Creation, Development and Impact of the General Principles of Community Law:

Towards a *jus commune europaeum*?

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Faculty of Law
Lund University, 2005

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To Annie and Aleksandra

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Maman and Aleksandra, I love you. This thesis is dedicated to you, obviously.

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TABLE OF ABBREVIATIONS

AC	Appeal Cases
AE	Annuaire Européen-European Yearbook
AG	Advocate General
AJDA	Actualité Juridique de Droit Administratif
AJCL	American Journal of Comparative Law
AJIL	American Journal of International Law
All ER	All England Law Reports
ALR	American Law Reports
BGB	German Code of Civil Law
BGHZ	Decisions of the Federal court of Justice in Civil cases
Bull. EC	Bulletin of the EC
BVerfG	German Federal Constitutional Court
BVerGE	Decisions of the Federal Constitutional Court
BVerwG	German Federal Administrative Court
BVerwGE	Decisions of the Federal Administrative Court
BYIL	British Yearbook of International Law
CLJ	Cambridge Law Journal
CA	English Court of Appeal
CAA	Cour Administrative d'Appel
CAP	Common Agricultural Policy
CC	Conseil Constituionnel
CCass	Cour de Cassation.
CE	Conseil d'Etat
CDE	Cahiers de Droit Européen
CFI	Court of First Instance.
CFSP	Common Foreign and Security Policy
CLR	Columbia Law Review
CJEL	Columbia Journal of European Law
CMLR	Common Market Law Reports
CMLRev.	Common Market Law Review
CLJ	Cambridge Law Journal
Dec.	Decision
DG	Directorate General
DULJ	Dublin University Law Journal
EBLR	European Business Law Review.
EC	European Community
ECB	European Central Bank
ECR	European Community Reports
EEC	European Economic Community
ECHR	European Convention on Human Rights
EcoHR	European Commission of Human Rights
EctHR	European Court of Human Rights.
ECJ	European Court of Justice
ECLR	European Competition Law Review
ECSC	European Coal and Steel Community
ECR	European Court Reports
EC Treaty	European Community Treaty.

TABLE OF ABBREVIATIONS

ECU	European Currency Units
EEA	European Economic Area
EFTA	European Free Trade Association
EJIL	European Journal of International Law
ELJ	European Law Journal
ELR	European Law Review
EP	European Parliament
EMU	European Monetary Union
EPL	European Public Law
ERPL	European Review of Private Law
ERT	Europarättslig Tidskrift.
EU	European Union
Euratom	European Atomic Energy Community
EUZW	Europäishe Zeitschrift für Wirtschaftrecht
FIDE	Fédération Internationale de Droit Européen
FILJ	Fordham International Law Journal
FT	Förvaltningsrättslig Tidskrift.
GATT	General Agreement on Tariffs and Trade
GPL	General Principles of Law
Giur.it.	Giurisprudenza italiana
G.U	Gazetta Ufficiale
HD	Högsta Domstolen
HL	House of Lords
HLR	Harvard Law Review
HILJ	Harvard International Law Journal
HRA	Human Rights Act
HRLJ	Human Rights Law Journal
HRLR	Human Rights Law Reports
HRLRev	Human Rights Law Review
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quaterly
ICR	Industrial Cases Reports
IGC	Intergovernmental Conference
ILO	International Labour Organization
ILJ	Industrial Law Journal
JO	Journal Officiel
JDI	Journal de Droit International
JR	Judicial Review
JT	Journal des Tribunaux
JT	Juridisk Tidskrift.
JTDE	Journal de Tribunaux de Droit Européen
ILJ	Industrial Law Journal
JCMS	Journal of Common Market Studies
LIEI	Legal Issues of European/Economic Integration
LQR	Law Quaterly Review
MCA	Monetary Compensatory Amount
MJ	Maastricht Journal of European and Comparative Law
MLR	Modern Law Review
NJA	Nytt Juridiskt Arkiv

TABLE OF ABBREVIATIONS

NSAIL	Non-state Actors and International Law
Nyg	Not yet given
Nyr	Not yet reported
OJ	Official Journal of the European Community
OJLS	Oxford Journal of Legal Studies
PL	Public Law
QB	Queen's Bench Reports
Reg.	Regulation
RAE	Revue des Affaires Européennes
REDP	Revue Européenne de Droit Public
RDP	Revue de Droit Public et de Science Politique
RDI	Revue de Droit International.
RDIPP	Revista di Diritto Internazionale Privato e Processuale
RDE	Rivista de Dirrito Europeo
RFDA	Revue Francaise de Droit Administratif
RIDC	Revue Internationale de Droit Comparé
RIE	Revista de Instituciones Europeas
RMC	Revue du Marché Commun
RMUE	Revue du Marché de l'Union Européenne.
RPLA	Review of Public Law and Administrative Law
RR	Regeringsrätten
RTDE	Revue Trimestrielle de Droit Européen
RÅ	Regeringsrättens Årsbok
SEA	Single European Act
SFS	Svensk Författningsamling
SMEs	Small and Medium-sized Enterprises
Stb	Deutch Law report
Summit	European Council Meeting
TA	Tribunal Administratif
TEU	Treaty on European Union (Maastricht Treaty)
TILJ	Texas International Law Journal
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UN	United Nations
VAT	Value Added Tax
UTLR	University of Toledo Law review
YEL	Yearbook of European Law
YLJ	Yale Law Journal
WLR	Weekly Law Reports
WTO	World Trade Organization
YEL	Yearbook of European Law
YLJ	Yale Law Journal
ZPO	German Code of Civil Procedure

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INTRODUCTIVE CHAPTER

1. METHODOLOGY

1.1. Purpose, Subject and Delimitation of the Research Project

The European Union (EU) displays the characteristics of an embryonic federation. *Sui generis* and parent organizations are terms that may define the Community legal order.[1] The EU may also be qualified as "sectorial federalism", since European integration is economically orientated and fostered by the case-law of the European Court of Justice (ECJ).[2] The notion of interaction, exemplified by the relationship between the Community and the national legal systems, reflects the very nature of the Community legal order. Thus, its analysis is of intrinsic interest and may facilitate the solution of practical problems, which arise between the Community and national levels. In that regard, it must be stressed that the Community system, built on active cooperation between the Community and the national authorities, may only survive if negative reactions at the national level are absorbed and answered at the Community level.[3] Following Bieber, it can be said that the relationship between a supranational legal system and its component municipal law is never static, though circumscribed by a Treaty or a Constitution.[4] Accordingly, the scope and substance of the supranational and the overlapping national legal orders in the federal system of United States are clearly interrelated and hence modify each other.[5] The same holds true in connection with the Community legal order.[6]

Notably, the interaction between the Community and national legal orders is clearly ensured through the application of two basic principles developed by the ECJ in its case-law, i.e. the principles of justiciability (direct effect) and supremacy. These principles ensure the penetration of Community law within the national systems, which has led to significant reactions at the national level. The purpose of this study is to analyze the interaction provoked by the use of these two principles in light of the general principles of law. Indeed, the general principles of law, which may be considered as the unwritten law of the Community, reflect perfectly the interaction between Community law and national law. Furthermore, they intervene

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[1] The German Federal Constitutional Court describes the EU as an "*interstate establishment"* (Federal Constitutional Court, Second Division, 12 October 1993, *Brunner* v. *European Union Treaty* [1994] 1 CMLR 57).

[2] Quitzow, "Some Brief Reflections about Federalism in the European Union and in the United States of America", in *Modern Issues in European Law*, 1997, pp. 183-198, at p. 192.

[3] Weatherill, *Cases and Materials on EC Law*, 3rd edition, Blackstone, 1996, at p. 20.

[4] Bieber, "On the Mutual Completion of Overlapping Legal Systems: The Case of the European Communities and the National Legal Orders", ELR 1988, pp. 147-158, at p. 147.

[5] *Ibid*.

[6] *See Bulmer* v. *Bollinger SA*, 1974, 2 All ER, pp. 1226 *et seq*. Lord Denning refers both to the relationship of the legal orders and their mobility.

as legitimizing the activism of the European Court of Justice and thus become "legitimacy principles".

The subject of the research is to focus on the general principles of law, to explain their creation, development, and utility in the Community legal system. Special attention is to be given to the influence of national law on their creation.[7] As seen above, the concept of interaction has imbued the creation of general principles of law. Reciprocally, the development and impact of general principles of law lead to another type of interaction by modifying national law and thus building a kind of common law. In other words, we witness a spill-over (diffusion, penetration, diffraction etc.) of the general principles within domestic law and a phenomenon which may be called cross-fertilization of legal orders.

Attention should also be given to the influence of the European Convention on Human Rights (ECHR). Can one even talk of interaction between the European Convention on Human Rights and the Community legal order? The Opinion 2/94 from the ECJ seems to have broken all hopes of formal interaction between the two legal orders.[8] However, the influence of the European Convention on Human Rights is feasible and visible in relation to general principles of law. Since the Opinion was rendered in 1996, the principles may be the most efficient tools to ensure the reception of the Strasbourg case-law within the Community legal order. The European Convention on Human Rights is part of most of the national legal systems, thus the general principles are inherently influenced by the Convention. Therefore, the dialectic of the Court must be scrutinized in light of the European Convention on Human Rights. In addition, an analysis of the EU Charter of Fundamental Rights appears necessary. What are the relationship and the degree of interaction between the general principles and the Charter of Fundamental Rights (CFR)? It will be demonstrated that more than half of the Charter's provisions represents a codification of the general principles of Community law. It is worth noting that the Charter boasts an enormous potential for legitimacy, though not yet legally binding.

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[7] Koopmans, "The Birth of European Law at the Crossroads of Legal Traditions", AJCL 1991, pp. 493-507, at p. 505. According to Koopmans, *"[t]he Court of Justice has become one of the major sources of legal innovation in Europe not only because of its position as the Community's judicial institution, but also because of the strength of its comparative methods. National courts take heed to the Court's way of reasoning. As a result, we sometimes see that legal principles which have made their way from the national's systems to the Court case law, in order to be transformed into principles of Community law, make their way back to the national courts. This happens of course, not only because of their willingness to adopt a certain method of law finding; besides, national courts are often under an obligation to apply rules of Community law"*.

[8] Opinion 2/94 of 28 March 1996 [1996] ECR I-1759. According to the Opinion, "[a]s Community Law now stands, the Community has no competence to accede to the Convention".

The research will also look at the incorporation of the CFR within the Constitutional Treaty.[9]

The interest of research on the general principles of Community law is relevant and crucial in the sense that, despite their "weak legal basis"[10] in the European Treaties, they constitute nowadays a dynamic source of creation of Community law and a potential for unification of the laws of Member States. Thus, the pivotal aim of the present research is to develop a "framework for understanding" the creation, development and impact of the general principles of Community law, seen in the light of national laws and the ECHR. The study of the general principles of law will be structured following a *"three step process"*:

> 1) **Creation.** This is the stage whereby the general principles are created as a result of the influence of Member States law, as well as the influence of international instruments, e.g. the ECHR.
> 2) **Development.** At this stage, the general principles are integrated in the Community legal order, thus becoming *sui generis* principles of Community law.
> 3) **Impact.** This part of the process consists of general principles "traveling back" to the national states imbued with a Community value.

The first step, the *creation* of general principles of law, embodies the analysis of the place of the general principles of law in the Community legal order so as to define their legal basis and position in the hierarchy of norms. Also, this part involves research into the concept of general principles from a theoretical angle, so as to discover their intrinsic nature and function, e.g. their non-conclusive nature or gap-filling function. What is more, it implies an examination of the concept of rule of law and its close connection with the general principles, which may be deemed as an unwritten rule of law. The analysis of the process of creation *stricto sensu* will be carried out. It means that one must concentrate on the sources of inspiration of the Court, and determine from which national legal concepts the Court is drawing the existence of a general principle of law.

A *critical approach* should be taken so as to analyze whether the Court is searching for the highest or lowest common standard of legal protection or whether the Court has sought to extract broad principles from comparative analysis. Can one say that the Court is expressly inspired by a principle of a particular national legal system or that the Court is perceptive to the general legal traditions common to the

[9] The Constitutional Treaty (CT) is not binding and thus must be treated cautiously. Consequently, the study of the CT will be limited to Part II (incorporation of the CFR) and Article I-9.

[10] There is no clear reference to the general principles such as in international law (Article 38 of the ICJ statute). However, the wording of Article 220 EC requires a general duty to ensure that the law is observed. Article 230 may provide another ground for justifying the general principles. Finally, Article 288(2) EC makes a more explicit reference to the general principles in relation to the tortuous liability of the Community.

Member States? Furthermore, in the determination of a principle as "common", can one say that the general character of the principle in the Member States influences the Court? Other important parameters must also be taken into account, like the protection of the individual and the notion of effectiveness of Community law. This stage is clearly related to the use of comparative methodology and necessitates an extensive examination of the jurisprudence of the European Court of Justice and the Opinions of the Advocates General (AG) in order to assess the influence of national law in the creative process. In addition, the alternative to comparative methodology, e.g. the inquiry of the European Convention on Human Rights and the Charter of Fundamental Rights, constitutes a part of the research regarding the identification of the sources of inspiration used by the ECJ. Finally, the use of teleological interpretation by the Court and its limits must also be scrutinized in relation to the comparison of laws. Is the Court "running wild" when it creates a particular principle? Or is the judge-made law perfectly legitimate? The research proposes to solve those queries. The "creation" makes up the first part of the research.

The second step concerns the *development* of general principles of law and studies, in particular, their scope of review. While this topic has been often analyzed by the doctrine, the ambition of the present research is to determine the reach of the general principles and their significance for the protection of individual rights. This analysis will demonstrate the existence of "legitimacy principles", which co-exist with the principles of justiciability and supremacy. From the practical point of view, when the research deals with the "legitimacy principles", only the principles enabling the individual to review the acts of the Community institutions or of the Member States are taken into consideration.

The research further attempts to establish a strict legal definition of the general principles in the EU legal order, as well as their scope and limits, and follows a systematic approach.[11] In that regard, using a synthetic classification, the general

[11] A systematic classification of the general principles may be attempted. Various types of specific classifications exist. An overview of the doctrine exemplifies that a great majority have dissimilar approaches when it comes to the classification. The interest of a simple and clear clarification, in relation to the function of the general principles, might permit us to establish a certain systematic methodology and might enable us to draw parallels between the principles included in a particular category. The main problem is the overlapping of certain principles which may fall into more than one category, e.g. proportionality, equality and effective judicial protection. Two main types of classification exist, i.e. an exhaustive and synthetic classification. As to the former, the advantage of the exhaustive classification is its simplicity. The main disadvantage is the large number of principles derived, which results, in my view, in a dilution of the nature and function of the principles. This type of classification has been chosen by Hartley: seven categories (Hartley, *The Foundations of European Community Law*, Oxford, 1998, at pp. 130-144), Schermers: 11 categories (Schermers, *infra*., at pp. 27-56) or Usher: six categories (Usher, *General Principles of EC Law*, 1998.). For instance Usher, considers in the first category, the principles derived from the Community Treaties (such a Community preference and equality), proportionality, legitimate expectations, procedural rights (where he includes effective judicial protection), the right to property and the principle of good administration. As to the latter ("synthetic classification:

principles may be divided and studied into three different groups, i.e. the administrative principles (e.g. proportionality, non-discrimination and legitimate expectations), the procedural principles (hybrid) (e.g. rights of defense), and fundamental rights (e.g. the right to property).[12] It is argued that we witness a "fundamentalization" of the general principles. To put it differently, the general principles may be considered as (*lato sensu*) fundamental rights. Moreover, it is asserted that the use of general principles of law in the EC is not unlimited. A comprehensive and critical survey of the limits of their development (application/review) has to be realized. This is essential in order to cope with the understanding of their dynamic. In that sense, the case-law of the ECJ must be scrutinized and the major limits must be stressed, e.g. EC law material and efficiency limits. As to the former, it implies that the Member States are obliged to comply with the general principles only when the matter involves a Community element. In purely internal matters, the general principles of Community law, however, do not impose any obligation on the Member States. As to the latter, it means that when the ECJ deals with the application of a particular general principle, that principle is balanced with the objectives of the Community. In other words, the principle cannot impair the efficiency of Community law. At the end of the day, the

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the authors are attempting to create groups where the relevant principles can fit), Steiner (*Textbook on EC Law*, Blackstone, 1998, at pp. 65-75) determined four categories in this respect *i.e.* the fundamental human rights, the rules of administrative justice (proportionality, legal certainty, procedural rights), equality and subsidiarity. Shaw (*European Community Law,* Macmillan, 1993, at pp. 99-109) derived three main groups: The principles of administrative and legislative legality (legal certainty, proportionality, equality, non-discrimination and procedural fairness), the pillars of economic integration as general principles of Community law and the fundamental rights. Finally, the view taken by Craig and de Búrca should be mentioned. They have opted for a dual classification, on the one hand the fundamental principles (including the rights of the defense) and on the other the "administrative principles" (proportionality, legal certainty, non-discrimination and transparency). Craig and de Búrca (Craig and de Búrca, *EU Law*, 1998, at pp. 296-371) incorporate the rights of the defense to fundamental rights. Such an appreciation is, indeed, justified in the light of a wide definition of fundamental rights. Moreover, in correlation to the most recent case-law in the due process field, it might also be argued that the ECJ is now following the same processes of elaboration for the rights of the defense as fundamental rights. Such a conclusion was however impossible to establish before the *Orkem* case (1989), at this time, the rights of the defense could be assimilated to an autonomous category of general principles.

[12] As to administrative principles, it is true that these principles are expressly laid down by the Grundgesetz, or regarded as unwritten principles of the German constitution. It is also true that proportionality and equality find specific expression in the EC Treaty and may be considered as fundamental rights by the ECJ case law. However, one of their main functions is to review the administrative legality of the acts of the institutions or of the Member States. As to the procedural principles, these hybrid principles contain both constitutional and administrative values. At the end of the day, it might be argued that these two categories are closely connected to fundamental rights. In other words, they constitute fundamental rights *lato sensu*.

understanding of the development of the general principles leads us to consider them not only as judicial tools but also, to a certain extent, as political ones, since the general principles afford legitimacy to the EU legal order**.**

The third step, the analysis of the *impact,* makes up the heart of the research project. This inquiry provides a comprehensive framework of the impact, based on a *critical approach* to the situation. Due to their dynamic character, the impact of the general principles is certain and has to be studied thoroughly. The impact is relevant not only in the European law area, but might also lead to a spill-over into purely internal national matters. The research is not limited to the impact at the national level, but will also take into account the potential interaction with the ECHR. As emphasized before, the general principles act as fundamental rights and administrative principles, as well as hybrid principles (containing constitutional and administrative values). Consequently, this part assesses the extent of the building of a *jus commune europaeum*, through the help of the general principles, in the administrative and constitutional spheres. The very notion of *jus commune* must be clarified in order to provide a proper framework for the research. It is pointed out that the recourse to comparative methodology is often associated with the formulation of *a jus commune*. The use of comparative methodology, as stressed previously, is inherent to the creative process of the general principles. Therefore, the general principles appear as potential vectors of this *jus commune europaeum*. The main question at stake is to discover whether the general principles of law, due to their recognized dynamic nature, offer a new impetus to the European and national legal orders.

This part of the study must be divided into three stages, which are inter-related. Firstly, can one consider that the general principles afford a "higher protection standard" than the national and the ECHR systems? Secondly, one must assess the impact of the general principles when they "travel back" to the national level. More exactly, what is the reaction of the national judicial authorities when confronted with the intrusion of these concepts that may create a higher standard of protection for the individual than their domestic provisions? How do they cope with the penetration of new legal concepts that may lead to modifications of their national law? Finally, are there examples of modifications in national law resulting from the impact of the general principles of law? Thirdly, it should be tested whether, in the case of modification of the national law, the general principles constitute precious tools for the creation of a common law. The analysis should also take into account the possible spill-over of general principles at the purely internal level. Three countries (United Kingdom, France and Sweden) have been selected in order to determine the existence of a *jus commune europaeum*. These countries are of interest, since they are reactive and receptive to the penetration of the general principles of EC law and can be used to demonstrate the convergence of their legal orders.[13] The specificity of

[13] The impact of the general principles of Community law on the new Member States do not fall within the scope of this research.

the impact and spill-over of the general principles in each of them will also be scrutinized.

1.2. The Variable and Hypotheses of the Project

This research mainly uses inductive and deductive logic in relation to the determination of "legitimacy principles" and the assessment of the *jus commune europaeum*. It must begin with a general topic, called the variable, which constitutes the central idea. Then, it must be narrowed down to research questions and hypotheses, which finally should be tested against empirical evidence. The variable is the study of the interaction between Community law, national law and ECHR law. As said by Legrand, *"[t]he growth of a transnational construction such as the EC has provoked a regulated encounter between the civil law and common law traditions and made the boundaries between legal systems more porous".*[14] So, it appears that in the European context, the interaction between legal Communities or entities is destined to grow in space. This interaction is particularly salient in relation to the general principles of law. The interest of this field of inquiry is stressed by the very nature of the general principles of law that constitute norms of law created by "judicial activism". The role of the principles becomes crucial due to the necessarily incomplete character of the Community legal order as determined by the objectives and substantive rules of the Treaties and the common traditions of the Member States.[15] According to Pescatore, *"legal principles transform the law into a coherent system".*[16] Therefore, it is important to analyze how general principles participate in the creation of new rules of law and thus contribute to the evolution of a legal system. They appear as one of the best seeds for the evolution of law. Two pivotal ideas convey the importance of the general principles of law, and make up the hypotheses, which should be tested in the EC legal order.

The *first hypothesis* is that the general principles of law constitute "legitimacy principles" in relation to the principles of supremacy and direct effect. The notion of legitimacy seems to be disregarded by the positivist doctrine, which justifies the existence of the law by its source: the State. In our context, the general principles are seen in the light of their functional importance. They are analyzed and understood as principles enabling the individuals to act against the Community institutions, and permitting the individuals to review the compatibility with Community law of the legislation or administrative practice of the Member States ("*concrete legitimacy"*). In addition, the general principles constitute political tools capable of injecting legitimacy in the EC system as a whole ("*abstract legitimacy"*). In that sense, the principles go beyond the sphere of the judiciary, to reach the political one. The general principles may be regarded as "integration tools". As stressed by Cappelletti, *"democracy cannot be reduced to a simple majoritarian idea, a judiciary*

[14] Legrand, "Comparative Legal Studies and Commitment to Theory", MLR 1995, pp. 262-273, at p. 262.
[15] Louis, *The Community Legal Order, Brussels*, 1980, at p. 68.
[16] Pescatore, *Introduction à la Science du Droit*, Luxembourg, 1960, at p. 120.

reasonably independent can contribute much to democracy, and so can a judiciary, active, dynamic and creative enough to be able to assure the preservation of a system of checks and balances vis-à-vis the political branches".[17]

Subsequently, particular attention must be given to the limits of the "principles of legitimacy". According to Posner, "when the methods available to the legal reasoner for making, criticizing or justifying legal decisions are examined coldly, we see that not they are not always distinctively legal and not always very objective. These points may be seen to have potentially serious implications for the legitimacy of the judicial enterprise".[18] Indeed, the principles, which are elaborated and applied by the ECJ, must comply with the basic features of "judicial legitimacy" in order to provide, in return, legitimacy to the European legal order. In conclusion, three questions need to be answered in order to verify the first hypothesis. First, is the creative process legitimate? Second, why may general principles afford legitimacy to the EC legal order and which type of legitimacy does it correspond to? Third, is the adjudication of the ECJ legitimate in the "applicative process"?

The *second hypothesis* aims at confirming the existence of a *jus commune*. It reconciles the general principles of law with the notion of *dynamic of law*. Law in theory is dynamic. EC law is particularly dynamic in comparison to national law and general principles of law are exceptionally dynamic in relation to other EC norms. The dynamic of the general principles is visible through their creation by means of judicial process and through their consequences. As to the latter, the principles lead to the modification and convergence of national concepts and to the creation of a common law. Already more than twenty years ago, an international conference at the European University Institute of Florence (1978) made reference to the building of a common law in different spheres of Community law.[19] Interestingly enough, the creation of a common constitutional and administrative law figured among the matters. In a similar vein, this research intends to explore these two domains. The creation of this *jus commune europaeum* appears, thus, limited to the sphere of public law. Theoretically, constitutional law might be a more appropriate ground for the creation of a *common law*. Indeed, constitutional construction has always been inspired by foreign experiences. Administrative law is generally influenced by the structure of the State and responds to the particular feature of the national society. However, in the Community law context, administrative law seems to constitute a better seed for the development of a common law. The development of a *jus commune* can only be realized in its full sense if the national authorities accept the general principles created by the case-law of the Court. The national authorities are obliged to comply with the general principles in the so-called domain of Community law. By contrast, in purely internal cases such an obligation does not exist.

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[17] Cappelletti, "Law Making Power of the Judge and its Limits", Monash Law Review, 1981, pp. 15 *et seq.*, at pp. 21-22. (Cited in Rasmussen, at p. 45).

[18] Posner, *The Problems of Jurisprudence*, Harvard, 1990, at p. 124.

[19] *See,* Schwarze, "Tendencies towards a Common Administrative Law in Europe", ELR 1991, pp. 3-19, "The Administrative Law of the Community and the Protection of human Rights", CMLRev. 1986, pp. 401-417.

The two hypotheses described above are in fact interrelated because the issue of the building of a *jus commune* is closely linked to the acceptance of the general principles of Community law, at the national level, as "legitimacy principles". In other words, the existence of "legitimacy principles" may help us to understand the reception of general principles at the purely internal level. This research takes the view that the general principles of Community law acting as "legitimacy principles", foster the acceptance of the principles at the national level by providing a high standard of protection to the individual. The national authorities, generally the national courts, are integrating the activism of the ECJ by "national activism", which ensures the unity of the national legal systems and affords a qualitative protection to their nationals, who are also European citizens. Thus, the general principles of law acting as "legitimacy principles" constitute vectors for the building of a European Common Law. The main problem is to actually demonstrate the very existence of "legitimacy principles". The present thesis aims at understanding and showing the *coherence* of the Court's approach to the building of efficient "legitimacy principles" and to the application process ("development") of the general principles of law. The main object of the research is to establish that "*legitimate judicial activism"* creates legitimacy in the EC legal order.[20] This constructive approach, as far as I know, has not been undertaken in any other research in this area.

1.3. Comparative Methodology and Research

Comparative research is generally extremely relevant in EC law studies.[21] In the context of the general principles of Community law, comparative methodology is particularly important. Firstly, comparing the national and Community appraisal of the notion of general principles, we may achieve a better understanding of the principles. Secondly, the comparative analysis can be deduced from the dynamic of general principles when *"traveling back"* to national systems. The comparison of their impacts at national level is essential in order to cope with their dynamics. Thirdly, the use of a comparative approach is necessary, since the Court and the

[20] The causation being the judicial activism of the Court, which may be called *"direct integrative judicial activism"*, in comparison with the causation of the second hypothesis, which can be called "indirect integrative judicial activism" (as the Member States are "receiving" the jurisprudence of the Court, and then incorporate it in their national legal orders, modifying it and creating subsequently a *jus commune europaeum*).

[21] *See,* Schwarze, *European Administrative Law*, Sweet and Maxwell, 1992, at p. 78. Using the textual meaning of the expression as a starting point, comparative law can be described as the setting against each other of different legal orders. A strict definition of comparative law cannot be found either in individual national legal orders, or at a European level. It is more a perspective of orientation than a separate research technique; it is a method of study rather than a legal body of rules and principles. More precisely, the research will use what Cappelletti has called a "*comparative phenomenological approach"*, i.e. an analysis of the actual phenomenon, the observable facts and events in the light of the ECJ jurisprudence (Cappelletti, *Judicial Process in Comparative Perspective*, Clarendon Press, 1991, preface).

Advocates General use judicial comparative methodology to create the general principles.[22]

On a more technical level, the analysis uses a *micro-comparison approach*. The terms macro-comparison and micro-comparison are generally attributed to Rheinstein and are frequently used in order to describe the two different types of comparative studies that may be undertaken. Macro-comparison refers to the study of two or more entire legal systems. Micro-comparison refers to the study of topics or aspects of two or more legal systems. Among the topics chosen for micro comparisons are the institutions, the development of legal systems and the sources of law. The general principles of Community law constituting a source of Community law enter perfectly into a comparative research study. The question is now to determine the most useful and efficient method for undertaking a comparative study.[23] A tripartite approach may be used. In that regard, the theory of Wigmore identifies:[24]

a) The *Comparative nomoscopy*, which is the description of systems of law.
b) The *Comparative nomothetics*, which is the analysis of the merits of the systems.
c) The *Comparative nomogenetics,* which is the study of the development of legal ideas and systems.

First, the comparative nomoscopy can be used in connection with the description of a particular principle of Community law with a similar or resembling national principle. It might help us to assess the "*sui generis"* nature of the general principle at the Community level. For example, it may be said that German law has inspired the "European" principle of proportionality. However, both concepts are not exactly similar. Similarly, the EC principle of proportionality is wider in scope than the

[22] The interest of the study regarding the Court's approach is underlined by its consequences. It may be argued that comparative methodology has a "normative effect". An analysis of its normative effect constitutes a sphere of high consideration for the purpose of this study. An examination of the "comparative method" used by the ECJ must be undertaken. This study constitutes a related field to the comparative approach taken in the project, but does not enter, *stricto sensu* into the comparative research.

[23] De Cruz, *A Modern Approach to Comparative Law*, Kluwer, 1993, at p. 5. What sort of comparative studies would rank as Comparative law? Such studies may fall into several categories and Hug (1922) suggests five possible groups of studies: Comparison of foreign systems with the domestic system in order to ascertain similarities and differences, studies which analyze objectively and systematically solutions, which various systems offer for a given legal problem, studies which investigate the causal relationship between different systems of law, studies which compare the several stages of various legal systems, and studies which attempt to discover or examine legal evolution generally according to periods and systems. This dichotomy does not constitute a rigid framework and other authors have elaborated a different approach.

[24] Glendon, Gordon and Osakwe, *Comparative Legal Traditions: Text, Materials and Cases*, American Casebook Series, 1993, at p. 4.

principle in French law and it could also be stressed that the principle is different from the English test of "reasonableness". Another use of the comparative nomoscopy can be interesting in relation to the pure theory of general principles. A comparison may be made between the national theories and the existence of the general principles in the Community law order.

Second, the comparative nomothetics will be the method followed in the evaluation of the general principles in comparison with the national and ECHR legal orders, i.e. the assessment of the standard of protection afforded by a general principle. Third, the comparative nomogenetics will be applied when dealing with the reception (impact) of the general principles of law at the national level. The use of this method is helpful in order to study the development and modifications of the national systems, to determine the negative and positive reactions and also to evaluate those systems of law, which are the most responsive to the reception of general principles of Community law.[25] As to the impact, a special focus is placed on three Member States, i.e. England, France and Sweden. The study of this impact will follow a three-stage approach and will include a descriptive phase, an identification phase (identifying differences and similarities between the systems) and an explanatory phase (accounting for the resemblance and dissimilarities between the concepts).[26]

The specific choice of the above-mentioned Member States is due to the willingness to focus this part of the present research on the so-called "reactive countries". By reasoning *a contrario*, it is evident that the general principles of proportionality or legitimate expectations, as elaborated by the ECJ, would have restricted impact, say, in Germany, since it was German law, which inspired their very elaboration.[27] The study of the impact of general principles in Germany might consequently be of limited interest for the research. Another reason for the above-mentioned selection of countries is that they provide a good representation of the great families of law in Europe.

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[25] It will be seen that by studying the impact, the most "penetrative principles" are the administrative ones. Concerning fundamental rights, the impact of the general principles is less important. It is argued that the case law of the ECHR may have already influenced the national orders. The purpose of the research is not to consider the impact of the ECHR case law as such on national law though the principles may be influenced by the ECHR or may be used as vectors for the ECHR. In that respect, the general principles of Community law became in the UK "a back door by which the European Convention on Human Rights pending its formal incorporation" (Usher, "General Principles of EC Law", European Law Series, 1998, at p. 156).

[26] Kamba, "Comparative Law: a Theoretical Framework", ICLQ 1974, pp. 485 *et seq*.

[27] Arguably, Germany boasts the highest standard in Europe. Subsequently, the impact of a principle is quasi impossible to measure. The EC standard may be lower than the national standard, *e.g*. legitimate expectations and state aids (Germany), or transparency (*Metten* case in the Netherlands).

2. FUNCTIONAL CLASSIFICATION OF EC PRINCIPLES

The term "general principle" exhibits the relative nature of this notion. Significantly, the general principles of Community law constitute as such a specific category of principles**.** The aim of this section is to "map", classify and clarify the various types of general principles that one discovers in the EC legal order and to contextualise them in relation to other types of principles encountered in EC law.

2.1. Origin, Functional and Subject-Matter Classification

It is conceivable to use different types of classification of the general principles of EC law. While one may generally resort to the origin-based, functional or subject-matter classification, the predominantly used type is the first one – the classification based on the origin of the general principles. However, this research will not follow this classification, but will instead attempt to use a functional classification.[28]

Before actually applying this functional classification to the subject-matter of this research, it is interesting to look at the two general classifications of general principles of EC law invented by Schermers[29] and Boulouis.[30] Arguably, these two classifications have strongly influenced the existing others. Thus, it appears important to study more precisely their underlying features. At first blush, the two classifications are based on the origin of the principles and are tripartite.

Boulouis identifies:

- "principes généraux communs aux droits des Etats membres".
- "principes inhérents à tout système juridique organisé".
- "principes déduits de la nature des Communautés".[31]

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[28] It appears that three categories result from the functional classification. Arguably, the general principles provide legitimacy in the sense that they afford judicial review to individuals against the Community institutions but also against the Member States acting within the scope of community law. The principles assuming such a function are called the *"operative principles"*. The function of the second category is to fill the gaps of the Community legal order. This is the so-called *"completive principles"*. The third category permits the regulation of the relationship between the institutions and the Member States or the institutions themselves. These are the *"regulative principles"*.

[29] Schermers, *Judicial Protection in the European Communities*, Kluwer, 1976.

[30] Boulouis, *Droit institutionnel des communautés européennes*, Domat Droit Public, 4th edition , 1993.

[31] *Ibid*., at p. 208. Boulouis, by establishing three categories, creates a class of "closed categories". The first group considered now as "A", refers to the principles common to the laws of the Member States. In this group, he encloses all the principles developed by the ECJ on the basis of a comparative analysis between the Member States. Those principles are inspired not only by constitutional law, but also through the case law and statutes of the Member States. This is, for instance, certain "due process" principles such as the principle of legal privilege, or the right against arbitrary or disproportionate intervention. The principles of effective judicial protection, duty to give reasons and the fundamental rights in general pertain to this category. In the second group, considered as "B", he includes the principles common to all the Member States. In concrete terms, he includes the principle of legal certainty and the

Schermers distinguishes:
- The "compelling principles" stemming from the legal heritage of Western Europe.
- The regulatory rules common to the laws of the Member States.
- The general rules, native to the Community legal order (indigenous principles).[32]

Significantly, the general classifications of Schermers and Boulouis seem extremely similar. Nevertheless, their theoretical approaches are different and must be carefully distinguished. The latter is based on a strict origin classification. The former appears to be partly influenced by functional considerations. Arguably, only the indigenous principles of Schermers and the principles deduced from the nature of the Community (Boulouis) are falling within an identical category.[33]

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principle of legitimate expectations in this category. The *audi alteram partem* principle can also be included. Boulouis states that *"when we consider those principles as inherent to all the organised judicial systems, we adopt most of the times a preconceived idea of this concept. This false idea being that the principles are closely linked to the law of the Member States, whereas their origin in most of the cases is not determined" (ibid.,* Boulouis, at p. 208). In the third one ("C"), the author considers the principles inherent to the Community legal order. To summarize, the classification adopted by Boulouis is pragmatic in its approach. Each principle is part of a specific category without any overlap between the various categories. This view is extremely clear and interesting from a practical point of view.

[32] Schermers, *supra n.29*, at pp. 20-21. Schermers seems more influenced by functional considerations. In the first category, Schermers identified the "compelling legal principles stemming from the common legal heritage of Western Europe" ("A"). Those principles flow from the common patrimony of the Member States and contain an element of justice or equity. It should be stressed that those principles do not need to be common to all the Member States. However, Schermers recognized, that *"a common legal order couldn't be formed from national legal orders, which contain diametrically opposite legal provisions"*. Concretely, this means that the principles created by the ECJ through inspiration of particular national systems should be capable of being incorporated in another Member State where the principle is not expressly stated or expressed in other terms. Secondly, he analyzed the "regulatory rules common to the laws of all the Member States" ("B"). These principles include all the rules, which are common to the legal orders of the Member States. Their function is to *"provide a solution in the event of a lacuna"* which can lead to a denial of justice. They are used to fill the gaps of the Community law. Finally, he referred to the "indigenous principles" proper to the EC system. Significantly, Schermers pointed out that certain indigenous principles could pertain to the compelling principles. However, he did not enter into details. This view is particularly interesting if we admit the principles of proportionality and equality as part of the principles deduced from the nature of the Community and not as principles common to the Member States. The differentiation between the various general principles of law is relevant in the sense that the first group takes precedence over secondary Community legislation, but not Treaty provisions, whereas the second group is used generally when no other sources of Community law can be used.

[33] At first glance, the three categories are similar. However, as stressed before, Boulouis established a closed class of principles, whereas Schermers considered the possibility of overlap between the various established categories. Consequently, the compelling principles must be viewed as a wider class than the general principles common to the law of the Member States. Indeed, the compelling principles are composed of the "principles common to the law

Recently there is a visible trend in EC law to put the general principles *dans l'air du temps,* which is exemplified by the increasing number of legal writings dedicated exclusively to the general principles of law. Since 1996, three books have been produced - by Papadopoulou (1996),[34] Usher (1998),[35] and Tridimas (1999).[36] Interestingly, two of them proposed their own theory of classification of the general principles of Community law, i.e. Papadopoulou and Tridimas. Only Papadopoulou attempts to undertake a full-fledge classification by using the "origin classification".[37] By contrast, Tridimas considers the subject matter classification as an alternative to the origin classification.[38]

Thus, Papadopoulou uses the following classification:
- Axiomatic principles
- Structural principles
- Common principles.[39]

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of the Member Sates" and of certain regulatory rules'. Schermers does not enter into detail when it comes to the deflection of the regulatory rules into the compelling principles. Nevertheless, as the author pinpointed, regulatory rules unlike compelling principles do not necessarily contain an element of justice, fairness or equity. Consequently, it may be argued that the basic difference between "compelling principles" (from "B") and non-compelling principles (from "B") is the existence of an element of justice in regulatory rules common to all the Member States. Subsequently, if a regulatory rule includes this element it may be deflected into the first category, and be recognized as a compelling principle. So, the compelling principles are formed from the principles common to the laws of the Member States and from the regulatory rules common to all the Member States possessing an element of justice. Furthermore, the two classifications may, at first blush, appear to be based on the origin of the principle. This assessment is certainly true. However, the theory of Schermers is also influenced by "functional" considerations, e.g. the regulatory rules permit to fill the gaps of the Treaty. The confusion of both classifications may lead to a blurred situation - impossibility to define the exact content and boundaries of the general principles - and to a certain dilution of the concept of general principle.

[34] Papadopoulou, *Principes généraux du droit et droit communautaire*, Bruylant, 1996.

[35] Usher, *General Principles of EC Law*, Longman, 1998.

[36] Tridimas, *The General Principles of EC Law*, Oxford, 1999.

[37] The author used a tripartite classification which is inspired by international law and is construed around the origin of the principles. The origin classification may be useful if one wishes to give a strict definition of the three categories without any type of overlapping. In this sense, Boulouis followed such an approach and obtained "closed categories". Conversely, Papadopoulou considers the overlapping possible as unavoidable and thus renders the identification extremely difficult.

[38] Tridimas, *supra n.36*, at p.3.

[39] Papadopoulou defines the axiomatic principles in the light of Boulouis' definition, considering those principles "as inherent to the notion of judicial legal order, being an expression of the rule of law and collective conscience. The judge does not have the necessity to rely on their origin when he recourses to them. This is for instance, the respect of the rights of the defence, legal certainty and its specific expressions such acquired rights or legitimate expectations" (*ibid*., Papadopoulou, at p. 8). In analyzing this definition, one can also establish a clear link between the axiomatic and the compelling principles (principles stemming from the very notion of the rule of law). It may be said that the definition given by

Tridimas worked in this way:
- Principles underlying the constitutional structure.[40]
- Principles derived from the rule of law that relate primarily to the relationship between the individual and the (Community and national) authorities. This category

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Papadopoulou is clearly influenced by Boulouis and Schermers (especially concerning the axiomatic principles). Consequently, one obtains a "hybrid" definition of the general principles. In addition, it should be remarked that the definition of the structural principles poses much less problems. The author considers that the structural principles belong to a particular judicial order, which reflects the objectives. Those are deduced from the very nature, the characteristics of the system. Those principles are for instance the principle of solidarity and the principle of institutional balance ruling the communitarian construction and permitting the judge to ensure the functioning of the judicial order from which those belong (*ibid*., at p. 9). Their origin which arises from the special nature of a particular legal order perfectly matches their function, that is to say, to govern the relation between the Member States and the institutions or the institutions themselves. Consequently, the structural principles correspond to the same class as the principles deduced from the nature of the Community (Boulouis) and the indigenous principles (Schermers). Finally, in relation to the common principles, it should be pinpointed that we can discern a lack of a systematic definition regarding their content. Hence, Papadopoulou argues that *"[e]nfin, les principes communs s'appliquent au sein d'organisations regroupant plusieurs systèmes nationaux, comme l'ordre juridique international ou L'union Européenne. Le Statut de la CIJ énumère en effet les principes généraux de droit reconnus par les nations civilisées parmi les sources de droit international et le Traité CE renvoie expressément aux principes généraux aux droits des Etats membres en matière de responsabilité extracontractuelle. Ces principes sont consacrés par le juge international ou communautaire, qui déduisent des solutions prescrites dans les droits nationaux, les principes sous-jacents et les transposent dans leurs ordres juridiques respectifs en les adaptant aux spécificités de ces derniers".* Notably, this definition appears very diffuse. The distinction between the axiomatic, structural principles and common principles has been adopted by Verhoeven ("Droit International Public", 1er Partie, UCL, eds. DUC, 1992, at pp. 95-98). According to Papadopoulou, this classification is the most useful in the sense that the general principles are easily identifiable. Conversely, one might consider such a classification as not providing a clear identification since the principles are constantly overlapping. It might be said that the classification based on the origins is thus too fuzzy to enable the establishment of a coherent order of classification of the general principles of Community law.

[40] More precisely, the author considers that "such principles refer to the relationship between the Community and Member States, such as the principle of primacy, attribution of competences, subsidiarity, and the duty of co-operation provided for in Article 10 EC. They may also refer to the legal position of the individual, such as the principle of direct effect, or to relations between the institutions of the Community, such as the principle of institutional balance. It is indicative of the extraordinary influence that the Court of Justice has had on the development of Community law that the main principles which define the constitutional structure of the Community are not provided for expressly in the Treaty but were discovered by the Court by an inductive process. This applies in particular to the principles of primacy and direct effect, which in the Court's own language form the essential characteristics of the Community legal order".

comprises for example, the general principles of equality, proportionality, legal certainty, the protection of legitimate expectations, and fundamental rights.
- Principles of substantive Community law, such as those underlying the fundamental freedoms or specific Community policies, for example common agricultural policy.[41]

To conclude, the approach of Schermers, which includes some functional elements, is the most suitable for the purposes of this research, since it is closely linked to the paradigm of review. Consequently, the views advanced by Schermers influence (in part) this research and will serve as a basis for the application of a "functional classification".[42]

2.2. The Functional Classification: Completive, Regulative and Operative Principles.

According to the functional classification chosen for the purposes of this research, the main criterion of distinction between various general principles of Community law is, as the name suggests, the very *function* of the principles. The general principles carry out several functions – they interfere in the judicial review**,** fill in the gaps and regulate the relationship between Community institutions and the

[41] As stated before, this classification is based on the "subject matter". Classifications may be attempted according to different criteria such as their substance (subject matter) or as a specific source (origin) of EC law in a given area. However, one may wonder if such a type of classification is indeed the same one. Thus, it could be argued that the source used in the creative process such as national constitutional law will determine the substance of the general principle subsequently created, i.e. human rights principles. In that regard, the "subject-matter" classification established by Tridimas may be compared with the "origin" classifications. In so doing, the principles underlying the constitutional structure come close to the structural principles (Papadopoulou), the indigenous principles (Schermers) and the principles deduced from the nature of the Community (Boulouis). Similarly, the principles that derive from the rule of law may be assimilated to the axiomatic and compelling principles. At the end of the day, the origin and subject matter classifications appear to constitute quasi-similar classifications. In his book, Tridimas did not attempt to classify the principles. His inquiry focused on a comprehensive study of the outcomes. It is well detailed and focuses mainly, but not solely on the principles derived from the rule of law that provide review to individuals, e.g. non-contractual liability. Conversely, the present research is based on the principles derived from the rule of law that provide review.

[42] *See,* Bengoetxea and Wiklund, "General Constitutional Principles of Community Law", in Bernitz and Nergelius, 2000, pp. 119-142, at p. 129. According to the authors, "the general constitutional principles of EC law can be seen in two different ways. They can be seen in isolation if one looks at each of the principles inside the hyphens, trying to define their content, their normative impact and implications, their contours and their systematic relations with other principles, their difficulties of application and interpretation or their place in the system of law, the provisions that sustain them or their theoretical construction from other sources. But that can also be analyzed according to the function they perform or even the process by which they are brought about".

