans le cadre des mesures restrictives à l'encontre de la Biélorussie, le Conseil se basant principalement sur des articles de presse ou, en tout état de cause, sur des sources publiquement accessibles notamment sur internet.

I agree with my colleague's answer. In the Russian cases, the issue of secrecy has not yet arisen. I would simply add that on the basis of Article 66 of the Rules of Procedure it is also possible to omit the names of persons other than the parties, as well as information from publicly available documents relating to a case. In such cases, the party (the Council) needs to give legitimate reasons for keeping the identity of the person or the information confidential.

IV. Sur la capacité du Tribunal à se prononcer sur la légalité des critères d'inscription eux-mêmes, si ceux-ci sont remis en cause

Dans le cadre d'un recours visant une mesure restrictive individuelle, en vertu de l'article 29 TUE et du règlement adopté en vertu de l'article 215 TFUE, peut être invoquée une exception d'illégalité visant les dispositions de la décision adoptée qui prévoient un critère général

32 | Arrêt du 18 juillet 2013, Commission e.a./Kadi, affaires jointes C-584/10 P, C-593/10 P et C-595/10 P, EU:C:2013:518, points 125 à 129.

permettant l'adoption des mesures restrictives individuelles visant le requérant. Selon la jurisprudence, le Conseil dispose d'un large pouvoir d'appréciation en ce qui concerne la définition générale et abstraite des critères généraux d'inscription. Ces critères font ainsi l'objet d'un contrôle juridictionnel restreint, en particulier en ce qui concerne l'appréciation des considérations d'opportunité sur lesquelles les mesures restrictives sont fondées.

Lorsque, dans le cadre de l'examen de la légalité d'un critère général d'inscription, le juge de l'Union considère que sa portée doit être précisée, il peut être amené à opérer une interprétation conforme au droit primaire de l'Union, à la lumière du cadre juridique dans lequel il s'inscrit et des intentions du législateur. Toute opération d'interprétation conforme exige la reconnaissance expresse de ce que la règle en question ne peut être considérée comme étant conforme à l'ordre juridique que dans la mesure où, en transcendant son strict libellé – mais sans le contredire – il soit possible de lui attribuer un sens compatible avec les exigences des règles auxquelles elle est soumise.

Under the EU rules on *locus standi*, applicants who are not the addressees of a measure are required to demonstrate either that the contested measure is of direct and individual concern to them, or, in case of a 'regulatory act', that it is of direct concern to them and does not entail implementing measures. In cases where the applicant requests, by an action for annulment under Article 263 TFEU, not to be included in a list but rather to be one of the alleged addressees of a general measure such as a ban on any Russian national flying over the territory of the European Union or a ban on any satellite or any internet service provider broadcasting the programmes of media outlets controlled by the Russian Government, a problem may arise as to the admissibility of the action. This is the case, for instance, with *Islentyeva* v *Council* [33], in which the applicant has challenged Regulation 2022/334 [34] with regard to the ban on operating aircraft and, in response, the Council has raised a plea contesting her *locus standi*. The General Court, faced with this problem, has opted to join the plea of admissibility to the merits.

33 | Pending case, *Islentyeva* v *Council*, T-233/22.

34 | Council Regulation (EU) 2022/334 of 28 February 2022 amending Council Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ 2022 L 57, p. 1).

V. Quelques exemples d'affaires

In the context of the third series of measures, the Council adopted, on 1 March 2022, Decision 2022/351 [35] and Regulation 2022/350 [36] in order to temporarily prohibit alleged Russian propaganda, carried out through certain media outlets under the control of the Russian Government and directed towards civil society in the European Union and neighbouring countries, in support of its military aggression against Ukraine: actions which constitute a threat to the public order and security of the European Union.

The applicant, RT France, was included in the list of entities set out in the annex to the contested measures. It sought the annulment of the contested measures on the ground that its rights of defence, freedom of expression and information and its freedom to conduct a business had been infringed. It also alleged a breach of the principle of non-discrimination and called into question the Council's competence to adopt the measures in question.

The Court ruled for the first time on restrictive measures adopted by the Council to prohibit the broadcasting of audiovisual content and dismissed the action.

As regards, first of all, the Council's competence to adopt the restrictive measures in question, the Court stated that, under the relevant provisions of the Treaty on European Union, the EU competence in matters relating to the Common Foreign and Security Policy ('CFSP') covers all areas of foreign policy and all issues relating to the security of the European Union and that the Union's action on the international scene is intended, inter alia, to promote respect for the principles of the United Nations Charter and international law. Since the concept of 'Union position' lends itself to a broad interpretation, such a position may take the form of decisions providing for measures capable of directly altering the legal situation of individuals, as confirmed by the wording of the second paragraph of Article 275 TFEU. By adopting the contested decision, the Council therefore exercised the competence conferred on the Union by the Treaties under the provisions relating to the CFSP.

35 | Council Decision (CFSP) 2022/351 of 1 March 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ 2022 L 65, p. 5).

36 | Council Regulation (EU) 2022/350 of 1 March 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ 2022 L 65, p. 1).

In that regard, the Court pointed out that the fact that national administrative authorities, such as the French Regulatory Authority for Audiovisual and Digital Communication (Arcom), have the power to adopt sanctions against the audiovisual entities in question does not preclude the competence of the Council, since the power conferred on those authorities is not based on the same values and does not pursue the same objectives. The national authorities cannot guarantee the same results as uniform and immediate action by the Council throughout the territory of the European Union, such as that carried out under the CFSP.

As regards the infringements of fundamental rights alleged by the applicant, the Court notes that, in accordance with the provisions of Article 52(1) of the Charter, those rights are not absolute and may be subject to limitations if such limitations are provided for by law, respect the essence of the fundamental right in question and, subject to the principle of proportionality, are necessary and meet objectives of general interest recognised by the European Union.

Thus, as regards the infringement of the rights of the defence, and in particular of the right to be heard, the Court observes, in the light of the objectives of the CFSP, that the measures at issue fall within a context of extraordinary and extreme urgency, characterised by a rapid worsening of the situation which has made it difficult to modulate the measures intended to prevent the spread of the conflict. Next, the Court noted that the adoption of restrictive measures targeting media, such as the applicant, financed by the Russian State budget and controlled, directly or indirectly, by the leaders of that country, which is the aggressor country, became urgent in order to preserve the integrity of the democratic debate in European society, following the outbreak of the armed conflict. The temporary suspension of broadcasting activities was necessary at that time as part of a strategy to combat hybrid threats, including disinformation and manipulation of facts. In view of the extremely unusual context in which the contested measures were adopted and in order to assure their effectiveness, the Court held that the EU authorities were not required to hear the applicant before the initial inclusion of its name on the lists at issue and, consequently, that there was no infringement of its right to be heard.

As regards **infringement of the freedom of expression and information**, the General Court first of all refers to the principles laid down in the case-law of the European Court of Human Rights regarding the power of the media in modern society, noting that the right of journalists to communicate information on matters of public interest is protected provided

that they act in good faith and on the basis of accurate facts, and provide 'reliable and accurate' information in accordance with journalistic ethics and the principles of responsible journalism.

In examining the proportionality of the restrictive measures at issue, the General Court noted that, unlike statements relating to matters of public interest requiring strong protection, statements defending, justifying or condoning the use of violence, hatred or other forms of intolerance are not normally protected, and that particular attention should be paid to the terms used and the context in which they are disseminated.

