FIDE XXIX Congress The Hague 2020

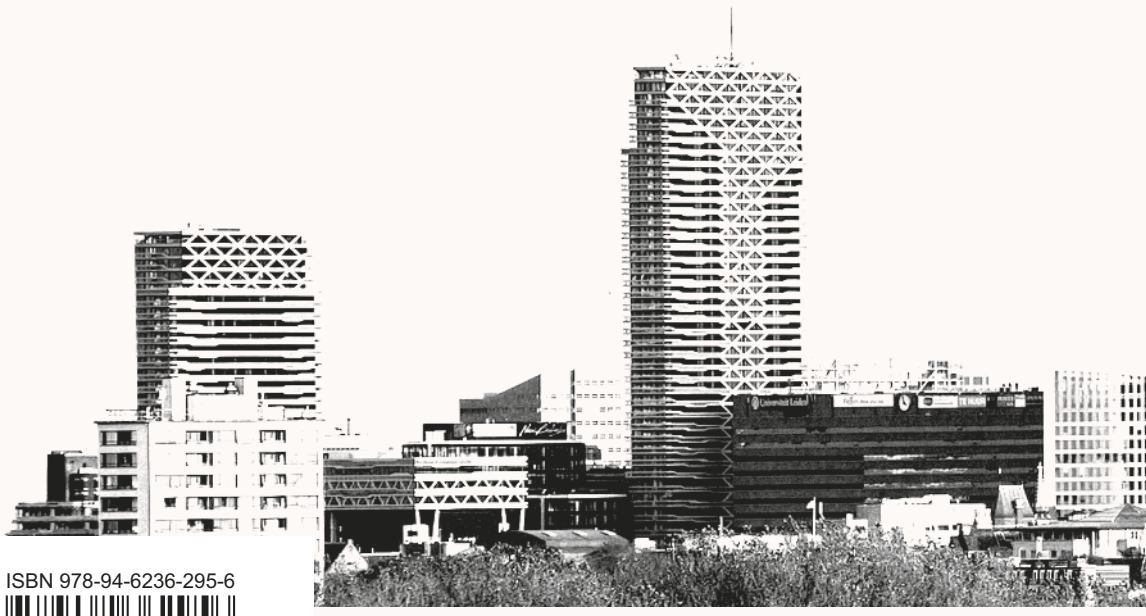
THE XXIX FIDE CONGRESS IN THE HAGUE 2021

CONGRESS PROCEEDINGS

VOL. 4

eleven

The proceedings of the XXIX FIDE Congress in The Hague are published in four volumes. The first three volumes were published in 2020. This book (Vol. 4) contains the congress proceedings of the XXIXth FIDE congress that, after years of preparation and the disruption caused by COVID-19, could finally take place in The Hague.



ISBN 978-94-6236-295-6

FIDE XXIX Congress The Hague 2020

The XXIX FIDE Congress in The Hague, 2021: Proceedings

The XXIX FIDE Congress in The Hague, 2021: Proceedings

Congress Proceedings
Kongressband
Actes du Congrès

The XXIX Congress in The Hague, 2021
Congress Publications Vol. 4

eleven

Published, sold and distributed by Eleven
P.O. Box 85576
2508 CG The Hague
The Netherlands
Tel.: +31 70 33 070 33
Fax: +31 70 33 070 30
email: sales@elevenpub.nl
www.elevenpub.com

Sold and distributed in USA and Canada
Independent Publishers Group
814 N. Franklin Street
Chicago, IL 60610, USA
Order Placement: +1 800 888 4741
Fax: +1 312 337 5985
orders@ipgbook.com
www.ipgbook.com

Eleven is an imprint of Boom uitgevers Den Haag.

ISBN 978-94-6236-295-6

Op de rug van een stier

Hanneke van Eijken[1]

Iemand zei dat Europa niets meer is
dan een grillige vlek op een wereldkaart
zonder te beseffen
dat goden van alle tijden zijn

dat Europa vele vormen kent
ze is een eiland in de Indische Oceaan
een maan bij Jupiter
zevenentwintig landen die als koorddansers
in evenwicht proberen te blijven

er leven godenkinderen die vergeten zijn
wie hun vader is

Europa is een vrouw
met een kast vol jurken
ze houdt er niet van een vlek genoemd te worden

over de wraak van goden en vrouwen met jurken
kun je beter niet lichtzinnig doen

1 Assistant professor of EU law at Utrecht University.

On the Back of a Bull

Translation by Sacha Prechal[2] *and Eleanor Sharpston*[3]

Somebody said Europe is nothing more
than a capricious stain on a world map –
without realizing
that the gods are eternal

that Europe comes in many forms
she is an island in the Indian Ocean
a moon of Jupiter
twenty-eight countries trying to keep their balance
like tight-rope walkers

the children of the gods live there
they have forgotten who their father is

Europe is a woman
with a wardrobe full of dresses
she doesn't like being called a stain

of the gods' vengeance and women with dresses
it is not wise to speak lightly

2 Judge at the Court of Justice of the European Union.
3 Former Advocate General at the Court of Justice of the European Union.

Table of Contents

1 Introduction

Gratitude and inspiration. Those words come to mind when looking back at the FIDE 2021 congress. We are so very grateful that after years of preparation and the disruption caused by COVID-19 the XXIXth FIDE congress could finally take place. Most importantly, that it could take place in real life and that we were able to welcome almost 450 participants to the world's legal capital The Hague. For many it was a possibility to catch up in person with friends and colleagues. For the organising team and all members of the Dutch Association for European Law it was a wonderful occasion to welcome you in some of the city's beautiful venues, such as the Hall of Knights, the art gallery Pulchri Studio and the Kunstmuseum. And since we feel inspired by the speeches, debates, and many encounters we all had during those four days of plenary sessions, working groups, lunches and social events.

As President Koen Lenaerts in his closing address said: FIDE remains as relevant as ever and the formula still stands. Indeed, bringing together national rapporteurs around three current issues of EU law still results in a fruitful exchange of information and ideas, between academics and practitioners, first at national level and later continuing the debate at the congress with European lawyers from across the Union and beyond. The discussions were topical, not always easy but certainly inspiring and proved once again the added value of uniting academics, national and European judges, practitioners and government lawyers.

Our three main topics – the role of national courts, EU personal data protection and the role of competition law in the digital economy – remained of relevance, despite repeated postponements. For once the dynamic nature of EU law worked to our advantage as in relation to all three topics important developments took place. We have seen new questions arise with respect to the functioning of national judiciaries, the importance of personal data for security purposes and health protection, the entry into force of legislation regulating Big Tech. Not all of these developments were of course positive. The participants of the FIDE Congress in The Hague in 1984 would be surely dismayed to see the attack on the primacy of EU law, a concept whose development was greatly influenced by the participants at the FIDE Congresses in The Hague and Paris in 1963 and 1965 respectively. They would surely be amazed as well by the massive technological advancement and the development of social networks, since they first discussed the topic of Europe and the Media in 1984.

We are most grateful to our national, general and institutional rapporteurs, who have done an absolutely wonderful job in not only presenting the participants with their reports, but in the run up to the congress with updates as well. All of these remain available at the FIDE 2020 website, along with the audio recordings of the three parallel working groups, as well as the video recordings of the speeches of our distinguished speakers and the plenary

panel discussions. We are also grateful to all moderators who have so skilfully led the discussions.

Whilst faithful to FIDE custom, the 2021 edition also presented some innovations, most notably the involvement of Young Rapporteurs, actively participating in the congress and reporting back on the Young FIDE seminar that brought together over hundred junior EU lawyers, academics and practitioners, in an online format in May 2021.

Another innovations was the invitation to non-lawyers to address the participants. The idea of the first panel on the future of the Union discussion had been to look forward after a decade of turmoil, including the financial crisis, the refugee crisis and Brexit. However, in the light of the pandemic and the rule of law crisis the discussion took on a new dimension and significance. Three prominent European thinkers – Luuk van Middelaar, Caroline de Gruyter and George Papakonstantinou – provided participants with an non-legal perspective of the state of the union. And although Papakonstantinou found himself the "lone economist in a sea of lawyers", it was most certainly rewarding to be able to put European law in context and be given a fresh look at Europe's challenges and opportunities.

On the final day we had the pleasure of a highly topical panel on the role of the judiciary in protecting the EU's core values, with the participation of judges from Europe's top courts. This debate was followed by a speech by the Chief European Public Prosecutor, who explained the unique nature of her office and the way in which it contributes to the protection of European values at a very practical level.

As Europe continues to confront both internal and external challenges, Jean Monnet's adage will remain as true as ever: "*L'Europe se fera dans les crises et elle sera la somme des solutions apportées à ces crises.*"

FIDE and its members will continue to think, discuss, work and actively contribute towards those solutions. The topics for the XXXth congress taking place in Bulgaria in 2023 most certainly takes core questions of European law head on: mutual recognition, geopolitics and the social union. We cannot wait to meet again in Sofia and wish the Bulgarian Association for European law much success with the preparations.

Meanwhile, we hope that you will enjoy reading this XXIX FIDE post congress publication to allow those that could not make it to the Hague get a taste of the congress and for those that did attend to revisit some of the discussions.

The FIDE XXIX team

Corinna Wissels
Jorrit Rijpma
Marlies Noort
Herman van Harten
Marleen Botman
Clara van Dam
Charlotte Schillemans
Armin Cuyvers

2 Congress Programme

Wednesday 3 November 2021
12:30 – 13:00 Welcome coffee and tea for the Steering Committee
13:00 – 14:00 Lunch of the Steering Committee
14:00 – 16:00 Meeting of the FIDE Steering Committee
18:00 – 20:00 Welcome reception (Hall of the Knights at the Binnenhof)
Welcome speech by Thom de Graaf, Vice-president of the Dutch Council of State

Thursday 4 November 2021
08:30 – 09:30 Welcome coffee and tea
09:15 – 09:30 Opening music: *A truly European collection of pieces for piano trio, from Kreisler to Widor and from Brahms to the trio's own arrangement of the European tune that unites us all*

Performed by:
Despoina Kornilaki (Political Administrator, Council of the European Union) – cello
Ina Söderlund (Legal Service, European Commission) – violin
Clio Zois (Legal Service, European Commission) – piano

09:30 – 10:45 Opening Ceremony – Welcome addresses
Corinna Wissels, President of FIDE 2018 to 2021: Welcome to FIDE 2021!
Hanneke van Eijken, Poem: Europe rhymes and grates
Dineke de Groot, President of the Supreme Court of the Netherlands: Some observations about the role of courts in dispute resolution and the development of EU law
Koen Lenaerts, President of the Court of Justice of the European Union: Constitutional relationships between legal orders and courts within the European Union
Marc van der Woude, President of the General Court of the European Union: The place of the General Court in the institutional framework of the Union
Frans Timmermans, Vice-President of the European Commission (online video speech)

10:45 – 11:15 Coffee and tea break

11:30 – 12:45 Plenary panel discussion – Fit for the Future: What role for Europe at home and in the world?

Caroline de Gruyter, journalist, writer and speaker
Luuk van Middelaar, Professor, Europa Institute, Leiden Law School
George Papaconstantinou, Professor of International Political Economy, European University Institute, School of Transnational Governance
Moderator: Christa Tobler, Professor of European Law, Europa Institute, Leiden University and University of Basel

12:45 – 14:00 Lunch

14:00 – 15:30 Parallel Working Groups – Session (I)

Topic 1: National courts and the enforcement of EU law
Short reflection on the Young FIDE Seminar
Young rapporteur: *Sim Haket, Assistant Professor of constitutional law at Utrecht University*

Subtopic: Direct effect: Application of the Charter of Fundamental Rights / general principles of EU law to private individuals
Moderator: *Sacha Prechal, Judge at the Court of Justice of the European Union*
General rapporteur: *Anna Wallerman*
Institutional rapporteur: *Michal Bobek*

Topic 2: The new EU data protection regime
Short reflection on the Young FIDE Seminar
Young rapporteur: *Teresa Quintel, Senior Lecturer at the Maastricht European Centre on Privacy and Cybersecurity*

Subtopic: (Impediments to) the enforcement of the GDPR
Moderator: *Maria Jose Costeira, Judge at the General Court of the European Union*
Institutional rapporteurs: *Herke Kranenborg and Anna Buchta*

Topic 3: EU competition law and the digital economy
Short reflection on the Young FIDE Seminar

Young rapporteur: *Daniel Mandrescu, PhD fellow at the Europa Institute of Leiden University*

Subtopic: Market definition and market power in digital markets
Moderator: *Pablo Ibáñez Colomo, Professor of Law and Jean Monnet Chair in Competition and Regulation at London School of Economics and Political Science*
General rapporteurs: *Nicolas Petit and Pieter Van Cleynenbreugel*
Institutional rapporteur: *Thomas Kramler*

15:30 – 16:00 Coffee and tea break
16:00 – 17:30 Parallel Working Groups – Session (II)

Topic 1: National courts and the enforcement of EU law
Subtopic: Supremacy of Union law: CJEU and national perspectives on the limits of the principle of primacy
Moderator: *Nina Póltorak, Judge at the General Court of the European Union*
General rapporteur: *Anna Wallerman*
Institutional rapporteur: *Michal Bobek*

Topic 2: The new EU data protection regime
Subtopic: Beyond NSAs: The role of other actors in developing data protection
Moderator: *Hielke Hijmans, Director at the Belgian Data Protection Authority*
General rapporteur: *Orla Lynskey*

Topic 3: EU competition law and the digital economy
Subtopic: Vertical restraints and digitisation
Moderator: *Elske Raedts, Principal Associate Antitrust, competition and trade, Freshfields Bruckhaus Deringer*
General rapporteurs: *Nicolas Petit and Pieter Van Cleynenbreugel*
Institutional rapporteur: *Thomas Kramler*

19:30 – 23:00 Young European Lawyers (YEL) Event, Pulchri Studio, The Hague

Friday 5 November 2021
08:30 – 09:30 Welcome coffee and tea

09:30 – 11:00 Parallel Working Groups – Session (III)

Topic 1: National courts and the enforcement of EU law
Subtopic: Effective judicial protection: Independence of the judiciary
Moderator: *Daniel Sarmiento, Professor of EU and Administrative Law at the University Complutense of Madrid*
General rapporteur: *Anna Wallerman*
Institutional rapporteur: *Michal Bobek*

Topic 2: The new EU data protection regime
Subtopic: Data protection in the pandemic
Moderator: *Stéphanie Laulhé Shaelou, Professor of European Law and Reform, UCLan Cyprus*
General rapporteur: *Orla Lynskey*
Institutional rapporteurs: *Herke Kranenborg and Anna Buchta*

Topic 3: EU competition law and the digital economy
Subtopic: Data and EU competition
Moderator: *Anna Gerbrandy, Professor of Competition Law, Europa Institute, Utrecht University*
General rapporteur: *Pieter Van Cleynenbreugel*
Institutional rapporteur: *Thomas Kramler*

11:00 – 11:30 Coffee and tea break
11:30 – 13:00 Parallel Working Groups – Session (IV)

Topic 1: National courts and the enforcement of EU law
Subtopic: Effective judicial protection: Impact of Union law on national standing requirements
Moderator: *Hanna Sevenster, State Councillor at the Dutch Council of State*
General rapporteur: *Anna Wallerman*

Topic 2: The new EU data protection regime
Subtopic: Public policy, public security and national security
Moderator: *Irmantas Jarukaitis, Judge at the Court of Justice of the European Union*
General rapporteur: *Orla Lynskey*

Institutional rapporteurs: *Herke Kranenborg and Anna Buchta*

Topic 3: EU competition law and the digital economy
Subtopic: Algorithmic decision making and EU competition law
Moderator: *Alexander Kornezov, Judge at the General Court of the European Union*
General rapporteur: *Pieter Van Cleynenbreugel*
Institutional rapporteur: *Thomas Kramler*

13:00 – 14:15 Lunch
14:15 – 15:30 Parallel Working Groups – Session (V)

Topic 1: National courts and the enforcement of EU law
Subtopic: Preliminary references
Moderator: *Nuno José Cardoso da Silva Piçarra, Judge at the Court of Justice of the European Union*
General rapporteur: *Anna Wallerman*

Topic 2: The new EU data protection regime
Subtopic: EU data protection law in a global context
General rapporteur: *Orla Lynskey*

Topic 3: EU competition law and the digital economy
Subtopic: Interplay regulation and EU competition law
Moderator: *Assimakis Komninos, Partner, White & Case LLP*
Institutional rapporteur: *Thomas Kramler*

15:30 – 16:00 Coffee and tea break
16:00 – 17:30 Parallel Working Groups – Session (VI)

Topic 1: National courts and the enforcement of EU law
Subtopic: The limits of mutual recognition
Moderator: *Lars Bay Larsen, Vice-President of the Court of Justice of the European Union*
General rapporteur: *Jurian Langer*
Institutional rapporteur: *Michal Bobek*
Subtopic: AI, gatekeepers and data altruism: Situating data protection amongst new regulatory initiatives

Moderator: *Maciej Szpunar, First Advocate General at the Court of Justice of the European Union*
General rapporteur: *Orla Lynskey*
Institutional rapporteurs: *Herke Kranenborg and Anna Buchta*

Topic 3: EU competition law and the digital economy
(Session organized and sponsored in cooperation with the Dutch Ministry of Economic Affairs)
Panel members:
Cristina Caffara, Senior consultant for Charles River Associates
Helen Gornall, Partner at De Brauw Blackstone Westbroek
Bjorn Vroomen, Head of Unit at The Netherlands Authority for Consumers and Markets

19:45 – 22:30 Walking Dinner at the Kunstmuseum, The Hague – *Speeches*
Jan van Zanen, Mayor of The Hague
Tom de Bruijn, Minister for Foreign Trade and Development Cooperation

Saturday 6 November 2021
08:30 – 09:00 Welcome coffee and tea
09:00 – 09:45 Reports on the Working Group sessions by the General Rapporteurs
Topic 1: *Anna Wallerman Ghavanini*
Topic 2: *Orla Lynskey*
Topic 3: *Pieter van Cleynenbreugel*
Moderator: *Sacha Prechal, Judge of the Court of Justice of the European Union*
09:45 – 11:15 Panel discussion: The role of courts in upholding the EU's foundational values in Article 2 TEU
Rajko Knez, President of the Constitutional Court of Slovenia
David Kosar, Associate Professor, Judicial Studies Institute, Masaryk University
Siofra O'Leary, Judge at the European Court of Human Rights
Lucia Serena Rossi, Judge at the Court of Justice of the European Union
Kees Sterk, Senior Judge and Professor, Maastricht University
Moderator: Rick Lawson, Professor, Europa Institute, Leiden University
11:15 – 11:45 Coffee and tea break

11:45 – 12:00 Speech by *Laura Kövesi, the European Chief Prosecutor: EU criminal law cooperation and the role of the European Public Prosecutor's Office*
12:00 – 12:30 Presentation of the XXX FIDE Congress in Sofia, Bulgaria, and final acknowledgements

Alexander Arabadjiev, Future President of FIDE, Judge at the Court of Justice of the European Union
Koen Lenaerts, President of the Court of Justice of the European Union
Corinna Wissels, President of FIDE 2018 to 2021

13:00 Closing

3 Topic 1: The Pivotal Role of National Courts in the EU Legal Order

3.1 Rapporteurs (General, Institutional and National)

General Rapporteurs	Michael Dougan and Anna Wallerman Ghavanini
Institutional Rapporteur	Michal Bobek
Young Rapporteur	Sim Haket

Austria	Marcus Klamert
Bulgaria	Maria Slavova
Croatia	Nika Bačić Selanec, Tamara Ćapeta, Iris Goldner Lang and Davor Petrić
Cyprus	Anne Pantazi-Lamprou
Czech Republic	Václav Stehlík, David Sehnálek and Ondrej Hamuľák
Denmark	Ulla Neergaard and Karsten Engsig Sørensen
Finland	Pekka Aalto, Samuli Miettinen and Juha Raitio
France	Carine Soulay
Germany	Jörg Philipp Terhechte
Hungary	András Osztovits and András Zs. Varga
Ireland	Ciarán Toland, Aoife Beirne and Sarah Fennell
Italy	Roberto Baratta
Luxembourg	Fatima Chaouche, Francis Delaporte, Jörg Gerkrath and Jean-Claude Wiwinius
The Netherlands	Hanneke van Eijken and Maartje Verhoeven
Norway (including Iceland	Christian Franklin, Ólafur Ísberg Hannesson, Ómar Berg
and Liechtenstein)	Rúnarsson, Georges Baur and Enya Steiner
Poland	Dawid Miąsik and Agnieszka Sołtys
Portugal	Inês Quadros and Pedro Guerra e Andrade
Romania	Răzvan Horațiu Radu
Slovakia	Lucia Mokrá, Michael Siman and Valéria Mihálíková
Slovenia	Verica Trstenjak and Petra Weingerl
Spain	Juan Antonio Mayoral Díaz-Asensio and Mercedes Pedraz Calvo
Sweden	Mona Aldestam and Ingeborg Simonsson

United Kingdom	Theodore Konstadinides and Anastasia Karatzia
Supplementary Contribution on the EFTA Court	Michael-James Clifton

3.2 Update General Report

Michael Dougan[1] *and Anna Wallerman Ghavanini*[2]

If there is one accusation we simply cannot level against EU legal studies, it is surely the charge of dullness: our discipline evolves at an astonishing (sometimes even bewildering) pace.

Already between circulation of the original questionnaire on the topic of "national courts and the enforcement of EU law" (on the one hand) and compilation of the general report based on the available reports from across the Member States and beyond (on the other hand), EU law had continued to develop apace in several of the fields that were specifically surveyed for the purposes of our FIDE gathering. The introduction to the general report itself (as published in Volume 1 of the *2020 Congress Publications*) draws attention to some of the relevant ECJ caselaw developments: for example, on the limits to the principle of primacy recognised by Union law itself in those (admittedly unusual) situations where disapplication of conflicting national provisions might create a damaging "legal vacuum"; and on the qualifications to the presumption of mutual trust / duty of mutual recognition, particularly within the context of the AFSJ, again demanded under Union law itself for the sake of respecting fundamental rights.

As we all know too well, the terrible tragedy of the COVID-19 pandemic unavoidably led to the postponement of our planned FIDE gathering, which was originally due to take place in The Hague during May 2020. Circumstances have now improved sufficiently for our dedicated Dutch hosts to reconvene the FIDE conference, which is now scheduled to occur in November 2021. In preparation for that exciting opportunity for us to meet again as colleagues and friends, the purpose of this short report is to highlight a few of the additional developments that have occurred in the caselaw – particularly but not exclusively that of the ECJ – several of which are sufficiently important and / or controversial that they will surely provide the raw material for much interesting and fruitful discussion in The Hague. In order to facilitate a more focused discussion, taking into account the most recent and relevant developments, the six main topics which were contained in the original

1 Professor of European Law and Jean Monnet Chair in EU Law, University of Liverpool.
2 Associate professor of EU Law, University of Gothenburg.

questionnaire (and addressed as such in the various national, general and institutional reports) have here been slightly adapted and reordered.

3.2.1 *Direct Effect: Application of the Charter of Fundamental Rights / general principles of Union law to private individuals*

In rulings such as Case C-414/61, *Egenberger*, ECLI:EU:2018:257, Joined Cases C-569/16 & C-570/16, *Bauer and Willmeroth*, ECLI:EU:C:2018:871 and Case C-684/16, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, ECLI:EU:C:2018:874, the ECJ had already expressed its view that at least certain provisions of the Charter of Fundamental Rights should be treated as capable of producing direct effect in respect of non-state actors / individuals, i.e. as such and in the exercise of their private autonomy (for example, as employers). Those judgments remain the most recent leading authorities on the issue as a matter of EU law itself, and have been reaffirmed in the more recent judgment in Case C-30/19, *Braathens Regional Aviation*, ECLI:EU:C:2021:269.

Many of the national reports discussed this issue – but in most cases, they highlighted how the question was one that (as yet) tended to be more debated in academic circles than litigated before the domestic courts. However, the Danish report provided one obvious exception: the ruling of the Danish Supreme Court in the *Dansk Industri / Ajos* litigation, which explicitly rejected the purely horizontal enforcement, certainly of an unwritten general principle of Union law, possibly also of the corresponding provision of the Charter itself. It will be interesting to know, during the upcoming FIDE discussions, whether the caselaw has now developed further in other jurisdictions.

3.2.2 *Supremacy of Union Law: CJEU and National Perspectives on the Limits of the Principle of Primacy*

Both the original questionnaire and general report as published in 2020 focused on the idea that Union law itself now incorporates a range of permissible (though strictly defined) limits to the otherwise fundamental principle that national rules conflicting with directly effective EU provisions should be disapplied by the domestic courts. The ECJ's caselaw in this field has indeed continued to develop, with several new and interesting judgments being delivered over these last months. For example, just on the question of when national courts might refrain from the disapplication of admittedly incompatible domestic rules, for the sake of preserving legal certainty and avoiding to create a damaging "legal vacuum", the Court has delivered additional rulings such as Case C-597/17, *Belgisch Syndicaat van Chiropraxie and Bart Vandendries*, ECLI:EU:C:2019:544; Case C-236/18, *GRDF*, ECLI:EU:C:2019:1120; Case C-24/19, *A*, ECLI:EU:C:2020:503; Joined Cases C-511/18,

C-512/18 & C-520/18, *La Quadrature du Net*, ECLI:EU:C:2020:791; and Case C-439, *B*, ECLI:EU:C:2021:504.

In a similar vein of cautiously limiting the impact of EU law primacy, the ruling in Case C-573/17, *Popławski*, ECLI:EU:C:2019:530 settled the longstanding debate as to whether the obligation to disapply national rules incompatible with Union law follows from the principle of primacy alone, or from the principle of primacy in conjunction with that of direct effect, favouring the latter solution. This landmark ruling has since been confirmed in later judgments such as Case C-615/18, *Staatsanwaltschaft Offenburg*, ECLI:EU:C:2020:376; C-233/19, *Centre public d'action sociale de Liège*, ECLI:EU:C:2021:374; Case C-30/19, *Braathens Regional Aviation*, ECLI:EU:C:2021:269; and Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 & C-397/19, *Asociația 'Forumul Judecătorilor din România'*, ECLI:EU:C:2021:393. This development does not appear to have sparked the academic interest that one might have expected. It would be interesting to know whether it has attracted attention in the Member States.

However, perhaps the most important recent developments to have taken place concerning the principle of primacy for Union law fell outside the strict scope of the original questionnaire / general report and instead revived a much more traditional debate about the status of Union law within the national legal systems: the limits to supremacy imposed by senior national courts in their interpretation of the domestic constitution. Here, of course, one thinks of the ruling of the German Federal Constitutional Court in the *PSPP* case (judgment of 5 May 2020) – delivered in spite of the German national report's assurance that there is "no doubt" of the German courts' "fundamental acceptance" of the primacy of EU law – which reignited debates about how far the FCC was willing to challenge the judicial authority of the ECJ (and indeed, how far the FCC was overstepping the boundaries of its own judicial mandate under German law). And more recent still, we have the unedifying experience of the politically compromised Constitutional Tribunal in Poland delivering its "judgment" in a request brought by the Prime Minister (Case K 3/21, decision of 7 October 2021): even though such an open attack on the primacy of Union law was widely anticipated, it is still generally regarded as yet another dark milestone in the ruling regime's attack on liberal democracy, as well as its deliberate policy of stoking populist confrontation with "Brussels".

3.2.3 Effective Judicial Protection: Independence of the Judiciary

Since its landmark ruling in Case C-64/16, *Associação Sindical dos Juízes Portugueses*, ECLI:EU:C:2018:117, the ECJ has continued to expand its caselaw on the full nature, and more detailed implications, of its own jurisdiction to scrutinise national adherence to the fundamental principle of judicial independence – viewed as an integral part of each Member

State's commitment to the values of the European Union as well as of their duty to provide an effective system of judicial protection in cases concerning Union law.

Besides the more recent judgments already cited in the general report (e.g. Case C-619/18, *Commission* v. *Poland*, ECLI:EU:C:2019:531; Case C-192/18, *Commission* v. *Poland*, ECLI:EU:C:2019:924; Joined Cases C-585/18, C-624/18 and C-625/18, *A K*, ECLI:EU:C:2019:982) we now also have further rulings on the question of judicial independence as delivered by the ECJ over these past several months: consider developments such as Case C-896/19, *Repubblika*, ECLI:EU:C:2021:311; and Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 & C-397/19, *Asociația 'Forumul Judecătorilor din România'*, ECLI:EU:C:2021:393.

Of course, it is important to note that this issue is closely interlinked with several other topics covered in the FIDE questionnaire / reports and due to be discussed at the conference in November 2021. In particular, there is no doubt that the undermining of judicial independence in certain Member States, and the ECJ's caselaw castigating such developments as a matter of Union law, have contributed to deliberate national attacks on the principle of primacy for Union law (see Topic II above, with particular reference to the decision of the Polish Constitutional Tribunal of 7 October 2021). In addition, national courts across the Union have expressed their own deep concerns, about how the systematic undermining of judicial independence in certain Member States should impact upon their own adherence to the presumption of mutual trust / duty of mutual recognition, especially within the context of the AFSJ (see Topic VI below, taking account of judgments such as Joined Cases C-354/20 PPU & C-412/20 PPU, *L* and *P*, ECLI:EU:C:2020:1033).

3.2.4 Effective Judicial Protection: Impact of Union law on National Standing Requirements

Amidst the legal tumult and political controversy of topics such as the primacy of Union law and attacks on judicial independence, participants at the FIDE conference might well find some welcome relief in the rather more sedate question: how does Union law impact upon national rules concerning standing and access to the courts? The subject may be relatively gentile, but the issues are nevertheless of great legal interest as well as real practical importance – while the national reports illustrate how the sheer variety of domestic approaches towards standing requirements, makes their interaction with the often quite abstract principles of effective judicial protection, as laid down under Union law, usually complicated.

As for the relevant ECJ caselaw, it has continued to develop in an essentially incremental (rather than in any way revolutionary) manner. In keeping with our experience over many years already, the most recent ECJ cases on national standing rules generally concern access

to the courts specifically for the purposes of enforcing EU environmental legislation – with the Court tending towards an approach (again familiar from longstanding practice and informed by the requirements of the Aarhus Convention) that favours the more generous treatment of interested or affected parties: consider, e.g. Case C-197/18, *Prandl*, ECLI:EU:C:2019:824; Case C-535/18, *IL*, ECLI:EU:C:2020:391; and Case C-826/18, *LB*, ECLI:EU:C:2021:7.

A notable exception to the general trend of Union law expanding standing rules is collective redress, where the Court (largely in keeping with the legislature) has taken a more cautious approach. This was again exemplified in Case C-507/18, *NH*, ECLI:EU:C:2020: 298, where the Court however recalled that Member States remain free to maintain or introduce more generous standing rules in their national legal orders.

3.2.5 Preliminary References

While the highest national courts' prolonged, but now diminishing, reluctance to engage with the Court of Justice in the preliminary reference procedure has always been at odds with the obligation laid down in Article 267(3) TFEU and the *CILFIT* case law, recent developments such as the infringement action against France and the disciplinary proceedings instituted by Polish judges for making preliminary references have heightened tensions. These tensions have continued to be visible in the Court's case law, for instance through the judgment in Case C-824/18, *AB*, ECLI:EU:C:2021:153.

Unlike many of the other issued covered by the questionnaire, however, the obligation to refer has developed very slowly, if at all, in the Court's case law. Characteristically, the main development concerning the highest national courts' obligation to refer questions to the Court is essentially a non-development: the ruling in Case C-561/19, *Consorzio Italian Management*, ECLI:EU:C:2021:799. Following Advocate General Bobek's Opinion of 15 April 2021 (ECLU:EU:C:2021:291), which contained a thorough critique of the restrictive (and much criticized) *CILFIT* case law and a proposal for a "major paradigm shift" on the understanding of the obligation to refer, expectations on the Court's ruling were high but in the end largely left unfulfilled by the judgment, which in all material respects reaffirmed *CILFIT*. A small innovation was however that the Court for the first time explicitly connected Article 47 CFR to the preliminary reference procedure (albeit while repeatedly emphasising the procedure's independence of the parties) and recognised – as has long been established in the case law of the European Court of Human Rights – that the highest national courts are under a duty to provide reasons for a decision not to request a preliminary ruling.

3.2.6 The Limits of Mutual Recognition

The questionnaire, and the general report as published in 2020, invited discussion of the way in which the Court has increasingly "internalised" national concerns about the full extent of the presumption of mutual trust / duty of mutual recognition as laid down under Union law – particularly in the field of AFSJ law and especially where domestic courts perceive a tension between their obligations under Union law and the need to ensure respect for fundamental rights. Rather than witness national courts simply reject their Union law duties, e.g. on the basis of national constitutional rules or in deference to the standards contained in the ECHR, the ECJ has preferred to incorporate "fundamental rights exceptions" into the very structures and substance of Union law itself.

As already noted in the general report which was published in 2020, the caselaw here has continued to evolve. In particular, we made the point (above, under Topic III) that the ECJ's caselaw on the "internal" limits of mutual recognition under Union law, now acts as an important point of interchange with other major developments in the framework for the enforcement of Union law before the national courts. Consider, e.g. the ruling in Joined Cases C-354/20 PPU & C-412/20 PPU, *L* and *P*, ECLI:EU:C:2020:1033, which explores the inter-relationship between the challenges facing judicial independence and respect for the rule of law within certain Member States (on the one hand) and the degree to which such challenges should impact upon how the courts in other Member States approach their own presumption of mutual trust / duty of mutual recognition (on the other hand). However, one of the most interesting aspects of the national reports in response to the original questionnaire, was the number of Member States whose domestic judges effectively continued to reason the balance between mutual recognition and fundamental rights primarily by reference to national constitutional law and / or the ECHR (rather than the approach authorised under / encouraged by the ECJ's own caselaw). It would be interesting to know whether any greater degree of doctrinal convergence has thus far emerged on this issue.

3.3 Updates National Reports

Supplementary contribution on the EFTA Court

Michael-James Clifton

Introduction

Since submitting the Supplementary Contribution on the EFTA Court in February 2020, there have been substantial developments in the EFTA Court's operation in advisory

opinion cases. These will be addressed in two parts: concerning or involving case law, and significant procedural changes and innovations.

Case law

Geographical scope of the EEA Agreement

In two cases, the EFTA Court has considered for the first time the geographic scope of the EEA Agreement: Case E-8/19, *Scanteam AS* v. *The Norwegian Government*, judgment of 16 July 2020, and Case E-11/20, *Eyjólfur Orri Sverrisson* v. *The Icelandic State*, judgment of 15 July 2021.

Case E-8/19, *Scanteam AS* v. *The Norwegian Government*, cited above, concerned a public procurement tender issued in the Norwegian national procurement register 'Doffin' by the Royal Norwegian Embassy in Luanda, Republic of Angola for the procurement of consulting services in connection with the planning, management and implementation of a human rights project in Angola.

The Court relying on inter alia the ECJ's judgments in Case C-214/94, *Boukhalfa*, EU:C:1996:174, and Joined Cases C-132/14 to 136/14, *Parliament* v. *Council*, EU:C:2015:813 held that "Legal acts incorporated into the EEA Agreement apply, in principle, to the same area as the EEA Agreement" "[h]owever, the geographical scope of the EEA Agreement does not preclude EEA law from having effects outside the territory of the EEA" (Case E-8/19, *Scanteam AS*, cited above, paras. 65 and 66).

The Court held in paragraph 69 that, "procurement is subject to EEA law where it is sufficiently closely linked to the EEA, such as when it is liable to have a direct impact on the functioning of the internal market within the EEA." This necessarily included "[a]cquisition by an EFTA State's foreign mission located in a third country by means of a public contract of supplies or services from an economic operator established in the EEA" (Case E-8/19, *Scanteam AS*, cited above, para 68).

Article 126(1) EEA provides that the Agreement "shall apply to the territories to which the Treaty establishing the European Economic Community is applied and under the conditions laid down in that Treaty, and to the territories of Iceland, the Principality of Liechtenstein and the Kingdom of Norway." In paragraph 73, the Court held that "there is no reason to examine Article 126 EEA". The Norwegian Government had argued "that the territorial scope of the EEA Agreement differs between EFTA States and EU Member States due to the wording of Article 126 EEA".

In Case E-11/20, *Eyjólfur Orri Sverrisson*, cited above, the Court relied upon its findings in Scanteam in a case concerning the Working Time Directive. It held "that in making a journey to a location other than the worker's fixed or habitual place of attendance, it is immaterial whether that journey is made entirely within the EEA or to or from third

countries if the employment agreement is established under and governed by the national law of an EEA State" (Case E-11/2,0 *Eyjólfur Orri Sverrisson*, cited above, para 65).

Presumption of compatibility with the ECHR? Norwegian Confederation of Trade Unions and Norwegian Transport Workers' Union v. Norway

The Fifth Section of the European Court of Rights rendered its judgment in *LO and NTF* v. *Norway* on 10 June 2021 (*Norwegian Confederation of Trade Unions (LO) and Norwegian Transport Workers' Union (NTF)* v. *Norway*, App. No. 45487/17). It goes far beyond the scope of this supplement to address fully the contents of the judgment. The case is significant. It is the third case to engage directly with the role of the EFTA Court. The first was *Ališić and Others* v. *Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia*, App. No. 60642/08; the second case, *Konkurrenten.no AS* v. *Norway*, App. No. 47341/15, was addressed at length in the Supplementary Contribution on the EFTA Court.

Very briefly, the EFTA Court rendered its judgment in Case E-14/15, *Holship Norge AS* v. *Norsk Transportarbeiderforbund*, [2016] EFTA Ct. Rep. 240 in April 2016. The Supreme Court of Norway in its judgment of 16 December 2016 followed the EFTA Court's ruling. LO and NTF lodged their case against Norway on 15 June 2017, complaining that the decision to declare the notified boycott unlawful had violated their right to freedom of association as provided for in Article 11 ECHR.

It is notable that the Norwegian Government argued before the Strasbourg Court that "while EU law and EEA law differ in certain respects, and even if it were decided that this difference means that EEA law, as such, does not benefit from the so-called *Bosphorus* presumption of equivalent protection, the present case concerns the application of the main part of the EEA Agreement, which corresponds with EU law, and to which the presumption should therefore apply" (*LO and NTF* v. *Norway*, para 105).

The Fifth Section was clearly uncomfortable with the ECtHR Second Section's position in *Konkurrenten.no*. While it 'reiterated' that the ECtHR "has held that if an organisation to which a Contracting State has transferred jurisdiction is considered to protect fundamental rights in a manner which can be considered at least 'equivalent' to that for which the Convention provides, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation (see *Bosphorus* v. *Ireland* [GC], App. No. 45036/98, paras. 152-153, 155-56 and *Konkurrenten.no AS* v. *Norway*, App. No. 47341/15, para 42, 5 November 2019)" (*LO and NTF* v. *Norway*, para 104), it proceeded "on the basis that for the purposes of this case the *Bosphorus* presumption does not apply to EEA law" (*LO and NTF* v. *Norway*, para 108).

The Fifth Section stated that "the Court observes, however, as clearly stated by the EFTA court in the *Holship* case, that fundamental rights form part of the unwritten

principles of EEA law … [s]ince this reflects the position which previously pertained under EU law, prior to successive EU Treaty amendments, according to which fundamental rights were first recognised as general principles of EU law, the Court considers that the fact that the EEA agreement does not include the EU Charter is not determinative of the question whether the *Bosphorus* presumption could apply when it comes to the implementation of EEA law, or certain parts thereof." (*LO and NTF* v. *Norway*, para 107).

The Fifth Section continued "[h]owever, given one of the other features of EEA law identified by the Court in the Konkurrenten.no decision – the absence of supremacy and direct effect, added to which is the absence of the binding legal effect of advisory opinions from the EFTA Court – and given that the existence of procedural mechanisms for ensuring the protection of substantive fundamental rights guarantees is one of the two conditions for the application of the *Bosphorus* presumption, the Court leaves it to another case, where questions in relation to the procedural mechanisms under EEA law may arise, to review this issue." (*LO and NTF* v. *Norway*, para 108).

As the Fifth Section stated that it left "it to another case, where questions in relation to the procedural mechanisms under EEA law may arise, to review this issue" this remains an open matter. It would appear clear that there is room for increased judicial dialogue.

Procedural innovations

New Rules of Procedure

The EFTA Court has issued new Rules of Procedure, to accommodate certain changes and update the existing provisions, as pertinent, pursuant to Article 43(2) SCA. These amendments are substantial that are completely restructured when compared to the previous Rules of Procedure. Consultations on the draft rules of procedure were held from 5 July 2018 until 1 October 2018. On 21 May 2021 the final version of Rules of Procedure 2021 were published and they entered into force on 1 August 2021. The purpose of the new Rules of Procedure is to update the Court's procedural rules in light of its own experience, as well as the experiences of the Court of Justice and of the General Court, insofar as those provisions are relevant for the structure and jurisdiction of the EFTA Court.

Changes to the Report for the Hearing

A Report for the Hearing is produced in advance of all hearings at the EFTA Court. The content of the Report for the Hearing has been reduced in advisory opinion cases so as to no longer include the arguments of the parties. Since autumn 2020, reports for the hearing now contain only the relevant law, facts, procedural history, and the parties' respective prayers. As part of the Court's January 2021 consultation document, the Court noted that it had "decided to shorten the Report for the Hearing. Currently, the report does, in

principle, no longer contain any record of the arguments set out in the written observations, only the proposed answers by each participant" (see EFTA Court, "Consultation on the possible publication of Written Observations in Advisory Opinion Cases", 13 January 2021, available at https://eftacourt.int/wp-content/uploads/2021/01/Consultation-publication-of-WO-final-13.1.21.pdf, accessed 10 June 2021).

Remote hearings

In the wake of the pandemic-induced closure of the Court's premises, a process requiring supplementary written submissions was instituted in Cases E-10/19, *Bergbahn Aktiengesellscha Kitzbühel* v. *Meleda Anstalt* and E-13/19, *Hraðbraut*. However, it swiftly became apparent that this method was not as efficient or effective as anticipated, and could not sufficiently substitute the attributes of hearings. As a direct consequence, the EFTA Court has been conducting remote hearings since June 2020. The first remote hearing was held on 16 June 2020 in Joined Cases E-11/19 and E-12/19, *Adpublisher AG* v. *J and K*, and it has conducted a total of 18 by June 2021.

The Court's remote hearings are conducted via Zoom, with the judges and registrar robed, seated in a socially-distanced fashion on the bench. 'Guidelines for Participants' have been issued, which note that the conduct of remote hearings is subject to the same rules as generally applicable to the Court's 'physical' oral hearings (see generally, Clifton and Şchiopu, "Justice must also be seen to be done: digitalisation at the EFTA Court", *EU Law Live Weekend Edition*, No. 63, 19 June 2021, 2-15 at pp. 3 and 4).

Streaming of proceedings

Both the remote hearings, and now the delivery of judgments – should this be conducted at a specific separate public sitting of the Court – are streamed on the Court's website (www.eftacourt.int). As President Páll Hreinsson has written, live-streaming was implemented in order to ensure both the "accessibility and transparency of the hearings" (see Hreinsson, 'EFTA Court 2020 Report', p. 5). The stream is 'not quite live', as there is a delay of a few moments. The event is not available to view after the closure of the public sitting. The content of the stream broadcast is the same feed as is visible to all participants (see generally, Clifton and Şchiopu, cited above, at pp. 4 and 5).

Publication of national courts' requests for advisory opinions

In all advisory opinion cases lodged after 1 January 2021, the national court's request is published in full (subject to any redactions) on the Court's website in both English and the language of the request (see, for example in Case E-1/21, *ISTM International Shipping & Trucking Management GmbH* v. *AHV-IV-FAK*; available at https://eftacourt.int/cases/e-1-21/).

Publication of submissions in advisory opinion cases

The EFTA Court is currently examining the possibility of publishing parties' written submissions in advisory opinion cases only on its website in cases lodged from 1 January 2021. To this end, the Court decided "to consult stakeholders in order to help facilitate a well-informed decision on the issue" on 13 January 2021 (see, EFTA Court, 'Consultation on the possible publication of Written Observations in Advisory Opinion Cases', 13 January 2021, available at https://eftacourt.int/wp-content/uploads/2021/01/Consultation-publication-of-WO-final-13.1.21.pdf, accessed 10 June 2021). The submissions would be published after the rendering of the Court's judgment, and may be redacted.

General update: Ireland

Ciarán Toland SC, Sarah Fennell and Aoife Beirne[3]

ECJ caselaw on "balancing" primacy with other concerns, e.g. concerns about legal certainty; limits to mutual trust / mutual recognition

When and how have the Irish courts balanced the principle of supremacy with other competing principles of Union law?

In the Court of Appeal decision in *Brady* v. *Revenue Commissioners* [2021] IECA 8, the Court addressed the question of supremacy of EU law, noting: "There does appear to have been an ostensible conflation in the minds of both the Circuit Court judge, and the High Court judge, of the concept, on the one hand, of disapplying a provision of a domestic statute because its application in the circumstances of the case would contravene EU law; and on the other hand, the concept of granting a declaration that a provision of a domestic statute is incompatible with EU law. Every domestic court at every level, whether it enjoys local and limited jurisdiction, full original jurisdiction or appellate jurisdiction, is bound to have regard to the doctrine of supremacy of EU law where it applies and has jurisdiction to disapply a provision of a domestic statute where its application would clearly contravene EU law. That was what counsel for the defendant (i.e. the present appellant) was asking the Circuit Court to do." (para [55])

When and how have the Irish courts dealt with conflicts between national constitutional principles and EU law?

In the High Court decision of *Right To Know CLG* v. *Commissioner For Environmental Information* [2021] IEHC 273. an appeal was allowed from a decision of the Commissioner for Environmental Information. The High Court found that documentation concerning speeches of the President of Ireland relating to environmental information and certain

3 We are grateful to Dr Róisín Costello BL for her research assistance.

documentation that was before the Council of State, when it advised the President in relation to two particular Bills on which he had consulted them, for the purpose of Art. 26 of the Constitution, should be produced on request under the European Communities (Access to Information on the Environment) Regulations 2007 (para [1]-[2]). The Court reasoned that although the President had immunity under the Constitution of Ireland, EU legislation requires that a Member State actively exclude any public body from the obligations contained therein.

The Commissioner for Environmental Information had refused to order the production of such documentation on the basis that the President was entitled to immunity under Article 13.8.1 of the Constitution (para [2]). That decision was subsequently appealed to the High Court under Article 13 of the 2007 Regulations. The central issue in the appeal was whether the Commissioner was correct in holding that the President was excluded from the definition of a public authority provided for in Directive 2003/4/EC pursuant to Art. 2.2 of the Directive, which provided that if the constitutional provisions of Member States: " … at the date of adoption of this Directive makes no provision for a review procedure within the meaning of Article 6, Member States may exclude those bodies or institutions from that definition." (para [4])

While that particular provision was not transposed into the 2007 Regulations (implementing the 2003 Directive), the respondents argued that such transposition was not necessary as, once a person or body enjoyed immunity from review of its decisions under the constitution at the date of entry into force of the Directive, they were automatically excluded from the definition of public authority contained therein (para [5]).

The appellant submitted that the true interpretation of that sentence in Art. 2.2. of the Directive, meant that Member States were obliged to take steps when transposing the Directive into domestic law to avail of the option that was given to them to exclude such persons or bodies from the definition of public authority. As the Irish Government had not done so, they submitted that the President was therefore within the definition of public authority in the Directive and in the 2007 Regulations and was obliged to furnish the documentation requested by the appellant (para [6]). The Court ultimately considered the position of the appellants to be correct.

Recent national challenges to the authority of Union law within the domestic legal systems

How have the Irish courts balanced the obligation of mutual recognition and the presumption of mutual trust against other competing principles of EU law?

In *Minister for Justice* v. *Lyszkiewicz* [2021] IEHC 108 the High Court ordered the surrender of the respondent to Poland in the context of European Arrest Warrant proceedings. Arguments had been advanced relating to the independence of the judiciary

and fair trial rights in that jurisdiction which, it was argued, should ground a refusal to surrender the respondent. The Court noted, however, that the ECJ had found, on two occasions that "that such generalised and systemic deficiencies in the rule of law of a requesting Member State are not in and of themselves a sufficient basis upon which to refuse an application for surrender" (para [38]). Rather, the Court noted that, in order to justify a refusal of surrender, such general and systemic deficiencies must be linked to the personal situation of the requested person such that there are substantial grounds for believing the requested person will not receive a fair trial. Noting that no argument was advanced to that effect in this case, and that no information was provided to the Court that could support such an argument the Court was obliged to dismiss the application to refuse the respondent's surrender (para [52]).