Member States. With regard to these functions, the general principles can be divided into *"operative principles",* the *"completive principles"*, and the *"regulative principles*". The present research will concentrate on the *"operative general principles of Community law"*. The basic aim is to narrow the scope of the inquiry. It is obvious that the research cannot take into account all the types of "[general] principles" encountered in Community law. However, before presenting the relevant principles chosen, an overview of the classification of the principles must be provided. When it will come to the choice of the principles, the main criteria of selection is their potential role for providing legitimacy to the EC legal order. Accordingly, the general principles provide legitimacy in the sense that they can afford a ground for judicial review to individuals against the Community institutions, but also against the Member States acting within the scope of community law. The principles assuming such a function are called the *"operative principles"*. It must be stressed that these principles are closely interrelated to the concepts of rule of law, individuals and judicial review.

According to Steiner, in the Community legal order, general principles constitute an aid in the interpretation of EC law and national law (implementation of EC law must be interpreted in such a way as not to conflict with general principles of law).[43] They may also supplement the provisions of written Community law.[44] Moreover, general principles of law may constitute a support to a claim for damages against the Community (Article 288(2) EC [ex Article 215(2)]).[45] In addition, they may be invoked in order to challenge an action of the Community, by the individuals and a State[46] (or to challenge inaction by its institutions, Article 232 [ex Article 175] and 236 EC [ex Article 179]). Finally, they may be invoked by individuals in order to challenge an action of a Member State taking a legal or administrative act relating to actions being performed in the context of a right or obligation arising from Community law.[47]

By challenging these actions, taken either by the Community institutions or by the States, the general principles of law reflect the legitimacy of the whole legal system. The notion of legitimacy is thus viewed in the light of judicial review. The research proposes to develop and explain why and how the general principles of law must be perceived as legitimacy principles in relation to the Community legal order

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[43] Steiner, *supra n.11,* at pp. 61-62.

[44] Case 13/61 *Bosch* [1962] ECR 45, at p. 59, Case 15/63 *Lasalle* [1964] ECR 32, at p. 54, Case 53/81 *Levin* [1982] ECR 1035, at p. 1049.

[45] Case 5/71 *Aktien-Zuckerfabrick Schöppenstedt* v. *Council* [1971] ECR 975, "where damages are claimed as a result of an illegal act on the part of the Community, it is necessary (but not sufficient) to prove that a sufficiently serious breach of a superior breach of law for the protection of the individual has occurred".

[46] An act infringing a general principle of law will be annulled or declared invalid. Case 4/73 *Nold* [1974] ECR 491, at p. 507. Case 114/76 *Bela-Mühle* [1977] ECR 1211, at p. 1221, Case 122/78 *Buitoni* [1979] ECR 677, at p. 684, Case 224/82 *Meiko-Konservenfabrik* [1983] ECR 2539, at p. 2548.

[47] Case 5/88 *Wachauf* [1989] ECR 2609. *See also* Case 203/80 *Casati* [1981] ECR 2595, at p. 2618, Case 222/84 *Johnston* [1986] ECR 1651, at p. 1682.

and establish how and why they construct a close link with the principles of justiciability and supremacy. Furthermore, as noted above, the general principles of law legitimize actions in the Community legal order by providing not only the possibility for individuals to challenge Community and States actions, but also for the State to challenge actions of the EC institutions.

The basis aim of this research is to narrow the scope of the inquiry and to concentrate on the "operative general principles of Community law", which are closely interrelated with the concepts of rule of law, individuals and judicial review. Every time the general principles assist in interpretation, supplement written provisions or support a claim for damages, they act as "completive principles". The last group is represented by the "regulative principles" that regulate the relationship between the Community institutions and the Member States or between the Community institutions themselves.

a) Completive Principles

With regard to gaps, already in the *Algera* case, the Court stressed that "unless the Court is to deny justice it is therefore obliged to solve the problem by reference to the rules acknowledged by the legislation, the learned writing and the case-law of the Member States".[48] Citing AG Roemer in the *Plaumann* case (1963),[49] it is not compulsory that such principles exist explicitly in the legal order of all the Member States. According to Schermers, the provision may even be lacking in all the other national legal orders except one, simply because they were not needed in order to solve the particular question.[50] In general terms, the completive principles are used to interpret the validity of a particular law and not to ascertain the validity of a specific measure. For instance, in the first *Deuka* case,[51] the principle of legal certainty was used by the Court in order to uphold the validity of the invalid Regulation.

Moving to the function of the completive principles as supplementing written provisions of EC law, in *Bosch* (1962),[52] AG Lagrange considered, regarding the interpretation of Article 234 EC [ex Article 177], that "we must take into account the general principles contained in the municipal law of the Member States, in particular France and Germany, where the system of preliminary ruling is well established". In *Lasalle* (1964),[53] the Court was confronted with the question of the legal capacity of the staff committee in the absence of any provisions expressly conferring it. AG Lagrange once again pinpointed that the question must, as always when a difficulty is not resolved *expressis verbis* by the relevant provisions, be considered in relation to principles arising from the provisions of the Treaty and the general principles of law, in particular to the laws of the Member States. Also, the

[48] Case 7-56 and 3-4/57 *Algera* [1957] 115.
[49] Case 25/62 *Plaumann* [1963] ECR 116.
[50] Schermers, *supra n.29*, at p. 26.
[51] Case 78/74 *Deuka* [1975] ECR 421.
[52] AG Lagrange in *Bosch*, *supra n.44,* at p. 59.
[53] AG Lagrange in *Lasalle*, *supra n.44,* at p. 54.

Levin case (1982) provides an interesting example.[54] In this case, the Court was confronted with the definition of the term "worker" contained in Article 48 [new Article 39]. First, AG Slynn[55] stressed that in construing Article 48, the meaning of worker constitutes a matter of Community law. Second, a worker should be defined in such a way as to avoid as far as possible variations between the Member States. Going further, the Court ruled that the meaning and the scope of the term 'worker' and 'activity as an employed person' should thus be clarified in the light of the principles of the legal orders of the Community. The completive principles are also relevant in relation to the implementation of EC law. In the *Kolpinghuis* case, the Court stated that the national courts must be guided by the general principles of law, which form part of Community law, and in particular the principles of legal certainty and non-retroactivity, in order to interpret the national legislation implementing a directive.[56]

In relation to the non-contractual liability of the Community, the assessment of Article 288(2) EC [ex Article 215(2)] in the light of the "legitimacy theory" might appear much more complicated. According to Article 288(2) of the EC Treaty, the non-contractual liability of the Community can be sustained in accordance with the general principles common to the laws of the Member States. Thus, it could be argued that through the use of general principles, the individual can obtain damages from the Community. This notion seems closely inter-linked with the protection of the individual. However, Article 288 (an independent course of action) does not lead to the review of the Community act.[57] Since the *Bergaderm* case, the Court has considered that a number of conditions must be met in order to engage the liability of the Community.[58] First, the rule of law infringed must be intended to confer rights on individuals. Second, the breach must be sufficiently serious. Third, there must be a direct causal link between the breach of the obligation resting on the author of the act and the damage sustained by the injured parties. [59] Interestingly, the Court

[54] *Levin*, *supra n.44,* at p. 1049, para. 12.
[55] *Ibid*., AG Slynn in *Levin*, at p. 1058.
[56] Case 36/75 *Rutili* [1975] ECR 1219.
[57] Case T-177/01 Jégo-Quéré [2002] 2 CMLR 44, para. 46.
[58] Case C-352/98 P *Bergaderm and Goupil* v. *Commission* [2000] ECR I-5291, paras. 41-42, and Case C-312/00 P *Commission* v. *Camar and Tico* [2002] ECR I-11355, para. 53, Case C-472/00 P *Commission* v. *Fresh Marine* [2003] ECR I-7541, para. 25, Case C-234/02 P *European Ombudsman* v. *Lamberts* [2004] para. 49, n.y.r, Case T-193/04 R *Hans-Martin Tillack* v. *Commission* [2004] n.y.r.
[59] The Court is clearly influenced by the criteria used in relation to the Member States liability. The court does not refer anymore to formulation used in the *Schöppenstedt* case ("where legislative action involving measures of economic policy is concerned, the Community does not incur non-contractual liability for damage suffered by individuals as a consequence of that action unless a sufficiently flagrant violation of a superior rule of law for the protection of the individual has occurred"). Arguably, the general principles of law constituted such a "superior rule of law". The breach of the superior rule of law needs to be sufficiently serious in order to enable the individual to ascertain the liability in damage of the Community. By contrast, the new test no longer refers to the breach of a superior rule of law.

stressed that the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach.[60] It is argued that the same holds true in connection with the general principles of Community law.

Finally, it needs to be stressed that completive principles when acting in their gap-filling capacity overlap, to a certain extent, with "operative principles". For instance, a principle pertaining to the "completive category" may be used as an "operative principle" (the function will be different). An example follows from the *audi alteram partem* principle. In the *TMP case*, [61] the right to be heard was used as a supplement to a written provision and subsequently invoked against the Commission, whereas in *Al-Jubail*[62] the principle was invoked successfully in order to invalidate an anti-dumping Regulation. In the latter case, the principle was used as an "operative principle". Thus, it can be said that the operative general principles have once been (during their creative process) completive principles. Indeed, the principle, before it acquires its review function ("secondary function") has been distilled by the jurisprudence of the ECJ in order to fill the gaps of the Community legal order ("primary function"). By analysing the case-law, it must however be pinpointed that certain principles used to fill the gaps have not achieved their secondary function. Two groups of principles can be distinguished in this respect. First, the principles which do not posses a clear element of justice, in the sense that their very purpose is not to review the legality of an institutional or Member States act, e.g. the concept of *force majeure* and undue enrichment. Second, one can notice the existence of principles, such as the principle of acquired rights,[63] which despite their "justiciable character" have never been used in practice to invalidate Community legislation. Finally, it appears that not all completive principles may acquire a "secondary function" (review function). The so-called "element of justice" is thus necessary to suit the "operative classification" and is seen, in the thesis, as allowing practical review.

b) Regulative Principles

The "regulative principles" may be seen as the counterpart to what has been called by Schermers the "indigenous principles" or by Boulouis "the principles deduced from the nature of the Community". Those *"[n]ew legal principles may evolve not only from the case law of the Court of Justice but also from the decisions and*

[60] *Supra n.58, Bergaderm,* paras. 43-44, *Tillack,* para. 53.
[61] Case 17/74 *TMP* [1974] ECR 1063.
[62] Case C-49/88 *Al-Jubail* [1991] CMLR 377.
[63] Papadopoulou, *supra n.34,* at p. 233, "[s]'il a été reconnu que le respect des droits acquis constitue un principe général du droit, la Cour n'a pas, jusqu'à ce jour, fondé une décision sur la seule base de cette règle non-écrite. Il s'agit, en d'autres termes, du schéma classique selon lequel la consécration explicite du principe est suivie par le refus de reconnaître qu'il a été violé dans le cas d'espèce. Ainsi a-t-il souvent été jugé que l'acte illégal n'était pas constitutif d'un droit acquis au profit de l'intéressé ou encore que son retrait était intervenu dans un délai raisonnable".

resolutions of the European Parliament or of other institutions".[64] In that regard, the principle of subsidiarity confers a perfect illustration of an "indigenous principle", which is not created by the European Court of Justice. Arguably, their origin, which arises from the special nature of the Community legal order, matches perfectly their function, i.e. to regulate the relation between the Member States and the institutions or between the institutions themselves. The regulative principles thus have a clear "constitutional dimension".[65]

First, one can underline the existence of regulative principles linked to the neo-liberal conception, the basic principles being the four freedoms. One can also include the principle of Community preference.[66] In *Association de défense des brûleurs d'huile usagées,* the Court stated that "it should be borne in mind that the principles of free movement of goods and freedom of competition, together with the principle of free trade as fundamental rights, are general principles of Community law of which the Court ensures the observance".[67] As was stressed by the Court in its Opinion on the Draft Agreement relating to the creation of the European Economic Area (Opinion 1/91),[68] the Treaty aimed at achieving economic integration leading to the establishment of an internal market and an economic and monetary union. The ECJ here drew from Article 1 of the Single European Act the objective of making progress towards European unity. The substantive provisions on free movement and competition were simply a means to that end. The decision thus firmly asserted the links between economic integration and politics and the role of the law as an instrument in developing that process.

The second group is composed of the institutional principles, such as the general principle of institutional balance,[69] the principle of solidarity[70] and the principle of subsidiarity. For instance, the principle of subsidiarity originated from the catholic social philosophy and postulates the individual as the basic unit of the society. It can be related to Article 72 of the German Constitution or to Amendment X of the US Constitution. Article 5 EC [ex Article 3B] can be interpreted as reasserting national sovereignty in a different way or as a new impetus to decentralization of decision-making, especially if we read it in connection with Article A TEU ("decisions are taken as closely as possible to the Community citizen").[71]

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[64] Schermers, s*upra n.29*, at p. 21 and Boulouis, *supra n.30*, at p. 209.

[65] It will be seen later that all regulative principles are constitutional principles. However the constitutional principles are not *per se* "regulative principles".

[66] Case 5/67 *Beus* [1968] ECR 125.

[67] Case 240/83 *Association de défense des brûleurs d'huile usagées* [1985] ECR 520 at p. 531.

[68] Opinion 1/91, delivered 14 December 1991, [1992] 1 CMLR 245.

[69] Case 9/56 *Meroni* v. High Authority [1958] ECR 133.

[70] Case 39/72 *Commission* v. *Italy* [1973] ECR 101.

[71] For an assessment of subsidiarity, *see* Emiliou , "Subsidiarity: Panacea or Fig Leaf ? in *Legal Issues of the Maastricht Treaty*, O'Keeke and Twomey (eds.), Chancery, 1994, pp.65 *et seq.* Emiliou, "Subsidiarity: an Effective Barrier against the Enterprises of Ambition"? ELR 1992, pp-383-407, Steiner, "Subsidiarity under the Maastricht Treaty" in O'Keefe and

The third group composed of three principles should be given particular importance. They are, in my view, the most relevant "indigenous constitutional principles" to the study and have been created or developed in the case law of the European Court of Justice. Those are the principles of direct effect (principle of justiciability), the principle of supremacy and the principle of loyalty (Article 10 EC/ ex Article 5). They are the pillars of the constitutional structure of the EU. They ensure the efficiency of the EC legal order by permitting the national authorities to protect the rights granted to the individuals in an effective way. They have to be studied carefully in relation to the "operative principles".

In general terms, the regulative principles are not necessarily enforceable, for instance, the principle of Community preference. In the case C-353/92 *Greece* v. *Commission,*[72] this general principle was invoked in relation to a provision of a Regulation placing soya beans producers of the Member States in a less favourable position than the producers from third countries. The Court ruled, following AG Jacobs, that the violation of such a principle would not lead to the invalidity of the measure concerned due to the proper nature of the principle. Indeed, the principle is not compelling. On the other hand, the principle of subsidiarity is enforceable. Hence, it may be argued that the "regulative principles" are somehow related to the "operative principles". In fact, a regulative principle may belong to the operative class and vice versa.[73] In this sense, the principle of subsidiarity overlaps with the operative class.

Finally, one may suggest that the classification of the structural principles poses much less problems. Indeed, their origin, arising from the special nature of a particular legal order, seems to perfectly match their function, that is to say, to govern the relation between the Member States and the institutions or between the institutions themselves. Consequently, the principles deduced from the nature of the Community (Boulouis), are similar to the indigenous principles (Schermers), the structural principles (Papadopoulou),[74] and institutional principles (De Witte).[75]

Twomey (eds.), pp. 49 *et seq*., and Toth, "A Legal Analysis of Subsidiarity" in O'Keefe and Twomey (eds.), pp.37 *et seq*.

[72] C-353/92 *Greece* v. *Commission* [1994] ECR I-3411 at p. 3451.

[73] Boulouis, *supra n.30,* at p. 211.

[74] Papadopoulou, *supra n.34*, "[t]he structural principles express the objectives of the particular judicial order to which they belong. They are deduced from the very nature and characteristics of the system. The principles include, for instance, the principle of solidarity and the principle of institutional balance ruling the communitarian construction and permitting the judge to ensure the functioning of the judicial order from which those belong". (my translation), at pp 8-9.

[75] *See,* De Witte, "General Principles of Institutional Law", in Bernitz and Nergelius (eds.), Kluwer, 2000, pp. 143-159. The "non-traditional principles" or "general principles of institutional law" are defined as *"not serving to protect the position of the individual, but rather to regulate the relations between the institutions"*. De Witte further followed a two-fold classification between horizontal institutional principles (between the institutions of the Community) and vertical institutional principles (between the Community and the Member States institutions).

c) Operative Principles

Operative principles make possible the review of the acts of the institutions and Member States. In that respect, these principles may be regarded as vectors of legitimacy.[76] As stated previously, the functional classification is inspired by the views of Schermers. Thus, one must analyse whether the operative principles are identical with the compelling principles. On the one hand, it must be noted that operative principles are considered compelling in the sense that they not only provide "judicial review" to the individual against the institutions, but also because they allow the individual to challenge the actions of Member States. On the other hand, Schermers does not enter into an exhaustive enumeration of the "compelling principles" and considers that a "definition of the compelling principles is very hard to give".[77] Accordingly, the principles are compelling due to their very nature and not due to their review function. The compelling principles include, for instance, principles such as undue enrichment or *force majeure*.[78] These principles do not provide review in the sense discussed above. By consequence, it is submitted that the operative and compelling principles, though clearly overlapping, do not constitute an identical category. Furthermore, it may be said that the operative category appears more restrictive.

The review function afforded to individuals requires a determination of which types of principles that fall into the "operative category".[79] One may consider it

[76] The purpose of the research is to analyze the general principles of law in the light of legitimacy. Succinctly, those principles are legitimate in the sense that even if they are created by judicial law-making, they are inspired by the national system of the Member States and the concept of rule of law. More precisely, they permit the legitimization of the Community by allowing the individuals to challenge the acts of the Community and the Member States. The notion of legitimacy in the legal order is of fundamental importance. As stressed by Heller, *"the legitimacy of a social order is decisive for the claim to power and validity of every social and political ruling power, which sets in place the particular order and actually maintains it. No organized political power can rely solely on its coercive apparatus to ensure its power and order. It must always strive for legitimacy, that is, to include the subjects within a Community of will and value which honors its claim to power. It must also try to justify its claim to rule through giving ideal content to legislation and must accept a normative duty to the subjects to bring about a genuine recognition on their part of this claim"* (Heller, *Theory of State*, "Staatslehre", 1934, pp. 305-310. Translation in Dyzenhaus, *Legality and Legitimacy*, Clarendon Press Oxford, 1997, at p. 181). The judiciary, which has been identified with the realization and implementation of the law, is in a permanent search of legitimacy. Arguably, the general principles of law offer precious legitimising tools both for the Community legal order and the European Court of Justice.

[77] Schermers, *supra n.29,* at p. 20.

[78] Undue enrichment, *force majeure*, or non-contractual liability belong to "completive principles".

[79] As seen previously, it might be extremely hard to establish a clear-cut distinction between the axiomatic and the common principles. Using the definition of Boulouis (who established closed class of principles), the operative principles are both inherent principles (legal certainty, legitimate expectations) and common principles (human rights, due process principles). Following Papadopoulou's definition, the operative principles would be axio-

easier to determine the operative principles according to their function, rather than to try to exert the element of justice or equity. Also, it may be argued that the element of justice and equity is precisely their "justiciability", their "review function" which stems from their binding nature. In that regard, the operative principles appear identical to the definition given by De Witte of the "traditional principles". According to the author, these norms constitute *"unwritten principles, recognized by the European Court of Justice that have a status of higher law by the fact that they may be invoked as a standard for the review of Community acts"*. [80]

What is more, the operative principles may be linked to the paradigm of the individual or citizen. In that sense, the operative principles come close to *"fundamental principles, which assure the protection of the citizens"* (Bengoextea and Wiklund) [81] and to *"principles which derive from the rule of law and pertain primarily to the relationship between the individual and the (Community and national) authorities"* (Tridimas).[82] As to the latter, this category comprises, for example, equality, proportionality, legal certainty, the protection of legitimate expectations and fundamental rights.[83] As to the former, it forms a wider group than the operative principles.[84] At the end of the day, it may be contended that a strong connection exists between the concepts of "individual" and "review".

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common principles. However, can it be argued that all axiomatic principles are also operative? In the light of the definition of axiomatic (as principles inherent to the legal order), it seems plausible to argue that the axiomatic principles are operative principles. In the sense that those axiomatic principles (where the Court did not refer expressly to a law of a Member State) possess a review function. The same is not true in relation to the common principles, only few have acquired the review function indispensable to enter in the operative category. On the one hand, the principle of *force majeure*, undue enrichment or continuity of Community action have been built by comparative methodology. Nevertheless, those principles cannot provide or have not been recognized as providing review. Consequently, these principles do not enter in the operative category. On the other hand, the human rights principles or due process principles enter into the scope of the "operative principles".

[80] De Witte, *supra n.75,* at p.143. De Witte establishes a distinction between the traditional principles and the non-traditional principles, the so-called "institutional principles", which corresponds to the structural, indigenous or constitutive principles (or at least a part of this classification).

[81] According to the classification, those provisions enter both in the constitutional principles defining the legal structure and in the operative class (only non-discrimination and proportionality).

[82] Tridimas, *supra n.36*, at p. 3.

[83] *Ibid*.

[84] Bengoextea and Wiklund, *supra n.42*, at pp. 133-134. The principles are defined as, *"[l]egitimizing the system: these are related to the very legitimacy of law: rule of law, democracy (transparancy, openess, and public access), fundamental rights, non-discrimination, effectiveness of judicial protection or access to justice, procedural autonomy but effective protection, Member State liability, these are drawn mainly from the constitutional traditions of the MS, from international instruments to which they adhere (esp.,the ECHR) and also from the system of the Treaty. These traditions and instruments thus become sources of EC law principles derived from the legal systems of the MS as general*

2.3. General principles as Completive and Operative principles.

In the light of the foregoing, it may be said that general principles boast two main functions. The primary function is to fill the gaps of Community law and the secondary function is to review the acts of the institutions and of the Member States. Equally, it may be argued that the general principles (have) perform(ed) both functions.[85] Once a principle is elaborated, the *ratio decidendi* is the gap filling of the EC legal order. Quoting Professor Herdegen, *"[t]he dogmatic justification for resorting to general principles of law is hence to avoid a déni de justice (which is in itself a general principle of law)"*.[86]

Also, it must be stressed that the secondary function often takes priority (in the sense that it constitutes the main function). Consequently, the terms "primary" and "secondary" must be understood on a temporary basis. The primary function is thus ephemeral. It is the chrysalis from which the secondary function emerges. In other words, the "operative general principles" (their function being to review) have once been "completive general principles" (their function being to fill the gaps). The overlapping is thus clear between both categories.

According to Koopmans, "[t]he general principles are not, or not any more, used to patch gaps left between legal provisions duly enacted by the framers of laws, constitutions or treaties. On the contrary, they are an integral part of the conceptual tools judges employ nowadays for settling disputes".[87] One may partly disagree with Koopmans. It may be said that each time the Court of Justice elaborates a general principle, its basic function is to patch gaps left into the Community legal order. In other words, the general principles of Community law may still be used to fill gaps.

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principles of law which only have an indirectly constitutional nature, by virtue of their being devised to protect the individual; many principles of administrative law fit here (retroactive removal of unlawful acts, proportionality, non-payment in days of strike, force majeure) as do principles of legal procedure (non bis in idem, equality of arms, confidentiality), arguably also the principle of consumer protection or the principle of sustainability or of environmental protection, socio-economic rights could perhaps also fit here since all Member States have, for instance, a social security system". This definition is very similar to the definition of the operative principles but is wider, in the sense that all of them might ensure the protection of the citizen. Nevertheless, all the above-mentioned principles do not permit review of Community action or of the Member States (such as the principle of extra-contractual liability and *force majeure*). Further, a number of the principles remain hypothetical, such as socio-economic principles. In this respect, one may consider that the development of such principles is not possible through the case law of the Court of Justice without any prior legislative development. The European Charter of Human Rights of December 2000 might be useful in this context.

[85] This assessment does not include the written operative principles, i.e. proportionality and equality.

[86] Herdegen, "The Origins and Development of the General Principles of Community Law", in Bernitz and Nergelius (eds.), Kluwer, 2000, pp. 3-23, at p. 5.

[87] Koopmans, "General Principles of Law in European and National Systems of Law: A Comparative View", in Bernitz and Nergelius (eds.), Kluwer, 2000, pp-25-34, at p. 34.

During the Malmö conference (1999) on the general principles of Community law, Schermers confirmed that, "[t]here are two different kinds of general principles. (1) Regulatory principles of law, which are used to fill gaps, if no other rule, exist. They are a kind of law in reserve, subordinate to written legislation". (2) Compulsory principles of law, which are fundamental principles of a higher level, taking priority over written legislation and having to be applied irrespective of the question whether the legal system has rules of its own. Rules conflicting with these latter principles may not be applied".[88]

Interestingly, the same type of categorisation is followed by Temple Lang who argues that, "[t]here are two kinds of general principles of law which the Court of Justice has said are part of Community law: principles of fundamental rights, and what are essentially administrative principles. These two categories are descriptive, and not mutually exclusive. The principle of legal certainty has consequences, which fall into both categories. Each of these general principles has two kinds of legal effects: it is a rule of interpretation of the Community Treaties and of Community legislation and other acts. It is an overriding rule of law, which invalidates actions taken in the sphere of Community law, which are contrary to the principle".[89] As stressed above, these two categories (fundamental rights and administrative principles) are not mutually exclusive. Overlapping is possible and admitted. The same view is taken explicitly by Schermers who classifies proportionality and legal certainty in the human rights category.[90]

Finally, the general principles can also be enshrined in the Treaty. In this respect, the principle of equality finds an explicit expression in the Community Treaties. Articles 12 EC [ex Article 6] (discrimination on grounds of nationality), 34 EC [ex Article 40(3)], 90 EC [ex Article 95] (tax discrimination) and 141 EC [ex Article 119] (gender discrimination) make express references to the principle of equality. Even if this principle is expressly mentioned, it has been ruled by consistent jurisprudence that non-discrimination is a "specific enunciation of the general principle of equality which is one of the fundamental principles of Community law".[91] In addition, the Treaty of Amsterdam also takes into account the principle of non-discrimination in connection with opportunities and treatment in matters of employment. Similarly, the principle of proportionality is expressed very

[88] Schermers, "Human Rights as General Principles of Law", in Bernitz and Nergelius (eds.), Kluwer, 2000, pp. 61-71, at p.61. Does this mean that Schermers excludes the third category? It does not seem so. First, such a statement may be explained by the theme of the conference, which was primary based on the general principles capable of providing protection to the individual (structural principles do not offer review to the individuals). Second, the speech of Schermers was dealing with human rights. Accordingly, human rights are not structural or indigenous principles.

[89] Temple Lang, "Legal Certainty and Legitimate Expectations as General Principles of Law", in Bernitz and Nergelius (eds.), Kluwer, 2000, pp. 163-184, at p. 163.

[90] Schermers, *supra n.88*, at pp. 61-71.

[91] Case 117/76 and 16/77 *Ruckdeschel* [1977] ECR 1753, at p. 1769, Case 124/76 and 20/77 *Moulins Pont à Mousson* [1977] 1795, at p. 1881.

clearly in various provisions of the Treaty.[92] AG Dutheillet de Lamothe in *Internationale Handelsgesellschaft* already underlined the presence of proportionality in the core Treaty.[93] The AG referred to the inclusion of the proportionality principle in seeking its legal sources and stated that "the source of this principle is an express and very clear provision of the Treaty". Indeed, the principle can be found in Article 34 (here we see the clear link between proportionality and equality), but also Article 134 [ex Article 115] related to the CCP (Common Commercial Policy). In addition, it has been incorporated in Article 3B [new Article 5 EC] with the Treaty of Maastricht and is expressly mentioned in the Protocol on subsidiarity of the Treaty of Amsterdam 1997. In the light of the foregoing, it can be said that the general principles of Community law are both written and unwritten principles. Notably, those written principles are also open to the review function and spill over into different domains of Community law through the case-law of the Court of Justice, due to the need to fill gaps. At the end of day, it is contended that the general principles of Community law are both completive and operative principles.

3. REGULATIVE PRINCIPLES (PRINCIPLES OF EFFECTIVENESS) AND THE GENERAL PRINCIPLES: ARE GENERAL PRINCIPLES ALSO CONSTITUTIONAL PRINCIPLES?

The Community legal order is partly based on legal principles elaborated by the Court. Thus, it appears that the ECJ jurisprudence is of pivotal importance for the nature of the Community legal order. In that respect, it is contended that regulative principles are constitutional principles, since they regulate the relationship between the national and Community legal orders. However, there is a close connection between the general principles and a specific category of regulative principles, i.e. the principles of efficiency (supremacy, justiciability and loyalty).[94] Arguably, after the creation of the principles of justiciability, supremacy and loyalty, one of the major inputs of the Court has been the creation and development of general principles of law. This relationship must therefore be scrutinized. Furthermore, are

[92] AG Dutheillet de Lamothe in Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, at p. 1146.
[93] *Ibid*., at p. 1147.
[94] Indeed, one should give particular attention to the role of Article 10 EC [ex Article 5] in the EC legal order. This view is inspired and supported by the work of Temple Lang. Temple Lang pinpoints simply, clearly and effectively the fundamental importance of this provision. In his words, Article 10 is the core of EC constitutional law. By using the term "constitutional", the author tells us that the Article is constitutional as it is enshrined in one of the founding Treaties. By analyzing his articles, one can quickly understand that Article 10 EC is more than a simple provision. *See, Temple* Lang, "The Sphere in which Member States are Obliged to Comply with the General Principles of Law and Community Fundamental Rights Principles", LIEI 1991, pp. 23-35, "Community Constitutional Law: Article 5 EEC Treaty", CMLRev. 1990, pp. 645-681 and "The Duties of National Authorities under Community Constitutional Law", ELR 1998, pp.109-131.

the general principles also constitutional principles? This section studies the link between regulative and general principles and concludes with the assimilation of general principles to constitutional principles.

3.1. The Principle of Supremacy

The Founding Treaties do not explicitly refer to the supremacy of the Community legal order over the domestic orders. As is well known, the ECJ in *Costa v. Enel* established strongly the *lex superior* principle.[95] In this respect, the Court argued that "by creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity of representation on the international plane, and more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community. The Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves". In practice, the doctrine of supremacy is used to render the conflicting national legislation unapplicable. This is called the pre-emptive effect of Community law.[96]

Also, it should be stressed that the supremacy of Community law applies to the constitutions of the Member States. The Court, in Internationale Handelsgesellschaft, pinpointed the need to ensure the uniformity and efficiency of Community law in all the Member States. Indeed, it would be a tremendous step-back if the States were allowed to use their domestic constitutions in order to circumvent the Community obligations.[97] The Court ruled that "the validity of a Community measure or its effect within the Member States cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure".[98] To put it in a nutshell, EC law is superior to national constitutional law.

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[95] Case 6/64 *Costa* v. *Enel* [1964] ECR 585.

[96] Case 106/77 *Simmenthal II* [1978] ECR 629, at p. 643. The pre-emptive effect can be illustrated by the *Simmenthal II* jurisprudence, where the ECJ ruled that, "[i]n accordance with the principle of the precedence of Community law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and national law on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but – in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the member States – also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions. Indeed any recognition that national legislative measures which encroach upon the field within which the Community exercises its legislative powers or which are otherwise incompatible with the provisions of Community law had any legal effect would amount to a corresponding denial of the effectiveness of the obligations undertaken unconditionally and irrevocably by Member States pursuant to the Treaty and would thus imperil the very foundations of the Community".

[97] Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

[98] *Ibid*., at p. 1134.

This interpretation led to violent reactions by certain constitutional national courts, e.g. in Italy and Germany. For instance, the German Constitutional Court, in *Internationale Handelsgesellschaft* (1974),[99] did not accept the ruling of the ECJ. The national court considered that the European standard of protection of fundamental rights was not sufficient even if, in casu, the Community legislation did not infringe German fundamental rights. Therefore, the ECJ started to build an unwritten bill of rights with the help of general principles of Community law. Significantly, one can see here the clear link between the construction of an effective Community legal order and the need to ensure the legitimacy of the system with the help of general principles.

It may be argued that the Community was, apparently, in search of legitimacy in order to penetrate the domestic legal orders. The interaction between Community law and national law is salient in this context. Arguably, the German and Italian constitutional courts have "forced" the ECJ to adapt its case law and create an "unwritten constitution". The ECJ in 1974, in the *Nold* case, restated its formulation established in *Stauder* and in *Internationale Handelsgesellschaft*, where fundamental rights are considered as forming an integral part of the general principles of law, the observance of which is ensured by the Court. [100]

Also, the Court clarified the importance of the national constitutions. The ECJ ruled that it is bound to draw inspiration from constitutional traditions common to the Member States and cannot therefore uphold measures that are incompatible with fundamental rights recognized and protected by the constitutions of those States.[101] Furthermore, the Court similarly ruled that international treaties, for the protection of human rights, could supply guidelines, which would be followed within the framework of Community law. In national law, constitutional provisions and principles protect human rights whether written or unwritten, whereas in international law a wide network of conventions has been adopted for this purpose. In Community law, the basic Treaties contained no specific provision for the protection of human rights as such (partly due to the economic character of the Union, which makes such encroachment very unlikely).

Relying on the general principles of law derived from the constitutions of the Member States and on relevant international treaties, the Court, between 1974 and 1986, set up a range of fundamental rights recognized and protected in the Community law order, these being (in chronological order): the right to property, freedom of trade union activity and the right to join an association, the principle of limitation of State prerogative in a "democratic society", freedom of religion, the prohibition of discrimination based on gender, the right to respect for private and family life, home and correspondence, the right to carry on an economic activity, non-retroactivity of penal provisions and the right to an effective judicial protection.

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[99] Decision of 29 May 1974, *Internationale Handelsgesellschaft* v. *Einfuhr-und Vorratsstelle fûr Getreide und Futtermittel*, BVerfGE 37, 271, [1974] CMLR 540.

[100] Case 4/73 *Nold* [1974] ECR 491, at p. 507.

[101] This part constitutes the clarification and adopts a similar reasoning to that in *Internationale Handelsgesellschaft*.

Finally, the German Federal Constitutional Court (1986), in *Wünsche Handelsgesellschaft* (Solange II), considered that the protection of fundamental rights in the EC order was adequate.[102] In other words, the Federal Constitutional Court would not exercise its jurisdiction as long as the Community level of protection is equivalent to the national rights standard.[103] In the *"Banana* case*"* (2000), it confirmed that the protection of fundamental rights was sufficient, and that it will not automatically adjudicate a complaint concerning the validity of a Community act in the light of the Basic Law (German Constitution).[104] Thus, it may be concluded that the supremacy of EC law over the national constitutional law was ultimately recognized with the help of the general principles of law and the legitimacy flowing from their very nature.

3.2. The Principle of Justiciability

The doctrine of direct effect stems from the famous *Van Gend en Loos* case (1962). More precisely, the Court here was confronted with the question whether to give direct effect to Article 12 EEC. The ECJ stated that "the Community constitutes a new legal order of international law for the benefit of which the Member States have limited their sovereign rights, albeit within limited fields, and the subject of which comprise not only Member States but also their nationals".[105] Arguably, the motivation underlying the ruling in *Van Gend en Loos* might be the concept of efficiency, i.e. that an individual must be able to assert directly effective community rights at the national level. Consequently, to ensure the efficiency, the national courts have been assigned the task of protecting the rights of the individuals at the domestic level. In this sense, the post-*Van Gend en Loos* jurisprudence, e.g. *Simmenthal II*,[106] *Ariete*,[107] *Factortame I,* [108] or the CFI in *Bemim*,[109] emphasized the role of the national courts in providing effective protection for those rights.[110]

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[102] Decision of the 22 October 1986, BVerfGE 73, 339, [1987] 3 CMLR 225.

[103] Kumm, "Who is the Final Arbiter of Constitutionality in Europe?: Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court of Justice", CMLRev. 1999, pp.351-386, at p. 364. The author stated that, "*[a]ccording to the doctrine enunciated in its solange II decision and restated in the Maastricht judgment, the FCC will not exercise its jurisdiction concerning basic rights so long as rights protections existing at the Community level are essentially equivalent to those protections present in the German Constitution*. He also considered (at p. 369) that, "[t]he Maastricht judgment modified the no jurisdiction so long as formula of the Solange II decision to become jurisdiction, but exercised in a relationship of co-operation with the ECJ".

[104] *See,* BVerfGE 102, 147, *infra* Part 1, Chapter 1.3.3.

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

[106] Case 106/77 *Simmenthal* [1978] ECR 629, para. 16.

[107] Case 811/79 *Ariete* [1980] ECR 2545.

[108] Case C-213/89 *Factortame* [1990] ECR I-2433, para. 19.

[109] Case T-114/92 *Bemim* v. *Commission* [1995] ECR II-147, para. 62.

[110] In some cases, the reasoning was closely associated to the principle of co-operation stemming from Article 10 EC.

To be directly effective, a provision needs to meet two requirements. First, the provision must be sufficiently clear and precise. Secondly, it must be unconditional. The jurisprudence of the ECJ has further extended the scope of direct effect to other provisions, e.g. Articles 30 [new Article 28], 36 [new Article 30], 85 [new Article 81], 86 [new Article 82] and 119 [new Article 141]. Moreover, the legal acts of the institutions under Article 249 [ex Article 189] have been given direct effect. The Regulations, for instance, are justiciable due to their very nature, i.e. their direct applicability. In contrast, the provisions of the Directives have to meet the dual requirements in order to acquire their direct effect.[111] The same holds true for the Decisions, Recommendations and International Agreements. Therefore, these provisions are a direct source of rights and duties for all those affected, whether Member States or individuals, who are parties to legal relationships under Community law. Finally, it is for the national courts, as authorities of the Member States, to ensure the protection of the rights conferred by Community law. It may be said that the principle of justiciability permits individuals to enforce uniformly their Community rights in the twenty-five Member States. In other words, the national courts in each of the Member States, whether in Skåne, Euskadi or Latgale, must protect in the same manner the rights arising from Community law.

As stressed previously, the doctrine of direct effect is closely connected to the protection of the individual. One may assert that the general principles reflect the same concern. According to Temple Lang, *"the general principles of law are inherently concerned with the rights of individuals. It would not make sense if they were not directly applicable, they are by their nature, rules which individuals need to be able to invoke in national courts"*.[112] In a similar vein, AG Mancini in *Jongeneel Kaas* (1984) opined that "the general principles of law and, in particular the principle of proportionality have direct effect. Accordingly, national courts must apply them if the circumstances in relation to which they are relied upon display a connection with the Community system".[113] Moreover, certain Treaty provisions containing a general principle of law have been held to be directly effective. This is especially true in relation to the principle of equality, which can be found in various Articles. The ECJ, by its case law, has attributed to Articles 90 EC [ex Article 95] (tax discrimination) and 141 [ex Article 119] (equal pay for equal work)[114] the hallmark of justiciability. Also, Article 12 [ex Article 6] (general prohibition of discrimination on ground of nationality) boasts the attribute of justiciability. In that regard, in the *Gravier* case, Article 7 EEC (Article 6 EC) read in conjunction with

[111] In addition, it may be said that the doctrine of direct effect, involves two components. First, the individual may invoke direct effect against the Member States (vertical direct effect). Second, an individual may use direct effect against another individual (horizontal direct effect). It should be stressed that the last notion is not applicable in the case of Directives, even if certain recent jurisprudential developments have shown a certain *assouplissement* of the doctrine.
[112] Temple Lang , *supra n.94,* at p. 29.
[113] Case 237/82 *Jongeneel Kaas* [1984] ECR 483, at p. 522.
[114] Case 43/75 *Defrenne* [1976] ECR 455.

Article 128 (on vocational training) leads to the creation of justiciable rights against discrimination on grounds of nationality.[115]

In addition, the *Von Colson* doctrine or doctrine of indirect effect imposes an obligation on the national courts to interpret their national legislation in light of the wording and purpose of Community legislation lacking direct effect.[116] Thus, the national courts should respect the general principles when they interpret the national law. To exemplify, the ECJ, in *Kolpinghuis Nijmegen,*[117] was concerned with the possible use by the national courts of a non-implemented directive in order to strengthen domestic sanctions. Arguably, such a use would have come into conflict with the general principle of *nulla poena sine lege.* The Court ruled that "a directive cannot of itself and independently of a national law adopted by a Member State for its implementation, have the effect of determining or aggravating the liability of persons who act in contravention of the provisions of that directive". The Court considered that the obligation to interpret national law in the light of Community law "is limited by the general principles of law which form part of Community law and in particular the principles of legal certainty and non-retroactivity".[118] Notably, AG Van Gerven, in *Marleasing* (1990),[119] used the same formulation in order to qualify the obligation on the part of the national courts in interpreting their national law in conformity with a Directive.[120] Similarly, the *Johnston* case provides for such an obligation.[121]

To conclude, by providing enforceable rights to individuals at the national level, the general principles appear once again as reinforcing legitimacy of the EC system. The use of general principles by the national courts is fundamental to ensure their effectiveness. As AG Tesauro noted, the national courts are the *natural forum* for EC law.[122] It should be pointed out that the question of direct effect of the principles remains an interesting field of research. It is argued that the principles chosen for the research are *prima facie* justiciable.[123]

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[115] Case 293/83 *Gravier* [1985] ECR 593.
[116] Case 14/83 *Von Colson and Kaman* [1984] ECR 1891. *See also* Case C-106/89 *Marleasing* [1990] ECR I-4135, Joined Cases C-397/01 to C-403/01 *Pfeiffer* [2004] para 110, n.y.r.
[117] Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969.
[118] *Ibid*., para. 13.
[119] Case C-106/89 *Marleasing* [1990] ECR I- 4135.
[120] *Ibid*., at pp. 4146-4147.
[121] Case 222/84 *Johnston* [1986] ECR 1651, para. 53.
[122] Tesauro, "The Effectiveness of Judicial Protection and Cooperation between the Court of Justice and National Court", in Festskrift til Ole Due, Liber Amicorum 1994, Gad, Copenhagen, pp. 355 *et seq*., at p. 373.
[123] The main argument against justiciability might be the degree of discretion left to the Court in a specific case. It might be maintained that the Court retains certain discretion in the application of these principles to concrete cases. However, the basic assumption remains that the principles selected for the project have direct effect, indeed the principles are compelling by nature, and consequently the degree of discretion is limited.

3.3. The Principle of Loyalty

Article 10 EC [ex Article 5] enshrines a duty to cooperate in good faith which, according to the ECJ case law, is incumbent both on the judicial authorities of the Member States acting within the scope of their jurisdiction[124] and on the Community institutions, which have a reciprocal obligation to afford such cooperation to the Member States.[125] In that sense, it may be said that Article 10 EC [ex Article 5] constitutes a *lex generalis*.[126] The extensive use of Article 10 EC by the ECJ began in the late 1980s. It is worth noting that the principle of co-operation is often used by the ECJ in its reasoning in cases involving the efficiency of the Community system. This is particularly true in cases where the Court needs to ensure the effective protection of individuals *vis-à-vis* Member States acting in the Community law sphere. Notably, the activity of the Court of Justice in the late 1980s gave a tremendous ambit to this Article. In that regard, it may be said that the use and interpretation of the Article by the ECJ is of equal importance to the early case-law (*Van Gend en Loos* and *Costa v Enel*). The principle of loyalty (Article 10 EC) appears, thus, closely linked to the concept of supremacy and justiciability. In other words, it ensures the efficiency of the EC legal order, when it comes to its implementation and enforcement, and appears necessary in order to ensure a proper application of the principles of direct effect and supremacy.

Article 10 EC establishes a duty of loyalty on the national authorities. Indeed, it is the national courts that are entrusted with ensuring the legal protection that citizens derive from the direct effect of Community law. Consequently, in the silence of the EC texts, it is for the national legal systems to assign the Courts jurisdiction and to determine the procedural conditions in the actions falling within the Community context. For example, in *Factortame I*, the Court stated that "any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law, by withholding from the national court to apply such a law, the power to do so should be set aside even temporarily".[127] More precisely, "[t]he full effectiveness of Community law would be as much impaired if a rule of national law could prevent a court seized of a dispute governed by Community law from granting interim relief in order to ensure

[124] Case 14/83 *Von Colson and Kamann* [1984] ECR 1891, para. 26, Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, para. 12, Case C-453/00 *Kühne & Heitz NV* [2004] para. 27.
[125] Case 230/81 *Luxembourg* v. *Parliament* [1983] ECR 255, para. 38, Case C-2/88 *Zwartveld and Others* [1990] ECR I-3365, para. 17.
[126] Article 10 EC states that "Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty".
[127] *Factortame I*, supra n.108, para. 20.

the full effectiveness of the judgement to be given on the existence of the right claimed under Community law".[128]

Furthermore, the ECJ, in the *Francovich* case,[129] could not rely on the direct effect of Directive 80/987. As a result, the breach of a substantive obligation could not be alleged in accordance with the relevant jurisprudence.[130] The Court circumvented the problem by basing its reasoning on Articles 10 [ex Article 5] and 249 [ex Article 189] of the EC Treaty and referred to the *Van Gend en Loos* jurisprudence[131] to assert that the principle of State liability was inherent in the Community legal system.[132] Additionally, the Court considered, once again in its reasoning, that "the national courts whose tasks is to apply provisions of Community law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals".[133] Finally, it concluded that the lack of a remedy for a breach of Community law impedes the full effectiveness of Community law and weakens the protection of rights.[134]

The Court's reasoning is remarkable. By using Article 10 EC as an instrument to elaborate a system of "euro-judicial remedy", it strengthens the effective protection of rights arising from Community law and develops a favourable environment for building a *jus commune europaeum.* It may be concluded that Article 10 EC is resorted to in order to ensure the efficiency of the rights conferred to the individual by Community law.[135] What is more, the role of Article 10 EC appears ubiquitous to the obligation of the Member States to respect general principles in the implementation of Community law at the national level and whenever the States attempt to derogate from a fundamental economic freedom. One of the basic assumptions is that the obligation derives from the need to protect the rights granted to the Community citizen. Another one results from the very nature of Article 10 EC.