Examining the conditions laid down in Article 52(1) of the Charter, the Court then observes that the restrictive measures at issue were provided for 'by law' in the sense that they were set out in acts of general application, with clear legal bases in EU law, and that they were foreseeable in the light of the applicant's conduct. The condition relating to the pursuit of an objective of general interest recognised by the Union is also fulfilled. By the restrictive measures at issue, the Council pursues the twofold objective of protecting the public order and security of the European Union, threatened by the propaganda campaign at issue, and of exerting pressure on the Russian authorities to put an end to their military aggression against Ukraine.

The Court also considers that the Council was entitled to regard the various items of evidence adduced as constituting a set of indicia which are sufficiently specific, precise and consistent to show that the applicant actively supported, before the adoption of the contested measures, Russia's policy towards Ukraine and that it disseminated information justifying the military aggression at issue, which constituted a significant and direct threat to the public order and security of the European Union.

Lastly, in the context of the balancing of the interests at issue, the Court pointed out that the information in question cannot benefit from the protection which Article 11 of the Charter confers on freedom of the press. In that regard, account should also be taken of Article 20 of the United Nations International Covenant on Civil and Political Rights of 16 December 1966, to which both the Member States and Russia are parties and under which 'any propaganda for war shall be prohibited by law'. In view of the extraordinary context of the case, the Court concludes that the limitations at issue on the applicant's freedom of expression are proportionate to the aims pursued by the measures adopted.

Il n'existe pas d'arrêts récents relatifs à la vague actuelle de mesures restrictives adoptées à l'encontre de la Biélorussie, les dernières mesures restrictives ayant été adoptées à partir de décembre 2020. Au 6 décembre 2022, toutes les affaires sont encore pendantes.

Ces affaires concernent par exemple :

- l'entreprise publique de l'aviation civile [37] ;
- des compagnies aériennes [38] ;
- une entreprise dans le secteur de l'informatique [39] et une entreprise active dans le domaine du développement immobilier [40] ;
- des entreprises d'État actives dans le domaine de la production de potasse [41] ;
- des hommes d'affaires [42] ;
- des députés [43] ;
- un journaliste [44] ;
- des recteurs d'universités [45].

37 | Affaire pendante, Belaeronavigatsia/Conseil, T-536/21.

38 | Affaires pendantes, Cham Wings Airlines/Conseil, T-255/22 et Belavia/Conseil, T-116/22.

39 | Affaires pendantes, Synesis/Conseil, T-97/21 et T-215/22.

40 | Affaire pendante, Dana Astra/Conseil, T-239/21.

41 | Affaires pendantes, Belaruskali/Conseil, T-528/22 et Belarusian Potash Company/Conseil, T-534/22.

42 | Affaires pendantes, Gutseriev/Conseil, T-526/21, Varabei/Conseil, T-245/21, Zaytsev/Conseil, T-563/21, Shakutin/Conseil, T-141/21, Shatrov/Conseil, T-523/21 et T-216/22.

43 | Affaires pendantes, Lyubetskaya/Conseil, T-556/21, Omeliyanyuk/Conseil, T-557/21, Haidukevich/Conseil, T-580/21.

44 | Affaire pendante, Gusachenka/Conseil, T-579/21.

45 | Affaires pendantes, Skryba/Conseil, T-581/21, Rubnikovich/Conseil, T-582/21, Bakhanovich/Conseil, T-583/21.

Parmi les arrêts les plus récents de la vague antérieure de mesures restrictives contre la Biélorussie, peuvent être mentionnés les arrêts suivants : *Mikhalchanka/Conseil* (2016) [46], *Ipatau/Conseil* (2016) [47], *BelTechExport/Conseil* (2017) [48].

L'arrêt *Mikhalchanka/Conseil* qui concernait un journaliste biélorusse qui avait été inscrit sur les listes en cause, entre autres, à cause de son rôle de « journaliste influent [d'une] chaîne de télévision d'État » [49] est intéressant à deux égards.

Premièrement, il traite de la question de la persistance de l'intérêt à agir, lorsque le nom d'une personne soumise à des mesures restrictives est retiré en cours d'instance [50].

Deuxièmement, le Tribunal se penche sur la question de savoir dans quelle mesure un journaliste est influent et pourquoi, en l'espèce, le requérant ne l'était pas.

Le Tribunal précise que celui-ci n'exerçait pas son activité de journaliste à un poste hiérarchiquement élevé dans l'organigramme de la chaîne de télévision publique, mais travaillait plutôt comme journaliste spécialisé, commentateur politique à la direction de la diffusion d'information de cette chaîne de télévision publique et comme présentateur d'un programme télévisé [51].

Au sujet de ce programme, le Tribunal a considéré que, même si ce programme télévisé était répertorié parmi les médias biélorusses ayant joué un rôle partial et actif en faveur du président Lukashenko pendant les élections présidentielles, le Conseil n'a ni prouvé que ledit programme avait une audience importante ni que le requérant était un journaliste ayant une influence telle dans les médias biélorusses qu'il aurait une responsabilité quant aux atteintes aux normes électorales internationales et à la répression à l'égard de la société civile et de l'opposition démocratique [52].

46 | Arrêt du 10 mai 2016, Mikhalchanka/Conseil, T-693/13, non publié, EU:T:2016:283.

47 | Arrêt du 23 novembre 2016, Ipatau/Conseil, affaires jointes T-694/13 et T-2/15, non publié, EU:T:2016:672.

48 | Arrêt du 27 septembre 2017, BelTechExport/Conseil, T-765/15, non publié, EU:T:2017:669.

49 | Arrêt du 10 mai 2016, Mikhalchanka/Conseil, T-693/13, non publié, EU:T:2016:283.

50 | Ibid., points 36 à 43.

51 | Ibid., point 101.

52 | Ibid., point 105.

M. Roberto Mastroianni,
Juge au Tribunal

Grande salle d’audience de la Cour de justice lors de l’Audience solennelle

Audience solennelle

Allocution de M. Koen Lenaerts, Président de la Cour de justice de l'Union européenne

Altesse royale,

Excellences,

Chers collègues,

Mesdames et Messieurs,

La séance solennelle qui clôture ce Forum des magistrats constitue le point d'orgue d'une année rythmée par différentes manifestations organisées par la Cour de justice mais également dans différents États membres, pour commémorer le 70e anniversaire de la Cour de justice de la Communauté européenne du charbon et de l'acier, devenue la Cour de justice de l'Union européenne.

Dans un discours donné à Luxembourg le 8 mai 2000 à l'occasion du 50e anniversaire du Plan Schuman, l'ancien président de la Commission européenne, Jacques Delors, déclarait : « Le traité CECA a constitué la matrice de ce qui a pu être réalisé jusqu'à présent. Tout y était : le sens de notre action, bien entendu, mais aussi un schéma institutionnel génial qui a permis les avancées, la méthode dite communautaire qui, aujourd'hui encore, doit nous servir de référence. […] L'expérience se chargera de prouver, en premier lieu, la validité de ce schéma institutionnel ».

Comment ne pas savourer la justesse de ce constat ? L'anniversaire que nous commémorons aujourd'hui est avant tout celui d'une institution. Mais c'est aussi celui de notre réseau judiciaire, celui du mécanisme européen du renvoi préjudiciel. Celui-ci fut, en effet, institué, pour la première fois, par le traité CECA entré en vigueur le 23 juillet 1952. Certes, la procédure préjudicielle fut limitée, à l'époque, au contrôle de la validité des décisions de la Haute Autorité CECA et du Conseil. Mais elle préfigura la procédure que nous connaissons aujourd'hui et qui couvre, depuis le traité de Rome, tant les demandes de contrôle de validité des actes des institutions de l'Union que celles portant sur l'interprétation du droit de l'Union.