Preliminary references

The circumstances in which a preliminary reference will be made

This issue of surrender of an individual to Poland was considered once more in the decision of *Minister for Justice* v. *Szamota* [2021] IECA 209, Collins J was presented with an appeal from the High Court which raised several important questions regarding the scope and effect of Article 4a(1) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States (para [1]). In light of a number of significant decisions of the ECJ, and in particular the decision in Case C-571/17 PPU, *Samet Ardic*, EU:C:2017:1026 the Court referred three questions to the ECJ as a result of the "significant issues" the case raised concerning Article 6 of the ECHR, Articles 47 and 48 of the Charter of the Charter and their interaction with section 37 of the 2003 Act (para [52]).

In the case of *Minister for Justice* v. *Siklosi* [2021] IECA 210 which was decided on the same day as Szamota the Court of Appeal noted that they were exercising their power to make a preliminary reference under Article 267 as a result of the "importance and complexity of the questions raised by the points of law certified by the High Court" (para [2]).

The central criteria for making a preliminary reference in the case of *Hellfire Massy Residents Association* v. *An Bord Pleanala* [2021] IEHC 424 (para [112]) include whether the questions raised a point of interpretation, rather than application, of EU law; that the point is not *acte clair* or *acte éclairé*; that the answer to the question must be necessary for the decision at hand and, finally, that the Court has chosen to exercise its discretion in favour of making a reference. The novelty of questions requiring resolution were subsequently demonstrated in the decision of the High Court in *Board of Management of Salesian Secondary School* v. *Facebook Ireland* [2021] IEHC 287 where a preliminary reference was made in the context of an application to identify those individuals behind an anonymous Instagram account in the context of disciplinary proceedings within a

secondary school (para [1]). The Court concluded that it was necessary to make a reference to the ECJ given the "significant legal issues in respect of privacy, data protection and freedom of expression raised by the case" (para [2]). Specifically, the Court noted that it was concerned with the existence of a right to anonymous speech under the GDPR, or Articles 7, 8 or 11 of the Charter (para [83]) and whether there was a requirement to put affected parties on notice of any application to identify operators of an anonymous account (para [83]). The reference was subsequently withdrawn following the decision by the applicants not to pursue the case.

A similar emphasis on novelty, and the importance of the questions posed to the regulatory schema in place in numerous member states grounded the decision to make a preliminary reference in respect of five questions concerning Regulation 11 of the European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations 2011 in the decision of *Eircom Limited* v. *Commission for Communications Regulation* [2021] IEHC 328. A similar emphasis was discernible again in the decision of *Stan* v. *Chief Appeals Officer* [2020] IEHC 548 in respect of Article 81 of Regulation 883/2004 (para [28]).

In *Eco Advocacy CLG* v. *An Bord Pleanala* [2021] IEHC 265 the High Court discussed specific features of the Article 267 procedure and noted that a wider set of interested parties may sometimes require to be put on notice where they are not joined as parties due to the limitations of the procedure (para [93]-[94]). The Court went on to note that while the Court can call in amici curiae of its own motion, as a general proposition and subject to further argument it would be a matter for the parties as to whether or not they want to ask for any other national, European or international body to participate as amici curiae (para [95], [98]).

General update: Poland

Agnieszka Sołtys

Recent national challenges to the authority of Union law within the domestic legal systems

The latest developments of the case law of the Polish Constitutional Court have brought a serious threat to the authority of Union law within the domestic legal systems.

On 20 April 2020, the Constitutional Court ruled on the application of the Prime Minister questioning the resolution of the combined chambers: Civil, Criminal and Labour and Social Security Law of the Supreme Court of 23 January 2020 (BSA I 4110 1/20). The Resolution of three Chambers of the Supreme Court was issued following the judgment of the ECJ in case *A.K.* (Joined Cases C-585/18, C-624/18 and C-625/18, *A.K. and others*

v. *Sąd Najwyższy*) in which the ECJ indicated the requirements to be fulfilled by courts in democratic states so that – in view of Article 6 ECHR, and Article 47 CFR – they could be considered impartial and independent. In its judgment the Constitutional Court ruled that the Resolution of 3 Chambers of the Supreme Court was inconsistent with the Constitution, the TEU, and the ECHR (case U-2/20).

The Resolution of three Chambers of the Supreme Court – implementing the ECJ judgment in *A.K.* – was also questioned in case K-1/20 initiated by the Marshal of the Sejm (the lower chamber of the Polish parliament). In a decision dated 21 April 2020, the Constitutional Court ruled that the Supreme Court – also in connection with the ruling of an international court – does not have the competence to provide a law-making interpretation of legal provisions, leading to a change in the normative status in the sphere of the system and organization of the judiciary.

On 14 July 2021 the Constitutional Court ruled (case P-7/20) that Article 4(3), second sentence, of the TEU, in conjunction with Article 279 TFEU – insofar as the ECJ *ultra vires* imposes obligations on the Republic of Poland as an EU Member State, by prescribing interim measures pertaining to the organisational structure and functioning of Polish courts and to the mode of proceedings before those courts – is inconsistent with the provisions of the Constitution. The judgment was issued in response to the question of the Supreme Court (Disciplinary Chamber) issued as a result of the ECJ's ruling in Case C-791/19 R *Commission* v. *Poland* in which it ordered Poland to immediately suspend the application of the national provisions on the powers of the Disciplinary Chamber of the Supreme Court with regard to disciplinary cases concerning judges.

Three other cases – initiated at the Constitutional Tribunal by the Prosecutor General (K-7/18), the Prime Minister (K-3/21) and the group of deputies of the governing party (K-5/21) – concerning the application of EU standards to the organization and functioning of the national judiciary – seek an assessment of the compatibility with the Constitution of EU Treaty provisions.

Rule of law / Independence of the judiciary

The situation in Poland concerning the rule of law / independence of the judiciary has been extremely dynamic. Since 15 February 2021 (the date of the 2021 FIDE Report on Poland) the ECJ, as well as the ECtHR, have issued a number of rulings concerning the reported issues. New cases have also been filed with the ECJ. It is worth noting several in particular.

On 2 March 2021, the ECJ issued a judgment in a preliminary ruling procedure, clarifying the requirements of EU law with respect to judicial appointments to the Supreme Court that took place in 2018 (Case C-824/18, *A.B. and others* v. *Krajowa Rada Sądownictwa*, ECLI:EU:C:2021:153). The ECJ found that successive amendments to the Polish Law on the National Council of the Judiciary which had the effect of removing

effective judicial review of that council's decisions, when proposing candidates for the office of judge at the Supreme Court to the President of the Republic, are liable to infringe EU law. Where an infringement has been proved, the principle of the primacy of EU law requires the national court to disapply such amendments.

On 6 May 2021, the Supreme Administrative Court implemented the above judgment of the Court of Justice (judgment in case II GOK 2/18), ruling that the current National Council for the Judiciary, in the procedure for appointing judges, does not provide sufficient guarantees of independence from the executive and the legislature. At the same time the Supreme Administrative Court indicated that it had not ruled on the systemic validity and the effectiveness of the acts of judicial appointments made by the President of the Republic, since they are not subject to judicial control.

In April 2021, the European Commission initiated infringement procedures before the ECJ against Poland – the EC challenged the law on the judiciary of 20 December 2019 (see Commission press release IP/21/1524; case registered as C-204/21). The Commission considers that the contested Polish legislation undermines the independence of Polish judges, in breach of Article 19(1) TEU and the primacy of EU law. In particular, the contested provisions prevent Polish courts from directly applying EU law protecting judicial independence, via threats of disciplinary proceedings, as well as from referring questions to the Court of Justice for preliminary rulings.

On 14 July 2021, the Vice-President of the Court issued an Order for interim measures (Case C-204/21 R, *Commission* v. *Poland*, ECLI:EU:C:2021:593) obliging Poland to immediately suspend the application of the provisions introduced in the law on the judiciary of 20 December 2019 concerning the competences of the Disciplinary Chamber of the Supreme Court towards judges.

On 15 July 2021, in the context of an infringement procedure launched by the European Commission, the ECJ found that the disciplinary regime for judges in Poland is not compatible with EU law (Case C-791/19). In particular, the ECJ found that the Disciplinary Chamber of the Supreme Court does not provide all the guarantees of impartiality and independence required, and is not protected from the direct or indirect influence of the Polish legislature and executive.

A number of additional requests for preliminary rulings filed by Polish courts concerning the justice reforms of 2017 and 2018 are still pending before the Court of Justice (see cases C-491/20 – C-496/20, C-506/20, C-509/20 and C-511/20 Supreme Court et al.; case C-615/20 Y.P. et al.; case C-671/20 M.M. et al.; C-181/21, G.; C-269/21, BC and DC).

The National Council for the Judiciary – a decisive body in the process of the appointment of judges – continues to operate despite serious concerns as to its independence. Those concerns have been expressed in the case law of Polish courts as well as in the jurisprudence of the ECJ (see recently case C-791/19).

In May 2021, the European Court of Human Rights found irregularities in the appointment procedure to the Constitutional Tribunal. In its judgment in case *Xero Flor w Polsce sp. z o.o.* v. *Poland* (Case No. 4907/18) the European Court of Human Rights ruled that Poland had violated Article 6(1) of the European Convention on Human Rights by denying the applicant the right to a 'tribunal established by law' on account of the participation of a judge whose election was vitiated by grave irregularities that impaired the very essence of that right, in the proceedings before the Constitutional Court.

On 16 June 2021, the Constitutional Tribunal ruled that the judgment of the European Court of Human Rights had been issued by the European Court of Human Rights without a legal basis, and in violation of its competences, thereby constituting unlawful interference with the national legal order in matters which remain outside the competence of that Court (the decision in case P 7/20). Therefore, the judgment of the European Court of Human Rights is 'non-existent'.

On 29 June 2021, the European Court of Human Rights issued a ruling (Cases No. 26691/18 and 27367/18) concerning the premature removal by the Minister of Justice of judges from their post as vice-presidents of ordinary courts. As the premature termination of the applicants' term of office as court vice-presidents had not been examined either by an ordinary court or by another body exercising judicial duties, the European Court of Human Rights found that Poland had infringed the very essence of the applicants' right of access to a court.

On 22 July 2021, the European Court of Human Rights issued a judgment (Case No. 43447/19) following a complaint from an attorney punished with a disciplinary penalty by the Disciplinary Chamber of the Supreme Court. The Court found a violation by Poland of Article 6(1) of the European Convention on Human Rights. It considered that the Disciplinary Chamber of the Supreme Court was not a 'tribunal established by law'. This was due to the defective procedure for appointing judges to this Chamber, in particular on the basis of the opinion of the National Council of the Judiciary, i.e. a body which, under the Amending Act on the NCJ of 8 December 2017, does not provide sufficient guarantees of independence from the legislative or executive power;

Following that judgment of the European Court of Human Rights, on 28 July 2021, the Prosecutor General filed a request with the Constitutional Tribunal (case K 6/21) for a declaration of non-compliance with the Constitution of Article 6(1) sentence 1 of the ECHR.

As to the current situation in Poland concerning threats to the rule of law – see in addition the European Commission Report issued on 20 July 2021: 2021 Rule of Law Report. The rule of law situation in the European Union accompanied by COMMISSION STAFF WORKING DOCUMENT 2021 Rule of Law Report Country Chapter on the rule of law situation in Poland, Brussels, 20.7.202, SWD(2021) 722 final.

The Report concludes that the reforms of the Polish justice system, including the new developments, continue to be a source of serious concerns. In particular, reforms carried out since 2015 have increased the influence of the executive and legislative powers over the justice system, to the detriment of judicial independence.

General update: Portugal

Inês Quadros

Recent national challenges to the authority of Union law within the domestic legal systems

On the 15th of July 2020 the Portuguese Constitutional Court delivered a landmark decision (Judgment 422/2020) in which for the first time directly addressed the question of primacy of EU law, in light of both the ECJ caselaw and the Portuguese Constitution. The case concerned a concrete review of constitutionality of a provision of Regulation 2220/85, on grounds of infringement of the principle of equality set out in article 13 of the Constitution.

The Constitutional Court recalled extensively the ECJ's caselaw regarding the primacy principle, recognised the particular nature of EU Law and rejected the federal model of primacy as a way of understanding the relation between it and domestic law. Accordingly, it highlighted the preference for dialogue and cooperation as the strategy for dealing with the, inevitable, "daily conflicts", by means of the preliminary references' procedure.

However, having in consideration the limits imposed to EU law primacy by article 8 (4) of the Constitution (already described in the Report) the CC draw attention to the need of preserving national competences and fundamental principles. The Constitutional Court recognises that the fundamental principles embedded in the Portuguese Constitution are shared by the European acquis due to the "deep historical, cultural and judicial affinity" between Member States and their common legal order, and that the final claim of sovereignty enshrined in the last part of Article 8 (4) should therefore have a very limited scope. Hence, the formula developed by the Constitutional Court on the relation between EU and domestic law reads as follows: "Pursuant to Article 8 (4) of the CPR, the Constitutional Court may only appreciate and refuse to apply a rule of EU law if the latter is incompatible with a fundamental principle of the democratic state based on the rule of law which, within the scope of EU Law itself – including, therefore, the case law of the ECJ –, does not benefit from a parametric value that is materially equivalent to that recognised for it in the CPR (…) Conversely, whenever the matter at issue is appreciation of a rule of EU law in the light of a (fundamental) principle of the democratic state based on the rule of law which, within the scope of EU law, benefits from a parametric value that is materially equivalent to that which is recognised for it in the Portuguese Constitution,

functionally guaranteed by the ECJ (in line with the judicial means provided for in EU Law), the Constitutional Court refrains from assessing the compatibility of that rule with the CPR".

Preliminary references

Following decision 422/2020 (supra, 3), the Constitutional Court has made its first preliminary reference to the ECJ (Judgment 711/2020 of 9.12.2020), on a case concerning an appeal from a tax arbitration court who had refused to apply a national provision on motor vehicle tax on the ground that it was incompatible with article 110 and 191 TFEU. The law on the functioning of the Constitutional Court prescribes that it can decide on appeals from decisions of courts that refuse to apply a given domestic norm on the ground of its incompatibility with international law, which was the case. Having considered that the decision required a correct interpretation of the above mentioned provisions of EU law, the Constitutional Court decided to refer a question to the ECJ. A note should be made regarding the fact that the Constitutional Court was careful in ticking every condition of admissibility of the question: it paid regard to the fact that it was a last instance Court; described the factual and legal background of the case; and made references to previous case law of the ECJ on the matter.

General update: Romania

Razvan Horatiu Radu

Recent national challenges to the authority of Union law within the domestic legal systems

By Decision 390/2021, the Romanian Constitutional Court challenged the ECJ Decision of 8 May 2021, pronounced in Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19, C-379/19. The Constitutional Court considered that "art. 148 of the Constitution did not assign to Union law a priority of application over the Romanian Constitution, so that a court does not have the power to analyse the conformity of a provision of national law, found as being constitutional in the light of art.148 of the Constitution, with the provisions of European law".

Inter alia, the Constitutional Court stated that "the CVM reports, drawn up on the basis of Decision 2006/928 of EC, by their content and effects, as established by The C.J.U.E. of 18 May 2021, does not constitute rules of European law, which the court of judgment to apply them with priority, removing the national norm. Therefore, the national judge does not it may be put in a position to decide on the priority application of recommendations to the detriment of the national legislation (...) so are not likely to enter

into a conflict with domestic law" or "the obligations cannot be incumbent on the courts, state bodies which they are not empowered to cooperate with a political institution of the European Union".

By this decision, the national courts were prevented from implementing the legislation of the European Union as interpreted by the above-mentioned ECJ decision because the non-observance by the national judge of the jurisprudence of the Constitutional Court represents a disciplinary violation. Moreover, the prioritization of the above-mentioned ECJ decision by a judge led to the initiation of disciplinary proceedings against him.

Currently, several preliminary references from the Romanian courts are pending before the ECJ, which question these new internal jurisprudential developments.

Rule of law / Independence of the judiciary

Recent developments in the jurisprudence of the Constitutional Court raise serious issues regarding the independence of judges. Under disciplinary action, they are prevented from giving priority to European Union law in cases arising from the above-mentioned ECJ decision of 18 May 2021.

3.4 Report to the Plenary

Anna Wallerman Ghavanini[4]

Good morning.

Before I devote myself to the topic at hand, I would like to congratulate the organisers on a wonderful event and thank them for entrusting me with the role as acting general rapporteur. It has been a pleasure and a privilege.

I would also like to acknowledge Michael Dougan's immense work with the questionnaire and the general report ahead of the Congress. I know he is sorry that he could not be here.

The task that has been assigned to me this morning is, of course, an impossible one. How can I summarise, in a few short minutes, two days of lively discussions on some of the most fundamental – not to say existential – issues of Union law? These remarks are doomed to fail to capture the richness of the debate and the insightfulness of the contributions.

Nevertheless, I shall try. I will make four observations.

4 Associate professor of EU Law, University of Gothenburg.

Direct effect and primacy

The first observation concerns the relationship between EU law and fundamental rights and the classical EU law themes of direct effect and supremacy.

In recent case law, the Court of Justice seems to have upgraded fundamental rights within EU law, both by recognizing the horizontal direct effect of the Charter and by increasingly agreeing that substantive EU law must be balanced against the need to uphold fundamental rights and principles, such as non-retroactivity in *Taricco I* and *II*.

We agreed that this kind of balancing exercises is inherent in the interpretation and application of law. It may even be considered a sign of the increasing maturity of the EU legal order. We also agreed that this is not a concession or a limitation of the principle of EU law primacy properly speaking, but rather a weighing of competing interests or values *within* EU law, where fundamental rights form a limit to the applicability of substantive rules.

Nevertheless, we noted that this perspective does not seem to be shared among the Member States, and we counted tee and a half recent challenges to EU law primacy in rulings from the Czech, Danish, German and most recently – but less confrontationally – French high courts. The Court of Justice's recent and increasing recognition of fundamental rights and general principles as possible balancing standards to substantive EU law effectiveness does not appear to have been sufficiently helpful to these courts as they attempt to reconcile their duties towards EU law with their loyalty to the national constitution or legislation.

We also observed that despite the Court's rulings on the direct horizontal effect of the Charter, there are still few examples of the Charter actually being applied in cases between individuals in the Member States. We explored various possibilities for this, the most important being, first, that in several Member States the concept of horizontally applicable fundamental rights is simply foreign, and second, that the Charter is still unfamiliar territory for many national judges, who might be more comfortable applying the national fundamental rights standards or the more established European Convention of Human Rights.

In this regard, we also raised the question of the added value of the Charter of Fundamental Rights. If national courts are more familiar with the national fundamental rights standards, and these in many cases will lead to the same solutions, it was submitted during the debate that perhaps the pragmatic solution is to operate a "don't ask, don't tell" strategy, overlooking some unorthodoxies in the motivations of national courts. However, other participants took a stricter line, arguing that supremacy is long since established and should be followed by the Member states as a matter of international law.

Judicial independence

A second issue that was present through many of our panels was the ongoing rule of law crisis. In the national reports, most Member States highlighted that there are some causes for concern. These problems can be placed on a scale: ranging from, at the one extreme, relatively few Member States that reported a no concerns over judicial independence, over the worryingly large number of Member States experiencing occasional or specific problems and then on to the gradually more troubling developments of political and media pressure, before we eventually arrive at the cases of systemic break-down of judicial independence at the other extreme. Somewhere on this scale, we concluded that these issues cease to be a matter solely for the Member State in question and become a common concern for the Union. We also noted the worrying possibility that the scale might instead be a slide, where minor problems may be the gateways towards more serious developments of rule of law back-sliding.

We found that it is difficult to establish exactly where the red line should be drawn, and we discussed whether the notion of judicial independence should be understood the same way in Articles 19 TEU, Article 47 of the Charter, and Article 267 TFEU. We observed, under the guidance of Advocate General Bobek, that the different functions of these provisions would seem to justify different standards.

Nor is it easy to know what, precisely, the Union response to judicial independence challenges ought to be. During our discussions, some participants took the position that the Union ought to take a hard line towards these developments, for instance excluding offending Member States from participating in the European Arrest Warrant regime and other collaborations dependent on mutual trust. Others noted that such an approach risks isolating those national judges that still seek to uphold the rule of law and contribute to additional or more severe rights violations for the populations concerned.

We also noted the risk that the cure turns out to be worse than the disease, if the EU deviates from its own fundamental values in its efforts to counter rights violations in the Member States. Frustrating as it may seem, the Union long-term interest may not always entirely coincide with the immediate needs or wishes of the courts in the concerned Member States. I do not envy the Court's task in striking the balance between, on the one hand, trying to support the national judges under political pressure – which I think it is clear from case law that the Court has been trying to do – and, on the other hand, upholding the rule of law in the EU, which requires staying within the limits of the law even where it prevents greater solidarity.

The judicial role

This leads me to my third observation: the role of the judiciary and the division of that role between the Court of Justice and the national courts.

As regards the role of the Court vis-à-vis the other institutions of the Union and the Member States, we observed that the judiciary has been given or taken on a large and important role – and perhaps one that is relatively larger than what the Court can realistically and legitimately be expected to fulfil.

This goes for the rule of law crisis, where it was argued that the Court can neither initiate a firmer stance against backsliding Member States, nor be expected to fill the gaps caused by possible non-recognition of their judgments without legislative intervention.

It also goes for another urgent crisis, namely the climate crisis, where we observed a growing trend towards turning to the courts with questions that should perhaps rather have a political solution, and also the need for legislative intervention to ensure the appropriate forms of access to environmental and climate justice.

And on top of that, we also recalled that the Court cannot enforce its own judgments; for that it remains dependent on the executive and on the Member States.

As regards the relations between the national judiciaries and the Court of Justice, our discussion centered on the function of the preliminary reference procedure. In *Conzortio Italian Management*, the Court of Justice has recently affirmed, with some new clarifications, its relatively strict *CILFIT* case law on the highest courts obligation to refer. At the same time, the national courts appear to operate on a more lenient understanding of the concept of acte clair, that leads national courts to refer less frequently than a literal interpretation of the Court's case law would prescribe. The discussion underlined the need for an open communication between the Court and the referring courts, while at the same time illustrating the Court's continued commitment to ensuring judicial protection in a wide range of cases rather than, as some commentators have proposed, moving towards a more selective approach.

Mutual trust and recognition

My last and shortest observation concerns the issue of mutual recognition, where our discussions are a precursor to what will be the first topic at the upcoming FIDE congress in 2023. The discussion focused, in particular, on the European Arrest Warrant. This was perhaps the topic where disagreement within the group was largest, which bodes well for the continued discussions.

By way of illustration, there were voices in the room that argued that there is too little scope under the current case law for refusing to execute a European arrest warrant in cases

of systemic rule of law infringements, but there were also those who argued that there is too much room for such refusals, risking to create safe havens for criminals and violating the rights of the victims of crime. It was underlined that the main rule is mutual recognition and that exceptions should remain exceptional, but it was also claimed that the more serious the situation in a Member State, the easier will it be to fulfil the criteria for those exceptions. It was noted that if the Court sticks to the current case law, it is accused of doing too little to support national judges, but if it goes further, it may be accused of putting pressure on national governments.

The conclusion to be drawn, I believe, is that we can all look forward to equally fruitful discussions when we reconvene in Sofia. Thank you.

4 Topic 2: The New EU Data Protection Regime

4.1 Rapporteurs (General, Institutional and National)

General Rapporteur	Orla Lynskey
Institutional Rapporteurs	Anna Buchta and Herke Kranenborg
Young Rapporteur	Teresa Quintel

Austria	Hans Kristoferitsch
Belgium	Anneleen Van de Meulebroucke, Dries Van Briel and Justine De Meersman
Bulgaria	Ana Velkova
Croatia	Antonija Ivančan
Cyprus	Stéphanie Laulhé Shaelou and Katerina Kalaitzaki
Czech Republic	Ondřej Serdula and Vojtěch Bartoš
Denmark	Søren Sandfeld Jakobsen
Estonia	Merike Kaev
Finland	Anu Talus and Tobias Bräutigam
France	Céline Castets-Renard, Mathieu Combet and Olivia Tambou
Germany	Dieter Kugelmann
Greece	Anna Pouliou, Virginia Tzortzi and Despina Vezakidou
Hungary	Tamás Bendik, Dániel Eszteri, Attila Kiss, Melinda Kovács, Ágnes Majsa and Katalin Siklósi-Somogyi
Ireland	Kate Colleary and Emily Gibson
Italy	Francesco Rossi Dal Pozzo
Luxembourg	Tine A. Larsen, Clémentine Boulanger and Annelies Vandendriessche
Malta	Mireille M. Caruana
The Netherlands	Dominique Hagenauw and Hielke Hijmans
Norway	Milos Novovic and Martin Hennig
Poland	Agnieszka Grzelak and Mirosław Wróblewski
Portugal	Filipa Calvão and Clara Guerra
Romania	Augustin Fuerea and Roxana-Mariana Popescu
Slovakia	Lilla Garayova

Slovenia	Nina Pekolj and Marjan Antončič
Spain	Antonio Segura Serrano and Julián Valero Torrijos
Sweden	Pernilla Norman
Switzerland	Jacques Beglinger
United Kingdom	Leonard W.N. Hawkes

4.2 Update General and Institutional Reports

Orla Lynskey,[1] *Anna Buchta*[2] *and Herke Kranenborg*[3]

As in politics, a year is a long time in EU data protection law. Since the submission for publication of the general and institutional reports in early 2020, there have been several significant judgments delivered by this Court regarding the topics covered in these reports and there are important preliminary references pending before it. National Supervisory Authorities (NSAs) have made approximately 600 further decisions, including a record fine of €775 million addressed to Amazon by the Luxembourgish NSA.

Moreover, beyond the topics covered in the original reports (which concerned the development of data protection law at national level), the pandemic itself tested the effectiveness of the EU data protection regime when Member States sought to rely on technological fixes to address the health and societal challenges it entails. Meanwhile, the European Commission continues to propose new legislative initiatives, most notably the proposed AI Act, which like other pending initiatives would fundamentally alter the regulatory context in which the GDPR applies.

A thorough examination of all of these developments is not possible. Rather, in advance of the 2021 Congress meeting, this update seeks simply to highlight some of the more significant elements. Part I considers notable developments relating to the topics covered in the original reports while Part II reflects on the wider role of the GDPR in the context of the pandemic and recent regulatory developments.

1 Associate Professor of Law, London School of Economics.

2 Head of the Policy and Consultation Unit, European Data Protection Supervisor.

3 Professor in European Data Protection and Privacy Law, Maastricht University; member of the Legal Service, European Commission. The opinions expressed in the report reflect the authors' personal opinions and cannot be attributed to the EDPS or the European Commission.

Relevant developments on report topics

The FIDE questionnaire sub-divided the questions for National Rapporteurs into four sub-topics, which shall be used to structure this update.

Setting the scene – Testing the flexibility afforded by the GDPR

As a Regulation, one might expect the uniform reception of the GDPR into national legal orders. However, as is well-documented, the GDPR affords Member States some flexibility to tailor its application to the national legal and societal context. For instance, Article 23 GDPR enables Member States to introduce legislative measures to restrict the scope of the rights provided for in Articles 12 to 22 (and the corresponding obligations in Article 5) as well as Article 34. It provides a list of legitimate interests that such a restriction may pursue and requires that any such restriction respect the essence of relevant fundamental rights and be necessary and proportionate. In *VQ* v. *Land Hessen*,[4] the Court was required to consider whether the activities of the Petitions Committee of the Parliament of the *Land* Hessen fell within the material scope of the GDPR. The Court found that none of the derogations from the scope of the GDPR in Article 2 were applicable but also that Article 23 GDPR (and the accompanying recital 20) contain no exception for parliamentary activities.[5] The Court therefore treated the legitimate interests specified in Article 23 GDPR as an exhaustive list.

The facts of *Latvijas Republikas Saeima*[6] provide a good illustration of an aspect of EU data protection law where Member States have been afforded less flexibility by the GDPR than under its predecessor the 1995 Data Protection Directive. Article 10 GDPR concerns the processing of personal data "relating to criminal convictions and offences". The Latvian Constitutional Court asked the ECJ whether the term "criminal convictions and offences or related security measures" found in Article 10 GDPR includes personal data processing relating to penalty points for motoring offences. Such motoring offences are classified as administrative offences by domestic law. The Court held that the term "criminal convictions and offences" refers exclusively to criminal offences. To justify this finding, it pointed to the legislative history of the provision; while the European Parliament had proposed the inclusion of the wording "administrative sanctions" this wording was not reflected in the final text. The Court concluded that:

4 Case C-272/19, *VQ* v. *Land Hessen*, ECLI:EU:C:2020:535.
5 Ibid., paras 71 and 72.
6 Case C-439/19, *Latvijas Republikas Saeima (Points de pénalité)*, ECLI:EU:C:2021:504.

> in deliberately not including the adjective 'administrative' in Article 10 of the GDPR, the EU legislature intended to limit the enhanced protection provided for by that provision to the criminal field alone.[7]

The Court also noted that this represented a change from the 1995 Directive which referred to the "processing of data relating to offences, criminal convictions or security measures" and which stated further that Member States "may provide that data relating to administrative sanctions … shall also be processed under the control of official authority". It is therefore apparent that the possibility for Member States to apply this provision to all administrative offences is now foreclosed by the GDPR. Only administrative offences that might be categorised as criminal fall within its ambit.

Whether the GDPR precludes the more restrictive interpretation of some of its provisions by Member States will be tested in a pending referral before the Court.[8] The Court is asked to confirm the meaning of Article 38(3) GDPR. This provision states that a Data Protection Officer (DPO) "shall not be dismissed or penalised by the controller or the processor for performing his tasks". The European Data Protection Board (EDPB) understands this provision to mean that the DPO can nonetheless be dismissed for other reasons, unrelated to the performance of their tasks (for instance, sexual misconduct).[9] German law prohibits the ordinary termination of the DPO's employment contract, irrespective of whether this dismissal is related to the performance of the tasks of the DPO. In this respect, the German law is stricter than the interpretation proposed by the EDPB, offering better protection to the position of the DPO. However, on this point the GDPR does not indicate that the Member State may add such stricter requirements. The Court is therefore asked whether the GDPR precludes such a domestic law prohibition.[10]

The Court is also asked to consider whether this finding extends to situations where the designation of a DPO is not mandatory pursuant to Article 37(1) GDPR. Initially this latter element might seem to resemble a *renvoi* situation, where national legislation adopts the same approach as that adopted in an EU measure and the Court thus accepts jurisdiction to interpret these purely domestic law provisions. However, Article 37(4) GDPR enables data controllers, processors and Member States to require the designation of DPOs in

7 Ibid., para. 78.

8 Case C-534/20, *Leistritz AG* v. *LH* (pending).

9 Article 29 Data Protection Working Party, "Guidelines on Data Protection Officers (DPOs)" WP 243 rev.01, revised and adopted on 5 April 2017 (as endorsed by the European Data Protection Board (EDPB), p. 15 and 16.

10 The precise wording of the question is as follows: "Is the second sentence of Article 38(3) GDPR based on a sufficient enabling clause, in particular in so far as this covers data protection officers that are party to an employment contract with the data controller?". See also the pending questions in Case C-453/21, *X-FAB Dresden GmbH & Co. KG*.

other circumstances. The referring court therefore simply wishes to know whether this interpretation of Article 38(3) GDPR applies also in these circumstances.

The reception of substantive GDPR provisions in the national legal order

The Court has had the opportunity to clarify the interpretation of a number of key GDPR provisions in its recent jurisprudence.

(a) Valid consent

In *Orange Romania*[11] the Romanian NSA issued an administrative penalty to Orange Romania, a mobile telecommunications service provider, for having taken and retained copies of customer identity documents without their valid consent.

It was Orange Romania's practice when concluding paper-based contracts with individual customers for its mobile telecommunications services to annex copies of their identity documents to these contracts. The consumer contracts indicated that the customer had been informed of this collection and storage by Orange Romania and that the existence of customer consent was established by the insertion of crosses in boxes in the written documentation evidencing the contract. The relevant segment of the clause in question stated: "he or she [the customer] has been informed of, and has consented to, the following: the storage of copies of documents containing personal data for identification purposes". It was an Orange Romania agent that completed this tick box on the retention of an identity document (usually on a computer) before customers signed to accept all of the contractual clauses.[12] That representative should also have informed the customer that this checkbox did not need to be ticked. Moreover, Orange Romania continued to conclude subscription contracts with customers who refused to consent to the storage of a copy of one of their identity documents. However, where a customer refused to provide consent, and thus wanted to deviate from this standard contract, Orange Romania required the customer to document this on the contract in handwriting in accordance with its internal procedures.

The Court was asked to provide guidance on whether such a practice and contractual clauses meet the requirements to demonstrate that a person's consent is validly given.[13]

The Court affirmed, in general terms, the requirements for consent found in EU data protection law. Consent must be active as now explicitly specified in the GDPR.[14] Consent must also be specific "in the sense that it must relate specifically to the processing of the data in question and cannot be inferred from an indication of the data subject's wishes for

11 Case C-61/19, *Orange Romania SA* v. *Autoritatea Națională de Supraveghere a Prelucrării Datelor cu Caracter Personal (ANSPDCP)*, ECLI:EU:C:2020:901.

12 Ibid., para. 45.

13 Ibid., para. 33.

14 Ibid., para. 36.

other purposes".[15] The Court noted that Article 7(2) GDPR requires that where consent is sought in the context of a written declaration that also concerns other matters, that consent request should be presented in a clearly distinguishable way from the other matters. Moreover, informed consent requires that the consent declaration must be presented in an intelligible and easily accessible form, using clear and plain language, particularly for pre-formulated declarations of consent. The information provided should enable the data subject to be able to determine easily the consequences of any consent he or she might give and ensure that the consent given is well informed. Freely given consent requires that the contractual terms must not mislead the data subject as to the possibility of concluding the contract even if they refuse to consent to the processing of their data.

The Court then turned to consider how these criteria applied to the contractual clauses under consideration. As an Orange Romania agent ticked the checkbox prior to the customer signing the contractual clauses the Court held that "the mere fact that that box was ticked is not such as to establish a positive indication of those customers' consent to a copy of their identity card being collected and stored".[16] This tick-box, without more, did not prove that the clause was actually "read and digested". The Court left it to the referring court to investigate whether this was the case.

The Court noted that the ticked clause in question did not appear to have been presented in a clearly distinguishable manner from other contractual clauses, putting in doubt its specificity.[17] The Court also considered that further investigation was required to assess whether consent was informed, in particular whether the clauses were capable of misleading the data subject as to the possibility to conclude the contract without giving consent.[18] The Advocate General had been more definitive on this point, noting that it was not "made crystal-clear to the customer that a refusal to the copying and storing of his or her ID card does not make the conclusion of a contract impossible".[19]

The Court considered, like the Advocate General, that the free nature of the consent also appeared to be called into question. The Advocate General had opined that consent could not be freely given as customers who declined to consent were put in a situation where they "perceptibly deviate from a regular procedure".[20]

Finally, both the Court and the Advocate General noted that it is for Orange Romania, as the data controller, to establish that its customers have actively given their consent to

15 Ibid., para. 38.
16 Ibid., para. 46.
17 Ibid., para. 47.
18 Ibid., para. 49.
19 Opinion of AG Szpunar in Case C-61/19, *Orange Romania SA* v. *Autoritatea Națională de Supraveghere a Prelucrării Datelor cu Caracter Personal (ANSPDCP)*, ECLI:EU:C:2020:901, para. 61.
20 Ibid., para. 60.

the personal data processing. According to the Court this precludes the possibility of Orange Romania requiring customers actively to express their refusal.[21]

(b) Legitimate interests

In the case of *TK v. Asociația de Proprietari bloc M5A-ScaraA*,[22] the Court had the opportunity to consider the application of the legitimate interests legal basis in the context of CCTV video recording. TK lived in a building where the association of building co-owners had installed a video camera surveillance system in some common parts of the building following a collective decision at a general assembly. One of these cameras was directed towards the front of the building while another two cameras were in the ground-floor hallway and in the lift. TK initiated proceedings against the association in order to have the cameras removed. These cameras had been installed in response to a number of criminal episodes in the building given that other security mechanisms (such as the installation of an intercom and magnetic card entry system) had been unsuccessful.

In its preliminary reference, the national court queried whether Articles 8 and 52 EU Charter and Article 7(f) of the 1995 Directive preclude national legislation that allows video surveillance to be used without the data subject's consent to ensure the safety and protection of individuals, property and valuables.[23] In particular, the referring court asked whether the legitimate interests of a controller must be "proven" and be "present and effective at the time of the data processing".[24]

Several states and the Commission had intervened before the Court to argue that the legitimate interests must be present and effective as at the date of the data processing and must not be hypothetical at that date, while acknowledging that this does not necessarily mean that the safety of property had already been compromised at the time of processing. The Court noted that the requirement of present and effective interest appeared to be fulfilled in this case as thefts, burglaries and vandalism had already occurred before the video surveillance system was installed.

Concerning the necessity of personal data processing to pursue these legitimate interests, the Court has held that derogations and limitations "in relation to the protection of personal data must apply only in so far as is strictly necessary". According to the Court, this means that the objective pursued cannot reasonably be as effectively achieved by other means less restrictive of fundamental rights.[25] In considering the need for processing, the Court also affirmed that this assessment must be made in conjunction with the data minimisation

21 *Orange Romania*, para. 51.
22 Case C-708/18, *TK* v. *Asociația de Proprietari bloc M5A-ScaraA*, ECLI:EU:C:2019:1064.
23 Ibid., para. 32.
24 Ibid., para. 43.
25 Ibid., para. 47.

principle, according to which personal data must be "adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed".[26]

The Court considered that the proportionality of the measures had been taken into account by the data controllers. Alternative security measures had been enacted but were insufficient, and the camera surveillance system was limited to particular parts of the building. Nevertheless, the Court endorsed the Commission's contention that in assessing whether such processing is necessary, the controller must examine "whether it is sufficient that the video surveillance operates only at night or outside normal working hours, and block or obscure the images taken in areas where surveillance is unnecessary".[27]

With regard to the balancing of rights entailed by the third limb of Article 7(f), the Court reiterated that this balancing will depend on the individual circumstances of a particular case and that account must be taken of the significance of a data subject's EU Charter rights. It specified that this precludes Member States from

> excluding, categorically and in general, the possibility of processing certain categories of personal data without allowing the opposing rights and interests at issue to be balanced against each other in a particular case. Thus, Member States cannot definitively prescribe, for certain categories of personal data, the result of the balancing of the opposing rights and interests, without allowing a different result by virtue of the particular circumstances of an individual case.[28]

The Court noted that the seriousness of the infringement of the data subject's fundamental rights might vary depending on whether the data concerned came from a public or non-public source. It held that the processing of data from non-public sources involved a more serious infringement of the rights to data protection and privacy as it implies that "information relating to the data subject's private life will thereafter be known by the data controller" as well as third parties to whom it may be disclosed. The Court reiterated some of the criteria relevant to this balancing exercise that it had previously identified in its case law. It concluded that the principle of data minimisation and the legitimate interests legal basis do not preclude national provisions such as those in the main proceedings, provided that the personal data processing fulfils the conditions laid down in Article 7(f).

26 Ibid., para. 48.
27 Ibid., para. 51.
28 Ibid., para. 53.

The facts of *M.I.C.M*[29] replicate those of the earlier *Promusicae*[30] judgment. Miricom is a copyright holder which holds rights over content (in this instance pornographic films). It had relied on a third party to gather the IP addresses of those who were infringing its copyright on peer-to-peer networks using the BitTorrent protocol. Telenet, a Belgian Internet Service Provider (ISP) refused to provide Miricom with information identifying the account holders linked to the infringing IP addresses. Amongst the issues the Court was asked to provide guidance on was the question of whether Miricom could rely on Article 6(1)(f) GDPR to collect the relevant IP addresses. In particular, the Court interpreted the question it was asked as follows: whether Article 6(1)(f) GDPR

> must be interpreted as precluding, first, the systematic registration, by the holder of intellectual property rights and by a third party acting on that holder's behalf, of the IP addresses of users of peer-to-peer networks whose Internet connections have allegedly been used in infringing activities and, second, the communication of the names and of postal addresses of those users to the rightholder or to a third party in order to enable him or her to bring a claim for damages before a civil court for prejudice allegedly caused by those users.[31]

The Court confirmed that the registration of IP addresses constitutes personal data processing. On the application of Article 6(1)(f), it affirmed that as the relevant provisions of the GDPR have "essentially the same scope" as the relevant provisions of the 1995 Directive, the Court's case-law on the Directive is in principle also applicable to the GDPR.[32]

The Court recognised that the recovery of claims by an assignee may constitute a legitimate interest.[33] It considered that the necessity criterion was likely fulfilled as it is often only possible to identify the owner of the internet connection on the basis of their IP address and the information provided by the ISP.[34] On the third limb of the legitimate interests test, the Court deployed the same reasoning as it had in its earlier caselaw under the Directive. This entailed an assessment of additional relevant legal obligations. It confirmed that a reading of Article 8(3) of the Directive on the Enforcement of IPRs in conjunction with Article 15(1) of the E-Privacy Directive and the (then) Article 7(f) of the 1995 Directive does not preclude Member States from imposing an obligation on data

29 Case C-597/19, *Mircom International Content Management & Consulting (M.I.C.M.) Limited* v. *Telenet BVBA*, ECLI:EU:C:2021:492.

30 Case C-275/06, *Productores de Música de España (Promusicae)* v. *Telefónica de España SAU*, ECLI:EU:C:2008:54.

31 Ibid., para. 101.

32 Ibid., para. 107.

33 Ibid., paras 108 and 109.

34 Ibid., para. 110.

controllers to disclose data to private persons in order to enable them to bring civil proceedings for copyright infringements but nor does it require those Member States to lay down such an obligation.[35]

It advised the national court that if it were to follow from its investigations that domestic legislative provisions exist that limits the scope of the rights to privacy found in Article 5 and 6 of the E-Privacy Directive, if Miricom had legal standing to bring proceedings and if the request for information was proportionate and not abusive, then it would be lawful in accordance with the GDPR.[36]

(c) Additional Article 5 and 6 Jurisprudence

In *Latvijas Republikas Saeima* the referring Court had queried whether the Article 5(1)(f) GDPR principle of "integrity and confidentiality" prohibited Member States from treating penalty points information about drivers as within the public domain and allowing for its further communication (without additional qualification). The Court extrapolated from the (precisely worded) questions of the national court that it seeks to establish whether the relevant processing was generally lawful in light of all of the provisions of the GDPR, in particular the principle of proportionality.[37] The Court therefore focused on the principle of data minimisation (Article 5(1)(c) GDPR) which "gives expression to the principle of proportionality".[38]

It began by noting that compatibility with the GDPR needs to be assessed both in light of general rules on legality, here Article 5(1)(c) and Article 6(1)(e), and the specific rules, here Article 10 GDPR. Article 6(1)(e) permits processing to the extent 'necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller'. The Court affirmed that none of these provisions impose a general and absolute prohibition on such disclosures by public authorities. The Court recalls that the EU Charter rights to data protection and to respect for private life are not absolute and that they must be considered "in relation to their function in society and be weighed against other fundamental rights". This entails an assessment under Article 52(1) EU Charter of whether the interference with these rights, taking into account its seriousness, can be considered justified and proportionate.

Having rooted its reasoning in the EU Charter, the Court then proceeded to conduct a proportionality analysis based on the specific provisions of the GDPR. While recognising that road safety improvement serves a public interest, it stated that the disclosure of penalty point data must be necessary to meet this objective. This necessity criterion is not met

35 Ibid., para. 125.
36 Ibid., para. 131.
37 *Latvijas Republikas Saeima (Points de pénalité)*, para. 97.
38 Ibid., para. 98.

where the objective could be pursued just as effectively by other less restrictive means. It considered that this necessity test had not been met given that there was no indication that alternative less restrictive measures had been considered and that the disclosure of penalty point information constitutes a serious interference with relevant fundamental rights since it may "give rise to social disapproval and result in the stigmatisation of the data subject".[39] Moreover, these measures went beyond what was necessary because, amongst other things, they concerned the data of those who committed offences occasionally in addition to those who systematically disregarded the road traffic rules.

The Court is asked for guidance on the identification of the most appropriate legal basis for data processing in a number of pending preliminary references.

In an anticipated preliminary reference from a regional appeal court in Germany, the Court is asked to provide guidance on Facebook's practice of processing personal data obtained from third-party websites and applications and other Facebook group services.[40] At issue in the domestic proceedings was whether this practice had a valid legal basis. The ECJ is asked to clarify whether, when such personal data is used for the provision of personalised content and advertising, the Article 6(1)(b) "contractual necessity" legal basis or the Article 6(1)(f) "legitimate interests" legal basis might be used. As consent must be freely given, the Court is also asked whether consent can be freely and effectively expressed where the data controller is a dominant undertaking (pursuant to competition law).

In a case taken by data protection activist Max Schrems against Facebook Ireland pending before the Austrian courts, the Austrian Court has referred a similar question to the ECJ.[41] It seeks to know whether Facebook can rely on the Article 6(1)(b) contractual necessity provision in place of Article 6(1)(a) consent to process personal data for the provision of personalised advertising. Perhaps more significantly, the Austrian court also invited the ECJ to clarify how the data minimisation and purpose limitation principles as provided by the GDPR should apply in the context of personalised online advertising, in particular when it comes to sensitive data. The Court's findings in this case will have important implications for all forms of big data processing.

Domestic enforcement of data protection law

The FIDE questionnaire sought to identify potential divergences between States concerning the domestic enforcement, both public and private, of the GDPR. There are now several relevant references pending before the ECJ.

On the relationship between NSAs and Courts, the ECJ is asked to clarify the meaning of the notion of "acting within a judicial capacity". According to Article 55(3) NSAs are

39 Ibid., para. 113.
40 Case C-252/21, *Facebook Inc. and Others* v. *Bundeskartellamt* (pending).
41 Case C-446/21, *Maximilian Schrems* v. *Facebook Ireland Ltd* (pending).

not competent to supervise processing operations of courts acting in their judicial capacity. The case concerns the practice in the Dutch Council of State to allow journalists on the day of a hearing to read, on the spot, certain procedural documents from the file ahead of the hearing. When a person involved in a case before the Council of State lodged a complaint about this practice with the Dutch NSA, the NSA refused to accept the complaint, based on its lack of competence to supervise courts. In a thought-provoking opinion, Advocate General Bobek suggested that the ECJ employ a broad interpretation of the concept of "judicial capacity", going beyond mere judicial decision-making in an individual case, as was argued by the applicant in the national case.[42] Specifically, any activities that may indirectly impact upon their judicial independence must be covered and courts should, by default, be considered to be acting in this capacity unless it can be shown that a particular activity is of an administrative nature.[43]

In a reference from a Hungarian regional court, the ECJ is asked to provide guidance on the relationship between the rights found in Articles 77(1) and 79(1) GDPR (respectively the right to lodge a complaint with a supervisory authority and the right to an effective judicial remedy against a controller or processor).[44] In particular, the referring court queries whether NSAs have priority competence over courts who have been asked, based on Article 79(1) GDPR, to determine the existence of an infringement and what impact Article 47 EU Charter has on the interpretation of this relationship. It also asks the ECJ whether the independence of NSAs enables them to adopt a different interpretation of the GDPR to a court in respect of the same alleged infringement.

The issue of what constitutes "harm" raised in the questionnaire for national rapporteurs features in two pending references. An Austrian court queries whether infringement of GDPR is in itself sufficient for an award of damages pursuant to Article 82 GDPR or whether the data subject must also have suffered harm. It also queries whether EU law requirements, beyond equivalence and effectiveness, influence the assessment of compensation and whether it is compatible with EU law to require something beyond upset for an award of non-material damages.[45] The Bulgarian Supreme Administrative Court queries whether the worries, fears, and anxieties (without further data misuse or harm) experienced by data subjects because of a breach of confidentiality constitute non-material harm entitling them to compensation.[46]

The Austrian Supreme Court of Justice has asked the Court whether Article 80(2) GDPR allows competitors, associations, entities and Chambers to sue the data controller

42 Opinion of AG Bobek in Case C-245/20, *X and Z* v. *Autoriteit Persoonsgegevens*, ECLI:EU:C:2021:822, para. 100.

43 Ibid.

44 Case C-132/21, *BE* v. *Nemzeti Adatvédelmi és Információszabadság Hatóság*.

45 Case C-300/21, *UI* v. *Österreichische Post AG* (pending).

46 Case C-340/21, *Natsionalna agentsia za prihodite* (pending).

for an alleged breach of the GDPR.[47] These entities are entitled to initiate proceedings pursuant to national consumer law. Article 80(2) enables "any body, organisation or association *referred to in paragraph 1"* to complain to an NSA or to go before a Court without the mandate of a data subject. Article 80(1) GDPR refers to organisations that are:

> a not-for-profit body, organisation or association which has been properly constituted in accordance with the law of a Member State, has statutory objectives which are in the public interest, and is active in the field of the protection of data subjects' rights and freedoms with regard to the protection of their personal data

It seems unlikely that competitors will fit this description, although their private action may ultimately benefit data subjects by vindicating their rights. Furthermore, it is doubtful whether associations which had standing before the GDPR entered into force, will meet the requirements of Article 80(1) of the GDPR. The case also raises questions about the interaction with the recently adopted Directive on collective redress (Directive 2020/1828).

