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## The Rule of Law in the Recent Jurisprudence of the ECJ

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JURISPRUDENCE OF THE ECJ

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### *INTRODUCTION*

There cannot be any doubt that the rule of law is one of the most elementary and important features of the European Union and the process of European integration as a whole. Without denying the nature of the integration as a genuinely political process, it is quite obvious that the rule of law is a truly fundamental factor for the supranational European Union which appears in legal texts as in legal practice as a true cornerstone of the entire construction. The most prominent placing of the rule of law in article 2 of the Treaty on European Union (“TEU”) amongst the values, on which the European Union is founded, might constitute the formal basis of the truly essential nature of the rule of law for the establishment of the European Union. The well-known reports of the Commission on the rule of law in accession countries might be another symbolic element of general political visibility in this respect.<sup>1</sup>

The particular significance of the rule of law for the European Union is explained, better than in any source of legal or judicial nature, in the speech that Walter Hallstein gave in March 1962 at the University of Padua on the European Economic Community as a Community of law, in which he stated:

This Community was not created by military power or political pressure, but owes its existence to a constitutive legal act. It also lives in accordance with fixed rules of law and its institutions are subject to judicial review. In place of power and its manipulation, the balance of powers, the

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1. See Commission of the European Communities, Communication From the Commission to the European Parliament and the Council on Enlargement Strategy and Main Challenges 2013–2014, COM(2013) 700 Final (Oct. 2013), 6–8; see also, e.g., Commission of the European Communities, Communication From the Commission to the European Parliament and the Council on Albania 2013 Progress Report, SWD(2013) 414 Final, 5–10; Commission of the European Communities, Communication From the Commission to the European Parliament and the Council on Serbia 2013 Progress Report, SWD(2013) 412 Final, 6–10; Commission of the European Communities, Communication From the Commission to the European Parliament and the Council on Turkey 2013 Progress Report, SWD(2013) 417 Final, 5–13.

striving for hegemony and the play of alliances we have for the first time the rule of law. The European Economic Community is a community of law . . . , because it serves to realize the idea of law.<sup>2</sup>

On the basis of this historical perspective, he reached the conclusion which until today appears to be a most exquisite portrayal of the nature of the treaties:

The founding treaty, which may not be terminated, forms a kind of a Constitution for the Community which contains rules on the establishment, composition, tasks, competences and interaction of the institutions of the Community as well as their relations with the Member States and the Community citizens . . . . But Community law not only grants powers to the Commission and the Council; at the same time, it provides for the restriction and limitation of these powers. The observance of these limits is ensured by the judicial review, which is entrusted to the European Court of Justice. The Court reviews the legality of acts of the Council and the Commission and provides legal protection in the field of Community law not only for Member States but also for Community citizens.<sup>3</sup>

But, as it is the case with other fundamental constitutional principles which have soon found general recognition, the real challenge with which the rule of law is confronted in practice is not a lack of acceptance or a sentiment of hidden regret. It is rather the seemingly self-evident respect of the rule of law in western democracies, which goes somehow strangely along with the feeling that one does not need to be engaged for a legal principle which is as obvious as the rule of law and therefore does not require our principal attentiveness. Of course, nothing is more profoundly wrong and dangerous than this kind of reasoning, which is in full contrast with the general experience which the judiciary has made throughout the western world. Whether you take the practice of the US Supreme Court or of the German Constitutional Court on the national level or of the European Court of Human Rights or of the European Court of

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2. See WALTER HALLSTEIN, *Die EWG—Eine Rechtsgemeinschaft. Rede anlässlich der Ehrenpromotion (Universität Padua, 12. März 1962)*, in *EUROPÄISCHE REDEN* 341, 343–44 (1979) (translation provided by author).

3. *Id.* at 344.

Justice (“ECJ”) on the supranational level, the experience is essentially identical in the sense that the democratic process does not offer sufficient and sufficiently effective guarantees against an abuse of power. If the king was said to do no wrong, governments and legislators in democratic systems certainly can do wrong and, based upon our experience, will do so. This is why it is and will remain a continued task of the judiciary to ensure the respect of the rule of law. In the European Union, this is in principle no different than in its Member States, but it is of course subject to a significant number of specific considerations in the respective contexts in which the scrutiny of the ECJ intervenes.

### I. *THE FOUNDATIONS OF THE JURISPRUDENCE OF THE ECJ ON THE RULE OF LAW*

Though it took the ECJ until 1986 to formally adhere to the words of Walter Hallstein that the European Union is by its nature a community of law,<sup>4</sup> the oeuvre of the Court is, since the very beginnings, closely linked to the development of principles which form an integral part of the rule of law as it is recognized throughout the national legal orders of its Member States.

#### A. *Foundations in the Early Jurisprudence of the Court*

Despite the specific European context, in which the rule of law is placed hereby explaining the particular importance of the other values proclaimed in article 2 TEU, such as human dignity, freedom, and equality, as well as non-discrimination and human rights in general, the Court’s jurisprudence on elements of the rule of law originated from a rather traditional perspective concerning the principles of legality, legal certainty, confidence in the stability of a legal situation, and proportionality.<sup>5</sup>

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4. *See* *Les Verts v. Parliament*, Case C-294/83, [1986] E.C.R. I-1357, ¶ 23.

5. The leading cases of the early jurisprudence of the Court in this field have been, *Algera and others v. Common Assembly*, Joined Cases 7/56 & 3-7/57, [1957] E.C.R. 41, 55 (stating the principle of legality and principle of legal certainty); *S.N.U.P.A.T. v. High Auth.*, Joined Cases C-42/59 & 49/59, [1961] E.C.R. 55, 87 (stating the principle of legal certainty); *Alvis v. Council*, Case C-32/62, [1963] E.C.R. 49, 55 (stating the right to be heard); *Klomp v. Inspectie der Belastingen*, Case C-23/68, [1969] E.C.R. 44, ¶ 13 (stating the confidence in the stability of a legal

As it already became apparent in the equally famous and fundamental *Algera* judgment, in which a comparative study had shown that the principle of non-revocability of administrative measures giving rise to individual rights is a legal principle generally acknowledged in the legal orders of all Member States, it would amount to a denial of justice, if the Court would have based its judgment on the absence of an explicit rule in the secondary law of the Union without having recourse to the general principles of Union law as they result from the constitutional traditions common to the Member States.<sup>6</sup> But, since the specific conditions for the application of such general principles vary from one national legal order to another, the recognition of general principles of Union law derived from the common constitutional traditions always entails a creative element and produces a harmonizing effect which goes beyond the democratic legitimacy offered by the secondary legislation of the Union.<sup>7</sup> Being a paramount example of judge made law in the European Union, the evolution of the Court's jurisprudence in this field is characterized by a cautious step-by-step approach and a particular self-restraint.<sup>8</sup> Nonetheless, over the past fifty-seven years since the *Algera* judgment, the Court has recognized a wide range of principles which form an integral part of the rule of law. The most prominent examples are substantive rules derived from the principle of legality,<sup>9</sup> the principle of legal

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situation); *Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Case C-11/70, [1970] E.C.R. 1126, ¶ 12 (proportionality); *H. Ferwerda v. Produktschap voor Vee en Vlees*, Case C-265/78, [1980] E.C.R. 618, ¶ 17 (stating the principle of legal certainty); *Merkur Fleisch-Import v. Hauptzollamt Hamburg-Ericus*, Case C-147/81, [1982] E.C.R. 1389, ¶ 12 (stating proportionality); *Denkavit Nederland v. Hoofdproduktschap voor Akkerbouwprodukten*, Case C-15/83, [1984] E.C.R. 2172, ¶ 25 (stating proportionality).

6. See *Algera and others*, [1957] E.C.R. 41, 55.

7. See THOMAS VON DANWITZ, *EUROPÄISCHES VERWALTUNGSRECHT, ENZYKLOPÄDIE DER RECHTS—UND STAATSWISSENSCHAFT* 210–14 (2008).

8. For cases regarding to the confidentiality of written communications between lawyers and clients, see, for example, *AM & S v. Commission*, Case C-155/79, [1982] E.C.R. 1577, ¶¶ 18–21; *Akzo Nobel Chems. and Akros Chems. v. Commission*, Case C-550/07 P, [2010] E.C.R. I-8301, ¶¶ 40–43, 69–70.

9. See *Algera and others*, [1957] E.C.R. 41, 55; *S.N.U.P.A.T.*, [1961] E.C.R. 55, 86; *De Compte v. Parliament*, Case C-90/95 P, [1997] E.C.R. I-2011, ¶ 35; *Conserve Italia v. Commission*, Case C-500/99 P, [2002] E.C.R. I-905, ¶ 90. See also the case law relating to the principle of the legality of criminal offences and penalties, X, Case C-60/02, [2004] E.C.R. I-665, ¶ 63; *Advocaten voor de Wereld v. Leden van de Ministerraad*, Case C-303/05, [2007] E.C.R. I-3672, ¶¶ 49–50.

certainty,<sup>10</sup> the principle of confidence in the stability of a legal situation,<sup>11</sup> and, in particular, the principle of proportionality.<sup>12</sup> Furthermore, the Court has recognized a significant number of procedural guarantees as an embodiment of the rule of law such as the right to be heard<sup>13</sup> and the right of defence,<sup>14</sup> the right of access to the file,<sup>15</sup> and the obligation to a proper motivation of legal acts.<sup>16</sup>

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10. See *Administration des douanes v Société anonyme Gondrand Frères and Société anonyme Garancini (Gondrand and Garancini)*, Case C-169/80, [1981] E.C.R. 1931, ¶ 15; *Gebroeders van Es Douane Agenten v Inspecteur der Invoerrechten en Accijnzen*, Case C-143/93, [1996] E.C.R. I-459, ¶ 27; *Belgium v. Commission*, C-110/03, [2005] E.C.R. I-2829, ¶ 30; *Akzo Nobel Chems. and Akcros Chems.*, [2010] E.C.R. I-8301, ¶ 100 and the case law cited therein.

11. See *Algera and others*, [1957] E.C.R. 41, 55; *S.N.U.P.A.T.*, [1961] E.C.R. 55, 87; *Lemmerz Werke v. High Auth.*, Case C-111/63, [1965] E.C.R. 678, 691; *Klomp*, [1969] E.C.R. 44, ¶ 13. For the more recent case law, see, for example, *Marks & Spencer*, Case C-62/00, [2002] E.C.R. I-6348, ¶¶ 44–45; *Bundeswettbewerbshilfebehörde and Bundeskartellamt v Schenker & Co. AG and Others*, Case C-681/11, [2013] E.C.R. I-0000, ¶ 41; *Test Claimants in the Franked Investment Income Group Litigation v. Commissioners of Inland Revenue and Commissioners for Her Majesty's Revenue and Customs*, Case C-362/12, [2013] E.C.R. I\_\_\_\_, ¶¶ 44–45.

12. *Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Case C-11/70, [1970] E.C.R. 1126, ¶ 12; *Merkur Fleisch-Import v. Hauptzollamt Hamburg-Ericus*, Case C-147/81, [1982] E.C.R. 1389, ¶. 12; *Denkavit Nederland v. Hoofdprodukschap voor Akkerbouwprodukten*, Case C-15/83, [1984] E.C.R. 2237, ¶ 25; *Schräder v. Hauptzollamt Gronau*, Case C-265/87, [1989] E.C.R. 2237, ¶ 2. For the more recent case law, see, for example, *Afton Chemical v. Secretary of State for Transport*, Case C-343/09, [2010] E.C.R. I-7027, ¶ 45; *Nelson and Others v. Deutsche Lufthansa AG & TUI Travel plc and Others v. Civil Aviation Auth.*, Joined Cases 581/10 & 629/10, [2012] E.C.R. I\_\_\_\_, ¶ 71; *Sky Österreich v. Österreichischer Rundfunk*, Case C-283/11, [2013] E.C.R. I\_\_\_\_, ¶ 50.