In the Community legal order, the provisions of the Treaty are considered superior to national law. EC law must be applied by the national courts, and the national governments have to comply with EC legislation. However, should national courts apply the general principles of law? And should Member States actions,

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[128] *Ibid*., para. 21.

[129] Case C-6/90 ad C-9/90 *Francovich* [1991] ECR I-5357.

[130] Case 60/75 *Russo* [1976] ECR 45. If damage occurred through an infringement of Community law, the principle of State liability applies.

[131] *Francovich*, *supra n.129,* para. 31.

[132] *Ibid*., paras. 34-35

[133] *Ibid*., para. 32. *See also Simmenthal II*, para. 16 and *Factortame I*, para. 19.

[134] *Ibid*., para. 33, "if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible, the full effectiveness of Community law will be impaired and the protection of the rights which they grant would be weakened".

[135] It may be argued that the ECJ could have used the general principle of "effective judicial protection" for its reasoning. However, the Court preferred to rely on Article 10 EC, an Article that has been given tremendous importance since late eighties, three years after the *Heylens case* (Case 222/86 *Heylens* [1987] ECR 4097).

through national administrative authorities, comply with the general principles? The nature of the Community legal order seems to give us a positive answer. In this respect, the reasons why the national authorities are obliged to comply with the general principles of law must be taken into consideration. Once again, Article 10 EC is of primary importance in this context. Indeed, it may be argued that according to the meaning and scope of Article 10, Member States (national authorities) are required to respect the general principles of law in order to comply with Community law. This obligation flows from the duty to fully and effectively apply Community law. Consequently, any national measure falling within the scope of Community law, which does not respect a general principle, creates an interference with Community law.[136] Moreover, the rights given by Community law may not be taken away by national authorities. Furthermore, Community institutions and national authorities may not act in breach of Community law principles. It is argued that the States are bound to respect general principles of law in two main circumstances.[137]

First, in implementing Community rules, the ECJ, in *Eridania*, held that the general principles of law are binding on all authorities entrusted with the implementation of Community provisions.[138] In a similar vein, in *Deutsche Milchkontor*, the Court stated that "according to the general principles on which the institutional systems of the Community is based and which govern the relation between the Community and the Member States, it is for the Member States, by virtue of Article 5, to ensure that Community Regulations are implemented within their territory".[139] More recently, in *Booker Aquaculture*, the Court stated that "the requirements flowing from the protection of fundamental rights in the Community legal order are also binding on Member States when they implement Community rules. Consequently, Member States must, as far as possible, apply those rules in accordance with those requirements".[140] Second**,** whenever the national authorities take measures affecting, directly or indirectly, rights protected by Community law they are bound to respect general principles of law.[141] One encounters these types of situations particularly in relation to the derogation from free movement provisions (cases dealing with the proportionality of a measure derogating from Community

[136] Temple Lang, "The Sphere in which Member States are Obliged to Comply with the General Principles of Law and Community Fundamental Rights Principles", LIEI 1991, pp. 23-35, at p. 31. *See also* "Community Constitutional Law: Article 5 EEC Treaty", CMLRev. 1990, pp. 645-681, at pp. 654-656.

[137] *Ibid., see also* by the same author, "The Duties of National Authorities under Community Constitutional Law", ELR 1998, pp.109-131, at pp-119-121.

[138] Case 230/78 *Eridania* [1979] ECR 2749, at p. 2771, para. 31.

[139] Case 205 and 215/82 *Deutsche Milchkontor* v. *Germany* [1983] ECR 2633. Moreover, the Member States may take measures on behalf of the Community. Member States must respect all the principles binding the Community institutions. Article 90(2) provides a ground for this assertion.

[140] Case C-20/00 and C-64/00 *Booker Aquaculture* [2003] 3 CMLR 6, para. 88.

[141] Case C-60/00 *Carpenter* [2002] ECR I-6279, obligation for the national authority to respect Article 8 ECHR when it takes administrative decisions affecting indirectly the provision of services.

law) e.g. *ERT, Carpenter* (2002), *Schmidberger* (2003), *Omega* (2004), [142] or citizenship provisions, e.g. *Baumbast* (2003), *Collins* (2004)[143] or judicial control, e.g. *Johnston, Heylens* and *Steffensen* (2003).[144]

Finally, one may conclude by using the words of Temple Lang, "[t]hroughout Europe, national courts should be applying the same general principles for the protection of individual rights under Community law. This is important not merely as a common body of judge made law for more than three hundred million people. The development of general principles is the result of a symbiosis between national and Community law, in which each can enrich and reinforce the other. The development of common standards of justice in the application of Community law will give rise to a sense of a common tradition, not based merely on common economic interests, and shared across differences of language and of national legal traditions. It is a wholly new, non-economic creation with enormous psychological and political potential for contributing to European history".[145] To summarize, the national courts (national judicial authorities) are under a duty to apply general principles of Community law. Importantly, such a duty exists also in relation to the administrative national authorities in matters falling within the scope of Community law. In the end, the proper application of the general principles may foster European integration. It is, now necessary to analyze, in more detail, the use of the general principles in a constitutional context.

3.4. The Use of General Principles for Constitutional Development

The general principles are closely linked to the constitutional evolution and the legitimacy enterprise of the EC. It may be said that the general principles embody a constitutional dimension. It is important to define precisely the meaning of "constitutional principles" in the EU context. In that respect three elements may be taken into consideration to determine the constitutionality of the principle. First, it may acquire this quality by organizing or regulating the structure of the Community legal order. Second, a principle may be constitutional since it is enshrined within the Treaty. Third, principles may provide an unwritten bill of fundamental rights. Notably, these three elements appear to be taken by Bengoextea and Wiklund, who, dealing with what they called the *"theoretical notion of principles",* established three categories of principles (constitutional principles): [146]

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[142] Case C-260/89 *ERT* [1991] ECR I-2925, *see also* Case 207/80 *Casati* [1981] ECR 2618, Case 118/75 *Watson & Belmann* [1976] ECR 1185, *ibid., Carpenter*, Case C-112/00 *Schmidberger* [2003] ECR I-5659, C-36/02 *Omega* [2004] n.y.r.

[143] Case C-413/99 *Baumbast* [2002] ECR I-7091, Case C-138/02 *Collins* [2004] n.y.r.

[144] Case 222/84 *Johnston* [1986] ECR 1651, Case 222/86 *Heylens* [1987] ECR 4097, Case C-276/01 *Joachim Steffensen* [2003] I-3735.

[145] Temple Lang, "The Core of the Constitutional Law of the Community-Article 5 EC Treaty", 1995, at p. 9, europa.eu.int/comm/dg04. *See also* by the same author, "Community Constitutional Law: Article 5 EEC Treaty", CMLRev. 1990, pp. 645-681.

[146] Bengoextea and Wiklund, *supra n.42,* at pp. 133-134.

- The constitutional principles which define the legal structure of the Community.
- The special standing of certain provisions (such as non-discrimination, basic freedoms, open market economy).
- The fundamental principles which assure the protection of the citizens.

One question remains to be answered - do general principles of Community law include these three categories?

As to the first category, the general principles, as seen above, are intricately linked to principles defining the legal structure of the Community, i.e. "regulative principles". However, the general principles do not include the first category. As to the second category, it is worth noting that the Court has stated that the EC Treaty is "*the constitutional charter of the Community based on the rule of law"*.[147] In other words, the Treaty makes up the Constitution of the Community legal order. Consequently, one may contend that a Treaty provision boasts a constitutional character. It is worth remarking that some of the principles of Community law are not only unwritten but also explicitly enshrined in the EC Treaty. The principle of proportionality finds specific expression in the Treaty. The same holds true for the principle of non-discrimination clearly mentioned in different Articles of the Treaty, and interrelated with the principle of proportionality.[148]As to the third category, it appears clear from a perusal of the case-law that fundamental rights form an integral part of the general principles of Community law. In addition, principles such as proportionality, non-discrimination, rights of the defence, or even legitimate expectations may be easily interlinked to a wide definition of fundamental rights.[149] Finally, in the light of the foregoing, it may be stated that the general principles of Community law make up constitutional principles both pertaining to the second and third category. The general principles constitute high ranking norms due to their constitutional origin, i.e. influenced by the constitutional law of the Member States and mentioned specifically in the EC Treaty or more generally in the TEU.[150] Notably, the principles override secondary legislation and, arguably, primary law.[151] Going further, these constitutional principles, elaborated or developed by the ECJ case-law, form an "unwritten bill of rights" in the EC system. Interestingly, the

[147] Opinion 1/91 [1992] 1 CMLR 245, at p. 269.
[148] Herdegen, "The Relation between the Principles of Equality and Proportionality", ELR 1985, pp. 563 *et seq*.
[149] These principles overlap with the notion of fundamental rights. For instance, according to the case law, the principle of equality has been described in some instances as fundamental rights. In *Defrenne III*, the Court ruled that the elimination of discrimination based on sex forms part of those fundamental rights protected by the Court. Concerning proportionality, the principle was described as a fundamental right in *Internationale Handelsgesellschaft*. However in the subsequent jurisprudence, *e.g. Buitoni* ([1979] ECR 677) or *Atalanta* ([1979] ECR 2137), the Court did not underline that proportionality was "fundamental".
[150] Monjal, *Recherche sur la hiérarchie des normes communautaires*, LGDJ 2000, at p. 381.
[151] Case T-177/01 *Jégo-Quéré* [2002] 2 CMLR 44, AG Jacobs in Case C-50/00 P UPA[2002] 3 CMLR 1.

Charter on Human Rights (December 2000) codified the general principles. Two elements pointed towards such a codification of the principles. First, their constitutional importance needed to be confirmed or legitimised by the Member States.[152] Second, their invisible character turned to be their very weakness.[153] It must be kept in mind that the Charter might have serious implications regarding the nature and content of the classification. This Charter, which codifies the general principles, in return provides visibility and legitimacy to the principles, and forms an essential part of the future written European constitution.

[152] Cappelletti, *supra n.17,* at p. 381, According to Cappelletti, "developing a common bill of rights for over a quarter of a billion Europeans is indeed an awesome task. This is not to say that a uniform standard of human rights among the Member States, enforced by judicial review at the Community level, will never be realized. Rather, it is to say at this point in the community's social-political development its at the best speculative to predict the likelihood of the Court of Justice alone developing and enforcing such standards".

[153] Toth, "Human Rights in the Past and in the Future", in Bernitz and Nergelius (eds.), Kluwer, 2000, pp. 73-92, at p. 87. According to Toth, *"[t]he concept of general principles of law is not suitable to provide a clear-cut, unambiguous, predictable protection of fundamental rights . . . at the beginning of the 21st Century the citizen has every right to expect more of a Community or Union based on the rule of law than mere 'inspirations' and 'guidelines', that he is entitled to see his fundamental rights set out in black and white in terms that he may enforce in a court of law".*

PART 1 CREATION OF THE GENERAL PRINCIPLES OF COMMUNITY LAW

The aim of this part of the thesis is to demonstrate that the process of creation is legitimate ("Legitimate Judicial Activism"), though influenced by policy considerations. In fact, it may be said that the ECJ, like Janus, has two faces when elaborating general principles.[154] On the one hand, it affords a strong protection regarding individual rights. On the other hand, it protects the effectiveness and uniformity of the European legal order.[155] The analysis of the ECJ intervention in the protection of individual (fundamental) rights leads to the query of whether the European judges increase or weaken such a protection and whether such an intrusion incorporates a risk of conflict between the various systems of protection.

This Part is divided into three Chapters. The first Chapter concerns the use of national law by the ECJ**.** The general principles are described as the results of the comparative analysis undertaken by the Court of Justice and its Advocates General. This comparative analysis is studied in detail and focuses on administrative, procedural and constitutional law. The Chapter concludes by identifying the approach followed by the Court in elaborating the principles and the standard of protection.

The second Chapter deals with the use of international instruments and focuses, more particularly, on the ECHR. It concentrates on the evolution of the case law and pinpoints the increasing use of the ECHR in the recent jurisprudence. It studies the complex relationship between the EC and ECHR legal orders. It is argued that the standard of protection is equivalent to the ECHR standard and that the ECJ may also provide a maximalist interpretation of the ECHR, since the Convention constitutes a minimal standard per se (Article 60 ECHR).

The third Chapter focuses on legal theory, legitimacy and the issue of activism. It is demonstrated that the ECJ takes individual rights seriously. In that sense, the Charter of Fundamental Rights that codifies the general principles must be analysed thoroughly. Its impact on the case-law of the Court must also be taken into consideration. Furthermore, the research is closely linked to the question of adjudication and attempts to categorize the process of elaboration within the consensus model. Finally, the Chapter assesses the legitimacy of the general principles and considers the process of elaboration as "legitimate judicial activism". Before embroiling into these chapters, however, it is necessary to understand the rationale of having recourse to general principles of Community law.

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[154] This is borrowed from Mestre (*Le Conseil d'Etat protecteur des prérogatives de l'administration*, LGDJ, 1974). The author, in 1974, described the French CE as both protecting individual rights and extending the power of administration.

[155] The first face may be linked to a right model (argument of principles). The second face may reflect the consensus model (argument of policy).

INTRODUCTION: PRINCIPLES DON'T FALL FROM HEAVEN.

The general principles have been described by the former President of the European Court of Justice (ECJ) "*as the main tool of judicial development in Community law"*. [156] Rodríguez Iglesias strongly stressed that the general principles are not invented from nowhere, but are to be found in the laws common to the Member States, international law and sometimes the Treaty itself. Accordingly, he claimed that the elaboration of the principles is "strictly judicial" and cannot be named "activism".[157] Indeed, it may be recalled that it is through the impulsion of the ECJ case-law, inspired by the constitutional traditions common to the Member States and international instruments (especially the European Convention on Human Rights), that the fundamental rights have become a reality in the European legal order.[158] The Treaties of Maastricht and Amsterdam included Article F(2) [new Article 6(2) TEU],[159] which acknowledged the Court's jurisprudence in the field of fundamental rights (as general principles) and rendered this provision justiciable.[160] That Article directly refers to fundamental rights and makes them consequently visible. The codification of the fundamental rights in a Charter subsequently contributes to the increased visibility of the general principles for the European citizens.

The role of the principles arises from the necessarily incomplete character of the Community legal order.[161] As suggested by Lord Denning, the general principles of Community law – due to the *sui generis* nature of the EC system – are "filling the gap" of Community law.[162] In that respect, it might be said that the principles render

[156] Rodríguez Iglesias, "Reflections on the General Principles of Community Law", CJLS 1999, pp. 1-16, at pp. 15-16.

[157] By providing reasons (national law and international law) for the elaboration of general principles, the ECJ increases the coherency of the Court legal reasoning.

[158] AG Tesauro in Case C-367/96 *Kefalas* [1998] ECR I-2843, para.19, "[f]irstly, I would recall that in Community practice the elaboration and application of unwritten principles have assumed an importance which is not insignificant, despite the lack of any express provision to this effect. Besides being used as interpretation criteria, these principles essentially serve to identify the limits on the powers exercised by the administration over subjects and, more generally to determine the legality of an act or of the conduct of a Community institution or of a Member State".

[159] Article 6(2) TEU, "[t]he Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law".

[160] The Treaty of Amsterdam added Article 46(d) EU, according to which the Court should review the acts of the institutions in order to assess their compatibility with fundamental rights referred in Article 6(2)TEU. For an assessment of Article 6(2), there were some doubts concerning the justiciability of this Article in the wake of the TEU (notably in connection to Article L TEU). However, the Treaty of Amsterdam made clear that this provision was justiciable in relation to the EC institutions.

[161] Louis, *The Community Legal Order*, Brussels, 1980, at p. 68.

[162] *Bulmer LTD.* v. *Bollinger S.A*, 1974, 2 All E.R, 1226 at p. 1236. "[t]he role of the EC remains quite different when it fills gaps. An English court may in the absence of legislative

the system more coherent. [163] Rasmussen, taking the examples of the Marshall court and the Warren court in the United States, and drawing a parallel with the ECJ, stated that in *"all three instances activism grew because the designated lawmaking institutions suffering from structural inadequacies had failed to legislate to the promotion of the spirit of the constitutional document".*[164] As to the ECJ, it can be said that the activism of the court grew because of the lack of human rights instruments (policy) in the Community legal order. In other words, there was a failure of the lawmaker to legislate in the context of fundamental rights. And the ECJ was, subsequently, under an obligation to fill the gaps of the legislature. Arguably, the ECJ is even obliged to fill the gaps of Community law in order to give proper justice.[165] Such a duty may be deduced from the wording of Article 220 EC [ex Article 164] according to which *"the Court of Justice and the CFI shall ensure that in the interpretation and application of this Treaty the law is observed".*[166] Undeniably, this provision establishes the principle of legality[167] and a further obligation to avoid a denial of justice.

The type of interpretation used by the Court to fill in the gaps of Community law remains to be defined. In general terms, the ECJ may have recourse to different types of interpretation, i.e. literal, historical, contextual and teleological interpretation, which are not mutually exlusive.[168] This quadripartite classification is

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clarity, retreat to the Common Law. It may suggest that it is applying a principle of the common law, though it may challenge the best of minds to find that principle anywhere in the foggy parameters of the Common law. The European Court has no such latitude. They talk rather in terms of general principles of Laws as they create new rules. Both are involved in judge made law, but with different justifications to assuage the fears that the judges are stepping beyond the line which limits their authority".

[163] Pescatore, *Introduction à la Science du Droit*, Luxembourg, 1960, at p. 120. According to Pescatore, *"legal principles transform the law into a coherent system".*

[164] Rasmussen, *On Law and Policy in the ECJ*, Nijhoff, 1986, at p. 61.

[165] By contrast, in public international law, a direct reference to the general principles is made in Article 38 of the Statute of the ICJ. *See*, Raimondo, "Les principes généraux de droit dans la jurisprudence des tribunaux *ad hoc*", in Delmas-Marty, *et al.*, *Les sources du droit international pénal*, Paris, Société de législation comparée, 2004, pp. 75-95.

[166] Notably, the new formulation, since Nice Treaty, includes the CFI. In the English version a difference in wording exists between Article 220 EC and Article 28(1) CT.

[167] Tridimas, *supra n.36,* at p. 11.

[168] Brown and Kennedy, *The European Court of Justice*, Sweet and Maxwell, 2000, at pp. 324-343. A different categorization appears possible. For instance, Bredimas considered that three types of interpretations can be attributed to the Court of Justice, namely the textual, subjective and functional interpretation (Bredimas, *Method of Interpretation and Community law*, European Studies in Law, 1978, at p. 20). Thus, the two first categories are similar to Brown and Kennedy's Classification (literal and historical classification). The literal (textual) interpretation reflects the choice of the Community legislator (Case 40/64 *Sgarlata v. Commission* [1965] ECR 215) concerning Article 173 [new Article 230]). The ECJ does not depart from the text of a provision when it is clear and compelling. The subjective method (historical) consists in the search of the original common legislative intention as conceived at the time of the Treaty. Those two methods of interpretation are less suited to interpret

the most common in European law and will be followed in this research. It must be said that it can be rather difficult to identify a particular method of interpretation used in a particular case, as the judge does not expressly mention which method is used. Generally, the contextual and teleological methods of interpretation is extensively used and may overlap in theory and practice. In relation to the elaboration of general principles, these two methods are equally applied, particularly when the court is required to fill the gaps of Community law.

As to contextual interpretation, it is suffice to remark that *Les Verts*[169] and *Chernobyl*[170] constitute the most notorious examples. As to the former, the Court

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Community law than contextual and teleological interpretation. In that sense, Arnull, (*The European Union and its Court of Justice*, Oxford, 1999, at p. 516) in light of the *CILFIT* case (Case 283/81 *CILFIT v. Ministry of Health* [1982] ECR 3415) argued that the multi-lingual character of the EC constitutes a hindrance to the application of literal (or grammatical) interpretation and that the very provisions of Community law must be placed in their context with special regard to the objectives of Community law. According to Brown and Kennedy (at p. 335), contextual (systematic) interpretation falls into a separate category,[168] whereas Bredimas associates this type of interpretation either to the textual (when the Court refers to the context) or functional interpretation (when the Court refers to the objectives of the Treaty). The contextual interpretation (also called "systematic interpretation" by Brown) is closely linked to the idea that the rules of the Community are attached to one another and constitute a coherent system. Consequently, a rule can be interpreted by a logical reference to another. The interpretation *in pari materia* is a specific sort of contextual interpretation where the Treaties of the Union are seen as one ensemble. For instance, an article of the ECSC can be invoked in order to interpret an EC Article, such as the reasoning by analogy. Indeed, a clear link can be established between the systematic interpretation and the functional interpretation. It might be said that functional interpretation constitutes a particular class of the systematic interpretation in the sense that it will assess the significance of a rule according to its functional context.

[169] Case 294/83 *Les Verts* v. *Parliament* [1986] ECR 1339, para. 24, "it is true that, unlike Article 177 of the Treaty, which refers to the acts of the institutions without further qualification, Article 173 refers only to the acts of the Council and the Commission. However, the general scheme of the Treaty is to make a direct action available against "all the measures adopted by the institutions which are intended to have legal effects, as the Court has already had the occasion to emphasize. The European Parliament is not expressly mentioned among the institutions whose measures may be contested because, in its original version, the EEC Treaty merely granted it powers of consultation and political control rather than the power to adopt measures intended to have legal effects vis-à-vis third parties. Article 38 of the ECSC Treaty shows that where the Parliament was given ab initio the power to adopt binding measures as was the case under the last sentence of the fourth paragraph of Article 95 of the Treaty, measures adopted by it where not in principle immune from actions from annulment". Another example is provided by Case C-221/88 *ECSC* v. *Acciairie e Ferriere Busoni SpA* [1990] ECR I-495 where the Court noted that Article 41 ECSC differs from Article 177 EC [new 234 EC] as it does not contain any provision governing the exercise by the Court of a power of interpretation. Such a power of interpretation is inherent to the scheme of the Treaty and consequently should be conferred in the circumstances of the case. The Court ruled that *"different through their textual terms, the respective provisions all express a twofold need to ensure the utmost uniformity in the application of Community law*" (*ibid*., at p. 523). The

used the rule of law argument combined with reasoning by analogy. As to the latter, the mere reference to the principle of institutional balance was sufficient. The sole respect of the rule of law justified the gap-filling invoked by the Parliament. The same kind of reasoning cannot be used when it comes to the elaboration of general principles intended to protect the individual against acts of the institutions or the Member States that are not defined explicitly in the scheme of the EC Treaty.

However, the mere reliance on the rule of law is not sufficient to justify the elaboration of the principles. The general principles are not inherent to the written EC legal order (with the exception of proportionality and equality), but rather to national legal orders. Consequently, the Court resorts to teleological interpretation combined with comparative methodology. instead of offering "arguments of policy" (in order to achieve a collective goal desired by EC Institutions) as it did in *Les Verts* and *Chernobyl,* through contextual interpretation.

This teleological (purposive) interpretation appears closely related to the gap-filling function attributed to the ECJ in the elaboration of general principles, which must be compatible with the structure and objectives of the Community.[171] Therefore, it must be studied how the Court of Justice is using teleological interpretation in order to formulate the principles that may fit the European legal order and are necessary to fill the gaps of the EC system. In the light of this task, the

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Court used an argument of policy, namely the uniformity of the European legal order, which flows from the vaguer notion of rule of law. The point here is that the Court justified the lacunae through reasoning by contextual analogy, analogy to the ECSC Treaty in the first case and analogy to the EC Treaty in the second. Can the Court use the analogy argument in the elaboration of an operative general principle? It would be difficult, as the general principles constitute most of the time unwritten principles, which are used to fill the gaps. The Court cannot make any reference, as the principle does not exist expressly in the scheme of the Treaties (The situation is not the same for proportionality and equality which are expressed in the Treaty scheme). The written principle of non-discrimination, *e.g.* Article 12 and 141 EC constitutes a specific expression of the unwritten general principle (contextual).

[170] Case 70/88 *Parliament* v. *Council* [1990] ECR I-2041. In this case, the Council raised an objection as to the inadmissibility of an action brought by the Parliament on the ground that the question of the latter to bring an action for annulment had been clearly decided by the Court in the *Comitology* case. The Parliament claimed that a new factor appears in this case, namely that the Parliament could not rely on the Commission to defend its prerogatives by bringing an action for annulment. The Court remarked that it is the Court's duty to ensure that the provisions of the Treaties concerning the institutional balance and ruled that *"the absence in the Treaties of any provisions giving the Parliament the right to bring an action for annulment may constitute a procedural gap, but it cannot prevail over the fundamental interest in the maintenance and observance of the institutional balance laid down in the Treaties establishing the European Communities" (ibid*., Chernobyl at para. 26). The Court's reasoning is founded on the maintenance of "institutional balance". The concept of institutional balance is extremely close of the notion of rule of law, it is an expression of an "institutional rule of law". By allowing the Parliament to bring an action the Court has considered the principle of institutional balance as an inherent principle of the Treaties, as an unwritten institutional rule of law.

[171] *Internationale Handelsgesellschaft*, *supra n.97,* at p. 1134.

ECJ will be seen as an institution ensuring and promoting the coherence of the legal order.

In the field of Community law**,** the teleological interpretation may also be denominated by the expression "*effet utile*" and functional interpretation. The latter term might suggest that the Court should interpret the law in the light of its own wishes and should therefore be cautiously used.[172] This interpretation is often referred to as "effective interpretation of Treaty obligations" and places the emphasis on the function, which the Treaty has to undertake, while taking into consideration the various political, economic and social facts that surround the functioning of the Treaty. As argued by Bredimas, the functional interpretation performs two functions. First, it is used as a method against the clear text and manifest intention of the legislator. Second, it constitutes a method to fill the gaps.[173] In the end, this implies that the principles are formulated in the light of the objectives (purposes) of the Treaty.

From a theoretical point of view, one may resort to Alexy's definition of teleological interpretation.[174] To put it in a nutshell, the state of affair determines the

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[172] Schermers, *Judicial Protection in the EC*, Kluwer, 1976, at p. 13. In the same line of reasoning, Arnull argued that "the purposive or teleological approach . . . is controversial one for those who are accustomed to seeing judges accord greater weight seem surprising in which the legislature has chosen to express itself" (*Ibid*., at p. 515).

[173] Bredimas, *supra n.168,* at p. 70. *See also* Schermers, who considers the existence of three purposes: Promotion of the objectives, prevention of unacceptable rules, and filling gaps (*ibid*., at p. 13), Bernitz, *Europarättens grunder*, Norstedts, 2001, at p. 49. Bernitz stresses the close link between the creation of the general principles of law and the teleological (or functional) method of interpretation. *See also*, *Bullmer v. Bollinger* [1974] 2 All. E.R, 1226 at p. 1237. Lord Denning commented that, "*all the way through the Treaty there are gaps and lacunae. These have to be filled in by the judges . . . they must follow the European pattern. No longer must they argue about the precise grammatical sense. They must look to the purpose and intent . . . They must divine the spirit of the Treaty and gain inspiration from it. If they find a gap, they must fill it as best as they can . . . These are the principles, as I understand it, on which the European Court acts"* .The term principle seems to include both the principles of interpretation and the principles as a source of law.

[174] Alexy, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification,* Oxford, 1989, at p. 243. According to Alexy, "the most difficult problems of teleological reasoning arise when Z cannot be described solely by means of empirical expressions. This is the case when Z is defined as being a state of affairs in which certain norms hold good . . . A borderline case of such a state of affairs exists when Z can be determined as being the very state of affairs in which R´, the norm to be justified holds. In such a case, reference to Z has no point other than to clarify what it means for R´ to be valid. As a rule the description of such state of affairs requires norms general in scope or principles. Z is then the state of affairs in which the principles P1, P2 . . . PN Hold. Teleological argument accordingly turns into a kind of argument from principles. The problem of reasoning from principles consists not so much in the justification of the principles but much more in the fact that the norm to be justified does not usually follow logically from the principles. There is a need for a concretization of the principles with the help of further

validity of the norm.[175] In the elaboration of principles, it might be said, that the objectives of the Community, e.g. effectiveness,[176] make up the very state of affair.[177]

Finally, teleological interpretation is closely associated with the use of comparative methodology. In that regard, Arnull, citing the *AM&S* case, wrote that

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normative statements". The aim is normatively determined ("state of affairs") and its correctness depends on the rational argumentation used by the decision-maker.

[175] In relation to the general principles, one may wonder to which "very state of affair" a particular principle is considered as valid. The principle (R´) can only be justified and thus elaborated if and only if it does not contravene to the "very state of affair" (Z).

[176] One of the objectives is to ensure the effectiveness of the system (Article 2 EU). *See* Lasser, "Anticipating Three Models of Judicial Control, Debate and Legitimacy: The European Court of Justice, the Cour de cassation and the United States Supreme Court", Jean Monnet Working Paper 1/03, Effectiveness and uniformity may be defined as meta-purposes (meta-teleological style of reasoning, meta-teleological policy arguments), *i.e.* purposes, values or policies underlying . . . the EU and its legal structure as a whole (*ibid*., at p. 44). The author concluded that the ECJ's interpretative technique is therefore orientated towards developing a proper legal order, namely, one that would be sufficiently certain, uniform and effective (*ibid*., at p54). According to Article 2 TEU, "[t]he Community shall have as its task, by establishing a common market and an economic monetary union and by implementing the common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious and balanced development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity between the Member States . . . to maintain in full the acquis communautaire and build on it with a view to considering to what extent the policies and forms of cooperation introduced by this Treaty may need to be revised with the aim of ensuring the effectiveness of the mechanisms and the institutions of the Community".

[177] Indeed, when the ECJ has recourse to teleological interpretation to fill the gap of Community law, the major aim at stake is the question of the effectiveness of the system. Quid principle? In other words, a principle (R´) can fill the gap (X) if and only if it does not undermine the "very state of affair" (Z). Thus, the norm formulated should contribute to the effectiveness of the system and not the contrary. To put it differently, the norm created may not lead to the dysfunction of the system at stake. The European legal order represents the valid systems of law as defined by the decision-makers in which the norm R´ (the general principle) must hold according to the very state of affair Z. The *Hoechst* case (1989) permits assessment of the importance of the principle of effectiveness regarding the process of creation. Put bluntly, the ECJ refused to elaborate a general principle protecting the inviolability of the business premises since it might have undermined the effectiveness of Regulation 17 (Article 14 of the Regulation 17 and the so-called "dawn raids"). Arguably, the "EC state of affair" did not allow the formulation of the general principle. The effectiveness of Community law appears to conflict with the elaboration of the principle. As to the application of general principles, the necessity to ensure the effectiveness of the EC system might also conflict with the interpretation made by the EctHR of a Conventional right. Indeed, the objectives of the European legal order might conflict with the objectives of the Strasbourg Convention (The main objective is to ensure human rights protection, *see infra*., *Pafitis* case of the EctHR).

"[w]here a Community act is silent or inclusive on a question raised in a case, the court sometimes supplement teleological approach by undertaking a comparative analysis of the laws of the Member States on the question in the search for a solution".[178] To recall the expression of Koopmans, the principles don't fall from heaven, but originate from the Member States and international law. Now, it appears important to study in more detail the use of national law by the ECJ.

[178] Arnull, *The European Union and its Court of Justice*, Oxford, 1999, at p. 520. *See also AM&S*, para. 27 "[i]n view, of all these factors, it must be therefore be concluded that although regulation No 17, and in particular Article 14 thereof, interpreted in the light of its wording, structure and aims, and having regard to the laws of the Member States".

CHAPTER 1. GENERAL PRINCIPLES AND DOMESTIC LAW

As seen before, domestic law clearly constitutes a source of inspiration for the ECJ. In that regard, Koopmans has demonstrated the interplay between national law and the development of general principles of law.[179] In a similar vein, Usher stresses the utmost importance of notions derived from domestic sources in the jurisprudence of the European Court, *"subject always to the proviso that once adopted by the Court, they are applicable as principles of Community law, not as rules of national law"*.[180] The comparative analysis followed by the ECJ is used both as a help to the interpretation of Community law and as a source of law in order to remedy the *lacunae* intrinsic to any system of law.[181] Comparative methodology is not strictly

[179] Koopmans, "European Public Law: Reality and Prospects", PL 1991, pp. 53 *et seq*., at p. 58.

[180] Usher, "The Influence of National Concepts on Decisions of the European Court", ELR 1973, pp. 359 *et seq*., at pp. 373-374.

[181] In other words, the use of comparative methodology is not only linked to the creation of operative general principles. It is used also as a simple support for interpreting a Treaty provision, *e.g.* a provision of the EC/ ECSC Treaty (Case 3/54 *Assider* v. *High Authority* [1954-1956] ECR 63. Concerning the interpretation of *détournement de pouvoir*. Comparative methodology may be used to interpret an existing provision such as in the *Assider* case, where AG Lagrange made use of French, Dutch, German and Italian Law concerning the interpretation of Article 33 ECSC) or elaborating completive principles *e.g.* undue enrichment and *force majeure.* These two principles do not endorse the review function (operative principles) but constitute merely completive principles. These principles help fill the gaps of Community law (to complete the system) but cannot be used to review the acts of the institutions or the Member States. The "completive principles" can be elaborated either directly or indirectly by influence of the laws of the Member States. As to a direct influence, In *Danvin* (Case 35/67 *Danvin* v. *Commission* [1968] 464), concerning staff matters, the Court made reference to a general principle common to the internal law of the Member States, without however going into great detail, in order to deduce the principle of undue enrichment. The Court went against the conclusions of AG Gand who was sceptical on the transposition of such a national private law principle into the European public sphere (staff matters). The principle was confirmed in the Case C-259/87 *Greece* v. *Commission* (FEOGA)[1990] I-2847. As to indirect influence, the concept of *"force majeure"* in *Schwarzwalmich* v. *Einfuhr* (C.just.CE, 11 juillet 1968, *Schwartzwaldmich,* Aff. 4/68, Rec.549, concl.Gand.1968) was deemed not to be identical in the various branches of the law and the diverse domains of application. By consequence, the existence of the principle in the Community legal order can only be established on a case by case analysis according to its field of application. This line of reasoning was confirmed in *IFG* (C.just. CE, 14 février 1978, *IFG*, Aff. 68/77, Rec.371, concl. Warner.1978), where the Court ruled that the concept of *force majeure* was common to the laws of the Member States. However, in the special area of the individual confronted by the administration such a general principle could not be deduced. Subsequently, the Court in its jurisprudence of the eighties built a concept of *force majeure* independently from the laws of the Member States and pointed out its community origin though it was indirectly influenced by the national legal orders. Finally, the Court rejected the existence of a principle of law because of the "uncommon" nature of the examined principle. For instance, in the Case 72/74 *Union Syndicale* v. *Council* [1975] ECR 401, at p. 416, AG Reischl made a comparison

related to a method of interpretation but is assimilated more easily as an aid to interpretation. Mertens De Wilmars considers comparative methodology as a method of interpretation *"à mi-chemin"* between the formal (literal or historical) and more substantial (systematic or teleological) methods of interpretation.[182] Consequently, as stressed earlier, comparative methodology may complement the purposive (teleological) interpretation in the formulation of general principles. In this sense, Bernitz argues that, "the general principles have been deduced from the Treaty but also from the common traditions of the Member States. The reference to the common traditions is an expression of the comparative method which often reflects the search of the ECJ for the general principles of law".[183]

There is, thus, a triangular relationship between comparative methodology, teleological interpretation and the gap-filling function of the general principles. The recourse to principles appears to be urged by the obligation to fill the lacuna. Then, the Court may use teleological interpretation in order to elaborate a principle fitting the European legal order. Finally, the use of comparative methodology may supplement the teleological interpretation by furnishing a legitimacy basis to the principles.[184] The recourse to the law of the Member States (comparative

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of the Belgian and French law; under which trade unions are allowed to bring proceedings in the defense of collective interests; with the situation in other countries such as Italy, Germany, UK and Netherlands. The AG used the case-law of the *Consiglio di Stato* to assert the peculiarity of this procedure in the Community context.

[182] Mertens de Wilmars, "Réfléxions sur les méthodes d'interprétation de la Cour de justice des Communautés européennes", CDE 1986, at p. 17.

[183] Bernitz and Kjellgren, *Europarättens Grunder*, Norstedts, 2001, at pp. 98-99 (my translation), "[d]omstolen har härlett de allmänna rättsprinciperna ur fördragen men även grundat dessa på gemensamma rättstraditioner i medlemsstaterna. Hänvisningen till gemensamma rättstraditioner är ett uttryck för den komparativa metod som ofta kännetecknar EG-domstolens sökande efter allmänna rättsprinciper".

[184] However, it may be said that there is no rigorous doctrine based on this tripartite reasoning at the heart of the ECJ jurisprudence regarding the elaboration of general principles. This is the result of the special legal position and function of the Court. In its case-law, where conflicts arise, the various approaches of the French, German and more recently English legal systems as well as those of the other Member States must be balanced (Schwarze, *European Administrative Law*, Sweet and Maxwell, 1992, at p. 9). To that extent, parallels can be drawn with the practice of the French *Conseil d'Etat*. Indeed, that body proceeds in its task of guaranteeing the protection of the rule of law on the merits of the case, rather than on the basis of some comprehensible doctrine (Potvin Solis, *L'effet des jurisprudences européennes sur la jurisprudence du Conseil d'État Français*, LGDJ, 1999, at p. 661. "il faut à cet effet, bien distinguer l'apport spécifique de chaque jurisprudence européennes ainsi que la portée du recours au droit comparé dans chacune d'elles. La jurisprudence communautaire doit être rapprochée de celle du Conseil d'État en ce qu'elle consacre par un raisonnement déductif des principes généraux du droit qui appellent une comparaison avec ceux consacrés par la jurisprudence française"). Interestingly, AG Gand in *Kampffmeyer* (Joined Cases 5,7 &13-24/66 *Kampffmeyer* v. *Commission* [1967] ECR 269) contended that an individual approach is required in order to analyse the case law of the Court of Justice in terms of methodology. This approach guarantees a basis for establishing a doctrinal context. Citing the Advocate General

methodology) allows the ECJ to find a (legitimate) solution in order to avoid a denial of justice. In turn, the use of domestic law justifies (by giving reasons) the elaboration of general principles.

This Chapter is divided into three sections. First, it analyses the influence of administrative and procedural national law regarding the elaboration of the general principles. Second, it focuses on the constitutional traditions as a source of inspiration. Finally, it assesses the standard of protection created by the evaluative approach taken by the ECJ.

1.1. GENERAL PRINCIPLES AND THE INFLUENCE OF ADMINISTRATIVE AND PROCEDURAL NATIONAL LAW

AG Roemer, in his Opinion in Case 6/54 *Netherlands* v. *High Authority*, highlighted that the laws of the different Member States must be taken into account when interpreting Community law.[185] One year later, AG Lagrange made an explicit reference to Article 4 of the French civil code.[186] This Article forbids the judge from not giving a judgment and constitutes the so-called rule against *déni de justice*. The AG stressed that the Court is under an obligation to give justice, though there exists a gap in the Community legal order. This argument justifies the recourse to general principles of Community law.

Though the influence of national law is more visible in the AG Opinions, the Court of Justice made reference in the early years to the need to use legislation and national case-law in order to solve administrative problems. The Court examined in detail the legal systems of the six constituting Member States regarding the revocation of illegal administrative acts and made explicit reference to provisions of French, German and English law in the *Algera* case.[187] In order to avoid a *déni de justice*[188] regarding this issue, the Court extracted a principle, the generality of which was confirmed in *SNUPAT*.[189] Finally, the Court, without any reference to the laws of the Member States, assimilated this principle to the umbrella concept of legal certainty.[190]

"at the outset, and without claiming to develop a general theory, we must consider, whether in the circumstances of *law and fact* found in the case, the Community has a liability towards the applicant". (*Ibid*., at p. 273). Going further, *"as in any legal work, theory can be built only by successive strokes and emerges from the reconciliation of the judgment, it is a culmination*" (*ibid*).

[185] Case 6/54 *Netherlands* v. *High Authority* [1954-56] 103, at p. 118.

[186] Case 8/55 *Fédération Charbonnière de Belgique* v. *High Authority* [1954-56] ECR 245, at pp. 277-278.

[187] Joined Cases 7/56 and 3-75/57 *Algera* v. *Assembly* [1957-58] ECR 39, at pp. 55-56.

[188] *See also* AG Lagrange in *Fédéchar*. The AG referred to Article 4 of the French civil code (dealing with the rule of *non-liquet*).

[189] Joined Case 42/59 and 49/59 *SNUPAT* v. *High Authority* [1961] ECR 53.

[190] *See* Usher, *General Principles of EC Law*, Longman, 1998, at pp. 3-4. The author cited the Case C-90/95 P *De Compte v. European Parliament*, and considered that the principle is

Logically, the influence of the six constitutive Member States in the early years constitutes the main contribution to the creative process. German law was particularly influential regarding the so-called administrative principles, e.g. proportionality and legitimate expectations. As stressed by Usher, the influence of German law in the Community legal order was ensured by an important amount of references from the German national courts to the ECJ.[191] However, the study is not limited to the analysis of German law. A wider comparative approach must be taken into account. In that regard, the influence of French law is visible and may be deemed quite important (1.1.1). Next, an analysis of the influence of new acceding countries appears to be of interest. Thus, the enlargement of the Communities in 1973 enabled the Court to extend its sources to the Common law. English and Scottish decisions were cited as early as March 1973, in the "*staff salaries* cases" and parallels may also be drawn with the *Transocean Marine Paint* case (1974) in relation to *the audi alteram partem* principle (1.1.2). Similarly, the accession of three Member states in 1995 is also of relevance when dealing with the concept of transparency (1.1.3).

1.1.1. Administrative Principles and the Influence of Continental (German?) Law.

This section deals with the influence of continental legal systems in the elaboration of administrative general principles. Indeed, most of the case-law analysed in this section corresponds to the time when the Community was composed of six Member States (all of them pertaining to continental legal orders). The inquiry focuses mainly on three general principles, i.e. proportionality, equality and legal certainty. It seems possible to contend that these principles act, mainly, as administrative principles. Nevertheless, it should be kept in mind that the mentioned principles may also be defined *lato sensu* as fundamental rights.[192] By contrast, the ECJ did not have recourse to the *"common constitutional traditions"* [193] in their formulation.

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assimilated to the principle of legitimate expectations. The principle of legal certainty is broader than the principle of legitimate expectations.

[191] *Ibid*.

[192] Proportionality and equality are found in the EC Treaty and equality is defined expressly as a fundamental right by the ECJ. The two categories are complementary and not mutually exclusive. The administrative are different from the fundamental rights *stricto sensu* because of their divergent creative process. The difference in the process might be due to the fact that those principles can act as administrative principles and/or could not be linked to the whole of the constitutions of the Member States , *e.g.* legitimate expectations.

[193] Zuleeg, "Fundamental Rights and the Law of the European Community", CMLRev. 1971, at p. 455. Zuleeg, writing before the *Nold* case, considered that "[t]he protection of fundamental rights, however, belongs to the general principles which are to be safeguarded by the Court of Justice. This guarantee must be determined by the common constitutional traditions of the Member States on the condition that these are reconcilable with structure and goals of the Community".

The French doctrine appears to consider that French administrative law was a strong vector for the ECJ in the context of general principles.[194] The most often cited example concerns the principle of effective judicial protection[195] and its relationship to the decision of the Conseil d'Etat in *Dame Lamotte*.[196] According to Galmot, in the elaboration of the general principles of law, "[l]e dialogue s'instaure essentiellement entre les représentants des systèmes juridiques influencés par le droit francais et les représentants des systèmes juridiques influencés par le droit allemand, c'est à dire finalement entre représentants de systèmes juridiques qui disposent tous de juridictions administratives anciennes, ayant eu le temps de mener une réfléxion approfondie".[197] Similarly, Potvin-Solis argues that the principles formulated by the ECJ sometimes make us remember certain principles expressed by the Conseil d'Etat.[198] In some cases, the ECJ in its "creative reference" or the AG made reference to French decisions, such as in the field of revocability of administrative acts, well-established rights and equality. However, it is irrefutable that, quantitatively speaking, the references to German law concerning proportionality, legal certainty and equality were more important.

The strong influence of a particular national system in the process of elaboration may be attributed to two main reasons, i.e. instrumentalist and/or substantive reasons. First, the instrumentalist reason coincides with the amount of preliminary rulings made by a specific country. In this respect, the German Courts initiated the majority of the preliminary rulings in the early years. Second, the substantive reason concurs with the "policy of high standard". More precisely, the Court might be tempted to rely on the highest standard of protection afforded by a particular country in order to provide, in return, a maximal standard for the individual.

Notably, German law has acquired a merited reputation which enables it to boast one of the most effective standards of protection, based on principles such as proportionality and legitimate expectations. These principles, to recall the expression of Nolte, *"made in Germany"* bear prodromical signs of robustness and security. Interestingly, the German doctrine classifies proportionality, equality and legitimate expectations as fundamental rights (being extracted from the *Grundgesetz* as a fundamental rights axiom). However, even if the influence of a particular national legal system may be determined, the ECJ always stresses the Community nature of the principle. In other words, the German label might propel the principle, but the principle is stamped *"made in Europe"*.

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[194] The French doctrine also considers that the EC concept of general principles is inspired from the French legal system.

[195] The ECJ has however formulated the principle of effective judicial protection in the light of Articles 6 and 13 ECHR and the constitutional traditions common to the Member States, without any mention of the *Dame Lamotte* case.

[196] CE, 17 February 1950, *Dame Lamotte*, Rec., p. 110.

[197] Galmot, "Réfléxions sur le recours au droit comparé par la Cour de justice des Communautés européennes", RFDA, 1990, pp. 255 *et seq*. at p. 258.