The German Facebook case (referred to above) is likely to be a pivotal one when it comes to delineating the boundaries between NSAs and other actors, specifically other regulatory authorities. From a substantive perspective, these proceedings have already attracted a lot of attention given that the German Competition Authority grounded its initial findings in the GDPR. The referring court queries whether it is possible for a national competition authority to determine that there has been a breach of the GDPR. The concern has been expressed that such a finding would undermine the GDPR's one-stop-shop system. The national referring court alludes to this through its observation that the Irish Data Protection Commissioner, the lead authority in the EU for Facebook, was investigating the same alleged GDPR breach. This judgement will therefore confirm whether the NSAs have exclusive competence as administrative authorities, to interpret and enforce the GDPR. The future consequences of the Court's findings may also be relevant to the various regulatory initiatives now in the legislative pipelines (see below).

These questions will provide welcome guidance on the relationship between public and private enforcement and how to deal with concurrent regulatory and legal proceedings under the GDPR. Given the numerous legislative proposals pending at EU level, such guidance may help to pre-empt contentious institutional issues.

Finally, it is necessary to mention that the Court has already had the opportunity to provide some further guidance on the more European dimension of data protection

47 Case C-319/20 *Facebook Ireland Limited* v. *Bundesverband der Verbraucherzentralen und Verbraucherverbände* (pending).

enforcement: the one-stop-shop procedure. In *Facebook Belgium*[48] the Court was asked to consider whether an NSA that was not the lead NSA under the GDPR can initiate legal proceedings to bring to an end an infringement concerning cross-border data processing. In this judgement, the Court confirmed that the general rule is that the lead supervisory authority is competent to adopt an infringement decision with the competence of other NSAs to adopt such a decision being the exception. The Court emphasised, nevertheless, that the lead supervisory authority must "exercise such competence within a framework of close cooperation with the other supervisory authorities".[49] Moreover, the Court held that where an NSA exercises its power to bring infringements to the attention of judicial authorities this would equally undermine the objective and effectiveness of the 'one-stop shop' mechanism.[50]

Data processing for national security purposes

The ECJ added a new chapter to the longstanding debate on the lawfulness of national measures that require telecom operators to retain or otherwise process traffic and location data of their customers in order for that data to be available for law enforcement or national security purposes. After the seminal *Tele2 Sverige* ruling, several Member States argued that the ECJ would not be competent to assess such measures if the objective was to safeguard national security. As described in the institutional report, this reasoning was based on the statement in Article 4(2) TEU that national security remains the sole responsibility of the Member States, as well as on the clause in the applicable data protection rules (the ePrivacy Directive) that excluded activities for the purpose of national security from its scope.[51]

In October 2020, the ECJ issued two rulings in cases stemming from Belgian, French and UK Courts. Following its logic in the *Tele2 Sverige* ruling, in which the Court discussed the exclusion of law enforcement activities from the scope of the ePrivacy Directive, but also took into account that the same ground appeared in the provision which allowed derogations from certain rights and obligations in the ePrivacy Directive, the ECJ concluded that the national measures at issue fell within the scope of the ECJ's jurisdiction.

The ECJ underlined that the activities that were excluded from the scope of the ePrivacy Directive concerned activities of the state. Since the national measures at issue involved the processing by telecom providers of traffic and location data, such activities could not

48 Case C-645/19, *Facebook Ireland Ltd and Others* v. *Gegevensbeschermingsautoriteit*, ECLI:EU:C:2021:483.
49 Ibid., para. 63.
50 Ibid., para. 65.
51 Institutional Report at pp. 99-101.

be covered by the exclusion.[52] Only where Member States directly implement measures without imposing processing obligations on providers the protection of the data of the persons concerned is not covered by the ePrivacy Directive.[53]

In its subsequent analysis the ECJ set out the hierarchy amongst the different objectives that are sought by the measures at issue, placing the objective of safeguarding national security at the top, considering that is goes beyond the other objectives listed in the ePrivacy Directive, including the combating of (serious) crime and safeguarding public security.[54] The ECJ also provided a description of what national security entails:

> That responsibility [i.e. national security] corresponds to the primary interest in protecting the essential functions of the State and the fundamental interests of society and encompasses the prevention and punishment of activities capable of seriously destabilising the fundamental constitutional, political, economic or social structures of a country and, in particular, of directly threatening society, the population or the State itself, such as terrorist activities.[55]

Because of the higher importance of the objective of safeguarding national security, according to the ECJ, generalised and indiscriminate retention is not per se excluded for that objective. This is an important consideration since the ECJ, in the *Tele2 Sverige* ruling, had concluded that such retention was excluded when the objective is fighting serious crimes. The ECJ formulated the circumstances in which such a generalised and indiscriminate retention measure could be lawful for safeguarding national security, emphasising that it should be temporary and put in place because of a serious threat to national security which is shown to be genuine and present or foreseeable.[56]

Also on the national security of third states, the case law of the ECJ developed further. In the anticipated *Schrems II* ruling,[57] the ECJ assessed whether the European Commission, in its EU-US Privacy Shield adequacy decision, drew the right conclusion as to the essentially equivalent level of protection offered by the United States when US security agencies have access to personal data transferred on the basis of the EU-U.S. Privacy Shield. The EU-U.S. Privacy Shield was adopted after the ECJ in the first *Schrems* ruling invalidated the so-called Safe Harbor adequacy decision, which did not contain any analysis of the US legal

52 Case C-623/17, *Privacy International* v. *Secretary of State for Foreign and Commonwealth Affairs and Others*, ECLI:EU:C:2020:790, para. 39; Case C-511/18, *La Quadrature du Net and Others* v. *Premier ministre and Others*, ECLI:EU:C:2020:791, para. 96.

53 *Privacy International*, para. 48; *La Quadrature du Net* (n. 49), para. 103.

54 *La Quadrature du Net*, para. 136.

55 *La Quadrature du Net*, para. 135.

56 *La Quadrature du Net*, para. 137.

57 Case C-311/18, *Data Protection Commissioner* v. *Facebook Ireland Limited and Maximillian Schrems* (*Schrems II*). ECLI:EU:C:2020:559.

framework on national security. Despite the elaborate description of the US framework in the EU-U.S. Privacy Shield decision, the consideration of new developments in the US legal framework and the introduction of a dedicated ombudsperson-mechanism, the ECJ again concluded that the safeguards offered were insufficient in the light of Article 7, 8 and 47 of the EU Charter of Fundamental Rights.

In the same *Schrems II* ruling, the ECJ left intact a decision of the European Commission which lays down Standard Contractual Clauses (SCCs), These SCCs can be relied upon by persons transferring personal data from the EU to third countries in a contract with the recipient of the data in the third country. The SCCs allow to provide for appropriate safeguards within the meaning of Article 46 of the GDPR. However, this is not automatic. The ECJ underlined that use of these appropriate safeguards should ensure that the personal data transferred are afforded a level of protection essentially equivalent to that which is guaranteed within the EU.[58] This requires the person relying on the SCCs to also take into consideration the relevant aspects of the legal system of the third country as regards any access by the public authorities to the personal data.[59]

Data protection in its broader context

Data protection in a global health crisis

From the early days of the COVID-19 pandemic, governments and public health authorities worldwide turned to data processing and technological solutions to mitigate its considerable impacts on society. Governmental and private sector responses[60] focussed on personal data collection and sharing in the context of epidemiological surveillance, contract tracing technologies including mobile apps, possibilities to use and re-use sensitive health data for scientific research and public health purposes, and the like. This resulted in considerable pressure on privacy and data protection, underlining the need for pragmatic approaches that would allow the reconciliation of the protection of individuals' fundamental rights with the need to combat a public health emergency.

From a legal perspective, the challenges were compounded by the fact that the EU competence in the area of public health is very limited and a Treaty legal basis for harmonising approaches is often lacking. At the same time, data concerning health constitute so-called special category data (often referred to as "sensitive data") subject to

58 *Schrems II*, para. 96.

59 *Schrems II*, para. 104.

60 COM(2020)2296, "Commission recommendation of 8.4.2020 on a common Union toolbox for the use of technology and data to combat and exit from the COVID-19 crisis, in particular concerning mobile applications and the use of anonymised mobility data".

a very strict regulatory regime.[61] As a consequence, most of the traditionally available legal grounds that allow for lawful processing of personal data were not available, and in most cases a recourse to EU or national law was necessary, often resulting in tensions with the need to respond quickly to a rapidly changing epidemiological situation.

Throughout 2020, the Commission has issued a Recommendation on a common Union toolbox for the use of technology and data to combat and exit from the COVID-19 crisis, in particular concerning mobile applications and the use of anonymised mobility data. The eHealth Network[62] has published a common toolbox[63] on the use of mobile applications to support contact tracing in the EU's fight against COVID-19, as well as interoperability guidelines[64] for approved contact tracing mobile applications in the EU. The Commission has also provided Guidance on Apps supporting the fight against Covid19 pandemic in relation to data protection.[65]

Against this background, both the European Data Protection Board (EDPB) and the European Data Protection Supervisor (EDPS) emphasised from the outset the need for a pan-European approach in tackling the pandemic. Both bodies issued practical guidance in relation to the most pressing challenges of the pandemic, stressing that pandemic-related technologies requiring the processing of personal data must be temporary, have a defined and limited purpose, and comply with EU data protection law.[66] As the supervisory authority responsible for the monitoring of personal data processing by EU institutions, bodies, offices and agencies (EUIs), the EDPS issued guidance in order to support EUIs in their effort to adopt the necessary health and safety measures in the workplace in compliance with the applicable data protection rules.[67]

---

61 Article 9 GDPR and Article 10 EUDPR.

62 A voluntary network set up under article 14 of Directive 2011/24/EU, and providing a platform of Member States' competent authorities dealing with digital health.

63 www.ec.europa.eu/health/sites/default/files/ehealth/docs/covid-19_apps_en.pdf.

64 www.ec.europa.eu/health/sites/default/files/ehealth/docs/contacttracing_mobileapps_guidelines_en.pdf.

65 Guidance on Apps supporting the fight against COVID 19 pandemic in relation to data protection, O.J. 2020, C 124/1.

66 "Guidelines 04/2020 on the use of location data and contact tracing tools in the context of the COVID-19 outbreak", www.edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-042020-use-location-data-and-contact-tracing_en; "Guidelines 03/2020 on the processing of data concerning health for the purpose of scientific research in the context of the COVID-19 outbreak", www.edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-032020-processing-data-concerning-health-purpose_en.

67 "Orientations from the EDPS: Body temperature checks by EU institutions in the context of the COVID-19 crisis", www.edps.europa.eu/data-protection/our-work/publications/guidelines/orientations-edps-body-temperature-checks-eu_en; manual contact tracing: "EDPS Orientations on manual contact tracing by EU Institutions in the context of the COVID-19 crisis", www.edps.europa.eu/system/files/2021-02/21-02-02_orientations_on_manual_contact_tracing_euis_en_0.pdf; and "Orientations from the EDPS: Reactions of EU institutions as employers to the COVID-19 crisis", www.edps.europa.eu/data-protection/our-work/publications/guidelines/orientations-edps-reactions-eu-institutions_en.

One of the most consequential initiatives adopted at EU level is the legal framework for the issuance, verification and acceptance of interoperable certificates on vaccination, testing and recovery to facilitate free movement during the COVID-19 pandemic (Digital Green Certificate).[68] An EU Digital COVID Certificate is a proof (via a QR code in a digital and paper format) that a person has either been vaccinated against COVID-19, received a negative test result, or recovered from COVID-19, valid in all EU countries and supported by an IT infrastructure that allows for the validity of the certificate to be verified across all EU Member States, as well as in a number of third countries.[69] The regulations adopted at EU level cover the use of the EU Digital COVID Certificate to facilitate safe free movement inside the EU. However, Member States can also use the COVID-19 certificates for domestic purposes, such as access to events or venues.

Despite the rather obvious tension with the principle of purpose limitation,[70] this possibility to re-use the certificate at national level for purposes not limited to the free movement of persons was not excluded by EU data protection authorities in the Joint Opinion 04/2021 issued by the EDPB and the EDPS in response to a consultation request pursuant to Article 42(2) EUDPR.[71] As a clear sign of a pragmatic approach under extraordinary circumstances, the NSAs chose instead to focus on conditions for such possible further uses at national level which always require a clear and comprehensive legal framework to be adopted in order to ensure, among other things, that it should not legally or factually lead to discrimination based on having been (or not been) vaccinated or having recovered from COVID-19. The EDPB and the EDPS considered that such a legal basis in Member State law should at the very least include specific provisions clearly identifying the scope and extent of the processing, the specific purpose involved, the categories of entities that can verify the certificate as well as the relevant safeguards to prevent abuse.

---

68 Regulation (EU) 2021/953 of the European Parliament and of the Council of 14 June 2021 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 pandemic, O.J. 2021, L 211/1; Regulation (EU) 2021/954 of the European Parliament and of the Council of 14 June 2021 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) with regard to third-country nationals legally staying or residing in the territories of Member States during the COVID-19 pandemic, O.J. 2021, L 211/24.

69 See www.ec.europa.eu/info/live-work-travel-eu/coronavirus-response/safe-covid-19-vaccines-europeans/eu-digital-covid-certificate_en#potential-use-of-certificates-for-access-to-facilities for more information.

70 Art. 5(1)(b) GDPR and Art. 4(1)(b) EUDPR.

71 EDPB and EDPS, "Joint Opinion 04/2021 on the Proposal for a Regulation of the European Parliament and of the Council on a framework for the issuance, verification and acceptance of interoperable certificates on vaccination, testing and recovery to facilitate free movement during the COVID-19 pandemic (Digital Green Certificate)", available at www.edps.europa.eu/system/files/2021-04/21-03-31_edpb_edps_joint_opinion_digital_green_certificate_en_0.pdf.

The extraordinary nature of the Regulation on the EU Digital COVID Certificate is clearly visible in the fact that it will apply for 12 months as from 1 July 2021 (although the Commission will have a possibility to propose to extend its duration if necessary, taking into account the evolution of the epidemiological situation on the pandemic, based on a report to be presented to the European Parliament). It will indeed be important to ensure that exceptional measures deployed in times of crisis remain limited in time, and not become part of the "new normal". Only then will it become clear whether the EU data protection rules withstood the test of the COVID-19 crisis.

The changing regulatory context in which GDPR applies

Those familiar with the GDPR will concede that it is a complex piece of EU legislation, with a correspondingly complicated relationship to national law. In some respects, the GDPR builds on national law (e.g. grounds for lawful processing in Article 6), or conversely allows or mandates national law to build on it and thus give effect to its provisions (e.g. the provisions on the organisation and functioning of the supervisory authorities). Other provisions of the GDPR allow or require national law to specify or further develop its rules in certain areas (e.g. specific data processing situations in Chapter IX) or even to depart from its provisions under certain conditions (see in particular Article 23 GDPR).[72]

But what seems even more challenging is to describe the relationship between the GDPR and other instruments of *EU law* which have a bearing on the processing of personal data.

Early examples of EU acts that led to lengthy discussions about how their provisions should be interpreted alongside the GDPR (or *reconciled* with it) include the PSD2 Directive,[73] Directive (EU) 2019/1770 on digital content,[74] or the Regulation on the free flow of non-personal data.[75] In some cases, guidance on the interaction or interplay between

72 For a detailed discussion, see the Opinion of the European Data Protection Supervisor of 7 March 2012 on the data protection reform package, available at www.edps.europa.eu/sites/edp/files/publication/12-03-07_edps_reform_package_en.pdf.

73 Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC, O.J. 2015, L 337/35.

74 See also Institutional Report Topic 2 at 3.1, p. 82.

75 Regulation (EU) 2018/1807 of the European Parliament and of the Council of 14 November 2018 on a framework for the free flow of non-personal data in the European Union, O.J. 2018, L 303/59. See also Commission, "Digital Single Market: Commission publishes guidance on free flow of non-personal data", available at www.ec.europa.eu/commission/presscorner/detail/en/IP_19_2749.

the legislative instruments in question and the GDPR has been provided by the EDPB[76] or by the European Commission.[77]

Since November 2020, the European Commission has presented several legislative proposals as part of the implementation of its European strategy for Data[78] which, when adopted, are bound to dramatically increase the complexity of the regulatory landscape. These include the proposals for a Data Governance Act[79] (DGA), the Digital Services Act[80] (DSA), the Digital Markets Act[81] (DMA), as well as the proposal for an Artificial Intelligence Act.[82]

While the proposals generally tend to state that they are *without prejudice* to the GDPR, this may not always be sufficient to resolve possible incompatibilities or conflicting interpretations, bringing the risk of introducing more legal uncertainty into an already young and dynamic area of regulation. For example, the notion of *data altruism* introduced in the proposal for the DGA[83] to cover situations where natural (or legal) persons would make data voluntarily available for reuse, without compensation, for "purposes of general interest, such as scientific research purposes or improving public services", appears to overlap, at least in part, with the concept of consent to the processing of personal data under the GDPR (which potentially covers purposes such as scientific research). At the same time, it is unclear whether it is intended to fully correspond to the GDPR understanding of consent, including the conditions for validity set out in Article 7 GDPR.[84]

The question of the relationship of the future new law to the GDPR arises also in relation to the proposal for an AI Act which is based on Article 114 TFEU, but also on Article 16 TFEU "insofar as it contains specific rules on the protection of individuals with regard to

---

76 See EDPB, "Guidelines 06/2020 on the interplay of the Second Payment Services Directive and the GDPR, Version 2.0", available at www.edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_202006_psd2_afterpublicconsultation_en.pdf.

77 Commission, "Digital Single Market: Commission publishes guidance on free flow of non-personal data", available at www.ec.europa.eu/commission/presscorner/detail/en/IP_19_2749.

78 COM(2020)66 final, "Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions: A European strategy for data".

79 COM(2020)767 final, "Proposal for a Regulation of the European Parliament and of the Council on European data governance (Data Governance Act)".

80 COM(2020)825 final, "Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC".

81 COM(2020)842 final, "Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)".

82 COM(2021)206 final, "Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain union legislative acts".

83 Art. 2(10) Data Governance Act.

84 See EDP and EDPS, "Joint Opinion 03/2021 on the Proposal for a regulation of the European Parliament and of the Council on European data governance (Data Governance Act) Version 1.1", available at www.edpb.europa.eu/system/files/2021-03/edpb-edps_joint_opinion_dga_en.pdf.

the processing of personal data, notably restrictions of the use of AI systems for 'real-time' remote biometric identification in publicly accessible spaces for the purposes of law enforcement".[85] In addition, one may wonder to what extent the proposed regulatory approach relying on existing product safety/market surveillance regulations and standardisation can be effective in safeguarding the fundamental right to privacy and data protection.[86]

Finally, the new proposals raise the question of effective enforcement of the rules, including the powers and responsibilities of the supervisory authorities for data protection. As the EDPB and the EDPS observe in their Joint Opinion 5/2021, most of the AI systems within the scope of the proposed AI Act will be based on the processing of personal data, or will process personal data, while the supervisory authorities for data protection will not necessarily be considered "competent authorities" under the AI Act.[87]

Finally, the new proposals each provide for a slightly different and often complex governance model, usually involving the Commission, various national competent authorities and an advisory committee, an expert group or another "Board" to be set up at EU level. Crucially, the involvement of supervisory authorities for data protection is not always guaranteed, and provisions for institutionalised and structured cooperation between relevant competent authorities is not explicitly provided. Such cooperation should ensure in particular that all relevant information can be exchanged with the relevant authorities – including NSAs – so they can fulfil their complementary role, while acting in accordance with their respective institutional mandate.[88]

4.3 Updates National Reports

General update: Belgium

Anneleen Van de Meulebroucke

85 AI Act Explanatory memorandum, p. 6 and recital (2).

86 For a discussion of this and other aspects, see EDPB and EDPS, "Joint Opinion 5/2021 on the proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act)", available at www.edpb.europa.eu/system/files/2021-06/edpb-edps_joint_opinion_ai_regulation_en.pdf.

87 Ibid., at 2.5 p. 13.

88 See also EDPS, "Opinion 1/2021 on the Proposal for a Digital Services Act", available at www.edps.europa.eu/system/files/2021-02/21-02-10-opinion_on_digital_services_act_en.pdf and EDPS, "Opinion 2/2021 on the Proposal for a Digital Markets Act", available at www.edps.europa.eu/system/files/2021-02/21-02-10-opinion_on_digital_markets_act_en.pdf.

The impediments to the enforcement of GDPR

The budget that was allocated to the Belgian Data Protection Authority remains rather limited. As a consequence, we notice that there is a delay in the treatment of cases by the Data Protection Authority. Yet, we also notice that an ever increasing number of cases is treated compared to the years before and that caselaw is developing. The case law of the Belgian Market Court (Marktenhof/Cour des marchés), which is the appeal instance for decisions of the Data Protection Authority, is also developing, and annulling some of the decisions issued by the Belgian Data Protection Authority, e.g. for a violation of the rights of defence or lack of motivation.

Beyond NSAs: the role of other actors in developing data protection

Several privacy activists are operating in Belgium, such as the Ministry of Privacy (see: https://ministryofprivacy.eu/), and the Liga for Human Rights ("Liga voor Mensenrechten" – see: https://mensenrechten.be/). These brought, among others, the case re the use of digital fingerprints before the constitutional court (see question 4).

Recently, two attorneys acting on behalf of different natural and legal persons headed to the Constitutional Court in the context of the Belgian register of assets ("vermogensregister") and the possible violation of privacy in that regard.

On 19 September 2021, the Belgian Data Protection Authority published the Code of Conduct of 28 January 2021 of the National Chamber of Notaries. This Code specifies certain modalities regarding the application of the GDPR for notaries.

Data protection in the pandemic

The Belgian Data Protection Authority has issued guidance and a FAQ page regarding all privacy and data protection related questions. The Belgian Regions have concluded several collaboration agreements in this regard (e.g. on the vaccination strategy on the Belgian COVID-19 Safe Ticket), on which the Belgian Data Protection Authority provided its comments.

Public policy, public security and national security

In January 2021, the Belgian Constitutional Court issued a ruling in the context of the use of digital fingerprints on the electronic identity card (which were added in 2018, despite the negative opinion of the Data Protection Authority). The case was brought by the League for Human Rights on the grounds, inter alia, that the digital fingerprint was not legal, not proportionate and not secure. However, the Constitutional Court ruled that the purpose, to combat identity fraud, reasonably justifies an interference with the right to respect for private life and the protection of personal data. The fact that no permanent central register

of all fingerprints would be introduced and that adequate safeguards were provided, constituted important elements in the decision.

In April 2021, the Belgian Constitutional Court annulled Belgium's data retention law, which provided for an obligation to retain telecom data. An annulment decision was brought to the Constitutional Court against the reformed data retention law of 29 May 2016, where after the Constitutional Court posed preliminary questions to the Court of Justice, the latter rendering its judgment on 6 October 2020. In its ruling of April 2021, the Constitutional Court followed the judgment of the ECJ.

EU data protection law in a global context

The Belgian Council of State has recently rendered two judgments following the *Schrems II* judgment.

In the first judgment, the Council of State suspended the execution of an award decision ("gunningsbeslissing") in summary proceedings because of a violation of the GDPR. The Council ruled that the contracting authority already has to consider GDPR-compliance in the regularity examination of a tender and externalize the results of such examination in the award decision. If the contracting authority indicates that the compliance with the GDPR by the chosen tenderer (in this case Amazon Web Services (AWS) – a cloud provider) is a "concern", then the contracting authority had to examine whether the chosen tenderer can guarantee the level of protection of personal data required by Union law.

In the subsequent judgment between the same parties, the Council of State rejected the claim to suspend the execution of the award decision. One of the loosing candidates filed a new claim for suspension in summary proceedings because the chosen candidate uses AWS. The Council ruled that the mere use of AWS and the transfer of data to the United States is not in itself prohibited if sufficient additional measures have been taken to provide adequate safeguards for the protection of personal data in the context of the transfer, including encryption of the data before it is transferred to AWS. The Council indicates that in this case the file shows that the chosen candidate does provide a comprehensive set of safeguards that can ensure the protection of personal data.[89]

Furthermore, the EDPB has provided a positive opinion on the Code of Conduct for Cloud Service Providers of the Belgian Data Protection Authority. The application for this Code of Conduct was made by Scope Europe, who wished to be accredited as a monitoring body for the EU Cloud code of conduct.

89 For more information – see: RvS 19 August 2021, nr. 251.378 (not yet published).

AI, gatekeepers and data altruism: Situating data protection amongst new regulatory initiatives

Within the framework of the EU SOLID initiative, the Flemish government (Digital Flanders) is currently looking into the possibility of setting up a Data utility company ("Datanutsbedrijf") to explore the possibilities of providing the services around the offer of the personal data vaults to organizations and governments outside Flanders.

In April 2021, there also has been legislative proposal amending the law of 11 April 1994 on public access to government information, in order to provide more transparency on the use of algorithms by the government.

General update: Cyprus

Stéphanie Laulhé Shaelou and Katerina Kalaitzaki

Any other relevant developments that you wish to highlight

Law 125(I)/2018 of 31 July 2018 is the national law providing for the protection of natural persons with regard to the processing of personal data and for the free movement of such data in Cyprus. Since the adoption of the law no legal amendments have been made to alter its text. Law 44(I)/2019 implemented the Data Protection Law Enforcement Directive (LED) (EU) 2016/680 into national law and again no legal amendments took place since its adoption on 27 March 2019.

However, the Office of the Commissioner for Personal Data Protection has issued 2 opinions (since the submission of the national report in 2019) providing guidelines and/or clarifying parts of the law addressed to the national parliament, the Member State government or, in accordance with Member State law, to other institutions and bodies. The second of these two opinions concern the use of programmes/software used by Higher Education Institutions due to the measures adopted to prevent the spread of the COVID-19 pandemic. The opinions have been issued in accordance with Article 58(3)(b) of the GDPR which grants each supervisory authority the authorisation and advisory power to issue, on its own initiative or on request, opinions to the national parliament, the Member State government or, in accordance with Member State law, to other institutions and bodies as well as to the public on any issue related to the protection of personal data.

The first opinion (16 January 2020) since the submission of the national report for Cyprus (Topic 2), concerned the implementation of Article 10 of the GDPR (Processing of personal data relating to criminal convictions and offences). In particular the opinion clarifies that "official authority" within the meaning of Article 10 GDPR is not clearly defined in the Regulation yet according to the text of the Article, in order for an organisation to be considered an "official authority", it must (a) have the power to exercise substantive

control and (b) the exercise of control must be formal, i.e. it derives from national law. In Cyprus, the official Authority is the Police, which also keeps a complete criminal record, i.e. the Archive of Previous Convicts. In Cyprus, adequate guarantees for the rights and freedoms of data subjects are ensured by Articles 9 and 10 (1) of the Police Law. Article 9 provides that the Record of Previous Sentences is kept for the purpose of issuing certificates criminal record or presentation of convictions before a competent court, in the context of criminal procedure, or fulfilment of the Republic's obligations arising from the European acquis, international convention or law in force in the Republic. Article 10 (1) provides that a criminal record shall be issued only to the applicant or to a person duly authorized by him. Under these provisions, where a public authority or a private body relies on any of the conditions of Article 6 (1) of the GDPR for the processing of data relating to criminal convictions and offenses or related security measures, such data may be collected by pursuant to Article 10 (1) of the Police Law, i.e. by issuing a criminal record to the applicant or to a person duly authorized by him.

The second opinion (21 August 2020) concerned the surveillance of distance / online examinations from higher education institutions addressing the concerns raised by students and organised representative groups on the use of programmes/software which examinees have to install on their computer. Higher education institutions, in the context of conducting distance examinations via the internet, should act as follows:

1. To assess the necessity of using a surveillance program and adopt the use of such a program, after first studying the various alternatives. Depending on the institution, the course and the skills to be evaluated, alternatives may be applied such as:
   - oral examination or homework assignment or examination with open books,
   - enabling physical examinations to take place (e.g., for institutions with a small number of students),
   - Separation of the examinees into smaller groups and use of more rooms or conducting the examinations in larger rooms
   - Separation of the examinees into groups that will come to the examination on different days meaning that the examination essay will be different but of the same degree of difficulty
2. Refrain from implementing measures as a result of a decision taken solely on the basis of automated processing. In case the supervision program provides any indication, whether there is a possibility that the examinee has copied, the decision will be made by the teacher.
3. Apply the principle of data minimization throughout the process. For this purpose, they should disable the unnecessary functions of the program, so that the minimum is used for the satisfactory level of validity of the examinations and the data collected and processed in each type of processing to be achievement of the intended purpose. For this purpose:

   a. there is no biometric identification of the examinees.
   b. the examinees are asked to show on the camera the student identity card (where they exist), instead of the political identity card. In addition, depending on the institution / course and the skills to be evaluated, except in exceptional cases with special justification, the eye movements of the examinees are not controlled.
4. To fully inform the examinees about the processing of their data in accordance with Article 13 of the GDPR. The information should include the purposes of the processing, the legal basis of the processing, the recipients or categories of recipients, any transmission of the data to third countries, the retention period of the data and information on their rights. It is good practice for institutions to meet with student organizations and / or answer questions / concerns / concerns of examinees and consider possible solutions to alleviate their concerns before using such a surveillance program.
5. Ensure that the data collected are not used for any purpose other than to ensure the validity of the examinations.
6. Take appropriate technical and organizational measures for data protection, in accordance with Articles 5 (1) (f) and 32 of the GDPR, in order to ensure an appropriate level of security against risks, including, inter alia, the possibility of ensuring the confidentiality, integrity, availability and reliability of data.
7. Ensure that access to data is restricted to authorized persons only and that data flow is restricted to strictly restricted copies or registration points.
8. To pseudonymize personal data, where possible in each processing operation, so that the data can no longer be attributed to a specific data subject, without the use of additional information, provided that such additional information is kept separate and subject to technical and organizational measures to ensure that they cannot be attributed to an identified or identifiable natural person
9. To ensure that the personal data collected are kept only for the period necessary to achieve the purpose and in any case not more than 6 months from the date of the examination.
10. Select an appropriate surveillance program provider to provide adequate assurances for the implementation of appropriate technical and organizational measures, so that the processing meets the requirements of this Regulation and ensures the protection of the data subject's rights in accordance with Article 28 of the GDPR. To select the right provider, institutions should carefully study the provider's privacy policy and consider how they comply with the provisions of the Regulation, especially in the case of providers based in third countries.
11. In cases where the provider of the surveillance program is based in third countries and / or the data is stored on servers in a third country or in the cloud, take care to select the appropriate legal basis of Chapter V of the Regulation for the transmission of data to third parties Countries. The most appropriate legal basis is the use of standard

data protection clauses issued by the Commission. On 16 July 2020, the ECJ issued a judgment abolishing the Privacy Shield, which made it possible for personal data to be transmitted to the United States. At the same time, he considered that the Standard Contractual Clauses remain in force, but with strict conditions. An organization that uses or intends to use them should review the monitoring status of the country and if a sufficient level of protection is not provided, it should not allow or suspend which transmission. Also, where necessary, it should take additional protection measures. Further guidance on this will be provided.

12. Carry out an impact assessment in accordance with Rule 35 of the Rules of Procedure to assess the risks and identify mitigation measures risks, taking into account all of the above issues. No substantial impediments have been identified in the enforcement of the GDPR in Cyprus and or other barriers to its effective application nationally.

General update: Czech Republic

Vojtěch Bartoš

The impediments to the enforcement of GDPR

- Lack of financial and personal resources on the side of the NSA
- Insufficient expertise of the NSA in ICT
- Systematic refusal of the NSA to shape the regulatory environment with ex-ante means (e.g. by issuing industry specific recommendations or guidelines)
- NSA not publishing its decisions in a comprehensive and systematic manner
- Grossly ineffective sanction policy of the NSA (not using its competences e.g. to impose temporary or definitive limitation/ban on processing or to issue substantive fines)

Data protection in the pandemic

The NSA issued between March 2020 and September 2021 several statements, recommendations and opinions with regard to processing of personal data in the context of the COVID-19 pandemic. The main focus of the statements was processing of personal data within the framework of the State-run "smart quarantine" and contact tracing, employees' health data in connection with compulsory COVID-19 testing, vaccination and other similar measures, COVID-19 passports/vaccination passports and other issues. The NSA also reported on some of these issues in other EU and non-EU States. In general, the role of the NSA during the pandemic was relatively active which helped to certain extent to data controllers (namely employers) to navigate through the maze of COVID-19-related regulations and data protection rules. On the other hand, the NSA did not address in any way whatsoever the extensive and recuring ransomware attacks on

some Czech hospitals during early 2020 although these attacks might have been some of the most notable data breaches in the Czech Republic since the GDPR came into effect.

The Ministry of Health issued since March 2020 several administrative measures of temporary nature which allowed/mandated processing of personal data namely for the purposes of contact tracing and "smart quarantine", compulsory testing of employees and other persons (students, clients and visitors of social care facilities, etc.). Almost no permanent legislative changes were made in order to provide for more specific legal bases of such processing, additional specifications of such processing activities or additional safeguards for the data subjects. Once these administrative measures are repealed most of these processing activities (namely processing of employees' health data) should be ceased. However, in the meantime many controllers stared assuming that further processing of such data (e.g. personal data related to COVID-19 testing of employees) can be based on their legitimate interest. As a result, it can be observed in practice that COVID-19-related health data are becoming "less private" and both public and private interests on their processing start prevailing. In that regard it can be seen as certain erosion of privacy.

General update: Greece

Virgina Tzortzi

The impediments to the enforcement of GDPR

In terms of the provisions of Law 4624/2019 and their compatibility with the GDPR, Opinion 1/2020 of the HDPA identified several issues that render the national legislation problematic. For example, the legislator has adopted a distinction between the entities of the public and the private sector, a distinction that can lead to confusion of the notions of "data controller" and "data processor". Several national provisions, such as article 5 and 22, constitute a mere repetition of the Regulation's relevant provisions, contrary to the GDPR, while the second paragraph of article 22 provides for cases under which the processing of sensitive data is allowed, without such derogations being allowed by the GDPR. Another example of exceptions introduced by the national law contrary to the GDPR, is that of article 28 para. 2 of Law 4626/2019, which pertains to the processing of personal data for demographic, scientific and artistic purposes. The HDPA found the exceptions introduced under said article to be so broad that the core of the right to data protection being undermined.

Additionally, in July 2021 the HDPA issued its Annual Activity Report, in which it is identified that the process of adapting to the new framework set by the GDPR is still ongoing, and the information systems used by the Authority to deal with complaints and requests are under the process of being upgraded and extended. The lack of adequate

personnel is mentioned as the most pressing challenge faced by the HDPA in carrying out its mission, and the Member State's obligation set forth in article 52 (4) GDPR to ensure that each supervisory authority is provided with the human, technical and financial resources, premises and infrastructure necessary for the effective performance of its tasks and exercise of its powers, including those to be carried out in the context of mutual assistance, cooperation and participation in the Board, is not abided by.

Beyond NSAs: The role of other actors in developing data protection

Apart from the HDPA and other administrative authorities such as ADAE and EETT that deal with data protection issues, one cannot overlook the role of national court in developing data protection. The judicial decisions interpreting and applying Law 4624/2019, through which the GDPR and Directive 2016/680 were implemented into the national legal order, are critical in clarifying the content of the applicable legislation.

Additionally, and given that according to Decision 1/2020 of the HDPA, the documents and materials of a case pending before a national court do not constitute personal data subject to the supervision by the HDPA, the role of prosecutorial and judicial authorities in safeguarding data protection in the process of prevention, investigation, detection or prosecution of criminal offences is pivotal.

Data protection in the pandemic

Since the beginning of the pandemic, the Hellenic Data Protection Authority (has issued several guidelines pertaining to the processing of personal data in the process of managing the COVID-19 pandemic (Decision 5/2020 and Guidelines 1/2020) and to the adoption of data security measures in the context of teleworking (Guidelines 2/2020 and 1/2021).

Guidelines 1/2020 clarify the legal basis for the processing of personal data in the context of dealing with the pandemic and underline that the right to data protection is not absolute, but can be weighed against other rights, such as health and human life. The guidelines determine which data can be characterized as "health data" falling under the scope of article 9 GDPR and the conditions for their processing, while the also underline the need for anonymisation of the data that is published for statistical and demographic reasons.

Additionally, the gradual lifting of quarantine measures and the reopening of certain activities has been made conditional upon the vaccination of the public and businesses, such as restaurants or theatres, are requested to verify whether their customers have been vaccinated, by requesting a vaccination certificate. The legislation that provided for the creation of a mobile application, used for the verification of the EU Digital COVID Certificates or vaccination certificates, was examined by the HDPA with regards to its compatibility with data protection rules. The HDPA issued Opinion 2/2021 identifying several issues of the proposed legislation relating to the lack of an impact assessment, the

role of the Ministry of Health and the General Secretariat for Civil Protection as data controllers and the lack of clarity on the sanctions that will be imposed in cases of data breaches that occur in the use of the application. Interestingly enough, the relevant legislation was adopted by the Greek Parliament, without awaiting the delivery of the HDPA's opinion.

The guidelines for the application of data protection rules on teleworking were recently complemented by Guidelines 1/2021. The HDPA underlines the obligation of the employer, as the data controller, to inform the employee on the benefits and downsides of teleworking and ensure that the processing of personal data takes place in accordance with the principles of article 5 GDPR. The HDPA also takes into account the disadvantageous position of the employees in the private sector and clarifies that the methods used by the employer for the organization of the work carried out from home should not lead to inequalities, discrimination or the adoption of automated decisions contrary to article 22 GDPR.

Technical and organizational measures should be put in place to ensure that the exercise of data subjects' rights is not hindered by teleworking, and any delays in their satisfaction are duly justified by the controller.

Additionally, the HDPA clarifies that the employer may use IT systems to verify whether the employees actually provide their services within the working hours, however the constant and generalized collection of personal data, e.g. through the compulsory activation of the computer's camera, the sharing of the employee's screen or the monitoring of keyboard/mouse movements, cannot be justified in accordance with the principle of proportionality.

General update: Italy

Francesco Rossi Dal Pozzo

Beyond NSAs: The role of other actors in developing data protection

On 26 May 2021, the Garante per la protezione dei dati personali (Italian Data Protection Authority) and the Garante nazionale dei diritti delle persone privati della libertà personale (Italian Guarantor for the Rights of Persons Detained or Deprived of Liberty) adopted a memorandum of understanding on the protection of persons deprived of their liberty. The two Authorities will cooperate to protect the dignity and rights of detainees and other persons under forms of restriction of freedom, such as migrants held in Centers for Return (Centri per i rimpatri) and guests in Residences for the Execution of Security Measures (Residenze per l'esecuzione delle misure di sicurezza). The two Authorities will be able to activate joint inspections and investigations on cases of mutual interest, initiate fact-finding investigations, exchange information on possible violations of relevance to the other

Authority and support joint training projects to share experiences and improve specific skills in the field.

The Italian Data Protection Authority has also collaborated with the Italian Medicines Agency (AIFA) in the drafting of the Communication of 12 March 2020 on the management of clinical trials in Italy under COVID-19 emergency, to ensure an adequate level of protection of personal data in the context of the remote management of the monitoring phase of clinical trials of drugs.

Data protection in the pandemic

In the context of the COVID-19 pandemic, the Italian Data Protection Authority has adopted several measures aimed at achieving a fair balance between public health and the protection of personal data. These measures include: Measure authorizing the processing of personal data carried out through the COVID-19 Alert System – Immuni App (1 June 2020); Measure of 17 December 2020, concerning the "TuPassi", a system to book services or schedule appointments with public and private entities); Injunction order against Azienda Ospedaliera Regionale (Regional hospital) "San Carlo" of Potenza (27 January 2021); Injunction order against Azienda USL (local health authority) of Romagna (27 January 2021); Measure of 25 February 2021, regarding the activities and methods of processing personal data of politicians who have requested allowances allocated in reaction to COVID-19; Measure authorizing the processing of personal data carried out through the COVID 19-App Immuni Alert System following the update of the impact assessment carried out by the Ministry of Health on which the Authority had expressed its opinion in a measure of 1 June 2020 (25 February 2021); Order of injunction against the Municipality of Palermo (15 April 2021); Warning measure regarding the processing carried out in relation to the green certification for COVID-19 provided for by legislative decree 22 April 2021, no. 52 (23 April 2021); Injunction order against Synlab Med srl concerning the communication to mistaken recipient of COVID-19 test reports (13 May 2021); Measure warning the Campania region regarding the use of green certifications for COVID-19 (25 May 2021); Measure of 3 June 2021 regarding Mitiga app; Corrective measure against PagoPA regarding the functioning of the IO app (9 June 2021); Measure providing guarantees for the use of the IO App to access COVID-19 green certifications (17 June 2021); Measure of definitive limitation regarding the processing of green certifications for COVID-19 provided by the Autonomous Province of Bolzano (18 June 2021); Measure warning the Region of Sicily with regard to the processing of personal data resulting from additional measures for the epidemiological emergency from COVID-19 (22 July 2021).

The shift of a large part of daily activities online, induced or accelerated by the pandemic, has also represented the target of significant consultative and guidance activities of the Authority, aimed at ensuring the necessary guarantees. These include: Opinion on the

draft ordinance containing urgent civil protection provisions in relation to the emergency on the national territory concerning the health risk connected to the onset of pathologies deriving from transmissible viral agents (2 February 2020); Opinion on the modalities of delivery of the electronic medical prescription (19 March 2020); Distance teaching: first indications (26 March 2020); Opinion to the Ministry of Economy and Finance on a draft decree, to be adopted in agreement with the Ministry of Health, on the dematerialization of the prescription for pharmaceutical services not charged to the National Health Service and on the modalities of consultation by the patient of the dematerialized memo of the electronic prescription (2 April 2020); Opinion on the outline of the provision of the Director of the Italian Revenue Agency (Agenzia delle Entrate) concerning the access to the pre-compiled declaration by taxpayers and other authorized parties, starting from the fiscal year 2019 (23 April 2020); Personal data flows between INPS (National Institute for Social Security) and the Campania Region in the context of the provision of economic support measures (28 April 2020); Opinion on proposed legislation to provide for an application to track COVID-19 infections (29 April 2020); Opinion on an outline of a regulatory provision to allow seroprevalence surveys on SARS-COV-2 to be conducted by the Ministry of Health and ISTAT (Italian National Institute of Statistics) for epidemiological and statistical purposes (4 May 2020); Opinion to the Autonomous Province of Trento on the draft provincial law concerning further support measures for families, workers and economic sectors related to the epidemiological emergency from COVID-19 and consequent variation to the budget of the Autonomous Province of Trento for the financial years 2020-2022 (8 May 2020); Measure on INPS data breach: Communication to affected stakeholders (14 May 2020); Opinion on a draft decree regarding the processing of personal data carried out through the Sistema Tessera Sanitaria (Italian Health Insurance Card) as part of the COVID-19 alert system (1 June 2020); Personal data protection impact assessment submitted by the Ministry of Health regarding the processing carried out as part of the COVID-19 alert system called 'Immuni' – Note on technological aspects (3 June 2020); Processing of personal data as part of the COVID-19 emergency by Offices of notifications, Executions and Protests (Ufficio Notifiche Esecuzioni e Protesti) of national courts (9 June 2020); Opinion on the request for civic access – data concerning the distribution of cases of COVID-19 registered in the region of Valle d'Aosta (3 September 2020); Opinion to the Autonomous Province of Trento on an outline of regulation concerning reactive medicine (medicina di iniziativa) in the provincial health service (1 October 2020); Opinion on the draft decree of the Ministry of Economy and Finance and the Ministry of Health on the implementation modalities of the reporting system of rapid antigenic swabs by family doctors and paediatricians and on the provision of these electronic reports to the subjects referred to in art. 19 of law decree no. 137/2020, through the Health Insurance Card System (3 November 2020); Opinion on an outline of the order of the Extraordinary Commissioner for the implementation and coordination

of the measures necessary for the containment and contrast of the epidemiological emergency COVID-19 (17 December 2020); Opinion on an outline of a provision that aims to regulate the information systems functional to the implementation of the strategic plan of vaccines for the prevention of SARS-CoV-2 infections (13 January 2021); Opinion on a draft decree of the Ministry of Economy and Finance and of the Ministry of Health, amending the decree of 3 June 2020, concerning the technical modalities for the involvement of the Health Insurance Card System for the purposes of implementing prevention measures in the context of public health interventions related to the COVID-19 emergency (25 February 2021); Opinion on a request for civic access (FOI, 23 April 2021); Guidance document on the designation, position and duties of the Data Protection Officer (DPO) in the public sector (19 April 2021); Opinion on the prime ministerial decree for the implementation of the digital COVID-19 certificate national platform for the issuance and verification of Green Pass (9 June 2021); Opinion on the draft Directive of the President of ISTAT on Identification of the processing of personal data referred to in Articles 9 and 10 of Regulation (EU) 2016/679 in the context of alert-cov statistical work (24 June 2021); Opinion on the draft decree on Measures setting out amendments and additions to the implementing provisions of Article 9, paragraph 10, of Decree-Law 22 April 2021, no. 52 on Urgent measures for the gradual recovery of economic and social activities in compliance with the need to contain the spread of the COVID-19 pandemic (31 August 2021).

Public policy, public security and national security

It is worth noting the entry into force of Law 4 August 2021 no. 109, "Conversion into law, with amendments, of Law Decree 14 June 2021 no. 82, containing urgent provisions on cybersecurity, definition of the national cybersecurity architecture and establishment of the Agency for national cybersecurity" (Official Journal of the Italian Republic, General Series no. 185 of 4 August 2021). The new legislation, effective as of 5 August 2021, defines the national cybersecurity architecture and establishes the National Cybersecurity Agency. Specifically, the law consists of nineteen articles.

Articles 1 to 4 define the national cybersecurity system, which is headed by the President of the Council of Ministers, who is given the overall direction and responsibility for cybersecurity policies, as well as the adoption of the relevant national strategy and – subject to deliberation by the Council of Ministers – the appointment and revocation of the Director General and Deputy Director General of the new 'Agency for National Cybersecurity' (established by Article 5). The Parliamentary Committee for the Security of the Republic (COPASIR) and the competent parliamentary commissions are informed in advance of these appointments (article 2). The President of the Council of Ministers may empower the Delegated Authority for the Information System for the Security of the Republic, where established, to perform those functions that are not exclusively attributed to him (article 3).

The "Inter-ministerial Committee for cybersecurity" (CIC) is established at the Presidency of the Council of Ministers. This body has the function of consulting, proposing and supervising cybersecurity policies (article 4).

Article 5 provides for the establishment of the National Cybersecurity Agency; article 6 regulates its organization; article 11 deals with its financial resources and accounting autonomy; article 12 concerns its personnel. Article 14, which deals with the annual reports that the President of the Council of Ministers is required to send (to Parliament and COPASIR) on the activities of National Cybersecurity Agency. Within the latter, the constitution of a "Nucleus for cybersecurity" is envisaged to deal with possible crisis situations (Articles 8 and 9). Article 10 addresses the management of crises involving aspects of cybersecurity.

Article 13 concerns the processing of personal data for national cyber security purposes. Article 15 dictates a series of novelties to Legislative Decree no. 65 of 2018 (implementing Directive (EU) 2016/1148 concerning measures for a high common level of security of network and information systems across the Union) in order to harmonize it with the regulatory framework inherent in Law Decree 14 June 2021 no. 82. Article 16 amends other legal provisions for the same purpose.

EU data protection law in a global context

The Italian Data Protection Authorities has also addressed the area of personal data transfers to third countries. It mainly focused on the innovations introduced following ECJ's *Schrems II* judgment (Case C-311/18) and the documents of the European Data Protection Board with recommendations on measures to ensure compliance with the GDPR in the context of cross-border data transfers. These Italian Data Protection activities include:

1. Collaboration between the Italian Data Protection Authority and other European supervisory authorities as part of a task force in charge of coordinating the examination of 101 complaints lodged against various data controllers established in the EEA Member States regarding the use, via their websites, of services provided by Google and Facebook that involve the transfer of users' personal data to the United States. In this context, and with specific reference to the complaints received by the Italian Data Protection Authority, a preliminary investigative activity was launched to acquire more elements regarding the guarantees adopted by the data controllers and managers involved after the declaration of the ECJ regarding the invalidity of Commission Decision No. (EU) 2016/1250 (so-called EU-US Privacy Shield) for the purposes of transferring data subjects' data overseas.
2. The activity of evaluating the requests received regarding the approval of Binding Corporate Rules (BCR) pursuant to art. 47 of the GDPR, aimed at requesting the involvement of the Italian Data Protection Authority as leader in the evaluation of the BCR. In particular, the role of the Italian Data Protection Authority as leader in the

European cooperation procedure was formalized in relation to a proceeding concerning a multinational group of companies in the digital infrastructure sector, after verification of the existence of the requirements set out in WP 263 (Working Document of Article 29 Working Party of 11 April 2018). In this capacity, an initial articulated analysis of the documents received was carried out, also through frequent interlocutions with the group aimed at making the necessary changes to the text of the proposed BCR to include all the elements indicated by WP 256 (Working Document of Article 29 Working Party of 6 February 2018) and, more generally, to conform the same to the GDPR; also for the purpose of their subsequent transmission (pursuant to art. 57, par. 1, letter g of the GDPR), to the supervisory authorities identified as co-reviewers within the relative European cooperation procedure.