13. *Alvis v Council of the EEC*, Case 32/62, [1963] E.C.R. 49, 55; *Commission v. Lisrestal and others*, Case C-32/95 P, [1996] E.C.R. I-5387, ¶ 21; *Mediocurso v. Commission*, Case C-462/98 P, [2000] E.C.R. I-7196, ¶ 36; *Sopropé—Organizações de Calçado Lda. v. Fazenda Pública*, Case C-349/07, [2008] E.C.R. I-10369, ¶¶ 36–37; *France v. People's Mojahedin Org. of Iran*, Case C-27/09 P, [2011] E.C.R. I\_\_\_\_, ¶¶ 65–66; *G. and R v. Staatssecretaris van Veiligheid en Justitie*, Case C-383/13 PPU, [2013] E.C.R. I\_\_\_\_, ¶ 32 and the case law cited therein.

14. See *AM & S v. Commission*, Case C-155/79, [1982] E.C.R. 1577, ¶ 18; *Orkem v. Commission*, Case C-374/87, [1989] E.C.R. 3343, ¶ 32; *Akzo Nobel Chems. and Akcros Chems.*, [2010] E.C.R. I-8301, ¶ 92 and the case law cited therein.

15. *Hoffmann-La Roche v. Commission*, Case C-85/76, [1979] E.C.R. 464, ¶¶ 9, 11; *Hercules Chemicals v. Commission*, Case C-51/92 P, [1999] E.C.R. I-4250, ¶ 75; *Limburgse Vinyl Maatschappij and Others v. Commission*, Joined Cases 238, 244, 245, 247, 250–52, 254/99 P, [2002] E.C.R. I-8618, ¶¶ 315–16; *Aalborg Portland and others v. Commission*, Case C-204/00 P, [2004] E.C.R. I-403, ¶ 68; *Knauf Gips KG v. Commission*, Case C-407/08 P, [2010] E.C.R. I-6375, ¶ 22.

16. See *Portugal v. Commission*, Case C-42/01, [2004] E.C.R. I-6102, ¶ 66; *Unicredito Italiano v. Agenzia delle Entrate, Ufficio Genova 1*, Case C-148/04, [2005]

B. *The Increasing Importance of Comparative Considerations in Legal Reasoning*

Given the particular importance of the role which the Court has attributed to comparative considerations in the evolution of general principles of Union law, it appears regrettable from an outside perspective that the methodology which the Court applies is not made fully transparent.<sup>17</sup> The rather short references which are contained in the Court's judgments<sup>18</sup> indeed only constitute the "tip of the iceberg"<sup>19</sup> and are based on extensive considerations contained in the conclusions of the Advocate General<sup>20</sup> and on preliminary research done by the internal service of the Court.<sup>21</sup> This lack of full methodological transparency, which has somehow been compensated for by a particularly intense treatment of the

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E.C.R. I-11169, ¶ 99; Spain v. Council, Case C-310/04, [2006] E.C.R. I-7318, ¶ 57; Interporc v. Commission, Case C-41/00 P, [2003] E.C.R. I-2156, ¶ 55; Elf Aquitaine v. Commission, Case C-521/09 P, [2011] E.C.R. I\_\_\_\_, ¶ 14; Confédération suisse v. Commission, Case C-547/10 P, [2013] E.C.R. I\_\_\_\_, ¶ 67.

17. See Pauliine Koskelo, *Report of P. Koskelo, President of the Supreme Court of Finland*, in ACTES DU COLLOQUE POUR LE CINQUANTIÈME ANNIVERSAIRE DES TRAITÉS DE ROME 24 (2007), available at <http://bookshop.europa.eu/en/actes-du-colloque-pour-le-cinquanti-me-anniversaire-des-traites-de-rome-pbQD7707253/>.

18. See LTU v. Eurocontrol, Case C-29/76, [1976] E.C.R. 1541, ¶ 5; Kampffmeyer and others v. Commission and Council, Joined Cases C-56-60/74, [1976] E.C.R. 712, ¶ 6; Hoechst v. Commission, Joined Cases 46/87 & 227/88, [1989] E.C.R. 2919, ¶ 17; Gerhard Köbler v. Republik Österreich, Case C-224/01, [2003] E.C.R. I-10290, ¶ 48 (principle of res judicata and independence of the judiciary); ThyssenKrupp Nirosta GmbH v. Commission, Case C-352/09 P, [2011] E.C.R. I-2359, ¶ 123 (principle of res judicata); Omega, Case C-36/02, [2004] E.C.R. I-9641, ¶¶ 33, 35 (human dignity). In relation to the confidentiality of written communications between lawyers and clients, the Court considered it appropriate to found its judgment on a more detailed analysis of the legal situation in the Member States, see *AM & S*, [1982] E.C.R. p. I-1577, ¶¶ 18-21; *Akzo Nobel Chems. and Akros Chems.*, [2010] E.C.R. I-8301, ¶¶ 40-43, 69-76.

19. See Pierre Pescatore, *Le recours dans la jurisprudence de la Cour de Justice des Communautés Européennes à des normes déduites de la comparaison des droits des États membres*, 35 REVUE INTERNATIONALE DE DROIT COMPARÉ [R.I.D.C.] 337, 358 (1980) (Fr.).

20. See, e.g., Opinion of Advocate General Mischo, *Hoechst v. Commission*, Joined Cases 46/87 & 227/88, [1989] E.C.R. I-2875, ¶¶ 48-126; Opinion of Advocate General Léger, *Köbler v. Austria* Case C-224/01, [2003] E.C.R. I-10243, ¶¶ 91, 96; Opinion of Advocate General Stix-Hackl, *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, Case C-36/02, [2004] E.C.R. I-9611, ¶¶ 82-84; Opinion of Advocate General Kokott, *Akzo Nobel Chems. and Akros Chems.*, [2010] E.C.R. I-8301, ¶¶ 47, 89-91, 101-04.

21. RÜDIGER STOTZ, *Die Rolle des Gerichtshofs bei der Integration*, in *Rengeling/von Borries (Hrsg.), in AKTUELLE ENTWICKLUNGEN IN DER EUROPÄISCHEN GEMEINSCHAFT* 21, 42 n.118.



comparative method in academic writing of different generations of judges of the Court,<sup>22</sup> is certainly due to the discretion which the Court has to exercise in the evolution and recognition of general principles of Union law and in particular when it comes to determine the precise contours of such a principle. In order to protect the authority of the Court's judgments, it becomes more and more vital to base judicial decision-making on comparative insights. Since the enlargement of the European Union goes along with an increase of legal orders which have to be taken into consideration when it comes to the recognition of general principles of EU law, the importance of comparative analysis is equally enhanced and the discretion which the Court has to exercise in this respect certainly becomes more delicate.

But, the increasing importance of comparative considerations in legal reasoning in EU law is, in particular, intensified by an evolution which has been initiated by national judiciaries and is enshrined in the concept of what is called "multilevel cooperation of courts" or *Gerichtsverbund* in the European Union.<sup>23</sup> On the basis of what Chief Justice Murray from Ireland described as a growing judicial cosmopolitanism,<sup>24</sup> this methodology of interpretation has expanded significantly in recent years. Today, judges pay increasing attention to comparative law arguments. While the famous controversy

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22. HANS KUTSCHER, *THESEN ZU DEN METHODEN DER AUSLEGUNG DES GEMEINSCHAFTSRECHTS AUS DER SICHT EINES RICHTERS* 23 (1976) (abbreviated language of material); Pierre Pescatore, *Le recours dans la jurisprudence de la Cour de Justice des Communautés Européennes a des normes déduites de la comparaison des droits des États membres*, 35 *REVUE INTERNATIONALE DE DROIT COMPARÉ* [R.I.D.C.] 337 (1980) (Fr.); Josse Mertens de Wilmars, *Le droit comparé dans la jurisprudence de la Cour de Justice des Communautés européennes*, *JOURNAL DES TRIBUNAUX* 37 (1991) (Fr.) (abbreviated language of material); Yves Calmot, *Réflexions sur le recours au droit comparé par la Cour de justice des Communautés européennes*, *RÉVUE FRANÇAISE DE DROIT ADMINISTRATIF* 258 (1990) (Fr.) (abbreviated language of material).

23. See Andreas Voßkuhle, President, Bundesverfassungsgericht, Sir Thomas More Lecture at the Honourable Society of Lincoln's Inn: European Integration and the Bundesverfassungsgericht (Oct. 31, 2013) [hereinafter Voßkuhle, European Integration], available at <http://www.london.diplo.de/contentblob/4026032/Daten/3646135/Vosskuhle.pdf>.

24. JOHN L. MURRAY, *Methods of Interpretation – Comparative Law Method*, in *ACTES DU COLLOQUE POUR LE CINQUANTIEME ANNIVERSAIRE DES TRAITES DE ROME* 45, 48 (European Court of Justice eds., 2007), available at <http://bookshop.europa.eu/en/actes-du-colloque-pour-le-cinquanti-me-anniversaire-des-trait-s-de-rome-pbQD7707253/>.

between Justice Kennedy and Justice Scalia from the US Supreme Court concerning the relevance of foreign law for the interpretation of the US Constitution has shown the conceptual difference in paradigmatic clarity,<sup>25</sup> the interpretation rule enshrined in article 39 of the South African Constitution of 1996, according to which the interpretation of fundamental rights has to respect international law and has to take account of foreign law, is certainly an instructive example of this recent evolution.<sup>26</sup> But, of course, it is of much greater practical importance to see that the ECJ has, by way of preliminary references, already been confronted with differences in the constitutional conceptions of different Member States and, on that basis, been asked to take those considerations into account when interpreting a fundamental right granted by the Charter of Fundamental Rights.<sup>27</sup>

The interpretation of fundamental rights offers a particularly striking example for the growing need of comparative analysis and the search for an interpretation which takes account of the meaning given to an equivalent right. This consideration has to be highlighted in the European context of the protection of fundamental rights, which genuinely takes place in a multilayered system. On the national level, fundamental rights are protected by national constitutions and, in quite a number of states, by constitutions of federated entities. On the European level, fundamental rights of EU

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25. See the grounds of the judgment written by Justice Kennedy for the majority in *Lawrence v. Texas*, 539 U.S. 558, 576–77 (2003) with reference to the case law of the European Court of Human Rights. In addition, see the dissenting opinion by Scalia, in *Thompson v. Oklahoma*, 487 U.S. 815, 868–69 (1988) and in *Roper v. Simmons*, 543 U.S. 551, 608 (2005). In this regard, see also Sanford Levinson, *Looking Abroad when Interpreting the U.S. Constitution: some Reflections*, 39 TEX. INT'L L.J. 353 (2004); Richard A. Posner, *The Supreme Court 2004 Term Foreword: A Political Court*, 119 HARV. L. REV. 31, 85–90 (2005); William H. Pryor Jr., *Foreign and International Law Sources in Domestic Constitutional Interpretation*, 30 HARV. L. & POL'Y REV. 173 (2006); Ganesh Sitaraman, *The Use and Abuse of Foreign Law in Constitutional Interpretation*, 32 HARV. L. & POL'Y REV. 653 (2009); Austen L. Parrish, *Storm in a Teacup: the U.S. Supreme Court's Use of Foreign Law*, 2007 U. ILL. L. REV. 637 (2007); DONALD W. JACKSON, *GLOBALIZING JUSTICE: CRITICAL PERSPECTIVES ON TRANSNATIONAL LAW AND THE CROSS-BORDER MIGRATION OF LEGAL NORMS* 7 (Michael C. Tolley & Mary L. Volcansek eds., 2010).