[198] Potvin-Solis, *L'effet des jurisprudences européennes sur la jurisprudence du Conseil d'État français*, LGDJ, 1999, at p. 693.

a) Proportionality and Equality

As is well known, the principle of proportionality is of utmost importance in German constitutional law, finding its origins in administrative law. In fact, it was the Prussian administrative tribunal of appeal that formulated the principle of proportionality in the *Kreuzberg* case (1882).[199] The German Constitution (*Grundgesetz*, Basic law) contains no express mention of proportionality in determining whether legislation and other governmental action conform to its values. Hence, the principle of proportionality appears inherent to the Basic law, flowing from the very nature of the rights enshrined in the written constitution. In other words, proportionality constitutes an *"unwritten constitutional axiom"* derived from the rule of law *(Rechstsstaatprinzip)* and the very nature of fundamental rights.[200] The German Constitutional Court defined proportionality as *"an expression of the general right of the citizen towards the state that his freedom should be limited by the public authorities only to the extent indispensable for the protection of the public interest"*. It plays the role as a "tool of interpretation" [201] of two conflicting fundamental rights in order to ensure the principle of unity of the Constitution.

The principle of proportionality in the European countries is mainly an unwritten principle developed by the jurisprudence (like Austria that uses the expression *Verhältnismässigkeit*) and the doctrine (like Belgium and France). The principle of proportionality in Belgium is contained in the notion of "reasonable appreciation", whereas in Greece, the principle is inserted in the general concept of good administration. Moreover, this principle can also be relied on in purely administrative matters. The test of review chosen by the ECJ is very close to the German or French proportionality test,[202] in that it looks primarily on the infringed interests of the individual and not on the rationale behind the Community measure.[203] However, it can be asserted that the review is applied in a *"more searching manner"* by the German courts than by the ECJ.[204]

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[199] *Kreuzberg* case, 14 June 1882, PrOVGE 9, 353.

[200] *See,* Emiliou, *The Principle of Proportionality in European Law*, *A Comparative Study*, Kluwer, 1996.

[201] Schwarze, *supra n.21,* at p. 690.

[202] One may sometimes distinguish a three-pronged test, *i.e.* suitability, necessity and proportionality *stricto sensu.* The third part of test concerns precisely the balancing of interest between individual rights and the policy at stake.

[203] *Infra*, Part 2 Chapter 5.1 of the research.

[204] Thomas, *Legitimate expectations and Proportionality in Administrative Law,* Hart, 2000, at p.83, "Proportionality allows the Court to subject public measures to close scrutiny. For historical reasons the German courts are conscious of the potential arbitrariness of discretionary power and therefore subject public measures to intensive review to ensure that they are proportionate. The European Court tends to apply proportionality in a less searching manner. The Court does not wish to overburden itself with legal challenges. Furthermore, it may lack sufficient knowledge and expertise in a general policy to apply proportionality. However, if legislative measures are disproportionate, then the Court will invalidate them".

In EC law, the first manifestation of the principle of proportionality occurred with Case 8/55, *Fédération Charbonnière de Belgique* v. *High Authority,*[205] that concerned a challenge of a general decision of the High Authority fixing Belgian coal prices. The Court observed that *"in application of a generally accepted rule of law"*, action of the High Authority in response to a wrongful act of an enterprise must be proportionate to the gravity of that act.[206] The principle developed within the administrative context, e.g. assessing the proportionality of legislation in the field of CAP, fines and penalties. It constitutes a general principle of law according to which the Community may impose upon Community citizens, for the purpose of the public interest, only such obligations, restrictions and penalties that are strictly necessary for the purpose of the public interest. It guarantees that the individual's freedom of action is not limited beyond the degree necessary for the general public interest. A *"reasonable relationship"* must exist between the measures taken by the institutions and the aim pursued by the Community.[207]

Importantly, the principle of proportionality overlaps with the administrative and fundamental rights fields. As Usher commented, in this regard, the definition by AG Dutheillet de Lamothe in *Internationale Handelsgesellschaft* gave proportionality a particular significance.[208] Consequently, it appears plausible to conceptualize proportionality from two angles, i.e. direct and indirect proportionality. On the one hand, *"direct proportionality"* may be used to define the types of direct challenges of an act expressly based on the breach of proportionality. For instance, this may be done in order to challenge the proportionality of a Commission's fine. On the other hand, *"indirect proportionality"* may be relied on in the case of a "human rights challenge", where the plaintiff does not use this principle explicitly, but argues that the incriminated act infringed a fundamental right. Consequently, in the determination of whether a human right is violated, the ECJ may have recourse to proportionality as a device of interpretation. To recap, "direct proportionality" seems more closely related to the concept of administrative proportionality, whereas "indirect proportionality" appears adjacent to the concept of fundamental rights. In that regard, the principle of proportionality was used by the ECJ, in its creative jurisprudence, as "*a substitute for fundamental rights"*.[209]

In *Internationale Handelsgesellschaft*, one of the arguments put forward was that the principle of proportionality could be derived from Articles 2 and 12 of the

[205] Case 8/55 *Fédération Charbonnière de Belgique* v. *High Authority* [1954-1956] ECR 105.
[206] *Ibid*.
[207] AG Dutheillet de Lamothe in Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1123, pp. 1146-47, Case 44/79 *Hauer* [1979] ECR 3237 at p. 3747.
[208] Usher, *General Principles of EC Law*, Longman, 1998, at p. 41.
[209] Schwarze, *supra n.21,* at p. 720. Indeed, in the *Stauder* case (1969), according to Schwarze, "*the principle was resorted as an interpretation guidelines, more exactly in the sense of an interpretation conforming to the constitution or to fundamental rights used in German law"*.

Basic Law of Germany.[210] Interestingly, the AG considered that three main lines of argumentation had been advocated:[211]

(1) that of the Frankfurt court, which states that since the principle of proportionality results from the combined effect of Articles 2 and 12 of the Basic law of the Federal Republic of Germany, Community measures may not infringe those constitutional provisions, an argument from which that court has drawn all the consequences since, before referring this question to the Court of Justice, it has held contrary to the Basic law, the provisions disputed today before the Court;[212]
(2) that outlined by the Verwaltungsgerichtschof of the Land of Hesse, which finds the legal source of this principle of proportionality in the unwritten law of the Community, in the general principles of Community law.[213]
(3) Finally that which I suggest to the court which would in this case find the source of this principle in an express and very clear provision.[214]

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[210] No explicit mention is made of the principle in Article 2 (Rights of liberty) and Article 12 (Right to choose an occupation, prohibition of forced labor).

[211] AG Dutheillet de Lamothe in *Internationale Handelsgesellschaft*, at p. 1146.

[212] Accordingly, this line of argumentation must be "rejected categorically". Indeed, the recognition of the constitutional law of one particular Member State, in order to assess the legality of a Community measure, endangers the uniformity of Community law and, particularly, the principle of supremacy as defined in *Costa v. Enel*. In this sense, *Internationale Handelsgesellschaft* ascertains the supremacy of Community law over national law (even constitutional law).

[213] The unwritten law of the Community finds its source of inspiration and legitimacy in the national laws of the Member States. However, it appears from the AG's Opinion that recourse to fundamental principles common to the Member States is subsidiary to the foreseeable existence of the principle in the Treaty itself, and as such the situation was *in casu*. Indeed, according to Dutheillet de Lamothe, *"[t]hey contribute to forming that philosophical, political and legal substratum common to the Member States from which through the case law, an unwritten Community law emerges, one of the essential aims of which is precisely to ensure the respect for the fundamental rights of the individual. In that sense, the fundamental principles of the national legal systems contribute to enabling Community law to find in itself the resources necessary for ensuring, where needed, respect for the fundamental rights which form the common heritage of the Member States" (ibid*., at pp. 1146-1147). It may be argued from the use of the formulation *"where needed"* that the support of national law as an unwritten source is auxiliary to an explicit provision of the Treaty.

[214] The presence of proportionality in the core Treaty was underlined by AG Dutheillet de Lamothe in *Internationale Handelsgesellschaft* (*ibid*., at p. 1147). He referred to the inclusion of the proportionality principle in seeking its legal sources and stated that "the source of this principle is an express and very clear provision of the Treaty" (Article 40(3)). (*See also* the Court ruling expressly citing Article 40(3), para. 20 at p. 1137). Indeed, the principle can be found in Article 40(3) [new Article 34] (one sees here the clear link between proportionality and equality), but also Article 115 [new Article 134] related to the CCP (Common Commercial Policy). In addition, it has been incorporated in Article 3B [new Article 5] by the Treaty of Maastricht and is expressly joined with subsidiarity in the Treaty of Amsterdam

The AG noted the existence of the principle of proportionality in German law and considered that Community law could not be reviewed in the light of national law. The AG concluded that the principle of proportionality was already a general principle of law and made references, in that respect, to the preceding case-law of the ECJ and its Treaty origin. The ECJ did not assimilate the principle of proportionality to a right of a fundamental nature, but used it as a principle in order to assess the extent of the violation of the fundamental right of freedom of commercial activities. The Court ruled that:

> "the protection of the right to property whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structures and objectives of the Community. It must therefore be ascertained, in the light of the doubts expressed by the Verwaltungsgericht, whether the system of deposits has infringed rights of a fundamental nature, respect for which must be ensured in the Community legal system".[215]

In the end, proportionality should be viewed as a Community principle that is not explicitly and directly derived from the constitutional law of a particular Member State, i.e. the German Basic Law. However, it is true that the principle of proportionality is of utmost importance in German constitutional law.

In order to determine the potential infringement of a fundamental right derived from the common constitutional traditions of the Member States (such as the right to pursue a trade and an activity), the ECJ has recourse to the principle of proportionality. The Court may find an encroachment of the fundamental right if and only if the Community measure does not conform to the structure and objectives of the Community, i.e. when the measure is disproportionate to the objectives of the Community and, subsequently, violates the alleged fundamental right. This analysis also implies that a fundamental right may be restricted due to the requirement of the respect of the structure and objectives of the Treaty. However, such a restriction (as the means) must be proportional to the objectives (as the end). The Court, in the *Nold* case, provided a better definition of the principle of proportionality. It considered that the principle of proportionality is inherent to the fundamental rights, which do not constitute "unfettered prerogatives".[216] Practically, it means that the

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1997 in the Protocol on subsidiarity. Article 3B [new Article 5 EC] states, *"that any action by the community shall not go beyond what is necessary to achieve the objectives of this Treaty*". The Treaty of Amsterdam considers in the same vein, that the institutions of the EC shall respect the principle of subsidiarity and shall also ensure compliance with the principle of proportionality as defined in the last paragraph of 3B.

[215] *Ibid*., *Internationale Handelsgesellschaft*, para. 4.

[216] *Nold*, *supra n.100,* para. 14, "[i]f rights of ownership are protected by the constitutional laws of all The Member States and if similar guarantees are given in respect of their right freely to choose and practice their trade or profession, the rights thereby guaranteed, far from constituting unfettered prerogatives, must be viewed in the light of the social function of the property and activities protected thereunder. For this reason, rights of this nature are protected by law subject always to limitations laid down in accordance with the public interest. Within the Community legal order it likewise seems legitimate that these rights should, if necessary,

test of proportionality must be carried out by the Court in determining an alleged encroachment of a fundamental right.

Internationale Handelsgesellschaft prompts a number of conclusions. In the light of both the Opinion of the AG and the ruling, it seems plausible to argue that the principle of proportionality stems from the Treaty and not directly from German constitutional law. However, one cannot disregard that the very facts of the case were of a constitutional nature, i.e. the question of a limitation of certain fundamental rights in a social order. In that sense, the principle of proportionality appears to be active in the context of fundamental rights (constitutional sphere). The parallel with the German concept is thus unavoidable. Drawing another analogy with German law, it might be contended that the EC principle of proportionality followed the same progression as its German corollary. Indeed, according to Tomuschat, *"the principle of proportionality was extended from administrative law, its original area of application, to the field of constitutional law. Parliamentary statutes are today subject to close scrutiny by the Constitutional court as to the extent to which they affect fundamental rights under the Basic Law"* .[217]

Finally, it may be argued that the principle of proportionality is not directly inspired from a particular national system, since it is specifically expressed in many provisions of the EC Treaty, e.g. Article 12 EC and 141 EC.[218] It is also worth remarking that AG Lagrange, in an attempt to delimit the concept of "comparableness of situations" enshrined in Article 3 (b) of the ECSC Treaty, remarked that this notion was intimately connected to the principle of equality. According to the Advocate General, the principle of equality was common to all the Member States and constituted a general principle that the Court was bound to apply.[219] However, German law is particularly influential (*Gleichbehandlung*). [220] Like the principle of proportionality and legitimate expectations, the principle of equality is a principle of German constitutional law (Article 3(1) of the Basic Law), which has implications in the administrative field. [221] Furthermore, the influence of

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be subject to certain limits justified by the overall objectives pursued by the Community, on condition that the substance of these rights is left untouched. As regards, the guarantees accorded to a particular undertaking, they can in no respect be extended to protect mere commercial interests or opportunities, the uncertainties of which are part of the very essence of economic activity".

[217] Tomuschat, "Europe, a Common Constitutional Space", in De Witte and Forder (eds.), *The Common Law of Europe and the Future of Legal Education,* 1992, pp.133-147, at p.142.

[218] Nolte, "German Principles of German and European Administrative Law – A Comparison in Historical Prespective", MLR 1994, pp. 191 *et seq*., at p. 196.

[219] Case 13/57 *Wirtschaftsvereinigung Eisen v. High Authority* ECR [1957-58] 265.

[220] *See* Christophe-Tchakaloff, "Le principe d'égalité", AJDA, 1996, Herdegen, "The Relation Between the Principle of Equality and Proportionality", CMLRev. 1985, pp. 683 *et seq*., where it is pinpointed that there is an extension of the scrutiny of this principle, being assimilated with the principle of proportionality.

[221] Nolte, *supra n.218*, at pp. 204-205. *See* in this respect, the Jellinek's comments by Nolte concerning the paucity of the application of the constitutional principle of equality (Article 109 of the Weimar Constitution) in the administrative field in the pre-world War II period.

French law may be stressed. Indeed, a link might be established between the principle of equality used in administrative law and the principle of *égalité devant les charges publiques*.[222] As to the interpretation of the ECSC Treaty, the Court in the *Meroni* case made explicit reference to this French concept. As to the interpretation of the EC Treaty, the ECJ, however, never mentioned the French concept. This stance might be explained by the fact that the principle of equality is enshrined in the Treaties.[223] Hence, one may venture to conclude that the principle of proportionality stems from the very wording of the Treaty[224] and not from a comparative analysis of the laws of the Member States. Nevertheless, one cannot disregard the fact that the application of the principle of proportionality by the ECJ is clearly influenced by the German tripartite test (suitability, necessity, proportionality *stricto sensu*).[225]

b) Legal Certainty and Legitimate Expectations

The principle of legal certainty is a very wide concept that appears axiomatic to any type of democratic society. In that sense, it may be described as the most complex of the general principles of Community law.[226] According to Temple Lang, the principle of legal certainty can be categorized both as a principle of administrative law and a fundamental human right.[227] The principle appears, thus, common to western democracies and consequently common to the legal orders of the Member States. Significantly, no provision can be found in the EC Treaty making explicit reference to this concept. Legal certainty is an "umbrella principle" in the sense that it is composed of specific sub-concepts such as non-retroactivity,[228] acquired rights and legitimate expectations. It is worth observing that the principle of non-revocation of administrative acts constituted the first implicit jurisprudential appearance of legal certainty in the European legal order. One can recall, in this respect, the important comparative analysis undertaken both by AG Lagrange and the Court itself in the *Algera* case. The principle of revocability of administrative acts was common to the Member States and the subsequent case-law clearly linked it to legal certainty or legitimate expectations.

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[222] Joined Cases 14,16,17,20,24,26,27/60 and 1/61 *Meroni* v. *High Authority* [1961] ECR 319, at p. 338.

[223] Usher, "The Influence of National Concepts on Decisions of the European Court", ELR 1973, pp. 359 *et seq*., at p. 368.

[224] AG Dutheillet de Lamothe in *Internationale Handelsgesellschaft*, *supra n.97,* "[t]he fundamental right invoked here – that the individual should not have his freedom of action limited beyond the degree for the general interest – is already guaranteed both by the general principle of community law, the compliance with which is ensured by the court an express provision of the Treaty", at p. 1147. *See also* the Court ruling citing expressly Article 40(3), para. 20 at p. 1137.

[225] *Infra*, *Part II.*

[226] Temple Lang, "Legal Certainty and Legitimate Expectations as General Principles of Law", in Bernitz and Nergelius (eds.), Kluwer, 2000, pp. 163-184, at p. 164.

[227] *Ibid*., at p. 163.

[228] Non-retroactivity of penal provisions is a fundamental right, defined as such by the ECJ.

The clearest application of the principle of legal certainty is represented by the principle of legitimate expectations, which basically means "protection of confidence" as directly translated from the French *"protection de la confiance légitime"*. However, the term "legitimate expectations" was preferred by AG Warner in *Mackprang*[229] and then adopted by the Court.[230] Usher believes that the main reason for the modification of the term "confidence" into "expectations" has been generated by the ambiguity of the terminology in English law. This transformation has helped to bring about a theoretical reconciliation between the Community law principle (substantive) and the concept of procedural legitimate expectations, well known in English law. By virtue of a simple change of terminology, the concept was not anymore unknown or seen as a strange foreign imported product.

The principle of legitimate expectations is particularly prominent in German law and known as "*Vertrauensschutz*". Like proportionality and equality, it corresponds, according to the German doctrine, to a fundamental right, due to its possible deduction from the *Grundgezetz*. In EC law, the principle of legitimate expectations has generally been applied as an overriding principle, so as to test the legality of the acts of the Community institutions and the Member States.

Legitimate expectations have been applied as a general principle in the early case *Commission* v. *Council*.[231] This case dealt with the validity of a Council Regulation, deemed to have been adopted in accordance with a previous Decision concerning the adjustment of staff salaries. One of the main questions at stake was the possible binding effect of this Decision, which might have affected the adoption of the Regulation. The Court referred to the protection of confidence, which implies that the prior decision bound the Council in its following action. According to the Court, *"whilst this rule is primarily applicable to individual decisions, the possibility cannot by any means be excluded that it should relate, when appropriate, to the exercise of more general powers"*.[232] The Court, finally, considered that the Council failed to demonstrate sufficient justification for adoption of the measure in question and thus found a breach of the principle of protection of confidence.[233] The reasoning of the ECJ was thus based on the "expectations" of the parties, not on particular well-established rights. By contrast, AG Warner undertook a wide comparative analysis of the principle *legem patere quam fecisti* in the English, French and Belgium laws.[234] The AG opined that the Decision had no legally binding effects on the Council. Consequently, the decision "*was in law, no better than a rope of sand"*. [235]

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[229] Case 2/75 *Mackprang* [1975] ECR 607, at pp. 622-623.
[230] *Ibid*., at p. 616, para. 4.
[231] Case 81/72 *Commission* v. *Council* [1973] 575.
[232] *Ibid*., at p. 584, para. 10.
[233] *Ibid*., at p. 585, para. 11.
[234] AG Warner found that the principle *legem patere quam fecisti* was of no assistance in the present case.
[235] *Ibid*., at p. 595.

Accordingly, the principle of legitimate expectations has never been specifically distinguished from the more general principle of legal certainty or from the French principle of *droits acquis*.[236] In *Westzucker*, the Court observed that "it is asked in the second question whether Regulation No 1048/71, thus interpreted, infringes a principle of legal certainty by which the confidence of persons concerned deserves to be protected (Vertrauensschutz)".[237] A clear reference is thus made to the concept of legitimate expectations in German law. However, the AG stressed the existence of this concept in other national legal orders. Concerning the infringement of general principles of legal certainty and protection of confidence by Regulation 1048/71, AG Roemer in *Westzucker* emphasised that:

> " Community law does not provide a clear answer. One can however say that the principles adduced in this connection by the plaintiffs, i.e. the principles of legal certainty and protection of confidence have already been recognized in Community law in another context and have become the object of national case law . . . it therefore seems reasonable in connection with the present examination first to proceed from the principles of German law adduced by the plaintiffs. This is all the more justifiable since, I think I am right in saying, similar concepts can also be found in French and Belgian case law. According to those decided cases, it is crucial that there should be a reference to a material or quasi-retrospective effect, not merely a permissible retrospective effect on the immediate application of new provisions upon as yet incompleted situation facts developing and legal relationship, when it is a case of loss of legal provisions (cf. The decision of the Bundesverfassungsgericht (Federal Constitutional court) of 22 June 1971, Die öffentliche Verwaltung' 1971, p.604). Under French and Belgian law there is a proviso that there must be no infringement upon *well-established rights* (cf. the judgments of the French Cour de Cassation of 20 February 1917 and of the Cour d'Appel de Bruxelles of 23 October 1940".[238]

The AG, first, acknowledged that the principles of legal certainty and legitimate expectations had already been recognized in Community law. Then, he turned to the national law of three Member States and confirmed the existence of such principles in German constitutional law by quoting a decision of the Federal Constitutional Court. The Opinion also stressed the existence of such principles in Belgian and French law through the concept of "acquired rights" (*droits acquis*). However, it should be noted that AG Roemer did not mention any constitutional jurisprudence of those countries. Was the principle of legitimate expectations uncommon to the constitutional traditions of the Member States? This is a highly probable hypothesis. In the same line of reasoning, the ECJ did not make use of its "fundamental rights formula" relating the principle to the common constitutional traditions of the Member States. Going further, can one establish that the principle of legitimate expectation, as defined by the European Court of Justice, may be derived from common law?

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[236] Usher, "The Influence of National Concepts", ELR 1976, at pp. 363-364.
[237] Case 1/73 *Westzucker* [1973] ECR 723, at p. 729, para. 6.
[238] AG Roemer in *Westzucker*, at p. 739.

In this sense, the Opinion of AG Warner in *Commission* v. *Council* is of particular interest. In that case, the Commission relied on the maxim *Legem patere quam fecisti*. The AG interpreted this maxim in the light of continental law. Accordingly, *"[i]t seems that, in those systems, that maxim has been interpreted to mean, at its widest, that when a public authority has adopted a rule for dealing with a particular category of cases, it may not so long as the rule stands, depart from it in any individual case falling within that category. But this does not preclude the authority from changing the rule".*[239] In English law, a comprehensive comparative analysis of the case-law did not reveal the existence of this principle and thus the maxim was deemed to be unknown.[240] The maxim bears the hallmark of the general principle of legal certainty and demonstrates the existence of divergences between the laws of the Member States in this area. AG Warner considered that this maxim dealt with binding rules and not simple expectations (simple course of actions). In the light of the Opinion, it seemed that the maxim, as applied by the Member States, could not permit an applicant to allege a breach of its legitimate confidence. However, the Court did not follow the Opinion of Warner and found that the Council Decision (even if not binding) could give rise to a legitimate expectation.

According to Usher,

> "[t]he principle of the protection of legitimate expectations, turns to one of the major general principles of European Community law . . . regarded as having been inspired by the German principle of 'Vertrauensschutz' a principle held by the German courts to underlie certain provisions of the German Basic Law. In the form developed by the European Court of Justice . . . while expectations may not be protected *contra legem,* an expectation may nevertheless prevail against an act, which constitutes general binding legislation in certain circumstances. Perhaps the classic example is to be found in Case 81/72 Commission v Council . . . it will be recalled that in the result, the Court held that a Council regulation was invalid as contravening the policy laid down by an earlier informal Council Decision. In so deciding, the Court did not follow the Opinion of AG Warner, who cited case-law in the Member States [to the effect that such policy statements did not produce any binding obligations], and in particular England and France to suggest that there was no such principle".[241]

In conclusion, it appears quite difficult to extract the principle of legitimate expectations from a comparative analysis of the laws of the Member States. This principle is certainly part of the *condrus legi*, but not of French or English law. The principle could be linked, to a certain extent, with the French concept of "*droit acquis"* or the principle of procedural legitimate expectations in English law. However, the EC law principle of legitimate expectations resembles much more its German counterpart, by which the ECJ, in the elaboration of the principle of legitimate expectations, seems to have been largely influenced. Does this mean that

[239] AG Warner in Case 81/72 *Commission v. Council* [1973] ECR 575, at p. 593.
[240] *Ibid.*, at pp. 592-593.
[241] Usher, *General Principles of EC Law,* Longman, 1998, at p. 145 and at p. 55.

the ECJ, in this particular case, followed a maximalist approach?[242] On the one hand, on the basis of the cases and Opinions dealing with legitimate expectations, it is credible to argue that the ECJ followed a maximalist approach, even with regard to the above-mentioned French and Belgian case-law (concerning "well-established rights"). On the other hand, one may analyse the principle of legitimate expectations as a corollary of the principle of legal certainty. Thus, the ECJ may have included the narrower principle (legitimate expectations) into the larger one (legal certainty). The principle of legal certainty, being common to the Member States, may allow the elaboration of a maximalist standard.[243]

1.1.2. Procedural Due Process and the Common Law Influence

The influence on general principles of Community law is not only limited to the continental law. In 1973, the accession of common law countries (United Kingdom and Ireland) permitted the Court and the AG to rely on the general concept of natural justice exemplified by the *audi alteram partem* principle.[244] As early as 1963, in the *Alvis* case,[245] the Court upheld, in Community law, the generally accepted principle of administrative law in the Member States, whereby a civil servant must be allowed the opportunity to reply to allegations against him before being disciplined. Precisely ten years afterwards, the UK and Ireland joined the Union and the influence of the common law was visible in the *TMP* (1974) and *AM&S* (1982), both concerning procedural due process.[246] The ECJ elaborated,

[242] This issue is discussed in more detail below in *Part 1 Chapter 3.1.*

[243] Arguably, legitimate expectations does not conflict with other national principles due to the general acceptance of the principle of legal certainty in the Community.

[244] Case 17/74 *Transocean Marine Paint* v. *Commission* [1974] ECR 1063.

[245] Case 32/62 *Alvis* v. *Council* [1963] ECR 49.

[246] This terminology can be used as corresponding to the right to a fair hearing or the "rights of the defence". This last expression is directly translated from the French *droits de la défense* (*see* Lenaerts, "Procedures and Sanctions in Economic Administrative Law", 17 FIDE Kongress, Berlin 1996, at p. 105). In the EC legal order, the Court and the Doctrine refer generally to the rights of the defence. The common law version can be appropriately chosen inasmuch as this notion is often assimilated to the unwritten law and the concept of natural justice. The 14th Amendment of the US Constitution, (*see* Lenaerts, "Fundamental Rights to be Included in a Community Catalogue", ELR 1991. Shaw, "EC Law", Macmillan Professional Master, 1993, at p. 108) which guarantees the right to due process, permitted the Supreme Court to supervise how the States manage their residual legislative and administrative competence (*see* Schermers, "the Scales in Balance: National Constitutional Court v. Court of Justice", CMLRev. 1990) In the EC order, such principles allowed the ECJ a wide judicial activism, by creating them and incorporating them in the European system. In competition law proceedings, the notion of procedural due process corresponds to a variety of sub-rights. The right to be heard is the widest notion and is accompanied by so-called "corollary rights" such as the right to access to files and the right to professional secrecy. Other principles might enter in the definition of due process, such as the principles of confidentiality between lawyers and clients, the protection against arbitrary or disproportionate interventions by the Commission and, the principle of self-incrimination.

under the influence of the common law, procedural principles like the right to be heard (*TMP*) and the protection of the legal privilege (*AM&S*).[247]

As to the right to be heard, a clear example of the comparative law approach is reflected by the *TMP* case.[248] AG Warner undertook a general comparative analysis of the laws of the Member States in relation to the right to a fair hearing. He analysed the unambiguous existence of the *audi alteram partem* principle not only in the law of England (being a principle of natural justice), but also in Denmark, Germany, Ireland and Scotland.[249] Then, the AG analysed the situation in France,[250] Belgium and Luxembourg,[251] where the respective Councils of State had developed such *principes généraux du Droit de la défense* in administrative law, applicable in the absence of any specific legislative provisions. Finally, he came to the third group, composed of Italy and Netherlands, where this principle did not exist in the administrative proceedings.[252] Even though the principle was not common to all the Member States of the Community, the Court emphasised the presence of this principle in the Community legal order, showing a progressive approach. The ECJ ruled quite insipidly, without any comparative analysis, that,

> "[it] is clear, however, both from the nature and objective of the procedure for hearing, and from Articles 5,6 and 7 of Regulation No 99/63, that this regulation, notwithstanding, the cases specifically dealt with in Articles 2 and 4, *applies the general rule* that a person whose interests are perceptibly affected by a decision taken by a public authority must be given the opportunity to make his point of view known. This rule requires that an undertaking be clearly informed, in good time, of the essence of conditions to which the commission intends to subject an exemption and it must have the opportunity to submit its observations to the Commission. This

[247] Tridimas, *The General Principles of EC Law*, Oxford, 1999, at pp. 245-246. According to Tridimas, "[d]espite the fact that most Member States incorporate in their legislation a general right to a hearing in dealings with the administration, no enthusiasm has emerged from regulators or academic for the introduction of a similar right by Community legislation. By contrast, preference seems to lie with reliance on the general concepts of fairness and due process borrowed from the common law. Natural justice was one of the first areas where, following the accession of the United Kingdom, the influence of common law on the Court of Justice was felt. Such influence was particularly evident in the Transocean Marine Paint case".

[248] Case 17/74 *Transocean Marine Paint* v. *Commission* [1974] ECR 1063. *See also Case* 107/76 *Hoffmann- la Roche* [1977] ECR *957*, Case 33/79 *Kuhner* v. *Commission [1980] 1607*, Case 136/79 *National Panasonic* v. *Commission* [1980] 2033, Case C-49/88 *Al-Jubail fertilizer Company* v. *Council* [1991] ECR I-3187 and Case C-395/00 *Fratelli Cipriani* [2002] ECR I-11877 (annulment of the Directive).

[249] *Ibid*., *TMP* at p. 1088.

[250] Certain authors in France such as Professor Vedel does not consider the existence of the *audi alteram partem* principle in France as such, but refers it under *les droits de la défense*.

[251] The case-law in Belgium and Luxembourg is less hesitant than the case-law in France in developing this principle .

[252] AG Warner in *TMP*, *supra n.248*, at p. 1082 and at pp. 1088-1089.

> is especially so in this case of conditions which, as in this case, impose considerable obligations having far reaching effects".[253]

As to the protection of the legal privilege, AG Slynn in the *AM&S* case[254] pinpointed that "the question is not whether legal professional knowledge is identical with the *secret professionnel*, but whether from various sources a concept of the protection of the legal confidence emerges".[255] In the words of Slynn, what matters is the overall picture. The Court, in ruling on the existence of a principle of confidentiality in relation between lawyers and clients, was clearly influenced by the common law that represented the most advanced system in terms of protection. In that regard, "the Court has to weigh up and evaluate the particular problem and search for the best and most appropriate solution".[256] The Commission, in the same line of reasoning (evaluative approach) as AG Slynn, argued that "even if there exists in Community law a general principle protecting confidential information between lawyer and client, the extent of such protection is not to be defined in general, in abstract terms, but must be established in the light of the special features of the relevant community rules, having regard to their wording and structure, and to the needs which they are designed to serve".[257]

The United Kingdom maintained, supporting the AG's and the applicant's views, that "the principle of legal protection of written communications between lawyer and client is recognized as such in the various countries of the Community, even though there is no single harmonized concept the boundaries of which do not vary. It accepts that the concept may be the subject of different approaches in the various Member States".[258] However, the French government argued that the application of the principle might lead to important dissimilarities between the Member States in the application of the rules of competition.[259]

The Court then complemented its teleological interpretation with the analysis of the respective laws of the Member States.[260] According to Usher, *"AG Warner was of the opinion that, at any rate in English law, this would be a situation where audi alteram partem could be invoked, he requested the court's Library and Research Division to make a comparative study of the laws of the other Member States to see*

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[253] *Ibid.*, *TMP,* para. 15 (italics added).
[254] Case 155/79 *AM&S* [1982] ECR 1575.
[255] AG Slynn in *AM&S*, at p. 1649.
[256] *Ibid.*, AG Slynn made direct references to AG Lagrange in *Hoogovens v. High Authority*.
[257] *AM&S*, *supra n.254*, para. 9.
[258] *Ibid.*, para. 6.
[259] *Ibid.*, para. 12, "the application of the principle will be incompatible with Community law and would inevitably create grave inconsistencies in the application of the rules governing competition".
[260] *Ibid.*, para. 27, "[i]n view, of all these factors, it must be therefore be concluded that although regulation No 17 . . . interpreted in the light of its wording, structure and aims, and having regard to the laws of the Member States . . . is subject to a restriction imposed by the need to protect confidentiality".

whether this was a principle generally accepted in other Member States". [261] Although he found that the standard of protection differs among the Member States, the AG concluded that European Community law contains a general principle of confidentiality between lawyers and clients, and thus limits the Commission's investigative powers. Since the principle of confidentiality is well known in common law and is not developed to the same extent in the continental European legal orders, the Court had to analyse the different national approaches, to make a synthesis and to find a common principle, which can fit in the European legal order.[262]

> ". . . Community law which derives from not only the economic but also the legal inter-penetration of the Member States, must take into account the principles and concepts common to the laws of those states concerning the observance of confidentiality. In particular, as regards certain communications between lawyers and client. That confidentiality serves the requirement, the importance of which is recognized in all of the Member States, that any person must be able, without constraint, to consult a lawyer whose profession entails the giving of independent legal advice to all in need of it.
>
> Whilst in some of the Member States the protection against disclosure afforded to written communications between lawyer and client is based principally on a recognition of the very nature of the legal profession, inasmuch as it contributes towards the maintenance of the rule of law, in other Member states the same protection is justified by the more specific requirement that the rights of the defence must be respected.
>
> Apart from the differences, however, there are to be found in the national laws of the Member States common criteria inasmuch as those laws protect, in similar circumstances, the confidentiality of written communications between lawyer and client provided that, on the one hand, such communications are made for the purposes and in the interests of the client's rights of defence and, on the other hand, they emanate from independent lawyers. That is to say, lawyers who are not bound to the client by a relationship of employment".[263]

Indeed, the Court had to synthesize the dual conditions of protection of the client's rights of defence, on the one hand, and the protection of the very nature of the legal profession on the other. The Court ruled that *"viewed in that context Regulation 17 must be interpreted as protecting the confidentiality of written communications between lawyers and clients subject to these two conditions, and thus incorporating such elements of that protection as common to the laws of the Member States".* [264] The Court combined the two conceptions and created a European concept, while drawing guidance from the national law. Thus, the common law influence is

[261] Usher, *General Principles of EC Law*, Longman, 1998, at p. 74.
[262] *See,* Schwarze, "Tendencies Towards a Common Administrative Law", ELR 1991, pp.3-19.
[263] AM&S, *supra n.254,* paras. 18-21.
[264] *Ibid*., para. 22.

remarkable in the context of due process principles, though it must be noted that the Court is always emphasizing the Community nature of the principle.[265]

1.1.3. The Transparency Principle and the Influence of "North Western Europe Law".

As demonstrated before, continental and common law influenced the Community judicature in its comparative analysis. This section furthers the analysis and focuses on the impact of North Western European law on the formulation of a (general?) principle of access to documents. In that sense, one may consider that the heart of the debate does not merely lie in the mighty question of the right of access to documents as a corollary to the right of expression, but also in the possible emergence of a general principle in the light of differences between the liberal approach of the "North Western European block" and the restrictive approach of other Member States.

At the outset, it must be noted that in the early 1990's, before the Treaty of Maastricht and the Code of Conduct, a right of general access to information was constitutionally (Portugal,[266] Spain,[267] Netherlands,[268] Greece,[269] and Sweden[270])

[265] Nevertheless, in the light of recent decisions, one might disagree. In the recent years, the ECJ seems to rely more and more on Article 6 ECHR to elaborate procedural principles (*Infra Baustahlgewebe* and *Montecatin*i). Joined cases T-125/03 R and T-253/03 *Akzo Nobel Chemicals* [2004] para. 186, n.y.r., the principle of confidentiality is considered as an essential corollary to the full exercise of the rights of the defence. The rights of the defence are clearly defined as fundamental rights.

[266] Articles 37, 48, 268 of the Constitution. Law No 65/93 of 26 August 1993, as amended by Law No 8/95 of 29 March 1995 and by Law No 94/99 of 16 July 1999. Article 62 of the code of administrative procedures approved by Law Decree No 442/91 of 15 November 1991.

[267] Section 105(b) of the Constitution. Law No 30 of 26 November 1992 on rules for public administration and administrative procedures. The general right of access to papers held by the public authorities arises out of the principle of the publicity of acts of the legislature, executive and judiciary enshrined in Article 9 (3) and Articles 80, 105 and 120 of the Constitution.

[268] Article 110 of the Constitution, Law of 31 October 1991, stbl 703, on public access to government information, amended on 12 March 1998. General Administrative Procedural Act of 4 June 1992.

[269] Article 10(3) of the Constitution of 1975 implemented by Article 10 of Law No 2690/1999. Code of administrative procedures, and Article 16 of Law No 1599/1986 ("on the relationship between the state and citizens"), whose scope was restricted to documents produced by the legal entities of the private law that belong to the public sector. Greece (Law No 1599/1986, which, however, makes the right subject to numerous conditions and exceptions).

[270] The Freedom of the Press Act, 1766, Chapter 2 (constitutional law), "on the public nature of officials documents", amended in 1949 and 1976.

and/or statutory protected (Denmark,[271] France,[272] and Italy[273]) only in few Member States. [274] At this time, in Belgium, Germany, Finland, Ireland, Luxembourg and United Kingdom there was no constitutional provision and no general access to information. In restricted areas, legislation provided for limited access to information only to non-contentious administrative proceedings,[275] like in Germany[276] or in Luxembourg.

As in Finland, Netherlands and Sweden the right of access to documents was constitutionally protected, these three countries should be perceived as propellers of the transparency concept within European law.[277] More particularly:

[271] Laws No 571 and 572 of 19 December 1985 on Access to Public Administration Files as amended by Law No 347 of 6 June 1991, 504 of 30 June 1993, 276 of 13 May 1998 and 429 of 31 May 2000.

[272] Law 78-573 of 17 July 1978, "de la liberté d'accès aux documents administratifs" and Law of 11 July 1979 "relative à la motivation des actes administratifs et à l'amélioration des relations entre l'administration et le public, Law No 321 of 12 April 2000, on the rights of citizens in their relations with the administrations.

[273] Law No 241 of 7 August 1990 on access to administrative documents, Law No 142 of 8 June 1990 (governing autonomous local administration), Law No 273 of 11 July 1995, Article 3 concerning the simplification of administrative procedures and the improvement of the efficiency of the public administrations).

[274] Article 20 (4) of the Austrian Constitution, Article 20 was implemented by the Federal Act on the duty to furnish information (*Auskunftsplichtgesetz* BGB 1 287/1987). The constitutional provision introduced a general duty for all administrative authorities to answer requests for information within their sphere of competence and a right for everyone to receive information. However, no general right of access could be deduced from the legislation taken on the basis of the Constitution. Following the revision of the Constitution in 1987, Article 20 of the Constitution puts the public authorities under a duty to make information in their possession accessible. That provision does not create an individual right on the part of citizens, but merely places the ordinary legislature, at federal level and at the level of the individual Laender, under a duty to formulate such a right, which they did by means of a series of laws passed between 1987 and 1990. The legislation precludes the public authorities from supplying general information albeit not including a right to inspect records

[275] Law of 1 December 1978 concerning non-contentious procedures.

[276] Law of 25 May 1976 .

[277] Curtin and Meijers, "Access to European Union Information. An Element of Citizenship and a Neglected Constitutional Right", in Neuwahl and Rosas (eds.), *The European Union and Human Rights*, 1995, pp. 77 *et seq*, at p. 80. According to Curtin and Meijers, "[f]reedom of information and the right to freedom of expression have a crucial role to play in strengthening the imperfect democratic order of the European Union. Moreover, the unacceptable face of the process of European integration needs to be recognized once and all for what it is. This concern is particularly topical with accession of two Nordic Countries where system of open government are not only deeply entrenched and accepted in the political culture but where access to official documents are regarded as something like a natural right with a counterpart in all civilized societies . . . adequate diffusion requires recognition of the principle at stake and a mentality revolution".

- Netherlands (Article 110 of the Constitution, in the version resulting from the revision carried out in 1983).
- Finland (Article 10(2) of the Constitution of 17 July 1919, as amended and entered into force on 1 August 1995 which connects the right of access to documents with freedom of expression), and Article 10 and 16 of the Constitution of 2000 (New Finnish Act on openness of Government Activities No 621/99).
- Sweden (where the right of access to public papers is enshrined in the Law on press freedom of 1949, a statute of constitutional rank, and has been so ever since 1766).[278]

Furthermore, it is necessary to underline the essential role of Swedish constitutional law in this matter as was done by the Commission in its comparative analysis in 1993. Notably, the accession of Sweden and Finland in 1995 brought new cases before the Court. Also, "Nordic" doctrine played an important role in the development and recognition of the principle of transparency. The jurisprudence of the ECJ illustrates this influence, for example, in case C-58/94 *Netherlands* v. *Council*.[279] *In casu*, Netherlands sought annulment of Decision 93/731 on the ground that the Council incorrectly relied, as its legal basis, on provisions which concerned its internal organization, i.e. Article 151(3) of the EC Treaty and Article 22 of its own Rules of Procedure. The Dutch Government argued that Decision 93/731 went beyond the scope of the rules on the Council's internal organization and constituted an act expressly designed to have legal effects *vis-à-vis* citizens. It considered that the Council had wrongly categorized the public's right of access to information which in fact constituted a fundamental right, as a matter of internal organization. The Court of Justice had to determine the appropriate legal basis of Decision 93/731, and to find out whether the Treaty provisions empowered the Council to adopt measures intended to deal with requests for access to documents.

The applicant argued that the prerequisite for openness constituted a general principle common to the constitutional traditions of the Member States and that the right to information (the right to access to documents being a corollary) was a fundamental right recognised by the international standards.[280] Interestingly, AG Tesauro qualified the principle of access to documents as a "democratic principle"[281] and "fundamental civil right".[282] This democratic principle was perceived as necessary so as to confer legitimacy on the public authorities.[283] The Court, referring expressly to the comparative analysis of AG Tesauro,[284] observed that most of the

[278] *See also* AG Tesauro in *Netherlands v. Council*, *infra*., fn 16.
[279] Case C-58/94 *Netherlands* v. *Council* [1996] ECR I-2169
[280] *Ibid*., para. 18.
[281] AG Tesauro in *Netherlands* v. *Council*, para. 14.
[282] *Ibid*., para. 16.
[283] *Ibid*., para. 14. *See also infra*, AG Léger in *Hautala*, para. 52.
[284] *Ibid*., paras. 14-15, "[i]t is clear from a comparative examination of the legislation of the Member States of the Community that publicity is inherent in any democratic system. All the national legal systems recognize that citizens have a broad right to be informed, although the

Member States enshrine either a legislative or a constitutional principle giving a general right of public access to documents held by public authorities.[285] Moreover, at the Community level, such a right was reaffirmed in Declaration 17 of the final act of the TEU.[286] The Court emphasized that there is a current trend that discloses "a progressive affirmation of individuals' right of access to documents held by public authorities".[287]

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rank of the legislative source conferring and governing that right varies, as do the limits to that right. In the first place, there is a general right to have access to documents of parliamentary institutions, in particular to those connected with the exercise of their primary function as legislators; indeed, it is normally provided that those institutions' documents must be published. Above all from the 1960s onwards, a right has been recognized to an increasing degree for citizens to have cognizance of papers held by the Government and the administration, with the very aim of taking a more open approach to reciprocal relations and to divest the administration of its more or less overtly authoritarian connotations . . . In this context, most Member States, as emerges from the note drawn up by the Court's documentation service, have adopted legislation, in some cases at constitutional level, which generally confers on individuals a right of access to administrative documents. The purpose of such rules is, in the first place, to enable a person party to an administrative procedure to put across his point of view properly: for that reason, it supplements the principle *audi alteram partem*. Secondly, access to information in the possession of the public authorities aims at increasing citizens' participation in the decision-making process of the administration and hence is conferred irrespective of whether the person concerned can show a specific, legally protected interest in having such access. In other words, it is no longer true that everything is secret except what is expressly stated to be accessible, but precisely the converse. The right of access is normally subject to expressly listed exceptions attributable to the need to protect particular general public interests or individuals' privacy. To a large degree, these are the same exceptions provided for by the Code of Conduct and Decision 93/731/EC: public security, international relations, proper conduct of criminal investigations, industrial secrecy, right to confidentiality, and so on. What is important is to stress once again that such legislation involves the definitive abandonment of secrecy as the general principle informing action by public administrative authorities and the recognition that citizens' right to have access to information in the possession of the public authorities is an expression of the democratic principle and hence helps to determine the democratic nature of the State". The AG undertook an extremely detailed comparative analysis in fn. 16 corresponding to paragraph 15.

[285] *Ibid*., *Netherlands v. Council*, para. 34, "[a]s the Advocate General emphasized in sections 14 and 15 of his Opinion, the domestic legislation of most Member States now enshrines in a general manner the public's right of access to documents held by public authorities as a constitutional or legislative principle".

[286] *Ibid*., para. 35, "[i]n addition, at Community level, the importance of that right has been reaffirmed on various occasions, in particular in the declaration on the right of access to information annexed (as Declaration 17) to the Final Act of the Treaty on European Union, which links that right with the democratic nature of the institutions. Moreover, as appears from paragraphs 3 and 6 of this judgment, the European Council has called on the Council and the Commission on several occasions to implement that right".

[287] *Ibid.,* para. 36.