3. Advisory activity on various queries received with regard to the provisions of Chapter V of the GDPR concerning, among other things, the use of exemptions in specific situations (see Art. 49 of the GDPR), the application of the standard data protection clauses pursuant to Art. 46, paragraph 1, letter c), of the GDPR, binding corporate rules and their approval pursuant to Art. 47 of the GDPR.

AI, gatekeepers and data altruism: Situating data protection amongst new regulatory initiatives

In the field of Artificial Intelligence, it is worth noting the fact-finding survey on Artificial Intelligence launched, on 13 May 2020, by the Joint Committees VIII and X of the Senate, pursuant to article 48 of the Rules of Procedure.

At the same time (2 June 2020), the Ministry of Economic Development launched the Italian Strategy for Artificial Intelligence. The Strategy is structured in three parts: the first is dedicated to the analysis of the global, European and national markets for Artificial Intelligence. The second part describes the fundamental elements of the strategy, while the third one deepens the proposed governance of Italian AI and makes some recommendations for the implementation, monitoring and communication of the national strategy on artificial intelligence, which is clearly anthropocentric and oriented towards sustainable development.

Last, as confirmation of the role played in this context by the Italian Data Protection Authority, it is worth noting that on 23 June 2021, the President of the Authority for the protection of personal data, Prof. Pasquale Stanzione, intervened in a hearing at the IX Commission of the Chamber of Deputies (Transport, Post, Telecommunications) on the subject of the complex relationship between users/consumers and profiling techniques with AI technology adopted by the Gatekeepers (see Tecnica, protezione dei dati e nuove vulnerabilità relazione del Presidente Pasquale Stanzione, Rome, 2 July 2021).

Any other relevant developments that you wish to highlight

The Data Protection Authority's track record of GDPR enforcement, from 25 May 2018 to 30 June 2021, includes:

- DPO contact information disclosures: 60,864.
- Complaints and reports: 30,262.
- Data breach notifications: 4,465.
- The Data Protection Authority imposed the following corrective measures and sanctions (art. 58(2) GDPR) in 2020:
- Warnings to controller/processor (art. 58(2)(a) GDPR): 6.
- Warnings to controller/processor (Art. 58(2)(b) GDPR): 45.
- Injunctions to data controller/processor to comply with requests made by data subjects concerning the exercise of rights granted by the GDPR (Art. 58(2)(c) GDPR): 23.
- Injunctions to the controller to comply with the provisions of the GDPR (art. 58(2)(d) GDPR): 16.
- Injunctions to data controller to notify the data subject of a personal data breach (Art. 58(2)(e) GDPR): 2.

General update: The Netherlands

Dominique Hagenauw

The impediments to the enforcement of GDPR

In 2020, the AP imposed 7 administrative fines pursuant to Article 83 GDPR, 2 administrative enforcement orders under periodic penalty payment and issued 4 reprimands against private companies, public authorities and other organisations.

Since the publication of the FIDE Congress Volume, the details of the following administrative fines have been published:

- TikTok fined for violating children's privacy (€750,000).
- Employee Insurance Agency fined for not properly securing the sending of group messages (€450.000).
- Orthodontic practice fined for unsecured patient website (€12,000).
- Maintenance company CP&A fined for violating privacy of sick employees (€15,000).
- Locatefamily.com fined for not having a representative in the EU (€525,000).
- Overijssel chapter of the Freedom Party (PVV) fined for failing to report data breach (€7,500)
- Municipality of Enschede fined for using Wi-Fi tracking (€600,000)
- Booking.com fined for delay in reporting data breach (€475,000)
- Hospital fined for inadequate protection of medical records (€440,000)

- National Credit Register (BKR) fined for personal data access charges (€830,000).
- Company fined for processing employees' fingerprint data (€725,000).
- Tennis association KNLTB fined for selling the personal data of its members (€525,000).

Regarding the AP itself, the AP has repeatedly called for more budget and capacity to be able to step up their enforcement. After the general elections in March 2021 and following two motions adopted by Parliament calling for an increase of the AP's budget, the AP sent a position paper to the *informateur* (a mediator who explores which parties could form a new government) in which the AP requests a fourfold increase of its budget to 100 million euros per year to be able to perform its work properly.

Beyond NSAs: The role of other actors in developing data protection

GDPR administrative case law is growing. There have been two court decisions in proceedings on the merits regarding an administrative fine imposed by the AP.

In November 2020, the Middle Netherlands District Court annulled the fine of €575,000 imposed on the football streaming service provider VoetbalTV for not being able to rely on a legitimate interest when processing personal data for purely commercial interests and profit maximisation. According to the court, the journalistic exception does not apply in view of the fact that the broadcast contains too little news value. However, the court does find that the fact that the claimant has a commercial interest does not automatically mean that they cannot have a legitimate interest. Excluding a particular interest as a legitimate interest in advance is contrary to European case law. The court ruled, inter alia, that this interpretation of legitimate interest by the AP was too strict. An appeal is pending before the Administrative Jurisdiction Division of the Council of State.

In March 2021, the Hague District Court upheld the enforcement decision against a hospital in The Hague for insufficient internal security of patient records, but reduced the fine to €350.000. The AP had issued the fine on a hospital for failing to adequately protect patients' personal data. They had established that the hospital lacked two-factor authentication and that the logging of access to patient files was not controlled on a regular basis. As reasons for lowering the fine, the court referred to the fact that the hospital did have measures in place to prevent unauthorized employees having access to patient files, and that the hospital did introduce two-factor authentication and proper logging after receiving the fine, showing a willingness to address the problem.

The GDPR has also been invoked, for the first time, in a civil law dispute among two businesses competing on the same market (GPS-watches for elderly and dependant people). In February 2021, a Dutch civil law court ruled that a distributor of GPS-watches could not invoke the protection offered by the GDPR against a competitor on the same market. The court held that, in spite of the fact that competitors relying on the GDPR to protect their interests would contribute to the enforcement of the GDPR, in the circumstances of

the case the interests of the complainant were not protected by the GDPR and could therefore not be invoked against its competitor. Before initiating judicial proceedings, the claimant had made a complaint with the AP concerning the same matter. The AP informed that they will not process the complaint, because these parties do not have the right to complain.

Data protection in the pandemic

The battle against the pandemic has raised a lot of new issues relating to human rights including privacy. Often a balancing of colliding rights was necessary. In the Netherlands, measures battling COVID-19 having an effect on privacy have been the release of the apps 'CoronaMelder' and 'CoronaCheck'. Both have been regulated by new legislation approved by the Dutch Parliament.

The CoronaMelder app is designed to alert the user when they have been in the proximity of someone (who remains unknown to the user) who has reported themselves as COVID-19 positive. This allows the users to take precautionary measures even if they have not yet shown symptoms. The app does not track someone's location or identity and the use is entirely voluntary. The AP in its advice found that the government should enter into an agreement with Google and Apple regarding the software they deliver to use the app, that there should be a law to regulate the use of the app and that it should be clear that the servers used by the app are secure.

The CoronaCheck app is not linked to the CoronaMelder app, as this app does use personal data to show that the user has either been vaccinated, negatively tested or recovered from COVID-19. The app does not reveal which of these is applicable but only shows a generic QRcode. The code is temporary and the person checking this code cannot download it. Only the personal data necessary to check the person's identity is shown. The AP has also published its advice on this app, relating to consent that needs to be freely given (where this is the legal ground), possible voluntary access policies, identifying data, etc.

Furthermore, owners of cafes and restaurants had to compulsory offer visitors to register their information in order to contact them in case another visitor would be diagnosed with COVID-19 after his or her visit. For visitors, the law however stipulated that registering was voluntarily and refusal without consequences.

Also, the use of Telecommunication data (location data) in the battle against COVID-19 was a topic of discussion in the Netherlands and a draft law was submitted to parliament, which has put it on hold pending the installation of a new government. In its advice, the AP has asked for strict limitations in this regard.

A new issue that has not been resolved yet is the call from employers to register their employee's COVID-19 status. So far this is prohibited by law, but it's currently under debate whether or not this should be made legal, at least for specific groups like medical staff.

Public policy, public security and national security

The rulings of the ECJ of 6 October 2020 in Case C-623/17, Privacy International, ECLI:EU:C:2020:790, and in Joined Cases C-511/18, C-512/18 and C-520/18, *La Quadrature du Net and Others*, had effect on the Intelligence and Security Services Act 2017 (Wiv). As a result of these rulings, it can be concluded that the Wiv does not completely fall outside of the scope of application of EU data protection law, at least as far as it concerns the analysis of bulk data, in case of data retention by private parties. However, although the ramifications of the abovementioned ECJ cases need more clarification in the future, according to experts, the Wiv probably does not need to be amended on this point.

The Wiv provides safeguards related to automated analysis of bulk data. It is considered to be a 'special power'. Special powers may only be applied for the performance of a narrower set of tasks, such as defending a continuing democratic legal order, protecting national security, investigating other countries and their militaries, maintaining international legal order, or specific military activities. The application of the special power at hand not only needs prior consent of the minister, but also requires an additional prior consent from an independent and specialized judicial commission, the Review Board for the Use of Powers (TIB). The Review Committee for the Intelligence and Security Services (CTIVD) performs an ex post control.

AI, gatekeepers and data altruism: Situating data protection amongst new regulatory initiatives

A proposal of the European Commission for a Data Governance Act (DGA) would provide the possibility to individuals or companies to give consent for so-called "data altruism", in order to share the data they generate for the common good, voluntarily and free of charge (e.g. for scientific research, Healthcare etc). Various questions have been raised with respect to data altruism. For example, the EDPB and the EDPS recommend that the DGA should better define the purposes of general interest of such "data altruism". Data altruism should be organised in such a way that it allows individuals to easily give, but also, withdraw their consent.

The proposal is also discussed in the Netherlands and questions have been raised in the Dutch Parliament concerning the conditions that apply to guarantee the quality and reliability of organisations that focus on data altruism. The government furthermore feels that in relation to the proposed European label for data altruism organisations, attention should be paid to the risk of improper use of donated data or uninformed donations of data. A code of conduct is suggested to help in mapping the interests of those involved and translate these into concrete conditions, which data altruism organisations must then commit to in order to obtain the label.

Any other relevant developments that you wish to highlight
In 2021, the AP warned that it was seeing an explosive increase in the number of hacks aimed at stealing personal data. The number of reports in 2020 was 30% higher than in the previous year.

General update: Switzerland

Jacques Beglinger

The impediments to the enforcement of GDPR

Only partial applicability of the GDPR for Switzerland
Switzerland is not a member of the European Economic Area (EEA), but is linked to it and the European Union through a network of bilateral or sectoral agreements. This means that European secondary law, and thus e.g. the GDPR, is only applicable to Switzerland where this results from a contractual obligation. For example, where Switzerland is covered by the Schengen and Dublin agreements, see printed Swiss Country Report, p. 599 et seq. There, Switzerland has implemented the EU requirements with the Schengen Data Protection Act (SDSG). The SDSG entered into force on 1 March 2019.

Accession of Switzerland to the modernized Convention 108 of the Council of Europe
Switzerland's international understanding of data protection is traditionally based on the principles developed within the framework of the proceedings of the Council of Europe, as laid down in the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS No. 108), see.

As already explained in the printed Swiss Country Report (see p. 598), the Swiss Federal Council decided on 30 October 2019 to sign the "Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data" (Council of Europe Convention 108+). This signature was deposited with the Council of Europe in Strasbourg on 21 November 2019.

The Swiss Federal Parliament gave the necessary approval to the signature on 19 June 2020 (see Parliamentary item of business 19.086).

According to Article 141(3) Swiss Federal Constitution, international treaties are subject to a referendum if they contain important legislative provisions or if their implementation requires the enactment of federal laws. Therefore, the parliamentary resolution was subject to an optional referendum, which, however, was not requested within the deadline of 8 October 2020. Following the parliamentary decision, the Swiss Federal Council is thus

authorised to ratify the protocol for Switzerland. It is expected to do so simultaneously with the entry into force of the revFDPA (see below) in the second half of 2022.

Autonomous alignment of Swiss data protection legislation with the GDPR
Currently, the Federal Act on Data Protection of 19 June 1992 (henceforth "FADP" or, according to some translations, "FDPA") is still in force in Switzerland (with *inter alia* important revisions of 24 March 2006 and 19 March 2010). This law is based on the principles of Convention 108 of the Council of Europe as not yet modernised. Against the background of the modernisation of the Council of Europe Convention on Data Protection No. 108 and in view of the innovations in EU data protection law, however, Swiss data protection law has been undergoing a transformation. To this end, the Swiss Federal Council submitted a draft for a full revision of the Federal Act on Data Protection (henceforth "revFADP" or, according to some translations, "revFDPA") to the Swiss Federal Parliament on 15 September 2017.

At the time of the conclusion of the printed Swiss Country Report, the total revision of the FDPA was still in progress (see printed Swiss Country Report, p. 598). In the meantime, it has been completed with parliamentary adoption of 25 September 2020 (see Parliamentary item of business 17.059). The possibility under Swiss constitutional law to demand a referendum on the new law was not used. The corresponding deadline expired on 14 January 2021. The total revision is thus legally concluded. The full text has so far been published in the official languages French, German and Italian. An unofficial English translation by the federal authorities is currently not available.

The new law is not yet in force. The Federal Council determines the date of entry into force (Art. 74(2) revFADP). According to the authorities, entry into force is expected in the second half of 2022 (see e.g. suggested by the Swiss FDPIC, The transfer of personal data to a country with an inadequate level of data protection based on recognised standard contractual clauses and model contracts, 27 August 2021, sect. 1. The revFADP will be accompanied by an Implementing Decision (rev Ordinance to the Federal Act on Data Protection, revDPO), a draft of which has been published for public consultation on 23 June 2021. With the entry into force of the revFADP, the SDSG (see above), which is currently already in force, will be fully integrated into the revFADP in terms of its content and will therefore be formally repealed at that time (Art. 68 revFADP in conjunction with Annex 1(I)). The update format used here does not lend itself to an in-depth presentation of the revision changes. For a compact overall view of the content of the future revFADP, however, see the FDPIC report "The new FADP from the FDPIC's perspective" of 5 March 2021.

Adequacy regime
Another reason for aligning Swiss data protection regulations with the principles of the GDPR was to maintain the Swiss Adequacy Decision adopted by the EU Commission back

in the year 2000 regarding the then valid Directive 95/46/EC also under the GDPR regime (see printed Swiss Country Report, p. 600 et seq.).

As Switzerland has fully completed the preparations for ratification of the Modernisation Protocol 223 to the Council of Europe Convention 108+ (see above), an important prerequisite for renewal of the Swiss Adequacy Decision has been met (see Recital 105 of the GDPR).

On maintaining pre-existing adequacy decision under the GDPR, the EU Commission has so far – despite the time limit in Art. 97(1) and (2)(a) – only published a general report (COM(2020) 264 final, sec. 2) of 24 June 2020, which indicates:

> […] As part of the first evaluation of the GDPR, the Commission is also required to review the adequacy decisions that were adopted under the former rules. The Commission services have engaged in an intense dialogue with each of the 11 concerned third countries one of which is Switzerland and territories to assess how their data protection systems have evolved since the adoption of the adequacy decision and whether they meet the standard set by the GDPR. The need to ensure the continuity of such decisions, as a key tool for trade and international cooperation, is one of the factors that has prompted several of these countries and territories so as Switzerland to modernise and strengthen their privacy laws. Additional safeguards are being discussed with some of these countries and territories to address relevant differences in protection. However, given that the Court of Justice in a judgment to be delivered on 16 July may provide clarifications that could be relevant for certain elements of the adequacy standard, the Commission will report separately on the evaluation of the existing adequacy decisions after the Court of Justice has handed down its judgment in that case. […]

The announced separate report has currently not yet been produced by the EU Commission and therefore the extension decision regarding the adequacy of the Swiss data protection regulation remains pending at the time of writing this Update.

Data protection in the pandemic

Various aspects of data protection played an important role in handling the pandemic in Switzerland. The development and use of COVID-19 apps as well as government and scientific access to health data in Switzerland (which has a markedly federal structure which entails a certain independence of the Cantons in data protection matters, too) took up a lot of space in the media and in the social discussion (see for the latter inter alia Swiss Internet Governance Forum 2021, Sess. 2).

A good overview of the challenges to data protection in Switzerland in times of COVID-19 can be found in the 28th Annual Report 2020/21 of the FDPIC, which addresses the FOPH's access to Swisscom mobility data; data protection challenges of introducing facilitations for people who have been vaccinated; implementation of a data protection-compliant COVID-19 certificate; the Swiss proximity tracing app (SwissCovid app); the legal framework for collecting contact details; data protection aspects of working from home; data protection requirements for early detection of coronavirus in the workplace; legislative process for the transposition of the COVID-19 Loan Guarantees Ordinance into the Federal COVID-19 Loan Guarantees Act; the FDPIC's duties and resources in times of COVID-19.

Public policy, public security and national security

Public security and national security

While the FADP as well as the revFADP in principle oblige both, private and federal authorities, to observe data protection (Art. 2(1) revFADP), federal authorities – and thus also those entrusted with safeguarding national security – may process personal data to the extent that they are specifically authorised to do so by a law (Art. 34 revFADP).

In this respect, the Federal Act on the Intelligence Service (Intelligence Service Act, IntelSA) of 25 September 2015 concerning the activities of the Federal Intelligence Service (FIS) is of particular importance with regard to safeguarding national security. Under the IntelSA, the FIS is permitted, in deviation from the revFADP in certain specified situations, to gather information from sources that are publicly and non-publicly accessible, to gather personal data without this coming to the attention of the persons concerned and use information gathering measures which do and do not require authorisation (Art. 5 IntelSA). It shall, however, choose the information gathering measure that causes the least interference with the fundamental rights of the persons concerned and it may not gather or process any information relating to political activities or the exercise of freedom of speech, assembly or association in Switzerland. Moreover, proportional duties to delete data recorded apply. See also the comments on section 5.1 of this Update report "Effects of the *Schrems II* case law of the European Court of Justice on Swiss data protection law", below, as well as the Swiss FDPIC's "2nd CH-US Privacy Shield Report" of 9 March 2020, section 2 "Authorities' access to personal data for national security".

For the surveillance of telecommunications, see the Federal Act on the Surveillance of Post and Telecommunications (SPTA) of 18 March 2021. Under it, the Swiss Confederation shall operate a Service for the surveillance of post and telecommunications under Article 269 of the Swiss Criminal Procedure Code8 (CrimPC). The Service, the ordering authorities, the approving authorities and the providers of postal and telecommunications services may process the personal data, including sensitive personal data and personality profiles,

that they need to order, approve and carry out surveillance (Art. 4 SPTA). Information processing specific to general police tasks is regulated in Art. 14 Federal Act on Measures to Safeguard Internal Security (FAMSIS).

Furthermore, on 18 December 2020, the Federal Parliament adopted the Federal Act on Information Security (FAIS) which addresses the handling of own data by federal authorities specifically and complements the other mentioned acts in various aspects. Since no referendum has been requested by 10 April 2021, the text is thus legally concluded. The date of entry into force has not yet been determined as the respective Implementing Decision must first be drafted. Concerning specifically the processing of personal data in the information security context, see there Section 5 (Arts. 45 et seq. FAIS).

Cybersecurity in particular

On 27 May 2021, the Swiss Federal Council enacted the Ordinance on Protection against Cyber Risks in the Federal Administration (Cyber Risks Ordinance, CyRV), which regulates the organisation of the Federal Administration for its protection against cyber risks as well as the tasks and responsibilities of the various offices in the cyber security domain. It addresses inter alia all intelligence and military measures designed to protect critical systems, to defend against attacks in cyberspace, to ensure the operational readiness of the Armed Forces in all situations, and includes active measures to recognise threats, to identify aggressors and to disrupt and stop attacks (see Art. 6 CyRV).

Moreover, it is worth mentioning that the revFADP (see above) not only imposes obligations to take appropriate technical and organisational measures regarding data security commensurate with the risk (Art. 8 revFADP). Rather, their deliberate disregard by private individuals will now be subject to direct individual punishment (Art. 61(c) revFADP). This means stricter sanctions in this respect, not only in comparison to the Council of Europe Convention 108+ (Art. 10 of which generally requires only "appropriate judicial and non-judicial sanctions and remedies for violations of the provisions of this Convention"), but also in comparison to the GDPR, which does not provide for individual sanctions. The data security obligations to be complied with will be defined by the Federal Council in an Implementing Decision, which is currently still at the draft stage (see Arts. 1 et seq. revDPO).

EU data protection law in a global context

Effects of the Schrems II *case law of the European Court of Justice on Swiss data protection law*

The ruling of 16 July 2020 by the ECJ in the case C-311/18, *Data Protection Commissioner* v. *Facebook Ireland Ltd and Maximilian Schrems* (hereinafter *Schrems II*) declared the Adequacy Decision 2016/1250 by the EU Commission regarding US companies certified

under the EU-US Privacy Shield regime invalid. Since Switzerland is not a member of the EU, this ruling is not binding for Switzerland. Switzerland, however, maintains a parallel CH-US Privacy Shield (see). Hence the need for clarification arose in Switzerland, too.

While the FDPIC does not have the competence to invalidate the Swiss-U.S. Privacy Shield Framework (and its position is subject to any rulings to the contrary by Swiss courts), as part of its annual review of the Swiss-U.S. Privacy Shield Framework, the FDPIC, it concluded on 8 September 2020 that the Swiss-U.S. Privacy Shield Framework does not provide an adequate level of protection for data transfer from Switzerland to the US pursuant to the FADP and published a Policy paper, including practical advice for Swiss companies, on the same date. Conversely, the US Department of Commerce also issued a clarifying notice to inform about this development. In view of the above, in practice, companies may no longer rely on the Privacy Shield framework as a valid data transfer mechanism.

In the same document of 8 September 2020, the FDPIC expanded on the ECJ ruling and took the view that the use of alternative data transfer mechanisms, such as Standard Contractual Clauses ("SCCs") or Binding Corporate Rules, which are frequently used in Switzerland, requires companies to conduct an assessment and possibly implement additional safeguards (including technical measures that can effectively prevent authorities in the receiving country from accessing the transferred data, such as encryption) where the risk assessment indicates that personal data is not adequately protected.

Standard Contractual Clauses

Following the adoption of Implementing Decision (EU) 2021/914 of 4 June 2021, by which, regarding the effect of the EU GDPR, the previous set of standard contractual clauses of 2010 was repealed, the Swiss FDPIC followed suit.

Along a first Communication of 18 June 2021, the FDPIC issued a "Guide to checking the admissibility of direct or indirect data transfers from Switzerland to foreign countries (Art. 6 para. 2 letter a FADP)". In a further Communication of 27 August 2021, it stated:

> […] the Swiss FDPIC recognises the standard contractual clauses for the transfer of personal data to third countries in accordance with Regulation (EU) 2016/679 of the European Parliament and of the Council (pursuant to Implementing Decision 2021/914/EU) as the basis for personal data transfers to a country without an adequate level of data protection, provided that the necessary adaptations and amendments are made for use under Swiss data protection law. […].

At the same occasion, the FDPIC published a Guidance document of the same date "The transfer of personal data to a country with an inadequate level of data protection based on

recognised standard contractual clauses and model contracts". In this document he explains the adaptations that are necessary in order for the EU SCCs to comply with Swiss legislation and thus be suitable for ensuring an adequate level of protection for data transfers from Switzerland to a third country in accordance with Article 6(2)(a) FDPA (or with Art. 16(2)(d) revFDPA once in force, respectively).

The necessary amendments to the EU SCC concern in particular the designation of the competent supervisory authority in Annex I.C under Clause 13, the applicable law for contractual claims under Clause 17 and of the place of jurisdiction for actions between the parties pursuant to Clause 18 b as well as adjustments or additions concerning the place of jurisdiction for actions brought by data subjects and concerning references to the GDPR. Until the revFDPA enters into force in the second half of 2022, there also needs to be a transitional provision concerning the protection of legal persons that still exists today under the current FADP but will no longer exist thereafter.

Impact of Brexit

With the departure of the United Kingdom from the EU on 31 December 2020, the applicability of the GDPR to the UK also ended, as did the mutual facilitations under the reciprocal adequacy regimes that existed until that date. However, these gaps in the adequacy system were immediately filled on both sides: the Swiss FDPIC added the UK to the list of countries with adequate data protection levels; conversely, the UK permitted the transfer of personal data from UK to the EEA and to any countries which, as at 31 December 2020, were covered by a European Commission 'adequacy decision' (and hence to Switzerland, too). Since in addition, on 28 June 2021, the EU approved adequacy decisions regarding the UK for the EU GDPR (see COM(2021)4800 final) and the Law Enforcement Directive (LED) (see COM(2021)4801 final), the largely unhindered transfer of personal data in the triangle Switzerland, UK, EU is still assured.

AI, gatekeepers and data altruism: Situating data protection amongst new regulatory initiatives

While many current challenges of digital regulation – and thus also issues adjacent to data protection – have been extensively discussed in the political work surrounding the drafting of the revFADP, which has been going on for several years, substantive regulations on these adjacent matters have not yet materialised. However, Switzerland is strongly engaged in the work of the Council of Europe and the OECD in this area, particularly with regard to the responsible use of artificial intelligence. See an overview in Beglinger, "Comment la Suisse doit-elle réglementer l'intelligence artificielle?", *La Vie économique, Plateforme de politique économique*, 7/2021, p. 25 et seq.).

Switzerland also traditionally relies on self-regulation and approaches that appeal to the self-responsibility of providers and consumers. In this context, efforts to establish ethical criteria and trust labels currently stand out. See inter alia specifically the work of the Swiss Digital Initiative, which relies on a public-private partnership for an internationally applicable Swiss Digital Trust Label.

General update: United Kingdom

Leonard Hawkes

The impediments to the enforcement of GDPR

A response will depend on how this question is to be understood. In one sense, it is no longer relevant: because the UK has left the EU, established its independence from the EU legal order and is to be treated as a 'third country' (outside the EU) including for GDPR purposes. The UK can now decide on its own data protection laws. However, the GDPR was implemented in the UK before exit from the EU and as such falls within the class of retained EU legislation: s. 3 of the European Union (Withdrawal) Act 2018 (the "Withdrawal Act") incorporates direct EU legislation (as defined) that was operative immediately before exit day (31 January 2020) so that it remains part of UK domestic law. As it was an operative EU regulation for this purpose the GDPR was therefore incorporated in UK domestic law by the Withdrawal Act.

Moreover, there are now adequacy decisions by which, on the one hand, the UK recognizes that the GDPR is adequate from the point of view of the UK Data Protection law and, on the other hand the EU Commission has recognized that the existing UK legislation is adequate from the point of view of GDPR. (Adequacy Decision of 28 June.) As will be seen below, the situation is not however static.

Relevant developments

Transitional period

The UK left the EU on 31 January 2020 and it entered a post-withdrawal transition period. During the transition period (which ran until 31 December 2020), the GDPR continued to apply and it was 'business as usual' for exchanges of personal data between the EU and the UK. Secondary legislation, the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019 ("DPPExitRegs19"), came into force on "exit day". The DPPExitRegs19 confirm that the "UK GDPR" is the GDPR as it forms part of the law of England and Wales, Scotland and Northern Ireland by virtue of section 3 of

the Withdrawal Act 2018 (see endnote (d)). Amongst other things, the DPPExitRegs19 remove all references to the European Institutions from the DPA18 so that it becomes a purely domestic UK legislation.

The UK-EU Trade and Cooperation Agreement (TCA)
The TCA, agreed on 24 December 2020 (and subsequently ratified by the European Parliament), set forth interim provisions for continuing the transmission of personal data from the EU to the United Kingdom initially until 1 May 2021 with an automatic extension until 1 July 2021 if there was no decision on the adequacy of the UK's data-privacy regime by 1 May (Art. 782 TCA). In the event the adequacy Decision was taken by EU Commission on 28 June 2021 (Commission Implementing Decision C(2021)4800 final). For the UK's approach to international data transfers see: www.gov.uk/government/publications/uk-approach-to-international-data-transfers.

Potential divergence
The UK's Department for Digital, Culture, Media & Sport (DCMS) launched "Data: A New Direction" a public consultation on its proposed reforms to the UK's data protection regime on 10 September 2021.

The consultation is 146pp long and will close on 19 November 2021. Proposed key changes include: reducing barriers to responsible innovation, reducing compliance burdens on businesses, boosting trade and reducing barriers to data flows, delivering better public services, reforming the Information Commissioner's Office (ICO).

Potential divergence – Example: Reducing barriers to responsible innovation
Data: A New Direction – Para. 48 "(…) data subjects should be allowed to give their consent to broader areas of scientific research when it is not possible to fully identify the purpose of personal data processing at the time of data collection. The government also proposes stating explicitly that the further use of data for research purposes is both (i) always compatible with the original purpose and (ii) lawful under Article 6(1) of the UK GDPR".

4.4 Report to the Plenary

Orla Lynskey[90]

Topic 3 of FIDE 2020-2021 was "The new EU data protection regime". While FIDE's focus was on the new data protection regime comprised of the General Data Protection Regulation

90 Associate Professor of Law, London School of Economics.

(GDPR) and the Law Enforcement Directive (LED), the national reports shed valuable light on its predecessor, the 1995 Data Protection Directive. It is clear from the national reports that the core principles of data protection law, such as data minimisation, purpose limitation and fairness were already well embedded in domestic legal orders before the GDPR entered into force. Moreover, while the EU Charter has gained attention internationally as a result of its inclusion of a stand-alone right to data protection, the national reports affirm that such an independent right already exists in the Constitutional orders of several States. Yet, FIDE also presented an important opportunity to gain better understanding about the reception of the GDPR at national level. While the national reception of a regulation might not ordinarily merit such scrutiny, the GDPR is no ordinary regulation. As has been noted from its inception, it affords Member States significant leeway through its numerous references to domestic law (whether that be domestic contract law or legislation in the public interest, for example) and from the opportunities it offers to build on its provisions or to derogate from them in some respects.

In the relatively short time that elapsed between the publication of the Topic 3 reports and our meeting at the FIDE Congress, data protection developments continued apace. The working group sessions were therefore used to complement the reports rather than to discuss them directly. Working group sessions were held on the following topics: (1) (Impediments to) the enforcement of the GDPR; (2) Beyond national supervisory authorities: The role of other actors in developing data protection; (3) Data protection in the pandemic; (4) Public policy, public security and national security; (5) EU data protection law in a global context; and (6) AI, gatekeepers and data altruism: Situating data protection amongst new regulatory initiatives.

The discussions on this heterogenous range of topics was informed, nuanced, and occasionally heated! While it is not possible to summarise these wide-ranging sessions in any detail, it is possible to identify three broad themes emerging from them.

First, we considered the ways in which data protection law is reconciled with other rights and interests, and the various points of contention that arise through such reconciliation. The national reports provide detailed insights into how Member States have reconciled data protection and freedom of expression under the auspices of Article 85 GDPR. Our working group session discussed how the Covid-19 pandemic proved to be an early test of whether public health imperatives could be achieved while respecting fundamental rights under the GDPR framework. As the pandemic developed, EU Member States reached for technological "solutions" to this public health challenge. Moreover, data protection issues began to crop up in all domains of life, ranging from education to employment to retail. The European Data Protection Supervisor (EDPS) responded quickly by adopting guidelines and recommendation to steer these domestic initiatives in a compliant direction. The GDPR proved to be an important tool to ensure good data governance in the face of widespread pressure to maximise personal data processing. For

instance, the GDPR did not prevent the adoption of technological measures, such as contact-tracing applications, but required that these applications be accompanied by a robust data protection policy detailing elements such as the purposes and duration of data processing.

The divergence in national approaches to the line of caselaw stemming from the ECJ's *Digital Rights Ireland* and *Tele2 Sverige* judgments was also discussed. These cases address how States can address national security concerns in a way that is compliant with the Charter rights to data protection and privacy. It was evident from the national reports that this remains a divisive and dynamic issue, with several relevant preliminary references pending before the ECJ. In *Tele2 Sverige* the Court held that the objective of fighting serious crime cannot in itself justify general and indiscriminate data retention practices. Despite the more recent caselaw in *La Quadrature du Net*, we discussed the many open questions: is the ECJ's claim of competence to oversee the compatibility of such processing with the Charter credible? What role remains for targeted data-retention in this proportionality assessment, it was significant in *Tele2 Sverige* but emphasis on it has waned in subsequent cases? Is it possible to differentiate between national security and serious crime in a principled manner? What of the relationship with the ECtHR on these issues? This reconciliation, we concluded, is far from complete.

The second theme discussed was the broader context in which EU data protection law sits and how it relates to this broader context. This arose We both in terms of EU data protection law's impact beyond the EU's borders and its connection with other regulatory frameworks. We had an animated discussion about the impact of the Court's caselaw on transnational data flows. One may query whether the combined impact of the *Schrems I* and *Schrems II* jurisprudence is that of data localisation: acting, as it arguably does, as a measure with an equivalent effect to a ban on the transfer of personal data outside of the EU. Following this jurisprudence, the European Data Protection Board has issued guidance on supplementary measures that a data controller might take in order to facilitate extra-EU personal data flows. The extent to which these supplementary measures afford data controllers sufficient room for manoeuvre was debated. From a data controller perspective, engaging in transnational data flows in the post-*Schrems* context is a risk-laden endeavour that is, perhaps ironically, more difficult for SMEs than for larger technology firms with deeper pockets and an established global presence. From a fundamental rights perspective, allowing the transfer of data from within the EU to entities outside which are not offering an essentially equivalent level of protection would circumvent the protection offered by the EU data protection framework. This itself might be to the detriment of EU-established firms acting in compliance with this framework. Ultimately, it was suggested that what the discussion on data transfers lacks is reliable and impartial data on the costs and benefits of data flows.

Since the questionnaire to national rapporteurs was drafted, the European Commission has proposed a slew of relevant legislative instruments. These include the Digital Markets Act; the Digital Services Act; the AI Act and the Data Governance Act. Other legislative instruments, such as the Data Act, are forthcoming. We considered how these legislative instruments would interact with the new EU data protection regime. We queried the extent to which these instruments are conceptually coherent was discussed. For instance, we examined whether the push for "data altruism" in the Data Governance Act might have a negative impact on data quality under the GDPR or the "completeness" of datasets for AI required by the AI Act. We also queried the desirability of the "without prejudice to the GDPR" formula found in these instruments. On the one hand, the use of this formula will put domestic data protection authorities and the EDPB under increasing pressure to resolve potential conflicts between these instruments. Kicking the can down the line in this way to regulators that are already under pressure has disadvantages. On the other hand, this potentially confers upon the GDPR a type of "super-regulation" status, ensuring also that the Charter rights which it implements will be brought within the frame of legal analysis when considering the interplay between these instruments.

The third topic discussed was enforcement. Since the publication of the initial FIDE reports, national data protection authorities have delivered 600 or so decisions. The public enforcement system foreseen by the GDPR is, by and large, working well at domestic level. However, the GDPR also introduced a new – more experimental – supranational governance structure. In order to address the issues of regulatory competition and fragmentation evident under the previous regime, it introduced a "one-stop-shop" mechanism. This mechanism requires data protection authorities to cooperate when issues arise that concern multiple jurisdictions. In such cases, the data protection authority where the data controller has its main place of establishment is deemed the lead authority and assumes a lead role in the proceedings. The ECJ has held that the lead authority exercises this role as a rule with other authorities acting in place of the lead authority only where an exception exists. We discussed the many challenges that this oversight and enforcement structure presents. Its very existence is now being called into question and alternative approaches are being mooted and assessed. Under the GDPR system, there remains the risk that data controllers will engage in forum shopping in determining their place of main establishment and that, in parallel, the regulators in some States will become overloaded. The efficiency of the procedure as a whole, and its capacity to ensure that the perspectives of all concerned authorities are taken into account adequately was debated in the working group session. The EDPB has sought to address some of the procedural impediments to effectiveness through guidance on Article 65 however session participants pointed to the remaining potential obstacles to effective enforcement.

Beyond this public enforcement by data protection authorities, we considered the role of other actors such as courts, other regulatory authorities (including competition and

consumer protection authorities) and civil society in data protection enforcement. The primary query we discussed was whether, on the whole, the involvement of these other actors has helped to deliver more effective data protection. While, in principle, there seemed to be agreement that other actors have an important role to play in ensuring oversight of the GDPR, the interplay between these various enforcement mechanisms is uncertain. What happens, for instance, if private litigation is launched before the courts in one State while a one-stop-shop proceeding is ongoing? While in some other areas of law, such as Competition Law, this interplay is now more clearly defined, data protection remains in its infancy from a procedural perspective.

After three days of intense and fruitful discussions, covering the breadth of data protection law, policy and enforcement, my (somewhat frazzled … !) conclusion about 'The new EU data protection regime' is that "it's complicated". Yet, despite its complications, as a cornerstone of EU digital policy and an important EU legal value, it remains worth the effort.

5 Topic 3: EU Competition Law and the Digital Economy

5.1 Rapporteurs (Institutional, General and National)

General Rapporteurs	Nicolas Petit and Pieter Van Cleynenbreugel
Institutional Rapporteur	Thomas Kramler
Young Rapporteur	Daniel Mândrescu

Bulgaria	Donka Stoyanova
Croatia	Melita Carević and Siniša Petrović
Czech Republic	Jiří Kindl and Michal Petr
Denmark	The Danish Competition and Consumer Authority
Estonia	Martin Mäesalu and Andrei Nirk
Finland	Beata Mäihäniemi, Patrick Günsberg and Liisa Tarkkila
France	Rafael Amaro and Marie Cartapanis
Germany	Mark-Oliver Mackenrodt
Greece	Assimakis Komninos and Emmanuela N. Truli
Hungary	Pál Szilágyi and Farkas D. Kovács
Ireland	Patrick Horan, Maureen O'Neill and Claire Waterson
Italy	Gabriella Muscolo, Mario Siragusa, Fausto Caronna and Paolo Caprile
Luxembourg	Pierre Barthelmé and Mattia Melloni
The Netherlands	Anna Gerbrandy, Henk-Jaap Albers, Annemieke van der Beek, Hanneke Kooijman, Marc Kuijper, Anne Looijestijn-Clearie, Edmon Oude Elferink, René Repasi, Merle Temme and Hans Vedder
Norway	Ingrid Halvorsen Barlund, Ronny Gjendemsjø and Eirik Østerud
Poland	Maciej Bernatt
Portugal	Tânia Luísa Faria
Romania	Raluca Dinu
Slovakia	Hana Kováčiková and Ondrej Blažo
Slovenia	Martina Repas, Katja Hodošček and Aleš Ferčič
Spain	José Marino García García and Pablo Ibáñez Colomo
Sweden	Björn Lundqvist

Switzerland	Alexandra Telychko
United Kingdom	Andriani Kalintiri and Ryan Stones

5.2 Update General Report

Pieter Van Cleynenbreugel[1]

This brief update contains an overview of the developments that have characterised EU competition law and the digital economy in the February 2020-November 2021 time frame. Following the structure of the General Report, I will pay particular attention to Member States' enforcement developments (I), to changes in substantive competition law (II), to developments in terms of remedies and to the relationship between competition law and (digital) regulation (III). Although the principles and parameters governing debates on EU competition law and the digital economy have not changed, important developments have taken place in the abovementioned time frame.

Enforcement activities at EU level and in Member States: an ever-increasing focus on FAANG firms?

In the General Report, we identified the emergence of more or less extensive enforcement activities and procedural/institutional upgrades among Member States. The following developments deserve to be highlighted in that respect. At EU level, the following additional enforcement and policy activities can be mentioned.

A Statement of Objections against Amazon: on 10 November 2020, the European Commission sent out a statement of objections against Amazon. The Commission is of the preliminary view that Amazon has breached EU antitrust rules by distorting competition in online retail markets. According to its press release, the Commission particularly takes issue with Amazon systematically relying on non-public business data of independent sellers who sell on its marketplace, to the benefit of Amazon's own retail business, which directly competes with those third-party sellers.[2]

A Statement of Objections against Apple: in June 2020, the European Commission had opened investigations against Apple in relation to the conditions under which its App-store had to be used. In particular in the realm of music streaming services, Apple imposed on developers the mandatory use of Apple's own proprietary in-app purchase system as well as restrictions on the ability of developers to inform iPhone and iPad users of alternative

1 Professor at the Competition and Innovation Institute, University of Liège.

2 See https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077.

cheaper purchasing possibilities outside of apps.[3] On the basis of a preliminary investigation, the Commission sent out a Statement of Objections on 30 April 2021, informing Apple of its preliminary view that it distorted competition in the music streaming market as it abused its dominant position for the distribution of music streaming apps through its App Store.[4] In a similar context, Epic Games also brought a complaint against Apple with the European Commission.[5]

Opening of an investigation against Facebook: on 4 June 2021, the Commission opened an investigation against Facebook. The aim of the investigation is to assess whether Facebook violated EU competition rules by using advertising data gathered in particular from advertisers in order to compete with them in markets where Facebook is active such as classified ads. According to the Commission, the formal investigation will also assess whether Facebook ties its online classified ads service "Facebook Marketplace" to its social network, in breach of EU competition rules.[6] At the time of finalising this update, the investigation is still on-going.

In the realm of concentration control, the European Commission proposed further guidance on the issue of referrals of notified concentrations to the European Commission under Article 22 of Concentration Control Regulation 139/2004.[7] Although the digital economy has not been the only sector targeted by that guidance, the Commission made it clear that 'market developments have resulted in a gradual increase of concentrations involving firms that play or may develop into playing a significant competitive role on the market(s) at stake despite generating little or no turnover at the moment of the concentration. These developments appear particularly significant in the digital economy, where services regularly launch with the aim of building up a significant user base and/or commercially valuable data inventories, before seeking to monetise the business'. It therefore invited Member States to refer (digital) cases to the Commission in case the concentration threatens to significantly affect competition. Those clarifications must make it possible for concentrations similar to the non-notified Facebook/Instagram merger to be evaluated by the European Commission.[8]

Member States have for their parts also not shied away from taking enforcement actions against FAANG firms (Facebook, Amazon, Apple, Netflix and Google). The following activities stand out in that context:

3 See https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1073.

4 https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2061.

5 As apparent from https://www.theverge.com/2021/2/17/22286998/epic-games-apple-european-comission-antitrust-complaint-app-store-fortnite.

6 See https://ec.europa.eu/commission/presscorner/detail/en/IP_21_2848.

7 https://ec.europa.eu/competition/consultations/2021_merger_control/guidance_article_22_referrals.pdf.

8 As also highlighted in the press, see by way of example, https://www.politico.eu/article/eu-steps-up-big-tech-crackdown-with-in-depth-probe-of-latest-facebook-kustomer-deal.

Changes to Austrian competition law: in September 2021, Austrian competition law has been modified as had been announced in the 2020 national report; modified merger thresholds and a modified dominance definition have been adopted in that context.[9]

Changes to the German Competition Act: in January 2021, the 10th Amendment to the German competition Act (GWB) was published.[10] The Amendment introduces a section 19a into the GWB, allowing the Bundeskartellamt to prohibit certain types of behaviour of undertakings of paramount importance for competition across markets. It is no secret that digital economy players have been primarily targeted in that respect.[11] On the basis of the new Act, the German Bundeskartellamt has initiated proceedings against Google, Apple and Amazon.[12]

A proposal to update the Greek Competition Act in order to tackle abuse of power in an ecosystem of structural importance for competition.[13]

The decisions taken and investigations opened by the French Autorité de la Concurrence against Google and Facebook.[14]

The investigation launched by the Dutch ACM against Apple, in which commitments have been solicited from the latter.[15]

Substantive competition law

Although the key provisions of (EU) competition law have remained intact, reflections have been on-going against the background of increased attention for the digital economy.

In that context and as mentioned in the previous section, Austrian and German competition laws have been adapted to take this new reality into account. Those modifications especially highlight the important 'gatekeeper' function digital economy players may fulfil in order to justify intervention by competition authorities. Although formally extending and specifying competition law provisions, the German Act entrusts the Bundeskartellamt with more ex ante action powers. That development responds to

9 See for the 2021 Amendment to the Austrian Competition Act, https://www.ris.bka.gv.at BGBLA_2021_I_176 and for background the blogpost by M. Mayr, http://competitionlawblog.kluwercompetitionlaw.com/2021/09/20/austria-introduces-significant-changes-to-its-competition-law.

10 http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl121s0002.pdf.

11 See for that confirmation, https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/19_01_2021_GWB%20Novelle.html.

12 See for an overview in that respect, https://www.bundeskartellamt.de/EN/Economicsectors/Digital_economy/digital_economy_node.html.

13 See the update provided to the national report by A. Komninos.

14 https://www.autoritedelaconcurrence.fr/fr/article/lautorite-de-la-concurrence-sanctionne-google-hauteur-de-220-millions-deuros-pour-avoir and https://www.autoritedelaconcurrence.fr/fr/article/publicite-en-ligne-facebook-propose-des-engagements-lautorite.

15 https://www.bleepingcomputer.com/news/apple/netherlands-orders-apple-to-offer-more-app-store-payment-methods.

concerns also addressed by EU regulatory developments that are nevertheless situated formally speaking outside the scope of EU competition law (including the Digital Markets Act, currently under negotiation and touched upon in section III).

In addition, on-going reflections on and updates of the European Commission's market definition notice[16] as well as the vertical agreements block exemption and vertical agreements guidance[17] show that those updates can no longer deny the specifics of digital markets, as also highlighted in the update offered by the institutional rapporteur.

The developments highlighted here demonstrate above all that the digital economy invites serious debates about whether or not to fine-tune generally applicable competition law provisions, so as to avoid questions on their application to digital economy activities. It remains to be seen how that debate will translate into specific changes in substantive (soft law) rules.

Remedies in competition law and its overlap with regulation in the digital economy

In terms of remedies and regulatory overlap, the General Report concluded that relatively little innovation was to be found in this context, especially as Member States and the EU were considering whether or not to complement competition law frameworks with additional regulatory tools. In this update, that conclusion still holds. Although the use of competition law remedies has not been abandoned completely (i.), one could anticipate that attention to remedies will especially increase once a complementary regulatory instrument enters into force. Developments surrounding the Digital Markets Act (DMA) go to the heart of those questions (ii.)

Competition law remedies in the digital economy

Digital economy cases have also given rise to the imposition of interim measures or remedies to alleviate competition law concerns. As already confirmed in the General Report, those remedies are relatively traditional and focus predominantly on behavioural obligations imposed.

At EU level, the Google/Fitbit merger serves as a vivid illustration of this approach. The European Commission allowed the acquisition of Fitbit by Google to proceed, but only to the extent that Google committed itself to respect, for a 10-year period and supervised by a trustee, important behavioural measures.[18] By way of example, Google

16 See https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3561.

17 See https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3585.

18 Summary of Commission Decision of 17 December 2020 declaring a concentration compatible with the internal market and the functioning of the EEA Agreement (Case M.9660 – Google/Fitbit) (notified under document C(2020) 9105), [2021] O.J. C194/7.

committed not to use for Google Ads the health and wellness data collected from wrist-worn wearable devices and other Fitbit devices of users in the EEA, including search advertising, display advertising, and advertising intermediation products.[19]

The French Autorité de la Concurrence also imposed behavioural interim measures on Google in a case involving Google's refusal to display links to or parts of articles from news media that did not waive copyright claims against Google. In 2020, the French Autorité took interim measures that required Google to enter into individual negotiations with relevant copyright holders,[20] a decision which was upheld by the Paris Court of Appeal.[21] As Google failed to comply in this respect, the Autorité imposed a fine of €500 million as a consequence.[22] The saga shows that the Autorité considers interim measures to offer a valuable tool to avoid competition by digital players to be distorted. It remains to be seen, however, whether the use of fines to nudge firms into compliance is a sufficient tool to ensure that competition is restored. The observations made in the 2020 General Report still hold in that regard.

Towards a complementary remedial and regulatory framework?

When we finalised our General Report in April 2020, reflections were still-ongoing with regard to the adoption of a so-called 'new competition tool' that would complement existing competition law provisions at EU level. Inspired by similar reflections and initiatives in the United Kingdom,[23] the Commission proposed a Digital Markets Act (DMA) regulation on 15 December 2020.[24] If and when adopted, the DMA proposes to have in place specific rules and oversight mechanisms that would allow to ensure that digital markets remain contestable and fair whenever so-called gatekeepers are present.[25]

The DMA applies to those undertakings considered to be digital gatekeepers. The European Commission, following a market investigation, will take a decision on gatekeeper status. To qualify as such, the proposal outlines substantive and quantitative criteria. First,

19 See also for a summary the relevant press release, https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2484.

20 https://www.autoritedelaconcurrence.fr/fr/decision/relative-des-demandes-de-mesures-conservatoires-presentees-par-le-syndicat-des-editeurs-de.