26. See S. AFR. CONST. 1996, ch. 2, art. 39.

27. Charter of Fundamental Rights of the European Union, 2000 O.J. C 364/1 [hereinafter Charter of Fundamental Rights]. See, e.g., *Germany v. Y and Z*, Joined Cases C-71/11 & C-99/11, [2012] E.C.R. I\_\_\_\_, ¶¶ 42, 56–72.

citizens are protected by the Charter of Fundamental Rights, by general principles of EU law, and by the fundamental rights enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms. Only for the latter convention, it is generally accepted that the human rights protected therein lay down minimal standards.<sup>28</sup> But, beyond the specific function of the Convention, as a matter of principle, it would be difficult for citizens to accept that the protection offered by fundamental rights with respect to EU institutions or acts undertaken by Member States to implement Union law would offer a lower level of protection than the one ensured on the national level against “purely” national acts of public authority. Differences in the level of protection would finally lead to a detrimental forum shopping in search of the most advantageous human rights protection<sup>29</sup> and provoke major difficulties in the delimitation of the respective jurisdictional competences.<sup>30</sup>

But, beyond those general considerations which imply an enhanced degree of awareness for comparative law considerations in the protection of fundamental rights, the Charter of Fundamental Rights of the European Union goes even a step further in making such considerations mandatory. It is quite striking to see that article 52 of the Charter, specifically in paragraphs 3, 4, and 6, contains provisions which are much more elaborate and precise than the rather general rule contained in article 39 of the South African Constitution. In addition, it seems that those provisions form a set of complementary requirements which, as such, might cause difficulties and even create contradictions. Article 52, paragraph

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28. See European Convention for the Protection of Human Rights and Fundamental Freedoms art. 53, Nov. 4, 1950, 213 U.N.T.S. 221 (“Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party.”).

29. See *Kamberaj v. L’Istituto per l’Edilizia sociale della Provincia autonoma di Bolzano and Others*, Case C-571/10, [2012] E.C.R. I\_\_\_\_, ¶ 62; *Åklagaren v. Åkerberg Fransson*, Case C-617/10, [2013] E.C.R. I\_\_\_\_, ¶ 44.

30. See *Åkerberg Fransson*, [2013] E.C.R. I\_\_\_\_, ¶¶ 17–27; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Apr. 24, 2013, 1 BvR 1215/07, NJW-RECHTSPRECHUNGS-REPORT, ZIVILRECHT [NJW] 2013, 1499, 1501 (Ger.), available at [http://www.bverfg.de/entscheidungen/rs20130424\\_1bvr121507.html](http://www.bverfg.de/entscheidungen/rs20130424_1bvr121507.html); Voßkuhle, European Integration, *supra* note 23.

3, states that for the Charter rights, which correspond to rights guaranteed by the Convention, the meaning and scope of those rights shall be the same as those laid down in the Convention. It is clarified that this provision does not prevent Union law to provide a more extensive protection. In the same line of reasoning but less imperative, article 52, paragraph 4, foresees that fundamental rights which are recognized by the Charter as they result from the constitutional traditions common to the Member States, shall be interpreted in harmony with those traditions. Finally, article 52, paragraph 6, holds that full account shall be taken to national laws and practices where the articles of the Charter contain a specific reference to national laws and practices.

Doubtlessly, those requirements have been included in the Charter in order to achieve a well-balanced and generally accepted standard of protection in the field of fundamental rights which should not differ too significantly from the traditions of the Member States. But, since those are far from being identical, the application of these interpretation-guidelines is even more accentuated by the explanations to the Charter which have been drafted in order to give guidance in the interpretation of the Charter and which shall, according to article 52, paragraph 7, be given due regard by the courts of the Union and of the Member States. For the time being, it is not yet foreseeable how the Court will face those different directives of interpretation which might, notably in a situation in which fundamental rights apply on the basis of multilateral relations, avoid incoherent results and, in particular, an open conflict between diverging requirements. It is even less predictable as to whether the ECJ will be able to apply those guidelines as a set of strict limitations to its judicial autonomy in the interpretation of the Charter rights or whether the need for an autonomous interpretation of the fundamental rights as it follows from the structure and the objectives of the Union will prevail.<sup>31</sup>

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31. *See* Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, Case C-11/70, [1970] E.C.R. I-1126, ¶4.

## II. RECENT JURISPRUDENCE OF THE ECJ ON THE RULE OF LAW

It should not be too much of a surprise that the recent jurisprudence of the ECJ on the rule of law was not triggered by the deviant behavior of Member States which is, as we will see later on, undoubtedly, in need of a reinforcement of the rule of law. The recent jurisprudence of the Court on the rule of law was rather provoked by the institutions of the European Union and, more generally, by what has become famous as the “war on terror.” It was the mechanism of the so-called smart sanctions which the Security Council of the United Nations used inter alia against private individuals and associations, which has given rise to the question how the right of defense would and could be ensured in a situation in which the European Union was charged to implement the sanctions binding under the UN Charter. Already in 2008, in the landmark decision in the joined case *Kadi and Al Barakaat*,<sup>32</sup> the Court recognized the necessity

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32. See *Kadi and Al Barakaat Int'l Found. v. Council and Commission*, Joined Cases C-402/05 P & C-415/05 P, [2008] E.C.R. I-6351, ¶ 281. The legal comments relating to this judgment are abundant, see, e.g., MARKUS KOTZUR, *Kooperativer Grundrechtsschutz in der Völkergemeinschaft*, in *EUROPÄISCHE GRUNDRECHTE ZEITSCHRIFT* 673 (2008) (Ger.); PAUL CASSIA & FRANCIS DONNAT, *Terrorisme International et Droits Fondamentaux: Les Leçons du Droit Communautaire*, in *REVUE FRANÇAISE DE DROIT ADMINISTRATIF* 1204 (2008) (Fr.); ROBERT KOLB, *Le Contrôle de Résolutions Contraignantes du Conseil de Sécurité des Nations Unies Sous L'angle du Respect du Jus Cogens*, in *REVUE SUISSE DE DROIT INTERNATIONAL ET EUROPÉEN* 401 (2008) (Fr.); JÖRN AXEL KÄMMERER, *Das Urteil des Europäischen Gerichtshofes im Fall "Kadi": Ein Triumph der Rechtsstaatlichkeit?*, in *EUROPARECHT* 114 (2009) (Ger.); JEAN PAUL JACQUÉ, *Primauté du Droit International versus Protection des Droits Fondamentaux*, in *REVUE TRIMESTRIEL DE DROIT EUROPÉEN* 161 (2009) (Fr.); KIRSTEN SCHMALENBACH, *Bedingt Kooperationsbereit: Der Kontrollanspruch des EuGH bei Gezielten Sanktionen der Vereinten Nationen*, in *JURISITENZEITUNG* 3 (2009) (Ger.); STEFAN GRILLER, *Die Bindung der Europäischen Union an das Recht der Vereinten Nationen unter besonderer Berücksichtigung der Rechtswirkungen von Beschlüssen des Sicherheitsrates im Unionsrecht*, in *ZEITSCHRIFT EUROPARECHT* 103 (2012) (abbreviated language of material); Guy Harpaz, *Judicial Review by the European Court of Justice of UN 'Smart Sanctions' Against Terror in the Kadi Dispute*, 14 *EUR. FOREIGN AFF. REV.* 65 (2009); Grainne De Búrca, *The European Court of Justice and the International Legal Order After Kadi*, 51 *HARV. INT'L L.J.* 44 (2010); Ana Maria Salinas DeFrias, *COUNTER-TERRORISM: INTERNATIONAL LAW AND PRACTICE* 83 (Katja Samuel & Nigel White eds., 2012); Christian Tomuschat, *The Kadi Case: What Relationship is there between the Universal Legal Order under the Auspices of the United Nations and the EU Legal Order?*, 28 *Y.B. OF EURO. L.* 654 (2009); Federico Fabbrini, *The Role of the Judiciary in Times of Emergency: Judicial Review of Counter-Terrorism Measures in the United States Supreme Court and the European Court of Justice*, 28 *Y.B. OF EURO. L.* 664 (2009).

for a full judicial review of such implementation measures of UN sanctions on grounds of fundamental rights granted by the legal order of the Union. The ECJ emphasized that the European Union is based on the rule of law inasmuch as neither the Member States nor its institutions can avoid review of the conformity of their acts with the treaty understood as “basic constitutional charter,” which enables the ECJ to review the legality of acts of the institutions, even if those acts are undertaken in fulfillment of obligations resulting from international agreements.<sup>33</sup>

*A. Effective Judicial Protection Against Restrictive Measures*

On the basis of that truly fundamental component of the rule of law, the Court had to further develop the requirements of judicial control under the circumstances of the war against terror in the case of *ZZ*, concerning a decision to refuse entry to a Union citizen to the United Kingdom on imperative grounds of public security, which were essentially based on “closed evidence” and had, in accordance with national law, not been disclosed to *ZZ*.<sup>34</sup> Under those circumstances, the reference to the Court focused on the requirements of effective judicial protection and in particular on whether the essence of the grounds must be disclosed to the Union citizen concerned by such a decision. At the outset, the ECJ repeated the settled caselaw according to which the fundamental right to an effective legal remedy would be infringed if a judicial decision were founded on facts and documents which the parties themselves, or one of them, have not had an opportunity to examine and on which they have therefore been unable to state their views.<sup>35</sup>

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33. See *Kadi and Al Barakaat Int'l Found.*, [2008] E.C.R. I-6351, ¶ 285; *Faraj Hassan v. Council and Chafiq Ayadi v. Council*, Joined Cases C-399/06 & C-403/06 P, [2009] E.C.R. I-11393, ¶ 71; *Bank Melli Iran v. Council*, Case C-548/09 P, [2011] E.C.R. I-11381, ¶ 105; *Commission and Others v. Yassin Abdullah Kadi*, Joined Cases C-584/10 P, C-593/10 P, & C-595/10 P, [2013] E.C.R. I\_\_\_\_, ¶¶ 66–67.

34. See *ZZ v. Sec'y of State for the Home Dep't*, Case C-300/11, [2013] E.C.R. I\_\_\_\_, ¶¶ 24, 28–32, 40–44.

35. *Id.* ¶ 53, 56; *Josep Peñarroja Fa*, Joined Cases C-372/09 & C-373/09, [2011] E.C.R. I-1785, ¶ 63; *Gaydarov v. Direktor na Glavna direksia “Ohranitelna politsia” pri Ministerstvo na vateshnite raboti*, Case C-430/10, [2011] E.C.R. I-11637, ¶ 41. To this effect, see *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v. Heylens and Others*, Case C-222/86, [1987] E.C.R. I-4097, ¶ 15;

However, the Court noted that it may prove necessary not to disclose certain information to the person concerned, in particular in the light of overriding considerations connected with State security. If, in exceptional cases, reasons of State security are invoked to refuse full disclosure of grounds which constitute the basis of a decision taken under the directive 2004/38, the national court must have at its disposal and apply techniques and rules of procedural law which accommodate, on the one hand, legitimate State security considerations regarding the nature and sources of the information taken into account in the adoption of such a decision and, on the other hand, the need to ensure sufficient compliance with the person's procedural rights, such as the right to be heard and the adversarial principle.<sup>36</sup> In the context of the judicial review under directive 2004/38 the Member States must lay down rules enabling the court entrusted with review of the decision's legality to examine both all the grounds and the related evidence on the basis of which the decision was taken. The national courts with jurisdiction in that matter must carry out an independent examination of all matters of law and fact relied upon by the competent national authority and it must determine whether State security stands in the way of such disclosure.<sup>37</sup> If it turns out that State security in fact does stand in the way of precise and full disclosure, judicial review has to be carried out in a procedure which strikes an appropriate balance between the requirements flowing from State security and the requirements of the right to effective judicial protection whilst limiting any interference with the exercise of that right to what is strictly necessary.<sup>38</sup>

The Court went on and established an essential distinction in that field. On the one hand, in order to comply with article 47 of the Charter, the person concerned must be informed, in any event, of the essence of the grounds on which a decision

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Kadi and Al Barakaat International Foundation v. Council and Commission, Joined Cases C-402/05 P & C-415/05 P, [2008] E.C.R. I-6351, ¶ 337; Commission v. Ireland and Others, Case C-89/08 P, [2009] E.C.R. I-11245, ¶ 52; and Banif Plus Bank Zrt v. Csaba Csipai & Viktória Csipai, Case C-472/11, [2013] E.C.R. I\_\_\_\_, ¶ 30.