However, in the Community legal order, there was no general rule on public access to documents possessed by the institutions.[288] According to the Court,

> "[s]o long as the Community legislature has not adopted general rules on the right of public access to documents held by the Community institutions, the institutions must take measures as to the processing of such requests by virtue of their power of internal organization, which authorizes them to take appropriate measures in order to ensure their internal operation in conformity with the interests of good administration".[289]

Thus, it endorsed the Council's right to use its power of internal organisation to regulate transparency in its activities. The lack of Community rules of a general nature controlling access to documents unequivocally justified an institution such as the Council to improve its methods of operating, in an effort to achieve transparency, by introducing more favourable rules than those which had so far governed its own practice. Subsequently, the Court ruled that the Council was empowered to adopt measures intended to deal with requests for access to documents in its possession and thus dismissed the application.[290]

Similarly to AG Tesauro, AG Léger in *Hautala* (2001) undertook a detailed comparative analysis of the laws of the Member States.[291] The AG remarked that an important number of national laws had been amended, e.g. in Ireland and the UK[292] so as to incorporate (in the constitution or in the legislation) a right of access to documents possessed by the public authorities and that consequently, in the light of *Netherlands* v. *Council*,[293] most of the domestic European legislations enshrine such a right.[294] The AG emphasized in detail the nature of such provisions in the national

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[288] AG Tesauro in *Netherlands v. Council*, para. 17. ". . . [o]nly some specific rules, requiring publicity or secrecy for particular acts or information, are laid down by the Treaty or secondary legislation".

[289] Ibid., *Netherlands v. Council*, para. 37.

[290] *Ibid*., para. 39.

[291] Case C-353/99 P *Council* v. *Hautala* [2001] ECR I-9565.

[292] AG Léger in *Hautala*, fn. 25, "[i]n Ireland a general right for the public to obtain the widest possible access to documents held by the administration has replaced the former principle under which citizens were entitled to have access only to certain limited categories of documents or to documents in the possession of the administration dating back more than 30 years (1997 Freedom of Information Act). In the United Kingdom, the 2000 Freedom of Information act recently extended the right of access, which had previously been reserved for certain limited categories of information".

[293] *Netherlands* v. *Council*, *supra n.279*, para. 34. *See also* according to the AG (fn 24), as regards current legislation of the Member States on access to documents of the institutions documents [COM(93) 191 final, OJ 1993 C 156, p. 10]. For an updated version of the text, *see* Commission documents dated 10 August 2000 entitled "comparative analysis of the Member States' legislation concerning access to documents" (http://www.europa.eu.int/comm/secretariat_general/sgc/acc_doc/en/index.htm).

[294] AG Léger in *Hautala*, *supra n.291*, para. 54.

legal systems of 13 Member States[295] (two Member States, namely Germany and Luxembourg, did not provide for any general right of access to documents).[296]

- In nine Member States, the right of access is of a constitutional nature (Belgium, Finland, Italy, Netherlands, Portugal, and Spain, Sweden) or founded in the constitution even if laid down by legislation (Austria and Greece).[297]
- In four Member States, the right of access is enshrined in the legislation (Denmark, France, Ireland, and UK).[298]

At the end of the day, only Germany, Luxembourg and, to a certain extent, Austria do not boast a general right of access to documents.[299] Though the majority of the Member States have constitutional provisions regarding the right to access, discrepancies still exist. The lack of common rules may impede the formulation of a general principle of transparency. Ultimately, it results from the foregoing that continental, common and north-western European law influenced the elaboration of administrative and procedural general principles. As seen above, the influence is not limited to administrative or procedural law, but also extends to constitutional law. The analysis will now shift to focus on the constitutional law that represents a source of inspiration in the creation of fundamental rights.

[295] *Ibid*., para. 57.
[296] The AG did not refer explicitly to those two Member States.
[297] It is worth noting that Belgium (1994) [Article 32 of the Constitution, entered into force in 1995, Act No 94-1724 of 11 April 1994 on the disclosure of information by administration (federal level). Act of 12 November 1997 on the disclosure of information by the administration (at municipal level). This is the case in Belgium (Article 32 of the consolidated version of the Constitution, dated 17 February 1994; that article was introduced when the Constitution was revised in 1993, and entered into force on 1 January 1995)] and Finland (1995) [Article 10 and 16 of the Constitution. New Finnish act on openness of Government Activities No 621/99. Act on administrative procedure included constitutional guarantees concerning the right of access]. In a similar vein, some *Länder* in Germany incorporated constitutional provision about access to documents [The Act of the Land of Brandebourg of 10 March 1998 on access to documents and the freedom of information Act of the Land of Berlin of 15 October 1999].
[298] Statutory protection appeared in Ireland in 1998 (Freedom of information Act No 13 of 1997. a general right for the public to obtain the widest possible access to documents held by the administration has replaced the former principle under which citizens were entitled to have access only to certain limited categories of documents or to documents in the possession of the administration dating) and in the UK in 2000 (The Freedom of Information Act of 6 April 2000. The 2000 Freedom of Information act recently extended the right of access, which had previously been reserved for certain limited categories of information).
[299] *See* more recently, AG Léger in *Mattila* and *Kuijer*, *infra, Part 2 Chapter 5.3.2.*

1.2. GENERAL PRINCIPLES AND CONSTITUTIONAL TRADITIONS

The Treaty of Rome was silent on the thorny issue of fundamental rights. By way of consequence, the ECJ instead elaborated an unwritten bill of rights.[300] Indeed, it should always be kept in mind that it is by the use of general principles as vectors that the EU nowadays boasts a solid and rather wide range of fundamental rights. The *Stauder* case (1969) made the first explicit reference to the general principles. However, this case did not qualify the methodology subsequently used by the Court in the elaboration of general principles. It is in *Internationale Handelsgesellschaft* (1970), that the ECJ ruled that the general principles are inspired from the constitutional traditions common to the Member States.[301] Further, the incorporation with the Treaty of Amsterdam of Article 6(2) TEU represented the *montée en puissance* of fundamental rights within the European legal order. According to Article 6(2) (ex Article F (2)), the European Union is bound to respect the fundamental rights: *"The Union shall respect fundamental rights, as guaranteed by the European Convention on Human Rights for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1959 and as they result from the constitutional traditions common to the Member States, as general*

[300] The fundamental rights were not incorporated in the basic Treaties. The underlying reason might be the economic character of the Community. However, the Court of Justice has created a important case-law in this area, developed the fundamental rights through the general principles of Community law . It is only in relation to the international instruments such as the ECHR and the human rights clauses in agreements with third countries that reference is made. The present section mainly focuses on the appraisal of the creation of an "unwritten bill of rights" by the Court through recourse to the general principles. This section will focus essentially on the normative judicial model, which Weiler has also called *"the first generation model"*. According to Weiler the normative judicial model *"must and will remain the cornerstone of the protection of Human Rights in the Community"*. *See* Weiler, "Methods of Protection: Towards a Second and Third Generation of Protection", in Cassese, Clapham and Weiler (eds.), *Human Rights and the European Community: Methods of Protection*, volume II, EUI, Baden-Baden, 1991, pp. 555-642, at p. 560. The second-generation model corresponds to a cluster of procedural devices providing access to justice. The third generation model is linked to institutional devices intended to permit an effective vindication (*Ibid*., Weiler at p. 562).

[301] The Court in 1974 in the *Nold* case further specified the methodology followed. Indeed, the Court recognized that when moulding a principle inspiration would be taken from international treaties concerning Human Rights. AG Ruiz-Jarabo Colomer in Case C-466/00 *Kaba* [2003] ECR I-2219, para. 88 fn.35, "Case 11/70 Internationale Handelsgesellschaft [1970] ECR 1125 alludes to 'the constitutional traditions common to the Member States', following the Opinion of Advocate General Dutheillet de Lamothe, who recognised that the fundamental traditions of national legal systems 'contribute to forming that philosophical, political and legal substratum common to the Member States from which through the case-law an unwritten Community law emerges, one of the essential aims of which is precisely to ensure the respect for the fundamental rights of the individual".

principles of Community law".[302] This Article confirms that the Union must respect fundamental rights, as guaranteed by the Convention and as they result from the constitutional traditions common to the Member States. Also, one must underline the significance of the common constitutional traditions in the provisions concerning the Charter of Fundamental Rights. It is worth stressing that the Charter has firm roots in the Member States' common constitutional traditions. In that respect, Article 52(4) CFR states that, *"[i]nsofar as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions"*. However, the common constitutional traditions do not constitute a direct source of Community law for the ECJ. In the words of Judge Skouris, *"it should be borne in mind that common constitutional traditions do not form a direct source of Community law and the Court of Justice is not bound by them as such, they constitute a source of inspiration for it in discerning and defining the scope of the general principles of law that apply in the Community legal order".*[303] This section will analyse the use of constitutional traditions by the ECJ as an indirect source of Community law. It is divided into two parts. First, it focuses on the early years of the Community case law (1.2.1). Secondly, it analyses the use of constitutional traditions by the AG and the Court in the recent jurisprudence (1.2.2).

1.2.1. From Stork to Internationale Handelsgesellschaft

a) From Stork to Stauder

In the 1960s, German applicants argued, in national courts and before the ECJ, that Community law should respect the provisions of the German Fundamental law *(Grundgesetz)*. It should be kept in mind, in that regard, that due to historical considerations,[304] the standard of protection reflected by the German Basic law offers a maximum range of human rights, not only in terms of quantity but also in terms of quality (high standard of review). Thus, in *Stork*,[305] the German applicant contended that the High Authority violated the right of free development of the person and the freedom of profession.[306] The Court considered that according to Article 31 ECSC, it was not competent to rule on provisions of national law. Consequently, *"[t]he high authority is not empowered to examine a ground of complaint which maintains that, when it adopted its decision, it infringed principles*

[302] The text of Article 6(2) makes reference to the fundamental rights as general principles of law. However, the term "general principles of law" is much wider than the term "fundamental rights", as it also includes administrative principles and procedural due process principles (right to be heard). Article 46 (ex Article L) of the Treaty of Amsterdam refers explicitly to Article 6(2), concerning acts by the Community institutions, and defines the extent of the jurisdiction of the ECJ.

[303] Final Report of the Working Group II, CONV 354/02, pp. 1-17, at p. 7.

[304] *See* Herdegen, "Natural Law, Constitutional Values and Human Rights/ A Comparative Analysis", HRLJ 1998, pp. 37 *et seq*.

[305] Case 1/58 *Stork* v. *High Authority* [1959] ECR 17.

[306] Articles 2 and 12 of the Basic law.

of German constitutional law".[307] One year later, in *Geitling*,[308] the Court ruled, concerning a complaint alleging infringement of Article 14 of the Basic law (the right to property), that it *"is not for the Court, whose function is to judge the legality of decisions adopted by the High Authority . . . to ensure that rules of internal law, even constitutional rules, enforced in one or other of the Member States are respected"*. *Stork* and *Geitling* reflected the unwillingness of the ECJ to deal with national law and to question the supremacy of Community legislation over domestic provisions. However, the national courts (particularly in Germany) found extremely attractive the claims based on national constitutional law. The ECJ had to find a solution to an increasing risk of insurrection by the national judicial authorities. This solution was provided by the *Stauder* case, in which the ECJ clarified and demonstrated the attachment (in a rather telegraphic manner) of the European legal order to human rights.

The *Stauder* case results from a preliminary ruling from the Stuttgart Administrative Court.[309] The plaintiff argued that his fundamental rights (right to dignity) enshrined in the German Constitution were violated due to the obligation to divulge his identity (the name and address of the potential recipient had to be mentioned on a coupon) in order to purchase EC butter for a low-price. Consequently, the Commission Decision imposing such requirements should be invalidated. The national court asked the ECJ whether such a requirement was compatible with the general principles of Community law.[310] Importantly, the Court stated that, *"interpreted in this way the provisions at issue contains nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community law and protected by the Court"*.[311]

Though Rasmussen has qualified the wording of this recital as *"almost accidental"*,[312] it seems clear that the ECJ perceives that fundamental rights pertain to the Community legal order and constitute general principles of Community law. It is true that the quoted paragraph 7 of the judgment does not give us rich details regarding the methodology that is employed by the Court as to the formulation of fundamental rights. Nevertheless, the subsequent jurisprudence filled this lacuna. Thus, the *Stauder* case represents the starting point of the "unwritten bill of rights" that was consecrated thirty years later by the Charter of Fundamental Rights (December 2000). Mancini pondered the catalogue of human rights - developed by the Court and initiated with the *Stauder* and *Internationale Handelsgesellschaft* - as *"one of the greatest contributions that the court has made to democratic legitimacy*

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[307] *Stork*, *supra n.305*, para. 4.
[308] Cases 36-38/59 and 40/59 *Geitling* v. *High Athority* [1960] ECR 423.
[309] Case 29/69 *Stauder*[1969] ECR 419.
[310] Rasmussen, "On Law and Policy in The European Court of Justice", Nijhoff, 1986, at p. 396. According to the author, "[i]t was a national judge who first suggested that fundamental rights enjoying a constitutional protection in the Member States might form part of some higher unwritten principles of Community law".
[311] *Stauder*, *supra n.309*, para. 7.
[312] Rasmussen, *supra n.310,* at p. 396.

in the Community".[313] In that respect, one may also recall, Cappelletti's famous (*"perhaps guilty of artistic license"),*[314] description of the fascinating spectacle of *"those thirteen little men unknown to most of the 320 million Community citizens, devoid of political power, charisma and popular legitimation who claim for themselves the . . . capacity to do what the framers did not even think of doing and what the political branches of the Community do not even try to undertake"*. [315]

b) The Obiter Dictum in Internationale Handelsgesellschaft: a Semi-Solution?

In the wake of the *Stauder* case, the ECJ, in another reference from a German Court, one year later, firmly acknowledged that the constitutional traditions common to the Member States constitute a source of inspiration for the elaboration of the general principles. Rasmussen appraised the answer given by the ECJ as a *"half solution"*.[316] *Internationale Handelsgesellschaft* is an important case in order to appreciate the constitutional nature of the European legal order. Indeed, the ECJ considered both the scope of the supremacy doctrine and the interdependent question of methodology concerning the elaboration of fundamental rights. The question of supremacy pushed the Court to recognize their existence in the EC legal order and to mature subsequent case law in this area. The Court refined the rather synthetic *"Stauder formula"* and ruled, in a more sophisticated way, that Community fundamental rights are inspired by the constitutional traditions of the Member States.[317] From that moment, fundamental rights are *"forming an integral part of the general principles of law"* or, using the Stauder formula, *"are enshrined in the general principles of Community law"*. The *Internationale Handelsgesellchaft* version was preferred to the *Stauder* formula and, then, ceaselessly referred to in the jurisprudence of the ECJ dealing with the elaboration of human rights.[318] The

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[313] Mancini, "Democracy and the European Court of Justice", in *Democracy and Constitutionalism in the EU*, 2000, pp. 31-50, at p. 45. *See also* Mancini, "The Making of a Constitution for Europe", in *Democracy and Constitutionalism in the EU*, 2000, pp. 1-16, at p. 13.

[314] *Ibid*., Mancini commenting on Cappelletti 's sentence, "The Making of a Constitution for Europe", in "Democracy and Constitutionalism in the EU", 2000, pp. 1-16, at p. 13.

[315] Cappelletti, Seccombe and Weiler (eds.), *Integration through Law*, Volume 1, Book 1, 1986, at p. 174.

[316] Rasmussen, *supra n.310*, at p. 420, fn. 22. The author is indeed making allusion to the Nold jurisprudence that will complete definitely the "reservoir of inspiration" by adding the international instruments.

[317] *Internationale Handelsgesellschaft*, *supra n.197,* at p. 1134 para. 4. Citing the Court, *"[a]n examination should be made as to whether or not any analogous guarantee inherent in Community Law has been disregarded. In fact, respect for fundamental rights forms an integral part of the general principle of law protected by the Court of Justice. The protection of such rights whilst inspired by the constitutional traditions common to the Member States must be ensured within the structure and objectives of the Community"*

[318] The following case-law always pinpointed that the "fundamental rights *form on integral part* of the general principles of law, from which the Court ensures the respect". *See* for instance *Nold* and *Johnston* (discussed further).

analysis of the very wording of the new formulation reveals that fundamental rights, as formulated and protected by the ECJ, are general principles *per se*. Moreover, it appears that the general principles constitute a wider category than fundamental rights in the traditional sense. In that regard, the general principles of law are not merely circumscribed to human rights, but also include administrative and due process principles.[319] Also, paragraph 4 of the case makes its clear that the national constitutional traditions of the Member States constitute a valid source of inspiration only in the context of fundamental rights protection.

The message conveyed by this case is unambiguous. The EU institutions are bound to respect the fundamental rights as defined by the European Court of Justice. And the national courts, contrary to what was argued by the defendant,[320] cannot review Community acts by having recourse to their national constitutional law.[321] By contrast, according to the German national court, *"[a]lthough Community regulations are not German national laws, but legal rules pertaining to the Community, they must respect the elementary fundamental rights guaranteed by the German Constitution and the essential structural principles of national law. In the event of contradiction with those principles, the primacy of supranational law conflicts with the principle of the German Basic Law"*.[322] The ECJ clearly and

[319] *See,* De Witte, "The Role of the ECJ in Human Rights", in Alston, *The EU and Human Rights*, Oxford, 1999, pp.859-897, at pp. 860-861. The author stressed the distinction between the principles of administrative law and the fundamental rights. The author considered that the ECJ does not distinguish clearly between the human rights principles and the other general principles of Community law.

[320] *Internationale Handelsgesellschaft*, *supra n.197*, at p. 1128, "[t]he fundamental right to free expression and free choice in commercial decisions enounced by the Basic Law of the Federal Republic, constitutes an element of that common fund of fundamental values which form part of Community Law; as to the principle of proportionality, it is recognized by several provisions of the EEC Treaty, in particular Article 40, and the Court of Justice has already had recourse to it in assessing various measures adopted by Community institutions".

[321] *Ibid*., para. 3, "[r]ecourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question".

[322] *Ibid*., at p. 1128. *See also*, AG Dutheillet de Lamothe in *Internationale Handelsgesellschaft*, at p. 1146 ". . . Frankfurt court, which states that since the principle of proportionality results from the combined effect of Articles 2 and 12 of the Basic law of the Federal Republic of Germany, Community measures may not infringe those constitutional provisions, an argument from which that court has drawn all the consequences since, before referring this question to the Court of Justice, it has held contrary to the Basic law, the provisions disputed today before the Court". According to the AG, this line of argumentation must be rejected categorically. Indeed, the recognition of the constitutional law of one particular Member State in order to assess the legality of a Community measure will definitely endanger the uniformity of Community law and particularly the principle of supremacy as defined in Costa v. Enel".

forcefully ruled that the acceptance of such a type of argumentation imperils dangerously the very foundation of the European legal order by damaging its uniformity and effectivity.[323]

Finally, one may venture to say that the unwritten law (fundamental rights) of the Community finds part of its source of inspiration and legitimacy in the national (constitutional) laws of the Member States. However, it appears from the AG Opinion that recourse to fundamental principles common to the Member States is subsidiary to the foreseeable existence of the principle in the Treaty itself. Indeed, according to AG Dutheillet de Lamothe,

> "[t]hey contribute to forming that philosophical, political and legal substratum common to the Member States from which through the case law, an unwritten Community law emerges, one of the essential aims of which is precisely to ensure the respect for the fundamental rights of the individual. In that sense, the fundamental principles of the national legal systems contribute to enabling Community law to find in itself the resources necessary for ensuring, where needed, respect for the fundamental rights which form the common heritage of the Member States".[324]

The use of the words *"where needed"*, thus suggests that the support of national constitutional law as an unwritten source is subsidiary to an explicit provision of the Treaty.

1.2.2. Comparative Analysis and the ECJ as a "Constitutional Laboratory".

This section focuses on the jurisprudence of the ECJ where it deals with detailed analysis of the common constitutional provisions. As Weiler put it, "*[t]he constitutional practices of the Member States are not used by the Court as a test for the constitutionality of the Community measure but simply as a source for culling the ideas".*[325] It is remarkable that the ECJ does not, in fact, embark so often upon a constitutional comparative analysis. The main example is still the *Hauer* case of 1979. In most cases, the Luxembourg judges prefer to generally observe that the elaborated right is *"common to the constitutional traditions of the Member States"*. Second, the Advocates General, by contrast, demonstrate a higher tendency to enter into such an analysis, on which the ECJ generally relies (implicitly or explicitly). However, the regular lack of an extensive constitutional comparative inquiry by the ECJ has been criticized. Even the *Hauer* case – where the ECJ dealt quite extensively with the domestic constitutions – was the object of negative comments by a part of the doctrine, whereas the other part applauded the courageous attitude taken by the Court. The *Hauer* case must be analyzed in detail.

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[323] *Ibid*., para. 3.
[324] *Ibid*., AG Dutheillet de Lamothe in *Internationale Handelsgesellschaft*, at pp. 1146-1147.
[325] Weiler, "The Jurisprudence of Human Rights in the European Union: Integration and Disintegration, Values and Processes", http:www.jeanmonnetprogram.org/papers/96/960211.

a) Comparative Analysis in the Court

In *Hauer*, the ECJ found that the ECHR provision, i.e. Article 1 of the Protocol 1, was not precise enough to allow the recognition of a general principle of Community law regarding the right to property. A comparative analysis of the constitutional laws of the Member States appeared, consequently, necessary. It is worth quoting that part of the judgment regarding the comparative analysis:

> "Therefore, in order to be able to answer that question, it is necessary to consider also the indications provided by the constitutional rules and practices of the nine Member States. One of the first points to emerge in this regard is that those rules and practices permit the legislature to control the use of private property in accordance with the general interest. Thus some constitutions refer to the obligations arising out of the ownership of property (German Grundgesetz, Article 14(2), first sentence), to its social function (Italian constitution, article 42(2), to the subordination of its use to the requirements of the common good (German Grundgezetz, Article 14 (12) second sentence, and the Irish constitution, Article 43.2,2), or of social justice (Irish constitution, Article 43.2.1). In all the Member States, numerous legislative measures have given concrete expression to that social function of the right to property. Thus in all the Member States there is legislation on agriculture and forestry, the protection of the environment and town and country planning, which imposes restrictions, sometimes appreciable, on the use of real property".[326]

The *Hauer* methodology is extremely interesting, though, unfortunately, rarely used. First, the ECJ looked into the European Convention on Human Rights. The Court did not consider that the provision of the First Protocol was clear enough so as to enable the Court to rule on the matter. Second, the ECJ turned to a comparative analysis of certain constitutional provisions in various Member States limiting the exercise of the right to property. According to Rasmussen, *"[t]he Court's reasoning in Hauer is persuasive and is probably aimed at inducing the Court's national competitors to accept as axiom that the EC's judiciary is capable of trustworthy and sophisticated handling of the sensitive fundamental economic rights issue"*.[327]

Other authors, such as Weiler and De Witte, launched criticisms as to the methodology followed by the Court in *Hauer*.[328] First, Weiler criticised the reluctance of the ECJ to analyze profoundly the ECHR requirements and the case-law of the Strasbourg Court.[329] Then, De Witte, quoting paragraph 20, considered

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[326] Case 44/79 *Hauer* [1979] 3237, para. 20.

[327] Rasmussen, On Law and Policy in the European Court of Justice, Nijhoff, 1986, at p. 407.

[328] De Witte, *supra n.319,* pinpointed also that the ECJ never made reference to a judgment of a national constitutional court. In my view, such a stance might be justified by the decision in *Internationale Handelsgesellschaft*.

[329] Weiler, "[t]he indication in the Hauer case is that the ECJ regards itself as able to give a protection which in substance is superior to that afforded by the Convention . . . the court does not make a particular effort to analyze the conventional requirements and its surrounding jurisprudence", Methods of Protection: Towards a Second and Third Generation of Protection", in Cassese, Clapham and Weiler (eds.), "Human Rights and the European

that *"the Hauer judgement is often cited as an example of concrete examination of national constitutional law. In fact, the ECJ examined the constitutional protection of the right of property in only three of the (then) nine Member States and did not delve deeply into them"*. [330] Going even further in the critical analysis, Clapham pointed out that the *"references to common constitutional principles, traditions, practices, precepts or ideas are unhelpful. Even if such thing existed, the Court's method so far has been to selectively distil common practices from some Member States* . . . [referring to Hauer] *and even then these only offer inspiration or guidelines"* [331]. These authors appraised with a critical eye the "light analysis" of the ECJ. It is true that the comparative analysis of the national provisions was only limited to three Member States and the language of the relevant provisions is quite *"bland"*. [332] Nevertheless, one ought not to forget the Opinion of the Advocate General in this case. AG Capotorti compared the laws of eight Member States (without mentioning the UK) and distinguished:[333]

> "That which recognizes private property against every form of arbitrary deprivation (Germany, Italy, France and Ireland).
>
> That which admits of the possibility of expropriation in the public interest in return for compensation (Germany, Italy, France, Belgium, Luxembourg, Netherlands and Denmark).
>
> That which leaves the limitations upon the use of property to be determined by the law (Germany, Italy and Ireland)".[334]

The AG concluded that "[a]n examination of the rules in force in the legal systems of the Member States (almost always at the level of constitutional law reveals that apart from the many different ways in which they are formulated as regards language and scope, those rules render property rights subject to three fundamental types of provisions . . . a synthesis of these three fundamental types of provisions is to be found in Article 1 of the first additional protocol to the ECHR".*[335]*

Community: Methods of Protection", volume II, EUI, Baden-Baden, 1991, pp. 545-642, at p. 590.

[330] De Witte, *supra n.319,* fn 82, at p. 878.

[331] Clapham, *Human Rights and the European Community: A Critical Overview,* Nomos, 1991, at pp. 50-51

[332] *Ibid*., "[t]he language of the constitutional provisions it cites from the German, Italian and Irish constitutions are as bland as the text of the ECHR protocol. It is the respective Court in each of these systems which translates the bland language into the societal choice, the fundamental balance between the individual and the general public".

[333] One may wonder why the UK was not referred to by the AG in the comparative analysis. Is that because the UK did not boast such a type of constitutional provision due to the unwritten character of its constitution? Was it a voluntary omission?

[334] AG Capotorti in *Hauer*, *supra n.326,* at p. 3760

[335] *Ibid*.

The criticism, voiced by De Witte and Weiler,[336] is in my view constructive. It is without doubt that the ECJ acquires a wider legitimacy if it embarks upon a detailed comparative analysis of Member States constitutional provisions so as to shape a general principle. It is also true that one may consider such an inquiry as compulsory if the national constitutions make up the unique source of the general principles. However, it ought to be stressed that the international instruments offer interesting alternatives for the European judges. A more optimistic view is also furnished by Wouter, who argues that, *"the fact that the Court rarely refers explicitly to national constitutional provisions does not in our opinion mean that it disregards them. In cases with a constitutional dimension the Court often ensures it is thoroughly documented by its study and documentation service. In addition the Court is often briefed by the Advocates General".* [337] Finally, it might be contended that in the search of collecting concepts in the various national constitutions, the ECJ, in the quest of a common standard, may be curtailed from formulating a minimum standard of protection.[338]

The Court has repeatedly held that fundamental rights form an integral part of the general principles of Community law, the observance of which it ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties.[339] The approach to look or to refer to constitutional traditions of the Member States is a flexible one. In the words of Weiler*, "truly original features of the current constitutional architecture in the field of human rights - the ability to use the legal system of each of the Member States as an organic and living laboratory of human rights protection".*[340] In the same vein, Schermers stated that *"like public international law, Community law does not define clearly what specific human rights are protected. This offers the advantage of flexibility but also the disadvantage of legal uncertainty. This disadvantage gradually decreases as a result of the case law of the Court of Justice".*[341] Weiler's formulation is, in my view,

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[336] Clapham, *Human Rights and the European community. A Critical Overview*, volume I, EUI, Nomos, 1991, at pp. 50-51.

[337] Wouter, "National Constitutions and the European Union", LIEI 2000, pp. 25 *et seq*., at p. 49, fn 93.

[338] Clapham, *Human Rights and the European Community. A Critical Overview*, volume I, EUI, Nomos, 1991, at p. 51.

[339] For the development of the case-law, *see e.g*., Case C-4/73 *Nold* v. *Commission* [1974] ECR 491, para. 13, Case C-36/75 *Rutili* [1975] ECR 1219, para. 32, Case C-63/83 *Kirk* [1984] ECR 2689, para. 22, Case C-222/84 *Johnston* [1986] ECR 1651**,** para. 18, Case C-257/85 *Dufay* v. *Parliament* [1987] ECR 1561, para. 10, Case C-260/89 ERT [1991] ECR I-2925, para. 41, Case C-404/92 *P X* v. *Commission* [1994] ECR I-4737, para. 17, Case C-299/95 *Kremzow* [1997] ECR I-2629, para. 14, and Case C-185/95 *P Baustahlgewebe* [1998] ECR I-8417, paras. 20-22.

[340] Weiler, "Does the European Union Truly Need a Charter of Rights?", ELJ 2000, pp. 95 *et seq*., at p. 96.

[341] Schermers, "The European Community Bound by Fundamental Human Rights", CMLRev.1990, pp. 249 *et seq.*, at p. 253.

clearly inspired by the characterization of US due process as a "living thing". The use of the national constitutional law in the elaboration of general principles reflects the very dynamic of those principles. Both authors are worried by the legal uncertainty, but also fascinated by the extensive use of the national constitutions by the ECJ, which is decreasing this uncertainty. The discussion may be summarized by Weiler's interrogation, *"[t]he current system of looking to the common constitutional traditions and to the ECHR as a source for the rights protected in the Union is, it is argued, unsatisfactory and should be replaced by a formal document listing such rights. But would clarity actually be added?*[342] The authors thus stressed not only the flexibility and dynamic of the recourse to national constitutional law, but also the lack of clarity of this unwritten human rights law, that may lead to uncertainty.

The link between national constitutional law and fundamental human rights is visibly established in the Court's case-law and the AG Opinions. As stated before, in *Internationale Handelsgesellschaft*, the Court ruled that Community human rights are inspired by the constitutional traditions of the Member States. In the *Johnston* and *Heylens* cases, the Court ruled that the existence of a remedy of a judicial nature reflects a general principle of Community law, which underlies the constitutional traditions common to the Member States. Finally, Article F of the TEU replicates the formula generally used by the Court in stating that the EU is committed to respect fundamental rights as guaranteed by the ECHR and "as they result from the constitutional traditions of the Member States". In the *Hauer* case, the Court made a rather extensive examination of the right to property in a number of the national constitutions. Similarly in the *Hoechst* case,[343] the Court, making a survey of the inviolability of the domicile in the national constitutions, found that this protection cannot extend to business premises due to the divergence between the national systems.[344] These cases and others relating to due process (hybrid rights), such as *Orkem*[345] and *Solvay*[346], are characterized as being based in the very essence, on the common legal traditions of the Member States.[347] This feature is underlined especially in the field of human rights, which form the guarantees of a *democratic society based on the rule of law*, such as in the fifteen Member States and the Community itself.[348] The reference to the Member States' constitutions in relation to

[342] Weiler, *supra n.340,* ELJ 2000, at p. 96.
[343] Case 46/87 & 227/88 *Hoechst* [1989] ECR 2893. *Hauer* and *Hoechst* constitute the rare cases where the Court made explicit references to the national laws of the Members States.
[344] De Witte, "Community Law and National Constitutional values", LIEI, 1991/92, pp.1-22, *see also* Wouter, "National Constitutions and the European Union", LIEI, 2000 , pp. 25 *et seq.*.
[345] Case 374/87 *Orkem* v. *Commission* [1989] ECR 3283.
[346] Case 27/88 *Solvay* v. *Commission* [1989] ECR 3255.
[347] Lenaerts, "Fundamental Rights to be Included in a Community Catalogue", ELR 1991, pp.367-390.
[348] *See* Case 294/83 *Les Verts* v. *Parliament* [1986] ECR 1339. *See also* Opinion 1/91 and Case 138/79 *Roquette Frères.*

fundamental human rights, as expressed by the general principles of law, establishes a framework for understanding the link between the Community, the rule of law and a democratic system.

b) Comparative Analysis of Constitutional Provisions in the AG Opinions

The following analysis suggests that the Opinions of the AG are much more meticulous than the ECJ rulings. However, the comparative analysis is not always fully realized in the sense that the AGs do not alwways refer to each of the national constitutions. Like the ECJ, the AG may refer generally to the constitutional traditions.[349] Moreover, it is worth noting that the AG and the ECJ undertake comparative analyses, which are not always circumscribed to the constitutional field. In that sense, the principle against self-incrimination or "*Orkem* principle"[350] constitutes a perfect example of the comparative methodology being used in criminal and administrative law.[351] In a similar vein, AG Léger in *Baustahlgewebe* referred to administrative, civil and criminal procedure in search of the possible formulation of a general principle of immediacy[352] and the application of the right to

[349] AG Ruiz-Jarabo Colomer in Case C-274/99 *P Connolly* [2001] ECR I-1611, para. 24, "[i]t seems to me that the appellant's criticisms of the very principle of what he calls a system of prior censorship are more worthy of attention. He contends that a system of that kind is contrary to both Article 10 of the Convention and the constitutional traditions of a large number of the Member States. By failing to acknowledge that fact, the Court of First Instance erred in law". *See also*, concerning effective judicial protection, AG Darmon in *Johnston* did not analyze the scope of a potential general principle in the field of judicial protection by scrutinizing the various national laws of the Member States. However, it can be submitted that the analysis is implied in his reference to the concept of rule of law. Indeed, the AG considered that the right to challenge a measure before the Courts is inherent in the rule of law. He continued by stating that "formed of States based on the rule of law, the EC is necessary a Community of law, which was created and works on the understanding that all Member States will show equal respect for the Community legal order" (*ibid*., Johnston, at p. 1656). Similarly, AG Mancini in *Heylens* did not enter into a debate as to the existence of a general principle. He merely stated that Article 8 of Directive 64/221 EEC (on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy; public security or public health), requires Member States to guarantee all Community citizens access to the legal remedies available to nationals (*ibid*., *Heylens*, at p. 4117).

[350] *Orkem, supra n.345*.

[351] *Ibid*., AG Darmon in *Orkem*, at p. 3327, para. 98. AG Darmon observed that "an analysis of national laws has indeed shown that there is a common principle enshrining the right not to give evidence against oneself. But it has also shown that that principle, becomes progressively less common as one moves away from the area of what I shall call classical criminal procedure".

[352] AG Léger in *Baustahlgewebe*, *supra n.339,* "[s]i important soit-il, il ne semble pas que le principe d'«immédiateté» puisse être rangé au nombre des principes généraux du droit dont votre Cour assure le respect . . . Dans la très grande majorité des États membres, les juridictions se voient imposer l'obligation de rendre leurs décisions dans un délai déterminé, en général proche de la clôture des débats (République fédérale d'Allemagne, république

be heard in a reasonable time without the existence of a constitutional provision or even a legislative basis.[353]

Competition law procedure offers a rich area for the recognition of the general principles.[354] Thus, it is not so surprising to find the *Hoechst* judgment and Opinion being of specific interest for the analysis concerning the comparative methodology employed by the Advocates General. The *Hoechst* case constitutes a landmark decision in the context of general principles. The main question at stake was the formulation of a general principle of a right to privacy also applicable to business premises. AG Mischo undertook a rather thorough comparative analysis of the constitutional laws and considered that the situation was not identical in all the Member States.[355] Certain Member States like Spain[356] and Germany[357] assimilated

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d'Autriche, royaume de Belgique, république de Finlande, royaume des Pays-Bas et royaume de Danemark), voire le jour même, sauf exception, de la clôture de la procédure orale (Royaume-Uni de Grande-Bretagne et d'Irlande du Nord, royaume d'Espagne, République hellénique, Irlande, République portugaise, royaume de Suède) . . . Deux précisions doivent toutefois être apportées. En premier lieu, les règles mettant en oeuvre le principe de l'«immédiateté», contrairement au principe du «délai raisonnable» dans certains États membres, ne sont pas d'ordre constitutionnel, mais de nature légale. Elles sont généralement énoncées par les textes de procédure civile, pénale ou administrative. En second lieu, leur effectivité n'est pas systématiquement garantie, car, aux États membres qui ne prévoient pas de délai maximal, il faut ajouter ceux qui ne sanctionnent pas, du moins par une invalidation de la procédure en cause, la méconnaissance du délai fixé (Royaume-Uni de Grande-Bretagne et d'Irlande du Nord, royaume de Belgique et royaume de Danemark)".

[353] *Ibid*., "[a]u préalable, il est nécessaire, ainsi que nous l'avons rappelé, d'examiner les solutions dégagées par les droits nationaux pour résoudre des problèmes comparables, afin de vérifier s'il existe une tradition juridique commune dont votre Cour pourrait s'inspirer. Bien qu'ils reconnaissent tous le droit à être jugé dans un «délai raisonnable», les ordres juridiques des États membres ne recourent pas à des solutions identiques en cas de violation de ce principe. Les manières de procéder des juridictions pénales diffèrent selon les États membres. Elles agissent d'ailleurs souvent de façon prétorienne, sans que des dispositions de nature constitutionnelle, ni même parfois légale, fondent leur démarche. Dans certains États, les poursuites sont déclarées irrecevables (République fédérale d'Allemagne, royaume de Belgique et royaume des Pays-Bas), ou abandonnées (royaume de Belgique et Irlande). La peine peut aussi être réduite (République fédérale d'Allemagne, royaume de Belgique, royaume d'Espagne, république de Finlande, grand-duché de Luxembourg, royaume des Pays-Bas et royaume de Danemark, pour les peines d'emprisonnement) ou être l'objet d'un sursis à exécution (République fédérale d'Allemagne et royaume de Belgique). Dans le royaume d'Espagne, il est permis à la personne poursuivie de former un recours en grâce lorsque le principe du «délai raisonnable» n'a pas été respecté".

[354] This is partly due to the direct powers of the Commission in this field under Articles 11 and 14 of Regulation 17. *See* Groussot, "The General Principles of Community Law in the Creation and Development of Due Process Principles Competition Law Proceedings: From Transocean Marine Paint (1974) to Montecatini (1999)", in Bernitz and Nergelius (eds.), *The General Principles of European Community Law*, Kluwer, 2000, pp. 185-204.

[355] AG Mischo in, Joined Cases 46/87 and 227/88 *Hoechst* v. *Commission* [1989] ECR 2859.

[356] *Ibid*., at p. 2887, paras. 64-65. Citing a Spanish case of 1985.

the business premises to the home. In others like Belgium, the question had not been definitively settled. Finally, two Member States, Ireland and the Netherlands expressly defined in their case law and constitutions that the concept of dwelling only applies to private persons living there.[358] AG Mischo, despite the divergences, was ready to endorse the existence of a fundamental right protecting the business premises, *"[a]bove and beyond those differences* a general trend is discernible *in the national legal systems . . . I therefore propose that it should be expressly stated that there is at Community level a fundamental right to the inviolability of business premises".*[359] The Court, however, did not follow the AG and refused to recognise the existence of such a general principle.

The AG may refer directly or indirectly (in the footnotes) to constitutional provisions. A good example of direct reference is provided by AG Jacobs in *Konstantinidis* where he undertook a comparative analysis of the constitutional requirements in five Member States (Spain, Portugal, Greece, Ireland and Italy).[360] By contrast, AG Darmon in *Roquette Frères*[361] stated that:

> "the principle of the right to effective protection by a court is not only a component part of the constitutional law of the Member States and a right guaranteed by the European Court of Human Rights. The case-law of the Court of Justice has declared it to be a fundamental principle of Community law. The Court has thus confirmed

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[357] *Ibid*., at p. 2888, under Article 19(3) Basic Law, legal persons enjoy Fundamental Rights and both the case law and legal written provisions are unanimous in considering that the term home covers business premises.

[358] *Ibid*., at p. 2889, para. 73 (for Ireland), The case-law seems to indicate that the constitutional protection does not apply to legal persons or to business premises, para. 83 and para. 84 (for the Netherlands), Article 12 of the constitution does not apply to natural persons or to places other than the dwelling of natural persons.

[359] *Ibid*, at p. 2893, para. 103.

[360] AG Jacobs in Case 168/91 *Konstantinidis* [1993] ECR I-1191, para. 37, "[u]nder Article 10(1) of the Spanish Constitution the dignity of the individual and the free development of his personality inter alia are the foundations of the political order and social peace. Article 15 grants everyone the right to life and physical and moral integrity, while Article 18 guarantees the right to honour, personal and family privacy and the individual's image. In Portugal Article 25 of the Constitution states that the moral and physical integrity of persons is inviolable, while Article 26(1) grants everyone the right to inter alia his personal identity, good name and reputation, image and privacy. Under Article 2 of the Greek Constitution respect for, and protection of, the value of the human being constitute the primary obligation of the State. Article 5 grants every person the right to develop freely his personality. In Ireland Article 40.1 of the Constitution states that all citizens shall, as human persons, be held equal before the law. Under Article 40.3.1 the State guarantees to respect the personal rights of the citizen, while Article 40.3.2 requires the State to protect in particular the life, person, good name and property rights of every citizen. Article 40.3 is not confined to the specific rights set out there, but may be extended to all rights which 'result from the Christian and democratic nature of the State': Ryan v. Attorney General 1965 IR 294, per Kenny J. In Italy Article 3 of the Constitution grants all citizens 'equal social dignity' and Article 22 provides that no one may, for political reasons, be deprived of his legal capacity, citizenship or name".

[361] Case C-228/92 *Roquette Frères SA* [1994] ECR I-1445.

> the existence of the right of access to a court and the right of effective protection by a court for individuals who rely on Community law".[362]

AG Darmon does not enumerate precisely the relevant articles in the domestic constitutional law. However, in the footnote,[363] the AG refers expressly to five constitutional provisions.[364] AG Tesauro adopts the same technique in *Netherlands* v. *Council* regarding the principle of transparency.[365]

Furthermore, the AG may have recourse to a pure constitutional analysis, e.g. AG Jacobs in *Konstantinidis* and AG Darmon in *Roquette Frères*, or blend it with legislative provisions. Concerning the latter model, similarly to the above-mentioned Opinion of Tesauro, AG Léger in *Hautala* (2001) referred both to constitutional and legislative provisions in relation to access to documents (transparency). The AG undertook a detailed comparative analysis of the law of the Member States.[366]

In a similar vein, AG Mischo, in *Booker*, was confronted with the question of whether there is a constitutional principle common to the laws of the Member States according to which the loss of property must necessarily give rise to the payment of compensation.[367] First, the AG acknowledged that the constitutional provisions of the Member States on the right to property require compensation in the case of expropriation.[368] Secondly, he undertook a comparative constitutional analysis as to the existence of such a right to compensation in the absence of a transfer of property,

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[362] *Ibid*., AG Darmon in *Roquette Frères*, para. 51.

[363] *Ibid*., para. 51, at fn 59.

[364] Article 19 of the German Basic Law of 23 May 1949, Article 24 of the Spanish Constitution of 29 December 1978, Article 20 of the Greek Constitution of 9 June 1975, Article 24 of the Italian Constitution of 27 December 1947, Article 20 of the Portuguese Constitution of 2 March 1976. The AG is also cites French research on the right of effective access to a court in French constitutional law, namely the study undertook by Renoux, JCP, 1993, I, 3675.

[365] AG Tesauro in *Netherlands* v. *Council*, *supra n.279*, paras. 14-15, fn. 16.

[366] *Ibid.,* para. 34, and AG Léger in *Hautala*, *supra n291,* para. 54.fn. 25, "[i]n Ireland a general right for the public to obtain the widest possible access to documents held by the administration has replaced the former principle under which citizens were entitled to have access only to certain limited categories of documents or to documents in the possession of the administration dating back more than 30 years (1997 Freedom of Information Act). In the United Kingdom, the 2000 Freedom of Information act recently extended the right of access, which had previously been reserved for certain limited categories of information".

[367] Case C-20/00 and C-64/00 *Booker Aquaculture* [2003] 3 CMLR 6.

[368] *Ibid*., AG Mischo in *Booker Aquaculture*, paras. 116-117, "Booker states that the constitutional texts of the Member States, which it reproduces in an annex to its observations, would enable it to obtain the payment of compensation for all or part of the losses it has suffered in practically all of the Member States of the Community, except the United Kingdom . . . There is no doubt that all of the constitutions enshrine the right to private property, subject to requisition or expropriation in accordance with the public interest, carried out in accordance with the law or subject to the payment of compensation, the principle of which is established, in most cases, in the constitutional provision itself".

i.e. destruction of fish stocks.[369] In that regard, he referred to the Constitution of Netherlands[370] and to Irish jurisprudence[371], being the most explicit sources concerning this issue. Also, the AG cited Spanish courts, which recognize that the destruction of animals affected by a contagious disease is a special form of expropriation, but highlighted, however, that such a right to compensation does not flow directly from the Constitution in question.[372] Finally, the AG concluded that there is no constitutional principle common to the laws of the Member States according to which the destruction of fish must necessarily give rise to the payment of compensation.[373] The approach followed by AG Mischo could be considered as minimalist since, on the one hand, only two Member States have a constitutional guarantee of compensation in the event of destruction of animals affected by a contagious disease, and, on the other hand, the UK does not boast particular legislation on this matter (while the legislation of thirteen Member Stattes does recognise such protection).[374]

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[369] *Ibid*., para. 118.

[370] *Ibid*., paras. 120-121, "[i]t is the Constitution of the Kingdom of the Netherlands that seems to me to be the most explicit, providing, in respect of property, that, 'in the cases laid down by or pursuant to law there shall be a right to full or partial compensation if, in the public interest, the competent authority destroys property or renders it unusable, or restricts the exercise of the owner's rights to it. The courts and academic authorities consider, however, that there is no automatic right to compensation in the case of destruction of property in the public interest . . . This is confirmed by the observations submitted by the Netherlands Government in the present cases. It stated with particular force that the costs involved in this case by the outbreak of the diseases, including those arising from the control measures, must be borne by Hydro and Booker. The Netherlands Government added: Many Member States adhere to the principle that, in general, everyone must bear the damage that they personally have suffered. It is for the victim to bear his loss, whether this results from mistake, negligence or unforeseeable circumstances. This is, in principle, the case for poor harvests owing to drought, damage caused by lightning or flooding, or that caused by disease".

[371] *Ibid*., para. 122, "[i]n Ireland, according to the case-law, the destruction of diseased animals requires the payment of compensation, in the light of the Constitution, if the interference with the right of property constitutes an unfair infringement of the said right. The unfairness is to be determined in accordance with the exigencies of the common good and the principles of social justice. Interference has been held to be unfair if it is absurd, disproportionate or irrational".