21 https://www.autoritedelaconcurrence.fr/sites/default/files/appealsd/2020-10/ca_20mc01_oct20.pdf.

22 https://www.autoritedelaconcurrence.fr/fr/decision/relative-au-respect-des-injonctions-prononcees-lencontre-de-google-dans-la-decision-ndeg.

23 See https://www.gov.uk/government/collections/digital-markets-unit.

24 See also, P. Van Cleynenbreugel, 'The Commission's digital services and markets act proposals: First step towards tougher and more directly enforced EU rules?', 28 *Maastricht Journal of European and Comparative Law* (2021), 675-678.

25 Art. 1(6) Commission Proposal for a Regulation of the European Parliament and of the Council n contestable and fair markets in the digital sector (Digital Markets Act), COM (2020) 842 final (hereafter DMA proposal). According to Art. 1(3), the proposal does not apply to electronic communications network markets and non-interpersonal communication services offered on such markets.

the undertaking concerned would need to provide one or more so-called core online platform services to business users established in the Union or end users established or located in the Union.[26] The DMA proposal more particularly distinguishes the following categories: (i) online intermediation services (including for example marketplaces, app stores and online intermediation services in other sectors like mobility, transport or energy) (ii) online search engines, (iii) social networking (iv) video sharing platform services, (v) number-independent interpersonal electronic communication services, (vi) operating systems, (vii) cloud services and (viii) advertising services, including advertising networks, advertising exchanges and any other advertising intermediation services, where these advertising services are being related to one or more of the other core platform services.[27] Second, in order to be qualified as gatekeepers, core online platform services providers need to (i) have a significant impact on the internal market, (ii) operate one or more important gateways to customers and (iii) enjoy or be expected to enjoy an entrenched and durable position in their operations.[28] More particularly, a service provider has (i) a significant impact when the undertaking to which it belongs achieves an annual EEA turnover equal to or above EUR 6.5 billion in the last three financial years, or where the average market capitalisation or the equivalent fair market value of the undertaking to which it belongs amounted to at least EUR 65 billion in the last financial year, and it provides a core platform service in at least three Member States. It operates (ii) an important gateway whenever it provides a core platform service that has on average throughout the last year more than 45 million monthly active end users established or located in the Union and more than 10,000 yearly active business users established in the Union in the last financial year. It enjoys (iii) an entrenched position whenever the previous two criteria have been fulfilled over the past three financial years.[29] Whenever not all quantitative criteria have been met, the Commission may still designate a core online platform services provider as a gatekeeper when it concludes, on the basis of a qualitative assessment, that the three substantive criteria have been met nonetheless. Inversely, a provider meeting all quantitative criteria would be able demonstrate that it does not act as a gatekeeper.[30]

The proposal also outlines in considerable detail the behaviour that cannot be engaged in by gatekeepers. That behaviour includes […]. Those obligations are directly inspired by types of behaviour of which businesses such as Google, Facebook and Amazon have been accused and for which EU competition law provisions had been mobilised.[31] The

26 Art. 1(2) DMA proposal.
27 Art. 2(2) DMA proposal.
28 Art. 3(1) DMA proposal.
29 Art. 3(2) DMA proposal.
30 Art. 3(4) DMA proposal.
31 See for that argument, C. Caffarra and F. Scott Morton, 'The Digital Markets Act: a Translation', available at https://voxeu.org/article/european-commission-digital-markets-act-translation.

European Commission could, by means of a delegated Regulation, modify or update those obligations and requirements.[32]

In case of systematic non-compliance with DMA regulatory obligations, the Commission could initiate a new market investigation. In that context, the Commission, by means of a decision adopted at the latest twelve months after opening the market investigation, impose on such gatekeeper any behavioural or structural remedies which are proportionate to the infringement committed and necessary to ensure compliance with the DMA Regulation.[33] This provision allows to speculate that the Commission could break up big digital players and force them to have their different services provision activities separated. Such decision would amount to a structural remedy, whereby the Commission orders market structures to be changed. Although it is theoretically possible that this could be done, the DMA proposal states that the Commission 'may only impose structural remedies (…) either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the gatekeeper concerned than the structural remedy'.[34] It remains to be seen how that obligation would take shape in practice.

At the time of finalising this update, legislative discussions on the DMA are still on-going. It remains to be seen what kind of agreement will be found between the Member States in the Council on that matter, especially with regard to the roles of national competition authorities in DMA enforcement.[35] It cannot be denied, however, that the DMA will raise important questions on the intersection between competition law and regulation. It will most likely fall upon the Court of Justice to clarify those questions in the not so distant future.

32 Art. 10 DMA proposal.

33 Art. 16(1) DMA proposal.

34 Art. 16(2) DMA proposal.

35 Member States such as France, Germany and the Netherlands explicitly asked for this in a joint Report, see for background, www.euractiv.com/section/digital/news/france-germany-the-netherlands-press-for-tighter-rules-in-dma.

5.3 Update Institutional Report

Thomas Kramler[36]

Market definition and market power in digital markets

On 12 July 2021 the European Commission has published a Staff Working Document that summarises the findings of the evaluation of the Market Definition Notice used in EU competition law. The evaluation concludes that while the principles of market definition remain unchanged, their application in digital contexts can lead to additional complexities that may not be fully addressed in the current notice. These include defining markets for multi-sided platforms, in particular where services are supplied at zero monetary price, defining markets for ecosystems or for data, and assessing online vs offline competition. Digitisation may also lead to new barriers to entry and switching costs. Reasons for this include the role of data (portability), interoperability, privacy questions, networks effects and single-/multihoming. In addition, digitisation may increase the need to reflect non-price considerations in substitution assessments. However, the evaluation results also show that not all of the market definition issues arising as a result of digitisation have been settled into best practices, but rather that practices are likely to evolve further in the future.

https://ec.europa.eu/competition-policy/system/files/2021-07/evaluation_market-definition-notice_summary_en.pdf

Vertical restraints and digitisation

On 9 July 2021, the European Commission published drafts of the revised Vertical Block Exemption Regulation (VBER) and Vertical Guidelines for stakeholder comments. The evaluation showed that the VBER and the Vertical Guidelines are useful tools that facilitate the assessment of vertical agreements and help reduce compliance costs for businesses. It also showed room for improvement, notably the need to adapt both texts to new market developments in particular in digital markets.

https://ec.europa.eu/competition-policy/public-consultations/2021-vber_en#related-links.

36 Head of the Digital Single Market Task Force, European Commission, Directorate General for Competition.

Interplay regulation and EU competition law

On 15 December 2020 the European Commission made a proposal for a Digital Markets Act which lays down harmonised rules ensuring contestable and fair markets in the digital sector across the Union where gatekeepers are present. Pursuant to recital 9 the Regulation aims at complementing the enforcement of competition law, it should be specified that this Regulation is without prejudice to Articles 101 and 102 TFEU, to the corresponding national competition rules and to other national competition rules regarding unilateral behaviour that are based on an individualised assessment of market positions and behaviour, including its likely effects and the precise scope of the prohibited behaviour, and which provide for the possibility of undertakings to make efficiency and objective justification arguments for the behaviour in question. Pursuant to recital 10 the Regulation pursues an objective that is complementary to, but different from that of protecting undistorted competition on any given market, as defined in competition-law terms, which is to ensure that markets where gatekeepers are present are and remain contestable and fair, independently from the actual, likely or presumed effects of the conduct of a given gatekeeper covered by this Regulation on competition on a given market. This Regulation therefore aims at protecting a different legal interest from those rules and should be without prejudice to their application.

https://eur-lex.europa.eu/legal-content/en/TXT/?qid=1608116887159&uri=COM%3A2020%3A842%3AFIN

5.4 Updates National Reports

General update: Bulgaria

Donka Stoyanova

Market definition and market power in digital markets

The Bulgarian Competition Protection Commission (CPC) has not reviewed new significant cases concerning the digital markets and online services. In several merger cases in the media sector the CPC has sustained its approach for defining the market power on the basis of (a) ratings/popularity among end-users and (b) income from advertisements. The CPC has not identified a participant on the digital market with significant/dominant market power.

Vertical restraints and digitisation
No specific issues have been identified on the digital market. There is no concentration of market power by specific platforms (social media, on-line stores, etc.).

Data and EU competition
The significance of personal data for delivery of tailored and personalized content, both on social media and for on-line services, is growing with fast rates. Most recent approach of digital providers is introducing various registration forms for obtaining consent for processing personal data for marketing purposes as much as possible. Personal data is significant for digital providers vis-a-vis the end-users and services provided to them. There is no concentration of platforms operated by national digital providers (similar to the concentration of Facebook, Instagram, WhatsApp and Viber), so at this point the processing of personal data is not a priority for competitive advantage at platform level. The main tendencies on the Bulgarian market follow European and worldwide tendencies.

General update: Belgium

Joëlle Froidmont

Market definition and market power in digital markets

Market definition
In its recent decisional practice, the BCA (Bulgarian Competition Authority) has continued to examine the impact of the online activity on the delineation of the relevant product markets.

In merger control case Boulanger/Krëfel, the BCA has examined the competitive relationships between (pure) online and offline retail sales of household electrical products. Although the BCA did not decide whether both types of sales should be included in the same relevant market, it nevertheless considered extensively the competitive pressure exerted by online sales in the competitive assessment (BCA's decision of 12 December 2019 in case CONC–C/C–19/0031).

In merger control case IPM/EDA-LAH, the BCA has identified the national markets for French-language daily paid press and French-language weekly non-specialised paid press, both markets being defined as including paper, PDF and online versions (BCA's decision of 22 December 2020 in case CONC-C/C-20/0031).

Market power

In view of the complexity of the market power assessment in the electronic communications/digital field, the BCA has continued its practice of conducting extensive market consultations and requiring raw data of different kinds from market participants in order to be able to look beyond (static) market shares and market concentration.

In merger control case Proximus/Mobile Vikings, the BCA has considered that the market shares based on existing customers and the HHI index only partially provided a picture of the competitive strength of the market participants concerned. The BCA has therefore decided to examine the "gross adds" market shares (i.e., market shares calculated on the basis of the number of new customers acquired by each operator in a given year) as well as the diversion ratios, in order to identify the contestable customers and understand the likely market dynamics in the post-transaction period (BCA's decision of 31 May 2021 in case MEDE-C/C-21/0006).

Vertical restraints and digitisation

In the antitrust case Newpharma-Pharmasimple/Caudalie, the BCA has made clear that the imposition of minimum resale price or territorial restrictions on selective online distributors cannot be justified by a concern for brand image protection, even though this concern is likely to justify the imposition of qualitative conditions. After acknowledging that there is little guidance with respect to which qualitative obligations are compatible with competition law, the BCA has accepted as a mitigating circumstance commitments offered by Caudalie to clarify the qualitative conditions to be imposed on (online) distributors (BCA's decision of 6 May 2021 in cases CONC-PK-17/0038 and CONC-PK-18/0001). This decision is currently under appeal (case 2021/MR/1).

Data and EU competition

In its recent decisional practice, the BCA has continued to examine the competitive relevance of data.

In the interim measures case Telenet/Proximus-Orange, the BCA has examined – but ultimately rejected – Telenet's argument according to which the envisaged JV between Proximus and Orange would lead to an information asymmetry between the participants in the forthcoming mobile spectrum auction (BCA's decisions of 8 January 2020 and 4 March 2020 in case MEDE–V/M–19/0036).

Algorithmic decision making and EU competition law

In a resolution, the Belgian Senate has called on the Belgian government to set up – in collaboration with the BCA and FPS Economy – a unit to monitor the use and operation of algorithms, artificial intelligence and big data on the market. The initiative should

contribute to preventing competition law infringements (doc nr. 6-498/3 – Session 2018/2019).

Interplay between regulation and EU competition law

The BCA has continued to cooperate closely with sector specific authorities such as those in the electronic communications and media sectors, notably in merger control case Proximus/Mobile Vikings (BCA's decision of 31 May 2021 in case MEDE-C/C-21/0006) and in interim measures case Telenet/Proximus-Orange (BCA's decisions of 8 January 2020 and 4 March 2020 in case MEDE–V/M–19/0036). In the latter case, the BCA temporarily suspended the implementation of a Shareholders Agreement and RAN (Radio access network) Sharing Agreement concluded by the parties concerned in order to allow the electronic communications regulator, BIPT, to further study the amended version of said agreements and to communicate its potential objections to the BCA.

In the long-lasting antitrust case *bpost*, the Brussels Court of Appeal has referred two questions to the ECJ for a preliminary ruling on the application of the ne bis in idem principle enshrined in Article 50 CFR (Court of Appeal judgment of 19 February 2020 in case 2019/MR/4). Advocate General Bobek has delivered an opinion according to which said principle does not preclude the competent competition authority of a Member State from imposing a competition law fine where the same person has already been finally acquitted in previous proceedings conducted by the national postal regulator for an alleged infringement of postal legislation, provided that, in general, the subsequent proceedings are different either as to the identity of the offender, or as to the relevant facts, or as to the protected legal interest the safeguarding of which the respective legislative instruments at issue in the respective proceedings pursue (AG Bobek's Opinion of 2 September 2021 in case C-117/20, bpost/BCA).

Any other relevant developments that you wish to highlight

The BCA has again included the "digital economy" as a priority sector in its 2020 and 2021 Priority Notes. In its 2021 Priority Note, the BCA has even made the reinforced action against (powerful) digital platforms its number one strategic priority.

General update: Czech Republic

Michal Petr

Any other relevant developments that you wish to highlight

In our contribution, we highlighted the CHAPS case as one of only a few decisions of the Czech Competition Authority in the area of digital economy. After our report has been

submitted, by the judgement of 25 November 2020, Ref. No. 30 Af 28/2018, the Regional Court in Brno cancelled the Competition Authority[1]s decision finding abuse of dominance. It however did so on procedural basis, not discussing the merits of the case, so it is very likely that a substantially same decision as described in our contribution will be re-adopted.

General update: Denmark

Pernille Wegener Jessen

Market definition and market power in digital markets

The DCCA has recently had a small number of completed and ongoing cases involving digital business/online platforms. In these cases, the DCCA accounted for pertinent issues related to digital platforms such as the multisided nature of the platforms, zero-pricing on the consumer side as well as the implications of multihoming by consumers and advertisers. The Authority applied methodology that has become standard practice among competition authorities, and the DCCA did not develop specific new methodologies for defining the relevant market or establishing market power in the recent cases.

General update: Finland

Beata Mäihäniemi

Algorithmic decision making and EU competition law

The Finnish Competition Authority has produced two papers on the role of algorithms in relation to personalised pricing and collusion, see KKV, Algoritmien aiheuttamat kolluusiotilanteet, Kilpailu- ja kuluttajaviraston selvityksiä 1/2021 and KKV, Personoitu hinnoittelu kuluttaja- ja kilpailupolitiikan tarkastelussa, Kilpailu- ja kuluttajaviraston selvityksiä 2/2021. Both only available in Finnish.

Any other relevant developments that you wish to highlight

Nordic competition authorities have issued a report on Digital platforms and the potential changes to competition law at the European level. Here they stress their support the assessment of new EU regulatory initiatives, such as DMA and DSA, however, some comparison of advantages and risks associated with such a regulatory intervention has to be ensured. Moreover, there should be more focus on legal certainty as well as predictability. At the same time, Nordic competition authorities point out that the application of these new initiatives raises a number of procedural and substantive issues such as the legal standard to be adopted, how engaged should the companies involved in these proceedings

be, as well as relevant national competition authorities. They also stress that some kind of guidance on agreements between companies to exchange, share and collate data would be in place. In particular, there is a need to assess how to design data-sharing remedies.

General update: Greece

Assimakis P. Komninos

Most recently, although there have been no decisions, the Hellenic Competition Commission ("HCC") has been particularly active in conducting sector inquiries that touch upon the digital sector.

Of most relevance is the HCC's sector inquiry into e-commerce. According to the HCC, the digital environment of e-commerce can promote innovation and facilitate price competition, but can also harm consumers, in case algorithms and big data are misused. Artificial intelligence may become a strong tool in the hands of cartels, leading to increased market transparency and market surveillance and enabling competitors not only to align prices, but also to respond immediately to any deviation from the agreed terms by the other cartelists. Further, the HCC is particularly concerned with dominant players (such as digital platforms) threatening competition and the consumers' welfare significantly, *inter alia* by relying on big data, thus possibly facilitating excessive pricing and other exploitative practices. Bearing the above in mind, the sector inquiry aims at determining how competition can work in the new digital environment. The sector inquiry also explores the use of algorithms by digital retailers and platforms for advertising or pricing purposes, including the implementation of personalised pricing systems. It also assesses the importance of consumers' big data for the operation of digital retailers and platforms and investigates practices between competitors in online commerce, as well as the conduct of powerful platforms.

According to the HCC, the final report is expected to be published in December 2021 and will contribute significantly to the effort of mapping the e-commerce sector in Greece, while identifying possible anti-competitive practices that prevent consumers from benefiting from e-commerce to the maximum extent possible. In the meantime, the interim report issued in August 2021, includes the results from the first phase of the inquiry and analyses thoroughly the current state of the market and its trends. A particular focus has been the relationship between retail and wholesale sellers, retailers operating online or physically and retailers active in Greece or abroad. As to the co-operation between retailers and suppliers or online platforms, the interim report advocates adopting guidelines for enhancing digital consumer information and digital business training, in collaboration with institutional, sectoral and scientific bodies.

Of importance is also the sector inquiry on production, distribution and marketing of basic consumer goods and in particular food products, as well as cleaning and personal hygiene products, which has been completed with the publication of a final report. Although not directly related to the digital sector, it still provides insights into how the online commerce has started gaining in popularity during and following the COVID-19 pandemic and how personalised offers and pricing, through the utilization of new technologies and the collection of data, proves to be a significant aspect of competition among supermarket chains.

Aside from the above two sector inquiries, the HCC is currently conducting a number of other sector inquiries, which will touch upon the digital sector. Thus, in March 2020, the HCC launched a sector inquiry into financial technology services (FinTech). Among this sector inquiry's goals are to explore the potential of innovative banking products and services, in order to benefit consumers and businesses and enable more players to enter into the financial market. The sector inquiry examines how fintech might affect or limit competition, with key issues being the interoperability and standardisation of technology, in order to avoid entry barriers and market sharing, as well as the need to ensure not only access to data by all players, but also the use of this data in a non-exclusionary way. In addition, the inquiry focuses *inter alia* on investigating the use of algorithms for market conduct and pricing. The publication of the final report is expected in December 2021.

Then, in July 2021, the HCC launched a sector inquiry on health services. The sector inquiry takes into account the access to patient and/or physician databases as a major aspect of competition in the pertinent markets for health services and insurance. In particular, it examines the importance of data in the structure and governance of the health services value chain, the growth of personalised medicine industry and the competition among MedTech and InsurTech services and ecosystems. The focus on health-related data goes beyond the traditional players of healthcare service providers, since such data is nowadays sourced through a plethora of channels and utilised by a wide range of players. Thus, the sector inquiry focuses on physicians and pharmaceutical companies keeping the patient's clinical history, on internet companies "monitoring" an individual's lifestyle, on medical device companies and e-health apps collecting medical information and on public health authorities and insurance companies keeping data on the cost and consumption of medicines and healthcare services. According to the HCC, access to medical data by any of the above could be used as a tool to foreclose competitors, conclude exclusive contracts and/or engage in tying or bundling practices in case the data holder leverages its power to enhance its position in another market and impose the use of its services. Besides, according to the HCC, the use of databases can also function as a tool of exploitation, through personalised or discriminatory pricing. The publication of the final report is expected in December 2022.

Through these sector inquiries, the HCC has made clear its intentions to investigate the challenges emerging in the new digital era and has subsequently taken initiatives for legislative proposals and regulatory guidelines. In its latest newsletter, the HCC has confirmed emphatically its intentions and declared:

> In view of the forthcoming legislative developments, both at national and EU level, aimed at radically reviewing the application of competition rules in the digital environment – including the amendment of Law 3959/2011 (in progress) as well as the European initiatives for the adoption of a regulatory framework for digital services (Digital Services Act) and digital markets (Digital Markets Act) – the [HCC] has appointed Professor Michalis Iakovidis (London Business School) as Head Advisor to issues of Digital Economy, as well as an Advisory Committee of experts from leading international universities, headed by Professor Frédéric Jenny, Chairman of the OECD Competition Committee. The HCC aims to participate actively in the relevant consultations held within the European Competition Network. To this end, it intends to maintain an open communication with representatives of Greek businesses in order to grasp the challenges which they face, as well as their understanding of the state of competition in the digital environment, in light of the specific characteristics of the Greek economy and the broader goal of this digital transformation. […].

Finally, this update would not be complete if we did not mention the recent proposal to amend the Greek Competition Act, while transposing the ECN+ Directive. The proposal was published for consultation in August 2021 and includes a new Article 2a, which is reminiscent of Section 19a of the new German Competition Act. The text of this proposed provision is as follows:

Article 2A
Abuse of power in an ecosystem of structural importance for competition

1. The abusive exploitation of the position of power held by a company in an ecosystem of structural importance for competition in the Greek territory is prohibited.
   In case the conditions are fulfilled for the application of both the present Article and of Articles 2 of the present Act and 102 of the Treaty on the Functioning of the European Union, the latter Articles shall apply to the exclusion of the present Article.
2. In order to control the application of para. 1, the Competition Commission shall take into account the business model of the ecosystem in question and the rules governing the relations of the involved parties. The Competition Commission shall also take into account sufficiently substantiated objective justifications put forward in relation to the practices concerned.

3.a) "Ecosystem" means: (a) a set of interconnected and substantially interdependent economic activities of different undertakings for the purpose of providing products or services affecting the same group of users; or (b) a platform linking economic activities of different undertakings for the purpose of providing one or more products or services that affect the same users or different groups of business or end users.

b) "Platform" means an entity that acts either as an intermediary for transactions between interdependent end user and business user groups or between interdependent business user groups, or as an infrastructure for the development and provision of different but interrelated products and services.

4. An ecosystem is presumed to be structurally relevant to competition when non-access thereto significantly affects the effective conduct of the business activities of third parties. In determining the structural importance of an ecosystem for competition, particular consideration shall be given to: (a) its economic strength or the significant share of that ecosystem in total turnover, or in the revenue of one or more sectors of the Greek economy; (b) its access to significant resources, in particular to a significant number of ecosystem-dependent business users in order to connect with end-users or to competitively sensitive data and information, (c) the importance of its activities for third-party access to supply markets and sales in Greece.

   Notwithstanding the fulfilment of the conditions laid down in the preceding subparagraph, an ecosystem shall be presumed to be of no structural importance to competition when, at the same time, there are at least four (4) other independent ecosystems operating, which constitute a viable alternative for users.

5. "Position of power" in an ecosystem is defined as the economic strength of an undertaking, which gives it the power to behave to a significant degree independently of its competitors, customers and, in general, users of the ecosystem. In order to establish the holding of a position of power by an undertaking in an ecosystem, account shall be taken, inter alia, of: (a) its control of the resources and infrastructure necessary for the economic activity of other firms; (b) its power to regulate the function of the ecosystem and the access to it by third parties; (c) its high bargaining power vis-à-vis business or end-users of the ecosystem; (d) the dependence on it by ecosystem users for mediation services, which are necessary for accessing product and services markets, and the absence of a corresponding alternative.

6. For the determination of violations of para. 1, the Competition Commission conducts an investigation ex officio. If it finds an infringement, the Competition Commission issues a decision, which is notified to the undertaking concerned and which obliges the latter to cease the infringement and to omit it in the future. By the same decision, the Competition Commission may call upon the undertaking concerned, within sixty (60) days from its notification, to propose measures that it intends to implement, in order to comply effectively with the decision of the Competition Commission.

7. The Competition Commission issues a decision within one hundred and twenty (120) days from the notification of the previous decision for the finding of infringement, which makes mandatory the measures proposed by the undertaking pursuant to para. 6.
   In the event that it does not consider the proposed measures to be appropriate, the Competition Commission may, after hearing the undertaking concerned, impose appropriate and necessary behavioural measures for the termination of the infringement, depending on the type and seriousness of the latter and on the business model of the ecosystem in question.
8. The Directorate General of the Competition Commission may initiate a procedure for the verification of compliance with the decision of para. 7 and the Competition Commission may issue a decision on compliance.
   By the decision of the Competition Commission and if non-compliance is found, the undertaking is obliged to cease the non-compliance and to omit it in the future, and a fine may be imposed on it in accordance with para. 2 of Article 25B.

The proposed provision is quite interesting and invites a few observations:

(i) the rule is not dependent on dominance, yet requires an undertaking to hold a "position of power in an ecosystem", which is defined as "the economic strength of an undertaking, which gives it the power to behave to a significant degree independently of its competitors, customers and, in general, users of the ecosystem";
(ii) if the "normal" competition rules on abuse of dominance apply, Article 2A does not apply, i.e. there is a rule of precedence;
(iii) the HCC is required to take into account the "business model of the ecosystem in question and the rules governing the relations of the involved parties", which is a rather welcome rule that favourably distinguishes this provision from other inflexible laws, such as the DMA Proposal, which does not allow for the taking into account of such parameters;
(iv) the HCC must "also take into account sufficiently substantiated objective justifications put forward in relation to the practices concerned", i.e. efficiency defences are allowed, like Section 19a of the German Competition Act and unlike the DMA Proposal; and
(v) no complaints are allowed, which means that complainants do not enjoy any formal rights.

A general observation is that the proposed rule comes closer to the nature of competition law than the DMA Proposal or indeed German law, in that it is based on a general clause (like Article 102 TFEU) and there is no list of *per se* prohibitions. That obviously makes the rule both more flexible and more open-ended, which may make better economic sense

but at the same time undermines legal certainty. Still, a general clause approach is preferable to the straightjacket of lists of *per se* prohibitions.

General update: Romania

Raluca Dinu

Market definition and market power in digital markets

National competition law is aligned with the European regulations, both at primary and secondary level, the Guidelines on the definition of the relevant market including how to define the relevant market according to the product / service market and the geographic market. Moreover, the European Commission Notice on the definition of the relevant market is under review, the digitisation being one of the topics included in the review.

In Romania, the e-commerce sector still has the features of a mature national market (both in terms of demand and supply) and somewhat isolated, but there is still a potential for opening up and diminishing geographical barriers, considering the rise in the level responsiveness and maturity of supply and demand. This sector is characterized by: low barriers to entry but high barriers to development (to become a major player); a dominant retailer that has created a number of competitive advantages in terms of exclusive online sales; a tendency to focus on this sector, further deepening the gap between major and small players. However, it must be borne in mind that, as the Romanian market opens, important foreign players will be able to make their presence felt on the domestic market more and there is therefore a prospect of an increase in the competitive pressure on the current winners on the domestic market.

Vertical restraints and digitisation

The national legislative changes or the changes in the enforcement strategies could be determined by the legal developments at the EU level. Under this framework, the European Commission services launched the review of the Vertical Block Exemption Regulation which defines certain categories of agreements that generally fulfil the conditions of exemption under Article 101(3) of the TFEU, in part by using market share criteria. The evaluations, which preceded the impact assessment phases, included open public consultations and were concluded with the publication of the Staff Working Documents. These reviews are relevant for the way in which market shares are calculated for online intermediation platforms – a topic relevant for the Vertical Block Exemption Regulation and its accompanying Guidelines, considering, case by case, the dual role of online platforms, in those cases involving vertical integration.

Data and EU competition

It is for the digital market players to ensure that compliance with the obligations laid down in the General Data Protection Regulation should be done in full compliance with other EU law, such as protection of personal data and privacy and competition law. Personal data are collected and processed to the extent permitted by Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, by the national Law no. 677/2001 on the protection of individuals with regard to the processing of personal data and the free circulation of such data, and by the national Law no. 506/2004 on the processing of personal data and the protection of privacy in the electronic communications sector.

Algorithmic decision making and EU competition law

The RCC's decision making practice could be relevant in this regard. As such, we may indicate on the RCC's investigation regarding the abuse of a dominant position by Dante International SA on the online intermediation services market in Romania, targeted on the discriminatory behaviour of Dante in relation to retailers of consumer products, who are direct competitors of the company. One of the sensitive issues evaluated regarded the listing algorithms, which favoured the products displayed by the investigated party. The RCC sanctioned the company Dante International SA with approximately 6.7 million EUR for abuse of a dominant position in the service intermediation market through online marketplace platforms and imposed a series of corrective measures on the company, to restore the normal competitive environment and prevent the occurrence of similar facts.

Interplay regulation and EU competition law

The Digital Markets Act proposed by the European Commission is currently in the process of negotiation in the EU legislative process. Against this background, it is to be mentioned that in December 2020, the Commission services published the Impact Assessment assessing the possible policy options for the Digital Markets Act legislative proposal. The impact assessment describes the growing importance of digital services and their providers in today's economy and assesses the obstacles that prevent effective competition from working in digital markets, including barrier to entry such as network effects, switching costs, data dependency, scale and scope economies, behavioural bias and others. Since the proposal for a Digital Markets Act is of a regulatory nature, its implementation – if adopted along the lines of the proposal – will not involve the definition of the digital markets. That said, the public consultations leading to the Digital Markets Act, in particular the one concerning the need for a New Competition Tool, may have an indirect informative value for the scope of the current report. Moreover, at national level, the P2B regulation (Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting

fairness and transparency for business users of online intermediation services) has been enforced in the Romanian law through the adoption of the GEO no. 23 from 31 March 2021 on promoting fairness and transparency for business users of online intermediation services.

Any other relevant developments that you wish to highlight?
The Romanian competent authorities assume an increasingly active role in the digital markets, both by using the tools provided by the national legal framework to investigate the market (e.g. RCC finalized the Big Data study, e-commerce sector investigation was completed in 2018, the collaborative economy study was finalised in 2020, sector inquiry report on the 'ride hailing' sector, infringement investigations – December 2020 – Dante International SA was sanctioned for abuse of a dominant position on the market of intermediation services through online marketplace platforms), but also by enforcing new competencies regarding digital markets (e.g. the competition authority assumed responsibility for the application of the EU Regulation No. 1150/2019).

General update: United Kingdom

Andriani Kalintiri and Ryan Stones

Market definition and market power in digital markets
In the last two years, the issues of market definition and power in the digital economy have arisen most frequently in the context of merger control by the UK Competition and Markets Authority (CMA). Since October 2019, the UK Merger Assessment Guidelines have been reformulated and the CMA has investigated around 20 anticipated or completed concentrations touching upon the digital economy.

In March 2021 the CMA published revised Merger Assessment Guidelines. While the substantive legal test has not changed, the CMA makes clear that this revision is due to the UK economy undergoing significant change since the 2010 guidelines, especially with the impact of digital technology on the sale of goods and services (para. 1.4). It notes that, while this has "not introduced new theories of harm or economic principles", it does require careful consideration to ensure that competition is promoted to the benefit of consumers, especially in dynamic markets when potential future competition is key. It also recognises how much it has learnt from the Furman and Lear reports (paras. 1.5, 1.7-1.8). This is reflected at key points throughout the Guidelines: acknowledgement that a harmful lessening of non-price competition is more important when considering digital content provided for no monetary cost to consumers (2.4); privacy, network effects on platforms, advertisement-free content, and innovation as important aspects of non-price

competition (2.5); references to the Lear Report and key digital economy decisions (PayPal/iZettle; Amazon/Deliveroo) when elaborating its approach to establishing the counterfactual (Chapter 3); a section dedicated to two-sided platforms which highlights how network effects, tipping, and barriers to entry make these mergers generally more problematic (4.21-4.25); extensive discussion of how the loss of potential competition, whether future and/or dynamic, can be harmful through references to the digital economy (5.13-5.24); online markets providing price transparency which strengthens the internal sustainability of coordinated market power (6.17); how foreclosure following non-horizontal mergers may take the form of shutting down application programming interfaces or limiting access to data (7.13); market power in non-horizontal theories of harm deriving from network effects, accumulated data, or integration into wider ecosystems (7.14); the importance of scale for conglomerate bundling potentially resulting from network effects and access to data (7.33); and network effects and early-mover data accumulation to improve and personalise products as a barrier to entry and expansion (8.41).

The new emphasis in the Merger Assessment Guidelines on aspects of the digital economy should also be viewed together with the CMA's joint statement on merger control issued with the Australian Competition and Consumer Commission and the German Bundeskartellamt in April 2021. Alongside issues relating to the pandemic, the three authorities have stressed that future uncertainty as to the development of dynamic markets should not necessarily lead to unconditional clearance, especially when considering the acquisition of potential future competitors by technology companies. The three authorities clearly indicate their unwillingness to simply accept parties' claims that concentrations will lead to efficiencies and synergies without clear, substantial evidence, given the potential harm to competition which may ensue. Furthermore, they demonstrate a readiness to require structural remedies or prohibit acquisitions outright.

Putting the CMA's revised Guidelines and stated aims into practice, four merger investigations in the digital economy over the last two years are noteworthy, demonstrating its approach to market definition and market power.

First, the on-going investigation into Facebook/GIPHY. Following unsuccessful clashes with the CMA in the Competition Appeal Tribunal and the Court of Appeal over its initial enforcement order of June 2020, an investigation was initiated in January 2021 against the completed acquisition by the digital giant of the market leader in searchable databases of GIFs (short picture animations) that can be posted on social media and messaging platforms. In August 2021 the CMA reached a provisional Phase II conclusion that the completed acquisition would substantially lessen competition and recommended divestiture of GIPHY. On market definition, the provisional findings include a discussion of the unique qualities of GIFs, which the CMA did not consider substitutable with videos or emojis. The CMA's prior Online Platforms and Digital Advertising Market Study formed the basis for establishing Facebook's market power in social media and digital advertising,

focusing on barriers to entry occasioned by network effects, Facebook's suite of apps, and status as a necessary trading partner for advertising. GIPHY also has been found to enjoy market power due to limited competition from rivals and its distinctive features (e.g. content quality, reach through distribution partners). The CMA is provisionally concerned about this acquisition for two reasons. First, the loss of potential competition from GIPHY in display advertising. While not currently active in digital advertising outside the US, GIPHY had plans to monetise through paid alignment services (prominent positioning of advertisers' GIFs in user searches) which the CMA thought had significant potential to generate revenue and could have challenged Facebook in both digital advertising and, if acquired by a rival, the social media platform market. Second, the CMA considered potential vertical foreclosure through GIPHY no longer being compatible with Facebook's competitors or being offered on worse terms. The CMA believes this is a likely outcome as such conduct is thought to be a low-risk and inexpensive strategy for Facebook. In contrast, the CMA at Phase I dismissed two other theories of harm: that access to GIPHY's data would materially increase Facebook's data advantage, increasing barriers to entry for digital advertising; and the loss of potential competition from Facebook developing a rival database to GIPHY. The final decision is expected by 1st December 2021.

Second, in June 2021 the CMA accepted undertakings in lieu of a Phase II reference decision in response to the Adevinta/eBay merger. This concentration would bring together Shpock, Gumtree, and eBay Marketplace, which all provide generalised online classified advertising services in the UK, allowing users to list goods for sale. The relevant market was disputed. While the parties agreed that they all competed in the market for online classified advertising services on generalist platforms, the CMA considered it appropriate to expand the market to include consumer-to-consumer sales on online marketplaces too. This was based upon evidence suggesting that the differences between the two forms is narrowing and documents indicating that they saw each other as rivals. The CMA did not however include vertical classified services because consumers would not use them and Shpock/Gumtree did not seem to view them as rivals. The CMA saw the merger to be a significant consolidation of market power, bringing together eBay Marketplace (50-60% share), Gumtree (3rd largest) and Shpock (important upstart) which would lead to a substantial increment in share and lessening of competitive pressure. Network effects would make eBay Marketplace harder to compete against and evidence of multi-homing was limited. The CMA found the three to be close competitors, especially as Shpock had pivoted towards being a transactional platform closer to eBay Marketplace. Internal documents also suggested that they considered each other close competitors. The only other significant rival was Facebook Marketplace, the second largest in the UK, though despite its rapid growth, the CMA was unsure whether this would be able to continue, especially as a closed network that was not transactional. Amazon's business-to-consumer focus also limited its competitive constraint on the parties. With material influence over

all three, the CMA was concerned that eBay would discourage Adevinta from making Shpock (through expansion and undercutting) and Gumtree (through transactionalisation) compete with eBay Marketplace. The parties agreed to divest Shpock and Gumtree. Adevinta found an upfront buyer for Shpock which was agreed by the CMA.

Third, in July 2020 the CMA decided to refer the merger in Taboola/Outbrain to a Phase II investigation unless undertakings were offered by the parties. Amongst other markets considered which did not raise concerns (outstream video advertising platforms, non-search display advertising platforms), Taboola and Outbrain both provide online content recommendations from a database of display adverts on websites to external content. These often are alongside pieces on publisher websites, identifying external links usually based on personalisation algorithms. The CMA argued that the merged entity would have considerable market power owing to a significant market share (80-90% with an increment of 30-40%), the parties being each other's closest rival for publishers based on internal monitoring documents and third party responses, and the absence of significant rivals. The CMA highlighted barriers to entry owing to exclusivity arrangements with publishers inhibiting switching and strong network effects. While the CMA acknowledged that Google was developing a rival service that could enter in a timely manner, it thought that the new entrant would not be sufficient as Google's similar "matched content" service only had a 0-5% share, there was potential differentiation between their offerings, and internal documents from the parties suggested that they felt able to defend their positions. Following the publication of its Phase II Issues Statement, the merger was abandoned in September 2020.

Fourth, in August 2020 the CMA cleared Amazon's acquisition of a 16% shareholding in Deliveroo, where it considered the competitive implications in the markets for online restaurant delivery and online convenience grocery delivery. Initiated in December 2019, Amazon/Deliveroo was complicated by myriad factors, not least the pandemic. One constant throughout was the CMA's finding that although Amazon had withdrawn from the online restaurant delivery market in 2018, absent the acquisition of material influence over Deliveroo it would have re-entered the UK market, perhaps through expanding its Prime service. The more competitive counterfactual of Amazon entering the concentrated restaurant delivery market alongside Deliveroo, Just East, and Uber Eats was therefore the analytical comparator for the Phase I and final Phase II decisions. In its Phase I referral to further investigation, the CMA was concerned that Deliveroo had market power despite Just Eat having twice the market share, owing to the latter's underdeveloped courier service and product differentiation (locations, food offered). However at Phase II, the 16% share seems to have swayed the CMA towards unconditional clearance. As evidenced by its activities in India, the CMA found it unlikely that the 16% share in Deliveroo would disincentivise Amazon from fully re-entering the market and competing aggressively with Deliveroo, where losses in Deliveroo dividends would be more than compensated by its

own profits from entry. Amazon's 16% shareholding would also not provide the opportunity to weaken Deliveroo against its own business due to the majority of other shareholders. In relation to online convenience grocery delivery, the CMA did not include supermarket grocery delivery services within the relevant market, finding that consumers were willing to pay a premium for groceries arriving within a couple of hours. At Phase I it highlighted the need for further investigation on the basis of Amazon and Deliveroo being the two strongest players with clear plans to expand towards closer competition and a combined share of 70-80%. But at Phase II, the panel emphasised the 16% shareholding: Amazon would not be able to weaken Deliveroo's convenience grocery service, nor would it have the incentive to compete less aggressively with Deliveroo as foregone Amazon profits would outweigh dividends from Deliveroo. As a result, the acquisition was unconditionally cleared at Phase II. Amazon/Deliveroo is also notable because between the Phase I referral and Phase II final decision, the CMA actually published two provisional reports. While the second provisional findings in June 2020 closely mirror the final decision, the initial April 2020 findings had cleared the acquisition based on Deliveroo being a failing firm in the counterfactual. Due to the onset of the pandemic and closure of many restaurants, the CMA accepted that Deliveroo would exit the market absent investment from Amazon, with no alternative purchaser available, and therefore its exit would be more harmful to competition than Amazon keeping it in business. When information came to light of Deliveroo performing better than initially thought, the CMA published revised provisional findings.

Beyond these four key investigations, the CMA initiated two Phase II investigations. In viagogo/Stubhub, the CMA secured the sale of Stubhub's business outside of North America to maintain competition in the UK between the two largest online platforms for the sale of secondary events tickets with uncapped prices. The anticipated merger in Crowdcube/Seedrs concerning two equity crowd funding platforms, connecting small-and-medium-sized enterprises with potential investors, was abandoned by the parties following a negative appraisal in the CMA's Phase II provisional report. In both instances the CMA was concerned by strong indirect network effects acting as barriers to entry/expansion, the parties being each other's closest competitor (based on offering, internal monitoring, and third-party responses), significant accumulations of market share, and the absence of strong competitive pressure from rivals.

Finally, the CMA unconditionally cleared at Phase I: Facebook's acquisition of customer relationship management software communicating via a webchat channel which competes with Facebook Messenger (Facebook/Kustomer); the merger of two package holiday metasearch websites (TravelSupermarket/IceLolly); Uber's acquisition of a software producer for taxi bookings, dispatch, and referrals used by Uber's rival online taxi platforms (Uber/GPC Software (Autocab)); the acquisition of Just Eat by an online food ordering platform no longer operating in the UK (Takeway.com/Just Eat); and two investigations

into mergers between providers of business intelligence tools utilising significant amounts of online data (Google/Looker Data Sciences and Salesforce/Tableau). Generally, these clearances were underpinned by limited overlap between the merging parties, strong competition from remaining rivals to the merged entity, ease of customer switching, and unpersuasive theories of conglomerate harm owing to a lack of ability or incentives to foreclose.

References

Report of the Digital Competition Expert Panel: Unlocking digital competition (Furman Report) (March 2019) available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.

Lear, Ex-post Assessment of Merger Control Decisions in Digital Markets: Final Report (May 2019), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803576/CMA_past_digital_mergers_GOV.UK_version.pdf.

CMA, PayPal/iZettle – Final Report (June 2019), available at www.gov.uk/cma-cases/paypal-holdings-inc-izettle-ab-merger-inquiry#final-report.

Joint statement by the Competition and Markets Authority, Bundeskartellamt, and Australian Competition and Consumer Commission on merger control (20 April 2021), available at www.gov.uk/government/publications/joint-statement-by-the-competition-and-markets-authority-bundeskartellamt-and-australian-competition-and-consumer-commission-on-merger-control/joint-statement-on-merger-control-enforcement.

CMA129, Merger Assessment Guidelines (March 2021), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1011836/MAGs_for_publication_2021_--.pdf.

CMA, Facebook/Giphy – Provisional Findings Report (August 2021), available at https://assets.publishing.service.gov.uk/media/611a39f28fa8f53dcaedea61/FB_GIPHY_final_pfs_with_appendices_and_glossary_160821.pdf.

CMA, Adevinta/eBay – Decision on acceptance of undertakings in lieu of reference (June 2021) available at https://assets.publishing.service.gov.uk/media/60db232e8fa8f50ab3b8b5ce/Adevinta-eBay_-_Decision_for_final_acceptance_of_UILs.pdf.

CMA, Taboola/Outbrain – Issues Statement (August 2020), available at https://assets.publishing.service.gov.uk/media/5f27e1d7e90e0732d865d713/Issues_Statement_-_Taboola_Outbrain.pdf.

CMA Press Release, Digital advertising merger to be abandoned during CMA investigation (14 September 2020), available at www.gov.uk/government/news/digital-advertising-merger-to-be-abandoned-during-cma-investigation.

CMA, Amazon/Deliveroo – Final Report (August 2020), available at https://assets.publishing.service.gov.uk/media/5f297aa18fa8f57ac287c118/Final_report_pdf_a_version_-----.pdf.

CMA, Amazon/Deliveroo – Revised Provisional Findings Report (June 2020), available at https://assets.publishing.service.gov.uk/media/5efc79d63a6f4023c77a136f/Revised_provisional_findings_Amazon-Deliveroo_---_PDF_A_web_-_.pdf.

CMA, viagogo/Stubhub – Final Report (February 2021), available at https://assets.publishing.service.gov.uk/media/601940a6d3bf7f70c3a495d1/v_sh_finalreport_.pdf.

CMA, Crowdcube/Seedrs – Provisional Findings Report (March 2021), available at https://assets.publishing.service.gov.uk/media/6061ddb9d3bf7f5ceaca0d82/Provisional_Findings_Crowdcube_Seedrs.pdf.

CMA Press Release, Crowdcube and Seedrs abandon merger during CMA investigation (25 March 2021), available at www.gov.uk/government/news/crowdcube-and-seedrs-abandon-merger-during-cma-investigation.

CMA, Facebook/Kustomer – Summary of Phase I Decision (September 2021), available at https://assets.publishing.service.gov.uk/media/6151a0da8fa8f5610b9c2208/Facebook.Kustomer_-_Summary_of_Phase_1_Decision_.pdf.

CMA, TravelSupermarket/IceLolly – Phase I Clearance Decision (September 2021), available at https://assets.publishing.service.gov.uk/media/6135d67fe90e070433f6c28e/TSM_Icelolly_-_Phase_1_decision_.pdf.

CMA, Uber/GPC Software (Autocab) – Phase I Clearance Decision (March 2021), available at https://assets.publishing.service.gov.uk/media/6093e751d3bf7f6d624f556b/Uber_Autocab_-_Phase_1_Decision_-_Non_Confidential_final_.pdf.

CMA, Takeway.com/Just Eat – Phase I Clearance Decision (May 2020), available at https://assets.publishing.service.gov.uk/media/5eb2b71ad3bf7f5548c1b190/Takeaway_Just_Eat_full_text_---.pdf.

CMA, Google/Looker Data Sciences – Phase I Clearance Decision (March 2020), available at https://assets.publishing.service.gov.uk/media/5e6f8119e90e070ac9b21395/Google_Looker_decision-.pdf.

CMA, Salesforce/Tableau – Phase I Clearance Decision (December 2019), available at https://assets.publishing.service.gov.uk/media/5dfa5c69e5274a670091be1a/Publication_version_-_Decision_-_Salesforce-Tableau_.pdf.

Vertical restraints and digitisation

The CMA is currently reviewing the responses received to its consultation on the future of block exemption for vertical agreements in the UK. Following the end of the Brexit transition period, the EU's Vertical Block Exemption Regulation (VBER) was retained in UK law, where agreements meeting the requirements of the VBER were exempt from the Chapter I Competition Act 1998 prohibition on anticompetitive agreements. This arrangement expires on the 31st May 2022 and the CMA is recommending to the UK Government that it be replaced with a UK Vertical Agreements Block Exemption Order ("VABEO"). The consultation ran from 17th June to 22nd July 2021. In its consultation document, prior engagement with stakeholders stressed to the CMA the importance of block exemption for legal certainty, consistency, and reducing the burden on businesses and the CMA, warning against fundamental change (or indeed allowing the VBER to lapse without replacement). Instead, the CMA is considering a series of tweaks, some of which are in response to the growth of the digital economy. First, removing as Article 4 hardcore restrictions dual pricing to distributors for offline/online sales and the requirement for overall equivalence between restrictions on online and physical sales within a selective distribution network. These had previously been considered indirect restrictions on internet sales but the CMA is minded to allow them due to the lower costs for online sales as opposed to bricks-and-mortar stores. Second, the CMA is considering whether to add wide parity / "most favoured nation" clauses as an additional Article 4 hardcore restriction, where the supplier is forbidden from offering a better price through any other outlet. This was especially motivated by concerns about online platforms using such terms to prevent competition between themselves. It prefers however the terminology of "indirect sales channel parity obligations". Beyond modifications, the CMA is inclined to retain resale price maintenance as a hardcore restriction, perhaps with greater guidance on when efficiencies may individually exempt such conduct. It also believes that the Article 4(b) inclusion of territorial and customer restrictions as hardcore (save for ample exceptions)

should also be kept, despite the EU's emphasis here upon the single market: it believes that they are also conducive to consumer choice across the UK, promote intra-brand competition, and could raise significant difficulties for Northern Ireland under the Protocol. Based on prior stakeholder representations, the CMA also thinks it appropriate to maintain the Article 2(4) inclusion of dual distribution agreements within the scope of block exemption, especially given how online sales have led to greater sales directly by manufacturers who also supply products to rival distributors.

The CMA envisages producing guidance to accompany the VABEO, equivalent to the EU's Guidelines on Vertical Restraints. The CMA has already indicated that this should include clarifications on agency agreements relating to online platforms (e.g. when platforms determine the price set on other sales channels) and the distinction between active and passive online sales for Article 4 territorial/customer restrictions. Consultation on this document will occur in late 2021/early 2022, with EU guidance remaining relevant until replaced.