36. *ZZ*, [2013] E.C.R. I\_\_\_\_, ¶ 57; *Kadi and Al Barakaat Int'l Found.*, [2008] E.C.R. I-6351, ¶ 344.

37. *ZZ*, [2013] E.C.R. I\_\_\_\_, ¶¶ 61–62.

38. *Id.* ¶ 64.

refusing entry is based. On the other hand, the weighing up of the right to effective judicial protection against the necessity to protect the security of the Member State concerned is not applicable in the same way to the evidence underlying the grounds produced before the national courts, since disclosure of that evidence is liable to compromise State security in a direct and specific manner and may, in particular, endanger the life, health, or freedom of persons or reveal the methods of investigation specifically used by the national security authorities and seriously impede, or even prevent, future performance of the tasks of those authorities.<sup>39</sup> In such circumstances, the national court finally has to assess whether the failure to disclose the evidence is such as to affect the evidential value of the confidential evidence.<sup>40</sup>

In the *Kadi II* judgment, concerning again the “blacklisting” of individuals under the circumstances of the war against terror, the Court transposed the essential requirements developed in *ZZ* to the freezing of economic resources on the basis of the inscription in a list drawn up by the Sanction’s Committee of the United Nations.<sup>41</sup> On that basis, the Court went on to examine the different reasons on which Mr. Kadi had been listed and concluded whether those were sufficiently detailed and specific to allow for an effective defense.<sup>42</sup> Taking the comments of Mr. Kadi into account, the Court concluded that none of the allegations presented against Mr. Kadi in the summary provided by the Sanctions Committee were such as to justify the adoption of restrictive measures on the level of the European Union against him, either because the statement of reasons was insufficient or because information or evidence which might have substantiated the reason concerned, was lacking.<sup>43</sup> It should still be noted that the Court is, indeed, pursuing a balanced approach to the scrutiny of restrictive measures taken in the context of the fight against terrorism as it

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39. *Id.* ¶ 66.

40. *Id.* ¶ 67.

41. *Commission and Others v. Yassin Abdullah Kadi*, Joined Cases C-584/10 P, C-593/10 P & C-595/10 P, [2013] E.C.R. I\_\_\_\_, ¶ 100–101 (referencing *ZZ*, [2013] E.C.R. I-0000, ¶¶ 51, 53); *id.* ¶¶ 120, 125–29 (referencing *ZZ*, [2013] E.C.R. I\_\_\_\_, ¶¶ 54, 57, 59, 61–64, 67).

42. *Id.* ¶¶ 143–49.

43. *Id.* ¶ 163.



follows notably from the judgments in *Al-Aqsa*<sup>44</sup> and in *Kala Naft*,<sup>45</sup> in which the decisions under scrutiny were upheld.

*B. Effective Judicial Protection and the Failure to Adjudicate Within a Reasonable Time*

Without neglecting that the above mentioned jurisprudence is certainly due to a number of circumstances which are specific to this subject matter, it should still be underlined that the right to effective judicial protection is the most important right under the Charter invoked in proceedings before the Court since the Charter entered into force<sup>46</sup> and has therefore given rise to quite a number of remarkable jurisprudential evolutions. One of the most interesting evolutions concerns the enforcement of the right to effective judicial protection against the failure to adjudicate within a reasonable time. In its earlier jurisprudence, the Court had been confronted with the plea and accepted that such a failure constituted a procedural irregularity. In the case of *Baustahlgewebe v. Commission*, the ECJ held that such a failure could justify a reduction of the amount of a fine imposed by the Commission in cartel-proceedings against an economic undertaking.<sup>47</sup> In a later case concerning a decision of the Commission finding that there had been abuse of a dominant position, the ECJ held that the failure of the General Court to adjudicate within a reasonable time can give rise to a claim for damages<sup>48</sup>.

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44. See *Stichting Al-Aqsa v. Council*, Joined Cases 539/10 P & C-550/10 P, [2012] E.C.R. I \_\_\_\_.

45. See *Council v. Mfg. Support & Procurement Kala Naft Co., Tehran*, Case C-348/12 P, [2013] E.C.R. I \_\_\_\_.

46. As for the cases closed until February 1, 2014, Article 47 of the Charter has been invoked, all types of proceedings included, in more than 80 cases before the Court, see, e.g., *ZZ*, [2013] E.C.R. I \_\_\_\_, ¶¶ 34, 40–69; *Pringle v. Ireland*, Case C-370/12, [2012] E.C.R. I \_\_\_\_, ¶¶ 28, 178; *Inuit Tapiriit Kanatami and others v. European Parliament and Council*, Case C-583/11 P, [2013] E.C.R. I \_\_\_\_, ¶¶ 30, 93–125; *Mfg. Support & Procurement Kala Naft Co., Tehran*, [2013] E.C.R. I \_\_\_\_, ¶¶ 65, 66, 68.

47. *Baustahlgewebe v. Commission*, Case C-185/95 P, [1998] E.C.R. I-8417, ¶ 48.

48. *Der Grüne Punkt v. Commission*, Case C-385/07 P, [2009] E.C.R. I-6155, ¶ 195.

The Court had to reconsider this jurisprudence in the cases *Gascogne Sack Deutschland*,<sup>49</sup> *Kendrion NV*,<sup>50</sup> and *Group Gascogne SA*<sup>51</sup> and came to a quite comprehensive approach. Based on the settled case law of the Strasbourg Court, the ECJ confirmed that a failure to adjudicate within a reasonable time must, as a procedural irregularity constituting the breach of a fundamental right, give rise to an effective remedy.<sup>52</sup> It went on explaining why the failure to adjudicate within a reasonable time can neither justify to set aside the judgment under appeal nor to annul the fine imposed by the contested decision.<sup>53</sup> On the question to reduce the fine imposed by the contested decision, the Court did not continue in the line of its jurisprudence in *Baustahlgewebe v. Commission*, but held that a claim for damages brought against the European Union pursuant to Articles 268 and 340, paragraph 2, of the Treaty on the Functioning of the European Union (“TFEU”) constitutes an effective remedy of general application, which has to be brought first to the General Court, sitting in a different composition from that which heard the dispute giving rise to the claim for damages and only on appeal to the ECJ.<sup>54</sup> It will be for the General Court to evaluate the relevant criteria for assessing whether it had observed the reasonable time principle which the Court had exposed in *Der Grüne Punkt*<sup>55</sup> as well as the actual existence of the harm alleged and the causal connection between the harm and the excessive length of the legal proceedings.<sup>56</sup> The final consideration of the Court on the cases brought before it shows that the ECJ did not allow for an easy way out, but demonstrated that it is indeed committed to an effective remedy for asserting and penalizing the breach of article 47 of the Charter.

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49. *Gascogne Sack Deutschland v. Commission*, Case C-40/12, [2013] E.C.R. I \_\_\_\_.

50. *Kendrion NV v. Commission*, Case C-50/12 P, [2013] E.C.R. I \_\_\_\_.

51. *Groupe Gascogne SA v. Commission*, Case C-58/12 P, [2013] E.C.R. I \_\_\_\_.

52. See *Gascogne Sack*, [2013] E.C.R. I \_\_\_\_, ¶ 80 (citing *Kudla v. Poland*, 2000-XI Eur. Ct. H.R. § 156–157); *Kendrion*, [2013] E.C.R. I \_\_\_\_, ¶ 81 (citing *Kudla v. Poland*, 2000-XI Eur. Ct. H.R. § 156–157); *Groupe Gascogne*, [2013] E.C.R. I \_\_\_\_, ¶ 72 (citing *Kudla v. Poland*, 2000-XI Eur. Ct. H.R. § 156–157).

53. See *Kendrion*, [2013] E.C.R. I \_\_\_\_, ¶¶ 82–88.

54. See *id.* ¶¶ 95, 101.

55. *Der Grüne Punkt v Commission*, Case C-385/07 P, [2009] E.C.R. I-06155, ¶¶ 181, 182, 186; *Kendrion*, [2013] E.C.R. I \_\_\_\_, ¶¶ 96–98.

56. *Kendrion*, [2013] E.C.R. I \_\_\_\_, ¶¶ 99, 101.

In sum, this jurisprudence contains different messages. The most evident one is the demonstration that the ECJ's approach is, even without formal adherence to the convention, fully consistent with the settled case-law of the Strasburg Court. Hereby the ECJ is reinforcing its image as independent guardian in the field of fundamental rights in which it invariably applies its standard of review. A second message, addressed to the General Court, indicates that the failure to adjudicate in a reasonable period of time is to be taken seriously and will, beyond the negative public exposure, lead to a further increase in its workload. And a final message is addressed to the Union's political institutions and the Member States to live up to their common responsibility for the well-functioning of the judicial institutions of the Union.<sup>57</sup>

### *C. Legislative Discretion and Judicial Scrutiny*

While the recent jurisprudence of the ECJ on effective judicial protection is recognizably marked by the impetus which the entry into force of the Charter of Fundamental Rights has brought about, the recent jurisprudence on the rule of law relates as well to questions of general nature and, in particular, to an "eternal" question of any system of constitutional justice: The interrelation between legislative discretion and judicial scrutiny and more precisely the way in which the Court operates its control and how it is respecting the discretion which is attributed to the legislator in any constitutional democracy.

According to the settled case-law, the Court acknowledges that in the exercise of the powers conferred on the legislator of the European Union, it enjoys a broad discretion where its action involves political, economic, and social choices and where it is called on to undertake complex assessments and evaluations. In addition, where it is called on to restructure or establish a complex system, it is entitled to have recourse to a step-by-step approach.<sup>58</sup> As regards to the judicial review of

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57. See, in that respect, the proposition of the Court to increase the number of judges at the General Court, Council Draft Regulation No. 8787/11 on Amendments to the Statute of the Court of Justice of the European Union and to Annex I thereto (Apr. 7, 2011).

58. See *Société Arcelor Atlantique et Lorraine and Others v Premier ministre, Ministre de l'Écologie et du Développement durable and Ministre de l'Économie, des*

compliance with constitutional requirements, such as the principle of proportionality, in the fields in which the European Union legislature has a broad legislative power, the lawfulness of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate, having regard to the objective which the competent institutions are seeking to pursue. However, even where it has such a discretion, the legislature must base its choice on objective criteria appropriate to the aim pursued by the legislation, taking into account all the facts and the technical and scientific data available at the time of the adoption of the act in question. When exercising its discretion, the EU legislature must fully take into account all the interests involved. In examining the burdens associated with various possible measures, it must be considered that, even if the importance of the objectives pursued is such as to justify even substantial negative economic consequences for certain operators, the exercise of the legislator's discretion must not produce results that are manifestly less appropriate than those produced by other suitable measures.<sup>59</sup> Where the European Union legislature is obliged to assess the future effects of rules to be adopted and those effects cannot be accurately foreseen, its assessment is open to criticism only if it appears manifestly incorrect in the light of the information available to it at the time of the adoption of the rules in question.<sup>60</sup> However, according to the case-law of the Court, the legislature is obliged,

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Finances et de l'Industrie, Case C-127/07, [2008] E.C.R. I-9895, ¶ 57; *Int'l Air Transp. Ass'n v. Dep't for Transp.*, Case C-344/04, [2006] E.C.R. I-403, ¶ 80; *Rewe-Zentrale v. Direktor der Landwirtschaftskammer Rheinland*, Case 37/83, [1984] E.C.R. 1229, ¶ 20; *Assurances du Crédit v. Council & Commission*, Case C-63/89, [1991] E.C.R. I-1799, ¶ 11; *Germany v. Parliament & Council*, Case C-233/94, [1997] E.C.R. I-2405, ¶ 43.