Selon la formule consacrée, la procédure de renvoi préjudiciel constitue la clé de voûte du système juridictionnel de l'Union, censée garantir, par l'instauration d'un dialogue entre la Cour de justice et les juridictions des États membres, l'unité d'interprétation du droit de l'Union. Conjuguée au principe de primauté du droit de l'Union et au respect dû aux interprétations de ce droit dégagées par la Cour de justice, la fonction unificatrice de cette procédure consiste à assurer l'égalité de tous devant la loi, européenne en l'occurrence.

Égalité des États membres, quels que soient leur taille, leur orientation politique ou leur puissance économique. Mais aussi égalité des citoyens européens, qui se voient offrir, par le canal d'une procédure nationale, un accès large à la justice européenne que les contraintes inhérentes aux autres procédures devant les juridictions de l'Union n'autorisent pas à leur accorder. La « magie » du renvoi préjudiciel est de permettre à tout citoyen de l'Union de s'adresser au juge national pour que celui-ci, en coopération avec la Cour de justice, protège ses droits contre toute atteinte qui leur serait portée par une autorité nationale, une administration, une entreprise, voire un autre citoyen.

Bon nombre des grands arrêts qui jalonnent la jurisprudence de la Cour de justice trouvent ainsi leur ancrage dans des litiges, parfois aux enjeux financiers modestes, portés par des citoyens ordinaires devant une juridiction nationale. Ainsi, le célèbre arrêt *Costa contre ENEL* de 1964 [1], qui fut le premier à consacrer explicitement le principe de primauté du droit de l'Union, puise son origine dans la contestation, par un ressortissant italien, du paiement d'une facture d'électricité. L'arrêt *Schecke et Eifert* de 2010 [2], dans lequel la Cour de justice a, pour la première fois, invalidé une réglementation européenne à l'aune de la charte des droits fondamentaux de l'Union européenne (ci-après la « Charte »), a pour toile de fond une action en justice d'agriculteurs bénéficiaires de fonds européens. La jurisprudence *Schrems* [3], initiée en 2015, fait suite à la plainte d'un universitaire autrichien à l'égard du transfert, par Facebook, de ses données personnelles vers des serveurs hébergés aux États-Unis. Les arrêts *Ruiz Zambrano* [4] et *Rendón Marin* [5], arrêts phares en matière de citoyenneté européenne,

1 | Arrêt du 15 juillet 1964, Costa / E.N.E.L., 6/64, EU:C:1964:66.

2 | Arrêt du 9 novembre 2010, Volker und Markus Schecke et Eifert, C-92/09, EU:C:2010:662.

3 | Arrêt du 6 octobre 2015, Schrems, C-362/14, EU:C:2015:650.

4 | Arrêt du 8 mars 2011, Ruiz Zambrano, C-34/09, EU:C:2011:124.

5 | Arrêt du 13 septembre 2016, Rendón Marín, C-165/14, EU:C:2016:675.

n'auraient pas vu le jour sans l'initiative de pères de famille colombiens. Et je pourrais multiplier les exemples à l'infini.

Mais l'égalité des citoyens à laquelle tend la procédure préjudicielle ne se décline pas uniquement en termes procéduraux d'accès à la justice. Il s'agit également d'une égalité « matérielle » tenant à la protection des droits que l'ensemble de ces citoyens tirent du droit de l'Union. L'uniformité attachée aux interprétations de la Cour de justice, corrélée au principe de primauté du droit de l'Union, vise en effet à garantir que toutes les dispositions du droit de l'Union revêtent la même signification sur l'ensemble du territoire de l'Union, indépendamment d'éventuelles dispositions contraires du droit national.

Les justiciables doivent ainsi bénéficier, de Lisbonne à Helsinki en passant par Berlin et Paris, d'une protection équivalente, par exemple, contre une clause abusive insérée dans un contrat de consommation, contre une atteinte à leur droit au respect de la vie privée ou contre une mesure constitutive d'une discrimination fondée sur l'âge, le sexe ou l'orientation sexuelle. Et pour assurer le respect homogène de leurs droits, ils doivent jouir, à travers l'Union, d'un même niveau de protection juridictionnelle effective, garanti par des juridictions impartiales et indépendantes.

Dans son célèbre ouvrage *De l'esprit des lois*, Montesquieu a écrit : « L'amour de la démocratie est celui de l'égalité ». En œuvrant, par ses interprétations uniformes du droit de l'Union, à l'égalité des citoyens à travers l'Union, la Cour de justice entend servir la démocratie. Ce faisant, elle promeut l'Union en tant qu'Union de droit. Comme on peut le lire à l'article 2 du traité sur l'Union européenne, démocratie et égalité figurent, en effet, au rang des valeurs communes, inhérentes à l'État de droit, autour desquelles la construction européenne entend fédérer les États membres et leurs populations.

Dans ce contexte, la qualité de la coopération judiciaire qu'incarne le mécanisme du renvoi préjudiciel s'avère indispensable à la perception, dans la conscience collective, d'une justice européenne proche des citoyens, de leurs aspirations et de leurs préoccupations concrètes dans les nombreux domaines d'intervention du droit de l'Union.

Par conséquent, je me réjouis – non pas par fierté personnelle, mais en tant qu'Européen profondément attaché au bon fonctionnement du réseau judiciaire qui s'est tissé depuis toutes ces décennies entre les juridictions nationales et la Cour de justice – lorsque je prends connaissance de décisions de cours constitutionnelles ou suprêmes soucieuses de la nécessité du maintien de l'unité dans l'interprétation du droit de l'Union.

Ainsi, et sans prétendre à l'exhaustivité, je voudrais d'abord mentionner l'arrêt du *Bundesverfassungsgericht* du 7 octobre 2019 [6] qui, dans le domaine de l'asile, a jugé qu'un tribunal administratif qui méconnaît les enseignements d'un arrêt de la Cour de justice viole, de ce fait, également l'interdiction de l'arbitraire consacrée par la loi fondamentale allemande. Dans un sens comparable, le *Högsta domstolen* (la cour suprême suédoise) a, dans un arrêt du 27 février 2020 [7] relatif à la protection des travailleurs en cas de transfert d'entreprise, rappelé sans ambages qu'un arrêt interprétatif de la Cour de justice constitue une « décision définitive » qui s'impose au juge de renvoi sur la question de droit de l'Union ainsi éclairée. De même, le *Raad van State* néerlandais a, dans un dossier relatif à l'énergie éolienne, jugé, le 30 juin 2021, qu'un juge national n'est pas habilité à donner la préférence à des dispositions nationales que la Cour de justice a estimées contraires au droit de l'Union et n'a, par conséquent, pas d'autre choix que de les écarter.

Je songe également à l'arrêt 67/2022 [8] par lequel la *Corte costituzionale* italienne a confirmé qu'une réglementation nationale jugée, par la Cour de justice, non conforme au droit de l'Union (en l'occurrence, en matière de sécurité sociale de ressortissants étrangers) devait, en vertu du principe de primauté du droit de l'Union, être directement écartée par la *Corte suprema di cassazione* sans que celle-ci doive au préalable solliciter un contrôle de constitutionnalité de cette même réglementation nationale. Dans cet arrêt, l'accent a été mis sur le lien indissociable qui existe entre ce principe de primauté et l'égalité des États membres, mais aussi, à travers eux, des citoyens européens devant la loi.