Turning to enforcement action against vertical restraints in the digital economy, the CMA has continued to focus primarily upon resale price maintenance ("RPM"). Since October 2019, infringement decisions pursuant to Chapter I of the Competition Act 1998 have included: Digital Pianos, Digital Keyboards and Guitars in July 2020 (against Yamaha and GAK, the latter of which was fined £279,000); Electronic Drum Sector in July 2020 (fining Roland £4 million, increased to £5million as an unsuccessful appeal to the Competition Appeal Tribunal was found to breach the settlement agreement); Synthesizers and Hi-tech Equipment in June 2020 (fining Korg £1.5 million); and Guitars in January 2020 (fining Fender £4.5 million). In all four decisions, the CMA has gone beyond condemning not just manufacturers requiring sales to be above a stipulated minimum, but also prohibiting restrictions on online price advertising below required levels as de facto RPM. As with its previous practice, the CMA has justified finding RPM to be a restriction by object due to it dampening price competition between resellers, whether online or in bricks-and-mortar stores, leading to higher prices for consumers.

In Synthesizers and Hi-tech Equipment and Electronic Drum Sector, the CMA found that manufacturers checking compliance of online prices with their requirements had been assisted through the use of automated price-monitoring tools. This was also the case for Yamaha in Digital Pianos, Digital Keyboards and Guitars, but this decision is notable for being the first UK instance in which the reseller, GAK, was fined. While Yamaha benefitted from leniency, the CMA decided that GAK should be punished for using similar price-monitoring tools itself to highlight non-compliant rivals to Yamaha, used software to automatically incorporate Yamaha's website prices to its own online store, and continued to engage in this conduct after the CMA had sent an advisory letter.

Given its consistent work against RPM and yet seemingly continuing prevalence, in June 2020 the CMA published advice and an open letter to retailers on how to avoid illegality, along with case studies on previous decisions.

Beyond RPM investigations, in November 2020 the CMA also reached an infringement decision against ComparetheMarket in Price Comparison Website for the use of wide most-favoured nation ("MFN") clauses. The CMA found that 32 agreements with home insurers, covering 40% of insurance sold through such websites, had the effect of reducing competition between price comparison websites, restricted the ability of ComparetheMarket's rivals to expand, and diluted competition between rival home insurers on such websites. ComparetheMarket closely monitored compliance with its wide MFN clauses, including enforcement against insurers that had agreed promotional lower consumer prices with rival price comparison websites in return for reduced commission or more prominent advertising. The wide MFN clauses meant that ComparetheMarket also benefitted from any deals negotiated with rival websites, preventing them from gaining a competitive advantage, and reducing the incentive for insurers to offer reduced prices, ultimately inflating final consumer prices. When ComparetheMarket increased its commission, insurers could not reflect this in a higher price on its website and lower prices on others, therefore requiring them to absorb the rise or increase their prices on rival websites. Furthermore, the CMA found that this lessening of competition amongst the 32 insurers (through e.g. differential pricing, less incentive to engage in promotional campaigns on comparison websites) also dulled pressure on all other insurers. The decision, including a fine of £17.9 million, has been appealed to the Competition Appeal Tribunal. BGL, the operator of ComparetheMarket, alleges, amongst other grounds, flaws in market definition, effects analysis, and the counterfactual. The hearing is scheduled for November 2021.

This action on MFNs followed CMA investigations into their use in the hotel online booking sector, discussed in our initial report. The commitments originally undertaken not to use wide MFN clauses expired in July 2020. Nevertheless, Booking.com and Expedia agreed to voluntarily continue abstaining from adopting such clauses.

Finally, the CMA's 2017 Sports Equipment prohibition decision was reviewed by the Court of Appeal. The Court of Appeal upheld the finding that Ping had restricted competition by object in preventing members of its selective distribution network from selling golf clubs online. The Court agreed that this characterisation of an internet sales ban was appropriate as it geographically limits the area from which customers can buy products, thereby reducing price competition between retailers.

References

CMA, The Retained Vertical Agreements Block Exemption Regulation Consultation Document (17 June 2021), available at www.gov.uk/government/consultations/retained-vertical-agreements-block-exemption-regulation-consultation.

CMA, Resale price maintenance in the digital piano and digital keyboard, and guitar sectors (17 July 2020), available at www.gov.uk/cma-cases/musical-instruments-and-equipment-suspected-anti-competitive-agreements-50565-6.

CMA, Online resale price maintenance in the electronic drum sector (22 July 2020), available at www.gov.uk/cma-cases/musical-instruments-and-equipment-suspected-anti-competitive-agreements-50565-5.

Press release, CAT increases fine after musical instrument firm breaks settlement bargain (19 April 2021), available at www.gov.uk/government/news/cat-increases-fine-after-musical-instrument-firm-breaks-settlement-bargain.

CMA, Online resale price maintenance in the synthesizer and hi-tech sector (29 June 2020), available at www.gov.uk/cma-cases/musical-instruments-and-equipment-suspected-anti-competitive-agreements-50565-4.

CMA, Online resale price maintenance in the guitar sector (22 January 2020), available at www.gov.uk/cma-cases/musical-instruments-and-equipment-suspected-anti-competitive-agreements-50565-3.

CMA, Restricting resale prices: an open letter to suppliers and retailers in the musical instruments sector (29 June 2020), available at www.gov.uk/government/publications/restricting-resale-prices-an-open-letter-to-suppliers-and-retailers-in-the-musical-instruments-sector.

CMA, Guidance: Resale Price Maintenance: Advice for Retailers (29 June 2020), available at www.gov.uk/government/publications/resale-price-maintenance-advice-for-retailers/resale-price-maintenance-advice-for-retailers.

CMA, Case study: £4.5 million fine for Fender for illegally preventing online price discounts (29 June 2020), available at www.gov.uk/government/case-studies/45-million-fine-for-fender-for-illegally-preventing-online-price-discounts.

CMA, Case study: Why we fined Casio £3.7 million for breaking competition law (29 June 2020), available at www.gov.uk/government/case-studies/why-we-fined-casio-37-million-for-breaking-competition-law.

CMA, Price comparison website: use of most favoured nation clauses (19 November 2020), available at www.gov.uk/cma-cases/price-comparison-website-use-of-most-favoured-nation-clauses.

Application No 1380/1/12/21 *BGL (Holdings) Limited & Others* v. *Competition and Markets Authority.*

Ping Europe Ltd v. *Competition and Markets Authority* [2020] EWCA Civ 13.

Data and EU competition

The following developments in the last two years are worth noting in relation to data and competition law.

Firstly, in May 2021 the CMA and the Information Commissioner's Office (ICO) published a joint statement on the relationship between competition and data protection in the digital economy. This statement, which is the first of its kind globally, sets out the two agencies' shared views on (a) the interactions between competition and data protection in the digital economy, highlighting the synergies and potential tensions between these policy areas; (b) how the two organisations are working together to maximise regulatory coherence; and (c) next steps to understand and promote outcomes in the digital economy that simultaneously promote competition and enhance data protection and privacy rights. The CMA and the ICO are cooperating closely in a number of pending investigations, including the CMA's investigation against Facebook's use of ad data (see below) and the ICO's investigation into real-time bidding in ad tech, which was resumed in January 2021.

Secondly, since October 2019 the CMA has opened three high-profile investigations into potential abuses of dominance by digital platforms.

Following complaints from interested parties, in January 2021 the CMA opened an investigation into Google's proposals to remove third party cookies and other functionalities from its Chrome browser and to replace them with a new set of tools for targeting advertising that would allegedly protect consumers' privacy to a greater extent, a project known as the 'Privacy Sandbox'. The CMA expressed concerns that these changes could undermine the ability of publishers to generate revenue and competition in digital advertising, thus entrenching Google's market power and leading to higher prices for consumers who ultimately pay for the cost of advertising. In response to these concerns, in June 2021 Google offered commitments, which included: (a) involving the CMA and the ICO in the design of the changes to avoid distortions to competition and the imposition of unfair terms on Chrome users; (b) increased transparency on the changes and their implementation, including the public disclosure of the rests of tests of the effectiveness of alternative technologies; (c) substantial limits on how Google will use and combine individual user data for the purposes of digital advertising after the removal of third-party

cookies; (d) a prohibition on discriminating against rivals in favour of Google's own advertising and ad-tech businesses when designing or operating alternatives to third-party cookies; and (e) a standstill period of at least 60 days before Google proceeds with the removal of third-party cookies. The CMA has notified its intention to accept the proposed commitments and is currently considering the feedback that it received to its public consultation, which closed on 8 July 2021.

Moreover, in June 2021 the CMA opened an investigation into Facebook's use of ad data. Specifically, Facebook collects data from its digital advertising services, which allow other businesses to advertise to business users, and from its single sign-on option, Facebook Login, which offers people the ability to sign into other websites, apps, and services using their Facebook log-in detail. The CMA is investigating whether Facebook has unfairly used the data gained from its advertising and single sign-on to benefit its own services, in particular Facebook Marketplace, where users and businesses can put up classified ads to sell items, and Facebook Dating, a dating profile service it launched in Europe in 2020, thus gaining an unfair advantage over competitors. According to the case timetable, the CMA is due to complete the initial investigation by February 2022.

For the sake of completeness, it is worth noting a third abuse of dominance investigation opened by the CMA in March 2021, this time against Apple, in relation to the terms and conditions for app developers to distribute apps through the App Store. This investigation was based on complaints from developers that (a) apps to iPhones and iPads can only be distributed via the App Store; (b) that certain developers who offer in-app features, add-ons or upgrades are required to use Apple's payment system, rather than an alternative system; and (c) that Apple charges a commission of up to 30% to developers on the value of these transactions or any time a consumer buys their app. According to the case timetable, the CMA is due to complete the initial investigation by November 2021.

Data has often been part of the CMA's analysis of theories of harm occasioned by mergers. Despite making a decision to refer on other grounds, in Facebook/GIPHY (discussed in section 1) the CMA dismissed at Phase I the theory of harm that access to GIPHY's data would increase Facebook's data advantage, raising barriers to entry for digital advertising. This was because it did not find the increase in data for Facebook to be of material significance and any attempts to gain data from other platforms using GIPHY were unlikely to succeed. In its Phase I clearance in Facebook/Kustomer, the CMA also thought it unlikely that barriers to entry would be raised by increasing Facebook's data advantage in online display advertising through access to Kustomer's customer relations management data on users. This was because it found that Facebook's advertising rivals could get access to similar data. Finally in Uber/GPC Software (Autocab), the CMA dismissed third party concerns about Uber accessing rivals' data where they used Autocab's booking, dispatch, and referral technology. If Uber were to use this data to compete with

other online taxi services through targeted prices and shorter waiting times, there were alternative technology providers to which its rivals could turn.

References

Competition and data protection in digital markets: a joint statement between the CMA and the ICO (19 May 2021), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/987358/Joint_CMA_ICO_Public_statement_-_final_V2_180521.pdf.

Press Release, Adtech investigation resumes (22 January 2021), available at www.ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2021/01/adtech-investigation-resumes.

Press release, CMA to investigate Google's 'Privacy Sandbox' browser changes (8 January 2021), available at www.gov.uk/government/news/cma-to-investigate-google-s-privacy-sandbox-browser-changes.

Press Release, CMA to have key oversight role over Google's planned removal of third-party cookies (11 June 2021), available at www.gov.uk/government/news/cma-to-have-key-oversight-role-over-google-s-planned-removal-of-third-party-cookies.

CMA Investigation into Google's 'Privacy Sandbox' browser changes (opened on 8 January 2021), available at www.gov.uk/cma-cases/investigation-into-googles-privacy-sandbox-browser-changes.

CMA Investigation into Facebook's use of data (opened on 4 June 2021), available at www.gov.uk/cma-cases/investigation-into-facebooks-use-of-data.

Press release, CMA investigates Facebook's use of ad data (4 June 2021), available at www.gov.uk/government/news/cma-investigates-facebook-s-use-of-ad-data

CMA Investigation into Apple AppStore (opened on 4 March 2021), available at www.gov.uk/cma-cases/investigation-into-apple-appstore.

Press release, CMA investigates Apple over suspected anti-competitive behaviour (4 March 2021), available at www.gov.uk/government/news/cma-investigates-apple-over-suspected-anti-competitive-behaviour.

CMA, Completed acquisition by Facebook, Inc. of GIPHY, Inc. Decision on relevant merger situation and substantial lessening of competition (25 March 2021), available at www.gov.uk/cma-cases/facebook-inc-giphy-inc-merger-inquiry.

CMA, Anticipated acquisition by Facebook, Inc. of Kustomer, Inc. Summary of the CMA's decision on relevant merger situation and substantial lessening of competition (17 September 2021), available at www.gov.uk/cma-cases/facebook-inc-dot-slash-kustomer-inc.

CMA, Anticipated acquisition by Uber International B.V., a wholly owned subsidiary of Uber Technologies, Inc., of GPC Computer Software Limited: Decision on relevant merger situation and substantial lessening of competition (29 March 2021), available at www.gov.uk/cma-cases/uber-technologies-inc-slash-gpc-software-limited-autocab-merger-inquiry.

Algorithmic decision making and EU competition law

Following up on its earlier work on Pricing Algorithms in 2018, in January 2021 the CMA launched a new programme on Analysing Algorithms with a view to developing its knowledge and helping it to better identify and address harm. The programme was launched with the publication of a review paper on algorithms and how they can reduce competition and harm consumers and with a Call for Information inviting views and evidence on the harms outlined in its research paper and information on specific issues with firms that the CMA could examine and consider for future action. The CMA review paper (a) considered direct harms to consumers, which often stem from algorithmic personalisation and the manipulation of consumer choices; (b) explored how the use of algorithms can exclude competitors and reduce competition and outlined the most recent developments in the algorithmic collusion literature; (c) summarised techniques that could be used to analyse algorithmic systems and (d) discussed the role of regulators to set standards and facilitate better accountability. In May 2021 the CMA published a summary of the feedback it received to its consultation.

References

CMA94, Pricing Algorithms – Economic working paper on the use of algorithms to facilitate collusion and personalised pricing (October 2018), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/746353/Algorithms_econ_report.pdf.

CMA, Algorithms: How they can reduce competition and harm consumers (January 2021), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/954331/Algorithms_++.pdf.

CMA Algorithms, competition and consumer harm: call for information (19 January 2021), available at www.gov.uk/government/consultations/algorithms-competition-and-consumer-harm-call-for-information.

CMA141con, Algorithms: how they can reduce competition and harm consumers – Summary of responses to the consultation (May 2021), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/991676/Summary_of_responses_to_algorithms_paper_publish.pdf.

Interplay regulation and EU competition law

The question of the interplay between regulation and competition law has remained highly prominent since October 2019. The following developments are worth noting in particular. These developments have occurred within the context of the UK Government's broader work in a range of areas, including the modernisation of the UK's competition and consumer landscape, its Digital Regulation Plan, its National Data Strategy, and its Innovation Strategy.

Firstly, in January 2020 the CMA published a report reviewing the existing evidence on the impact of regulation on competition in the UK and making several recommendations. The report notes that evidence from academic literature suggests that (a) on average greater regulation is associated with less competition; (b) there is no clear evidence in the literature on the appropriateness of the current overall balance between competition and regulation in the UK; (c) much of the harm to competition comes from regulation that creates or raises barriers to entry; (d) the proper design of regulation can substantially reduce the negative impacts on competition; (e) it is necessary to guard against regulations which serve firms with vested interests; and (f) in dynamic markets more flexible forms of regulation can reduce the risk of deterring innovation, and therefore harming competition. The report also notes that evidence from practice suggests that, while there is already a number of different guidance documents available to policy-makers to support them in developing better regulation, there is sometimes insufficient analysis of the impact of regulation on competition. On the basis of this evidence, the report makes three high-level recommendations: (a) develop regulation that supports innovation and disruption; (b) update the guidance for assessing the impact of regulation; and (c) enhance the oversight of Regulatory Impact Assessments. This report has informed the CMA's response to the Department for Business, Energy and Industrial Strategy's public consultation on the 'Reforming Regulation Initiative', which closed on 11 June 2020. In its response, the CMA recommended that policymakers should (a) seek to understand the competitive dynamics of a market when contemplating, designing and reviewing regulation; (b) consider more flexible forms of regulation to ensure regulation is future-proof, proportionate and not unduly restrictive; (c) ensure the views of small and medium-sized

enterprises are closely considered during the regulatory design and review phase; and (d) seek to avoid certain features of regulation that may inhibit competition and (e) it indicated its support for a broader approach to evaluating the cost of regulation, which should include the impact on the effective functioning of markets.

Secondly, since October 2019, significant progress has been made on the implementation of several of the recommendations in the Furman Report which called for a new pro-competition regime for digital markets. Among others, this regime would include the adoption of tailored codes of conduct for firms with 'strategic market status' and would be operated and enforced by a new dedicated 'Digital Markets Unit'. In March 2020 the Government approved the setup of a Digital Markets Taskforce within the CMA to provide advice on how best to implement the recommendations of the Furman Report. In July 2020 the CMA published the final report of its market study into online platforms and digital advertising and recommended that the Government passes legislation to establish a new pro-competition regulatory regime. In November 2020 the Government published its response to the CMA's market study on online platforms and digital advertising, indicating its support for a new procompetitive regulatory regime for firms with strategic market status and for a Digital Markets Unit within the CMA to be responsible for its operation and enforcement. In December 2020 the Digital Markets Taskforce published its advice to the Government proposing a detailed three-pillar regime for 'strategic market status' firms. According to this, a firm will have 'strategic market status' where it has substantial and entrenched market power and where the effects of that market power are particularly widespread or significant. Under the proposed regime, 'strategic market status' firms (a) will be subject to tailored and legally binding codes of conduct, which will be designed and overseen by the Digital Markets Unit; (b) may be subject to procompetitive interventions, such as interoperability requirements; and (c) will be subject to a special merger control regime, which will include an obligation to notify new transactions and to stand still pending their approval and a more cautious legal test for their assessment. In April 2021 the new Digital Markets Unit was indeed established within the CMA to begin work to operationalise the future procompetition regime for digital markets. In July 2021 the Government launched a public consultation on a new procompetition regime for digital markets, largely endorsing the framework proposed by the Digital Markets Taskforce. The consultation closed on 1 October 2021 and the Government is currently analysing the public feedback. On 4 October 2021 the CMA published its response to the consultation, expressing its strong support for the government's proposals and its commitment to providing all practical support as the work to develop the regime progresses.

Thirdly, in July 2020 the CMA, the Information Commissioner's Office (ICO) and the Office of Communications (Ofcom) launched a Digital Regulation Cooperation Forum. The Forum aims to support cooperation and coordination between the CMA, the ICO and Ofcom on online regulatory matters, and enable coherent, informed and responsive

regulation of the UK digital economy. Specifically, the Forum has six objectives: (a) collaborate to advance a coherent regulatory approach; (b) inform regulatory policy making; (c) enhance regulatory capabilities by pooling knowledge and resources; (d) anticipate future developments by developing a shared understanding of emerging digital trends; (e) promote innovation by sharing knowledge and experience; and (f) strengthen international engagement with regulatory bodies. In March 2021 the Forum published its plan of work for 2021-2022, prioritising three areas: (a) responding strategically to industry and technological developments, among others by establishing joint strategic projects where cooperation will help provide clarity and regulatory coherence, including service design, algorithmic processing, digital advertising technologies and service encryption; (b) developing approaches for delivering coherent regulatory outcomes where different regulations overlap, such as ICO's Age Appropriate Design code and Ofcom's approach to regulating video-sharing platforms; and (c) building skills and capabilities by developing practical ways of sharing knowledge, expertise, capabilities and resources, for example in AI and data analysis. In May 2021 the Forum published its response to the Department of Digital, Culture, Media and Sport (DCMS) on the future of the digital regulatory landscape and how to achieve coherence in regulatory approaches across digital services, which included a summary of ideas to address barriers to cooperation and measures to strengthen digital regulatory cooperation in future.

Fourthly, in February 2021 the CMA updated its Digital Markets Strategy, which was initially published in July 2019, in light of its work in this area and broader developments both within and outside the UK. In its revised Strategy, the CMA identifies four strategic aims: (a) using its existing tools to maximum effect; (b) building knowledge and capability; (c) establishing the regulatory framework and function; and (d) adapting its existing tools. With these strategic aims in mind, it then identifies seven priority areas of focus: (a) the work on establishing the proposed procompetition regulatory framework and function; (b) the use of the existing competition, consumer and markets regime powers to the maximum effect; (c) the work of the Data Technology and Analytics (DaTA) unit; (d) the work of the Digital Regulation Cooperation Forum; (e) pursuing and strengthening international cooperation; (f) supporting the Government on reform proposals for existing tools; and (g) updating existing CMA guidance, as needed. These priorities are also reflected in the CMA's Annual Plan for 2021/2022, according to which the authority will focus on the following four themes: (a) protecting consumers and driving recovery during and after the coronavirus pandemic, as well as supporting the UK economy by fostering competition to promote innovation, productivity and growth; (b) taking its place as a global competition and consumer protection authority as it assumes new responsibilities after the EU Exit Transition Period; (c) fostering effective competition in digital markets; and (d) supporting the transition to a low carbon economy. In this context, it is worth noting that in June 2021 the CMA launched a new market study on mobile ecosystems, following its market

study on online platforms and digital advertising. The statutory deadline for a consultation on whether to make a market investigation reference is on 14 December 2021, while the final report of the market study is due to be published by 14 June 2022.

References

CMA 111, Regulation and Competition – A Review of the Evidence (January 2020), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/857024/Regulation_and_Competition_report_-_web_version.pdf.

Reforming Regulation Initiative, Response from the Competition and Markets Authority (July 2020), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/904990/RRI_CMA_Response_.pdf.

UK Government, Digital Markets Taskforce: Terms of Reference (11 March 2020), available at www.gov.uk/government/publications/digital-markets-taskforce-terms-of-reference/digital-markets-taskforce-terms-of-reference—3.

CMA, Online Platforms and Digital Advertising – Market Study Final Report (1 July 2020), available at https://assets.publishing.service.gov.uk/media/5fa557668fa8f5788db46efc/Final_report_Digital_ALT_TEXT.pdf.

UK Government, Response to the CMA's market study into online platforms and digital advertising (November 2020), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/939008/government-response-to-cma-study.pdf.

CMA135, A New Procompetition Regime for Digital Markets – Advice of the Digital Markets Taskforce (8 December 2020), available at https://assets.publishing.service.gov.uk/media/5fce7567e90e07562f98286c/Digital_Taskforce_-_Advice.pdf.

UK Government, Non-statutory Digital Markets Unit: Terms of Reference (7 April 2021), available at www.gov.uk/government/publications/non-statutory-digital-markets-unit-terms-of-reference/digital-markets-unit-non-statutory-terms-of-reference.

UK Government Consultation, 'A New Procompetition Regime for Digital Markets' (July 2021), available at www.gov.uk/government/consultations/a-new-pro-competition-regime-for-digital-markets.

CMA Response to the government's consultation, 'A new procompetition regime for digital markets' (29 September 2021), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1022636/CMA_response_to_Digital_Markets_consultation.pdf.

Digital Regulation Cooperation Forum (1 July 2020), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/896827/Digital_Regulation_Cooperation_Forum.pdf.

Digital Regulation Cooperation Forum: Plan of Work for 2021 to 2022 (10 March 2021), available at www.gov.uk/government/publications/digital-regulation-cooperation-forum-workplan-202122/digital-regulation-cooperation-forum-plan-of-work-for-2021-to-2022.

Digital Regulation Cooperation Forum: Embedding Coherence and Cooperation in the Fabric of Digital Regulators (4 May 2021), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/982898/DRCF_response_to_DCMS__PDF.pdf.

The CMA's Digital Markets Strategy, February 2021 Refresh, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/959399/Digital_Markets_Strategy.pdf.

CMA137, CMA Annual Plan 2021 to 2022 (23 March 2021), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/972070/CMA_Annual_Plan_2021_to_2022_---.pdf.

CMA Press Release, Mobile ecosystems market study (15 June 2021), available at www.gov.uk/cma-cases/mobile-ecosystems-market-study.

Any other relevant developments that you wish to highlight

It is also worth noting the following relevant developments since October 2019.

Firstly, the UK left the European Union on 31 January 2020 and the Transition Period ended on 31 December 2020. In January 2020 the CMA published guidance on its functions under the Withdrawal Agreement, while in December 2020 it published guidance on its functions after the end of the Transition Period as well as a summary of the responses it received to its consultation on it. In brief, the legal framework in place before Brexit will continue applying to merger and antitrust cases initiated before the end of the Transition Period ('continued competence cases'). Post-transition, the CMA is able to investigate a merger that is also being reviewed by the Commission and it may open an antitrust

investigation applying national competition laws (Chapters I and II of the Competition Act 1998), but not Articles 101 and 102 TFEU. The European Commission has retained competence to monitor and enforce commitments given or remedies imposed in relation to the UK in EU antitrust and merger cases, although this responsibility may be transferred to the CMA by mutual agreement. It is worth noting that before the end of the Transition Period, in September 2020, the CMA had provided feedback to the European Commission's consultation on the Digital Services Act and the New Competition Tool.

Secondly, in February 2020 the UK Government commissioned the CMA to prepare and publish a regular state of competition report to raise their collective understanding of the level and nature of competition across the UK economy. This first-of-its-kind report was published in November 2020. The CMA based its analysis on a range of metrics covering the UK economy, including concentration, indicators of dynamic competition, profitability and mark-ups, profit and mark-up resistance, consumer surveys, high frequency data on business formation and closure during the pandemic; and data on consumer and business experiences during the pandemic. The CMA noted that the evidence for some of these metrics is mixed, but overall concluded that competition in the UK may indeed have weakened over the last two decades and that this gives sufficient cause for the CMA, regulators and government to remain vigilant in protecting and promoting competition. As noted in its recent consultation on Reforming Competition and Consumer Policy and in line with the recommendation in John Penrose MP's report on how the UK's approach to competition and consumer issues could be improved in future, the UK Government intends that the CMA produce regular 'State of Competition' reports assessing the strength of competition in the UK economy. These reports will provide better evidence to inform the Government's overall competition policy and help shape future action.

Thirdly, following up on the recommendations in the Furman Report, in Lord Tyrie's letter to the Government and in the Penrose Report, the UK Government recently consulted on a wide range of reforms relating to competition and consumer policy. These proposals were at least partly motivated by concerns that the current framework is too slow and ineffective to deal with problems in fast-moving markets and that these shortcomings will be amplified following Brexit in the light of the anticipated increase in the CMA's workload. Among others, in the sphere of competition policy, the UK government is considering (a) playing a more active role in the CMA's activities by providing more frequent and detailed Strategic Steers; (b) expanding the jurisdictional scope of Chapter I and Chapter II of Competition Act 1998 so as to ensure that conduct which does not take place within the UK or the abuse of a dominant position outside the UK will still be caught by the domestic competition rules where it has foreseeable negative effects for UK competition and consumers; (c) facilitating negotiated procedures including by streamlining the settlement process and by adopting a new settlement tool ('Early Resolution Agreements') for Chapter II investigations; (d) strengthening the CMA's powers to gather evidence and to sanction

those who do not cooperate with it; and (e) reforming the UK markets regime, including granting the CMA the power to adopt interim measures and to accept commitments at any stage of a market inquiry.

Fourthly, in line with its commitment to pursuing and strengthening international cooperation post-Brexit, in September 2020 the CMA entered into a Multilateral Mutual Assistance and Cooperation Framework with the Australian Competition and Consumer Commission (ACCC), the Competition Bureau of Canada (CBC), the New Zealand Commerce Commission (NZCC) and the Department of Justice (USDOJ) and Federal Trade Commission of the United States of America (USFTC). The Memorandum of Understanding sets out rules for the provision of investigative assistance among the participating authorities on a reciprocal basis with a view to facilitating the administration and enforcement of their competition laws. It is worth noting that, in line with the recommendation in the Penrose Report, in its recent consultation on Reforming Competition and Consumer Policy, the UK Government expresses its intention to introduce legislation that will provide for clearer and more flexible rules for information sharing between the UK's competition authorities and their overseas counterparts and will introduce new investigative assistance powers in civil competition and consumer enforcement investigations to allow the UK's competition authorities to use compulsory information gathering powers to obtain information on behalf of overseas authorities.

Fifthly, the CMA has continued using its consumer enforcement powers to tackle problems in digital markets, as the following examples demonstrate. Indeed, following the launch of an investigation into online reviews in May 2020, in June 2021 the CMA opened formal enforcement cases against Amazon and Google in relation to possible breaches of consumer protection law, having concerns that they have not been doing enough to tackle fake reviews on their sites. In January 2020 Facebook and eBay took action to address the CMA's concerns about fake and misleading online reviews being bought and sold on their sites. In December 2020, the CMA announced that, following up on work from the International Consumer Protection and Enforcement Network (ICPEN) and thanks to its own leading role, along with the Dutch and Norwegian competition authorities, Apple added a new section to each app's product page in its App Store containing key information about the data the app collects and an accessible summary of the most important information from the privacy policy, to tackle concerns that users were not given clear information on how their personal data would be used before choosing an app. In October 2020 and in the context of the CMA's investigation into the disclosure of paid for endorsements on social media platforms which was launched in August 2018, Facebook Ireland committed to do more to prevent hidden advertising being posted on Instagram. Last but not least, in August 2020 the CMA accepted that the changes that StubHub had implemented in relation to its ticket selling platform were adequate to address its concerns that StubHub had been, among others, failing to adequately warn people that tickets may

not get them into an event, using misleading messages about ticket availability and failing to ensure people know exactly where they will sit in a venue.

Sixthly, in the past two years, there have been a number of private enforcement cases relating to digital markets. In July 2021 two collective redress claims were submitted to the Competition Appeal Tribunal for damages caused by Google's and Apple's illegal conduct in relation to their app stores, i.e. the Play Store and the App Store respectively. The claim against Google submits that Google abused its dominance by (a) bundling the Play Store with other proprietary apps; (b) imposing a series of contractual and technical restrictions that restricted the ability of Android app developers to distribute Android apps via distribution channels other than the Play Store; (c) requiring that payments be made exclusively through Google's payments processing system, thus preventing Android App developers from utilising other payment processing service providers; and (d) charging excessive and unfair commissions in relation to certain in-app purchases. The claim against Apple submits that Apple abused its dominance by (a) imposing restrictive terms which require iOS App developers to distribute iOS Apps exclusively via the App Store and that all purchases are made using Apple's in-app payments processing system; and (c) by charging excessive and unfair prices in the form of commission of certain in-app purchases. It is also worth noting these practices formed part of a claim brought by Epic Games against Apple and Google before the Competition Appeal Tribunal, following the initiation of similar proceedings in the US. In February 2021 the Competition Appeal Tribunal dismissed Epic Games' request for permission to serve out of jurisdiction in relation to Apple and granted a similar request in relation to Google only in part.

References

CMA113, UK exit from the EU – Guidance on the functions of the CMA under the Withdrawal Agreement (28 January 2020), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/864371/EU_Exit_guidance_CMA_web_version_final_---2.pdf.

CMA125, Guidance on the functions of the CMA after the end of the Transition Period (1 December 2020), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/940943/Guidance_Document_for_End_of_Transition_Period_--.pdf.

CMA125resp, Guidance on the functions of the CMA after the end of the Transition Period (December 2020), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/940124/Summary_of_Responses_End_ofTransition Period_.pdf.

CMA's response to the European Commission's consultations in relation to the Digital Services Act package and New Competition Tool (September 2020), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/917455/CMA-response_to_DSA_and_NCT_consultations.pdf.

State of competition: letter from the Chancellor of the Exchequer and the Secretary of State for Business, Energy and Industrial Strategy to Andrea Coscelli, CMA (5 February 2020), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/863371/20200205-letter-from-beis-treasury-to-dr-andrea-coscelli-cma.pdf.

CMA133, The State of UK Competition (November 2020), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/939636/State_of_Competition_Report_Nov_2020_Final.pdf.

Letter from Andrew Tyrie to the Secretary of State for Business, Energy and Industrial Strategy (21 February 2019), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/781151/Letter_from_Andrew_Tyrie_to_the_Secretary_of_State_BEIS.pdf.

John Penrose MP Report, Power to the People (February 2021), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/961665/penrose-report-final.pdf.

UK Government consultation, Reforming Competition and Consumer Policy: Driving growth and delivering competitive markets that work for consumers (July 2021), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1004096/CCS0721951242-001_Reforming_Competition_and_Consumer_Policy_Web_Accessible.pdf.

CMA149con, Reforming Competition and Consumer Policy: Driving growth and delivering competitive markets that work for consumers (October 2021), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1022615/Reforming_Competition_and_Consumer_Policy_publication_4.10.21.pdf.

Memorandum of Understanding, Multilateral Mutual Assistance and Cooperation Framework for Competition Authorities (2 September 2020), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/914038/MMAC_---_pdf.pdf.

Press Release, StubHub makes changes to its UK site to address CMA concerns (19 August 2020), available at www.gov.uk/government/news/stubhub-makes-changes-to-its-uk-site-to-address-cma-concerns

Press Release, Instagram to tackle hidden advertising after CMA action (16 October 2020), available at www.gov.uk/government/news/instagram-to-tackle-hidden-advertising-after-cma-action.

Press Release, CMA and global partners secure privacy changes to the App Store (8 December 2020), available at www.gov.uk/government/news/cma-and-global-partners-secure-privacy-changes-to-the-app-store.

Press Release, Facebook and eBay pledge to combat trading in fake reviews (8 January 2020), available at www.gov.uk/government/news/facebook-and-ebay-pledge-to-combat-trading-in-fake-reviews.

Press Release, CMA investigates misleading online reviews (22 May 2020), available at www.gov.uk/government/news/cma-investigates-misleading-online-reviews.

Press Release, CMA investigates misleading online reviews (22 May 2020), available at www.gov.uk/government/news/cma-investigates-misleading-online-reviews.

Press Release, CMA to investigate Amazon and Google over fake reviews (25 June 2021), available at www.gov.uk/government/news/cma-to-investigate-amazon-and-google-over-fake-reviews.

Application No 1408/7/7/21, *Elizabeth Helen Coll* v. *Alphabet Inc and Others.*

Application No 1403/7/7/21, *Dr. Rachael Kent* v. *Apple Inc and Apple Distribution International Ltd.*

Application No 1377/5/7/20, *Epic Games Inc and Others* v. *Apple Inc and Another.*

Application No 1378/5/7/20, *Epic Games Inc and Others* v. *Alphabet Inc, Google LLC and Others.*

5.5 Report to the Plenary

Pieter Van Cleynenbreugel[37]

Taking place 18 months after the Congress reports had been drafted, the Working Group sessions devoted to "EU competition law and the digital economy" built upon rather than extensively discussed the different reports. Those reports were rather used as starting points for more fundamental reflections on the state of EU competition law resulting from its confrontation with different issues raised by digital economy players. As a consequence, the different panels predominantly focused on issues that were only marginally raised in the national and general reports. Among others, the following questions were raised: (1) Is simply having gathered data – without even having used them yet – already an indication or sufficient evidence of a barrier to entry and therefore a dominant economic position? (2) Should data be made available to competitors and how does this relate to the obligations flowing from data protection law? (3) What happens if two competing undertakings independently buy a self-learning algorithm that streamlines prices at which they sell their products to consumers? (4) Does or could such behaviour fall within the ambit of EU competition law? (5) Are specific regulations necessary to address gaps in EU competition law enforcement and, if so, how do those rules interact with EU competition law?

Absent case law on many subject matters, the answers to those questions at this stage remained speculative. Despite such speculation, it is clear that the contours of open legal questions to be addressed in the near future have become clear in this context. What came out of the discussions is above all that EU competition law in general and Articles 101 and 102 TFEU in particular remain remarkably stable. A tailored interpretation of those provisions could offer already some solutions to the questions raised and it will be exciting to watch those interpretations unfold in the upcoming years.

Notwithstanding the stability of Articles 101 and 102 TFEU, the working groups identified three points of attention that will increase in importance in the following year: (1) important lacunae in the interpretative framework accompanying Articles 101 and 102 TFEU, (2) the role of EU competition law in an increasingly regulated digital environment and (3) the resulting emergence and impact of an increasingly more legal approach supplementing the 'more economic approach' underlying EU competition law. Although the working groups did not offer final answers or even fully developed solutions to those points of attention, fruitful debates have allowed to set the scene for doctrinal and judicial answers to be provided for.

37 Professor at the Competition and Innovation Institute, University of Liège.

Lacunae in the existing legal framework

The working group discussions identified important lacunae in both the application and interpretation of Articles 101 and 102 TFEU as well as too limited attention devoted to effective remedies repairing competitive harm and tools allowing to ensure compliance by digital actors.

In terms of lacunae, four elements have above all been identified. First, the lack of a tailored market definition framework has been considered problematic. The European Commission's 1997 market definition communication does not take sufficiently into account the definition of two-sided markets that essentially – but not only – emerge in the digital economy. In addition, the fact that competition does not always take place in but also for a market may have to be factored in the Commission's decision-making practice in a more explicit manner. It is expected that the upgraded and updated market definition notice will address those issues. Second, the identification of what constitutes an abuse of dominance in the digital context may require important clarifications. Third, EU competition law does not offer a tailor-made answer to the issue of tacit algorithmic collusion. It is indeed unclear whether tacit coordination by self-learning algorithms would fall under Article 101 TFEU and to what extent the existing provision can accommodate for this. Fourth, although the European Commission's updated vertical block exemption Regulation and guidelines offer clearer rules regarding online sales and (exclusive and selective) distribution practices, it remains to be evaluated whether those rules are sufficiently broad and predictable to cover the variety of online distribution practices the digital economy generates.

As far as remedies and compliance go, the digital economy invites competition authorities to experiment with alternative remedies. However, a legal framework accompanying and streamlining the setting up of such remedies is still lacking. In the same way, important advancements can be made in stimulating compliance of digital economy players with EU competition rules. It is expected that, as more cases will emerge, those topics will also gain in importance.

EU competition law in an increasingly regulated environment

The application of EU competition law in the context of the digital economy makes clear that generally applicable competition law provisions operate in an increasingly regulated environment. The envisaged adoption of the EU Digital Markets Act (DMA) confirms this. Against that background, new questions regarding the role and objectives of competition law emerge. The working group discussions focused on two main issues in that regard.

First, the General Data Protection Regulation (GDPR) and other (emerging) rules on data and their relationship and/or compatibility with EU competition law are not fully clear at this stage. As those rules condition data sharing, it may induce anticompetitive practices. It is likely that in the near future, those questions will come more explicitly to the forefront and will have to be addressed by the EU Courts.

Second, the envisaged DMA can be considered an elephant in the room for EU competition law. Given its focus on ensuring the contestability of digital markets, important questions have been raised as to its nature and relationship with more general competition law. At this stage, it remains unclear whether the DMA rules are in essence Competition law or not. Formally speaking, the institutional rapporteur emphasised that the rules are a different kind of regulation, but in practice, the Commission will be tasked enforcing both sets of rules and will have to choose between which kind of rules to apply. If and when it would choose to apply the DMA, questions arise as to whether, in substance, the Commission is not applying competition law rules. An affirmative answer to that question would have important consequences for subsequent or parallel enforcement of (national or EU) traditional or specific competition law rules. To the extent that the DMA and competition law are said to protect the same legal interests, the ne bis in idem principle may become an important limitation on the cumulative or subsequent application of DMA and competition rules. In addition, the choice between enforcement on the basis of one or the other set of rules may have an impact on the subsequent possibilities for private enforcement by those having suffered damages as a result of certain practices. By way of example, it is unclear to what extent proof of an infringement of DMA rules could also serve as evidence of a violation of competition law in a follow-on private damages action before national courts. At present, many open questions remain in that respect.

The developments outlined here demonstrate that competition law concerns are increasingly factored into regulatory initiatives at EU level. As a result, competition law is increasingly being regulated. The question therefore arises to what extent enforcement practices in such regulated competition law fields will eventually have an impact on the general application and interpretation of the transversal competition law provisions outlined in the TFEU. Practice will have to show to what extent that is the case. At this stage, it cannot be excluded, however, that regulations such as the DMA will produce effects that will trickle down into the application and enforcement of general competition law rules.

The emergence and impact of a more legal approach supplementing the more economic approach underlying EU competition law

Although, for the past 25 years, the emergence of an increasingly more economic approach towards EU competition law has been advocated, the digital economy demonstrates a clear

return in favour of predictable ex ante rules and guidance. Questions can therefore be raised as to whether we witness the re-emergence of a more legal approach towards competition law and what that will mean within and beyond the framework of the digital economy.

The working group discussions made clear that this more legal approach does not reject a more economic approach. Economically sound principles need to be translated into sound and predictable legal rules or principles. In that way, EU competition law's clear embedding in a legal order grounded in the Rule of Law can be maintained and solidified. The emergence of more detailed legal rules shows that EU competition law's engagement with rule of law debates is simultaneously also taking shape.

A point of discussion that kept popping throughout the working group sessions against that background up relates to the objectives of competition law. Its application in the forays of the digital economy shows that there is still no consensus as to what it is that competition law wants to protect and how those objectives can be achieved best. The digital economy at least points out that a discussion of the objectives of EU competition law remains more than ever relevant.

The foregoing summary is only a brief and evidently incomplete reflection of the at times passionate debates that took place in the working group sessions. If there is one thing that came out of our debates, it must be that the application of "EU competition law and the digital economy" is far from settled. A lot of developments will take place and it will be most interesting to verify how the field has evolved in five to ten years' time and what its impact will be on competition law in general and beyond the confines of the digital economy. There was therefore consensus among working group participants that the topic should ideally be covered in a future FIDE Congress. A story to be continued …

6 Reports on Panel Discussions

6.1 Fit for the Future: What Role for Europe at Home and in the World?

Malu Beijer[1] *and Gijs van Midden*[2]

FIDE's first panel discussion on Thursday kicked off with a panel of "non-legal" thinkers. Caroline de Gruyter, Luuk van Middelaar and George Papaconstantinou were asked to give their views on the European Union's role at home and in the world. The reflections of these speakers on this theme were meant to give a broader outlook for the more specific legal debates that would follow on Thursday afternoon and the next few days of the FIDE congress.

The moderator, Christa Tobler, Professor of European Law at the Universities of Leiden and Basel, opened this panel discussion by recalling a discussion that was held on the same topic five years ago. At the time, during the Dutch presidency of the Council, a book titled *Fit for the future: Reflections from Leiden on the functioning of the European Union* was published. Back then, there was a series of so-called unprecedented crises: the financial and economic crisis, the migration crisis, the Rule of Law crisis, and the referendum on Brexit. The effects of these crises, as accurately noted by Tobler, can still be felt today.

Next up was the first speaker of this panel, Caroline de Gruyter, a journalist and lecturer based in Brussels and, amongst others, European Affairs correspondent and columnist for the Dutch daily newspaper *NRC Handelsblad*. In her introductory statement, De Gruyter made an analogy with the Habsburg empire and pointed out that Europe is mostly an internal project. She finds that the European Union is neither proactive at home nor in the world. It is, instead, reactive.

When a crisis, such as the euro crisis or the Rule of Law crisis, happens, the solution will need to appease all 27 member states. The EU is an internal project and is meant to keep the peace on the continent. That means that we have rules that we are all bound to. There can be no winners or losers: "They all need to share a piece of the pie", De Gruyter noted. The institutional and political balance and the pre-existing arrangements between the member states are upset by such crises. The same happens when an external crisis hits the EU, such as the migration crisis or Russian cyber-attacks. Member states will need to negotiate first before a European solution can be provided. For this reason, we cannot

1 Senior legal policy officer at the Netherlands Ministry of the Interior and Kingdom Relations.
2 Coordinating specialist advisor and EU advisor at the Netherlands Council of State.

work ahead, she said. The EU can only act when the member states want it to act. At the same time, De Gruyter explained, these reactions of the member states are logical. The European Union is, first and foremost, a project that is meant to keep peace at the European continent.

De Gruyter also commented that the European Union is getting better at this process and is learning from the crises. During the Covid-crisis, for example, a collective vaccine procurement was initiated. It took some time, and the European Commission was mostly reactive, because all member states have wish-lists and a different take on what happens. What comes out is always some kind of compromise, but in the end a good solution was found. De Gruyter finds that we have no alternative than to accept that this is how Europe works. We have to muddle through, just like the Habsburg Empire did, which lasted 600 years! Sometimes we are good at it, like the vaccine procurement, sometimes we are not, like the migration crisis. The European Union, like the Habsburg empire, is an interstitial power, being surrounded by countries that want to weaken it, without being well prepared for upcoming dangers. The Union is using Habsburg tricks, like delaying tactics and making alliances even with non-friendly powers, and has become good at navigating in its environment. De Gruyter ended her introductory remarked with the statement that "everything is a compromise and nothing can be perfect. Not at home, nor in the world".

Next, Luuk van Middelaar, Professor of EU law at Leiden University and, amongst others, political commentator for *NRC Handelsblad*, reflected on the European's response to the Covid-crisis. He commenced by saying that "any crisis is a moment of truth. You get to know your friends in professional as well as personal life". Van Middelaar found a remarkable contrast between the very bleak and bitter scenes at EU level at the moment of the outbreak at the crisis – in February and March 2020 – and the rather surprisingly robust response five months later. At first, there was a lot of panic. Italy, for example, cried for help, and everyone was asking for face masks. No help came, however, and borders were even closed. There was a lack of financial solidarity. Some suggested that this was the end of the EU. Five months later, however, we were buying vaccines together and, perhaps even more revolutionary, also a recovery fund was devised. That leaves us with two questions: why the panic at the outbreak and why the speed of the response?

This panic during the outbreak, Van Middelaar explained, happens all the time. People very soon predicted the end of the achievements, like Schengen or the euro, sometimes out of a certain interest. During the outbreak of the plague in London in 1665, as Daniel Defoe wrote in his book, people were locked up as well. Thousands of people were dying. Later on, people were making fortunes by selling brochures about the end of the world. Such prophecies of doom appeal to human nature. There is also something else. In the EU we need existential threats, or at least, we need to emphasize certain threats to put those who are more reluctant to take action. Van Middelaar then quoted Herman van Rompuy. When he led complex negotiations with the member states, he said that he would have to

wait until the member states felt that they were in front of the abyss, with their back against the wall and a knife against their throat. This is how the European Union works. It is, after all, not a state.

On to a more positive note and in reaction to the second question, Van Middelaar found the response to the Covid-crisis – as compared to the euro crisis – was quick. Previous crises, such as the financial crisis, has taught us a lesson. The system is now more robust, with, for example, a European Stability Mechanism being put in place and the ECB having learned how to react. But there was also an "emergence of the European public sphere". There was a public outcry for help, from Italy, Spain, and other places as well, and it was very visible to everyone: "Europe has to act". Public health therefore became a common interest and the EU provided help. At the same time, this also learns us, that we need panic before we can even act and, according to Van Middelaar, we need to work on this.

Third speaker of the panel discussion held "amongst a sea of lawyers" was economist George Papaconstantinou, Professor of International Public Economy at the European University Institute, Chair at the School of Transnational Governance. He provided remarks on three themes: policies, institutions and investments. As to the first, the main question is whether our economic policy stance and toolkit is fit for the future? We have learned a lot of the eurozone crisis, in which we were late, we misinterpreted the crisis (as a fiscal crisis instead of a banking crisis) and we improvised. Overall, we overcame the crisis, although at a huge social cost in a number of countries. Today, however, we have a toolkit, which is much more in tune with the times. Compared to the response to the eurozone crisis, Papaconstantinou also found, the response to the Covid-crisis to be quick. We pulled out all the stops: Member states were allowed to spend and the Next Generation EU was put together.

But we are now in crunch time, Papaconstantinou underscored. We have to rethink the tools and start a very difficult debate on the Stability and Growth Pact, like on the right levels of debt rates, since the government debts are increasingly higher than before the crisis. The ECB has swiftly responded to the crisis, but is also adapting to the circumstances, by e.g. integrating climate goals in its toolkit and thinking about the digital Euro. There are huge disagreements on how far this may go, given its mandate. Courts and countries are vocal on the ECB's actions.

Secondly, the Covid-crisis has learnt us that institutions are not sacrosanct. Papaconstantinou remarked that institutions are time and situation specific. They always emerge, as they are a compromise, and are often suboptimal. It is necessary to challenge whether the EU's institutions indeed acted appropriately. He cited the foundation of the ESM, as a good example of a necessary evolution of our toolkit. That is positive and we need to be open for that, Papaconstantinou finds. At the same time you have to challenge whether they do the things for which they are designed originally. Political legitimacy and more accountability is needed this time.

Thirdly, with regard to investments, we have learnt that taboos can be broken. Papaconstantinou referred to the Next Generation EU fund. This instrument is breaking a number of previous rules, in terms of transfers, the common issuance of debts and the fact that the EU has new own resources. This is an incredible achievement, as it can open a whole new avenue for common actions. But Papaconstantinou warned, we need to find appropriate responses to the next crisis we will face. Europe is falling behind in several areas, such as in the climate crisis and as regards digitalization. Papaconstantinou found that we need to think beyond the nation states. Leaders of the member states all think about what they bring home, but they need to think about what is needed to go forward collectively. It is time to go beyond the existential crises, because the European Union is resilient.