59. *Société Arcelor Atlantique et Lorraine and Others*, [2008] E.C.R. I-9895, ¶¶ 58–59; *Tempelman and van Schaijk v Directeur van de Rijksdienst voor de keuring van Vee en Vlees*, Joined Cases C-96-97/03, [2005] E.C.R. I-1895, ¶ 48; *Agrarproduktion Staebelow v. Landrat des Landkreises Bad Doberan*, Case C-504/04, [2006] E.C.R. I-679, ¶ 37; *The Queen v. Minister of Agric., Fisheries and Food and Sec'y of State for Health, ex parte: Fedesa and others*, Case C-331/88, [1990] E.C.R. I-4023, ¶¶ 15–17; *Greece v Commission*, Case C-86/03, [2005] E.C.R. I-10979, ¶ 96.

60. *Schaible v. Land Baden-Württemberg*, Case C-101/12, [2013] E.C.R. I\_\_\_\_, ¶ 50; *Agrarproduktion Staebelow v. Landrat des Landkreises Bad Doberan*, Case C-504/04, [2006] E.C.R. I-679, ¶ 38; *Agrana Zucker Agrana Zucker GmbH v. Bundesminister für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft*, Case C-309/10, [2011] E.C.R. I-7333, ¶ 45.

under certain circumstances, to consider the need for a review of the adopted measures.<sup>61</sup>

As it appears from this jurisprudence, the ECJ does not issue a blank check to the EU legislature and operates various differentiations which allow for a well-balanced approach to this matter. In the *Vodafone* case, the Court placed much emphasis on the impact assessment which the Commission had presented in relation to the legislative proposal under scrutiny of the Court<sup>62</sup> in order to verify the rationality of the assessments operated in the legislative procedure. In doing so, the ECJ not only contributes to the success of the European Union's initiative for a "better legislation,"<sup>63</sup> but adopts a properly balanced approach between legislative discretion and judicial scrutiny.

#### D. *Balancing Fundamental Rights*

The recent jurisprudence of the ECJ has not only demonstrated a reasonable reinforcement of the intensity of its scrutiny in general, but indicates in particular that the principle of proportionality has received lately an enhanced attention.<sup>64</sup>

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61. See *Société Arcelor Atlantique et Lorraine and others*, [2008] E.C.R. I-9895, ¶ 62; *Schaible v. Land Baden-Württemberg*, Case C-101/12, [2013] E.C.R. I\_\_\_\_, ¶ 92.

62. *Vodafone v. Sec'y of State for Bus., Enter. and Regulatory Reform*, Case C-58/08, [2010] E.C.R. I-4999, ¶¶ 5, 55, 58, 65.

63. As for the action of the European Commission for improving the quality, effectiveness and simplicity of EU legislation, see, for example, Commission of the European Communities, *European Governance: A White Paper*, COM(2001) 428 final (July 2001), 20; Commission of the European Communities, *Action Plan "Simplifying and Improving the Regulatory Environment"*, COM(2002) 278 final (May 2002); Communication of 6 June 2002, *European Governance: Better Lawmaking*, COM(2002) 275 final; Commission of the European Communities, *Communication of, Updating and Simplifying the Community Acquis*, COM(2003) 71 final (Feb. 2003). In Commission of the European Communities, *EU Regulatory Fitness*, COM(2012)746 (Dec. 2012), the European Commission committed to strengthening the existing smart regulation tools (impact assessment, evaluation, stakeholder consultation) and launched the *Regulatory Fitness and Performance Programme ("REFIT")*, aiming at identifying regulatory burdens, gaps and inefficient or ineffective measures as well as possibilities for simplification or repeal. Since 1992, the European Commission has been publishing an annual report on *Better Lawmaking*, covering also subsidiarity and proportionality. See, e.g., Commission of the European Communities, *Annual Report 2012 on Subsidiarity and Proportionality*, COM(2013) 566 final (July 2013).

64. See *Vodafone*, [2010] E.C.R. I-4999; *Afton Chem. v Sec'y of State for Transp.*, Case C-343/09, [2010] E.C.R. I-7027; *Sky Österreich v Österreichischer Rundfunk*, Case C-283/11, [2013] E.C.R. I\_\_\_\_; *Schaible v. Land Baden-Württemberg*, Case C-101/12,

According to settled case-law, the principle of proportionality requires that measures adopted by EU institutions do not exceed the limits of what is “appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.”<sup>65</sup> The Court carefully enhanced the intensity of its scrutiny in recent judgments with respect to any disproportionate nature of an obligation imposed on individuals insofar as it has to verify whether the legislature has met its obligation to strike a balance between the different interests at issue<sup>66</sup> and, in particular, whether the requirements arising from those different rights and freedoms have been carried out in order to reconcile them and to strike a fair balance between them.<sup>67</sup>

The balancing exercise which the ECJ carefully undertook in the *Schecke & Eifert* case in 2010 concerned the reconciling of the objective of transparency protected under article 15 TFEU with the rights to privacy and the protection of personal data protected under articles 7 and 8 of the Charter and led the Court to an annulment of the contested regulation with respect to private individuals since it found that the EU institutions had not struck the required balance between the interests at stake.<sup>68</sup> On the basis of the same balancing test, the Court arrived at the opposite conclusion in *Sky Österreich*, in which the ECJ noted that the EU legislature was required to strike a balance between the freedom to conduct a business, on the one hand, and the fundamental freedom of citizens of the European Union to receive information and the freedom and pluralism of the

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[2013] E.C.R. I\_\_\_\_; *Schecke and Eifert v Land Hessen*, Joined Cases C-92-93/09, [2010] E.C.R. I-11063; *Digital Rights Ireland Ltd and Kärntner Landesregierung and Others*, Joined Cases C-293/12 & C-594/12, [2014] E.C.R. I\_\_\_\_.

65. See *Afton Chem.*, [2010] E.C.R. I-07027, ¶ 45; *Sky Österreich*, [2013] E.C.R. I\_\_\_\_, ¶ 50; *Schaible* [2013] E.C.R. I\_\_\_\_, ¶ 29.

66. See *Schecke and Eifert* [2010] E.C.R. I-11063, ¶ 77; *Sky Österreich* [2013] E.C.R. I\_\_\_\_, ¶ 59; *Schaible* [2013] E.C.R. I\_\_\_\_, ¶ 94.

67. See *Promusicae v. Telefónica de España SAU*, Case C-275/06, [2008] E.C.R. I-00271, ¶¶ 65–66; *Deutsches Weintor eG v. Land Rheinland-Pfalz*, Case C-544/10, [2012] E.C.R. I-0000, ¶ 47; *Sky Österreich*, [2013] E.C.R. I\_\_\_\_, ¶ 60.

68. See *Schecke and Eifert*, [2010] E.C.R. I-11063, ¶¶ 72, 77, 79, 80; *Schaible*, [2013] E.C.R. I\_\_\_\_, ¶ 60.

media, on the other hand.<sup>69</sup> In the latter case the Court concluded that the legislature was entitled to adopt the contested rule on access to exclusive broadcasting rights for the purpose of making short news reports which limit the freedom to conduct a business and to give priority, in the necessary balancing of the rights and interests at issue, to public access to information over contractual freedom.<sup>70</sup>

In *Digital Rights Ireland and Seitlinger and Others*,<sup>71</sup> the ECJ only very recently declared the Data Retention Directive 2006/24 to be invalid, holding that the retention of the entire electronic telephony and internet traffic data of virtually all users in the European Union is a disproportionate measure for attaining the objective of public security. The ECJ explicitly stated that in view of the important role played by the protection of personal data in the light of the fundamental right to respect for private life as laid down in articles 7 and 8 of the Charter, and regarding the extent and seriousness of the interference caused by the data retention directive, the EU legislature's discretion is reduced and judicial review has to be strict.<sup>72</sup> The Court acknowledged that the fight against crime and terrorism is undisputedly of utmost importance and pointed out that everybody's right to security is laid down in article 6 of the Charter.

However, even such a fundamental objective of general interest does not, in itself, justify the retention measures such as established by the directive. On the contrary, the ECJ regarded the retention measures to be disproportionate, since the directive does not require any relationship between the data whose retention was provided for and a threat to public security. In particular, the directive is not restricted to a retention in relation (i) to data pertaining to a particular time period and/or a particular geographical zone and/or to a circle of particular persons likely to be involved in a serious crime, or (ii) to persons who could, for other reasons, contribute, by the retention of their data, to the prevention, detection or prosecution of serious

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69. See *Sky Österreich*, [2013] E.C.R. I \_\_\_\_, ¶ 59.

70. See *id.* ¶¶ 66–67.

71. See *Digital Rights Ireland Ltd and Kärntner Landesregierung and Others*, Joined Cases C-293/12 & C-594/12, [2014] E.C.R. I \_\_\_\_.

72. *Id.* ¶ 48.

offences. Furthermore, the directive does not provide any exceptions as to the persons concerned, with the result that it applies even to persons whose communications are subject to the obligation of professional secrecy.<sup>73</sup>

In addition, the directive fails to lay down any objective criterion which could ensure that the competent national authorities have access to the data and can use them only for the purposes of prevention, detection or criminal prosecutions concerning offences that may be considered to be sufficiently serious to justify such interference.<sup>74</sup> Also, the retention period of a minimum of six months and a maximum of twenty-four months does not distinguish between categories of data and their potential usefulness for the purpose of public security and is not based on objective criteria in order to ensure that it is limited to what is strictly necessary.<sup>75</sup>

Moreover, the directive also lacks sufficient safeguards, as required by article 8 of the Charter, to ensure effective protection of the data retained against the risk of abuse and any unlawful access. In this context, the Court added that the directive did not require the data in question to be retained within the European Union, with the result that control of compliance with the requirements of protection and security by an independent authority, as required by article 8 paragraph 3 of the Charter, was not fully ensured. Such control, carried out on the basis of EU law, is regarded by the ECJ as an essential component of the protection of individuals with regard to the processing of personal data.<sup>76</sup>

It can be concluded from the recent jurisprudence of the ECJ that the scrutiny of the Court tends to be increased in situations in which the proper balancing of different fundamental rights and freedoms or imperative grounds of public policy are at issue.

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73. *Id.* ¶¶ 57–59.

74. *Id.* ¶¶ 60–62.

75. *Id.* ¶¶ 63–64.

76. *Id.* ¶¶ 66–68.



*E. Distribution of Powers Between the Institutions of the Union*

Another important element of the rule of law, directly relating to the political checks and balances embodied in a constitutional system, concerns the distinction between the adoption of rules in matters which only can be enacted in the legislative process and matters which may be subject to rule-making on the basis of implementing powers. In that respect, the adoption of rules essential to a subject matter is, according to settled case law, reserved to the legislature of the European Union. Therefore, the essential rules governing the matter in question must be laid down in the basic legislation and may not be delegated.<sup>77</sup> In a recent judgment on the Schengen Borders Code and in particular the surveillance of the sea external borders, the Court held that provisions which, in order to be adopted, require political choices falling within the responsibilities of the European Union legislature cannot be delegated and, furthermore, essential elements of a basic legislation cannot be amended nor supplemented by new essential elements enacted on the basis of implementing powers.<sup>78</sup> In that respect, the Court rejected the position taken by both the Council and the Commission and pointed out that ascertaining which elements of a matter must be categorized as essential, is not for the assessment of the European Union legislature alone, but must be based on objective factors subject to judicial review.<sup>79</sup>

After having examined the contested decision in the light of the empowering-disposition contained in the basic legislation to take implementing measures, the Court judged that the adoption of rules on the conferral of enforcement powers on border guards entails, on one hand, political choices falling

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77. See *Parliament v. Council*, Case C-355/10, [2012] E.C.R. I\_\_\_\_, ¶ 64 (referencing *Deutsche Post and Germany v. Commission*, Joined Cases C-463/10 P & C-475/10 P, [2011] E.C.R. I\_\_\_\_, ¶ 36; *Atlanta v. European Cmty.*, Case C-104/97 P, [1999] E.C.R. I-6983, ¶ 76; *Molkereigenossenschaft Wiedergeltingen eG v. Hauptzollamt Lindau*, Case C-356/97, [2000] E.C.R. I-5461, ¶ 21; *Parliament v. Commission*, Case C-156/93, [1995] E.C.R. I-2019, ¶ 18; *Parliament v. Council*, Case C-303/94, [1996] E.C.R. I-2943, ¶ 23; *Söhl & Söhlke v. Hauptzollamt Bremen*, Case C-48/98, [1999] E.C.R. I-7877, ¶ 34; *Parliament v. Council*, Case C-133/06, [2008] E.C.R. I-3189, ¶ 45.