Je pense enfin aux arrêts par lesquels, dans le domaine très sensible de la conservation des données de communications électroniques à des fins de lutte contre la criminalité, différentes cours constitutionnelles ou suprêmes – belge, chypriote, française, portugaise notamment – ont fidèlement mis en œuvre la jurisprudence de la Cour de justice issue,

6 | Arrêt de la Cour constitutionnelle fédérale allemande du 7 octobre 2019, 2 BvR 721/19 -, Rn. 1-25, ECLI:DE:BVerfG:2019:rk20191007.2bvr072119

7 | Arrêt de la Cour suprême suédoise du 27 février 2020, Ö 5731-18.

8 | Arrêt de la Cour constitutionnelle italienne du 8 février 2022, 67/2022, ECLI:IT:COST:2022:67.

notamment, de ses arrêts *Digital Rights* [9], *Tele2 Sverige* [10] et *La Quadrature du Net* [11]. L'arrêt du *Tribunal constitucional* portugais du 19 avril 2022 [12] mérite d'être épinglé en ce que, au prix d'un revirement de sa propre jurisprudence, cette juridiction constitutionnelle a « incorporé » la jurisprudence de la Cour de justice relative à la Charte dans les paramètres du contrôle de constitutionnalité des dispositions nationales en cause et a invalidé celles-ci à la lumière de cette jurisprudence. Pour le *Tribunal constitucional* – et je le cite – une telle solution « est la seule qui garantisse l'application uniforme de l'ordre juridique de l'Union et qui harmonise sa propre compétence et celle de la Cour de justice, en préservant l'autonomie et la primauté du droit de l'Union dans ses applications à des cas spécifiques, sans qu'il faille y voir une violation de la Constitution ».

Je ne voudrais cependant pas être mal perçu comme préconisant un quelconque assujettissement des juridictions nationales à la Cour de justice ou un prétendu « autoritarisme judiciaire » de celle-ci, qui ferait fi des sensibilités nationales.

Contrairement à des discours en vogue, et parfois tenus dans le cadre de procédures devant elle, la Cour de justice n'entend aucunement façonner à sa guise les ordres juridiques nationaux selon un « moule constitutionnel » préétabli, ni imposer une conception « unilatéraliste » de l'État de droit et du socle de valeurs communes à partager par les États membres. Ainsi que cela ressort de bon nombre de ses décisions, la Cour de justice respecte l'identité nationale des États membres, inhérente à leurs structures fondamentales politiques et constitutionnelles. C'est à ces derniers qu'il appartient de définir le modèle constitutionnel, politique, sociétal qui reflète les choix démocratiques de leur propre population, étant entendu que l'exercice de ces compétences nationales doit tenir compte des valeurs et des principes fondamentaux de l'Union, qui sont communs aux États membres, ainsi que des droits et des libertés dont jouissent les citoyens européens en vertu du droit de l'Union.

9 | Arrêt du 8 avril 2014, Digital Rights Ireland et Seitlinger e.a., C-293/12, EU:C:2014:238.

10 | Arrêt du 21 décembre 2016, Tele2 Sverige, C-203/15, EU:C:2016:970.

11 | Arrêt du 6 octobre 2020, La Quadrature du Net e.a., C-511/18, EU:C:2020:791.

12 | Arrêt de la Cour constitutionnelle portugaise du 19 avril 2022, n° 268/2022.

Est-il besoin de rappeler que, depuis les arrêts *Melloni* [13] et *Åkerberg Fransson* [14] de 2013, il est acquis que les États membres demeurent libres d'appliquer, au-delà du socle commun de protection garanti par la Charte, leurs propres standards de protection de ces droits, dans le respect de la primauté, de l'unité et de l'effectivité du droit de l'Union ?

La jurisprudence de la Cour de justice compte par ailleurs de nombreux exemples attestant de la prise en compte, dans ses interprétations du droit de l'Union, de principes ou de valeurs tenant à l'identité nationale de l'État membre concerné.

Ainsi, dans l'arrêt *Boriss Cilevičs* de septembre 2022 [15], la Cour de justice a rappelé qu'un État membre est en droit, au nom de son identité nationale, de promouvoir l'usage de sa langue officielle, en l'occurrence dans des programmes d'enseignement supérieur.

Dans l'arrêt *Centraal Israëlitisch Consistorie van België* de décembre 2020 [16], relatif à des mesures régionales d'interdiction d'abattage rituel sans étourdissement préalable, la référence à l'identité nationale s'est traduite par l'affirmation d'un « espace de diversité » au sein de l'Union, qui a fait dire à la Cour de justice que, en l'absence de choix précis dicté par le législateur européen, une entité nationale ou régionale peut procéder, à la lumière du « contexte social qui lui est propre », à un arbitrage entre le respect de la liberté de religion et la sauvegarde du bien-être animal.

Dans la même ligne, la Cour a, dans l'arrêt *WABE* de juillet 2021 [17], relatif à l'interdiction du port de signes religieux sur le lieu de travail, jugé que le constat qu'une règle d'entreprise poursuivant de manière générale et indifférenciée une politique de neutralité à l'égard des clients, n'est pas contraire à la directive sur l'égalité de traitement en matière d'emploi et de travail, est sans préjudice d'un éventuel choix constitutionnel national de renforcer la protection de la liberté de religion par rapport à la liberté d'entreprise.

13 | Arrêt du 26 février 2013, Melloni, C-399/11, EU:C:2013:107.

14 | Arrêt du 26 février 2013, Åkerberg Fransson, C-617/10, EU:C:2013:105.

15 | Arrêt du 7 septembre 2022, Boriss Cilevičs e.a., C-391/20, EU:C:2022:638.

16 | Arrêt du 17 décembre 2020, Centraal Israëlitisch Consistorie van België e.a., C-336/19, EU:C:2020:1031.

17 | Arrêt du 15 juillet 2021, WABE, C-804/18, EU:C:2021:594.

Je terminerai par un dernier exemple, qui illustre bien l'importance, mais aussi les limites, du respect dû aux identités nationales. Il est fourni par les arrêts *Coman* [18] et *Pancharevo* [19]. Dans ces deux arrêts, la Cour de justice a tenu à rappeler que chaque État membre est libre de défendre, au nom de son identité nationale, sa propre conception du mariage ou de la parentalité en en refusant l'accès à des personnes du même sexe. Mais de tels choix de société ne peuvent pas aller jusqu'à entraver la libre circulation de telles personnes qui sont légalement mariées ou reconnues mères d'un même enfant dans un autre État membre.

L'un des enjeux majeurs de la procédure préjudicielle tient, en définitive, à la préservation de la cohabitation harmonieuse des valeurs communes de l'Union et des identités nationales. Ce délicat arbitrage, à la recherche permanente du meilleur point d'équilibre, repose sur une coopération loyale et franche, au sein de la « communauté des juges » qui anime, depuis 70 ans, le mécanisme du renvoi préjudiciel. Dans ce subtil exercice, les juridictions nationales, en particulier les cours constitutionnelles et suprêmes, et la Cour de justice sont, non pas des concurrentes, mais des alliées qui doivent se renforcer mutuellement. La Cour de justice a notamment pour mission d'épauler les cours constitutionnelles ou suprêmes dans leurs fonctions de garantes du respect de la règle de droit dans les différents ordres juridiques nationaux. Ces dernières doivent assurer le respect, dans leur propre État membre, des interprétations du droit de l'Union dégagées par la Cour de justice.

C'est, en effet, en regardant tous dans la même direction, plutôt qu'en agissant en ordre dispersé, voire de manière conflictuelle, que nous contribuerons à entretenir le climat de solidarité qui doit présider au bon fonctionnement du mécanisme de renvoi préjudiciel. Cette approche coopérative ne peut qu'être bénéfique à la construction européenne dans son ensemble, mais aussi à la préservation, dans l'esprit des citoyens européens, du sentiment d'appartenance à une Union de valeurs et de droits fondamentaux qui, par son degré d'aboutissement, est unique au monde.