Following these statements, Tobler asked the speakers some further challenging questions: What does the EU still need to be fit for the future? And how can the EU deal with the new crises that already lie ahead, such as the digital and the climate crisis?

De Gruyter responded to this by affirming that some crises, like the euro crisis, may well return. But changes can be seen. For example, as to Eurobonds, Germany has ceased its resistance against them. The position of Germany within the EU during the corona crisis also illustrates that we need leaders. Leaders that explain the EU's policies at home well and make the case for the EU. Merkel showed us this. During the first lockdown, she saw that Italy was heavily affected, and started to worry about the internal market. This is how she sold the idea of giving money to Italy, instead of lending it. The whole single market would, Merkel explained on German television, be disbalanced if German and Italian companies would compete. The *Bundestag* passed the solution with an overwhelming majority. It is, thus a matter of political will. In this regard, De Gruyter also remarked that the populist leaders don't seem to be anti-EU anymore after the Brexit. Instead of exiting the EU, they want to change it from the inside. In that sense, they are "willing to play the game" in Brussels. Let them come forward, she added, and let them take part in the political fights we have in Brussels. Brussels will become more grown up because of these new politicians.

According to Van Middelaar, the key word of today is strategic autonomy. Whereas, first, this has been treated in irony and for most in a military sense, after Brexit, Trump, Chinese takeovers in German high-tech industries, things began to change. Now, there is a lot happening in industrial policy, as regards foreign direct investment screening and the question is on the table whether we should treat the rest of the world differently than ourselves. The EU needs to be less naïve. But the recent developments in, for most, economic law shows the capacity of the EU to adapt, although slowly. However, when it comes to populist politicians and leaders, Van Middelaar is less optimistic than De Gruyter, as they may also make the situation in the EU worse.

Papaconstantinou also saw that things have changed after Chinese investors moved up from the south to the north. The EU is between the US and China, not sharing the fear of the Americans that China is planning world power. The EU can take a more equilibrated and intelligent position. It is necessary to have a more forward looking response, also to the new challenges in the climate and the digital sphere. We should embrace what is happening on these issues and stop looking backwards, being afraid of what's happing. Besides that, Papaconstantinou found that we should be listening more to the Eurobarometer and what citizens want. People actually want more action at the European level than some may think.

With only little time left, few questions could be taken from the audience during this panel discussion. What reforms are necessary for the Court of Justice of the European Union, was asked? Papaconstantinou reiterated, more generally, that we have to communicate better to European citizens. Here, there is a big difference with the United States, and its Supreme Court. In the US people know about the judgments of this court. He noted that the only good thing which may come from the challenge of supremacy of EU law, is that people are waking up and see that there is an issue here. Better explanations by courts have become necessary. The next, and final, question was also raised on this last topic. How do we need to respond to the challenges coming from certain Central and Eastern European member states on the supremacy of EU law? Van Middelaar answered that although this is a very worrisome event, there is a much bigger, political, problem that lies underneath which we should focus on instead. There is a risk of Poland becoming an autocracy. That is much more worrisome than the rather technical issue of supremacy. The EU should not lose sight of that more important political battle in Poland. With this final statement, the first discussion panel of the FIDE congress came to an end.

6.2 The Role of Courts in Upholding the EU's Foundational Values in Article 2 TEU

Elise Filius[3] *and Eva Grosfeld*[4]

On Saturday morning, five speakers joined for a discussion on the topic: "The role of courts in upholding the EU's foundational values in Article 2 TEU". Moderated by Professor Rick Lawson, the discussants spoke about the rule of law – a recurring theme during the FIDE congress – the other foundational values of the EU, and how these relate to the Member States' constitutional traditions.

3 PhD candidate at the Institute for Criminal Law and Criminology, Leiden University.
4 PhD candidate at the Europa Institute, Leiden University.

The first speaker was Lucia Serena Rossi, judge at the ECJ, who shared her personal views on Article 2 TEU and its values. Judge Rossi emphasized that Article 2 embodies the core values of EU membership and must be given sense by assessing it within the framework of other Treaty provisions. As a start, she noted that Article 49 TEU imposes the condition for a European state that *voluntarily* wants to accede to the EU to comply with the values as laid down in Article 2. Article 2 thus not only contains the fundamental values, but also the *foundational* values of the EU.

Judge Rossi proceeded by underlining the relation between Article 2 and Article 19 TEU as can be seen in the *ASJP* case (Case C-64/16). Moreover, when reading opinion 2/13, where mutual trust is connected to respect for the values, or Opinion 1/17, where the ECJ noted that the values of Article 2 TEU are a part of the EU's constitutional framework, it is clear that Article 2 is at the core of the European constitutional identity.

This brought Judge Rossi to a comparison between Article 2 and Article 4(2) TEU on national constitutional identities. According to her, the true nature of Article 4(2) emerges when structural elements of the national constitutional identity are evoked which go against the general interest of the EU. Here, it is the task of the ECJ to embody the traditional theory of counter-limits developed in national legal systems within the EU legal order. However, she emphasized that ultimately, Article 4(2) cannot prevail over Article 2. In case of divergence between national constitutions and EU fundamental principles only two options therefore remain for the Member State: amendment of the national constitution or withdrawal from the EU. In the end, Judge Rossi stated that, in order to protect the values enshrined in Article 2, all remedies provided for by the Treaty must be applied.

Next, Kees Sterk, senior judge at the district court of Zeeland-West-Brabant, professor at the University of Maastricht, former vice-president of the Dutch Council for the Judiciary, and former president of the European Network of Councils for the Judiciary (ENCJ), gave five points what judges can do *outside* their judgments to uphold the independence of the judiciary.

First, Judge Sterk mentioned dialogues with judges or councils from other European Member States, especially those where the independence of the judiciary is under attack. He stressed that dialogues can only be fruitful in case of a common ground for dialogue, where the common ground should be that the rule of law-values are law, and not just political concepts as expressed by the recent ruling of the Polish 'Constitutional Court' (para. 19).

Second, on the common basis that the rule of law is law, judges should further articulate common standards in Europe, as the Consultative Council of European Judges, the Venice Commission and the ENCJ have been doing for many years. This process of articulation should be accelerated in the context of the growing attacks on the independence of the judiciary. According to Judge Sterk, articulation must lead to problem identification in European countries and problem solving. This should be done in (informal) dialogues

with other national and European actors such as judges, courts, universities, parliaments, governments, and the European Commission.

Third, Judge Sterk emphasized that judges should make clear, especially to politicians, that the common European rules on independent judiciaries are neither vague nor arbitrary. He gave two very clear common standards: (1) appointment and promotion of judges should be done based on merits and experience, not based on loyalty to politicians, companies, or anyone, as the only loyalty judges have is to the law; and (2) disciplinary proceedings and dismissals should not happen based on the content of a judgment. Judge Sterk noted that there is no room for (European) politicians to compromise on these concrete rules which are deeply rooted in the common European traditions.

In his fourth point, Judge Sterk noted that an important strategy for judges in upholding the rule of law is to use all instruments EU law provides for. However, in case the rules of a constitution are not working any more or EU law is not executed by the Commission, another strategy is more important: reaching out to the public – for example, in schools or during rock festivals on marketplaces – just as Polish judges do to gain the public's trust by explaining to them what judges do and why they should be independent. He advised other judges to follow their path and not wait until their judiciary is full under attack by politicians, because at the end of the day, this might be a better safeguard for independence, especially in case of a parliamentary majority hostile to judicial independence.

As a final point, Judge Sterk stressed that when the rule of law and the independence of the judiciary are at stake, judges have a duty to defend it, even when that implies entering the political debate.

Judge Síofra O'Leary, judge at the European Court of Human Rights (ECtHR), presented some personal views on the sources of the EU values as laid down in Article 2 TEU and what this says about the interaction between the ECJ, national courts and the ECtHR. She underlined that the values in Article 2 mirror those in the Statue of the Council of Europe and in the preamble of the European Convention on Human Rights (ECHR). The symmetry of values relied on by the two European courts manifests itself in general and concrete ways. She further noted that the ongoing dialogue between the two European courts on issues such as the rule of law is a dialogue driven by national courts as evidenced by leading preliminary references in this field and individual complaints brought by judges, prosecutors, and litigants to the Strasbourg court. In such cases reference is explicitly made to common constitutional traditions, the ECHR and, often implicitly, to Article 2 TEU. However, Judge O'Leary questioned whether it was necessary to reflect on whether references to common values are being framed effectively. When key principles of the EU legal order, such as the autonomy of the EU and the ECJ or the principle of effectiveness are added to the mix, they may create a false impression of a top-down imposition of external values rather than something that is born of Member States' own constitutional

and national heritage. That the impression is false does not mean that it should not be engaged with.

According to Judge O'Leary, it could be argued that in the case-law of the ECJ, Article 2 is seen too rarely in the company of Article 6(3) TEU, the preamble of the Charter, where the origins of the common values are clearly identified, or Article 6(2) TEU, where the legal basis of the future relationship with the ECHR still resides. Like Judge Rossi, she noted that another example is Article 4(2) TEU. Here, although she agreed with Judge Rossi that national identity cannot provide grounds to decline or derogate foundational values, Judge O'Leary emphasized that this does not render Article 4(2) obsolete. Judge O'Leary also recalled the considerable care taken since the Treaty of Lisbon to bed in the EU Charter while avoiding its potentially centrifugal force. Despite the essential role of Article 2, it is worth asking whether limits to the potentially centrifugal force of this Article are not to be found in some of the mentioned Treaty Articles or in the softer, more inclusive terms of the Charter. She considered that the discourse of values is very powerful but wondered whether, beyond Articles 2 and 19(1) TEU, which work very effectively in tandem, that discourse might also harbour a broader approach to Article 2 and the more consistent location of the origins of these values at both the national and European level would very likely enhance, rather than undermine, autonomy and authority.

When turning to the role of the Strasbourg court, Judge O'Leary noted that recent case-law on questions relating to the rule of law and, beyond that, solidarity, highlights the ECHR's reach and robustness. ECtHR case-law provides a judicial x-ray of a Contracting Party's Article 2 'state of health'. She noted that the Strasbourg court has developed a pilot judgment procedure as a means to identify structural problems underlining repetitive cases (a possibility now being discussed in the EU context), and that judgments finding violations of the Convention are powerful tools which position human rights, the rule of law and democracy in domestic public discourse. Finally, she observed that the Commission's Rule of Law Reports extend beyond questions relating to judicial independence to others concerning anti-corruption frameworks, freedom of expression and media pluralism. In the latter regard it is in Strasbourg case-law and Council of Europe bodies that hard and soft law mechanisms have been developed to tackle such problems.

On a final note, Judge O'Leary concluded that one should remember the sources and inspirations of all Article 2 values, which serve the rights, interests, and aspirations of all Europe's citizens. When that provision was first developed, great emphasis was placed in the Constitutional Convention on equality, solidarity, and social justice. The crises which have engulfed Europe ever since highlight the importance of these other Article 2 values.

Raiko Knez, president of the Constitutional Court of Slovenia, agreed with the other panel members that a dialogue between the ECJ and national courts is important. In his view, this dialogue has been given too little attention. He noted that when the EU was still a Community, it was easier for national constitutional courts to apply consistent

interpretations to the EU and national legal system. Yet, with the transition to a Union, core dilemmas on values arose, and the intertwining values at the national, EU and international level became more complex. National (constitutional) courts must engage with these three levels and come up with a consistent interpretation.

According to President Knez, national constitutional courts sometimes feel side-lined by the ECJ in deciding on core dilemmas. As an example, he referred to the situation where the ECJ, in answering a preliminary question from the regular court, de facto decides on the individual case. If the case reaches the constitutional court, it is already decided upon. President Knez called for a more sensible approach to issues that touch upon national constitutions and stressed that, in his view, a dialogue should accommodate EU and national sensibilities on values issues.

Finally, David Kosař, associate professor of Constitutional Law at Masaryk University, focused on the limits of courts to uphold the EU's fundamental values, and delved into the necessary dialogue between courts and the general public. He stressed that we are living in a world of competing claims of authority. As the most convincing claim will win, a dialogue with the people is necessary to gain their support and protect the rule of law. When public trust is fragile, principles of the rule of law are at higher risk to be sacrificed. In order to gain the public's trust and mobilize the people to defend the rule of law, Dr. Kosař highlighted a few possible solutions. First, we should educate people in the values of Article 2. In his view, currently little is said about these values in high school curricula and even in legal education. Courts should also engage with the public more effectively, including through social media. Second, ECJ and other EU bodies should engage with domestic constitutional scholars who have interpreted concepts such as judicial independence for decades instead of trying to reinvent the wheel. Third, innovative solutions such as online courts and greater use of fourth branch institutions may be helpful in broadening the way to access to justice. Dr. Kosař pointed out that many people do not care about judicial independence and the rule of law simply because they have never been to court nor have contemplated about going to court as a means to resolve a dispute. Online courts can change that. Furthermore, focusing on the fourth branch institutions – guarantor institutions such as ombudspersons, election commissions, audit bodies and independent administrative agencies – could enhance the legitimacy of the courts and diffuse the pressure from political branches.

Finally, Dr. Kosař reminded that when responding to the rule of law problems in EU Member States, it is crucial to consider constitutional conventions and informal practices that underpin Article 2 values. According to him, the EU institutions must also accept reasonable disagreement on separation of powers and judicial independence, where consensus is much lower than regarding fundamental rights.

After these enlightening speeches, Professor Lawson opened the floor for discussion between the panel members and the audience. The discussion was focused on the relationship between EU values and common constitutional traditions, in particular on the relationship between Article 2 and Article 4(2) TEU.

In reaction to Judge O'Leary, Judge Rossi stressed that when it comes to common constitutional traditions, emphasis lies on the word 'common'. Although national constitutional courts should point out their core national values to the ECJ, in the end it is up to the ECJ to accept constitutional traditions as common and accept derogation.

President Knez noted that at the end of the day, content is more important than putting the right label such as value, principle, or common tradition on the matter. When disagreements on core dilemmas arise, the European courts – meaning the ECHR, ECJ and national courts – should unitedly find a solution as they are the backbone of the system.

Judge O'Leary remarked that it is one thing for the ECJ to identify what constitutes as a general principle under Article 6(3) TEU, but it is quite another to identify the origins of the values as laid down in Article 2 or the sources, origins, and lodestars of the EU-Charter. Building on what was previously said by President Knez and Dr. Kosař, she emphasized that when it comes to Article 2 and the interplay between Article 2, the EU-Charter, Article 6 TEU and other provisions, it is necessary to involve constitutional courts and scholars on the development of these issues.

Joining the discussion, Professor Daniel Sarmiento called for caution when dealing with Article 4(2) TEU. The perception should be avoided, he argued, that the EU tells its Member States what their national identity is. Ms Thérèse Blanchet, the Director General of the Council Legal Service, reminded all of the fact that the Treaty of Maastricht had stated, in Article F, that the Union respects the national traditions of the Member States, "whose systems of government are founded on the principles of democracy". This close link between national traditions and the rule of law should not be forgotten.

When the panel members were asked to deliver their final message to the audience, Judge Sterk mentioned that it is important to remember that all will be in vain if there is no trust from society. Dr. Kosař noted that in the debate on defining Article 2 values and national constitutional identity, other actors than courts should also be involved. President Knez would like to see that the judiciary as a whole would end the era of disintegration and give clear guidance on how to go forward. Judge O'Leary stressed that the general public does not understand the rule of law, and that, in order to connect with ordinary men and women, we need to engage with the other values too. Judge Rossi brought the panel to a close by stating that the ECJ does not want to expand its power, but only aims at defending the EU legal order, and that although times are difficult right now, the ECJ is in a good position to do so.

At the end of the session Professor Lawson concluded that, as proven by the fact that the panel members were still standing despite their undoubtedly weary legs, "united we stand, divided we fall".

7 Speeches

7.1 Welcome Address by the President of FIDE XXIX

Corinna Wissels[1]

Opening Ceremony, 4 November 2021

Madame la Présidente de la Cour Supreme des Pays Bas,
Monsieur le Président de la Cour de Justice
Monsieur le Président du Tribunal
Chers collègues, chers amis mesdames et messieurs,

Nous sommes extrêmement heureux de vous accueillir ici à la Haye pour la XXIX édition de la FIDE. Lorsque nous nous sommes lancés dans cette aventure, nous étions loin d'imaginer ce qui allait se passer. Apres les difficultés de la crise financière, de la crise des réfugiés et du Brexit, nous voulions aller de l'avant. La pandémie s'est avérée être le « cygne noir » légendaire.

Und dennoch, hier sind wir nun. Aus FIDE 2020 ist FIDE 2021 geworden. Eineinhalb Jahre später sind wir in der glücklichen Lage, uns persönlich treffen zu können, zu diskutieren und Kontakte zu knüpfen. Die Unterstützung und Ermutigungen auf diesen Weg haben wir sehr zu schätzen gewusst. Unsere Berichterstatterinnen und Berichterstatter, unsere Rednerinnen und Redner, unsere Young FIDE – Europarechtlerinnen und Europarechtler, unser Medienteam bei EU Law Live, unsere Sponsoren und vor allem Sie: Sie haben uns treu zur Seite gestanden.

Dear colleagues and friends, on behalf of FIDE and the Dutch Association for European law, I finally have the great privilege and joy to declare open the XXIX FIDE Congress in The Hague.

Twice before did FIDE convene in The Hague, in 1963 and 1984. The impact of FIDE on the development of European law has been well-documented. From the outset FIDE formed a unique transnational network bringing together key actors, who stood at the

1 State Councillor at the Administrative Jurisdiction Division of the Dutch Council of State, president of FIDE XXIX.

basis of the new legal order and shaped European law as a discipline in its own right. The Court's "constitutional" understanding of European law was discussed and found broad support at FIDE's early conferences in The Hague in 1963 and Paris in 1965. In the early 1960s European law had yet to achieve its full potential. In 1984, FIDE discussed Europe and the media and the principle of equal treatment in Economic law. Few of the participants then would have been able to predict the way in which the European legal order has matured. The degree of integration between the peoples of Europe. Or the fact that today virtually no aspect of our daily lives remains untouched by EU law. Just to mention one: the digital economy that will also been on our agenda the coming days.

The continuous development of EU law entails that our work is never finished. As new questions arise that need to be discussed and answered. The challenges the European Union face are huge and imminent. It therefore remains important to bring together European lawyers from all Member States to listen, discuss and understand EU law.

European cooperation is not just an option, it is a necessity. Yet this cooperation can only function on the basis of mutual trust, on the understanding that all members of the Union adhere to the same core values. And we all know that these concepts are not just of academic interest. Recent challenges to the rule of law, mutual trust and the primacy of EU law have a significant impact on the actual functioning of our cooperation within the Union. Primacy of EU law does not only concern the relationship between the EU and a specific Member State. It is three-dimensional, affecting a Member State, the EU and the other Member States. The lack of primacy of EU law, which is common to all Member States, may compromise the principle of equality of the Member States before the law.

At the same time, we also witness that the EU is a system that functions remarkably well. Every day, so many representatives of the member states and of the EU Institutions come together to decide upon a great variety of issues, searching for and agreeing to compromises. We all know: these compromises are never perfect, yet essential. I firmly believe that the European Union can and should be the framework to flourish and enhance cooperation between the European citizens and Member States, strengthen free trade, free movement of persons, solidarity and mutual trust and provide for a sustainable healthy environment.

And these past one and a half year, the pandemic has shown us that we Europeans are connected to the world, as well as to each other. The initial reaction to the pandemic may have been a turn to national measures and national solutions. We all recall the attempts to close internal borders. And yet the Union also proved to have its value, with a common approach to the approval of the vaccines, and the EU coronavirus recovery plan. Once more a crises has given a new impetus to European integration.

Ladies and gentlemen, our initial programme has proven resilient and topical. Fresh challenges to the primacy of EU law, the importance of personal data for security and health, and new legislation regulating Big Tech. These are just a few development that will

take centre stage in the coming days. Our panel discussions on the future of Europe and the safeguarding of European values remain equally relevant.

My hope for present and future members of FIDE is to continue the debate and inspire new generations to actively participate in the debate on the future of the EU and the role of its legal framework. I am grateful that today we have in our midst all generations. Let me specifically mention a well-respected representative of the very first generation of European lawyers and FIDE participants, Laurens Jan Binkhorst. He was there in 1962, in 1984 and today. Present as well are many young European lawyers. We are proud to continue and expand on the recent tradition of organizing a Young FIDE programme in cooperation with the Europa Institute of Leiden Law School. After a first event in Estoril, the Young European Lawyers will organise their second FIDE event later this evening, where they can meet in an informal setting. Let me also mention that the students in the blue sweaters with FIDE logo, assisting the FIDE team the coming days, are all student European law from Leiden Law School.

Before passing the floor to the next speakers, I would like to thank and congratulate all those who have contributed to the organization of the Congress. In particular, I should like to express our special gratitude to the Court of Justice of the European Union, the city of The Hague, the Ministry of Foreign Affairs and the Ministry of Economic Affairs and Climate policy, Leiden Law School and its |Europa institute.

Finally, I should thank the FIDE 2021 team. Let me mention Marlies Noort, Herman van Harten, Jorrit Rijpma, Marleen Botman and Clara van Dam. And I should also mention Carina van Os, student assistant from Leiden Law School who joined the team recently. Without their work and support we would not be here today. I also want to thank FIDE's Secretary General Charlotte Schillemans and treasurer Armin Cuyvers for their excellent work for FIDE. There are many other members from the Dutch Association for European Law, who have put in valuable effort and work, and inspired the FIDE 2021 team to make this Congress happen.

Ich freue mich auf interessante und produktive Debatten und bin mir sicher dass dieser XXIXe FIDE-Kongress erfolgreich wird sein.

Le fait que nous puissions discuter de l'état de l'Union et de son ordre juridique ici et aujourd'hui, en présence des uns et des autres, plutôt que derrière nos écrans d'ordinateur, fait déjà de ce congrès un succès.

I thank you for your attention and wish you all excellent, fruitful and inspiring days.

7.2 Speech by the President of the Court of Justice of the European Union

Constitutional Relationships between Legal Orders and Courts within the European Union

Koen Lenaerts[2]

Opening ceremony, 4 November 2021

President Wissels,
President van der Woude,
Executive Vice-President Timmermans,
Excellencies,
Dear colleagues,
Ladies and Gentlemen,

It is a great honour to address you at the opening ceremony of this 29th FIDE congress, and I am particularly pleased to be here in such eminent company.

I am very grateful to President Wissels, in particular, and to all the other organisers of FIDE for having made this event happen in spite of all the difficulties that they have faced. I would also like to thank our Court interpreters for being here since without them this congress would not be possible.

FIDE is a real success story. It provides a unique forum for bringing together practitioners, judges and academics from all over Europe and beyond to discuss EU law. We have all looked forward to this year's congress with particular anticipation, given that it had to be postponed due to the unprecedented COVID-19 pandemic. So I am glad that we are all here – physically present – to discuss where EU law currently stands and what lies ahead. Our host city, The Hague, with its renowned judicial and legal traditions and institutions, provides the perfect venue for our discussions in the coming days.

I would like to share with you today some thoughts concerning the role of the Court of Justice of the European Union and the position of EU law in general, in light of the challenges that we currently face.

The authority of the Court of Justice has been challenged in various Member States, as has the primacy of EU law, not only by politicians and the press, but also before and

2 President of the Court of Justice of the European Union and Professor of European Union Law, Leuven University. All opinions expressed herein are personal to the author.

even *by* national courts, including certain constitutional courts. This is an extremely serious situation and it leaves the Union at a constitutional crossroads. I believe it is no exaggeration to say that its foundations as a Union based on the rule of law are under threat and that the very survival of the European project in its current form is at stake.

That being so, I would like us for a moment to take a step back and to remind ourselves what the role of the courts is in a democratic society, and more particularly in a Union such as ours.

As guardians of the rule of law, courts guarantee that both public authorities and private citizens respect the rules of the game. When required, they must uphold the rights of the few against the will of the many, even if that means delivering unpopular rulings. Courts must deliver their judgments without fear nor favour.

Formally, the power of courts is grounded in a basic text, be it a Constitution or a Treaty. However, it is ultimately a society's commitment to the rule of law, democracy and fundamental rights that gives force to that document and thus to judicial decisions. Without respect for those values, a Constitution or a Treaty is no more than a piece of paper.

Therefore, individuals must be convinced – and must constantly be reminded – that in order for them to enjoy liberty and justice, judicial decisions must be respected, in particular by the losing party. It is therefore to be welcomed when government officials state publicly that, although they may not agree with the outcome of a particular case, it is their duty to respect the ruling and to enforce it. By contrast, when public officials state that courts are biased because they did not rule in their favour, when they criticize judges personally or fail to react when the press call them enemies of the people, they undermine the rule of law.

The same damaging consequences may ensue when courts themselves no longer respect each other and replace dialogue with open confrontation. That is particularly true in the EU, whose legal order is based on cooperation between the Court of Justice and national courts, as well as amongst national courts themselves.

In order for that cooperative system to operate properly, both the Court of Justice and national courts must respect the division of jurisdiction laid down in the Treaties. Like any legal system, the Union's legal order can only function if it is clear who has the last word in declaring what the law is. Thus, in accordance with Article 19 TEU, as well as the requirements of uniformity and equality before the law, the Court of Justice must have the last word in saying *what EU law is*, just as national constitutional courts have the last word when interpreting their own constitutions. Moreover, the primacy of EU law, as interpreted by the Court of Justice, must be respected wherever it applies since, in the absence of uniform application of that law, it could no longer fulfil its unifying role as the law common to the Member States.

It is also important to emphasise in this context that, as the Court of Justice made clear in *Wightman*,[3] membership of the European Union is voluntary. It is based on a democratic and sovereign choice made by each Member State to join the Union and to accept the rights and obligations inherent in membership. Member State sovereignty is pooled, not relinquished. While I sincerely hope that no Member State will ever again feel the need to exercise its rights under Article 50 TEU, the fact that those rights exist reinforces the legitimacy of EU law. For as long as a Member State remains in union with its European partners under the EU Treaties, all of its public authorities – including its highest courts – must respect the primacy of the law created by those Treaties, as interpreted by the Court of Justice. Failure to do so undermines the equality of Member States under Union law and contradicts the democratic and sovereign choice made by the Member State in question, under its own constitutional law, to join the Union and to remain within it.

European integration through the rule of law took seventy years to build. The Court of Justice is not the new kid on the block. The Treaties may have been amended on several occasions but the Court of Justice and the principles governing its jurisdiction are as old as the first post-war constitutional courts established in Europe. The Court of Justice has incorporated many constitutional traditions common to the Member States into the constitutional fabric of the EU, thereby ensuring that EU law and national constitutional laws are deeply intertwined. Moreover, in recent years, the Court of Justice itself has been called upon to deal with a considerable number of cases – some of which are still pending – that relate directly to those common traditions, in particular the rule of law and solidarity at Union level. The Court of Justice and the constitutional courts of the Member States should be natural allies, not adversaries, in this context.

It is also important to stress that, in spite of the difficulties to which I have just alluded, the work of the Court of Justice in dealing with the cases that come before it, and in particular with the references for a preliminary ruling that it receives from Member State courts, continues smoothly and serenely. Over the past five years, the Court of Justice received a total of 2 768 such references. That number, which has continued to rise unabated – except for a small drop in 2020 at the height of the COVID-19 pandemic – reflects the highly successful cooperation that continues to take place between the vast majority of Member State courts and the Court of Justice within the framework of the preliminary ruling mechanism.

Those references reflect many of the societal issues with which the Member States are confronted, including questions relating to the pandemic itself. That is unsurprising, given how deeply embedded Union law has become within national legal systems. Moreover,

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

national courts are also the 'common law' courts of the EU, called upon to apply Union law as the law of the land just like national law. It is true – and indeed it could and should not be otherwise – that most cases raising questions of EU law are dealt with directly by national courts without any need for the Court of Justice to be involved by means of the preliminary ruling mechanism. National courts thus play an indispensable role in guaranteeing the faithful and uniform application of EU law.

That said, today's challenges concern not only *compliance* with judgments of the Court of Justice, but also *access* to the preliminary ruling procedure.

It follows from Article 267 TFEU that the preliminary ruling mechanism is open to any 'court or tribunal' of a Member State. In applying that criterion, the Court of Justice takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent.[4]

Thus, in the *Miasto Łowicz* judgment[5] of last year, the Court of Justice had to make it clear that national judges must not be exposed to disciplinary proceedings or measures for having submitted a reference to it. Were it otherwise, judges might be deterred from choosing to exercise their discretion to submit a request for a preliminary ruling to the Court of Justice or even to comply with their obligation to make such a reference.[6]

As regards that latter obligation, I would like to draw your attention to the judgment of 6 October of this year in *Consorzio Italian Management*,[7] the so called *CILFIT II* judgment, in which the Court of Justice confirmed, in substance, its case-law as to the three situations in which a national court of last instance is relieved of that obligation.

The Court emphasised, *inter alia*, that the mere fact that the national court in question has already submitted a reference for a preliminary ruling in the same proceedings does not alter that obligation.[8] It also recalled that a national court of last instance may refrain from making a reference if the correct interpretation of EU law is so obvious as to leave no scope for any reasonable doubt. However, before concluding that there is no such doubt, the national court of last instance must be convinced that the matter would be equally obvious to the other courts of last instance of the Member States and to the Court of Justice. Thus, where a national court of last instance is made aware of the existence of divergent lines of case-law – among the courts of a Member State or between the courts of different Member States – concerning the interpretation of a provision of EU law applicable to the dispute in the main proceedings, that court must be particularly vigilant in its assessment

4 See, for example, Case C-274/14, *Banco de Santander*, ECLI:EU:C:2020:17, para. 51.

5 Joined Cases C-558/18 and C-563/18, *Miasto Łowicz and Prokurator Generalny*, ECLI:EU:C:2020:234.

6 Case C-791/19, *Commission* v. *Poland (Disciplinary regime applicable to judges)*, ECLI:EU:C:2021:596, para. 230.

7 Case C-561/19, *Consorzio Italian Management e Catania Multiservizi*, ECLI:EU:C:2021:799.

8 Ibid., para. 59.

of whether or not there is any reasonable doubt as to the correct interpretation of that provision. In any case it must set out the reasons why the correct interpretation of that provision does not give rise to such reasonable doubt before deciding not to refer.

On the substantive level, although Union law now has some impact on almost every field of human activity and must prevail wherever it is applicable, the Court of Justice fully recognizes that the limits on the scope of EU law must be respected, in accordance with the principle of conferral. To give one recent example: the Court of Justice held in June of last year in *TÜV Rheinland*[9] that EU law, as it currently stands, does not apply to territorial limits on civil liability insurance coverage.

Moreover, even where EU law *is* applicable, there is room for diversity. Thus, in *Centraal Israëlitisch Consistorie van België*,[10] the Court of Justice emphasised that the EU legislature had intended to confer a broad discretion on the Member States in the context of the need to reconcile the protection of the welfare of animals and respect for the freedom to practice religion. The Court of Justice thus concluded that in an evolving societal and legislative context characterised by an increasing awareness of animal welfare, the Flemish legislature was entitled to adopt a decree requiring a reversible stunning procedure in the context of ritual animal slaughter.

Similarly, regarding unequal treatment on grounds of religion, the Court recalled in *WABE and Müller Handel*,[11] that when several fundamental rights and principles enshrined in the Treaties are in issue, the necessary proportionality assessment is to be carried out in accordance with the need to reconcile the requirements of the protection of the various rights and principles at issue, striking a fair balance between them. However, it found that the EU legislature *had not itself* struck such a balance between the freedom of religion and the legitimate aims that may be invoked in order to justify a difference in treatment, but had rather left that balancing exercise *to the Member States and their courts*.

In the context of the proportionality analysis, the Court moreover observed that, since EU law allows for the adoption of national provisions that are more favourable as regards equal treatment, a Member State *may* subject the justification of a difference in treatment indirectly based on religion or belief to higher standards of protection. Those higher standards may result from national provisions protecting freedom of thought, belief and religion, as a value to which modern democratic societies attach particular importance.

Both of those cases illustrate the respect paid by the Court of Justice to the national identity of the Member States, as provided for in Article 4(2) TEU, and to the diversity that accompanies it. Where, however, EU law itself lays down exhaustively the rules to be

9 Case C-581/18, *TÜV Rheinland LGA Products and Allianz IARD*, ECLI:EU:C:2020:453.

10 Case C-336/19, *Centraal Israëlitisch Consistorie van België and Others*, ECLI:EU:C:2020:1031, paras 71, 79 and 81.

11 Joined Cases C-804/18 and C-341/19, *WABE and MH Müller Handel*, ECLI:EU:C:2021:594, paras 87-90.

applied to a particular issue, those rules – as interpreted by the Court of Justice – must prevail over national law.

Thus, as was held recently in *Repubblika*,[12] national identity may not serve to justify a departure from the values of the Union set out in Article 2 TEU. Indeed, all Member States subscribed, when they joined the European Union, to the common values of respect for human dignity, freedom, democracy, equality, the rule of law and human rights, including the rights of those belonging to minorities.

As regards the rule of law, the Court of Justice has repeatedly been called upon to specify its content, especially in the context of the requirement of judicial independence, in the line of cases beginning with the Portuguese judges case in 2018.[13] The Court has consistently held that while the organisation of justice in the Member States is a national competence, all national courts which may be called upon to rule on questions of EU law must provide sufficient guarantees of independence and impartiality.[14] Thus, while the EU does not impose any particular model on the judicial systems of the Member States, it does lay down red lines. Respect for those red lines and for the rule of law in general is the foundation for mutual trust. The European project – and the solidarity among Member States that this project entails – depends on that trust.

I leave you with this final thought. The Court of Justice has been entrusted by the Member States with the task of deciding what the law is at EU level. The members and staff of the Court work extremely hard and constantly strive to produce rulings that are accurate, correct in law and just. I am very proud of them. However, a US Supreme Court Justice, Robert H. Jackson, once famously observed that 'we are not final because we are infallible, but we are infallible only because we are final'. Indeed, in all legal systems jurisprudence ultimately rests on a final judicial decision, the *res judicata*. That is why all subjects of EU law, including the Member States and in particular their courts, must comply, immediately and in full, with judgments of the Court of Justice, thereby upholding the EU rule of law and the equality of Member States before that law.

Thank you.

12 Case C-896/19, *Repubblika* v. *Il-Prim Ministru*, ECLI:EU:C:2021:311.

13 Case C-64/6, *Associação Sindical dos Juízes Portugueses*, ECLI:EU:C:2018:117.

14 Case C-791/19, *Commission* v. *Poland (Disciplinary regime applicable to judges)*, ECLI:EU:C:2021:596, para. 56 et seq.

7.3 Speech by the President of the General Court

The place of the General Court in the institutional framework of the Union

Marc van der Woude[15]

Opening Ceremony, 4 November 2021

Introduction

The European integration project has a complex relationship with crises. One could say it is built and fed by crises. Today's one is of a different nature, however, because it affects the legal foundations of the Union and hence its capacity to overcome other crises. Indeed, some Member States call into question the very rule of law itself in disrespect of their initial commitments.

The Court of Justice finds itself at the heart of this legal tempest. This does not come as a total surprise. EU law is increasingly at the core of many societal issues. Dealing with questions of high societal importance is not the only worry of the Court of Justice. In consequence, it also has to face an ever-growing workload.

Against this backdrop, one might be inclined to forget that the Court of Justice is not the only jurisdiction that must safeguard the rule of law. This mission is entrusted to two jurisdictions: the Court of Justice and the General Court. In the sphere of economic administrative law, the General Court fulfils this task by upholding the rights, which the Treaties grant to individuals, companies, public authorities and States in their dealings with the EU institutions.

This is an important role for at least two reasons. First, in a context in which the EU institutions must deal with rule of law problems in some Member States, their own conduct must be irreproachable There can be no double standards in the Union. Second, the cases brought before the General Court raise rule of law questions of their own. They are different, but are not less problematic. In cases dealing with large players of the digital industry for instance, the General Court is regularly requested to define the limits of private power over society. In many respects, the threats to freedom and open society also originate from private sources.

Unlike the Court of Justice, however, the General Court has benefitted from a reform that significantly increased its resources. I refer in this respect to Regulation 2015/2422.

15 President of the General Court; Professor at Erasmus University Rotterdam.

Once the transition phase foreseen by this regulation has been completed, the General Court will be in a position to take on additional responsibilities.

It follows that there are two Union courts pursuing a common objective, which is the protection of the rule of law in the Union, with one court gradually reaching the limits of its capacity and another court gradually getting up to speed to take on more work. Under these conditions, the question arises as to whether the allocation of tasks between the two jurisdictions composing the Court of Justice of the EU should be reviewed and, if so, when and how.

Obviously, this is a complex matter that requires both courts to redefine their respective tasks and missions within the limits set by the Treaties and in particular by Article 19 TEU, which not only refers to the Court of Justice and the General Court, but also to national courts. Indeed, any reshaping or reorganization of the Union's jurisdictional architecture must take account of national courts that ensure effective judicial protection in the Member States. Even if the Union legislators have the final say in redefining judicial powers, a judicial system that does not have the support of all its constituent parts, is bound to fail. In other words, any future reform should be acceptable for the Court of Justice, the national courts and the General Court. Or, to paraphrase Brussels' eurospeak, Article 19 TEU relies on a "*trilogue juridictionnel*".

Redefining the work allocation between the Union courts is not easy. It cannot be decided in a hurry, but requires time for reflection and discussion. Moreover, there is sufficient time for such concertation, since the matter is not particularly urgent. Despite occasional criticism, mostly from dubious sources, the judicial system of the Union works rather well. Even so, given the complexity of the question and the time needed for reflection, I submit it is important that we launch the discussion on the redefinition of powers in a not too distant future.

First, as regards the Court of Justice my colleague President Lenaerts is much better placed than I am to explain its workload and capacity constraints. My understanding remains nevertheless that with the constant influx of increasingly delicate preliminary reference issues, the Court of Justice will soon reach the limits of its capacity. Second, as regards the General Court, I have the conviction that it will soon be ready to take on new responsibilities.

Before discussing, in the second part of my speech, the various options and avenues for such responsibilities, I will explain, in the first part, why the General Court will be able to take on additional work in the relatively short term.

Part I: A jurisdiction getting on cruise speed

Specific implementation measures

As regards the situation at the General Court, it is not my intention to retell the story of the reform put in place by Regulation 2015/2422. I will just briefly refer to a series of concrete measures that the General Court has put in place to make this reform work as best as possible.

These measures concern in particular the new structure of ten chambers composed of five judges, to the specialization of these chambers in the field of intellectual property and civil service law and to a new role for the vice-president, who acts as a broker between the chambers to ensure the consistency of their case law. The General Court also adopted a series of resolutions pertaining to its working methods focusing on more pro-active case management, especially in large groups of cases, and more in depth-control, especially by extended formations.

Current state of play

Of course, it is still early days to claim that all these measures have been a success, especially after 18 months marked by the pandemic. Even so, there are tangible results. The length of proceedings has decreased considerably. Moreover, the General Court refers more and more case to extended formations, hence giving more weight and authority to its judgements. It should also be noted that the criticism in legal doctrine about the allegedly "unbearable lightness of the General Court's judicial control" has ceased all together. Finally, the General Court has been in a position to gain specific expertise in dealing with complex issues in the economic, medical or chemical sphere.

These results do not only reflect the possibly subjective opinion of the President of the General Court, but also the more critical view of the Court of Justice. I refer in this respect to the report of the Court of Justice, as foreseen in Article 3(1) of Regulation 2015/2422, assessing the merits of the reform, which the Court of Justice delivered in December 2020. This assessment is on balance positive. There is obviously room for improvement, as the General Court had largely acknowledged itself before the adoption of the report. The General Court is now finalizing the internal review process on the basis of the various recommendations made by the Court of Justice.

The Council was less positive in its conclusions on the report of the Court of Justice. It is perfectly normal that the legislator is entitled to have a return on a budgetary investment. However, I am concerned by the tone of the Council's conclusions, since they seem to reflect the intention for constant monitoring of the internal functioning of the General Court. At a certain point, the page of the reform of the General Court must be turned. It cannot and should not justify ongoing oversight on judicial activities, especially not in the context to which I referred above.

The road ahead

I am convinced that the reform of the General Court will be a success. The General Court is gradually achieving its cruise speed and will have completed its internal review process at the end of this triennial period in September 2022. Even so, there are still some obstacles on the road to success, both within and outside the General Court.

As regards the internal challenges, the General Court still has to improve its handling of large groups of cases as well as the handling of increasingly complex antitrust, State aid or banking cases.

With respect to the external challenges, I refer to the permanent instability in the composition of the General Court; judges come and go. First, not all Member States attach the same importance to a good functioning of the General Court. They do not renew their judges, even after a term of less than six years. Second, when judges leave, often to join the Court of Justice, Member States fail to appoint a successor in time, despite the obligation to do so foreseen by the Statute. Both causes imply that the General Court is in an ongoing process of recomposing chambers and portfolios.

To conclude the first part of my speech: the General Court will take all measures necessary for the implementation of the reform before September 2022 and will be able to take on additional responsibilities any time thereafter.

Part II: Future options

Now, starting the second part of my speech, the question arises as to what these new responsibilities could possibly be. At this stage, I see two approaches for a future reallocation of tasks, each being the extreme of a spectrum on which the legislator or treaty makers can place the cursor to find an intermediary solution.

The first model is a pragmatic one

The underlying rationale of this possible model is simple. It activates the mechanism foreseen of Article 256 TFEU and consists of an ad hoc transfer of powers from one court to the other. Under this system, the Court of Justice decides on an ad hoc basis, which preliminary reference cases it wants to keep for itself and which cases it transfers to the General Court. The Court of Justice would thus have a dispatch role.

This system is akin to the approach followed in the past for the transfer of competencies in direct appeals. In the early days, when the General Court was still a court of first instance attached to the Court of Justice, its competence was limited to competition law and staff matters. Subsequently, its competence grew organically to what it is today. Even if the General Court is a jurisdiction in its own right after the Treaty of Nice, there is no clear reason why this step-by-step or incremental approach could not be duplicated in the future.

Even so, some could object that pragmatism has its limits. As any building, the judicial architecture of the Union must obey certain rules and stay within the limits set by the Treaties. It cannot grow in all directions.

More fundamentally, the division of tasks between the two jurisdictions must be understood by the outside world and in particular by national courts, the other party in the "*trilogue juridictionnel*". For example, a system under which preliminary reference cases were to be transferred on an ad hoc basis from the Court of Justice to the General Court is likely to encounter resistance from the part of national courts. It would be strange, from the perspective of the referring national court, if its preliminary questions were not treated by the Court of Justice, but would be transferred to the General Court without any clear underlying rationale for work allocation. The national court could interpret such an ad hoc transfer as a sign that its questions are not sufficiently important to deserve the attention of the Court of Justice. If so, the system set up by Article 267 TFEU could possibly lose its attractiveness in general.

The conceptual model

The conceptual approach lies at the other end of the spectrum of options and consists of identifying the main responsibility of each of the two courts and adjusting the judicial architecture accordingly. This description begs the question as to how to identify that responsibility. The answer to that question is obviously not easy to give.

That answer does not follow from the Treaties themselves. Article 19 TEU entrusts the Court of Justice and the General Court with one and the same overarching mission: they must ensure that, in the interpretation and application of the Treaties, the law is observed. The picture does not become much clearer when reading the Treaty on the Functioning of the European Union.

More guidance could possibly be found when analysing the roles played by the two courts in the architecture of the Union. Here again, the Court of Justice combines most roles. It undoubtedly has a constitutional role, as illustrated by a series of high profile cases dealing with fundamental societal questions. It also acts as a Council of State in direct appeals brought by or against institutions and Member States or when it issues an opinion at their request. The Court of Justice is also a review court when it rules on appeals brought against decisions adopted by the General Court. In the majority of cases, this review is akin to cassation technique limited to questions of law. There are, however, also cases where the Court of Justice seems to act differently, as a Court of Appeal.

For its part, the General Court combines in essence two roles. It is a trial court of first instance operating in separate chambers rendering decisions subject to the review by the Court of Justice. However, it also acts as a Court of Appeal or Council of State in the areas covered by the mechanism of prior authorization of appeals provided for by Article 58a of the Statute, to which I already referred to above. In those areas, essentially trade mark

law, the General Court de facto acts as the judge of last resort, unless it raises an issue that is significant with respect to the unity, consistency or development of Union law.

When comparing the roles exercised by the two courts, one may assume that the Court of Justice will be increasingly called upon to exercise its constitutional role in high profile cases such as the recent rule of law cases. A comparison with national constitutional courts suggests that it will have to be more selective. Indeed constitutional courts in the USA, UK and the Members States rarely to deliver more than 150 written judgments per year.

Obviously, redefining work allocation between the Union courts on the basis of the Court of Justice's constitutional role is easier said than done. A case that seems a suitable candidate for such a transfer at first sight, may well turn out to be of fundamental importance on closer examination. The *Van Gend en Loos* case, for example, dealt with a relatively simple customs classification issue. Although it will be difficult to find a clear criterion, the demarcation line could be drawn in several ways.

Various avenues

One avenue to explore is to free the Court of Justice as much as possible from its review functions by extending the mechanism of prior authorizations of appeals to a wider range of legal areas. This could be done at the legislative level by creating new administrative appeal bodies, comparable to the Boards of Appeal in intellectual property cases, in secondary legislation. Regulation 1049/2001 on access to documents and the EU Staff Regulations would be obvious candidates for such additional bodies, which would guarantee a quasi-judicial review before a case is brought before the General Court.

Alternatively and more categorically, it could be envisaged to provide for an additional level of review within the General Court itself, justifying that appeal to the Court of Justice would be limited to cases affecting the unity, consistency and development of EU law. This internal review could be entrusted to a larger formation within the General Court, along the lines of the systems existing within the US Federal Courts of Appeal.

Another avenue consists of defining specific categories of cases that would trigger the competence of the General Court to hear preliminary reference cases within the meaning of Article 256 TFEU. This definition could rely on a combination of two interacting factors.

The first factor could relate to the specific expertise acquired by the General Court over the years, such as its experience in competition law, in the law governing the registrations of various chemical or medical substances, or the rules on the supervision of the banking sector and trademarks.

The second factor is more institutional in nature and refers to situations in which it is hard to define the dividing line between the EU administration and national administrations. These situations often occur when these authorities act as a network, such as the ECN and the Single Supervisory Mechanism in the banking sector, but also the registration of medical and chemical substances. In many respects, the intertwining nature

of the EU and national authorities create confusion as to where private and public authorities can seek judicial review. In those situations, the case law of the Court of Justice clearly states that preference should be given to review by the General Court. Even if this case law purports to give priority to direct appeals before the General Court under Article 263 TFEU, it could serve as an indicator for the specific legal areas, which could eventually be transferred to the General Court.

Final comments

Even if I am pragmatist by nature, my preference lies with this conceptual model pursuant to which the Court of Justice would increasingly act as the Union's constitutional court and transfer lesser tasks and responsibilities to the General Court. This court which could become the Union's Council of State controlling the conduct of its institutions, when they act directly or indirectly in close cooperation with national administrations.

7.4 Speech by the President of the Supreme Court of the Netherlands

Some observations about the role of courts in dispute resolution and the development of EU law

Dineke de Groot[16]

Opening Ceremony, 4 November 2021

Introduction

Madame la Présidente de FIDE, Mesdames et Messieurs, chers collègues, chers amis européens. Es freut mich außerordentlich Sie alle hier in Den Haag begrüßen zu dürfen.

Good morning ladies and gentlemen. It is an honour and a pleasure that I may speak to you at this opening ceremony of the 2021 FIDE congress in the Netherlands. At FIDE, professionals within the world of European law unite to discuss the state of EU law on both European and national level. For the Hoge Raad, working with EU law is daily practice. In my introduction I would like to share some observations about the role of courts in

16 President of the Supreme Court of the Netherlands; professor of civil procedure at the Vrije Universiteit Amsterdam.

dispute resolution and the development of EU law. I will do this from my own perspective as a judge and as an academic interested in dispute resolution.

The task of the Hoge Raad in dispute resolution and development of the law

The Hoge Raad is the Supreme Court of the Kingdom of the Netherlands for civil, criminal and tax cases and for some specialized administrative cases. It is a court of cassation. The Hoge Raad is not competent to establish the facts of a case anew, but reviews whether the previous court interpreted the law correctly, followed the right procedure, and sufficiently substantiated its judgment.

The Hoge Raad provides judgments in individual cases, within the judicial space of the wider dispute resolution system in the Netherlands. The tasks of the Hoge Raad go beyond the particularities of the individual court case. The law distinguishes three different tasks; the Hoge Raad is expected to promote legal unity, to further the development of the law and to safeguard legal protection of the people. The idea is that judgments given with an eye not only on the individual case, but also on these core tasks, encourage legal certainty in society, a vital aspect of the rule of law.