78. See *Parliament* [2012] E.C.R. I\_\_\_\_, ¶ 65–66.

79. See *id.* ¶ 67.

within the responsibilities of the European Union legislature in so far as it requires the conflicting interests at issue to be weighed up on the basis of a number of assessments. Depending on political choices, the powers of border guards may vary significantly and the adoption of such rules therefore constitutes a major development in the system of the Schengen Border Code.<sup>80</sup> On the other hand, the Court considered important to point out that provisions on conferring powers of public authority on border guards meant that the fundamental rights of the persons concerned may be interfered with to such an extent that the involvement of the legislature is required.<sup>81</sup>

This judgment constitutes not only a major step to the evolution of a more elaborate system on the delegation of powers which is specifically addressed in articles 290 and 291 TFEU and currently under examination before the Court.<sup>82</sup> It may very well give a first indication as to how the Court might interpret the first condition contained in article 52, paragraph 1, of the Charter of Fundamental Rights requiring that any limitation on the exercise of the rights and freedoms recognized by the Charter “must be provided for by law.” In any event, the Court has continued to enhance the responsibilities of the European Parliament, even to the detriment of Council and Commission. But it has not left out to underline that the crucial question which elements of a subject-matter must be considered as essential remains subject to its judicial review.

### III. *ENSURING THE RESPECT OF THE RULE OF LAW BY MEMBER STATES OF THE EUROPEAN UNION*

The foregoing observations on the recent jurisprudence of the ECJ relating to the rule of law quite clearly indicate that ensuring the rule of law offers more than enough challenges to the Court—even without considering the field of application which first comes to mind when the rule of law is mentioned in the context of European Union law and the process of European legal integration: the observance of the rule of law by the Member States of the European Union. Taken as such, this

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80. *See id.* ¶ 76.

81. *See id.* ¶ 77.

82. *See* Commission v Parliament and Council, Case C-427/12 (pending).

subject covers the entire question of compliance of Member States with EU law and, in particular, the requirements resulting from the obligation to ensure a complete transposition of EU directives. In that respect, the recent Commission's 30th Annual Report on Monitoring the Application of EU law (2012) of October 22, 2013, gives an overview over the observance of EU law in general and by each Member State.<sup>83</sup>

#### A. *Actual Context*

In recent years, the observance of the rule of law by Member States of the European Union has primarily been discussed in the context of the public perception that the political evolution in a Member State might be in contradiction with the values of the Union enshrined in article 2 TEU.<sup>84</sup> In the actual discussion, reference has in particular been made to Hungary,<sup>85</sup> and recently to Romania,<sup>86</sup> but studies have shown

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83. The Commission reports annually on the national implementation of EU law. *See, e.g.*, Commission of the European Communities, 30th Annual Report on Monitoring the Application of EU Law 2012, COM(2013) 726 final (Oct. 2013) (including as Parts I and II, specific reports on the Situation per Member State, Commission Staff Working Document, SEC(2013) 432 final, and the Situation per Policies, Commission Staff Working Document, SEC(2013) 433 final); Commission of the European Communities, 29th Annual Report on Monitoring the Application of EU Law 2011, COM(2012) 714 final (Oct. 2013) (including specific reports on the Situation per Member State and the Situation per policies, Commission Staff Working Documents, SEC(2012) 399 final and SEC(2012) 400).

84. The so-called "Haider Affair" "was giving rise to that discussion." *See, e.g.*, Per Cramér & Pål Wrangé, *The Haider Affair, Law and European Integration*, *Europarattslig Tidskrift* 2000, 28 et seq.; Gregory Fox & Georg Nolte, *Intolerant Democracies*, 36 *HARVARD INT'L L. J.* 1 (1995); WALDEMAR HUMMER & ANTON PELINKA, *ÖSTERREICH UNTER "EU-QUARANTÄNE"*, (2002); Cécile Leconte, *The Fragility of the EU as a "Community of values": Lessons from the Haider Affair*, 28 *W. EURO. POL.* 620 et seq. (2005); Lucia Serena Rossi, *La "Reazione Comune" degli Stati Membri dell'Unione europea nel caso Haider*, 83 *RIVISTA DI DIRITTO INTERNAZIONALE* 151 (2000); HELMUT SCHMITT VON SYDOW, *Liberté, démocratie, droits fondamentaux et État de droit: analyse de l'article 7 du traité UE*, in *REVUE DU DROIT DE L'UNION EUROPÉENNE* 285 (2001).

85. *See* Caroline Hemler, *Europäische Kommission v. Ungarn*, V.S.R. EUROPA BLOG (Oct. 1, 2012), [www.vsr-europa.blogspot.com/2012/01/europaische-kommission-vs-ungarn.html](http://www.vsr-europa.blogspot.com/2012/01/europaische-kommission-vs-ungarn.html); Manuel Müller, *Demokratie in Ungarn: Zeit für eine neue Grundrehtedoktrin des Europäischen Gerichtshofs?*, *DER (EUROPÄISCHE) FÖDERALIST* (Feb. 22, 2012), [www.foederalist.blogspot.com](http://www.foederalist.blogspot.com); Cornelia Ernst, *Verfahren nach Artikel 7 E.U.V. gegen Ungarn einleiten*, *Die Linke* (Jan. 18, 2012), <http://www.dielinke-europa.eu/article/7973.verfahren-nach-artikel-7-euv-gegen-ungarn-einleiten.html>; *see also* Press Release, European Parliament, Hungary Must Abide by EU Values, Say MEPs (July 3, 2013),

that the situation relating to certain fundamental freedoms appears troublesome even in well-established Member States.<sup>87</sup> Beyond all difficulties to find common ground for an adequate evaluation of the respective situations and for the acceptance of the acting institutions, such as the Venice Commission,<sup>88</sup> the context of the legal discussion is framed by the inadequacy of the procedure foreseen in article 7 TEU which clearly cannot be considered as an operational or even suitable instrument to ensure the rule of law in the Member States of the European Union and the observance of the values enshrined in article 2 TEU.<sup>89</sup> Therefore, it seems to be quite generally accepted in

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<http://www.europarl.europa.eu/news/en/news-room/content/20130701IPR14768/html/Hungary-must-abide-by-EU-values-say-MEPs>.

86. See Manuel Müller, *Was tun für den Rechtsstaat in Rumänien?*, DER (EUROPÄISCHE) FÖDERALIST (July 17, 2012), [www.foederalist.blogspot.com](http://www.foederalist.blogspot.com); Edward Kanterian & Cristina Arion, *Wie die rumänische Regierung die Verfassung Verbessern will*, (June 14, 2013), <http://www.verfassungsblog.de/de/wie-die-rumanische-regierung-die-verfassung-verbessern-will/#.U2epLIFdV8E>; Recht im Kontext & Edward Kanterian, *The Crisis of Democracy in Hungary and Romania—Learning from Weimar?*, (May 13, 2013), <http://www.verfassungsblog.de/de/the-crisis-of-democracy-in-hungary-and-romania-learning-from-weimar/#.U2epoYFdv8E>.

87. Timm Beichelt, *Von Steinen und Glashäusern*, FRANKFURTER ALLGEMEINE ZEITUNG, Dec. 12, 2013, at 7.

88. The Venice-Commission has delivered in total 12 opinions with regard to Hungary, of which 8 opinions were delivered only in 2012: Opinion 683/2012 on the Cardinal Acts on the Judiciary that were amended following the adoption of CDL-AD(2012)001 sur la Hongrie; Opinion 672/2012 on Act CXII of 2011 on informational Self-determination and Freedom of Information; Opinion 671/2012 on the Act on the Rights of Nationalities; Opinion 668/2012 on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career; Opinion 665/2012 on Act CLI of 2011 on the Constitutional Court; Opinion 664/2012 on Act CCVI of 2011 on the Right to Freedom of Conscience and Religion and the Legal Status of Churches, Denominations and Religious Communities; Opinion 663/2012 on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts; Joint Opinion 662/2012 on the Act on the Elections of Members of Parliament of Hungary. As for Romania, the Venice-Commission has delivered in total 9 opinions, one opinion in 2012: Opinion 685/2012 on the Compatibility with Constitutional Principles and the Rule of Law of Actions Taken by the Government and the Parliament of Romania in Respect of Other State Institutions and on the Government Emergency Ordinance on Amendment to the Law N° 47. The opinions of the Venice-Commission are available at [http://www.venice.coe.int/WebForms/documents/by\\_opinion.aspx](http://www.venice.coe.int/WebForms/documents/by_opinion.aspx) (02.02.2014).

89. See, e.g., Armin von Bogdandy et al., *Reverse Solange—Protecting the Essence of Fundamental Rights against EU Member States*, 49 COMMON MKT. L. REV. 489, 491, 496–507 (2012); SERGIO CARRERA ET AL., THE TRIANGULAR RELATIONSHIP BETWEEN FUNDAMENTAL RIGHTS, DEMOCRACY AND THE RULE OF LAW IN THE EU. TOWARDS AN EU COPENHAGEN MECHANISM 6 (2013), available at <http://www.ceps.eu/book/rule-law-or>

academic literature that the procedure in article 7 TEU should be modified and “sharpened” in order to make it operational.

But since such a modification would require a revision of the treaty, the discussion has focused on other instruments which could practically be made available in due course.<sup>90</sup> A new conception of the field of application of the Charter of Fundamental Rights of the European Union, fundamentally different from the one embodied in article 51 of this Charter, has forcefully been argued for.<sup>91</sup> In order to make such a concept workable in practice, a right of the ECJ to certiorari has been suggested.<sup>92</sup> Without going into a profound analysis of the different aspects which certainly will have to be taken into consideration when reflecting upon such a proposition, I wish to limit my remarks to some quite obvious comments. In the first place, it has to be borne in mind that the European landscape is far from being homogenous when it comes to the respect for the rule of law and for fundamental rights by individual Member States. In such a situation, an extensive reading of article 51 of the Charter—although possibly welcomed by some Member States as a European support for the respect of the rule of law and in particular of fundamental rights—would not only run counter to the article’s wording and meaning as it results from the genesis and the general structure of article 51 and 52 of the Charter,<sup>93</sup> but it would also undoubtedly be considered as an

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rule-thumb-new-copenhagen-mechanism-eu; Steven Greer & Andrew Williams, *Human Rights and the Council of Europe and the EU. Towards ‘individual’, ‘constitutional’ or ‘institutional’ justice?*, 15 EUR. L.J. 462, 474 (2009). For a critique of Art. 7 TEU following the example of the Iraq War, see Andrew Williams, *The indifferent Gesture: Article 7 TEU, the Fundamental Rights Agency and the UK’s Invasion of Iraq*, 31 EUR. L.R. 1 (2006).

90. See von Bogdandy et al., *supra* note 89, at 508 et seq.

91. For the “reversed Solange” approach, see *id.* See also András Jakab, *Supremacy of the Eu Charter in National Courts in purely domestic Cases*, VERFASSUNGSBLOG (Mar. 27, 2013), <http://www.verfassungsblog.de/de/ungarn-was-tun-andras-jakab/#.UvFtA6wt3bw>.