[372] *Ibid*., para. 119.

[373] *Ibid*., para. 123.

[374] *Ibid*., para. 124, "Booker also cites three Member States (the Kingdom of Sweden, the Republic of Finland, and the French Republic) in which specific legislation provides for the payment of compensation in respect of fish diseases. It turns out that such legislation also exists in other States of the Community (the Federal Republic of Germany, the Republic of Austria, the Kingdom of Belgium, the Kingdom of Denmark, the Kingdom of Spain, the Hellenic Republic, the Italian Republic, the Kingdom of the Netherlands and the Portuguese Republic). I am, however, doubtful whether the Parliaments of these Member States adopted these laws in order to protect private property: they did so, rather, out of national solidarity

By contrast, an example of a more progressive approach can be found in the recent Opinion of AG Ruiz-Jarabo in *KB*, concerning the right to marry for transsexuals.[375] The AG acknowledged the fact that, at the present time, thirteen of the fifteen countries of the Union recognise that right, either by express legislative provision or through administrative or judicial practice.[376] Then, the AG referred to the constitutional traditions of the Member States and concluded that such right formed part of the common legal traditions, though there is no absolute *concordentia* between the laws (non-constitutional) of the Member States.[377] This Opinion prompts two conclusions. First, it may be contended that the AG identifies non-constitutional legislation with the constitutional traditions of the Member States. Consequently, the term "constitutional traditions" appears to have received a wide meaning. Second, the approach followed by the AG is clearly progressive given that there was no absolute concordance between the laws of the fifteen Member States. In that respect, this Opinion differs importantly from the approach followed by AG Mischo in *Booker Aquaculture*.

To conclude, the analysis above demonstrated that references to national constitutional law by the AG may be direct or indirect. Also, the AG may mention purely constitutional or mixed provisions (adding non-constitutional laws). It may be argued that the wide interpretation of "constitutional traditions" (including

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with the farmers concerned, or in order to obtain their active cooperation in the eradication of diseases likely to spread very widely and very quickly".

[375] Case C-117/01 KB [2004] 1CMLR 28.

[376] *Ibid*., AG Ruiz-Jarabo in *KB*, para. 28, "[a] comparative study of the prevailing legal situation shows that the marriage of transsexuals in their acquired gender is generally accepted. Whether it is as a result of express action by the legislature (Germany, Greece, Italy, the Netherlands, Sweden), administrative practice (Austria, Denmark) or judicial interpretation (Belgium, Spain, Finland, France, Luxembourg, Portugal), registers can be amended following gender reassignment operations, so that transsexuals are able to marry. Only the Irish and United Kingdom legal systems appear to go against this general trend, which is not a bar to identifying a sufficiently uniform legal tradition capable of being a source of a general principle of Community law".

[377] *Ibid*., paras. 66-67, "[t]here is no doubt that the fact that it is impossible for United Kingdom transsexuals to marry in their new physiological sex is contrary to a general principle of Community law. It is well established in the case-law of the Court of Justice that in the matter of fundamental rights the general principles of Community law must be derived from the constitutional traditions common to the Member States, in the light of the guidance afforded by international treaties for the protection of human rights which have been ratified by the Member States. The European Convention on Human Rights is also of particular relevance in that regard . . . It may be concluded from points 28 and 29 above, first, that the right of transsexuals to marry persons of the same biological sex is incorporated into the laws of the vast majority of the Member States. At the present time, 13 of the 15 countries of the Union acknowledge that right, either by express legislative provision or through administrative or judicial practice. That fact must, of itself, be sufficient for the right to form part of the common legal tradition, since if the general principles are to be determined only when there is complete concordance in all the Member States, this line of inquiry would be rendered nugatory".

legislation), e.g. AG Ruiz-Jarabo in *KB*, leads to the establishment of progressive solutions.

Ultimately, a final question needs to be answered. When does national law (as a source of inspiration) enter into play in the elaboration of a general principle? Does it precede or succeed the use of international law (the other source of inspiration)? Two approaches are distinguishable, in recent years, when trying to give substance to a general principle. First, the use of constitutional traditions may intervene in the second position, i.e. after international law has been used.[378] This is the most common approach, since international law (ECHR provisions are of special significance) is appraised as having a unifying potential. This method may explain why the comparative analysis is not realized systematically. Second, the comparative analysis may come first. This is the situation, particularly, where ECHR provisions are not, or are insufficiently, developed, e.g. in the transsexuality issue[379] or concerning the right to a name.[380] Each of the approaches may reflect, to a certain

[378] AG Mischo in *Booker*, *supra n.367*, para. 102, "[a]s has been held since *Nold*, and confirmed in *Hauer*, Community law does not, in defining the precise content of fundamental rights, ignore the level of protection provided, firstly, by international instruments for the protection of human rights to which the Member States are party, foremost amongst them being the European Convention of Human Rights, and, secondly, the constitutional traditions common to the various Member States".

[379] AG Ruiz-Jarabo in *KB*, *supra n.375*, paras. 67-69, "[i]t may be concluded from points 28 and 29 above, first, that the right of transsexuals to marry persons of the same biological sex is incorporated into the laws of the vast majority of the Member States . . . Second, since the Court of Human Rights delivered its judgments on 11 July 2002, that right has formed an integral part of Article 12 of the Convention. All that the Court of Human Rights allows the State is a degree of discretion in relation to the conditions which must be fulfilled for gender reassignment to be valid, to the consequences for previous marriages and to the obligation to inform an intended spouse about the gender change . . . Consequently, both methods employed by the Court of Justice to give substance to the general principles of Community law lead to the same conclusion: transsexuals have a fundamental right to marry on conditions which take account of their acquired sex". Conversely, the ECJ in 2004 relied only on the interpretation of Article 12 made by the EctHR in the *Goodwin* case (2002).

[380] AG Jacobs in *Konstantinidis*, *supra n.360,* paras. 35-41. AG Jacobs in the search of a potential fundamental right to his name made an inquiry both into the ECHR and the national constitutions of the Member States. The AG made some interesting comments on the relations between the ECHR, the constitutional traditions of the Member States and the construction of the fundamental rights. On the one hand, Jacobs remarked that the ECHR does not contain any explicit provisions on this matter, whereas Article 18 of the American Convention on human rights and the ICCPR (with a wide interpretation) does. However, the AG considered that such a gap is *"repaired"* by the existence of the right in the national constitutions of the Member States and then embarked on a comparative analysis of the constitutional requirements in five Member States (Spain, Portugal, Greece, Ireland and Italy). Jacobs pinpointed that the Italian provision is the only one to expressly prohibit the deprivation of names and asserted that protection of personal identity can be deduced from all the constitutions. Consequently such a protection should be elevated to the rank of fundamental right in the EC legal order. This conclusion, according to the AG, could be drawn despite the non-explicit existence of such a right in the ECHR and an extensive interpretation of Article 8

extent, a particular standard of protection. It is necessary, now, to analyse the standard of protection offered by the ECJ.

1.3. EVALUATIVE APPROACH AND STANDARD OF PROTECTION

This section will attempt to determine, in the light of the case law and AG Opinions, the approach followed by the ECJ in elaborating a general principle. It is argued that in holding a principle to be common to the Member States, the Court looks to general trends, common underlying principles, in other words, use an evaluative approach. Generally, three approaches may be used, i.e. minimalist (the laws of the Member States must be similar in order to determine a general principle of law), maximalist (the most protective law towards individuals of one (or few) Member State is chosen), and evaluative (a general trend must be discerned) by the ECJ in order to formulate general principles. Notably, the standard of protection is closely linked to the approach followed by the Court in elaborating the general principles. While minimalist approach leads to a low standard of protection, maximalist approach offers the highest. It remains to determine the standard of protection afforded by the evaluative approach. Firstly, this section will describe the minimalist and maximalist approach (1.3.1). Secondly, it concentrates on the evaluative approach (1.3.2). Thirdly, it assesses the standard of protection in the light of German constitutional jurisprudence (highest national standard) and provides some concluding remarks (1.3.3).

1.3.1. Minimalist and Maximalist Approaches

Already in the early 1960s, the doctrine attempted to determine the comparative method followed by the Court regarding the formulation of general principles. In that respect, Heldrich advocated for a minimum standard, under which the Court had to determine a common agreement between the laws of the six Member States and find a concordance between the laws of all them. Grisoli and Lorenz criticized with virulence such a *metodo statistico-matematico*.[381] This terminology is, in my view, very close to the expression used in the seminal Opinion of AG Lagrange in *Hoogovens*.[382] The AG made reference to *une sorte de moyenne plus ou moins arithmétique entre les diverses solutions nationales*, which he then turns to refute and adopts, instead, "the most progressive solution". Scheuner also stressed that such an approach was too stringent and not justified and suggested, instead, "a uniform and commonly acceptable standard".[383] In a similar vein, Zuleeg considered

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ECHR. The Opinion is not followed by the ECJ. *See infra Chapter 6.2.3.* AG Jacobs in *Garcia Avello* [2003] (Right to a name recognized in the light of the citizenship provision).

[381] Lorenz, "General Principles of Law: Their Elaboration in the Court of Justice of the European Communities", AJCL 1964, pp. 1-29.

[382] Case 14/61 *Hoogovens v. HA* [1962] ECR 253.

[383] Scheuner, "Fundamental Rights in European Community Law and in National Constitutional Law", CMLRev. 1975, pp. 171 *et seq.*, at pp. 184-185. *Uniform*: "It is not possible to transfer definite formulations or details from the one or the other national order,

that a minimal standard cannot be applied to the protection of human rights and identified, consequently, that the laws of certain Member States may offer adequate protection to individuals. And, in exceptional circumstances, the law of one single Member State may serve as a source for that protection.[384] This approach is known as the maximalist approach.

Notably, AG Warner and Schermers both advocated such an approach. AG Warner in *IRCA* considered the unique (in comparison to the constitutions of the Member States) and implicit (not written) constitutional character of the principle of legal certainty in Germany.[385] Warner stated that,

> "[t]he same rule must in my opinion apply in Community law. The Court has already said in general terms that it cannot uphold measures incompatible with fundamental rights recognized and protected by the constitutions of the Member States [Citing Nold]). I would be inclined to refine on this and to say that a fundamental right recognized and protected by the constitution of any Member State must be recognized and protected also in Community law. The reason lies in the fact that, as often been held by the Court [Citing Costa v ENEL], Community law owes its very existence to a partial transfer of sovereignty by each of the Member States to the Community. No Member State can, in my opinion, be held to have included in that transfer power for the Community to legislate infringements of rights protected by its own constitution. To hold otherwise would involve attributing to a Member State the capacity, when ratifying the Treaty, to flout its own constitution, which seems to me impossible".[386]

The pivotal point of the Advocate General is founded on the acceptance of the transfer of power by the Member States. Indeed, it is argued that the Member States may not accept this transfer if the Community legislation encroaches upon a national constitutional guarantee without any available review.

A similar type of maximalist reasoning is followed by Schermers. He emphasized that,

> "[t]he Court of Justice accepts characteristics which the Member States have in common as also belonging to the Community, whenever it refers to general principles of law. Where one Member State considers a particular principle so

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not even in a case where an applicant belongs to that system. The general principles observed in the Community must be uniform". *Common standard*: "It must lead to a result acceptable in all the Member States. Its objects must be to find the rules best suited to express a common traditions and compatible with the structure of the Community". This approach reflects the evaluative approach. *See infra*, Zuleeg, who criticized the application of minimal standards.

[384] Zuleeg, "Fundamental Rights and the Law of the European Community", CMLRev.1971, at pp. 450-451.

[385] AG Warner in Case 7/76 *IRCA* [1976] ECR 1213**,** "[i]n the sphere of civil law there is no express provision in the constitution of any Member State putting a limit on the extent to which legislation may be retroactive. The Budesverfassungsgericht has however held it to be implicit in the German Constitution that a statute may not operate retroactively so as to defeat legitimate expectations. In so far as it purports so to do it will be held invalid (*see* for instance *BVerfGE*, Bd 30, 367, 385–386)", at pp. 1236-1237.

[386] *Ibid,* at p. 1237.

> important that it incorporates it in its constitution, one may safely submit that that principle forms party of the European cultural heritage. Even though other States may not give it any constitutional rank they will normally accept it, also as a principle of law. To be recognized as a principle of Community law the principle does not necessarily have to be incorporated in the written legal system of each Member State . . . In practice, this must come close to accepting that a Community act is void whenever it infringes a national constitutional requirement". [387]

Schermers assimilates human rights to a type of *jus cogens* and analyses the potential confrontation between the constitution of a Member State and Community law. The *Fragd* decision of the Italian constitutional court is taken as an illustration. Schermers considered that if the national fundamental rights provision prevails over the Community measures, it leads to problems of uniformity of application regarding Community law. However, it is contended that legal certainty would not be endangered as *"the most important legal certainty is the certainty of human rights"*. [388] The question at stake is *"are there higher rules of law (national) which may require a national court not to apply rules of Community law?"* [389] The reasoning of Schermers is inspired from the German legal doctrine that is based on Article 24 and 79 of the German Constitution. Article 24 permits the transfer of sovereignty to international organizations provided that the human rights protection is not diminished. Article 79 prohibits any modification of the Constitution if such modification alters the standard of human rights protection. The approach advocated by Schermers appears, to a certain extent, less radical than AG Warner's approach. Indeed, the author considered that the fundamental rights recognized in the constitution of one particular Member State must be recognised as a fundamental principle of Community law unless it can be proved that this fundamental right is contrary to one of the other domestic legal orders.[390]

More recently, Besselink argued for a "universalised maximum standard". [391] Accordingly, he proposed to adopt the highest national standard at the Community level in concrete cases.[392] Weiler has analyzed profoundly what he calls *"the*

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[387] Schermers, "The European Community Bound by Fundamental Human Rights", CMLRev. 1990, pp. 249 *et seq.*, at pp. 254-255.
[388] Schermers, "The Scales in Balance: National Constitutional Court v. Court of Justice", CMLRev. 1990, pp. 97 *et seq.*, at p. 103.
[389] *Ibid*., Schermers, at p. 97.
[390] Schermers, "Judicial Protection in the European Communities", 1979, 2nd edition, at p. 29.
[391] Besselink, "Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union" CMLRev. 1998, pp. 629-680. The author described three types of situation, i.e. the pluralist standard, the local maximum standard and the universalized standard. The pluralist approach considers that the Community standard of protection is adequate There is no question of maximum or minimum standard since the Community legal order is autonomous (*Ibid*., at p. 667). The local maximum approach that permit to supplement the alleged Community minimum standard with a higher standard at the domestic level (*ibid*., at p. 675).
[392] *Ibid.,* at pp. 670-674.

conundrum of high and low standard".[393] Taking the right to property (*Hauer* case) and the right to life (*Grogan* case) as practical examples, he advocates for a powerful rejection of the maximalist standard articulated around two central ideas.[394]

First, it is argued that the maximalist approach entails the risk of establishing the dominance of one particular Member State. Indeed, such a choice amounts to the imposition of the highest standard embodied in the constitution of one Member State on the rest of the Member States. In a similar vein, De Witte has considered that is not the proper role of the ECJ to rely on the maximalist standard of protection, but to be inspired by the common features of the constitutions of the Member States. Therefore, the ECJ, must act with self-restraint in shaping fundamental rights and, also, be extremely aware that the constitutional norms represent the aggregate of the societal values espoused by a specific Member State. The choice of a maximalist approach appears to favour a specific country and the author does not see why this should be the case.[395] Furthermore, Weiler has emphasised that the ECJ categorically rejects the maximum standard of protection.[396] Such an assertion is based on the paragraph 14 of the *Hauer* judgment, where the ECJ decided that:

> ". . . The introduction of special criteria for assessment from the legislation or constitutional law of *a particular Member State* would, by damaging the substantive unity and efficacy of Community law, *lead inevitably to the destruction of the unity of the Common Market and the jeopardizing of the cohesion of the Community*".

The same approach may also be deduced from the judgment in *Internationale Handelsgesellschaft* and, particularly, from the Opinion of AG Dutheillet De Lamothe regarding the sources of the principle of proportionality.[397] What is more, the *Grogan* case offers a perfect illustration of the necessity to reject the maximalist approach.[398] Whereas, Coppel and O'Neill complained that neither the ECJ, nor the AG followed the maximalist approach advocated by AG Warner in *IRCA*[399] and consequently should have recognised the right to life of the unborn, Weiler forcefully demonstrates that the maximalist approach cannot be logically upheld.

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[393] Weiler, "The Jurisprudence of Human Rights in the European Union: Integration and Disintegration, Values and Processes", http:www.jeanmonnetprogram.org/papers/96/960205.

[394] Besselink*, supra n.391*. This approach is described by Besselink as the pluralist approach.

[395] De Witte, "The Past and Future Role of the ECJ in the Protection of Human Rights", in Alston, *The EU and Human Rights*, 1999, at pp. 881-882. De Witte compares Germany and Sweden and asserts that the maximalist approach would be favourising Germany. This statement is right though not applicable to transparency (which is constitutionally protected in Sweden while not in Germany).

[396] Weiler, "The Jurisprudence of Human Rights in the European Union: Integration and Disintegration, Values and Processes", http:www.jeanmonnetprogram.org/papers/96/960208 and 960212.

[397] *Supra Chapter 1.2.1 (b).*

[398] *See also*, Weiler and Lockhart, "Taking Rights Seriously: The European Court and Its Fundamental Rights Jurisprudence", CMLRev.1995, at pp. 597-599.

[399] Coppel and O'Neill, "The European Court of Justice: Taking Human Rights Seriously?", CMLRev. 1992, pp. 669 *et seq.*, at p. 686.

Using the example of the constitutional existence of a woman's right to autonomy over her body (including a right to aborting under certain circumstances),[400] he highlights the impossible task for the judge to select one of the standards (both being maximalist). Indeed, the right to life of the unborn enshrines a high standard of values and morality, conflicting with the freedom of choice of the woman. Consequently, to elaborate a "maximal" right to life of the unborn amounts to a minimal approach to protection of the woman's right to self-determination.

The dilemma embodied in the *Grogan* case is also underlined, in another perspective, by AG Van Gerven. According to the AG, the case raises not only the problem between an economic freedom and a fundamental right[401], but also a clash between two human rights, namely the freedom of expression and the right to life of the unborn: [402]

> "…The question is all the more delicate when it is a matter, as in this case, of assessing two fundamental rights which are as sensitive as, on the one hand, freedom of expression, whose fundamental nature in a democratic society is stressed by the European Court of Human Rights, and, on the other, the right to life, as it applied to unborn life in the Member State in question on the basis of a fundamental ethical value judgment enshrined in the Constitution".[403]

This is also particularly true in relation to principles stemming directly and uniquely from German law, invoked before the ECJ. The methodology followed by the ECJ in those instances constitutes interesting counter-arguments to the theory of maximum standard formulated by AG Warner in the *IRCA* case. In *Chemiefarma*, AG Gand observed that *"[t]he rule relied upon exists in Germany, it is not known generally in the other Member States and it is thus impossible to consider it as a general principle"*. [404] Similarly in *Balkan Import-Export*[405] and *Werhahn* v.

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[400] This is not without remembering the approach of the French Constitutional Council in relation to abortion and the concept of *infans conceptus*.

[401] *See* Phelan, "Right to life of the Unborn v. Promotion of Trade in Services: The European Court of Justice and the Normative Shaping of the European Union", MLR 1992, pp. 670 *et seq.*, at p. 686. In relation to the conflict between a market freedonm and the fundamental right to life, "where a human right and an economic objective conflict, it is the right, not the objective, which is modified to complement fundamental economic principles".

[402] AG Van Gerven in *Grogan*, para. 34, "[i]t is a question here of balancing two fundamental rights, on the one hand the right to life as defined and declared to be applicable to unborn life by a Member State, and on the other the freedom of expression, which is one of the general principles of Community law on the basis of the constitutional traditions of the Member States and the European and international treaties and declarations on fundamental rights, in particular Article 10 ECHR".

[403] *Ibid*.

[404] AG Gand in Case 41/69 *ACF Chemiefarma* v. *Commission* [1970] ECR 661 at p. 713.

[405] AG Roemer in Case 5/73 *Balkan Import-Export* [1973] ECR 1091 at p. 1130. Concerning a principle of German Constitutional law, Article 80 of the Basic law relating to the grant of power by the legislator, which must be expressed clearly and precisely, and the notion of separation of power.

Council,[406] AG Roemer rejected the elaboration of general principles inspired solely by German law.

Second, it is contended that a recognition of the maximalist approach results in a policy of limited government. As Weiler puts it, *"to say, as we did in our hypothetical case based on Hauer that Germany has the highest level of protection of private property among the Member States is also to say that Germany, in this area, places the largest number of restrictions to act in the general interest"*.[407] Subsequently, the transplantation of the German standard into Community law may lead to the effect of implementing a theory of restricted governance. While admitting that in the opinions of some, this might be a fine solution, Weiler fears that such an option might lead to an unworkable situation. It is irrefutable that an extremely high standard of protection (favouring the individual *vis-à-vis* the general interest) may lead to an impossible situation of governance. When does rupture occur? One must admit that this is rather difficult to predict. It appears, indeed, impossible to fix a clear borderline between the highest standard that does not endanger the workable situation and the standard that crosses the Rubicon and will thus, render the situation unworkable. Moreover, one should not overlook the fact that the recognition of a substantive right does not *per se* affect the standard of governance. So, it is essential to distinguish between the elaboration of a fundamental right and the subsequent application of such a right by the European judge (who can allow or not a very wide margin of appreciation to the institutions in the implementation of the Community objectives).

At the end of the day, it may be said that the maximalist approach is not used in the elaboration of fundamental rights. As stressed previously, such an approach was expressly rejected by the ECJ in *Internationale Handelsgesellschaft* and *Hauer*. Thus, it seems impossible to rely on a principle inspired from one particular national system, though such a principle may afford a maximal degree of protection for individuals. A further delicate question, but one not to be avoided is whether there is a place for a maximalist approach concerning administrative general principles. As seen earlier, proportionality and equality were held to be common to the Member States and were also enshrined explicitly in the EC Treaty.

To my knowledge, in the field of administrative general principles, the principle of legitimate expectations is the only example, which might fall under this approach.[408] In that respect, it seems credible to argue, that the ECJ followed a

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[406] AG Roemer in Case 63 and 69/72 *Werhahn* v. *Council* [1973] ECR 1229 at p. 1274. A claim for compensation without culpability arising by reason of an illegal intervention similar to expropriation of property is a principle of German law.

[407] Weiler, "The Jurisprudence of Human Rights in the European Union: Integration and Disintegration, Values and Processes", http:www.jeanmonnetprogram.org/papers/96/960208.

[408] Legitimate expectations has never been described explicitly as a fundamental right by the ECJ in contrast to the principle of equality (*See, contra*, AG in Case C-5/89 *Commission* v. *Germany* [*BUG-Alutecknik*]). The "transparency principle" or access to documents also follows a peculiar mechanism of elaboration that will be studied later on. However, this principle is now enshrined in the EC Treaty after the Treaty of Amsterdam.

maximalist approach, even if the ECJ mentioned French and Belgian jurisprudence (concerning "well-established rights").[409] It is also interesting to note that the principle of legitimate expectations was only defined as a fundamental right in Germany. Rightly, the Court did not refer to the "constitutional traditions common to the Member States" and preferred to create an administrative principle that had, nonetheless, a practical and theoretical constitutional background within German law. Conversely, one may analyse the principle of legitimate expectations as a corollary of the principle of legal certainty. The principle of legal certainty, being common to the Member States, may authorise the ECJ to elaborate a maximalist standard if, and only if, the principle does not conflict with other national principles.[410]

To conclude, it is a mistake to describe the process of elaboration of the general principles as an emanation of the maximalist approach. This approach constitutes a seducing and noble methodology to ensure an effective respect of fundamental rights in the Community, but, it must be stressed that it is not followed by the ECJ. Far from being extremely minimalist or maximalist, the approach of the ECJ to the national law can be characterised as evaluative.[411]

1.3.2. Evaluative Approach

The evaluative approach, being the rule, is limited within the "*framework of the structure and objectives of the Community".* [412] In that regard, it must be noted the

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[409] Conversely, *see*, *supra n.231*, AG Warner in *Commission* v. *Council* [1972]. One might wonder why AG Warner, who took a restrictive position in *Commission* v. *Council* (1972) laid down the basis for a maximalist approach, three years later, in the *IRCA* case (1975). Maybe, the AG, after the ruling of the Court (against his Opinion), interpreted the approach of the Court as maximalist and, seeing a gap for its potential application in the field of fundamental rights, advocated such a seducing theory.

[410] Schermers, *supra n.388.* Arguably, legitimate expectation does not conflict with other national principles due to the general acceptance of the principle of legal certainty in the Community.

[411] *See e.g.*, Lorenz, "General Principles of Law: Their Elaboration in the Court of Justice of the European Communities", AJCL 1964, 1-29, at p. 9. According to Lorenz, *"[i]f on the one hand it is not necessary, either in international law or in Community law, that all states concerned agree on a certain principle of law, it is, on the other hand, equally true that such a principle must not merely exist in the law of one country or only in a minority of legal systems".*

[412] Case 11/70, *Internationale Handelsgesellschaft* [1970] ECR 1125, at p. 1134. *See e.g.*, Zuleeg, "Fundamental Rights and the Law of the European Community", CMLRev. 1971, pp. 446, *et seq.* at p. 451, Similarly to Lorenz and Scheuner, Zuleeg maintained that "the protection of fundamental rights, however, belongs to general principles which are to be safeguarded by the Court of Justice. This guarantee must be determined by the common constitutional traditions of the Member States on the condition that theses are reconcilable with the structure and the goals of the Community", Zampini, "La Cour de justice des Communautés européennes, guardienne des droits fondamentaux dans le cadre du droit communautaire", RTDE 1999, 659, at p. 688. According to the author, "se référer aux traités

ECJ cannot elaborate a principle, which possibly undermines the effectiveness[413] or uniformity[414] of the European legal order.

It is worth recalling that the gap-filling role of the ECJ is exercised in the light of its teleological (functional) method of interpretation and comparative analysis. In other words, the principle must conform to the objectives and purposes of the Treaty. There is, thus, a very strong linkage between the evaluative approach and the functional (evaluative) approach of comparative law. The evaluative approach appears to be the result of the application of a functional approach to comparative law by the Court. Interestingly, Zweigert and Kötz pinpoint that the principle of functionality is generally recognized as the basic methodological principle of every comparison of laws. The initial question must be focused on a concrete problem and must aim at the method of the solution offered. According to Schwarze, *"the Court has to analyse the different national approach, make a synthesis and find a common principle, which can fit in the European legal order".*[415]

AG Lagrange applied this method in *Hoogovens*. [416] Notably, the AG considered that the case-law of the Court, when it comes to invoking national laws, is not limited to the "common denominator" between the different national solutions. By contrast, *"the most progressive solution"* is chosen in light of the objectives of the Treaties.[417] What is the exact meaning of "the most progressive solution"? Does it mean that the maximalist standard afforded by the law of one particular Member State must be chosen? Or is it the most progressive solution given by the synthesis of the laws of the Member States suiting the objectives of the Community? What has been called the *"functional approach of comparative law"* by Schwarze,[418] is also reflected in the *Algera* case, or in the Opinions of AG Warner in the *Mills* case[419] and AG Slynn in *AM&S*.[420] Equally, in the words of AG Slynn *"[t]he Court has to weigh up and evaluate the particular problem and search*

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internationaux, à la convention EDH, comme aux principes communs aux traditions nationales, ne signifie pas forcément pour la Cour de justice s'aligner sur un niveau minimum ou une moyenne, mais, viser le principe le plus adapté aux spécificités de l'ordre juridique communautaire; ce qui ne signifie pas forcément viser le standard le plus haut".

[413] Joined Cases 46/87 and 227/88 *Hoechst* [1989] ECR 3165.

[414] *Hauer*, *supra n.326.*

[415] Schwarze, "Tendencies Towards a Common Administrative Law", ELR 1991, pp. 3-19, *see also* Schwarze, "The Administrative Law of the Community and the Protection of Human Rights", CMLRev. 1986, pp. 401-417, at p.415.

[416] Case 14/61 *Hoogovens* v. *HA* [1962] ECR 253 at pp. 283-284.

[417] *Ibid*., moreover he goes on to say that the *spirit* has guided the Court hitherto. However, certain limitations exist to the development of the general principles of law, in relation to the structure and objectives of the Treaty. The role of the Court in the comparison of law as been defined as "evaluative" by Schwarze.

[418] Schwarze, *European Administrative Law*, Sweet and Maxwell, 1992, at pp. 83-84.

[419] Case 110/75 *Mills* v. *European Investment Bank* [1976] ECR 955.

[420] AG Slynn in Case 155/79 *AM&S* v. Commission [1982] ECR 1575.

for the best and most appropriate solution".[421] The Court in AM&S, using expressly teleological interpretation and comparative methodology[422] as a help for the interpretation of Regulation 17, formulated a principle of confidentiality, which could fit the European legal order. In that sense, Usher vigorously stresses that, "the concept of legal professional privilege accepted as a general principle of Community law is also categorised by the European Court as an aspect of the rights of the defence, and shows very clearly that general principles as adapted into EC law may not be identical to the national principles on which they are based".[423]

It seems clear that the interpretation of "best and most appropriate solution", like "the most progressive solution", is thus evaluative and not maximalist.[424] According to Schwarze,

> "[t]he evaluative comparative method, which has regard to the structure and objectives of the Community, plays a considerably greater role in the extrapolation of administrative law principles before the Court of Justice than would appear simply from the decisions of the Court themselves. The Court of Justice may simply rely upon the conclusions of the Advocates General . . . [citing five Opinions] . . . Moreover, The Court of Justice has access to a Documentation Service, one of the most important tasks of which is the preparation of comparative reports".[425]

From the foregoing discussion, it is clear that the evaluative approach is also applied when the Court interprets procedural principles and fundamental rights.

After having defined the evaluative approach, it is necessary to define the standard of protection it offers. Arguably, the evaluative approach appears flexible and therefore leads to flexible standards. To put it differently, the evaluative approach may lean towards either minimalist or maximalist protection. The *Orkem* case offers an interesting illustration of the evaluative approach leaning towards maximalist protection. AG Darmon, in *Orkem*, referred to the functional methodology of AG Slynn in *AM&S*, [426] and concluded that the principle against

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[421] *Ibid*., AG Slynn in *AM&S*, at p. 1649. AG Slynn made direct references to AG Lagrange in *Hoogovens v. High Authority*.

[422] *Ibid*., *AM&S* para. 27, "[i]n view, of all these factors, it must be therefore be concluded that although regulation No 17, and in particular Article 14 thereof, interpreted in the light of its wording, structure and aims, and having regard to the laws of the Member States ".

[423] Usher, *General Principles of EC Law*, Longman, 1998, at p. 80.

[424] The maximalist argument might be accepted if it does not undermine the effectivity of the system (*see Orkem*). However, such a type of formulation leads to a dictate of the maximalist State. *See Infra* for a discussion on this issue.

[425] Schwarze, *European Administrative Law*, *supra n.21,* at pp. 74-75.

[426] AG Darmon in *Orkem*, *supra n.100,* at p. 3332, para. 118, "[h]e took first care to draw attention to the fact that, despite the inevitable differences between the Member States, a principle whereby relations between lawyers and client were confidential could be identified and classified as a rule of Community law. Then, in a second phase, he endeavored to clarify how that principle applied and the extent to which it applied in the Community law order". Case 155/79 *AM&S* [1982] ECR at p. 1654, "to achieve the best and most appropriate solution, not only in the light of the practice of the Member Sates, but the interests of the Community and individuals". *See also* AG Lagrange in the *Hoogovens* case.

self-incrimination existed in criminal law,[427] but not in administrative proceedings. AG Darmon observed that *"an analysis of national laws has indeed shown that there is a common principle enshrining the right not to give evidence against oneself. But it has also shown that that principle, becomes progressively less common as one moves away from the area of what I shall call classical criminal procedure"*.[428] The Court seemed to accept the analysis of the AG by stating that *"[i]n general, the laws of the Member States grant the right not to give evidence against oneself only to natural persons charged with an offence in criminal proceedings. A comparative analysis of national law does not therefore indicate the existence of such a principle, common to the laws of the Member States, which may be relied upon by legal persons in relation to infringement in the economic sphere, in particular infringements of competition law"* .[429]

As for the minimalist protection, the *Hoechst* case is of interest.[430] In this case the ECJ undertook a comparative analysis (not detailed) of the laws of the Member States.[431] It concluded that in all legal systems of the Member States, any intervention by the public authorities must have a legal basis. Despite a certain degree of divergences, those systems laid down protection against arbitrary or disproportionate interventions. The Court recognised the need of protection of activities in the private sphere and considered that the interventions must have a legal basis. This protection was elevated to the rank of a general principle.[432] In casu, even if the Court ruled that the protection of man's personal freedom is not extended to business premises, the individuals have a right to be defended against arbitrary or disproportionate interventions by public authorities in the sphere of their professional competence. The Court in Hoechst had thus chosen the lowest common denominator, considering that the protection of the inviolability did not extend to the business premises. [433] The recognition of a general principle protecting business

[427] *Ibid*., at p. 3331, para. 111.
[428] *Ibid*., at p. 3327, para. 98.
[429] *Ibid*., *Orkem*, para. 29.
[430] *Supra n.413*.
[431] *Ibid*., *Hoechst*, para. 19.
[432] *Ibid*., "[n]one the less, in all the legal systems of the Member States, any intervention by the public authorities in the sphere of private activities of any person, whether natural or legal, must have a legal basis and be justified on the grounds laid down by law, and consequently, those systems provide, albeit in different forms, protection against arbitrary or disproportionate intervention. The need for such protection must be recognized as a general principle of Community law". *See also Dow Benelux*, para. 30, *Dow Chemical Ibérica*, para. 16.
[433] *Ibid*., *Hoechst* para. 17, "[s]ince the applicant has also relied on the requirement stemming from the fundamental right to the inviolability of the home, it should be observed that, although the existence of such a right must be recognized in the Community legal order as a principle common to the laws of the Member States in regard to the private dwellings of natural persons, the same is not true in regard to undertakings, because there are *not inconsiderable divergences between the legal systems of the Member States in regard to the*

premises could have undermined the powers of the Commission and, thus, the effectivity of the Community legal order.

The foregoing analysis prompts two conclusions. First, it seems safe to say that the evaluative approach reflects, to a certain extent, the two faces of the ECJ. In other words, the ECJ protects individual rights through the elaboration of general principles. However, the Court is always extremely careful to respect the objectives of the Community (*Internationale Handelsgesellschaft* and *AM&S*) and not to undermine the effectiveness (*Hoechst*) and uniformity (*Internationale Handelsgesellschaft* and *Hauer*) of the Community legal order. Secondly, it may be said that the standard of protection afforded by the evaluative approach is flexible, i.e. it may fluctuate between minimalist and maximalist protection. The principle elaborated (and thus the standard of protection it embodies) through the evaluative approach, must be adapted to the specificity of the European legal order. Nevertheless, the Community judicature, arguably, attempts to find the most progressive solution. It is contended that, though flexible, this standard of protection is strong. This assertion is verified by the German jurisprudence.

1.3.3. Appraisal of the Standard by the German Constitutional Court and Conclusion.

a) Appraisal of the Standard by the German Constitutional Court

The point of departure when analysing the jurisprudence of the ECJ must be the inquiry into the reactions of the German judge towards the fundamental rights *lacunae* in the European legal order.[434] As is well known, in the aftermath of the Second World War, the standard of fundamental rights protection in Germany was high.[435] The problem, from the national point of view, arose indirectly through the idea of supremacy of Community law. Indeed, according to the ECJ's jurisprudence, a secondary EC legislation might infringe a basic right and still prevail over constitutional provisions. The assertion, in *Internationale Handelsgesellschaft*, that Community law is superior to the national law of the Member States - even their constitutional law - was the trigger of the national court's rebellion, which reacted against the evident lack of human rights within EC law.[436] Notably, the possibility to control the compatibility of Community law in the light of fundamental rights

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nature and degree of protection afforded to business premises against intervention by the public authorities". (italics added).

[434] Hartley, "The Foundations of European Community Law", Oxford, 1998, 4th edition, at pp. 233-241. *See also*, Frowein, "Solange II", CMLRev.1988, pp. 201 *et seq.,* Roth, "The Application of Community Law in West Germany: 1980-1990", CMLRev.1991, pp. 137 *et seq*.

[435] *Costa v. Enel, supra n.95.*

[436] *See* for an overview of the debate, Dallen, "An Overview of European Community Protection of Human Rights with some Special References to the UK", CMLRev. 1990, pp. 766-772, De Witte, *supra n.319,* in *The EU and Human Rights,* at pp. 863-864.

guaranteed by national constitutional law was already invoked by the Federal Constitutional Court (FCC) in 1967.[437]

The ECJ, as seems to follow from the *Internationale Handelsgesellschaft* or the *Hauer* cases, was, thus, concerned by the fact that the national courts may review EC law in the light of their own constitutional law. In the words of the Court, "recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into questions".[438]

The German doctrine assessed the result of the FCC jurisprudence as a booster to the human rights elaborated by the ECJ. However, according to Mancini, *"[i]t would be an exaggeration to say that the European Court was bulldozed into protecting fundamental rights by rebellious national courts. It is, however, clear that the Court did not embark upon that course in a spontaneous binge of judicial activism".*[439] It seems to me rather clear that reactions of the national courts influenced to a large extent the ECJ jurisprudence. The *modus operandi* resembled, certainly, more a cooperative dialogue[440] between the national and European Courts than a tidal wave orchestrated by the domestic judicature. Before entering into detail as to the German case-law, it is worth remarking that the Italian Constitutional Court also reacted (to a lesser extent) to the low fundamental rights standard. Indeed, the Corte Costituzionale in *Frontini and Pozzani* (1973) accepted the supremacy of Community law with the reservation that Community institutions may never violate one of the fundamental principles of the Italian Constitution. [441] The national judges reiterated their reservation in the *Granital* case (1984),[442] when they renounced their privilege to declare the national constitutional law incompatible with Community law in the light of the *Simmenthal II* jurisprudence (1978).

As to the German FCC, in *Internationale Handelsgesellschaft* (1974), [443] it declared that "as long as" (*Solange I*) Community law had not developed a standard of fundamental rights protection equivalent to the *Grundgesetz,* the German

[437] *Bundesverfassungsgericht*, 18th October 1967, *BVerfGE 22*, 233.
[438] *Internationale Handelsgesellschaft*, *supra n.97,* para. 3.
[439] Mancini, "Democracy and the European Court of Justice", in "Democracy and Constitutionalism in the EU", 2000, pp. 31-50, at p. 45.
[440] "A dialogue (although indirect) between the national court and the ECJ", Weatherill, "The Modern Role of the Court in Constitutional Law" in *Law and Integration in the European Union*, Oxford, 1995, at pp. 210-221.
[441] *Corte Costituzionale*, 27 December 1973, No 183, in 18 Giur.cost (1973) 2401, *see also* in 10 RTDE 1974, pp. 148 *et seq.*
[442] *Corte Costituzionale*, 8 June 1984, No 170, in 29 Giur.cost (1984) 1098, *see also* in 21 RTDE 1985, pp. 414 *et seq.*
[443] *Bundesverfassungsgericht,* 29 May 1974, BVerfGE 37, 271 at p. 280.

constitutional provisions would prevail over Community law. However, the FCC did not invalidate the Community act by having recourse to the national constitutional provisions. Also, it must be noted that the *Nold* case of the ECJ, was given and transmitted to the FCC less than two weeks before the ruling in *Solange I*. Consequently, it may be said that the ECJ seemed to be extremely preoccupied by the reactions of the national court. In other words, these reactions had to be taken seriously. Arguably, in the wake of the FCC decision, the ECJ started to elaborate an "unwritten Bill of Rights" founded on the constitutional traditions common to the Member States, but also the international treaties on Human Rights (particularly the ECHR as will be stressed further on).

At the end of the day, the reaction of the Karlsruhe judges was a harsh but positive one. At the Community level, one might consider that a national reaction lead to either positive or negative effects. In that sense, the positive effect largely depends on how the Community institutions (*in casu* the Court) are able to answer and absorb the national backlash. The Community response to the national laments may be deemed effective and forcefully persuasive. Twelve years after the *Solange I* decision, which might have imperilled the very foundations of the European legal order, i.e. by undermining seriously the principle of supremacy, the FCC gave a clear sign of relaxation.

The German judges in *Wünsche Handelsgesellschaft* (1986)[444] stated that *"as long as"* the level of fundamental rights protection in the Community legal order remains adequate to the German standard, there is no need to examine the compatibility of the Community legislation in the light of the *Grundgesetz* (*Solange II*). The FCC, in *Solange II*, undertook a profound analysis of the ECJ jurisprudence in the human rights field and pointed out the various principles elaborated by the European Court.[445] The German court came to the conclusion that the ECJ increased and stiffened the level of human rights protection.[446] The FCC, thus, recognized that the level of fundamental protection was sufficiently ensured. Nevertheless, the German Basic Law remains like a Damocles sword over the European judges, who have to furnish a high standard of protection, i.e., a standard *quasi*-similar or at least not incompatible with the *Grundgesetz*.

The "spectre" of the lack of fundamental rights' protection resurrected in the wake of the Maastricht Treaty. The *Maastricht decision* of the FCC, also known as the *Brunner* case, [447] exemplifies the persistent interest of the German constitutional court regarding the issue of basic rights. This decision, however, did not focus

[444] *Bundesverfassungsgericht,* 22 October 1986, *Wünsche Handelsgesellschaft*, BVerfGE 73, 339 at p. 386. *See also* in 23 RTDE 1987, pp. 537 *et seq.*

[445] The FCC referred to the right to property, the right to freedom of activity, freedom of association, the principle of equality, the protection of the family, freedom of religion, the principle of proportionality, the principle of legal certainty, non-retroactivity, *non bis in idem*, the right to a fair trail and the right to an effective judicial protection.

[446] *Wünsche Handelsgesellschaft*, *supra n.444,* BVerfGE 73, 339 at pp. 379-382.

[447] *Bundesverfassungsgericht,* 12 October 1993, *Brunner,* BVerfGE 89, 155, in 1 CMLR [1994] pp. 57-109.

essentially on the human rights problematic, but also concerned the question of legislative competence.[448] Boom has undertaken a detailed comparison of the *Maastricht* decision with the decision of the United States Supreme Court (USSC) in *Martin* v. *Hunter* (1816)[449], where the Supreme Court of Virginia refused to follow the mandate of the USSC, considering that the USSC had exceeded its jurisdiction and acted *ultra vires*.[450] According to the same author, *"[t]he Maastricht decision is the latest and strongest, since Solange I, challenge to the ECJ. It is this steady opposition that leads to Germany's appellation of the Virginia of Europe"*.[451]
More importantly, the FCC, in recital 13 of the *Maastricht* case, stated that,

> "[t]he Federal Constitutional Court by its jurisdiction guarantees (Citing expressly Solange I and II) that an effective protection of basic rights for the inhabitants of Germany will also generally be maintained as against the sovereign powers of the Communities and will be accorded the same respect as the protection of basic rights required unconditionally by the Constitution . . . Acts done under a special power, separate from national powers of the Member States, exercised by a supra-national organization also affects the holder of basic rights in Germany. They therefore affect the guarantees of the Constitution and the duties of the constitutional Court, the object of which is the protection of constitutional rights in Germany . . . However, the Court exercises its jurisdiction on the applicability of secondary Community legislation in Germany in a relationship of cooperation with the European Court, under which that Court guarantees protection of basic rights in any particular case for the whole area of the European Communities, and the Constitutional Court can therefore restrict itself to a general guarantee of the constitutional standard that cannot be dispensed with".[452]

The *Maastricht* case may be interpreted as a mere restatement of the *Solange II* case. In other words, the German court does not exercise its jurisdiction regarding fundamental rights so long as the Community protection is essentially equivalent to

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[448] Kumm, "Who is the Final Arbiter of Constitutionality in Europe?: Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court of Justice", pp. 351-386. *See also* Schmid, "The Neglected Conciliation Approach to the Final Arbiter Conflict: A Critical Comment on Kumm", CMLRev 1999, pp. 509-514. For a critical analysis of the Maastricht Decison, *see* Weiler, "The State 'über alles': Demos, Telos and the German Maastricht Decision", 1995, www.law.harvard.edu, *see also*, Kokott, "German Constitutional Jurisprudence and European Integration II", EPL 1996, 413. Herdegen, "Maastricht and the Constitutional Court: constitutional restraints for an Ever Closer Union", CMLRev. 1994, pp. 235 *et seq*., Everling, "The Maastricht Judgment of the German Federal Constitutional Court and its Significance for the Development of the European Union", YEL 1994, Wieland, "Germany in the European Union - The Maastricht Decision of the Bundesverfassungsgericht", EJIL 1994, pp. 259 *et seq.*.
[449] *Martin* v. *Hunter's Lessee*, 14 U.S. 304 (1816).
[450] Boom, "The European Union after the Maastricht Decision: Is Germany the 'Virginia of Europe", 1995, in www.law. harvard.edu, pp. 8-37.
[451] *Ibid*., at p. 37.
[452] *See, supra n.447, CMLR* [1994], at p. 79. The FCC has made an explicit reference to *Solange II* in fn. 16.

the German Constitution. Another interpretation might be that the *Solange II* formula (no jurisdiction as long as..) is replaced in order to become jurisdiction exercised in a relationship of co-operation with the ECJ in the field of legislative competence. One may, subsequently, argue that the "jurisdictional extension could conceivably lead, despite the Court's affirmation of the Solange II formula, to instances where the Federal Constitutional Court challenges individual decisions of the ECJ, instead of merely safeguarding a general level of fundamental rights protection and stepping in only when that level fell below German requirements".[453] Limbach (the President of the FCC) pointed out that the possibility to control the acts of the European Community stemming from the *Solange II* does not constitute a danger to Luxembourg jurisprudence. The President of the FCC considered that such a reading of the decision was erroneous and not conform to Article 23 of the Fundamental Law.[454] This Article allows a difference of standard between Community and German law and, thus, authorizes a lower level of fundamental rights protection by the Community in certain areas. It would be a sign that all types of public authorities must respect fundamental rights in a modern democratic society.[455] Finally, the respect of the ECJ competence and the idea of cooperation render superfluous the case-by-case control by the national constitutional court acting as a watchdog.[456] This reasoning, particularly concerning the standard, seems to be confirmed by two judgments (*Alcan* and the "*Banana* case") given in 2000 by the ECJ.