Pareille approche constructive, alimentée par un dialogue préjudiciel empreint de respect et de confiance mutuels, est également le gage de l'« éternelle jeunesse » du système juridictionnel de l'Union. Tel est, en tout cas, le vœu que je forme à l'occasion de ce 70e anniversaire de l'institution.

18 | Arrêt du 5 juin 2018, Coman e.a., C-673/16, EU:C:2018:385.

19 | Arrêt du 14 décembre 2021, Stolichna obshtina, rayon « Pancharevo », C-490/20, EU:C:2021:1008.

De gauche à droite : M[me] Sam Tanson, Ministre de la Culture et Ministre de la Justice du Grand-Duché de Luxembourg ; M. Egils Levits, Président de la République de Lettonie et ancien juge à la Cour de justice ; Son Altesse Royale le Grand-Duc Héritier, Guillaume de Luxembourg ; M. Othmar Karas, Premier Vice-président du Parlement européen

M. Othmar Karas,
Premier Vice-président du Parlement européen

Speech by Mr Othmar Karas, First Vice-President of the European Parliament

Your Royal Highness,

President Lenaerts,

Vice-President Jourová,

Ministers,

Honourable Judges and Advocates General,

Presidents of the national constitutional courts,

Ladies and gentlemen,

Today is a very special day for us. We are gathered here together to celebrate an anniversary. And it is a special day for me to be in this room and to speak to you on behalf of the European Parliament and our President, Roberta Metsola, and thereby contribute to this ceremony.

I must admit that, when I grew up studying international and European economic law in St. Gallen, it was the first time that I spent an entire course of studies learning not through the history of the institutions and decision-making and opinion-forming, but by means of the decisions of the Court of Justice of the European Union. And that is what helped me to understand the internal market, the four freedoms and the very essence of the European Union.

One thing is clear to us today, and yet it bears repeating: without the Court of Justice of the European Union, the European project would not be possible. Our European democracy functions only with the rule of law. Democracy and a State based on the rule of law are mutually dependent. There is no democracy without a functioning State based on the rule of law. The rule of law means that politics are also bound by the law, that the law determines politics. The English term 'rule of law' expresses this aptly.

Jurisdiction, the separation of powers and fundamental rights are prerequisites for peace, freedom, social cohesion and sustainable development in the EU. The Court of Justice of the European Union has been at the heart of European jurisprudence since 1952 and is a

major driving force in the process of European integration. The Court of Justice has the last word – and that is a good thing.

Through its decisive interpretation of the law, the Court of Justice has ensured that EU law is directly applicable and takes precedence over national law. This is now explicitly stated in the Lisbon Treaty. And I would call in particular on all politicians to show greater respect for the decisions and independence of the Court, but not only for this Court and its decisions.

If we do not respect superior EU law and decisions in general, this will threaten the very nature and identity of the project that is the European Union. If we do not have this respect, we will also not be able to restore confidence in decisions and, therefore, confidence in democracy and the rule of law.

The Court has placed the citizen at the heart of the European legal order since the very beginning, with landmark judgments in the *van Gend en Loos* [1] and *Costa* [2] cases reaching back to the 1960s.

Thanks to its extensive case-law on consumer rights, free movement of persons, non-discrimination, defence of the four freedoms, free movement of services, equal treatment, social and LGBTIQ rights, and EU citizenship, the Court has delivered concrete and tangible benefits for people – not only for EU citizens, but also for those with family members who are not nationals of an EU Member State.

And under Article 19 of the Treaty on European Union, the Court of Justice is responsible for ensuring not only the uniform interpretation, but also the application, of primary and secondary EU law – making it the guardian of the entire EU legal order.

Ladies and Gentlemen,

Like the rest of us, the Court of Justice of the European Union still has much work to do: punishing infringements of the law by Member States, interpreting political decisions, eliminating discrimination and enforcing equal rights for all citizens of the European Union.

1 | Judgment of 5 February 1963, *van Gend en Loos*, 26/62, EU:C:1963:1.

2 | Judgment of 15 July 1964, *Costa / E.N.E.L.*, 6/64, EU:C:1964:66.

At the present time – 70 years after it was established and after 42 000 judgments and decisions – we need the EU Court of Justice more than ever. We urgently need the anchor of the rule of law and a common understanding of liberal democracy and the separation of powers, especially at a time when our societies are increasingly divided, not only by crises but also by political actors who place populism, polarisation and confrontation before the search for common solutions and our law.

We use the term 'liberal' democracy more and more consciously to distinguish European democracy from 'authoritarian, illiberal' democracies and also to defend it internally. Our understanding of democracy is not simply a question of majority and minority, it involves protecting minorities, justice and equality.

We understand the parliamentary system to be more than simply a one-party system; it is a system of compromise, dialogue, respect for minorities and values, legislative power and the separation of powers between the executive, the legislature and the judiciary.

This liberal democracy – and, I stress, *our* liberal democracy – is in danger all over the world, not only outside the European Union, but also within the European Union. Trust in political institutions and decision-makers is at a dangerously low level.

Who would have thought that in the United States, two years after the presidential election, after all the courts had made their rulings, there would be elected representatives who would still believe that the presidential election had been stolen from them? And that some of them would be involved in the storming of the Capitol?

Who would have thought that the post-war order, based on multilateralism and the recognition of sovereignty and treaties, would be wiped out in a single action – Russia's war of aggression against Ukraine on 24 February? And that every treaty since 1945, from the UN Charter to the European Convention on Human Rights and the Budapest Memorandum, would be ignored and broken, shattering our mutual trust?

Russia's war of aggression has strengthened our convictions about who we are, what we stand for, what we will not accept and what we must be prepared to fight against. It has also reinforced our conviction that nothing we have created can ever be taken for granted.

Unfortunately, at the same time, we still have countries within the European Union that trample on European law, ignore European values and legitimise these abuses with their democratic majority.

Now, more than ever, we must do everything in our power to enforce respect for the rule of law.

Now, more than ever, we must all of us join forces to protect, promote and strengthen liberal democracy across all national, party and ideological boundaries.

To achieve this, we undoubtedly need to be a community of laws and values – a community for the future. This cannot be taken for granted. We can strengthen liberal democracy worldwide only if we also do our homework in the Member States and in the European Union. We cannot credibly point the finger at others if we are not prepared to ensure justice, trust and security in our own countries.

We are not starting from scratch, as today's 70th anniversary shows. The European project goes hand in hand with the process of improving our democracy and our parliamentary system. We already have the foundations: the Court of Justice, the Convention on Human Rights, the Charter of Fundamental Rights and the Treaties. And we have a 'toolbox' to help us protect democracy and the rule of law: the EU Treaty-infringement procedure, the EU conditionality mechanism, the Article 7 procedure, the EU Fundamental Rights Agency and the Rule of Law Report. We need to implement, enforce, improve and use these tools consistently.

With this in mind, ladies and gentlemen, it is my hope that there will be no lazy compromises in the Council's decisions on the conditionality mechanism. It is not a question of what is convenient, but of what is credible.

With this in mind, I look forward to the comprehensive defence of democracy package announced by EU Commission President Ursula Von der Leyen.

And also with this in mind, I would like to thank the citizens who, at the Conference on the Future of Europe, placed particular emphasis on improving the EU's democracy and parliamentary system and called on us all to reform the treaty, which will eventually become a constitutional treaty, so that the European Union can become more capable of action, more democratic, more social, more independent and more competitive, both internally and externally.