92. See generally Tom Kennedy, *First Steps towards a European Certiorari*, 18 EUR. L.R. 121 (1993); Petra Jeney, *Victim of Its Own Success – the EU Court in Need of Reform*, OPEN SOC’Y FOUNDS. (Jan. 1, 2010), [http://www.academia.edu/1078276/Victim\\_of\\_Its\\_Own\\_Success\\_the\\_EU\\_Court\\_in\\_Need\\_of\\_Reform](http://www.academia.edu/1078276/Victim_of_Its_Own_Success_the_EU_Court_in_Need_of_Reform).

93. See Thomas von Danwitz & Katherina Paraschas, *A Fresh Start for the Charter: Fundamental Questions on the Application of the European Charter of Fundamental Rights*, 35 *FORDHAM INT’L L.J.* 1396, 1399 (2012); ALLAN ROSAS, *WHEN IS THE EU CHARTER OF FUNDAMENTAL RIGHTS APPLICABLE AT NATIONAL LEVEL?* 1269 (2012); Koen Lenaerts, *Exploring the Limits of the EU Charter of Fundamental Rights*, 8 EUR. CONST. L.R. 375

unjustified “intervention” in those Member States, in which it is considered as a “sovereign” prerogative of the national constitutional court to ensure the observance of the rule of law and the fundamental rights enshrined in the national constitution. Therefore, such an approach would inevitably lead to an enhanced institutional controversy between the ECJ and national constitutional courts and, not to forget, the Strasbourg Court. Despite a number of “invitations” addressed to the Court in that respect from national courts, the ECJ has so far refrained from an extensive reading of article 51, as is demonstrated by quite an impressive number of court orders declining its jurisdiction.<sup>94</sup>

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(2012); THORSTEN KINGREEN, *Ne bis in idem: Zum Gerichtswettbewerb um die Deutungshoheit über die Grundrechte*, in *EUROPARECHT* 446 (2013).

94. See *Savia and Others v Ministero dell'Istruzione, dell'Università e della Ricerca and Others*, Case C-287/08, [2008] E.C.R. I-136; *Pignataro v Ufficio centrale circoscrizionale presso il Tribunale di Catania and Others*, Case C-535/08 [2009] E.C.R. I-50; *Noël v SCP Brouard Daude and Centre de Gestion et d'Étude AGS IDF EST*, Case C-333/09, [2009] E.C.R. I-205; *Hermes Hitel v Nemzeti Földalapkezelő Szervezet*, Case C-16/12, [2012] E.C.R. I\_\_\_\_; *Cicala v Regione Siciliana*, Case C-482/10, [2011] E.C.R. I-14139; *Attila Vajnai*, Case C-328/04, [2005] E.C.R. I-8577; *Polier v. Najar*, Case C-361/07, [2008] E.C.R. I-6; *Kurt v Bürgermeister der Stadt Wels*, Case C-104/08, [2008] E.C.R. I-97; *Asparuhov Estov and Others v. Ministerski savet na Republika Bulgaria*, Case C-339/10, [2010] E.C.R. I-11465; *Chartry v. Belgium*, Case C-457/09, [2011] E.C.R. I-819; *Rossius and Collard v. Belgium*, Joined Cases 267/10 & 268/10, [2011] E.C.R. I-81; *Vino v. Poste Italiane*, Case C-161/11, [2011] E.C.R. I-91; *Pagnoul v. État Belge*, Case C-314/10, [2011] E.C.R. I-00136; *Lebrun and Howet v. État belge*, Case C-538/10, [2011] E.C.R. I-00137; *Cozman v. Teatrul Municipal Târgoviște, Rs. C-462/11*, [2011] E.C.R. I-00197; *Boncea and Others v. Statul roman*, Joined Cases C-483-84/1, [2011] E.C.R. I-00198; *Corpul Național al Polițiștilor v. Ministerul Administrației și Internelor (MAI) and Others*, Case C-434/11, [2011] E.C.R. I-00196; *Vinkov v. Nachalnik Administrativno-nakazatelna deynost*, Case C-27/11, [2012] E.C.R. I\_\_\_\_; *Currà and Others v. Germany*, Case C-466/11, [2012] E.C.R. I\_\_\_\_; *Ministerul Administrației și Internelor (MAI) and Others v. Corpul Național al Polițiștilor*, Case C-134/12, [2012] E.C.R. I\_\_\_\_; *Corpul Național al Polițiștilor v. Ministerul Administrației și Internelor, Inspectoratul General al Poliției Române, Inspectoratul de Poliție al Județului Brașov*, Case C-369/12, [2012] E.C.R. I\_\_\_\_; *Antonella Pedone v. N*, Case C-498/12, [2013] E.C.R. p. I\_\_\_\_; *Gentile v Ufficio Finanziario della Direzione Ufficio Territoriale di Tivoli and Others*, Case C-499/12, [2013] E.C.R. I\_\_\_\_; *Ajdini v État belge*, Case C-312/12, [2013] E.C.R. I\_\_\_\_; *Rivas Montes v. Instituto Municipal de Deportes de Córdoba (Imdeco)*, Case C-178/12, [2013] E.C.R. I\_\_\_\_; *Sindicato dos Bancários do Norte and Others v. BPN Norte*, Case C-128/12, [2013] E.C.R. I\_\_\_\_; *Dutka v. Mezőgazdasági és Vidékfejlesztési Hivatal and Csilla Sajtos v. Budapest Főváros VI. Ker. Önkormányzata*, Joined Cases C-614/12 & C-10/13, [2014] E.C.R. I\_\_\_\_; *Weigl v. Nemzeti Innovációs Hivatal*, Case C-332/13, [2014] E.C.R. I\_\_\_\_; *Sociedade Agrícola e Imobiliária da Quinta de S. Paio Lda v Instituto da Segurança Social IP*, Case C-258/13, [2014] E.C.R. I\_\_\_\_; *Schuster & Co Ecologic SRL v. Direcția Generală a*

This prudent policy of institutional self-restraint is not only motivated by a well-balanced concept of a mutual respect for the jurisdiction both of national constitutional courts and the basic objective of the Strasburg system and the preservation of its integrity, but also reflects in particular a realistic self-understanding of the role attributed to the Court by the treaties of the European Union. Notably, it reflects a keen sense for the legitimacy of the Court and its limits which even after sixty years of European integration may still not be compared to the legitimacy of national supreme or constitutional courts.<sup>95</sup> In any event, an extensive interpretation of article 51 of the Charter would inevitably lead to a fundamental shift in the multilayered system of judicial protection between Member States, the European Union, and the ECJ and the conventional system of the Strasburg court, which might be perceived as largely duplicating the Strasburg system and in the end bear the risk of jeopardizing its very existence, at least for the Member States of the EU. Insofar as the problem to cure results from a deficient observance of the rule of law and fundamental rights beyond the field of application of EU law, given the historic mission of the Strasburg system it would seem logical to enhance its proper effectiveness. As understandable as it might be to foster the respect for the rule of law and fundamental rights by an application of the instruments resulting from EU law,<sup>96</sup> it should

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Finanțelor Publice a Județului Sibiu— Activitatea de Inspecție Fiscală, Case C-371/13, [2014] E.C.R. I\_\_\_\_; Sergio Alfonso Lorrain, Case C-224/13, [2014] E.C.R. I\_\_\_\_; Sándor Nagy v. Hajdú-Bihar Megyei Kormányhivatal and Others, Joined Cases C-488-491/12 & C-526/12, [2014] E.C.R. I\_\_\_\_; Cholakova v. Osmo rayonno upravlenie pri Stolichna direktsia na vatreshnite raboti, Case C-14/13, [2014] E.C.R. I\_\_\_\_; Tribunale di Tivoli, Case C-73/13, [2014] E.C.R. I\_\_\_\_ (not yet reported); Francesco Fierro and Fabiana Marmorale v. Edoardo Ronchi and Cosimo Scocozza, Case C-106/13, [2014] E.C.R. I\_\_\_\_; Claudio Loreti and Others v. Comune di Zagarolo, Case C-555/12, [2014] E.C.R. I\_\_\_\_; Cruciano Siragusa v. Regione Sicilia—Soprintendenza Beni Culturali e Ambientali di Palermo, Case C-206/13, [2014] E.C.R. I\_\_\_\_.

95. Thomas von Danwitz, *Verfassungsrechtliche Herausforderungen in der jüngeren Rechtsprechung des EuGH*, EUROPÄISCHE GRUNDRECHTE ZEITSCHRIFT 253, 253 (2013).

96. For an approach which the Court has firmly rejected so far, see Kamberaj, Case C-571/10, [2012] E.C.R. I\_\_\_\_; Åkerberg Fransson, Case C-617/10, [2013] E.C.R. I\_\_\_\_. See also Clemens Ladenburger, *European Union Institutional Report*, in Laffranque (Hrsg.), Reports of the XXV FIDE Congress, 2012, Vol. 1, S. 141 et seq., 183 et seq.; Clemens Ladenburger, in Tettinger/Stern (Hrsg.), Europäische Grundrechte-Charta, Art. 52, ¶¶ 80 et seq., in particular ¶¶ 85 et seq. (2006); von Danwitz & Paraschas, *supra* note 93, at 1396, 1410; Martin Borowsky, *Art. 51*, in CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION ¶ 33 et seq. (Jürgen Meyer ed., 3d ed. 2011); Koen Lenaerts,

in the end not be forgotten that this cure only can be made available for EU Member States. Therefore such an approach would, in the long run, leave “what’s left” to the Strasburg system and make it increasingly difficult to maintain the effectiveness and authority of this system which is much more in need for it than judicial protection in Europe elsewhere.

*B. The Role of the ECJ in Ensuring the Respect of Rule of Law by EU Member States*

In recent years as much as in the past, the Court has been confronted with alleged infringements of EU law by all Member States, although the number of infringement proceedings brought before the Court is currently declining.<sup>97</sup> The public debate on the political and constitutional evolution of some Member States and in particular of Hungary should not lead to the erroneous conclusion that it is only these Member States which are at the origin of proceedings relating to an alleged inobservance of the rule of law. It should rather be born in mind that even for well-established Member States the record on the observance of the rule of law is not beyond doubt.<sup>98</sup> But, of course, the Court has recently been confronted with cases relating to the political and constitutional evolution in Hungary and has made its contribution to ensure the respect of the rule of law in this country.

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*Exploring the limits of the EU Charter of Fundamental Rights*, 8 EUR. CONST. L.R. 375, 399 (2012).

97. According to the Annual Report 2012 of the Court, the number of infringement proceedings brought before the Court has been constantly declining from 207 new cases in 2008 to 58 new cases in 2012, see EUROPEAN COURT OF JUSTICE, ANNUAL REPORT 97 (2012).

98. Beichelt, *supra* note 87. In 2012, twenty new infringement procedures against the six founding Member States have been brought to the Court (two against Belgium, seven against Germany, respectively; five against France and Italy; and respectively one against the Luxembourg and the Netherlands). See EUROPEAN COURT OF JUSTICE, ANNUAL REPORT at 97 (2012). In the same period, five judgments have been delivered against Belgium, four against France, one against Germany, two against Italy, and three against the Netherlands. See European Commission, 30th Annual Report on Monitoring the Application of EU Law (2012), COM(2013) 726 final (Oct. 2013), ¶¶ 20, 27, 28, 32, 35, 37; see, e.g., Commission v. Belgium, Case C-577/10, [2012] E.C.R. I\_\_\_\_; Commission v. France, Case C-164/11, [2012] E.C.R. I-0000; Commission v. Germany, Case C-574/10, [2012] E.C.R. I-0000; Commission v. Italy, Case C-565/10, [2012] E.C.R. I-0000; Commission v. Netherlands, C-542/09, [2012] E.C.R. I-0000.