I learned at the Hoge Raad that it requires a sort of judicial group sensitivity to assess which case might be suitable for which steps in contributing to legal unity and the development of the law, or in filling gaps in the legal protection of the people. This sensitivity is part of the respect for the division of powers between the legislator, executive and judiciary. But in particular, this sensitivity supports the Hoge Raad to take care of two main features of the case law of a court.

One feature is that the outcome of a case must make sense in light of the facts of that case. Another feature is that the effectiveness of the law must be guaranteed in the living situation of citizens. The contribution to the legal system by judgments of national and international courts remains part of dispute resolution between citizens, companies and organs of the State. Thus, for a court, an individual case functions both as an incentive and a restraint to seek for the appropriate contribution to the development of the law. The case to case approach of a court enables judges to seek for an interpretation or application of the law that suits the current case and leaves enough space for dispute resolution in forthcoming cases.

The custom to deal with cases from the combined perspectives of dispute resolution and the three core tasks in the law system, is also prevalent while working with EU law. In cases with an EU law dimension, I perceive a third perspective in the daily practice of the Hoge Raad, which is the principle of loyal cooperation with the Court of Justice of the European Union. I will provide you with some examples of the way the Hoge Raad gives

effect to the principle of loyal cooperation in requests for preliminary ruling and generally in its dialogue with the Court of Justice in judgments.

Before that, as an introduction to these examples, I will speak about the duty of national last instance courts to ask for a preliminary ruling.

The duty of national last instance courts to ask for a preliminary ruling

At a FIDE congress, it needs neither explanation nor emphasis that EU law directly affects the national legal order. The Hoge Raad is one of the larger questioners to the Court of Justice. If a decision on a question concerning the interpretation of EU law is necessary to enable the Hoge Raad to give judgment, the Hoge Raad will, as a national last instance court, bring the matter before the Court of Justice on the basis of article 267 of the Treaty on the Functioning of the European Union (TFEU). The Court of Justice reasserted in its recent judgment in the case of *Consorzio Italian Management and Catania Multiservizi*[17] the criteria identified in its judgment in *Cilfit*[18] – exactly 39 years ago – for the exceptions under which a last instance national court does not need to ask the Court of Justice for a preliminary ruling.

As an academic, I read with great interest the opinion of Advocate-General Bobek to the *Consorzio* case and his elaborated proposal for a new standard instead of the *Cilfit* criteria. As a judge, I was not surprised about the choice of the Court of Justice not to follow this proposal. In its judgment, the Court of Justice called article 267 TFEU "the keystone of the judicial system stablished by the Treaties, setting up a dialogue between one court and another, specifically between the Court of Justice and the courts of the Member States, having the object of securing uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties".[19] The proposal of the Advocate-General was to relocate this keystone by creating another balance in the functioning of article 267 TFEU, in which the development of EU law by courts is given priority over the intertwined judicial tasks of dispute resolution and the development of EU law.

In this proposal, I appreciate the recognition of difficulties of last instance national courts with identifying whether a question of EU law falls within the scope of the duty to ask for a preliminary ruling. But I doubt if such difficulties are – in light of article 267 TFEU – to be considered a legitimate reason to overrule the part of *Cilfit* in which the duty to refer was made subject to conditions of the specific case. Article 267 TFEU integrates

17 Case C-561/19, *Consorzio Italian Management and Catania Multiservizi*, ECLI:EU:C:2021:799.
18 Case 283/81, *Cilfit and Others*, ECLI:EU:C:1982:335, para. 7.
19 Case C-561/19, *Consorzio Italian Management and Catania Multiservizi*, ECLI:EU:C:2021:799, para. 27.

the interpretation of EU law by the Court of Justice in the national dispute resolution systems of the member states. Therefore, the assessment whether the answer to a question of EU law is necessary to enable a national court to give judgment, cannot be dominated by the perspective of the development of EU law. The Advocate-General suggests that national courts will only be obliged to refer if three cumulative conditions are met. These are that – in the words of the Advocate-General – a case raises (i) a general issue of interpretation of EU law; (ii) to which there is objectively more than one reasonably possible interpretation; (iii) for which the answer cannot be inferred from the existing case-law of the Court of Justice. I doubt whether the effectiveness and equivalence of EU law for citizens would improve if national courts would be able to refrain from asking questions in all cases that do not fall within the scope of these three conditions.[20] The role of courts within the rule of law is intrinsically linked to the need for a type of legal certainty that is developed by deciding on the merits of cases, with judicial sensitivity for the incentives and restraints in a specific case to contribute to the development of the law.

Some Dutch examples in the context of identifying the scope of Article 267 TFEU

Now let us have a closer look at the sometimes difficult task of courts to identify whether a question of EU law in a case should be referred for a preliminary ruling. As I said, I would like to provide you with some examples of Hoge Raad judgments. These examples show different aspects of the way the Hoge Raad gives effect to the principle of loyal cooperation in requests for preliminary ruling and generally in its dialogue with the Court of Justice.

In the *Consorzio* case, an Italian court had to deal with a party bringing forward questions of EU law twice. The Court of Justice highlighted in its judgment the aspect that the system of direct cooperation between the Court of Justice and national courts, is completely independent of any initiative by the parties.[21] This aspect was explicitly mentioned by the Hoge Raad in 2018, in a judgment in a case about state liability in which it rejected the complaint of a party according to which the Hoge Raad previously unlawfully failed to ask the Court of Justice for a preliminary ruling.[22]

As to whether different language versions of a provision influence the decision to ask for a preliminary ruling, the Court of Justice recognized in the *Consorzio* judgment that a national judge cannot be required to examine each of the language versions of the provision in question. It however advises national courts to bear in mind those divergences between

20 Opinion of AG Bobek, Case C-561/19, *Consorzio Italian Management and Catania Multiservizi*, ECLI:EU:C:2021:291, paras 134 and 135.

21 Case C-561/19, *Consorzio Italian Management and Catania Multiservizi*, ECLI:EU:C:2021:799, para. 53.

22 HR 21 December 2018, ECLI:NL:HR:2018:2396, para. 3.3.3.

the various language versions of that provision of which it is aware, in particular when those divergences are set out by the parties and are verified.[23]

This has been common practice at the Hoge Raad. Sometimes, English, French and German versions are explicitly mentioned in judgments of the Hoge Raad to identify or even clarify doubts about the meaning of a Dutch translation or implementation of an EU law provision. Sometimes, this comparison gives reason to ask for a preliminary ruling,[24] sometimes to a final judgment without a request for preliminary ruling.[25]

The Court of Justice added in the *Consorzio* judgment a duty for a last instance national court to provide the reasons for refraining from making a reference on the basis of the reasserted *Cilfit* criteria.[26] With regard to giving reasons, I would like to mention that it is not uncommon for the Hoge Raad to do the opposite, under the principle of loyal cooperation: to demonstrate the need for a preliminary ruling by giving reasons for the perceived absence of an acte clair or an acte éclairé.[27] In the case of summary proceedings, the eventual lack of an acte clair is sometimes explicitly mentioned as not enough to ask for a preliminary ruling.[28]

The Court of Justice mentioned in its *Consorzio* judgment[29] that a last instance national court can even be obliged to make a reference for a preliminary ruling in a case in which the Court of Justice already answered questions. A similar situation arose in the *Franzen and others* case, although not at the same court. The dispute concerned the social security position of cross-border workers. Initially, in 2013, the Dutch appeal court requested for a preliminary ruling.[30] The Court of Justice did not answer one of the questions,[31] probably because of a mistake in the understanding of national law. Even though the answer of the Court of Justice could have been interpreted as a sign that this question might not be regarded relevant, the Hoge Raad decided to ask additional questions in the following cassation procedure in this case. The Hoge Raad stuck faithfully to the *Cilfit* exceptions: if these are not met, there is still uncertainty on a particular part of EU law and follow-up questions should be asked. In 2018, in its additional questions to the Court of Justice, the Hoge Raad further explained national social security law.[32] The second time around, the Court of Justice provided clarity on the matter.[33]

---

23 Case C-561/19, *Consorzio Italian Management and Catania Multiservizi*, ECLI:EU:C:2021:799, para. 44.
24 For instance: HR 28 September 2012, ECLI:NL:HR:2012:BW7507, para. 3.7.2.
25 For instance: HR 21 May 2021, ECLI:NL:HR:2021:749, paras. 3.2.2-3.3.3.
26 Case C-561/19, *Consorzio Italian Management and Catania Multiservizi*, ECLI:EU:C:2021:799, para. 51.
27 For instance: HR 12 March 2010, ECLI:NL:HR:2010:BK4932, para. 5.2.7.
28 For instance: HR 17 April 2015, ECLI:NL:HR:2015:1063, para. 3.8.5.
29 Case C-561/19, *Consorzio Italian Management and Catania Multiservizi*, ECLI:EU:C:2021:799, para. 59.
30 Centrale Raad van Beroep 1 July 2013, *Franzen and others*, ECLI:NL:CRVB:2013:783.
31 Case C-382/13, *Franzen and others*, ECLI:EU:C:2015:261.
32 HR 2 February 2018, *Giesen and Van den Berg*, ECLI:NL:HR:2018:126; HR 2 February 2018, *Franzen and others*, ECLI:NL:HR:2018:127.
33 Joined Cases C-95/18 and C-96/18, *Franzen and others*, ECLI:EU:C:2019:767.

Contributing to the development of EU law

A recurring theme in judgments of the Hoge Raad is the commitment to contribute to the development of EU law. This is not just because national law prescribes that one of the three core tasks of the Hoge Raad is to contribute to the development of the law, or because article 267 TFEU demands a judicial dialogue. It also relates to the role of the Hoge Raad as a substantial stakeholder on the rule of law in the Netherlands. This role stands in a wider picture in the context of EU law.

This is especially relevant with regard to requests for preliminary ruling that relate to fundamental rights. One might think of questions on procedural law, such as various references in 2013 in customs cases, on the interpretation of the principle of respect for the rights of the defence.[34] Nevertheless, Dutch first instance courts, courts of appeal, and administrative courts may just as much contribute to the debate on fundamental rights. This contribution may for instance be found in references for preliminary ruling on consumer protection.[35]

Dispute resolution and development of EU law in the frame of confidence

In the wider European picture, the Hoge Raad is hence a link in a judicial discourse that goes beyond the particularities of the individual court case. By a loyal practice of submitting references for preliminary ruling, the Hoge Raad aims to hold a constructive dialogue. In this dialogue, the Hoge Raad speaks directly to the Court of Justice and Dutch national courts, and indirectly to numerous other national courts in the European Union. It also listens closely to the European Court of Human Rights. This wider conversation enables courts to resolve disputes and at the same time contribute to the development of EU law. The dialogue is principally based on mutual trust in the Court of Justice, national courts, and other institutions in the three powers of state. In such a dialogue, it should also be a possibility to openly discuss whether legal or moral borders have been crossed, without creating a conflict. The confidence amongst the judiciary and between the judiciary and other state institutions can in this context be viewed as a prerequisite for the confidence of EU citizens to have faith in the judiciary as well as in parliament and government, both on a national and EU level.

34 HR 22 February 2013, ECLI:NL:HR:2013:BR0666; HR 22 February 2013, ECLI:NL:HR:2013:BR0671.

35 Such as Rechtbank Amsterdam 19 September 2019, ECLI:NL:RBAMS:2019:7062; Gerechtshof Amsterdam 5 March 2019, ECLI:NL:GHAMS:2019:657 and Gerechtshof Den Haag 2 April 2019; ECLI:NL:GHDHA:2019:630; CBb 3 July 2015, ECLI:NL:CBB:2015:210.

Closing

These remarks bring me to the end of this opening speech. I wish you an interesting congress,

with rich discussions and lots of opportunities to connect in person. Thank you for your attention.

7.5 Speech by the President of the UK Association for European Law

Brexit: Reflections

Paul Craig[36]

Opening Ceremony, 4 November 2021

It is a very great pleasure to be here at the 2021 FIDE Conference in the Hague, and to be given the opportunity to say a few words. I would like to begin by thanking FIDE for allowing the UK Association of European Law to retain a status within the organization, notwithstanding Brexit. I would also like to pay tribute to my predecessor, Sir Alan Dashwood, who did such a sterling job as President of UKAEL, more especially given that his tenure covered the difficult Brexit period. Finally, I wish to express my thanks to the other members of the UKAEL committee, including our excellent administrator, who have been of such importance in ensuring the vitality of the organization, as attested to by the steady stream of webinars and other events staged by UKAEL. The vibrancy in this respect is reflected in our calendar for the remainder of this year, which includes two webinars, one on the Komstroy judgment, the other more broadly on conflicts between national courts and the ECJ. We round off the calendar year with an annual lecture by Lady Vivien Rose from the Supreme Court, who will speak on the circumstances in which the Supreme Court will depart from retained EU law. This provides a fitting link to two brief points that I would like to make concerning Brexit.

Law, complexity and obligation

There are I think very few people who would have realized the full legal complexity entailed by Brexit. This is unsurprising, given that it was a voyage on uncharted seas. There were

36 President of the United Kingdom Association for European Law and Professor Emeritus of English Law, St John's College, Oxford .

three principal dimensions to the legal complexity. There were legal issues relating to the Withdrawal Agreement; to the Trade and Cooperation Agreement; and to the status of EU law within the UK in a post-Brexit world.

The last of these can be taken by way of example. The UK brought the entirety of the EU acquis into UK law through the EU (Withdrawal) Act 2018. This might seem odd at first sight, given that the UK was leaving the EU. The rationale for the legislation is nonetheless readily apparent. The UK was a member of the EU from 1972, and many areas of life were regulated by EU law. It would in theory have been possible to reject all this regulatory material in the event of Brexit. This would, however, have led to chaos. The EU rules regulated matters from product safety to creditworthiness of banks, from securities markets to intellectual property and from the environment to consumer protection. There could not simply be a legal void in these areas, and pre-existing UK law would often not exist.

This was the rationale for the EUWA. The foundational premise is that the entirety of the EU legal acquis is converted into UK law. Parliament can then decide, in two stages, which measures to retain, amend or repeal. Stage one is to ensure that the EU rules retained as domestic law are fit for legal purpose when we left the EU, since there might be provisions that did not make sense in a post-Brexit world, such as reporting obligations to the Commission, which had to be altered by exit day. Stage two is the period post-Brexit, when parliament could decide at greater leisure whether it wished to retain these rules.

The recognition that EU law should be retained then led to a plethora of complex legal issues concerning, inter alia, the way in which different types of EU law should be retained within UK law; the status of EU law within the UK legal order; its place relative to pre and post Brexit case law; and the application of these principles within and by the devolved areas of the UK. These and many other such issues will continue to occupy courts and academics alike for some considerable time to come. It also means that students in the UK will continue to require knowledge about EU law for the foreseeable future.

There is, however, the other legal dimension adumbrated above, which concerns law and obligation. It is captured most succinctly in the maxim pacta sunt servanda. It is axiomatically applicable to the Withdrawal Agreement and the TCA, so far as they structure UK-EU relations. It is well-established that the obligations flowing from such international obligations cannot be avoided merely because of difficulties relating to implementation of such treaties. It is equally well-established that recognized principles of treaty interpretation are applicable. It is, therefore, regrettable that the UK came close to breaching provisions in the Withdrawal Agreement in the Internal Markets Bill. It is equally regrettable that the UK elided discussion of triggering Article 16 of the Northern Ireland Protocol, with removal of the jurisdiction of the ECJ from the terrain of the Protocol, given that the latter has no connection with the former.

Sovereignty and control

The considerations that informed Brexit were eclectic, including the desire to control borders, discontent with the workings of the EU and sovereignty. It was, however, sovereignty that became the principal consideration that informed the UK's negotiating discourse on the Trade and Cooperation Agreement. It played out in multiple ways, as exemplified most notably, albeit not exclusively, by the Prime Minister's push back on the idea of a level playing field. The assumption, explicit and implicit, was that Brexit meant an accretion of sovereign power compared to the status quo ante. The thinking was cast in zero-sum terms: the EU had power over certain areas that were repatriated to the UK, which took back control over its own destiny. The assumption was that what was repatriated would accrue to the UK Parliament. This thereby increased Parliament's sovereignty and enhanced democracy by allowing our elected representatives to signal their assent or rejection of the choices placed before them. The reality was rather different.

Parliament exercised little by way of sovereign choice over the TCA itself. It did so in formal terms through enactment of the legislation required to bring the TCA into UK law, in the form of the European Union (Future Relationship) Act 2020. There were, however, severe exigencies of time, flowing from the fact that the trade negotiations continued until the 11th hour, with the consequence that MPs had only a couple of days to digest 1246 pages of dense legal text. Most did not read or understand it.

Parliament also exercises little power over the subject matter dealt with by the TCA. The issues previously regulated by the EU will henceforth be regulated through a series of bilateral treaties, such as the TCA, and Parliament has scant, if any, involvement in the decisions that are made. This is readily apparent from the TCA decision-making structure. The operative decisions are made by the Partnership Council, and the plethora of trade and specialized committees established by the TCA. There are broad powers to make binding decisions, recommendations, delegate functions, establish new committees, and the like. The decisions will largely be made by ministers aided by those with technocratic expertise in the relevant areas. There is little parliamentary involvement in any of this. The reality is that the TCA regime has diminished democratic oversight of the decisions that will be made thereunder compared to the position under EU law.

There is a further dimension of sovereignty and Parliament post-Brexit, which is the accretion of executive power entailed by the Brexit process. The Brexit political rhetoric was repeatedly framed in terms of taking back sovereign power and control, but the political and legal reality is that a considerable amount of such power resides with the executive and not Parliament. The complex Brexit legislation contains a very great number of instances where far-reaching power is accorded to ministers, with little by way of parliamentary oversight. This is then further reinforced by what are known in the constitutional jargon of the trade as Henry VIII clauses, that enable the secondary legislation

crafted by ministers to modify, amend or repeal legislation, including primary statute. There are parliamentary procedures for oversight of the proposed regulations, but they provide relatively little comfort in this respect, since the political and practical reality is that it is difficult for Parliament to exercise control over the secondary legislation.

The very idea that Brexit was required in order to enhance sovereign choice was, moreover, more than a little ironic. It is true that the EU constrained choice. This is, however, the consequence of all forms of collective action. Individuals and States make choices. They can remain on their own, and maximize their autonomy. They can join clubs, treaties and the like, which perforce limit their sovereign choice in various respects, the trade-off being membership benefits, combined with the increased power that flows from other club members. The language of control, as applied to UK membership of the EU, did not moreover represent reality. This was so for a number of reasons: the UK played an active part in shaping the very nature of the EU as it developed over time, as exemplified by its role in single market initiatives, those concerning the AFSJ and financial services; the UK disagreed with relatively little EU legislation, when viewed in terms of volume over time; the UK secured Treaty opt-outs and benefited from differentiated integration in many areas that it did not wish to participate in; and the EU tried to accommodate the special needs of the UK through the Cameron-negotiated Treaty amendments that died the death post the referendum. The idea that the UK was put upon and had to break free from chains that bound it proved terrific in terms of slogan, it just bore scant relation to reality.

The very idea that there was some foundational contrast between "EU control" and the desired land of "free trade" was equally misleading. The language of "free trade" was elided with that of "freedom", to be contrasted with the "control" associated with the EU. This was a terrific public relations exercise, if the objective was to leave the EU. It nonetheless concealed reality. The reason is readily apparent, as pointed out by trade scholars, such as Holger Hestermeyer and Federico Ortino: trade agreements go far beyond mere tariff arrangements, and regulate a wide variety of areas, including services regulation, intellectual property and immigration. Such agreements all limit a State's sovereign choices. In this regard, the portrayal of EU law as limiting sovereignty and trade law as merely guaranteeing free trade is a fallacy. This forceful argument is fully borne out by the text of the resultant TCA.

Let me reiterate by way of conclusion my thanks on behalf of UKAEL for a continued status within FIDE. EU law will remain of continuing importance within the UK, Brexit notwithstanding. All UK companies trading in Europe will have to be cognizant of its rules, and the UK government remains bound by the Withdrawal Agreement, including the Northern Ireland Protocol, and the Trade and Cooperation Agreement.

7.6 Speech by the Executive Vice-President of the European Commission

Frans Timmermans[37]

Opening Ceremony, 4 November 2021

Honourable representatives of the judiciary, ladies and gentlemen, dear friends, thank you so much for inviting me to speak to FIDE today. I would have loved to do this in person and meet you in person, but, sadly, because of the obligations I have with now the COP conference taking place in Glasgow I cannot attend your conference, but I am really honoured that you have asked me to speak to you to share a message with you.

I am honoured because I have been a great admirer of your work for many, many years starting, of course, with the European Court of Justice whose work I follow on a daily basis, and a court that has been leading in creating a judiciary space in Europe that protects nations, that protects individual citizens, and that protects the rule of law.

Now, we are in the middle of an incredibly interesting time, but also a time of huge upheaval. I think this time is only comparable to the first industrial revolution in terms of its implications for our societies, for our industries, for our economy, and also for our institutions. Because in any time of fundamental societal change, and we are living through times of fundamental societal change, tectonic changes are taking place across the world, not just because of the pandemic, not just because of the climate crisis, not just because of the threatening Ecocide, also because of hugely changing geopolitical relations, and because we are again in an industrial revolution, all this together poses a huge challenge to humanity. And whenever humanity is challenged and humanity needs to adapt to new circumstances, existing institutions will be challenged. This applies to political institutions, State institutions and it applies also, obviously, to the judiciary.

That is something we see across the board in the world, in the Western world specifically, whether you look at the United States or you look at the European Union. And that in itself is not something we need to be concerned about. In times of great change, you either adapt to the change, or you become superfluous. So we need to adapt to the world that's coming, but we also need to make sure that in adapting to the world that is coming we stick to the values we share and the values we deem essential for the functioning of our society, and for the liberties our individual citizens cherish.

In this context, I believe the strengthening, the preservation first and foremost, but the strengthening also of the rule of law, and the concept of the rule of law is of essential

37 Executive Vice President of the European Commission for the European Green Deal.

importance. In a world that is expanding, in a world where activities no longer are limited within national boundaries, in a world where acting on a continental scale becomes ever more important, being able to also act in terms of the rule of law on a continental scale becomes more important. There we are very fortunate as Europeans to have a European judicial space, which is based on the rule of law, which is based on the preservation of the liberties we cherish collectively.

Now what we learned from the period of oppression and dictatorships, in Western Europe before the second and during the Second World War, in Eastern Europe even until 1989. What we learned from that is that if unchecked, power has the tendency to control everything. Now what happened in dictatorships in Europe was what you could call State capture. That is a party, or the States, capturing all the elements of a society, all the institutions, and forcing them to act in the interest of one party or of one State, and thus destroying the division of powers and destroying the rule of law, and creating rule by law.

I want to insist on this point, because sometimes that we tend to forget our past and especially tend to forget the darkest parts of our past, and tend to believe that State capture is something that will never happen again. Now I always say to my students when explaining this phenomenon that nothing done in Nazi Germany was unlawful. It was unlawful if you apply the rule of law, but it was not unlawful if you apply rule by law, because every condemnation by a Nazi judge, every act against minorities, was based on a law. But it was rule by law and not rule of law.

The principle of rule of law is therefore extremely important to protect the individual rights of citizens, to protect our collective liberties, and also to make the functioning of a society based on openness and based on the protection of the rights of those who are strong and the rights of those who are weak extremely important. For that the judiciary is essential, for that an independent judiciary is essential. Now in Europe another dimension is the dimension is added to that. The dimension where we have agreed on a continental scale between 27 Member States that it's not the size of your country that determines whether you're right or wrong, it's not the power of your army or the power of your security forces that determines whether you're right or wrong, it's the law that determines whether you're right or wrong.

Treaties, negotiated, signed, ratified by all Member States, sometimes even submitted to public votes in referenda, those treaties are the basis of the laws that we all need to respect regardless of whether we're big or we're small. And the interesting, new, unique element of the European legal order is that maintaining this is the responsibility of all. Checking whether this is maintained is the responsibility of every judge in the Member State, and the responsibility of European judges at the European level. So every national judge is also a European judge. The European judge is also a national judge, and the interplay between them, unfettered, undisturbed by interference from political parties

from the State or from other actors, is of the essence to protect the individual rights of all European citizens.

The uniqueness of this model needs to be cherished. Needs to be also I would say, propagated as a model for other parts of the world, other continents that need to come closer together, but especially in Europe it needs to be protected by all of us, because it offers a unique possibility to make sure that every individual citizen knows that EU law will be applied on her or him in the same way, whether they live in the Netherlands or whether they live in Sweden, or in Italy, or in Poland, or in Spain.

And if there is doubt about that, a national judge will decide. If the national judge does not know for sure, that national judge can ask the European Court of Justice how to interpret this, so that we have a uniform interpretation of EU law. If this system is not respected, or is made the subject of a political discussion, or of forms of compromise that would undermine the working of the system, then EU law ceases to be applied everywhere, then everyone can give their own interpretation of EU law, and at the end of the day there will be no EU law left and it will depend on the willingness or the unwillingness of national authorities whether a citizen is protected under EU law, yes or no. And this is something we need to avoid. This is something we need to fight for. And that is why I believe discussing the EU law, the nature of EU law and the future development of EU law is of the essence. That's why your congress is so important.

Now, once again, let me be very clear. Nobody is beyond reproach. Nobody is beyond the need for reform from time to time. Neither State institutions nor the European Commission, nor judicial institutions in the Member States. But, if we lose track of what underpins our system, which is an open society, where the rights of individuals are protected in the same way across the European Union. Where the rights also of other economic actors are protected in the same way across European Union. If we lose that, lose sight of that fundamental principle, then we lose the most valuable elements of our European legal system that was based on the never again of totalitarian systems, that is based on the enshrinement of the democratic rule of law that is the basis of European societies.

I wish you very fruitful discussions and I will be very happy to learn from the results of everything you have discussed today. Thank you.

7.7 Speech by the Mayor of The Hague

Jan van Zanen[38]

Kunstmuseum The Hague, 5 November 2021

Minister De Bruijn, Dear guests, Welcome to The Hague.

Monsieur le Ministre De Bruijn, Chers participants, Nous vous souhaitons à tous la bienvenue à La Haye, qui a le grand honneur d'accueillir le congrès de la Fédération Internationale Pour Le Droit Européen.

Sehr geehrter Herr Minister De Bruijn, verehrte Anwesende, herzlich willkommen in Den Haag. Den Haag ist eine ausgesprochen internationale Stadt. Ich hoffe von ganzem Herzen, dass dies dazu beitragen möge, dass Sie sich hier zuhause fühlen.

Permettez-moi à présent de poursuivre en anglais. Bitte gestatten Sie mir, auf Englisch fortzufahren.

We are very honoured that the International Federation for European Law is meeting again in The Hague!

Your last congresses here were in 1984 and 1963. A long time ago. The map of Europe looked very different then. East and West were two completely different worlds … And in 1963, the first year you met in The Hague, your federation was just two years old. In fact, the same age as the person welcoming you today … The International Federation for European Law and I were born in the same year. And if that doesn't create a bond …

On the other hand, the museum we are in today was founded some time before that. It was opened in 1935 and is the last design by the famous Dutch architect and urban planner Berlage. Berlage consciously experienced the first peace conferences in The Hague and was a committed internationalist. He not only created a design for the Peace Palace, which was not selected, he also sketched plans for a 'World Capital'. The project should have been built over a century ago on the outskirts of The Hague, to accommodate international organisations working in peace and justice. The plan was shelved, but The Hague did develop into an international city of peace and justice.

And near here, we have the Organisation for the Prohibition of Chemical Weapons, the International Residual Mechanism for Criminal Tribunals and the already mentioned Peace Palace. Not forgetting Eurojust. Because The Hague is also a city with a distinctive

38 Mayor of The Hague.

European profile. Apart from Eurojust, our city is home to more than thirty European organisations, including Europol and the European Cybercrime Centre.

What's more: it was here in The Hague, in 1948, that the process of European unification began. Chaired by the legendary Sir Winston Churchill who, by way of exception, was allowed to smoke his trademark cigars in the gothic Ridderzaal, already a non-smoking zone.

Today, in 2021, The Hague is focusing on promoting cooperation between cities, national governments and the EU, to achieve a better Europe. The challenges in many areas, such as sustainability and social resilience, are immense. Moreover, in view of the impact of the COVID pandemic, cooperation has become increasingly important.

Dear guests, you will understand why The Hague is the ideal location for the International Federation for European Law congress. I hope that these days have been fruitful and that you will have a successful end to the congress tomorrow. Please be assured that you will always be welcome in The Hague. Hopefully, it will not take 37 years for you to return. Enjoy your evening and we look forward to seeing you again in The Hague.

Thank you.

Je vous souhaite une très bonne soirée et à très bientôt à La Haye. Je vous remercie.

Ich wünsche Ihnen einen sehr angenehmen Abend und bis bald in Den Haag. Vielen Dank.

7.8 Speech by the Minister for Foreign Trade and Development Cooperation

Tom de Bruijn[39]

Kunstmuseum The Hague, 5 November 2021

Mesdames, Messieurs,

Permettez-moi de m'adresser à vous en anglais, à l'instar du maire.

Thank you Jan, for hosting us at this beautiful location in The Hague – the city known as the home of international law and arbitration. As you said, The Hague is a fitting location for this conference. Because for everyone who is here tonight, the rule of law has a special

39 Minister for Foreign Trade and Development Cooperation of the Netherlands.

meaning. You understand better than anybody else how indispensable the rule of law is to democracy. You know how vital it is, as a safeguard that enables our democracies to function properly. How it equips individuals and businesses to invoke their rights before independent courts. And how it affects judicial cooperation, the Schengen area, the single market and the daily lives of our peoples.

The EU: a rules-based organisation

Of course, as Minister for Foreign Trade and Development Cooperation, my main focus is on the EU's external relations. But the EU's external relations are shaped by its internal character.

The EU is, intrinsically, a rules-based organisation. Its acquis is the very fabric that binds its Member States together. So it shouldn't surprise us that the EU feels most comfortable in a rules-based global environment, since this is how we function ourselves. This sets the EU apart from the other major players in the global arena. But this distinction can have its disadvantages when power politics is needed to defend the rules-based international order. The EU is an economic powerhouse, yet it is reluctant to throw its economic weight around. Our single market provides a predictable environment where companies know what the rules are and – if necessary – how to enforce them.

So in the international arena, too, the EU strives for a rules-based order where disputes are resolved peacefully. Our companies and citizens prosper when the rules of the game don't change all the time. Rules need to be reliable and predictable. Unfortunately, however, the rules-based international trade system we Europeans value so much is under pressure. I see three main challenges: the paralysis in the World Trade Organization; the rise of State capitalism and unfair trading practices; and the nexus between trade, sustainable development and corporate social responsibility.

The WTO

First, the WTO, which acts as a forum for trade negotiations, settles trade disputes between its members, and monitors national trade policies. A well-functioning WTO is a cornerstone of the multilateral system. But unfortunately the organisation is at risk of marginalisation. This is due to a deadlock in negotiations, the blockage of institutional reforms and the paralysis of the dispute settlement mechanism. And of course due to the COVID-19 pandemic and its harmful effects on global supply and value chains. These are the reasons why we've been hearing certain buzzwords again on the global stage. Like "decoupling", "economic sovereignty" and "self-sufficiency".

These developments are not mere incidents. They are symptoms of an increasingly multipolar world, which is putting stress on the WTO's rules-based approach. This is why the WTO's members need to change the institution to make it fit for the future. By updating its rulebook, by developing policy on digital trade and services, and by anchoring sustainability firmly in the WTO agenda. This will enable us to manage tensions between the major powers, ensure a level playing field and safeguard our planet for future generations.

So I hope that the WTO's 12th Ministerial Conference, which will take place in Geneva later this month, will be a success and show that the WTO still has a significant role to play. Only by negotiating new rules can the WTO remain fit for purpose in this new era.

Level playing field

Secondly: a level playing field. Ensuring a global level playing field is at the top of our political agenda. Our businesses increasingly have to operate in a world where countries instrumentalise trade as a geopolitical tool. Here we see an apparent paradox: the EU needs to act more assertively and become more resilient, and at the same time uphold its commitment to openness and multilateralism. But I do not think these two imperatives oppose one another. In fact, I believe that the EU has a duty to defend an open, fair and rules-based global trading system. The EU continues to push for reform at multilateral level, for example by adopting new rules on industrial subsidies. Unfortunately change is slow to come.

So work is ongoing in Brussels on various legal instruments to expand the EU's trade toolbox. We see this in discussions on an International Procurement Instrument. We see it in the proposal for a Regulation to address distortions in the single market caused by foreign subsidies. And we see it in the Commission's forthcoming proposal for an anti-coercion instrument. The Netherlands believes the EU should have a robust trade toolbox. Not so that the EU can join others in weaponizing trade for geopolitical purposes. But so that the EU can act assertively and proportionately when others do not respect the rules. We need a trade toolbox precisely in order to uphold rules-based trade.

Trade, equity and sustainable development

Finally, there is a nexus between trade, corporate social responsibility and sustainable development. The EU's people and NGOs are demanding, rightly, that trade policy deliver on these issues. Because trade only really works when it works for everyone. And we can only preserve our economies in the long term when we start working with nature in a sustainable way. For instance: As our agricultural sector is affected by biodiversity loss due

to declining animal pollination and soil fertility, financiers of these activities are facing risks. For Dutch financial institutions alone, exposure to biodiversity loss is costing more than 500 billion euros.

This makes it vital for us to start working with nature in a sustainable way.

Allow me to quote President Eisenhower. At the height of the Cold War, his economic advisers briefed him about the potential impact of a nuclear war on the US dollar. Eisenhower is said to have replied: "Wait a minute, boys, [if there's a nuclear war, we're] not going to be reconstructing the dollar. We're going to be grubbing for worms." This is what we need to keep in mind when we discuss trade and our common future. If we don't advance swiftly and efficiently towards a more sustainable future, and develop a green agenda for the WTO, our economies won't be of much use anymore. This is why we need to act now, while at the same time ensuring that trade is not just profitable for some, but equitable for all. This means we need to make sure that the EU market is free of products made by forced labour, and that the supply chain is free of human rights violations and environmental damage.

We can only accomplish this if we work together. In other words, if EU policies are coherent and consistent about risks to people and planet in global value chains. This is why the Netherlands is strongly in favour of EU-level mandatory due diligence. And why we are currently developing building blocks for legislation with a dual aim: to influence the European legislative trajectory, and to have these building blocks at hand for national legislation if the EU fails to deliver. We hope an EU Action Plan will be in place soon. A plan that focuses on shaping global supply chains sustainably and promoting transparency, human rights, and social and environmental standards for due diligence.

Conclusion

In other words, we need to strike a balance: between the benefits of open, competitive trade and increased resilience and sustainability, a more assertive stance towards unfair trade practices, and rules-based cooperation. Open trade should be founded on, and contribute to, sustainability, security and predictability, fair conditions of competition, and a level playing field. This is not an easy task. But it's vital if we want to build more resilient and sustainable societies, in which more people share in prosperity.

Ladies and gentlemen, As I hope I've made clear, I firmly believe the EU will do better in a rules-based multilateral order. That means working hard to adapt those rules to today's world. And of course, to be credible in the global arena, the EU also needs to be a shining example of the rule of law within its own borders. So I thank you for your efforts. And I wish you all a pleasant dinner and productive discussions.

Thank you.

7.9 Speech by the European Chief Prosecutor

EU criminal law cooperation and the role of the European Public Prosecutor's Office

Laura Kövesi[40]

Closing ceremony, 6 November 2021

Ladies and Gentlemen,

Thank you for the opportunity to share with you a few words just before closing this extraordinary Congress. A dear friend, a fellow prosecutor, once told me that he never doubted that things will always eventually turn out well, with law on his side. My friend is by nature an optimistic person, but I get his point: the law not only guides us as to what is right, it also gives us courage to do what is right.

Justice is the very core of what allows us to live in society. There can be no community in Europe that is not a community of law. There can be no Union in Europe without the rule of law. As law practitioners, we are in the first line of defence of the fundamental values and principles on which our ever-closer Union is based. This is why the establishment of the European Public Prosecutor's Office is of strategic importance for European integration.

As European Chief Prosecutor, I meet many people who misunderstand the EPPO as just another "agency" of the EU. I also meet many people who consider the EPPO as a pilot project, a proof of concept – something small, which, if it works, might eventually be scaled up.

Well, for me, the reality of the EPPO is quite different. First, institutionally, the EPPO is an independent organ of the European judiciary, not an agency that typically executes or coordinates a policy defined by a political authority. We are not a coordinator, we are not a network; we are not a new layer to improve cross-border cooperation in judicial matters. Our competence is a genuine transfer of sovereignty. We are a specialized prosecution office, independent from the respective national authorities.

Our European Delegated Prosecutors are embedded in the respective national systems with full prosecutorial powers. Any crime falling under our competence, as defined in the EPPO regulation, has to be reported to us. Only the EPPO can investigate, prosecute and bring it to judgement in the relevant national court. The EPPO is a systemic part of the overall architecture put in place by the EU to protect its financial interests. It seems that not everyone has fully grasped the systemic nature of the EPPO. If we are hindered in the

40 European Chief Prosecutor.

exercise of our competence, the protection of the EU budget is at stake. This can of course have far- reaching consequences.

As we operate, we are identifying a whole set of issues related to the application of twenty-two different criminal laws and criminal procedural laws as well as to different implementations of the PIF Directive. The most evident legal challenges that we have and that we will continue to have in the years to come are linked to our structure, competence and the absence of a harmonised criminal law and criminal procedural law.

We need to work as a single office in twenty-two different legal systems. How to ensure a common approach and consistency between so many different legislations, legal traditions, jurisprudence, operational and organisational structures? It is evident that our work will generate new, ground-breaking jurisprudence by the European Court of Justice. It will also have an impact on the daily work of our fellow prosecutors, judges and police officers in the Member States. Second, we are not the outcome of a small transfer of competences. As from 1 June this year, when we started operations, we have processed almost two thousand and four hundred criminal reports, initiated more than four hundred investigations, for an estimated damage of more than five billion euros.

This should not come as a surprise. In fact, it is only the beginning, the tip of the iceberg. We are getting all the workload that was, until now, dealt with at national level. The transfer of existing cases, on which we have to decide whether we keep them or return them to national authorities, has not been completed yet. Simultaneously, we are dealing with all the new cases.

We are getting this workload for a reason. In line with the principle of subsidiarity, we are supposed to be able to deal with it more efficiently than national authorities.

Let me explain why I am convinced that the EPPO is changing the paradigm of cross border investigations involving organised crime and financial fraud in the EU. We are investigating fraud involving EU funds of over 10.000 Euro and cross-border VAT fraud involving damage above 10 million Euro. We are responsible for fraud happening on both sides of the EU budget: expenditures as well as revenues.

It is evident, in particular when it comes to cross border corruption or VAT fraud, that our main adversaries are organized criminal groups. This is why our prosecutorial policy is to focus on those cases where serious organized crime is involved and our main objective is to help the Member States recover the damages.

The greatest advantage of the EPPO from an operational point of view is that we act as a single Office within a decentralised structure. Where until now, any prosecutor had to use the lengthy channels of mutual legal assistance to get information or evidence from another Member State, the European Delegated Prosecutors cooperate directly: a phone call, an instruction in the EPPO's case management system are enough. We also have the ability to merge investigations and prosecutions across borders.

This allows to proceed much faster in individual cases, but it also allows to discover new criminal activities and open new investigations, based on information that no one else can have. No one is currently better placed than the EPPO to investigate all the possible ramifications of a cross-border case.

The immediate access to all the information in the cases registered in twenty-two Member States allows us to establish connections that could not be identified otherwise. In fact, we have unprecedented access to all the available databases and to international "facilitators', such as CARIN, Interpol, the Egmont Group and the FIUs. A close cooperation with Europol, OLAF and Eurojust may be established from the initial stages of any of our investigations. Over time, I expect that we will have more and more investigations that could simply not have been initiated at national level, because no one would have picked up the relevant information.

With the establishment of the EPPO, we have created what I call the "EPPO zone". A zone where, by implementing a prosecutorial policy, we are unifying the approach to EU fraud investigations. A zone where we think and act functionally, rather than internationally. To give you a concrete example: we are not asking national authorities to put more focus on customs fraud, we are the authority bringing all the relevant actors in the EPPO zone, be it in Rotterdam or in Valetta, to improve the level of detection of customs fraud.

Ladies and gentlemen, the operational start of the EPPO has taken place in a context no one could anticipate. The overall volume of the financial interests of the EU has almost doubled, and we will have new own resources. The COVID-19 pandemic has already weakened the economic system, and made it more vulnerable to criminal infiltration. The risk of corruption has increased.

There is no precedent for a European Public Prosecutor's Office. Our aim is to make a real difference on those cases where serious organized criminality is involved and to help the Member States recover more damages. It is not easy to find solutions for twenty-two different judicial systems. Each of us comes with a specific background, language, culture but we have to act as one team. Our workflows and procedures are complex, because we have a complex structure. Between the central office in Luxembourg and the numerous decentralized offices, we have to create a sense of belonging and collective identity. But our potential outweighs the difficulties. I trust that together, we will make this self-evident. So that very soon law students in Europe can only wonder, how come it took us so long, to make the EPPO happen.

Thank you for your attention.

8 The XXX FIDE Congress in Sofia, Bulgaria (31 May-2 June 2023)

The Bulgarian Association for European Law (BAEL), who took over the presidency of FIDE from NVER, announced that the XXX edition of the FIDE Congress is planned to take place in Sofia from the 31th May to the 2nd June 2023.

In the words of BAEL's president, Judge Alexander Arabadjiev, it will be a visionary congress as the topics put forward are all united in one common thread: Defining the constitutional, economic and social physiognomy of the Union. These topics are focused on the strategic development and the future of the European Union and aim at generating propositions and new ideas.

The first topic – "Mutual trust, mutual recognition and the rule of law" – aims to shift the debate from focusing on events in certain Member States to wider conceptual and constitutional questions. It thus has the overarching objective to examine whether these principles are capable of forming the very backbone of the constitutional identity of the European Union, and therefore become the foundation of the full spectrum of EU law.

On a more specific basis, new developments will also be discussed such as the economic consequences of the deficiencies of the rule of law (Regime of Conditionality for the Protection of Union Budget in the cases of breaches of the principles of the rule of law in the member States).

More importantly, the debate has so far been mostly structured on a "top down" approach, that is to say the mechanisms that EU institutions have at their disposal in order to examine compliance with the principles of mutual trust, mutual recognition and the rule of law on the national level. The topic will expand the debate by examining its "horizontal" dimension, addressing the way national courts examine the deficiencies of the rule of law in their own Member State, as well in other Member States in the context of applying the various instruments of judicial cooperation. It will also discuss the often under-estimated "bottom-up" dimension of the debate, that is to say how breaches of these principles on the national level can have consequences on the Union itself, by eroding its own constitutional identity.

The general rapporteur for the first topic is Miguel Poiares Maduro, Professor at Católica University, Lisbon and the School of Transnational Governance of the European University Institute, Florence.

The second topic – "The new geopolitical dimension of the EU competition and trade policies" – is fast becoming the new "hot" topic in EU economic law. It is the focal point of several different branches of law: competition law, trade law and investment law through the prism of industrial policy with the objective to achieve the strategic economic autonomy of the Union.

At a time when EU competition and trade policy is being redefined with the objective to support a green and digital recovery and to promote investment in key sectors, some key notions may need to be revisited in order to take into account the new realities. Issues such as "European champions" or the lack thereof, killer acquisitions, security concerns linked to foreign direct investment, foreign subsidies and the securing of strategic value chains will inevitably be discussed. For example, it may be necessary to consider what forms of strategic cooperation in sustainability initiatives or in securing the autonomy of strategic value chains are possible without infringing Article 101(1) TFEU and/or are capable of being justified under Article 101(3) TFEU.

This topic will also provide the opportunity to discuss if "a new economic constitutionalism" is likely to emerge – a concept which reflects a constitutional shift in the EU integration process. Thus, the elements of a new 'Political economy' of the Union could be outlined. In this context and on this basis the Union will be in a position to shape the world around it through leadership which reflects its strategic interests and values.

The general rapporteurs for this topic are Jean-François Bellis, who teaches EU competition law at several universities and is a founding partner of Van Bael & Bellis law firm and Isabelle Van Damme, lecturer on WTO Jurisprudence and Legal Advocacy at several universities and partner at Van Bael & Bellis law firm.

The third topic is entitled "European Social Union". The purpose of this topic is to discuss the development and strengthening of a true and meaningful EU social dimension. It is often thought that while European economic integration leads the way in European affairs, social coherence and social integration often lag behind. The topic thus aims at conceptualizing the idea of a European Social Union as a way of bringing the EU closer to its citizens.

It will address a number of issues amongst which feature specifically the following: conflicts between free movement rights and social rights, the importance of the Charter-based "solidarity" rights, the impact of free movement on the demographic crisis and the adjacent "brain drain" phenomenon which has ravaged Eastern and Central Europe, as well as parts of Southern Europe, EU trade policy and labour rights' protection, social justice and solidarity as common values of the Union.

This brings to another central tenet of European integration: the principle of solidarity as an integral part of the constitutional identity of the EU. This mutual infiltration of values and principles between different areas of the Union's legal order is a characteristic feature

of this order and of the Union itself and of its constitutional identity which has evolved 'From a Community of Law to a Union of Values'. The general rapporteur for the third topic is Sophie Robin-Olivier, Professor of Law at the Sorbonne school of Law.

BAEL expresses the hope that the analytical framework which will emerge at the FIDE 2023 Congress will help to envisage and eventually to build an 'Ever closer and stronger Union'.

Europa rijmt en schuurt

Hanneke van Eijken[1]

Europa heeft zijn grenzen uitgegumd, in strijklicht
zie je de schetslijnen nog staan
akkers rijgen er samen, de wegen slaan ineen
Europa staat voor taal
voor definities, voor regulering en ambities

Europa rijmt, schuurt, het zingt en gromt
er is een leger ambtenaren, instellingen
zijn in beton en glazen poppenhuizen neergezet

Europa is een vredeskorf, het is een daad
in de dorpen wonen timmerlieden, fotografen en zigeuners
in de steden is altijd wel iemand die op liefde wacht
een stuk grond bewerkt, leert schrijven of fietsen
zijn wetten zijn fijnmazig als het eerste lentelicht
op een zandpad in het bos

Europa is havens vol schepen, netten vis, plastic soep en landen
die hun handen samenvouwen in een pact, ze vormen een sluis
een kluis, een fort
Europa schuurt, gromt, het rijmt en zingt

en als je me vraagt, waar is het begin?
dan neem ik je mee naar de navel van Europa
ik vertel je het verhaal van de zoon van de edelman
het verhaal van de Vorst van Poděbrady, kom
hier ligt de geboorte van een meesterwerk, een kunststructuur
honingraat, na honingraat, honingraat na honingraat

1 Assistant professor of EU law, Utrecht University.

Europe rhymes and grates

Translation by John Iron

Europe has erased its borders, you can still see
its sketchlines floodlit
its fields stringing together, its roads linking hands
it stands for language
for definitions, for regulation and ambitions

Europe rhymes, grates, it sings and growls
there is an army of officials, it has erected its institutions
in concrete and glass doll's houses

Europe is a hive of peace, it is a deed
in its villages live carpenters, photographers and gipsies
in its cities there is probably always someone waiting for love
tending a piece of land, learning to write or ride a bike
its laws are as finely meshed as the first spring light
on a sandy path in the wood

Europe is ports full of ships, nets of fish, plastic soup and lands
that fold their hands together in a pact, forming a sluice
a vault, a fort
Europe grates and it growls, it rhymes and it sings

if you ask me where does it begin?
I'll take you with me to Europe's navel
I'll tell you the story of the nobleman's son
the story of the King of Poděbrady, come
here lies the birth of a masterpiece, an artistic structure
honeycomb, on honeycomb, honeycomb on honeycomb

List of FIDE 2021 Partners

Institutional Partners/Partenaires institutionels/Institutionelle Unterstützer

COURT OF JUSTICE OF THE EUROPEAN UNION

European Commission

Ministerie van Buitenlandse Zaken

Den Haag

Universiteit Leiden

Autoriteit Consument & Markt

Universiteit Leiden Europa Institute

Raad van State

de Rechtspraak

Ministerie van Economische Zaken en Klimaat

de Rechtspraak College van Beroep voor het bedrijfsleven

Sponsors/sponsors/Sponsoren

ALLEN & OVERY

Boomjuridisch

eleven international publishing

Brinkhof

DE BRAUW BLACKSTONE WESTBROEK

DEFARES

大成 DENTONS

Freshfields Bruckhaus Deringer

HOUTHOFF

LOYENS & LOEFF

PELS RIJCKEN

Stibbe

Media Partner

EU LAW LIVE

stay alert | keep smart