Ladies and gentlemen,

We cannot take our European liberal democracy, our rule of law and our fundamental values for granted. We must cherish them even more, defend them, fight for them, reclaim them and raise awareness of them every day. To do this, we need the Court of Justice of the European Union – and each and every one of you – now more than ever.

On behalf of the European Parliament, the citizens' chamber of Europe, I would therefore like to thank each and every one of you who have served this Court over these past 70 years for the European idea and for European law. On behalf of Parliament, I congratulate you and wish you all the very best for the future!

Stanislas Adam (au violon) et Andrew Thomson (au piano)

M. Michal Šalomoun,
Ministre de la Législation et Président du Conseil Législatif du Gouvernement de la République tchèque

Speech by Mr Michal Šalomoun, Minister for Legislation and Chairman of the Legislative Council of the Government of the Czech Republic

Bringing justice closer to the citizen

Your Highness, Mr President, ladies and gentlemen,

It is my honour to take part in this forum, held in celebration of the 70th anniversary of the creation of the Court of Justice on the theme of bringing justice closer to the citizens.

It would undoubtedly be appropriate to recall the now-famous cases in which the Court of Justice has demonstrated its capacity to resolve, in close cooperation with the national courts, the problems of Europeans: to salute and to celebrate you, the Court of Justice and the high representatives of the European judiciary, in the language of your decisions. However, may I introduce the theme from another angle? May I look at the European judiciary, as it appears in the robes of the Court of Justice and in the robes of the Member States, from the citizen's perspective?

Only a year ago, before I was appointed a Government Minister, I was a practising lawyer. I encountered both a helpful, approachable judiciary and a judiciary that lay out of reach, despite its apparent proximity in the courtroom. I'd like to talk about the two 'faces' of the European judiciary with which I came into contact.

I came across the former face in connection with this Court. The story of Mr Ryneš, as a result of whom I had my first direct contact with the Court of Justice, took place in the small Moravian town of Třebíč – the town from which I, Mr Ryneš and, by coincidence, Vice-President Jourová all come from. Mr Ryneš was a local journalist. Considered by many to be a troublemaker, he had a great number of enemies. From time to time, his windows were broken, he was beaten up or thrown into the river. Mr Ryneš tried to react to those wrongs. He filed criminal charges, stuck protective film onto his windows and raised a protective wall. However, all this proved to be in vain. Finally, backed into a corner, he installed a CCTV camera on his house.

He managed to capture images of two figures who had fired a stone through his window with a sling. He turned to the police, in order to identify those persons on the recording and initiate their prosecution.

The criminal court acquitted the defendants, since the judge could not identify them as the persons on the recording. One of the accused then notified the case to the Czech data protection authority, which fined Mr Ryneš for the installation of the CCTV camera. Mr Ryneš, objecting to this outcome, engaged me as a lawyer and the case ended up before the Czech Supreme Administrative Court, which referred a question to the Court of Justice for a preliminary ruling. The question could be paraphrased as whether the installation of a CCTV camera could be classified as a personal or domestic activity, outside the scope of the regulation on protection of personal data. The leitmotif of the reffered question was clear: it would not be just to fine Mr Ryneš for what had happened.

I distinctly remember the package arriving at my law firm from the Court of Justice in Luxembourg. For my client and myself, it was a very heartening moment. The case, which raised a legal and philosophical issue, was to be settled on an EU-wide level. The Member States of the European Union were to comment on it. The case was not to be resolved in a routine manner, but would have the judiciary's full attention.

In the end, the story had a happy ending. Although the installation of a CCTV camera constituted processing of personal data, the Court of Justice pointed out other means by which the case could be resolved fairly under the Directive on personal data protection.

As a lawyer, I have also come across a judiciary whose face is shrouded in mystery. I have often represented clients in disputes involving copyright. This is a relatively harmonised field with a wide scope for the submission of questions for a preliminary ruling. I tried in the course of many sets of court proceedings to initiate orders for reference, but was never successful. The replies to my applications, if they arrived at all, varied. One of those replies, which I received in court proceedings that shall remain anonymous, still rings in my ears: the court will not be sending anything anywhere to avoid embarrassment.

I think that fear was misplaced. No judge who sends a question for a preliminary ruling should fear being humiliated. The Court of Justice rigorously upholds the right of the national courts to make orders for reference as well as their independence in the application of EU law. In its communication with them it must nevertheless carefully keep in mind at all times the face it shows to them, since if the Court of Justice fails to present an approachable face to

the national courts, the face presented by the European judicial system to EU citizens will not be approachable either.

How then should the European judiciary act in order to bring justice closer to the citizens? Primarily, the judiciary formed of the European judges here in Luxembourg and the European judges in the individual Member States should engage with one another.

Not far from here, in the Cathedral of Notre Dame, lies a Luxembourgish Count who became a Czech King. He is known in the Czech Republic as John of Luxembourg, in Luxembourg as John of Bohemia and throughout Europe as John the Blind. Famous for his chivalry, his motto was 'Ich dien', or 'I serve'.

I think these characteristics of the Blind King could be useful inspiration for you.

Be gallant in your communication with each other. Respect yourselves and respect your roles because you need each other. The Court of Justice cannot serve the judiciary or citizens without the national courts, and the national courts cannot serve the EU judiciary without the Court of Justice.

Be strong in the defence of citizens' rights, since the courts are the last hope of citizens when their rights cannot be asserted otherwise.

And, last but not least, serve. Your occupation and your calling is to serve. Be self-confident rather than subordinate or subservient, and serve the European judiciary, your Blind Lady.

Ladies and gentlemen, thank you for the invitation, thank you for your attention and may you – may we! – create the judiciary I have talked about. Please believe that for the parties to the proceedings and for the citizens to whom EU rights apply, it is important to have a sense of solidarity, the knowledge that we are 'all in it together' in Europe and that the European Union is not something remote. You are the European judiciary and together we are the European Union.

Thank you.

M^me^ Věra Jourová,
Vice-présidente de la Commission européenne

Speech by Ms Věra Jourová, Vice-President of the European Commission

Your Royal Highness, Dear President, Dear Members of the Court, honourable guests,

Today we are meeting to celebrate 70 years of the Court of Justice, the institution which, for seven decades now, has been ensuring that the Union remains a Union of law. The Court of Justice has played a crucial role in European integration, and I have no doubt that it will continue to do so.

When, a few months ago, together with my colleagues from the Commission, we met in Luxembourg for the 70th anniversary of the first meeting of the members of the High Authority, two items were on the agenda: law and peace. This is because these two elements represent, better than any other, the very essence of the Union.

What the European Union is now grew out of an aspiration of the peoples of Europe to live in peace and achieve shared prosperity, after a long history of violence. 70 years later, war is again ravaging our continent. This is why the search for peace must remain our common and primary goal.

The EU is a unique project. The Union is not based on the argument of military strength, but on the strength of arguments. Europeans decided to solve their conflict through compliance with common rules, in other words, by law. And they have picked one arbiter – the Court of Justice of the European Union. Therefore, our Union is governed by the rule of law. It is a Union which acts by law and is subject to the law. A Union in which those who make the law and apply it are also fully subject to it. A Union in which the winners backed by a majority of votes, no matter how big, continue to be fully bound by established rules and procedures. This is what differentiates true democracies from authoritarian regimes. We can all clearly see that now due to the criminal actions of the Kremlin regime.