As to the first case, a German undertaking (Alcan) obtained a subsidy from the State without notification to the Commission pursuant to Article 88(3) EC. The Commission declared the aid to be incompatible with EC law and ordered the national authorities to repay the aid. The German authorities refused to do so and the ECJ ruled in 1989 that Germany had committed a breach of the Treaty.[457] Subsequently, the government of the Land Rheinland-Pfalz claimed the sum from the undertaking. Alcan maintained that the order of recovery was in breach of the principle of legitimate expectations. The national court of first instance found convincing the appellant's argument and invalidated this order. However, the

[453] Boom, *supra n.450*, at p. 7.
[454] Inserted by the law of the 21 December 1992, BGBI I p. 2086. Article 23 is generally interpreted by the German doctrine as the consecration of *Solange II*. Article 23 of the Fundamental Law corresponds to the consecration of *Solange II* and states that Germany participates to the realisation of an unified Europe by developing a European Union which is bound to respect the democratic principles, judicial, social and federal as well as the principle of subsidiarity and which guarantees a level of protection of fundamental rights *"substantially comparable"* to the German Fundamental law.
[455] Limbach, "Die kooperation der Gerichte in der zukünftigen Grundrechtsarchitektur. Ein Beitrag zur Neubestimmung des Verhätnisses von Bundescerfassungsgericht, Gerichtsof der Europäischen Gemeinshaften und Europäischem Gerichtshof für Menschenrechte", EUGRZ 2000, pp. 417-420, at pp. 419-420. Traduced in French by Grewe, in RTDE 2001.
[456] *Ibid*., at p. 420.
[457] Case 94/87 *Alcan I* [1989] ECR 175.

Federal Administrative Court referred a question for preliminary ruling to the ECJ,[458] which found no breach of the mentioned principle. Finally, Alcan introduced a constitutional claim alleging breaches of Articles 2 (right to freedom) and 14 (right to property) of the Fundamental Law. The appellant also made reference to the *ultra vires* doctrine, according to which the ECJ had exceeded its jurisdiction. The FCC refused to assess the complaint in regard to the breach of fundamental rights and held that the constitutional principle of legitimate expectations was not endangered by the human rights standard established by Community law.[459] Moreover, it considered that the ECJ did not embark upon judge made-law by requiring the reimbursement of the illegal subsidies and consequently did not act *ultra vires*.[460]

As to the *banana* case, which dealt with the Banana Regulation 404/93, German undertakings alleged breaches of Articles 12 and 14 of the Fundamental Law, concerning the right to property, the right to freely exercise a professional activity and the principle of equality.[461] The Administrative Court of Frankfurt asked the FCC, in October 1996, to determine the constitutionality of the Community Regulation. Three and a half years after having received the question, the Constitutional Court unanimously declared the application inadmissible. The Court explicitly relied on the *Solange II* formula and linked it with the *Maastricht* decision.[462] The interesting part of the judgment lies in the interpretation of the

[458] Case C-24/95 *Alcan II* [1997] ECR I-1591.

[459] Hoffmeister, "German Bundesverfassungsgericht: Alcan, Decision of 17 February 2000; Constitutional Review of EC regulation on Bananas, Decision of 7 June 2000", CMLRev.2001, pp. 791 *et seq.*, at p. 793.

[460] *Ibid*., at p. 804. Hoffmeister rephrased the Solange wording as meaning that, "as long as the Bundesverfassungsgericht and the European Court of Justice keep their mutual trust, they will cooperate by respecting the division of sovereignty entrusted by the people in the contemporary Union to their respective States and the Union together".

[461] BVerfGE 102, 147.

[462] Grewe, "Le traité de paix avec la Cour de Luxembourg: L'arrêt de la Cour constitutionnelle allemande du 7 juin 2000 relatif au règlement du marché de la banane", RTDE 2001, pp. 1 *et seq.*, at pp. 11-12. According to the author, "il n'est donc pas question ici d'une compétence de surveillance de la Cour allemande mais d'une harmonisation spontanée du droit sur initiative européenne. Le ton est ainsi donné: il s'agit de prendre au sérieux la jurisprudence européenne et de minimiser ce que la Cour avait déclaré en 1993 quant à sa propre compétence. C'est ainsi que la décision du 7 juin 2000 déclare que l'arrêt de Maastricht se teint aussi à cette irrecevabilité des recours fondés sur l'article 100 LF, même si la démonstration n'en est pas toujours convaincante. L'arrêt rappelle le considérant selon lequel la Cour garantit par sa compétence et en coopération avec la Cour de justice une protection efficace des droits fondamentaux. Il décrit ensuite cette coopération en constatant que l'arrêt Maastricht admet la compétence de la CJCE pour la protection des droits fondamentaux à l'encontre du droit communautaire dérivé; ce qu'omet de mentionner l'arrêt de juin 2000, c'est qu'en 1993, cette compétence n'apparaissait pas comme un monopole de la CJCE. L'arrêt conclut par une reprise pure et simple de Solange II qu'il met dans la bouche de l'arrêt Maastricht . . . On est donc entré ici dans le domaine de la relecture et du toilettage de la jurisprudence Maastricht". Whereas in the *Maastricht* Case, Judge Kirchhof (the reporting judge) underlined the central role of the nation-state and perceived the EU as an

requirements for constitutional complaints regarding secondary Community law. In that respect, the control of constitutionality of secondary Community law, in conformity with Article 100 of the Fundamental Law, is granted only if detailed motivations prove that the Community law measure does not guarantee the minimum level of protection of fundamental rights.[463] Consequently, the applicant must demonstrate that the general human rights standard afforded at the EC level is insufficient in relation to the particular interest. This requires an extensive analysis of the human rights protection afforded by the European institutions. The applicant cannot limit himself to establishing an inconsistency between the European and national level of protection.[464] To put it differently, it is extremely difficult to fulfil the conditions of admissibility.[465]

Finally, it may be said that the evaluative approach affords a high standard of protection. At least, this appears to be the view of the FCC. As is well known, this court is extremely meticulous as to the level of fundamental rights protection in the Community law context. However, a *Solange III* decision, that will put an end to the jurisdiction of the FCC in the fundamental rights area, has not come yet. It might happen when the Charter will acquire a binding status.

b)Concluding Remarks

By way of conclusion, I shall touch upon three points. First, it appears that the ECJ has recourse to national administrative, procedural and constitutional law in the elaboration of the general principles of Community law. The use of national law as an indirect source of inspiration leads to the creation of administrative and procedural general principles as well as fundamental rights. It is worth remarking that the Court of Justice has made express references to the laws of the Member States in only a few cases, *e.g. Algera*, *AM&S*, *Hauer*, *Hoechst*, *Orkem* and *Netherlands* v. *Council*. Notably, the Court does not enter into a comprehensive comparative analysis such as in *Algera* or *Hauer* and mentions in broad terms the comparative methodology relied on.[466] The comparative analysis is often reflected in

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association of States, the decision of 2000 does not embed into an analysis of the European and German systems.

[463] *See Banana* case, *supra n.461*, para. 54. *See* Lavranos, *Decisions in International Organizations in the European and Domestic Legal Orders of selected EU Member States*, 2004, PhD submitted 4 June 2004 at the ACIL.

[464] Von Bogdandy, "The European Union as a Human Rights Organization? Human Rights and the Core of the European Union", CMLRev. 2000, 1307-1338, at p. 1323.

[465] It seems plausible to argue that the elaboration (whom initiative was German) and the signature of the Charter of Fundamental Rights in Nice (December 2000) pushed the delivery of the "*Banana* case". (*Ibid*., Grewe at p. 17).

[466] Case 32/62 *Alvis* v. *Council* [1963] ECR 49, at p. 55. In Alvis, the Court observed that *"[a]ccording to a generally accepted principle of administrative law in force in the Member States . . . the administration of these states must allow their servants the opportunity of replying to allegations before any disciplinary decision is taken concerning them"*. *See also*, Case 23/68 *Klomp* [1969] ECR 43. the Court underlined that the principle of *"continuité des*

the AG Opinions, e.g. Dutheillet De Lamothe in *Internationale Handelsgesellschaft* (concerning proportionality) or Roemer in *Westzucker* (concerning legitimate expectations).[467]

However, it is possible to establish the influence of a particular system on the development of general principles and fundamental rights from a perusal of the case-law. In that respect, it may be said that continental law, particularly German law, influenced the elaboration or application of administrative principles, e.g. legitimate expectations and proportionality. The same holds true in connection with the common law and the shaping of the rights of the defense. In a benign vein, the principle of transparency has been influenced by North Western European law. Consequently, it is argued that the extension of the European Community from six to fifteen Member States has effectively increased the sources of law for the ECJ in the search of general principles. In 1973, the accession of common law countries (United Kingdom and Ireland) permitted the Court and the AG to rely on the general concept of natural justice exemplified by the *audi alteram partem* principle. Similarly, the accession of Sweden and Finland in 1995, gave additional constitutional sources as to the elaboration of the principle of access to documents ("transparency"). Going further, it may be contended that the accession in 2004 of ten new Member States will also extend the sources of inspiration. It is worth noting that a comparative analysis might be a perilous exercise in a legal order composed of 25 Member States. Consequently, the direct use of the ECHR or the CFR might constitute interesting alternatives.

Second, in the context of fundamental rights, the ECJ refers, in a general manner, to the constitutional traditions common to the Member States. However, in the early case-law the ECJ seemed reluctant to use national constitutional law. It is only in the seminal *Internationale Handelsgesellschaft* case that the Court ruled that respect for fundamental rights forms an integral part of the general principles of law protected by the Court, such rights being inspired by the constitutional traditions common to the Member States.[468] This statement gives the fundamental rights the status of general principles. However, not all general principles are fundamental rights in the strict sense. In other words, the general principles constitute a wider category, e.g. administrative and procedural principles. Importantly, it should always be kept in mind that it is through the use of general principles as vectors that the EU nowadays boasts a solid and rather wide range of fundamental rights. As seen above, the Court does not systematically embark into a detailed comparative study of the constitutional laws of the Member States in order to discover a general principle. This stance has been severely criticized by parts of the doctrine that considers that a

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structures juridiques" was *"a principle common to the legal orders of the Member States which can be traced back to the Roman empire"*.

[467] Lorenz, "General Principles of Law: Their Elaboration in the Court of Justice of the European Communities", AJCL 1964, at p. 12. According to Lorenz, "[t]he Court, and more often the Advocates-General in their conclusions, have taken occasion to comment upon the method to be applied in filling gaps of Treaty law".

[468] Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

detailed comparative constitutional analysis would have enhanced the legitimacy of the Court's jurisprudence. Even if one may agree with this assertion, one may equally wonder about the very need of a profound comparative analysis when the ECHR is also available as a source of inspiration. To put it differently, the mere reliance on the ECHR enables the ECJ to establish a commonality of traditions, since all the Member States are parties to it. At the end of the day, the references by the Court to the common traditions of the Member States give substance (by providing reasons) to the formulation of fundamental rights and permit to build on their legitimacy.

Third, the approach followed by the Court in its creative process constitutes an evaluative approach. In other words, it discerns a general trend and the Community principle inspired from this general trend must coincide with the objectives of the Community. In that regard, Judge Skouris has considered that, *"it is not the Court's duty to discern, and, as it were, mechanically transpose into the Community legal order, the lowest common denominator of constitutional traditions common to the Member States. The Court draws inspiration from those traditions in order to determine the level of protection appropriate within the Community legal order and for that very reason appreciate them more freely"*.[469]

The evaluative approach has been criticized with virulence by Besselink. Notably, he argues that it leads to the establishment of a common minimum standard and should be abandoned in favour of a maximalist approach.[470] This maximalist approach, as seen previously, constitutes a seducing and noble methodology to ensure respect of fundamental rights in the Community legal system. However, the systematic application of the maximalist approach by the ECJ appears to me untenable in the light of both the objectives of the Treaty and constitutional discrepancies. In addition, the presumption of the evaluative approach leading to a minimal standard of protection cannot be upheld. It is contended that the standard of protection is, in fact, fairly high. This assertion is confirmed by the jurisprudence of the German Federal Constitutional Court.

The approach of the Court appears to me flexible and should remain so. It should not be forgotten that the national law is not the only source of inspiration and, international law, e.g. ECHR, constitutes another dynamic source of inspiration. In recent years, this source of inspiration has tended to acquire an increasing importance. Thus, the following Chapter must study the close relationship between the elaboration of the general principles and international law.

[469] Skouris, "Hearing of Judge Mr. Vassilios Skouris on 17 September 2002", WD No 19, CONV 295/02, pp. 1-9, at p. 8.
[470] Besselink, *supra n.391*, at p. 664.

CHAPTER 2. GENERAL PRINCIPLES AND INTERNATIONAL LAW

Even if undoubtedly international law constitutes a source of inspiration for the ECJ regarding the elaboration of general principles, it is interesting to note that, in the early years, the ECJ did not refer abundantly to international instruments in order to formulate fundamental rights. A change occurred after Opinion 2/94, which held impossible the accession of the Community to the ECHR, but marked the start of the extensive use of the jurisprudence and acceleration in the shaping of fundamental rights. The codification of fundamental rights in the Charter of Fundamental Rights might also represent a new turning point for the jurisprudence. However, the Charter is not yet binding and it seems that it will not lead to the revolution expected. It might be transformed into a tidal wave if it follows a policy of judicialization. It is worth noting that the Constitutional Treaty authorizes the accession to the ECHR. As the EC law standard of human rights should be tested in the light of the European Convention on Human Rights, it is contended that the EC standard is equivalent to the ECHR and may even go further. Thus, the Chapter is divided into three sections. First, it analyses the early case-law and focuses on international instruments as indirect sources. Secondly, it assesses the development of the ECJ case-law in the wake of the Opinion 2/94. Thirdly, it apprehends the current standard of protection.

2.1. INTERNATIONAL INSTRUMENTS AS AN INDIRECT SOURCE FOR GENERAL PRINCIPLES

This section is divided into three parts. First, it will focus on the ECHR as an indirect source (2.1.1). Secondly, it will assess whether other international standards may be used as a source of inspiration (2.1.2). Thirdly, it will point out the special significance of the ECHR (2.1.3). But before explaining the precise role of international instruments as an indirect source, it is necessary to describe the context in which it arises. In that respect, it clearly stems from the case law that EC institutions are bound to respect fundamental rights. In the *Nold* case (1974), the applicant (in a direct action) asserted a violation of some fundamental rights.[471] The restrictions introduced by the new trading rules were alleged to jeopardize the profitability of the undertaking and the free development of its business activity. These rights are related to property rights and protected by the German law and the constitutions of other Member States. The Court ruled in paragraph 13:

> "as the Court has already stated, fundamental rights form an integral part of the general principles of law, the observance it ensures. In safeguarding these rights, the court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures, which are incompatible with fundamental rights recognized and protected by the Constitutions of those Member States. Similarly international treaties for the protection of human rights,

[471] *Nold*, *supra n.391*, at p. 507, paras. 12-13.

> on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within *the framework of Community law*".[472]

Thus, in order to elaborate fundamental rights, the Court bound itself by two specific sources, i.e. the constitutions of the Member States and international treaties.[473] It should be noted that the language of paragraph 13 is paradoxical. In fact, the Court used both imperative ("the Court is bound . . .") and facultative language ("to draw inspirations . . .").[474] Moreover, the Court made reference to "the international treaties . . . on which the Member States have collaborated". The use of such wording was due to the fact that France was in the process of ratifying the ECHR. Interestingly, while France ratified the European Convention on Human Rights on 3 May 1974,[475] the judgment of the ECJ in *Nold* was given 11 days afterwards, on 14 May 1974, i.e. 15 days before the *Solange I* decision. The judgment was transmitted to the Federal Constitutional Court with, arguably, the hope to appease the expected white hot anger of the Karlsruhe judges. Finally, the ECJ stressed that the fundamental rights at issue were subject to certain limitations required to protect the public interest.[476] These rights appear derogative and, thus, similar to the ECHR rights that are subject to the doctrine of margin of appreciation.[477] According to

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[472] *Ibid*., para. 13.

[473] It will be pointed out, in the aftermath, that the Court will extract more and more from the second requirement and particularly from the European Convention on Human Rights.

[474] Weiler, "Methods of Protection: Towards a Second and Third Generation of Protection", in Cassese, Clapham and Weiler (eds.), "Human Rights and the European Community: Methods of Protection", volume II, EUI, Baden-Baden, 1991, pp. 545-642, at p. 586.

[475] *loi* 73-1227 of 13 December 1973, ratified the ECHR and the additional protocols 1,3,4,10. This text has been published by the *Décret* no 74-360 of 3 May 1974 (JORF, 4th 1974). It should also be pinpointed that it is only in 1981 (9th October 1981, Décret no 81-917) than France recognized the application of Article 25 ECHR permitting the right of individual request.

[476] *Nold*, *supra n.100*, para. 14, "[i]f rights of ownership are protected by the constitutional laws of all the Member States and if similar guarantees are given in respect of their right freely to choose and practice their trade or profession, the rights thereby guaranteed, far from constituting unfettered prerogatives, must be viewed in the light of the social function of the property and activities protected thereunder. For this reason, rights of this nature are protected by law subject always to limitations laid down in accordance with the public interest. Within the Community legal order it likewise seems legitimate that these rights should, if necessary, be subjects to certain limits justified by the overall objectives pursued by the Community, on condition that the substance of these rights is left untouched. As regards, the guarantees accorded to a particular undertaking, they can in no respect be extended to protect mere commercial interests or opportunities, the uncertainties of which are part of the very essence of economic activity".

[477] It is not the aim of this section to focus on this crux. The application of the "doctrine of the margin of appreciation" (if any) by the ECJ will be studied later on.

Rasmussen, the *Nold* decision constituted a "*manifest overruling'*"[478] in the sense that the common constitutional traditions did not anymore constitute the unique sources of inspiration for the ECJ. This point of view is disputable and one may not assess the *Nold* judgment as overruling, but see it as complementary jurisprudence. Arguably, given that all the Member States had ratified the ECHR, *Nold* permitted the ECJ to declare that international treaties provide useful guidelines. Drawing a parallel with *Internationale Handelsgesellschaft*, it is hard to imagine a similar ruling in 1970 which could have led to confusion, since the ECHR could not be relied on as a unifying (common) source of constitutional standard.[479]

Looking more closely at paragraph 13 of *Nold*, one notices that common constitutional traditions are referred *in primus*, international treaties being placed in the second limb of the paragraph. This might make one appraise the common constitutional traditions as a more important source than the ECHR. Such hierarchy is doubtful, in my view, since one cannot ignore the word "similarly".[480]

To conclude, even though in its early jurisprudence, the ECJ relied more on a comparative analysis in the formulation of fundamental rights, e.g. *Hauer*, *Wachauf*, and *Hoechst*, it made increasing use of international legal (ECHR) standards, reaching its peak at the end of the 1990's with explicit reference to the ECHR case law. Indeed, the international legal (ECHR) standards are certainly much more useful from a practical point of view, since the comparative analysis might lead one to exhume potential divergences as to the application and interpretation of constitutional provisions within the Member States of the Community.[481]

2.1.1 The ECHR as an Indirect Source

In *Rutili*, an Italian citizen (living in France and married to a French woman) took part in various political and syndicate activities during the events of May 1968.[482] The French authorities forbade him to sojourn in four departments in the northeast

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[478] Rasmussen, *On Law and Policy in The European Court of Justice*, Nijhoff, 1986, at p. 399. "[i]n Nold, the Court reversed its own earlier declarations that only rights growing out of the Member States' common constitutional traditions were protected by Community law".

[479] Moreover, can we speak of overruling when at this time no *stare decisis* could be deduced from the jurisprudence? Whether *Nold* was an overruling of the antecedent cases, the ECJ would have stated and explicitly reviewed the decisions, such as in the *Keck* case.

[480] *See* the *Hauer* case, para. 20, where the ECJ first analysed the "conventional provision" before entering into a comparative analysis of the constitutional laws of the Member States.

[481] Guild and Lesieur, *The European Court of Justice on the European Convention on Human Rights,* Kluwer, 1998, at p. xviii., "[t]he choice of the Court to rely first and most heavily on the common constitutional traditions of the Member States may well have sounded sweet to the ears of national constitutional courts. Their contribution to then protection of human rights through interpretation of national constitutions would thereby be recognised. However, for the Court of Justice the comparative law approach can be something of a minefield", in "The European Court of Justice on the European Convention on Human Rights", Kluwer, 1998, at p. xviii.

[482] Case 36/75 *Rutili* [1975] ECR 1219.

of France (in *Lorraine*). Those national measures were subject of a preliminary reference to the ECJ in order to verify their compatibility with Article 48 EEC. For the first time, after the explicit recognition of the ECHR as a source of inspiration in the *Nold* case (1974), the ECJ made an explicit reference to Articles of the European Convention on Human Rights.[483] In *Watson* and *Belmann*, AG Trabucchi made an interesting analysis of the *Rutili* case, in which he stated that:

> "in that judgment, the court substantially reaffirmed the principle which had already emerged from its previous decisions that the fundamental human rights recognized under the constitutions of the Member States are also an integral part of the Community legal order. The extra-Community instruments under which those States have undertaken international obligations in order to ensure better protection for those rights, can, without any question of their being incorporated as such in the Community order, be used to establish principles which are common to the states themselves".[484]

Craig and de Búrca have commented that,

> "[t]his passage effectively summarized the ECJ's approach to the source of Community fundamental rights, by stressing that the importance of international declarations of rights such as the ECHR lay not in their character as a positive and direct source of Community law, but in fact that they represented basic principles to which all of the Member States signatories to the convention had subscribed. They could be seen as an important expression of common values shared by The EC Member States. Which in turn made them a valuable indicator of the Community's general legal principles and human rights. In this way, the Court maintain the supremacy of Community law over national legal principles, and while avoiding the charge of having judicially incorporated the Convention and other international agreements into Community law without Member States' concern, it could at the same time use these sources to suggest a strong consensus among the states as regards that foundations of the general principles of Community law". [485]

One can only share these views. To put it in a nutshell, the ECHR is not a direct source of Community law, but a guideline, constituting a kind of "soft law" in the EC legal order. Indeed, the Strasbourg Convention is not binding on the Community institutions and the ECJ is not legally bound by the jurisprudence of the ECHR judges. However, the ECHR may produce certain legal effects. The most flagrant

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[483] *Ibid*., para. 32. "[t]aken as a whole, these limitations placed on the powers of Member States in respect of control of aliens are a specific manifestation of the more general principle, enshrined in Articles 8, 9, 10 and 11 of the Convention for the Protection of Human Rights and fundamental Freedoms signed in Rome on 4 November 1950 and ratified by all the Member States, and in Article 2 of the protocol 4 of the same Convention, signed in Strasbourg on 16 September 1963, which provide in identical terms, that no restrictions in the interests of national security or public safety shall be placed on the rights secured by the above-quoted Articles other than such as are necessary for the protection of those interests in a democratic society".

[484] AG Trabucchi in Case 118/75 *Watson and Belmann* [1976] 1185, at p. 1207, para. 4.

[485] Craig and de Búrca, *EU Law*, 1998, at p. 305.

illustration is offered by the recourse to the European Convention on Human Rights as a source of inspiration for the creation of a particular general principle. The ECJ is not obliged to scrupulously follow the ECHR (even if the ECJ is generally loyal), but at the moment when it decides to make reference to the Strasbourg Convention, the ECHR was transformed to produce legal effects through the binding norm (the general principle). Following Grief, "*[b]esides highlighting the Convention as a source of general principles to which it will have recourse, the ECJ' s ruling suggested that provisions of Community law must be construed and applied by member states with reference to those principles*".[486] Finally, it must be emphasised again that the ECHR constitutes a much more effective tool than constitutions of the Member States.[487] In fact, through the reliance on the ECHR, the presumption of commonality (or *"presumption of consensus")* can be automatic. Consequently, the ECJ is not obliged to undertake detailed and difficult analyses of the constitutional provisions common to the Member States.[488]

In the wake of *Rutili*, the AG and the Court made direct references to provisions of the ECHR. For instance, in *Prais* (1975), the plaintiff (Mrs Prais) challenged in 1975 the validity of a Decision refusing her to pass an examination on an alternative date. She based her argumentation on Article 27[489] of the Staff Regulation and Articles 9 ECHR[490] and 14 ECHR.[491] She argued that Article 27 of the Staff Regulation required the defendant (appointing authority) to arrange the examinations in a way which would allow every candidate, whatever their religion, to take part in those tests.[492] AG Warner did not agree with such an extensive interpretation of the freedom of religion and said:

> "I need not, I think, take up your Lordship's time in reviewing the decisions of the European Court of Human Rights and of the European Commission of Human

[486] Grief, "The Domestic Impact of the European Convention on Human Rights as Mediated through Community law", PL 1991, pp.555-567, at p. 561.

[487] For the same line of reasoning, *see* Janis, Key, Bradley,, *European Human Rights Law*, Oxford, 2000, at p. 504, "[t]he definition of fundamental rights in national constitutions differs from state to state, the primacy of Community law excluded the possibility of a differential application of Community rules according to national constitutions. Nor Could the ECJ choose one or two national constitutions as the model for a Community scheme of fundamental rights. There was, therefore, an advantage in taking the definition of human rights for Community purposes from a common, international source. And by 1974, the ECHR had been ratified by all Community states".

[488] *See e.g., Hoechst* case.

[489] Case 130/75 *Prais* v. *Council* [1976] ECR 1589. Article 27 states that "officials shall be selected without reference to race, creed or sex".

[490] *Ibid*., para. 8, "[t]he plaintiff also relies on Article 9 of the ECHR . . . Since the European Convention has been ratified by all the Member States the rights enshrined in it are according to the plaintiff, to be regarded as included in the fundamental rights to be protected by Community law".

[491] *Ibid*., para. 7,"[i]n addition the plaintiff claims that religious discrimination is prohibited by Community Law as being contrary to the fundamental rights of the individual".

[492] *Ibid*., para. 9.

> Rights bearing upon the interpretation of Article 9 and 14 of the Convention. None of them seems to me touch the questions that arise in the present case . . . having regard to the actual wording of Articles 9 and 14 of the European Convention, I find it impossible to conclude that those articles have, or that either of them has, the effect for which Mrs Prais contends. On the contrary, I am impressed by the consideration that so to conclude would be to conclude that most of the Member States of the Communities were consistently infringing the Convention".[493]

The Court followed the AG's reasoning and considered that despite the existence of such a fundamental right in the Community legal order, it could not oblige the authority to avoid a conflict with a religious requisite which the authority was not aware of.[494] Hence, the appointed authority should have been informed in due time in order to set up an examination suitable for all of the candidates. Subsequently, the complaint was irremediably rejected. [495]

Next, according to AG Capotorti in *Defrenne*:[496]

> "the rule that there should be no discrimination is a general principle of the community legal order. The Court of Justice has referred to it on more than one occasion and has gone so far as to rule that Community measures which conflict with it are invalid. It is a principle contained in the list of fundamental human rights recognised within the Member States and within the context of the European Convention on Human Rights and Fundamental Freedoms, consequently it forms part of Community law and must be protected by the Court of Justice".[497]

The Court, in line with the AG Opinion, considered that respect of fundamental rights is one of the general principles of Community law[498] and ruled that *"there can be no doubt that the elimination of discrimination based on sex forms part of those fundamental rights"*.[499]

Further, in the *Kirk* case (1984),[500] the ECJ ruled that "the principle that penal provisions may not have retroactive effects is one which is common to all the legal orders of the Member States and is enshrined in Article 7 of the European Convention for the Protection of Human Rights and Fundamental freedoms as a

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[493] *Ibid*., AG Warner in *Prais*.
[494] *Ibid*., *Prais*, para. 18.
[495] *See also*, Case C-358/89 *Extramet Industrie* v. *Council* [1991] ECR I-2925. Similarly, some parties have been tempted to rely directly on the ECHR provisions. For exemplification, Extramet attempted to rely directly on Articles 6 and 13 ECHR in connection to the question of standing (Article 230, old Article 173). AG Jacobs in his Opinion clarified the stance of the ECHR (and this before the 2/94 Opinion) by stating that "[t]he Convention and the laws of the Member Sates are however, indirectly relevant, in that they support the existence of a general principle of law, namely the right to an effective judicial remedy. In the present case, the ECJ did not follow the analysis of the AG in relation to Article 173 [new 230 EC].
[496] Case 149/77 *Defrenne* [1978] ECR 1365.
[497] *Ibid*., AG Capotorti in *Defrenne*, para. 4.
[498] *Ibid*., *Defrenne*, para. 26.
[499] *Ibid*., *Defrenne*, para. 27.
[500] Case 63/83 *Kent Kirk* [1984] ECR 2689.

fundamental right, it takes its place among the general principles of law whose observance is ensured by the Court of Justice".[501] In a similar vein, AG Van Gerven in *Charlton*[502] remarked that the principles *nullum crimen sine lege*, *nulla poena sine lege* and *nulla poena sina culpa*[503] constitute fundamental rights common to the constitutional traditions of the Member States and enshrined in Article 7 of the ECHR (only for the first two principles), being protected by the ECJ which ensures the respect of the general principles (of which human rights form an integral part). However, these principles apply only in relation to criminal law.[504] According to AG Ruiz Jarabo, the first two principles fall under the overriding principle of legality in criminal law, which is without doubt a principle common to the constitutional traditions of the Member States and must be upheld in accordance with Article 7(1) ECHR.[505] The ECJ in *Criminal Proceedings against X* ruled that the principle was a general legal principle common to the Member States and also enshrined in different international treaties, particularly in Article 7 ECHR.[506]

As a final example, in *Bosman*,[507] the ECJ reiterated its constant formula for the recognition of a Community fundamental right,

> "[a]s regards the arguments based on the principle of freedom of association, it must be recognised that this principle, enshrined in Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and resulting from the constitutional traditions common to the Member States, is one of the fundamental rights which, as the Court has consistently held and also reaffirmed in the preamble to the single European act and in Article F(2) of the Treaty on European union (new Article 6(2)), are protected in the Community legal order".[508]

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[501] *Ibid*., *Kirk*, para. 22. *See also ex parte FEDESA*, para. 42 and *Criminal proceedings against X*, para. 25. In the light of the ECJ jurisprudence, it may be argued that this is a dual principle. Indeed, one may distinguish between the retroactivity of penal provisions and the retroactivity outside the criminal area. (*Ibid*., *ex parte FEDESA*, para. 41). Concerning the former in *ex parte FEDESA*, the "*Kirk* formula" was stated again and the principle was once again described as common to the legal orders of the Member States and encapsulated in the ECHR (*ibid ex parte FEDESA*, para. 42) Concerning the latter, it seems that according to the jurisprudence some limitations can be attached to, in exceptional circumstances, if and only if the legitimate expectations of those concerned are fairly regarded (i*bid ex parte FEDESA*, para. 45).

[502] Case-116/92 *Charlton* [1993] 2 ECR I-6755.

[503] *See* AG Van Gerven in Case C-326/88, *Hansen & Son* [1990] ECR 2911, para. 14, "[t]he rule of proportionality applied by the European Court of Human Rights in connection with Article 6 of the Convention accordingly admits a certain restrictions to the principle *nulla poena sine culpa"*.

[504] AG Van Gerven in *Charlton*, *supra n.502,* para. 18.

[505] AG Ruiz Jarabo in Case C-74/95 and C-129/95 *Criminal Proceedings against X* [1996] ECR I-6609, paras. 43-44.

[506] *Ibid*., *Criminal Proceedings against X*, para. 25.

[507] Case C-415/93 *Bosman* [1995] ECR I-4921.

[508] *Ibid*., para. 79.

2.1.2. Other international standards?

Even if it is true that the largest number of references have been made to the ECHR, the ECJ may use other types of international conventions, such as the European Social Charter (1961),[509] the International Labour Organisation (ILO) convention 111[510] and the ILO Convention 89[511] and, to a larger extent, the International Covenant on Civil and Political Rights (ICCPR). The priority given to the European Convention of Human Rights is reflected in the case-law, e.g. *Johnston*, which often stresses the "special significance" of the ECHR.[512] Moreover, Article 6(2) TEU (*ex* Article F(2)) refers exclusively to the ECHR. In that regard, in the wake of the Amsterdam Treaty, did the ECJ stop referring to other international instruments due to the restrictive wording of the cited provision? In the light of the *Grant* case,[513] it seems difficult to maintain such an assertion. In that case, the appellant referred to the ICCPR in relation to the definition of sexual orientation. The ECJ confirmed that the Covenant was an international instrument that will be taken into account regarding the application of the principle of equality.[514]

The ICCPR has been used much more often than the European Social Charter (ESC) or the ILO Conventions. To my knowledge, only two references to the ILO conventions have been made and the ESC has been rarely cited both by the AG and the ECJ.

The second referral[515] to the European Social Charter (Article 10) was made by the ECJ in *Blaizot*,[516] in connection with the interpretation of vocational training. Simlarly, AG Lenz in *Bergemann*[517] found that marriage and family are subject to a high degree of protection in international treaties, for example Articles 8 and 12 of

[509] Case 149/77 *Defrenne* [1978] ECR 1365, para. 28.
[510] *Ibid*.
[511] Case 158/91 *Levy* [1993] ECR I-4287.
[512] Case 222/84 *Johnston* [1986] ECR 1651.
[513] Case C-249/96 *Grant* [1998] ECR I-621, para. 44 (making reference to the ICCPR).
[514] *Ibid*., *Grant*, paras. 43-44, "Ms Grant submits, however, that, like certain provisions of national law or of international conventions, the Community provisions on equal treatment of men and women should be interpreted as covering discrimination based on sexual orientation. She refers in particular to the International Covenant on Civil and Political Rights of 19 December 1966 (United Nations Treaty Series, Vol. 999, p. 171), in which, in the view of the Human Rights Committee established under Article 28 of the Covenant, the term 'sex' is to be taken as including sexual orientation (communication No 488/1992, Toonen v. Australia, views adopted on 31 March 1994, 50th session, point 8.7) . . . The Covenant is one of the international instruments relating to the protection of human rights of which the Court takes account in applying the fundamental principles of Community law (see, for example, Case 374/87 Orkem v. Commission [1989] ECR 3283, paragraph 31, and Joined Cases C-297/88 and C-197/89 Dzodzi v. Belgian State [1990] ECR I-3763, paragraph 68)".
[515] The first referral to the ESC was made in *Defrenne* (*supra*).
[516] Case 24/86 *Vincent Blaizot* [1988] 379, para. 17, "Article 10 of the European Social Charter . . . treats University education as a type of vocational training".
[517] Case 236/87 *Bergemann* [1988] ECR 5125.

the ECHR and the European Social Charter (ratified by all the Member States except Belgium, Luxembourg and Portugal).[518] However, he concluded that the comparative analysis of those provisons did not lead to the possible formulation of a general principle of law, *"according to which the spouse is always entitled to unemployment benefits where his or her unemployment is the result of a change of residence linked to family circumstances"*.[519] AG Darmon in *Sevince* mentioned Article 19 of the European Social Charter concerning workers legally resident in a country.[520] As put by De Witte:

> "the Court of Justice has never held with so many words that the European Community institutions are bound by the European Convention on Human Rights, but the European Convention on Human Rights is certainly, together with the national constitutions, an important source of inspiration for the discovery and application of the general principles of Communit law. As for the European Social Charter, it has now also been ratified by all Member States and can therefore act according to the Court of Justice, as an additional source of inspiration for the general principles of Community law" .[521]

The European Social Charter[522] can be described as the counterpart of the ECHR in the social field, in the same way that the Covenant on Economic, Social and Cultural Rights (CESCR) is the counterpart of the ICCPR.[523] The Covenant embodies rights such as the right to work (Article 1), the right to organize syndicates (Article 5), the right to bargain collectively (Article 6) or the right to social security (Article 12). Van Dijk argues that the ECJ should incorporate the provisions and the jurisprudence of the ECHR and the ESC.[524] However, as demonstrated before, the ECJ has made very few references to the ESC, and prefers to rely on instruments materializing the "erroneous primacy" of the civil and political rights.[525]

After the ECHR, the Covenant on Civil and Political Rights is without doubt the international instrument most frequently used by the ECJ. According to AG Jacobs in *Konstantinidis*,

> "[o]ne instrument which the Court has sometimes been willing to draw on as a source of fundamental rights is the International Covenant on Civil and Political Rights, adopted by the United Nations General Assembly in 1966. The Covenant,

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[518] *Ibid*., AG Lenz in *Bergemann*, paras. 27-28.
[519] *Ibid*.
[520] AG Darmon in Case C-192/89 *Sevince* [1990] ECR 3461.
[521] De Witte, "Protection of Fundamental Social Rights in the European Union- The Choice of the Appropriate Legal Instrument" in Betten and Mac Devitt, *The Protection of Fundamental Social Rights in the European Union*, Kluwer, 1996, at pp. 64-65.
[522] The ESC has been ratified in October 1961, it entered into force on 26 February 1965.
[523] Harris, "The European Social Charter", in Hanski and Suksi (eds.), *An Introduction to the International Protection of Human Rights*, Åbo, 1999. The ESC and the ICCPR make up thus for the regional counterparts of the two Covenants of 1966.
[524] *See* Van Dijk and Van Hoof, *Theory and Practice of the European Convention on Human Rights*, Kluwer, 1998.
[525] *Ibid.*

> which has been ratified by all the Member States except Greece, was mentioned by the Court in its judgments in Case 374/87 Orkem v Commission [1989] ECR 3283, paragraph 31, and Joined Cases C-297/88 and C-197/89 Dzodzi [1990] ECR I-3763, paragraph 68. Article 24(2) of the Covenant states that "Every child shall be registered immediately after birth and shall have a name." It might well be possible to infer from that provision that if human beings are entitled to be given a name on birth they are entitled to keep that name throughout their lives and to object to unjustified changes in its orthography ".[526]

More precisely, the ECJ in the *Orkem* case remarked that "Article 14 of the International Covenant, which upholds, in addition to the presumption of innocence, the right (in paragraph 3(g)) not to give evidence against oneself or to confess guilt, relates only to persons accused of a criminal offence in court proceedings and thus has no bearing on investigations in the field of competition law".[527] Article 14 of ICCPR has also been referred to in the Dzodzi case in connection with the right of appeal.[528]

It seems that the Advocates General have been more willing to refer to the ICCPR, e.g. AG Jacobs in *Konstantinidis* referring to Article 24(2) ICCPR (right to a name), AG Darmon in *Sevince*[529] mentioning Articles 12 (liberty of movement and freedom to choose its residence) and 13 of ICCPR (expulsion of a foreigner from a territory must be done in accordance with the law), meanwhile, AG Darmon in *Van Gemert-Derks* (1993)[530] making allusion to Article 26 ICCPR (in relation to a preliminary ruling of a national court) and its potential influence on the principle of equal treatment (not followed by the ECJ). More recently, AG Léger in *Hautala* (2001) mentioned Article 19 ICCPR concerning freedom of expression in relation to access to documents (transparency).

Though the references to the ICCPR are more numerous (especially in the AG Opinions) than to the ILO Conventions or the ESC, the ECHR remains the international standard predominantly adopted by the ECJ. One can wonder what's the reason for that? One answer may be that not all the Member States had ratified the ICCPR, the point actually made by the Advocates General Jacobs[531] and Darmon[532] (in relation to Greece, in particular). However, in the more recent *Hautala* case (2001), AG Léger stated that the fifteen Member States have now ratified the ICCPR.[533] Even though one may speculate that consequently there will be an increasing number of references to the ICCPR, it is difficult to foresee that the

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[526] AG Jacobs in *Konstantinidis*, *supra n. 360*, para. 35. *See also* AG Darmon in *Sevince*, para. 26, "[t]he Court has *also* invoked the International Covenant, particularly in the Orkem judgment, although that agreement has not been signed by Greece".
[527] Case 374/87 *Orkem* v. *Commission* [1989] ECR 3283, para. 31.
[528] Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] ECR I-3763, para. 68.
[529] Case C-192/89 *Sevince* [1990] ECR 3461.
[530] AG Darmon in Case-337/91 *Van Gemert-Derks* [1993] ECR I-5435.
[531] AG Jacobs in *Konstantinidis*, *supra n. 360,* para. 35.
[532] AG Darmon in *Sevince*, *supra n.529*, para. 26.
[533] AG Léger in *Hautala*, *supra n.291*, para. 55.

ICCPR will take precedence over the ECHR. Indeed, the ECHR is still the instrument of special significance and its regional character is much more "user friendly" than the Covenant on Civil and Political Rights.[534]

2.1.3. The ECHR as a "Starting Point" of "Special Significance"

In order to support the analysis of the increasing importance of the ECHR, it is necessary to pay attention to two cases illustrating its *montée en puissance*. First, the *Hauer* case will present it as a "starting point". Secondly, the *Johnston* case will demonstrate its pivotal significance.

a) ECHR as a "starting point"

In *Hauer*, an individual (Mrs Hauer) was refused permission to plant new vineyards on the basis of a Community Regulation No 1162/76. The ECJ was asked about the possible infringement of fundamental rights by this Community measure and stated that the doubts evinced by the *Verwaltungsgericht* as to the compatibility of the provisions of Regulation No 1162/76 with the rules concerning the protection of fundamental rights must be understood as questioning the validity of the Regulation in the light of Community law.[535] The Court referred expressly to the previous seminal jurisprudence, i.e. *Internationale Handelsgesellshaft* and *Nold*. Concerning the former, the ECJ stated once again that an infringement of fundamental rights could only be judged in the light of Community law itself.[536] As to the latter, the ECJ explicitly cited the famous paragraph 13 of *Nold* (referring to the common constitutional provisions and the international treaties dealing with human rights such as the European Convention on Human Rights).[537] Then, the Court held that "*the right to property is guaranteed in the Community legal order in accordance with the ideas common to the constitutions of the Member States, which are also reflected in the first protocol to the European Convention for the protection of Human Rights"*.[538] The Court referred expressly to Article 1 of the Protocol 1 which states that,

> "[e]very natural or legal persons is entitled to the peaceful enjoyment of his possession. No one shall be deprived of his possession except in the public interest and subject to the conditions provided for by law and the general principles of international law. The preceding provisions shall not, however, in any way impair

[534] Nevertheless, one cannot disregard the potential role of the Charter of Fundamental Rights (December 2000) as a source of reference. The AG and the applicants have attempted to rely on the Charter automatically after its recognition.
[535] *Hauer*, *supra n.326,* para. 16.
[536] *Ibid*., para. 14.
[537] *Ibid*., para. 15, citing *Nold* para. 13 and going further "[t]hat conception was later recognized by the joint declaration of the European Parliament, the Council and the Commission of 5 April 1977, which, after recalling the case law of the Court, refers on the one hand to the European Convention on Human Rights and fundamental freedoms of 4 November 1950".
[538] *Ibid*., para. 17.

> the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties".[539]

However, the ECJ considered that the simple reference to the ECHR Protocol was not sufficient in order to establish a precise answer *in casu*.[540] Consequently, a comparative analysis of the constitutional laws of the Member States was indispensable.[541] According to Weiler, the Convention and its Protocols were used as pure *"starting points"*.[542]

To summarize, the ECJ looked, first, at the European Convention on Human Rights. The Court did not consider that the provision of the First Protocol was clear enough to enable the Court to rule on the matter. Then, the ECJ turned to a comparative analysis of certain constitutional provisions in various Member States limiting the exercise of the right to property. Weiler criticized the reluctance of the ECJ to profoundly analyze the ECHR requirements and the case law of the Strasbourg Court.[543] Arguably, the Kirchberg judges were reluctant, at this early stage, to apply Article 1 of Protocol 1 of the ECHR and its corresponding jurisprudence. Indeed, a strong assimilation to the ECHR could undermine the Community nature of the fundamental rights and further open the Pandora's Box of the mighty conflict of dual authoritative rulings.[544]

b) ECHR is of Special Significance

In *Johnston***,** the Court analyzed the prerequisites of judicial control under Article 6 of Directive 76/207 on equal treatment of men and women.[545] More precisely, this Article obliged the Members States to introduce in their national legislation all measures necessary to permit individuals to "pursue their claim by judicial process".

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[539] *Ibid*., para. 18.
[540] *Ibid*., para. 19.
[541] *Ibid*.
[542] Weiler, "The Jurisprudence of Human Rights in the European Union: Integration and Disintegration, Values and Processes", http:www.jeanmonnetprogram.org/papers/96/960210.
[543] Weiler, Methods of Protection: Towards a Second and Third Generation of Protection", in Cassese, Clapham and Weiler (eds.), *Human Rights and the European Community: Methods of Protection*, volume II, EUI, Baden-Baden, 1991, pp. 545-642, at p. 590, "[t]he indication in the Hauer case is that the ECJ regards itself as able to give a protection which in substance is superior to that afforded by the Convention . . . the court does not make a particular effort to analyze the conventional requirements and its surrounding jurisprudence". Nowadays, the lack of deep ECHR analysis constitutes the exception.
[544] However, such a type of argumentation cannot be followed in the light of the most recent jurisprudence on fundamental rights, e.g. *Montecatini*, *Carpenter*, *Schmidberger*, *KB*, where the ECJ realized a thorough analysis of the ECHR and its case law. Moreover, it should always be kept in mind, that similarly to the constitutional provisions, the ECJ uses the conventional provision in order to extract a European conception of the right at stake. The ECHR will not be bestowed so as to review the Community measure.
[545] Case 222/84 *Johnston* [1986] ECR 165.