## 1. Impressions of an Ongoing Integration Process

In the first place the Court was confronted with an application by Hungary to find, in essence, that the Slovak Republic had failed to fulfill its obligations under EU law in not allowing Hungarian President Sólyom to access Slovak territory on August 21, 2009,<sup>99</sup> for taking part in a ceremony to inaugurate a statue of Saint Stephen, the founder and first king of the Hungarian State. August 21st is considered to be a sensitive date in Slovakia, since it was on August 21, 1968, that the armed forces of five Warsaw pact countries, which included Hungarian troops, invaded the Czechoslovak Socialist Republic. With respect to the obligation resulting from the citizenship of the Union, the Court held that the right for all Union citizens to move and reside freely within the territory of the Member States is subject to limitations resulting from international law applicable to the status of Mr. Sólyom as Hungarian head of State.<sup>100</sup> Since the presence of a Head of State on the territory of another State imposes an obligation to protection on the latter, the status of Head of State therefore has a specific character governed by international law, which is in fact able to justify a limitation on the exercise of the right of free movement conferred by article 21 TFEU and directive 2004/38.<sup>101</sup> The Court found as well that the refusal of the Slovak Republic to allow the President of Hungary access to its territory did not come under the concept of the abuse of rights as defined in the case-law of the Court.<sup>102</sup> If this case does not reveal important legal insight, the political incident on which it is based shows to the contrary quite impressively that the importance of good neighborly relations and mutual understanding of the delicate nature of historical events does not constitute an *acquis* to the same degree common to all Member States of the European Union.

A comparable sentiment is raised by a request for a preliminary ruling referred to the Court from a Hungarian Court of first Instance concerning, in substance, the question as

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99. Hungary v. Slovak Republic, Case C-364/10, [2012] E.C.R. I \_\_\_\_.

100. *See id.* ¶¶ 43–44.

101. *See id.* ¶¶ 48, 52.

102. *See id.* ¶¶ 53, 58–60.

to whether the conditions under which a special tax has been levied between 2010 and 2012 was constitutive of a disguised discrimination of foreign-owned undertakings. The Court held that the application of the steeply progressive scale to a consolidated tax base consisting of turnover provided for by the Hungarian legislation would entail indirect discrimination on the basis of the registered office of the companies, if it was liable to disadvantage undertakings linked within a group to companies established in another Member State on the Hungarian market.<sup>103</sup>

## 2. The Recent Constitutional Evolution in Hungary under Review by the ECJ

The recent constitutional evolution of Hungary has been subject of two infringement procedures brought by the European Commission.<sup>104</sup> The first one, which concerned a national scheme requiring compulsory retirement of judges, prosecutors, and notaries on reaching the age of sixty-two and spread the flavor of a court-packing plan,<sup>105</sup> was decided on the basis of directive 2000/78 on combating discrimination, *inter alia*, on grounds of age. In that respect, the Court categorized the provisions at issue as instituting a difference of treatment based directly on age<sup>106</sup> and pursued its review on the question whether this difference in treatment based on age was objectively and reasonably justified by a legitimate aim and whether the means of achieving that aim are appropriate and necessary.<sup>107</sup> In its subsequent review of this standard, the Court generously accepted that both the aim of standardization of employment relation in the public sector and the aim of

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103. *See* *Hervis Sport- és Divatkereskedelmi*, Case C-385/12, [2014] E.C.R. I\_\_\_\_, ¶ 45.

104. *See* *Commission v. Hungary*, Case C-286/12, [2012] E.C.R. I\_\_\_\_; *Commission v. Hungary*, Case C-288/12 (pending).

105. *See* MICHAEL E. PARRISH, *THE HUGHES COURT: JUSTICES, RULINGS, AND LEGACY* 233–35 (2002); ROBERT G. MCCOLSKEY, *THE AMERICAN SUPREME COURT* 113, 116–19 (Daniel J. Boorstein, ed., Sanford Levinson rev. 5th ed. 2010); Michael Ariens, *A Thrice-Told Tale, or Felix the Cat*, 107 *HARV. L. REV.* 620 (1994); Richard D. Friedman, *Switching Time and other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 *U. PA. L. REV.* 1891 (1994).

106. *Commission v. Hungary*, [2012] E.C.R. I\_\_\_\_, ¶ 54.

107. *Id.* ¶ 56.

attaining a balanced age structure can indeed constitute a legitimate aim of employment and labor market policy<sup>108</sup> and even acknowledged that the national provisions at issue were an appropriate means of achieving the aim of standardization pursued by Hungary.<sup>109</sup> But concerning the objective of establishing a balanced age structure, the Court held that the measures taken were not appropriate to achieve a truly balanced age structure in the medium and long terms.<sup>110</sup> On the decisive question of the proportionality of the age discrimination, the Court held that Hungary failed to provide any evidence to establish that more lenient provisions would not have made it possible to achieve the objective at issue<sup>111</sup> and concluded that the provisions at issue were not necessary to achieve the objective of standardization invoked by Hungary.<sup>112</sup>

If the rather technical answer given by the ECJ might have caused some surprise to academic observers who were focusing on the constitutional and political nature of the measure at issue, the sober reasoning of the Court, strictly limited to the technicality of the matter, should be understood as bridging the gap which Hungary will have to overcome in accepting the judgment.

The second infringement procedure brought by the European Commission against Hungary concerns national provisions by which the six-year term of the data protection supervisor has been terminated before the end of the term in conjunction with the creation of a new national authority on data protection and freedom of information.<sup>113</sup> It was brought to the ECJ on the basis of directive 95/46, which provides for the creation of an independent authority charged with the supervision of the national law which Member States have enacted pursuant to this directive. In essence, it concerns the question of whether the requirement of independence, which the Court has highlighted in its settled case-law on that

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108. *Id.* ¶¶ 57–62.

109. *Id.* ¶ 64.

110. *Id.* ¶ 77.

111. *Id.* ¶ 71.

112. *Id.* ¶¶ 72–75.

113. *Commission v. Hungary*, Case C-288/12 (pending).

directive,<sup>114</sup> is infringed by a national measure bringing the term of the data protection supervisor to an end prior to the one foreseen in the mandate. Advocate General Wathelet held on the basis of the settled case law<sup>115</sup> that already the mere risk of any kind of influence on the decisions of the national authority on data protection and freedom of information is sufficient for an infringement of article 28, paragraph 1, second subparagraph, of the directive.<sup>116</sup> On the basis of this standard, he concluded that the measure in question is in fact contrary to the obligations resulting from the directive. In its judgment, the ECJ pointed out that the requirement to set up independent supervisory authorities on data protection derives from article 8 paragraph 3 of the Charter and article 16 paragraph 2 TFEU and is thus an essential component of the protection of individuals with regard to the processing of personal data.<sup>117</sup> The Court held that the independence requirement covers the obligation to allow supervisory authorities to serve their full term of office and to have them vacate office before expiry of the full term only in accordance with the rules and safeguards established by the applicable legislation.<sup>118</sup> Hungary failed to fulfil its obligations under directive 95/46 by compelling the supervisor to vacate office in contravention of the safeguards established by statute, thereby compromising his independence.

#### IV. ENSURING THE RULE OF LAW—A NEVER ENDING STORY

The recent jurisprudence of the Court relating to the rule of law allows for a couple of conclusions which are, of course, drawn from a judge's perspective. It should not be surprising that the challenges which the ECJ has to meet in ensuring the rule of law in the European Union are, in essence, not much different from what national judges had and still have to cope with.

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114. *Commission v. Germany*, Case C-518/07, [2010] E.C.R. I-1885; *Commission v. Austria*, Case C-614/10, [2012] E.C.R. I\_\_\_\_\_.

115. *Germany*, [2010] E.C.R. I-1885, ¶¶ 19, 25, 30, 50 as well as *Austria*, [2012] E.C.R. I\_\_\_\_\_, ¶¶ 41, 43.

116. Opinion of Advocate General Wathelet, *Commission v. Hungary*, Case C-288/12, [2014] E.C.R. I\_\_\_\_\_, ¶ 68 (delivered Dec. 10, 2013) (not yet reported).

117. *Commission v. Hungary*, Case C-288/12, [2014] E.C.R. I\_\_\_\_\_, ¶ 47.

118. *Id.* ¶ 55.

In the first place, this overview has shown in particular that, even in democratic societies in which the rule of law is traditionally respected in principle, it is not self-evident that the rule of law will in fact be observed when legislation has to meet new challenges. In that respect it should be stressed that the democratic nature and all public transparency of the political process are not sufficient to ensure the rule of law. For the protection of minorities and, in particular, of individuals, a reasonably intense judicial review both of individual decisions and legislative acts appears indispensable to effectively ensure the rule of law. Even in democratic societies it sometimes needs courage to resist to political and publicly dominating appreciations when the rule of law is endangered. It is therefore of crucial importance to monitor the full independence of judges on all levels. Secondly, the importance of comparative considerations has increased over recent years and will become more and more an indispensable condition for legal reasoning in the multilayered system of judicial protection in Europe. Today, the authority of our judgments requires that they appear convincing to judges in all European Member States who are primarily rooted in a particular national legal tradition and not familiar with the case-law of the Court. It is therefore a prerequisite for any further legal integration in Europe that the Court communicates on the basis of a legal reasoning which is, if not familiar, at least easily understandable to all its judicial counterparts. Finally, the rule of law is not a static concept. It grows and changes its profile with the evolution of society due to economic, social, technological, and political factors. If we need the respect for strong traditions in ensuring the rule of law, we need as well the openness of our minds to properly react to all new evolutions which endanger the rule of law and, thereby, to fully live up to the heritage of our founding fathers<sup>119</sup>: In order to finally replace the past striving for a domination of Europe by a rule of law in the European Union common to all its citizens, it is essential to understand the rule of law as a living instrument<sup>120</sup> which is shaped according to the challenges ahead.

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119. See HALLSTEIN, *supra* note 2, at 341, 343–44.

120. The living-instrument-doctrine is primarily discussed in relation to the Strasbourg court but formulates a legal reasoning widely shared in continental law

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traditions, see *Tyrer v. The United Kingdom*, 26 Eur. Ct. H.R. 4, 15–16 (1978); *Soering v. The United Kingdom*, 161 Eur. Ct. H.R. 8, 40 (1989); *Loizidou v. Turkey*, 310 Eur. Ct. H.R. 7, 26 (1995); *Christine Goodwin v. The United Kingdom*, 2002-VI Eur. Ct. H.R. 1, 26. See, in this regard, Luzius Wildhaber, *The European Court of Human Rights in Action*, 21 RITSUMEIKAN L. REV. 83, 84 (2004); Kanstantsin Dzehtsiarou, *European Consensus and the Evolutive Interpretation of the European Convention on Human Rights*, 12 GERMAN L. J. 1730, 1731 (2011); Magnus Kilander, *Interpreting Regional Human Rights Treaties*, 13 SUR INT'L J. ON HUM. RTS. 145, 152-54 (2010). For the dynamic interpretation of Union law, see KUTSCHER, *THESEN ZU DEN METHODEN DER AUSLEGUNG DES GEMEINSCHAFTSRECHTS AUS DER SICHT EINES RICHTERS* 23, 31 (1976); ANNA BREDIMAS, *METHODS OF INTERPRETATION AND COMMUNITY LAW* 33–48 (1978). For the discussion in comparative constitutional law, see MICHEL FROMONT, *JUSTICE CONSTITUTIONNELLE COMPARÉE* 270 (2013). For the discussion in US constitutional law, see, for example, William H. Rehnquist, *The Notion of a Living Constitution*, 29 HARV. J.L. & PUB. POL'Y, 401 (2006); DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010); Jack M. Balkin, *The Roots of the Living Constitution*, 292 B.U. L. REV. 1129 (2012).