Your Royal Highness, President, honourable Members of the Court, honourable guests,

The case-law of the Court is the primary vehicle for ensuring the legality of decision-making in the EU. While the legislator must often have a wide margin of political discretion, it must act within the limits laid down by law. I can testify that the Commission is applying this in its day-to-day work. In all our work, be it on rule of law, or green or digital policies, we are always guided by the case-law and the anticipation that our proposals could be challenged before

the Court. And this is a good thing. It keeps us, in the Commission, in check. It mobilises us to stay within the limits established by law.

A Union based on the rule of law also means respect for our basic values. These values guide the actions of the EU institutions, but, as the judgments of the Court show, they also have a very concrete legal meaning. A suitable example is the value of solidarity. This value has played a crucial role in recent months. It is sufficient to mention Covid, the solidarity measures adopted to support Ukraine against Russia's unjustified and criminal aggression, and the energy crisis. Each of these crises has led the EU institutions and the Member States to adopt, at an unprecedented speed, a wide range of measures specifically tailored to the challenges of each crisis. The value of solidarity is therefore an essential cornerstone of EU action. Solidarity is crucial for the Union and for the people of Europe. But this is not the only value.

It gives me great pleasure to witness, in my roles as Commissioner for Justice and now Vice-President of the Commission, how the rule of law has gained substantive case-law and with it, a more concrete legal meaning. This is all thanks to the Court rulings, often in cases brought by the Commission. I can tell you, five years ago, when we were about to launch the first value-based infringement, there were voices opting for caution because of the relatively uncharted legal territory and the challenges related to translating values into legal rulings.

Yet, today, I feel the EU institutions are not only more determined than ever to uphold the rule of law within the European Union; they also have unprecedented legal clarity on the scope and limits of their competences in this regard. And of course, these legal pillars, this build-up of case-law, will also help future generations to uphold democracy and its key values before the courts. Because without effective judicial protection, many of the rights that the EU acquis confers on citizens would be a dead letter.

Your Royal Highness, Dear President, Honourable Members of the Court, honourable guests,

This is not only true for the rule of law. We can see it in all other key policy areas of this Commission. Let's take digital transition with its landmark legislation, the Digital Markets Act and the Digital Services Act. The Commission proposed these laws to bring accountability and responsibility to large online platforms and to put an end to lawlessness on the internet. In doing so, our legislation aims to safeguard citizens' fundamental rights and freedoms in the digital space. This is a delicate balance between interests that are sometimes difficult to reconcile and can only be achieved by assessing each individual case, ultimately by the Court.

The future will bring to the chambers in Luxembourg the cases that will set the course of European integration and help to find a just balance between rights and freedoms. I am thinking here, for instance, about media freedom and pluralism, another essential element of a democratic society. The Commission has recently proposed the European Media Freedom Act. While the main objective of this Act is to ensure the proper functioning of the internal market for media, this can only happen if media freedom and pluralism are protected. Again, I have no doubt that the voice of the Court will determine the European dimension of this protection at the right time.

To conclude, let me recall that the European Union is a community of values and of law which must be upheld and defended at all times. This is what keeps us together. This is what we stand for. This is the task of the EU institutions. And I want to wholeheartedly thank the Court of Justice for ensuring, through 70 years of relentless service, that this is the case.

Thank you.

M[me] Sam Tanson,
Ministre de la Culture et Ministre de la Justice du Grand-Duché de Luxembourg

Allocution de M^me^ Sam Tanson, Ministre de la Culture et Ministre de la Justice du Grand-Duché de Luxembourg

Une justice proche du citoyen

Altesse royale,

Monsieur le Président de la Cour de justice de l'Union européenne,

Monsieur le Premier Vice-président du Parlement européen,

Monsieur le Ministre de la Législation et Président du Conseil Législatif du Gouvernement de la République tchèque,

Madame la Vice-présidente de la Commission européenne,

Mesdames et Messieurs les juges et avocats généraux,

C'est un grand honneur pour moi de m'adresser à vous dans le cadre de l'audience solennelle à l'occasion du 70e anniversaire de l'installation de cette Cour à Luxembourg.

Depuis sa création, la Cour de justice œuvre à la construction européenne et développe une jurisprudence qui a une portée immédiate sur les droits des citoyens.

La Cour protège les droits des citoyens en contrôlant la légalité des actes des institutions de l'Union et en veillant au respect, par les États membres, des obligations auxquelles ils sont tenus en tant que membres de l'Union.

Elle le fait aussi en clarifiant, à la demande des juges nationaux, la portée du droit de l'Union. La pierre angulaire du système juridictionnel institué par le droit primaire est ce dialogue de juge à juge. La procédure du renvoi préjudiciel assure la cohérence, l'autonomie et le plein effet du droit de l'Union, et participe ainsi de l'affirmation d'un État de droit européen dont les citoyens des États membres sont les premiers bénéficiaires.

Il est important de préserver cette particularité de notre Union de droit, et le Conseil de l'Union européenne en est conscient, notamment dans le cadre des négociations sur l'adhésion de l'Union à la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales, ces négociations entrant désormais dans une phase cruciale.

L'impact direct de la jurisprudence de la Cour sur la vie des citoyens est remarquable. À titre d'illustration concrète, nous sommes actuellement confrontés au défi d'une mise en conformité d'une telle jurisprudence à impact direct dans le domaine de l'accès au registre des bénéficiaires effectifs.

Je souhaite brièvement mettre en relief **trois domaines dans lesquels l'effet direct sur la vie des citoyens est palpable.**

L'Union européenne est désormais dotée d'une réglementation formant un socle solide et cohérent pour la **protection des données à caractère personnel.** Clairement, la Cour a marqué de son empreinte ce droit européen de la protection des données et s'est avérée être un garant résolu des droits individuels.

Elle a renforcé la nécessaire indépendance des organes nationaux de protection des données, clarifié les conditions des transferts de données vers des pays tiers ou encore apporté des précisions sur le droit de toute personne au déréférencement, pour ne citer que certaines décisions de principe.

La Cour veille ainsi à la proportionnalité de l'ingérence des pouvoirs publics dans la sphère privée des citoyens de l'Union.

L'interdiction d'une conservation généralisée et indifférenciée de ces données a été consacrée à travers les différents arrêts depuis « Digital Rights » [1] et l'ingérence des pouvoirs publics limitée et clairement encadrée.

Ces arrêts ont suscité des réactions importantes. Des efforts fragmentés visant à se conformer à la jurisprudence de la Cour sont en cours dans plusieurs États membres, y compris au Luxembourg, même si du point de vue de la protection égale des droits des utilisateurs, je suis d'avis qu'il serait préférable de travailler sérieusement sur un nouvel instrument

1 | Arrêt du 8 avril 2014, Digital Rights Ireland et Seitlinger e.a., C-293/12, EU:C:2014:238.

juridique européen spécifique établissant des standards communs conformes aux exigences jurisprudentielles.

Un autre domaine est celui de l'établissement d'un **espace de libre circulation des personnes sans frontières intérieures.**

Schengen est un acquis majeur de l'histoire de l'intégration européenne qui touche directement la vie quotidienne des citoyens dans les régions transfrontalières, mais aussi nos économies. La libre circulation et la fluidité du trafic à nos frontières sont d'un intérêt économique et social vital pour mon pays.

Ces dernières années, l'espace Schengen se trouve confronté à une érosion progressive sur toile de fond sécuritaire et migratoire. La pandémie de COVID-19 n'a certainement pas arrangé la situation.

Ce contexte très difficile a fait en sorte que les décisions de réintroduction de contrôles aux frontières intérieures sont reconduites par plusieurs États membres depuis des années.

Un citoyen a eu la persévérance de choisir la voie judiciaire pour attaquer ces pratiques, et dans le cadre d'une procédure de renvoi préjudiciel, la Cour a jugé, en avril 2022 [2], que la réintroduction des contrôles aux frontières intérieures doit rester exceptionnelle, ne doit intervenir qu'en dernier recours et ne peut être prolongée de manière illimitée pour une même menace.

Cet arrêt est sans aucun doute une contribution essentielle pour, à l'avenir, mieux encadrer les contrôles aux frontières intérieures, bien que nous soyons encore loin d'une normalisation du fonctionnement de l'espace Schengen.

Un troisième aspect de la jurisprudence récente de la Cour, à première vue plus abstrait, mais central, est celui de **l'État de droit.**

L'État de droit revêt une importance existentielle pour l'Union européenne. C'est l'un des fondements d'une démocratie efficace et réelle. Sans l'État de droit, l'Union européenne, en tant qu'Union de droit, n'existerait pas et nous ne pouvons pas le tenir pour acquis.

2 | Arrêt du 26 avril 2022, Landespolizeidirektion Steiermark (Durée maximale du contrôle aux frontières intérieures), C-368/20, non publié, EU:C:2022:298.

La Cour est de plus en plus souvent amenée à examiner si cette valeur fondatrice de notre Union est respectée au niveau national, notamment en ce qui concerne les procédures de nomination des juges nationaux, leur responsabilité personnelle ou encore le régime disciplinaire qui leur est applicable. Au Luxembourg, nous allons voter encore ce mois-ci la loi instituant le Conseil national de la Justice, qui contribuera à renforcer l'indépendance judiciaire.

La nécessité d'un contrôle opéré par des juridictions **indépendantes** dans tous les domaines couverts par le droit de l'Union trouve son fondement à l'article 19 du traité sur l'Union européenne.

Cette indépendance est au demeurant essentielle au dialogue de juge à juge qu'incarne la procédure du renvoi préjudiciel. Elle concerne aussi bien l'espace de liberté, de sécurité et de justice que toutes les politiques liées au marché intérieur.

La jurisprudence de la Cour dans ce domaine est un vecteur de **confiance** des citoyens en une justice européenne et nationale à l'abri d'influences directes ou indirectes des pouvoirs exécutif et législatif, alors même que nous devons constater avec préoccupation une augmentation des menaces pesant sur l'État de droit dans un nombre d'États membres. La Cour nous a rappelé dans plusieurs de ses arrêts récents ce qu'une Union de droit ne saurait tolérer :

- que soit sapée la confiance des citoyens en la justice par des réformes législatives ou des interprétations constitutionnelles visant à museler l'appareil judiciaire ou à « [mettre] à l'écart [...] un certain groupe de juges » ;
- que le régime disciplinaire des juges puisse être détourné de ses finalités légitimes et utilisé à des fins de contrôle politique des décisions judiciaires ou de pression sur ceux-ci ;
- que des juges nationaux, garants de la correcte application du droit de l'Union, s'exposent à une procédure et à des sanctions disciplinaires au seul motif qu'ils ont procédé à un renvoi préjudiciel à la Cour de justice ou qu'ils entendraient se conformer à une décision de celle-ci.

L'uniformité d'interprétation du droit de l'Union est la garantie ultime que les règles européennes revêtent le même sens pour tous les justiciables dans les différents États membres. C'est la Cour de justice qui doit avoir le dernier mot quand il s'agit du droit de l'Union. C'est essentiel pour garantir le principe de l'égalité entre États membres et entre citoyens européens.

Mesdames et Messieurs,

Un système judiciaire moderne et résilient en temps de crise est essentiel pour garantir le droit des citoyens à accéder à la justice et à un procès équitable. Les tribunaux doivent pouvoir fonctionner en toutes circonstances, il s'agit là aussi d'un principe de l'État de droit.

Le numérique est à cet égard un facilitateur technologique crucial.

Plusieurs initiatives législatives sont négociées à présent au Parlement européen et au Conseil en vue de la **numérisation** de la coopération judiciaire. Le besoin de numérisation et d'interopérabilité entre systèmes nationaux est pressant au sein du marché intérieur dans lequel de nombreux contentieux entre citoyens et entreprises s'inscrivent dans un contexte transfrontière. Les procédures pénales bénéficieront elles aussi d'une numérisation plus approfondie grâce à ces initiatives.

La Cour de justice s'appuie également sur les potentialités offertes par les outils numériques avec notamment l'application e-Curia.

La Cour a innové avec les audiences à distance mises en place en 2020 pour assurer la continuité du service public européen de la justice : ce projet a été récompensé en 2021 par le Prix de la bonne administration de la Médiatrice européenne, dans la catégorie « excellence en innovation ou transformation ».

Institution juridictionnelle multilingue, la Cour doit être en mesure de traiter une affaire quelle que soit la langue officielle de l'Union dans laquelle elle a été introduite. Elle assure ensuite la diffusion de sa jurisprudence dans les 24 langues officielles.

C'est un enjeu d'égalité d'accès de tous les citoyens à la justice européenne. Cet attachement au **multilinguisme** n'a d'équivalent dans aucune autre juridiction au monde.

Mesdames, Messieurs,

La protection de l'État de droit et la protection des droits individuels reconnus par les traités, la charte des droits fondamentaux de l'Union européenne et le droit secondaire de l'Union restent au cœur de l'œuvre que la Cour de justice accomplit. Les conséquences sur la vie des citoyens peuvent être décisives.

Cette œuvre n'ira pas en diminuant dans les années à venir.

Bien au contraire, car les co-législateurs de l'Union négocient actuellement de nombreuses propositions susceptibles d'avoir un impact direct sur le citoyen, comme la future législation sur l'intelligence artificielle qui a pour objet la création d'un cadre européen pour une intelligence artificielle humano-centriste digne de confiance qui respecte les droits fondamentaux.

Ces textes seront tôt ou tard interprétés par la Cour, contribuant à la richesse de l'apport jurisprudentiel de l'institution que nous accueillons avec fierté depuis maintenant 70 ans.

Je vous remercie pour votre attention.

De gauche à droite : M. Lars Bay Larsen, Vice-président de la Cour de justice ;
M. Koen Lenaerts, Président de la Cour de justice et M. Marc van der Woude, Président du Tribunal

Mots de clôture de Koen Lenaerts, Président de la Cour de justice de l'Union européenne

Nous voici au terme de cette audience solennelle. Je remercie Monsieur le Premier Vice-président Othmar Karas, Monsieur le Ministre Michal Šalomoun, Madame la Vice-présidente Věra Jourová et Madame la Ministre Sam Tanson pour leurs excellentes interventions et vous tous pour votre présence.

Nous allons écouter maintenant le prélude de « L'Ode à la Joie » de la 9e Symphonie de Beethoven. L'ensemble musical qui va nous interpréter l'hymne européen, formé d'agents de la Cour issus chacun d'un État membre différent, est comme une allégorie de la devise de l'Union européenne : « Unis dans la diversité ». Dans un ensemble musical comme celui-ci, chaque musicien joue ou chante sa propre voix, sa propre partition, distincte des autres. Et pourtant, une fois mises ensemble, toutes ces voix s'harmonisent. Le résultat dépasse largement l'effet que chacune des voix aurait produit individuellement, pour autant que les musiciens restent à l'écoute les uns des autres. Cette écoute dans le respect de la diversité représente toujours le défi central de l'Union 70 ans après sa création.

Je clôture cette audience en vous demandant de bien vouloir vous lever pour écouter l'hymne européen et vous invite par la suite à une réception dans la salle des Pas perdus.

Des agents de la Cour interprètent le prélude de « L'Ode à la Joie » de la 9e Symphonie de Beethoven

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