However, the national legislation did not implement this right in an effective way.[546] According to the Court, the requirement of judicial control enshrined by Article 6 of the Directive reflects the general principles of law, which underlie the constitutional traditions common to the Member States. That principle is also laid down in Articles 6 and 13 of the European Convention on Human Rights.[547] Consequently, Article 6 of Directive 76/207 interpreted in light of the general principle of effective judicial protection confers a right on individuals to obtain an effective remedy in a national court against a measure that they consider to be contrary to the principle enshrined in the Directive. Thus, in *Johnston*, the Court made clear that the ECHR was of special significance,[548] this statement being reiterated by the subsequent case-law, e.g. *ERT*,[549] *Kremzow* ,[550] but also in the 2/94 Opinion of the Court on the Accession to the ECHR.[551]

Moreover, as stressed before, Article 6(2) TEU (*ex* Article F(2)) refers expressly to the ECHR and not to other international sources, and recognises the jurisprudence of the ECJ in its human rights methodology. This Article is similar to Article F(2) of the Maastricht Treaty, but is, contrary to it, *"justiciable"*. Consequently, the Community institutions are bound to respect the fundamental rights as guaranteed by the ECHR and the constitutional traditions common to the Member States. In that respect, it may also be said that the Community is indirectly

[546] Article 53(2) of the sex discrimination order permitted the authority to hinder an individual asserting the rights conferred by the Directive.

[547] *Johnston*, *supra n.545,* para. 18, "the requirement of judicial control stipulated by that Article reflects a general principe of community law which underlies the constitutional traditions common to the Member States. That principle is also laid down in Articles 6 and 13 of the European Convention on Human Rights and Fundamental Freedoms of 4 November 1950. As the European Parliament, Council and commission recognised in their joint declaration of 10 April 1977 and as the Court has recognised in its decisions, the principles on which that Convention is based must be taken into consideration in Community law". *See also Heylens* and *Borell*i para. 14.

[548] *Ibid*., *Johnston*, "[h]owever, it is settled case-law that fundamental rights form an integral part of the general principles of Community law whose observance is ensured by the Community judicature (see, in particular, Opinion 2/94 the Court of Justice of 28 March 1996 [1996] ECR I-1759, paragraph 33, and the judgment in *Kremzow*, cited above, paragraph 14). For that purpose, the Court of Justice and the Court of First Instance draw inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated and to which they are signatories. The Convention has special significance in that respect (Case 222/84 *Johnston* [1986] ECR 1651, paragraph 18, and *Kremzow*, cited above, paragraph 14). Furthermore, paragraph 2 of Article F of the Treaty on European Union (now Article 6(2) EU) provides that the Union shall respect fundamental rights, as guaranteed by the [Convention] and as they result from the constitutional traditions common to the Member States, as general principles of Community law".

[549] Case C-260/89 *ERT* [1991] ECR 2925, para. 41.

[550] Case C-299/95 *Kremzow* [1997] ECR I-2629, para. 14.

[551] Opinion 2/94, *supra n.8,* para. 33.

bound by the ECHR.[552] The formulation of Article 6(2) TEU is somehow different from the formula persistently used by the ECJ. In fact, it should be noted that this provision places the ECHR before the constitutional traditions. This modification might reflect the increasing importance of the ECHR Convention to the detriment of other international sources and, also, the common constitutional traditions.

Going further, the voluntary reference to the ECHR as a source of special significance may signify that the ECJ considers itself bound to respect the ECHR and its interpretation by the EctHR. However, as stressed above, the ECHR is not a direct source of Community law, though the ECJ generally loyally respects the ECHR.[553] So long as the Community does not accede to the ECHR, the Convention simply remains a guideline for the ECJ in the elaboration of the general principles of Community law. However, once the ECHR has been "filtered" by the ECJ through the general principles, the end result is much the same as if the Community was formally bound by the ECHR.

2.2. POST 2/94 OPINION CASE-LAW

Before the *Nold* case was decided, Zuleeg commented that international instruments, e.g. the European Convention on Human rights, offered a minimal human rights standard and must be carefully used in order to provide guidelines.[554] Interestingly, already in *Internationale Handelsgesellschaft* (1970), the parties invoked the ECHR. However, the European Court of Justice did not follow that argument and based its reasoning on the provisions of the Treaty and the constitutional traditions common to the Member States. This case exemplified the difficulties in the search of a common standard that the Court encountered at the time.[555] In that sense, the recourse to the European Convention of Human Rights provided a framework for "minimum guarantees".[556] This framework also appears to be needed regarding the formulation of general principles. It is argued that its intensive use in the recent case-law demonstrates that the ECJ tends, nowadays, to substantiate its analysis on such an instrument rather than engaging within a detailed comparative analysis of the (constitutional) laws of the Member States.

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[552] Jacobs and White, *The European Convention on Human Rights*, Oxford, 1996, at p. 413. The ECHR is not binding on the institutions. Jacobs and White argue that the provisions of the ECHR "can and must be given effect as general principles of Community law. The result is much the same as if the Community were bound by the Convention".

[553] *Infra*, the most recent case-law (2002-2004) may be appraised as offering a counter argument.

[554] Zuleeg, *supra n.193,* CMLRev. 1971, at p. 460. In this respect *see*, Article 60 ECHR.

[555] Article 2 of the German Basic law, which guarantees the freedom of personal activity, did not have any equivalent in other constitutions.

[556] This minimal guarantee is however different from the "minimalist approach" described previously. Indeed, it might be argued that the "minimalist approach" would lead to a rather low degree of protection, whereas the "minimal guarantee" of the ECHR establishes a common level of protection based on the Strasbourg standards (high standards).

2.2.1. The Opinion 2/94

In the early 1990's, some authors believed in a total interaction between Community and Strasbourg law. Nevertheless, in the Opinion 2/94 (28 March 1996) on accession by the Community to the ECHR,[557] the Court stated that, "as Community law now stands, the Community has no competence to accede to the Convention", in other words, a Treaty amendment would be required. By consequence, the ECHR does not constitute a direct source of Community law and must be viewed as merely providing inspiration or guidelines to the ECJ.[558]

Opinion 2/94 raised many vivid discussions in the doctrine which will not be reproduced in this paper.[559] Instead, this section focuses on the interpretation of the protection of fundamental rights made by the ECJ and the implications of the non-accession on the future of human rights case law. In the light of this thesis, the important question at stake concerns the position of the ECHR in the Community legal order. Notably, it is worth emphasizing that, after the Opinion, the ECHR remained a simple source of inspiration for the ECJ. The accession by the Community to this Convention was the only possibility to incorporate it into the European legal order.[560] The Commission and the Council, as well as some Member States (such as Germany) pressed for an accession. A part of the doctrine seemed to consider the compatibility of the jurisdiction of the EctHR with the EC Treaty in the light of the Opinion 1/91 on the draft agreement relating to the creation of the

[557] Opinion 2/94 [1996] ECR I-1759.

[558] Since the *Nold* case (1974), the Court may find inspiration in international treaties protecting human rights such as the European Convention on Human rights. AG Léger in *Hautala* stressed that, "it must be emphasized at the outset that the Court of First Instance has no jurisdiction to apply the Convention when reviewing an investigation under competition law, inasmuch as the Convention as such is not part of Community law (Case T-374/94 Mayr-Melnhof v. *Commission* [1998] ECR II-1751, paragraph 311)".

[559] *See* Jacobs, "European Community Law and the European Conventionon Human Rights", in Curtin and Heukels, *Institutional Dynamics of European Integration,* Essays in Honour of Schermers, Dordrecht, 1994, 561, Editorial Comments, "Fundamental Rights and Common European Values", CMLRev. 1996, pp. 215 *et seq*., Schermers, "The Human Rights Opinion of the ECJ and its Constitutional Implications", CELS Occasional paper No 1, University of Cambridge, 1996, Gaja, "Opinion 2/94, Accession by the Community to the European Convention on Human Rights and Fundamental Freedoms", CMLRev.1996, pp. 973 *et seq*., De Schouter and Lejeune," "L'adhésion de la Communauté européenne à la Convention de sauvegarde des droits de l'homme A propos de l'avis 2/94 de la Cour de Justice des Communautés", CDE 1996, pp. 555 *et seq.*, Wachsmann, "L'avis 2/94 de la Cour de Justice relatif à l'adhésion de la Communauté européenne à la Convention de sauvegarde des droits de l'homme et des libertés fondamentales", RTDE 1996, pp. 467 *et seq.*, Toth, "The European Union and Human Rights: the Way Forward, CMLRev. 1997, p. 491 *et seq.*, and Duvigneau, "From Advisory Opinion 2/94 to the Amsterdam Treaty: Human Rights Protection in the European Union", LIEI 1998, pp. 61 *et seq*.

[560] Jacqué, "Communauté européenne et Convention européenne des droits de l'homme", Mélanges Boulouis, Dalloz, 1991, at p. 330.

EEA.[561] Interestingly, the ECJ in 1996 appeared more preoccupied by the "substantial constitutional changes" involved in such an accession.[562]

One of the pivotal points of the Opinion is the Court's appraisal of Article 235 as being devised to *"fill the gap"* and as supplying those powers *"which are necessary to enable the Community to carry out its functions with a view to attaining one of the objectives laid down by the Treaty"*. [563] As to fundamental rights, its reasoning is twofold. First, the ECJ insists on the importance of the protection of the fundamental rights.[564] Second, the Court recalls its theory on the general principles of Community law and the special significance of the ECHR as a source of inspiration.[565]

The Court emphasized the important protection given to human rights in the European legal order. It made references to the various written provisions dealing with human rights, focusing on the duty of the European institutions to respect them. The ECJ appears to implicitly recognize such protection as an objective of the Community. Then, it highlights that fundamental rights are also safeguarded through

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[561] Jacobs, "European Community Law and the European Convention on Human Rights", in Curtin and Heukels, *Institutional Dynamics of European Integration*, Essays in Honour of Schermers, pp. 561 *et seq*., at p. 568. *See also* Jacobs and White, *The European Convention on Human Rights*, Oxford, 1996, at p. 413, "[t]here seems no issue of principle which would preclude the subjection of decisions of the Court of Justice to review by the Court of Human Rights though the effect of Article 164 of the EC Treaty [now Article 220], which makes the Court of Justice the final arbiter of Community law, would need to be redefined".

[562] Opinion 2/94, para. 34, " . . . [a]ccession to the convention would, however entail a substantial change in the present Community system for the protection of human rights in that it would entail the entry of the Community into a distinct institutional system as well as integration of all the provisions of the Convention into the European legal order".

[563] *Ibid*., para. 29.

[564] *Ibid*., para. 32, "[i]t should first be noted that the importance of respect of human rights has been emphasized in various declarations of the Member States and of the Community institutions . . . Reference is also made to respect for human rights in the preamble of the Single European Act and in the preamble to, and in Article F(2), the fifth indent of Article J.1(2) and Article K.2(2), of the Treaty on European Union. Article F provides that the Union is to respect fundamental rights, as guaranteed, in particular, by the Convention. Article 130U(2) of the EC Treaty provides that Community policy in the area of development cooperation is to contribute to the objective of respecting human rights and fundamental freedoms". Certain provisions (in 1996) such as Article F(2), Article 2 EC Treaty (to promote . . . the raising of standard of living and quality of life"), Article 8E "to strengthen and to add to the rights" of the citizens of the Union seem to confirm that the protection of human rights is a *"horizontal objective"* (term used by Gaja, at p. 984)".

[565] *Ibid*., para. 33, "[f]urthermore, it is well settled that fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or which they are signatories. In that regard, the Court has stated that the Convention has special significance (see, in particular, the judgment in Case C-260/89 ERT [1991] I-2925, paragraph 41)".

the general principles of law (the "unwritten law"). It is stressed that the protection through those principles is ensured by the ECJ and inspired by the common constitutional traditions of the Member States and the ECHR (which has a special significance). It is also worth remarking that the ECJ here refers to the *ERT* case. This case deals with the respect of fundamental rights by the Member States (acting within the scope of Community law), but the ECJ only states in the next paragraph, that "respect for human rights is . . . a condition of the lawfulness of Community acts".[566]

On the one hand, one may interpret those strong statements as a desire to establish a link between the protection of the fundamental rights and the objectives of the Community, but also to stress the constitutional nature of such an issue. The weight of the modification of the human rights regime exceeding the boundaries of Article 235 might presuppose that the mutation proceeds undeniably from an objective of the Community.[567] On the other hand, the ECJ did not explicitly state that the protection of human rights constitutes an autonomous objective of the Community. By contrast, it is described as *"a condition for the lawfulness of the Communtiy acts"*. [568] In a similar vein, according to Gaja, *"while the Opinion contains a multitude of references to the way in which human rights are protected within the Community, it is evasive on the point of whether protection of human rights – in particular as enshrined in the European Convention of Human Rights – represents one of the Community's objectives"*.[569]

Though the ECJ did not expressly mention human rights protection as a Community objective, it is arguable that accession would have had serious constitutional implications on the laws of the institutions and the Member States. For instance, the consequences of the accession for the Member States signified that the ECHR would have been binding on the Member States with the authority of Community law. In the UK, it signified a reinforcement of the authority of the ECHR mediated through EC law.[570] The Court opined that, *"[s]uch a modification of the system for the protection of human rights in the Community, with equally fundamental institutional implications for the Community and for the Member States, would be of constitutional significance and would therefore be such as to go beyond the scope of Article 235. It could be brought about only by way of treaty amendment"*. [571] In the words of Weiler and Fries,

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[566] *Ibid*., para 34.
[567] Wachsmann, "L'avis 2/94 de la Cour de Justice relatif à l'adhésion de la Communauté européenne à la Convention de sauvegarde des droits de l'homme et des libertés fondamentales", RTDE 1996, pp. 467 *et seq.*, at p. 479.
[568] Craig and de Búrca, *EU Law*, 1998, at pp. 334-337.
[569] Gaja, "Opinion 2/94, Accession by the Community to the European Convention on Human Rights and Fundamental Freedoms", CMLRev. 1996, pp. 973 *et seq.*, at p. 984.
[570] Wachsmann, RTDE 1996, *supra n.567,* at p. 477. The British Human Rights Act was adopted in 1998, and entered into force in 2000.
[571] Opinion 2/94, *supra n.557,* para. 35.

> "[a] Community human rights policy which respected the current institutional balance, which avoided formal accession to the ECHR, which left intact the definition of the material contents of rights and their Community autonomy and which, critically, scrupulously remained within the field of Community law, would not and could not be considered of constitutional significance in the sense used by the Court in Opinion 2/94, and thus could be based, where necessary on Article 308 (former Article 235)".[572]

The Court did not follow this reasoning in connection to the accession to the ECHR. In that regard, the ECJ concluded that, *"it must therefore be held that, as Community law now stands, the Community has no competence to accede to the Convention"*.[573]

One cannot deny that the accession would certainly have enhanced the level of protection in the European legal order.[574] In my view however, the choice of the "*status quo* approach"[575] did not constitute a decline of human rights protection in the EC. Conversely, an overview of the subsequent jurisprudence of the ECJ shows a large recognition of the ECHR jurisprudence and a great awareness to take rights seriously. Moreover, the solution given by the ECJ may be understood as giving importance to the protection of fundamental rights and reflecting the desire of the Luxembourg judge to remain at the center of the human rights protection. Also, it may be contended that this is not only a question of prestige but also a question of *cohabitation* between two sources of authoritative rulings.[576] In the words of Zampini, "*la prise de position exprimée dans cet avis 2/94 pouvait aussi signifier le réflexe autonomiste et existentialiste d'un juge, qui fait de sa fonction de gardien de l'ordre juridique communautaire une attribution intangible et qui peut, dès lors, éprouver quelque réticence à se placer sous la coupe de l'autre juge européen"*. [577]

In the aftermath of the 2/94 Opinion, the jurisprudence of the Luxembourg and Strasbourg Courts had to co-exist again. However, the divergence of jurisprudence seems difficult to avoid completely. On the one hand, one may argue that the

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[572] Weiler and Fries, "A Human Rights Policy for the European Community and Union: The Question of Competences", in Alston, 1999, at p. 160.
[573] Opinion 2/94, *supra n.557*, para. 36.
[574] Gaja, "Opinion 2/94, Accession by the Community to the European Convention on Human Rights and Fundamental Freedoms", CMLRev. 1996, pp. 973 *et seq.*, at p. 989. According to Gaja, "[b]y simply closing the door to accession the Court has regrettably failed to contribute to the development of the protection of human rights".
[575] Toth, "The European Union and Human Rights: the Way Forward", CMLRev. 1997, pp. 491 *et seq.*
[576] Editorial Comments, "Fundamental Rights and Common European Values", CMLRev. 1996, pp. 215 *et seq.*, at pp. 219-220.
[577] Zampini, "La Cour de justice des Communautés européennes, guardienne des droits fondamentaux dans le cadre du droit communautaire", RTDE 1999, 659 *et seq.*, at pp. 660-661, "[t]he position taken by the ECJ may also signify an autonomist and existential reflex from the ECJ judge, who appraises his function of guardian of the European legal order as intangible and thus feels reticent to fall under the Strasbourg jurisdiction". (my translation).

divergence is accidental and thus occurs rarely.[578] Such a straight appraisal of the "conflicting jurisprudence" might be misleading. It seems right to trust the hypothesis that divergence in interpretation is inevitable, due to the potential antagonistic objectives enshrined in both the ECHR and the EC Treaty.[579] This problem was accentuated during the discussion for accession and has been exemplified by Toth,

> "[s]uppose that the Hoechst, Orkem and National Panasonic cases came before the ECHR following the judgments of the ECJ, this would inevitably have required the ECHR to interpret complex EC competition rules to see if the Commission's acts were compatible with the Convention. There can be no doubt that in doing that Court would have given priority to the objectives of the Convention over those of EC Competition law. This would necessary mean interference with the power of the ECJ as the supreme judicial body within the Community".[580]

Finally, it could be argued that the clashes of jurisprudence between the two jurisdictions are, indeed, some of the factors which will determine the development of European law in the near future.

2.2.2. Increasing Use of the ECHR Case-law

Before entering into an analysis of the increasing use of the ECHR case law in the wake of the 2/94 Opinion, it seems important to stress that the AGs have made use of the ECHR case-law in a much more flexible way than the Court. In the *Demirel* case, the Court refused to assume jurisdiction in the light of the "*Cinéthèque* formula" and remarked that, *"at present no provision of Community law defining the conditions in which Member States must permit the family reunification of Turkish workers lawfully settled in the Community. It follows that the national rules at issue in the main proceedings did not have to implement a provision of Community law"*.[581] AG Darmon pointed out that the *Abdulaziz* case of the EctHR[582] did not, generally speaking, recognize such a right (authorizing a spouse who is not a national to settle in a territory) as derived from Article 8 ECHR.[583]

TV 10 SA dealt with a reference for a preliminary ruling where the national court asked whether Articles 10 and 14 ECHR could be infringed by the national

[578] Wachsmann, "L'avis 2/94 de la Cour de Justice relatif à l'adhésion de la Communauté européenne à la Convention de sauvegarde des droits de l'homme et des libertés fondamentales", RTDE 1996, pp. 467 *et seq.*, at p. 477.
[579] The classical example is offered by the *Hoechst* case. *See also* Editorial Comments, "Fundamental Rights and Common European Values", CMLRev. 1996, pp. 215 *et seq.*, at p. 219.
[580] Toth, "The European Union and Human Rights: the Way Forward", CMLRev. 1997, pp. 491 *et seq.*, at p. 504.
[581] Case 12/86 *Demirel* [1987] ECR 3719, para. 28. (whereas its does in Article 10 Regulation 1612/68 in relation to Community workers).
[582] Judgment of the European Court of Human Rights of 28 May 1985, "A" Series, No 95.
[583] AG Darmon in *Demirel*, *supra n.581*, para. 27.

rule restricting the freedom to provide services.[584] More precisely, the main question at stake concerned the interpretation of derogations to the free movement of services on grounds of public policy in the light of the margin of appreciation conferred to the Member States by the paragraph 2 of Article 10 ECHR (freedom of expression). The AG referred to the practice of the ECJ in the field of the protection of fundamental rights.[585] Then, he made explicit reference to *Elliniki Radiophonia Tileorassi* (and its corollary jurisprudence in the field of interpretation of the ECHR, such as *Nold*, *Johnston* or *Hauer*),[586] where the ECJ ruled that national rules presenting a restriction on the exercise of the freedoms to provide services must be interpreted in the light of the ECHR.[587] The AG undertook a profound analysis of the EctHR and EcoHR precedents on Articles 10 and 14, citing expressly the relevant paragraphs of the case. The AG quoted, first, the *Hoechst* case,[588] where the Court did not analyze the ECHR case law due to its inexistence.[589] However, the situation was deemed different in the present case.[590] The *Groppera Radio AG* v. *Switzerland* case[591] (it should be noted that the German government made reference to the same Strasbourg case)[592] of the EctHR and also the decision of the EcoHR in *Cable Music Europe Ltd* v. *Netherlands*[593] were explicitly mentioned in relation to the interpretation of paragraph 2 of Article 10 by the Strasbourg institutions and the wide margin of appreciation given to the Member States in this area. Then, the AG cited the relevant paragraphs of the decisions in relation to the Community law issue.[594] By contrast, the ECJ did not refer expressly to the judgment and decision of

[584] Case C-23/93 *TV 10 SA* v. *Commissariaat Voor de Media* [1994] ECR I-4795.

[585] AG Lenz in *TV 10 SA*, para. 79, "[i]n the past, the Court of Justice has been repeatedly asked to apply and interpret provisions of the European Convention on Human Rights. The Court of Justice has held as follows with regard to its jurisdiction to review legislative measures for compatibility with the European Convention: although it is true that it is the duty of this Court to ensure observance of fundamental rights in the field of Community law, it has no power to examine the compatibility with the European Convention of national legislation which concerns . . . an area which falls within the jurisdiction of the national legislator".

[586] *Ibid*., para. 80.

[587] *Ibid*., AG Lenz in *TV 10 SA*, para. 82.

[588] Joined Cases 46/87 and 227/88 *Hoechst* v. *Commission* [1989] ECR 2859.

[589] *Ibid.,* para. 18, "[f]urthermore, it should be noted that there is no case-law of the European Court of Human Rights on that subject".

[590] AG Lenz in *TV 10 SA*, *supra n.584,* para. 85, "[t]here is case-law of the European Court of Human Rights on the application of Articles 10 and 14 of the European Convention to facts similar to those of the instant case".

[591] European Court of Human Rights, judgment of 28 March 1990 No 14/1988/158/214 *Groppera Radio AG and Others v. Switzerland*, Publications of the ECHR, Series A, Vol. 173.

[592] *Ibid*., para. 76.

[593] Case 1803/91 *Cable Music Europe Ltd* v. *Netherlands*. Unreported, *See* AG Lenz in *TV 10 SA*, para. 87, for the wide interpretation of the paragraph 2 by the EcoHR.

[594] AG Lenz in *TV 10 SA*, *supra n.584,* para. 85, citing paragraph 73 of *Groppera Radio*, where the EctHR held that, "[l]astly and above all, the procedure chosen could well appear necessary in order to prevent evasion of the law; it was not a form of censorship directed

the ECHR institutions. The ECJ ruled in the same vein as the EctHR did in *Elliniki Radiophonia Tileorasi* and stated that fundamental rights form an integral part of the general principles of law and that restrictions imposed by the Netherlands broadcasting policy ensured plurality of opinion and subsequently freedom of expression.[595]

AG Van Gerven in *Grogan* analysed Article 2 of the ECHR in the light of the corresponding Strasbourg jurisprudence and found that no case-law dealt with this issue. However, the AG noted that the EcoHR made some statements[596] on this issue, but refrained from elaborating conclusions regarding the scope of Article 2 in relation to the right to life of the foetus[597] and also refused to accept complaints based on the violation of the right to family life (Article 8).[598]

In the wake of the 2/94 Opinion, the ECJ made direct references to the ECHR case-law. This assertion is confirmed by the case-law from1996-1998, e.g. *P* v. *S and Cornwall* (Article 8 ECHR), [599] *Criminal Proceedings against X* (Article 7 ECHR),[600] *Familiapress* (Article 10 ECHR),[601] and *Grant* (Article 8 ECHR). [602]

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against the content or tendencies of the programmes concerned, but a measure taken against a station which the authorities of the respondent State could reasonably hold to be in reality a Swiss station operating from the other side of the border in order to circumvent the statutory telecommunications system in force in Switzerland. The national authorities accordingly did not in the instant case overstep the margin of appreciation left to them under the Convention".

[595] *Ibid*., *TV 10 SA,* paras. 24-25.

[596] Application No 8416/79, *X.* v. *United Kingdom*, Collection of Decisions 19 (1980), p. 244.

[597] AG Van Gerven in Case C-159/90 *Grogan* [1991] ECR I-4685, para. 33, " . . . I would also point out that the European Court of Human Rights has not yet had occasion to rule on the compatibility of rules on abortion with the European Convention but the European Commission of Human Rights has made some pronouncements on this question. In its rulings the European Commission of Human Rights has refrained from making a general pronouncement on whether or not Article 2 of the Human Rights Convention protects the right to life of the foetus and, if so, to what extent. It has indicated only that, having regard to the protection of the mother's life which is obviously guaranteed by the Convention, the foetus cannot be entitled to an absolute right to life (as was claimed by a man who complained that national legislation did not prevent his wife from having an abortion). On an earlier occasion the European Commission of Human Rights dismissed a complaint brought by two women on the basis of Article 8 of the European Convention to the effect that national legislation under which abortion was permissible only within a specified period and/or subject to specified conditions, was to be regarded as an infringement of the right to respect for family life".

[598] Application No 6959/75, *Brueggemann and Scheuten* v. *Federal Republic of Germany*, Collection of Decisions 10 (1978), p. 100.

[599] Case C-13/94 *P* v. *S and Cornwall County Council* [1996] ECR I-2143, para. 16, "[t]he European Court of Human Rights has held that the term 'transsexual' is usually applied to those who, whilst belonging physically to one sex, feel convinced that they belong to the other; they often seek to achieve a more integrated, unambiguous identity by undergoing medical treatment and surgical operations to adapt their physical characteristics to their psychological nature. Transsexuals who have been operated upon thus form a fairly well-

What is more, this line of case-law is also clearly visible in the context of direct actions (*Baustahlgewebe*, *Montecatini*, *Connolly*). In the field of procedural principles (rights of the defense), the Court, in *Baustahlgewebe*, ruled that Article 6(1) of the European Convention on Human Rights provides that in the determination of his civil rights and obligations or in the determination of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.[603] The Court highlighted that the general principle of Community law, according to which everyone is entitled to a fair legal process, has its roots in the fundamental rights and is applicable to the proceedings concerning undertakings to which the

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defined and identifiable group (judgment of 17 October 1986, in *Rees v. United Kingdom* (Rees case, ECHR (1986), Series A, No 106)".

[600] Cases C-74/95 and 129/95 *Criminal Proceedings against X* [1996] ECR I-6609, para. 25, "[m]ore specifically, in a case such as that in the main proceedings, which concerns the extent of liability in criminal law arising under legislation adopted for the specific purpose of implementing a directive. That principle has also been enshrined in various international treaties, in particular in Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms (see, *inter alia*, the judgments of the European Court of Human Rights in *Kokkinakis v. Greece*, 25 May 1993, Series A, No 260-A, paragraph 52, and in *S.W. v. United Kingdom* and *C.R. v. United Kingdom*, 22 November 1995, Series A, No 335-B, paragraph 35, and No 335-C, paragraph 33).

[601] C-368/95 *Familiapress* [1997] ECR I-621, paras. 25-26, "[a]rticle 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms does, however, permit derogations from that freedom for the purposes of maintaining press diversity, in so far as they are prescribed by law and are necessary in a democratic society (see the judgment of the European Court of Human Rights of 24 November 1993 in Informationsverein Lentia and Others v. Austria Series A No 276)".

[602] Case C-249/96 *Grant* [1998] ECR I-621, paras. 33-34, "[t]he European Commission of Human Rights for its part considers that despite the modern evolution of attitudes towards homosexuality, stable homosexual relationships do not fall within the scope of the right to respect for family life under Article 8 of the Convention (see in particular the decisions in application No 9369/81, X. and Y. v. the United Kingdom, 3 May 1983, Decisions and Reports 32, p. 220; application No 11716/85, S. v. the United Kingdom, 14 May 1986, D.R. 47, p. 274, paragraph 2; and application No 15666/89, Kerkhoven and Hinke v. the Netherlands, 19 May 1992, unpublished, paragraph 1), and that national provisions which, for the purpose of protecting the family, accord more favourable treatment to married persons and persons of opposite sex living together as man and wife than to persons of the same sex in a stable relationship are not contrary to Article 14 of the Convention, which prohibits inter alia discrimination on the ground of sex (*see* the decisions in S. v. the United Kingdom, paragraph 7; application No 14753/89, C. and L.M. v. the United Kingdom, 9 October 1989, unpublished, paragraph 2; and application No 16106/90, B. v. the United Kingdom, 10 February 1990, D.R. 64, p. 278, paragraph 2) . . . In another context, the European Court of Human Rights has interpreted Article 12 of the Convention as applying only to the traditional marriage between two persons of opposite biological sex (see the Rees judgment of 17 October 1986, Series A no. 106, p. 19".

[603] *Ibid*., para. 20.

Commission has addressed the decision imposing a fine.[604] The general principle of Community law on the right to be heard includes the right to a hearing within a reasonable time. This right appears as a corollary right of the *audi alteram partem* principles, as is the right to access to the Commission's file. The Court estimated that the duration was extremely important.[605] Nevertheless, the Court stressed, citing expressly the jurisprudence of the European Court of Human Rights such as *Erkner/Hofauer*,[606] *Kemmache*[607] and *Phocas* v. *France*,[608] that in the appraisal of the length of the period, the circumstances specific to each case and particularly the importance of the case for the person, its complexity and the behaviour of the applicant and of the concerned authorities should be taken into consideration.[609] Similarly, in the *Montecatini* case (1999), the defendant invoked the principle of presumption of innocence against the "polypropylene decision" of the CFI as a "principle common to all the civilized judicial orders".[610] The Court, finally, recognized that the principle of presumption of innocence is part of the fundamental rights protected by the case law of the Court as reaffirmed in the preamble to the Single European Act and Article F (2) of the TEU, and which notably emanates from Article 6(2) of the European Convention on Human Rights.[611] Also, citing the *Öztürk* and *Lutz* jurisprudence[612] of the EctHR, the Court emphasised that this general principle applies to all types of proceedings against undertakings which lead to fines or penalties.[613]

In the field of fundamental rights, the Court in *Connolly* undertook a wide analysis of the ECHR jurisprudence regarding freedom of expression. [614] Mr Connolly, an official of the Community, published a book in 1995 entitled "The Rotten Heart of Europe: The Dirty War for Europe's Money", without prior authorisation from his superiors. Disciplinary proceedings were started against him for disregarding his duties and obligations prescribed by the staff Regulations. On 16 January 1996, Mr Connolly was dismissed from his post without any entitlement

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[604] *Ibid*., para. 21, "[t]he general principle of Community law that everyone is entitled to fair legal process, which is inspired by those fundamental rights (see in particular Opinion 2/94 [1996] ECR I-1759, paragraph 33, and judgment in Case C-299/95 Kremzow [1997] ECR I-2629, paragraph 14), and in particular the right to legal process within a reasonable period, is applicable in the context of proceedings brought against a Commission decision imposing fines on an undertaking for infringement of competition law".
[605] *Ibid*., para. 29.
[606] *Erkner and Hofauer* v. *Austria* (9616/81) [1987] ECHR 5 (23 April 1987).
[607] *Kemmache* v. *France* (Nos. 1 and 2) (12325/86) [1993] ECHR 51, para. 60.
[608] *Phocas* v. *France* (17869/91) [1996] ECHR 17 (23 April 1996). *See also Garyfallou AEBE* v. *Greece* (18996/91) [1997] ECHR 74 (24 September 1997), para 39.
[609] *Baustahlgewebe*, *supra n.339,* para. 29.
[610] Case C-235/92 P *Montecatini* v.*Commission* [1999] ECR I-4539, paras. 35 and 173.
[611] *Ibid*., para. 175.
[612] *Österk* case 21 February 1984, series A no 73 and Lutz of 25 August 1987, series A no 123-A.
[613] *Montecatini*, *supra n.610,* para. 176.
[614] Case C-274/99 *P, Connolly* v. *Commission* [2001] ECR I-1611.

to a retirement pension. He brought an action before the CFI,[615] which ruled that the decision was lawful. Consequently, he appealed to the ECJ alleging an infringement of the fundamental right to freedom of expression. More precisely, the appellant criticised the reasoning of the CFI judgment, arguing that it was based on a failure to respect the principle of freedom of expression.[616]

The ECJ, like the AG in his Opinion,[617] furnished an extremely complete overview of the ECHR case-law in relation to the scope of Article 10 ECHR and particularly the limitation to this freedom of expression embodied in its paragraph 2. First, the ECJ stressed the importance of the principle of freedom of expression and found (in the light of the EctHR jurisprudence such as *Handyside*, *Müller* and *Vogt*)[618] that it constitutes a basic foundation of a democratic society, which is both applicable to information or ideas that are received in a favourable manner and also relevant to those informations or ideas which are perceived as deranging or shocking.[619] The ECJ stressed also that freedom of expression is equally applicable to officials and other employees of the Community.[620] Second, the ECJ focused on the limitations to the freedom of expression, which are necessary in a democratic society,[621] and considered, citing directly the case-law of the EctHR, that those limitations must be interpreted restrictively.[622]

The Court asserted that it is legitimate to subject public servants to obligations designed to ensure a relationship of trust between the European institutions and its officials.[623] Consequently, the institutions should have the right to impose on one of its employees a system of obtaining a permission before publishing any material dealing with the work of the Communities. The rights of the institutions (which may

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[615] Joined Cases T-34/96 and T-163/96 *Connolly v. Commission* [1999] ECR-II-463.
[616] *Connolly*, *supra n.614*, para. 35.
[617] AG Ruiz-Jarabo Colomer in *Connolly*, paras. 15-18 and paras. 25-27.
[618] *Handyside* v. *The United Kingdom* (5493/72) [1976] ECHR 5 (7 December 1976) para 49, *Müller* and *Others* v. *Switzerland* (10737/84) [1988] ECHR 5 (24 May 1988), para 33, *Vogt* v. *Germany* (17851/91) [1995] ECHR 29 (26 September 1995), para 52.
[619] *Connolly*, *supra n.614,* para. 39.
[620] *Ibid*., para. 43. The Court expressly cited the *Oyowe* and *Traore* case.
[621] *Ibid*., para. 40.
[622] *Ibid*., para. 41, "[t]hose limitations must, however, be interpreted restrictively. According to the Court of Human Rights, the adjective 'necessary involves, for the purposes of Article 10(2), a 'pressing social need and, although '[t]he contracting States have a certain margin of appreciation in assessing whether such a need exists, the interference must be 'proportionate to the legitimate aim pursued and 'the reasons adduced by the national authorities to justify it must be 'relevant and sufficient (see, in particular, Vogt v. Germany, § 52; and Wille v. Liechtenstein judgment of 28 October 1999, no 28396/95, § 61 to § 63). Furthermore, any prior restriction requires particular consideration (*see* Wingrove v. United Kingdom judgment of 25 November 1996, *Reports of Judgments and Decisions* 1996-V, p. 1957, § 58 and § 60)". *See also* para. 42 where the ECJ referred to the *Sunday Time* case of the EctHR (The Sunday Times v. The United Kingdom (6538/74) [1979] ECHR 1 (26 April 1979) para 49) to stress that the legislative provisions implementing those restrictions must be worded with sufficient precision.
[623] *Ibid*., para. 44.

be justified by the public interest) are such as to justify restrictions on the freedom of expression in accordance with the European Convention on Human Rights.[624] The ECJ cited the ECHR jurisprudence connected with the freedom of expression of the civil servants at the national level. [625] Finally, the ECJ, using analogous reasoning, ruled that *"the fact that the restriction at issue takes the form of prior permission cannot render it contrary, as such, to the fundamental right of freedom of expression, as the Court of First Instance held . . . in the contested judgment"*. [626]

In its recent case-law (2002-2004) concerning preliminary rulings, it appears that the Court has increasingly referred to the ECHR jurisprudence. This is particularly true in relation to Articles 6, 8, 10 and 12 ECHR. In *Steffensen* (2003), the Court applied the right to a fair hearing (right to a second opinion on the analysis of samples of foodstuff) regarding German procedural rule,[627] and referred to ECHR case-law in order to explain the scope of Article 6(1) ECHR.

As to Article 8 ECHR, the Court in *Carpenter* (right to respect for family life, where one ECHR case was referred to)[628] and *Roquette* (right to privacy, three ECHR

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[624] *Ibid*., paras. 46 and 51.

[625] *Ibid*., para. 49, "[a]s the Court of Human Rights has held in that regard, it must '[be borne in mind] that whenever civil servants' right to freedom of expression is in issue the duties and responsibilities referred to in Article 10(2) assume a special significance, which justifies leaving to the national authorities a certain margin of appreciation in determining whether the impugned interference is proportionate to the above aim (see Eur. Court H. R. Vogt v. Germany, cited above; Ahmed and Others v. United Kingdom judgement of 2 September 1998, *Reports of Judgments and Decisions* 1998-VI, p. 2378, § 56; and Wille v. Liechtenstein, cited above, § 62)".

[626] *Ibid*., para. 52.

[627] Case C-276/01 *Joachim Steffensen* [2003] ECHR I-3775, para. 75, "[i]t should be noted, next, that, it follows from the case-law of the European Court of Human Rights that Article 6(1) of the ECHR does not lay down rules on evidence as such and, therefore, it cannot be excluded as a matter of principle and in the abstract that evidence obtained in breach of provisions of domestic law may be admitted. According to that case-law, it is for the national courts to assess the evidence they have obtained and the relevance of any evidence that a party wishes to have produced (*see Mantovanelli v. France*, judgment of 18 March 1997, *Reports of Judgments and Decisions* 1997-II, § 33 and 34; and *Pélissier and Sassi v. France*, judgment of 25 March 1999, *Reports of Judgments and Decisions* 1999-II, § 45)".

[628] Case C-60/00 *Carpenter* [2002] ECR-6279, para. 42, "[e]ven though no right of an alien to enter or to reside in a particular country is as such guaranteed by the Convention, the removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life as guaranteed by Article 8(1) of the Convention. Such an interference will infringe the Convention if it does not meet the requirements of paragraph 2 of that article, that is unless it is 'in accordance with the law', motivated by one or more of the legitimate aims under that paragraph and 'necessary in a democratic society', that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued (see, in particular, *Boultif* v. *Switzerland*, no. 54273/00, §§ 39, 41 and 46, ECHR 2001-IX)".

cases)[629] followed the same practice. Notably, in *Rechnungshof and Rundfunk* (2003),[630] the Court referred to five judgments of the EctHR dealing with the existence of an interference with private life and the justification of the interference.[631] Identically, the Court, in *Akrich* (2003), [632] referred to two EctHR judgments on Article 8 ECHR as to the interpretation of what is necessary in a democratic society.

As to Article 10, the Court in *Schmidberger*[633] (concerning restrictions on the right to organise demonstrations) and *RTL* (concerning restrictions on advertising)[634] used once again the Strasbourg case law.

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[629] Case C-94/00 *Roquette* [2002] ECR I-9011, para. 52, "[a]lthough the national court with jurisdiction to authorise coercive measures must take into account the particular context in which its jurisdiction has been invoked, as well as the considerations set out in paragraphs 42 to 51 above, those requirements cannot prevent or absolve it from performing its obligation to ensure, in the specific circumstances of each individual case, that the coercive measure envisaged is not arbitrary or disproportionate to the subject-matter of the investigation ordered (see, by analogy, Eur. Court HR, Funke v. France judgment of 25 February 1993, Series A No 256-A, § 55, Camenzind v. Switzerland judgment of 16 December 1997, *Reports of Judgments and Decisions* 1997-VIII, § 45, and in *Colas Est and Others v. France*, cited above, § 47)".

[630] Joined Cases C-465/00, C-138/01 and C-139/01 *Rechnungshof and Rundfunk* [2003] ECR I-4989. The Rechnungshof (state control body, Court of Audit) infers from the paragraph 8 of the BezBegrBVG (Federal constitutional law on the limitation of salaries of public officials) an obligation to list in the report the names of the persons concerned and show their annual income. The defendants (*inter alia* local and regional authorities, public undertakings) relying on the Directive 95/46 and Article 8 ECHR, considered that its does not exist such an obligation. The main question at stake is whether this paragraph compatible with community law? Or Does Community law preclude a national legislation requiring a state control body to collect and communicate data on the income of persons employed by the bodies subject to that control?

[631] *Ibid*., paras, 73, 75, 77 and 83.

[632] Case C-109/01 *Akrich* [2003] 3 CMLR 26, para. 60, "[t]he limits of what is necessary in a democratic society where the spouse has committed an offence have been highlighted by the European Court of Human Rights in *Boultif* v. *Switzerland*, judgment of 2 August 2001, *Reports of Judgments and Decisions* 2001-IX §§ 46 to 56, and *Amrollahi* v. *Denmark*, judgment of 11 July 2002, not yet published in the Reports of Judgments and Decisions, §§ 33 to 44".

[633] Case C-112/00 *Eugen Schmidberger* [2003] ECR I-6559, para. 79, "[s]econd, whilst the fundamental rights at issue in the main proceedings are expressly recognised by the ECHR and constitute the fundamental pillars of a democratic society, it nevertheless follows from the express wording of paragraph 2 of Articles 10 and 11 of the Convention that freedom of expression and freedom of assembly are also subject to certain limitations justified by objectives in the public interest, in so far as those derogations are in accordance with the law, motivated by one or more of the legitimate aims under those provisions and necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued (see, to that effect, Case C-368/95 *Familiapress* [1997] ECR I-3689, paragraph 26, Case C-60/00 *Carpenter* [2002] ECR I-6279, paragraph

Concerning Article 12, the Court in *KB* (2004) highlighted the new *Goodwin* case of the EctHR regarding the right to marry for transsexuals.[635]
Finally, it seems worth remarking that, while the parties and the AG intensively call for invoking the ECHR jurisprudence, the Court may not always turn to the ECHR case-law.[636] Instead, it would simply mention the relevant ECHR Article[637], or in certain circumstances, would apply directly the ECHR provisions in order to interpret and review a national measure falling within the scope of Community law.[638] This assertion acquires even more weight in the light of the *Carpenter*, *Baumbast* and *Akrich* cases.[639] In *Carpenter*, for instance, the Court reviewed

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42, and Eur. Court HR, Steel and Others v. The United Kingdom judgment of 23 September 1998, *Reports of Judgments and Decisions* 1998-VII, § 101)".

[634] Case C-245/01 *RTL Television GmbH* [2004] 1 CMLR 4, para. 73, "[i]t is also clear from the case-law of the European Court of Human Rights on Article 10(2) of the ECHR that national authorities have a discretion in deciding whether there is a pressing social need capable of justifying a restriction on freedom of expression. According to that case-law, such a discretion is particularly essential in commercial matters and especially in a field as complex and fluctuating as advertising (*see VGT Verein gegen Tierfabriken* v. *Switzerland*, judgment of the ECHR of 28 June 2001, Reports of Judgments and Decisions 2001-VI, paragraphs 66 to 70)".

[635] Case 117/01 *KB* [2004] 1 CMLR 28, para. 33, "[t]he European Court of Human Rights has held that the fact that it is impossible for a transsexual to marry a person of the sex to which he or she belonged prior to gender reassignment surgery, which arises because, for the purposes of the registers of civil status, they belong to the same sex (United Kingdom legislation not admitting of legal recognition of transsexuals' new identity), was a breach of their right to marry under Article 12 of the ECHR (*see* Eur. Court H.R. judgments of 11 July 2002 in *Goodwin* v. *United Kingdom* and *I.* v. *United Kingdom*, not yet published in the *Reports of Judgments and Decisions*, §§ 97 to 104 and §§ 77 to 84 respectively".

[636] Joined Cases C-20/00 and C-64/00 *Booker Aquaculture* [2003] 3 CMLR 6.

[637] Case C-101/01 *Bodil Lindqvist* [2003] ECR I-1611, para. 90. The Court referred to the respect of Article 10 ECHR (without mentioning ECHR case law). This case concerns the publication of personal data on the internet. According to the Court, the directive 95/46 (on the protection of individuals with regard to the processing of personal data on the free movement of such data) does not conflict with Article 10 ECHR. Concerning the implementing national legislation, it is for the national courts and authorities to ensure a fair balance between the rights and interests, including the fundamental rights protected by the Community legal order.

[638] Groussot, "UK Immigration Law under Attack and the Direct Application of Article 8 ECHR by the ECJ", NSAIL 2003, pp. 187-200.

[639] Case C-109/01 *Hacene Akrich* [2003] 3 CMLR 26, para. 58. "[t]hat said, where the marriage is genuine and where, on the return of the citizen of the Union to the Member State of which he is a national, his spouse, who is a national of a non-Member State and with whom he was living in the Member State which he is leaving, is not lawfully resident on the territory of a Member State, regard must be had to respect for family life under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (hereinafter the Convention). That right is among the fundamental rights which, according to the Court's settled case-law, restated by the preamble

directly a UK administrative decision in the light of Article 8 ECHR. In the operative part of the judgment, the Court maintained that,

> "[t]he decision to deport Mrs Carpenter constitutes an interference with the exercise by Mr Carpenter of his right to respect for his family life within the meaning of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, … which is among the fundamental rights which, according to the Court's settled case-law, restated by the Preamble to the Single European Act and by Article 6(2) EU, are protected in Community law".[640]

The formulation used by the Court is not the traditional formulation generally referred to regarding the application of fundamental rights by the ECJ. By contrast, the AG employed the long-established formulation, which makes reference both to the constitutional traditions common to the Member States and considers the ECHR as a source of special significance. [641] One may wonder about the reasons behind this new approach which gives the ECHR a central and unique role in ECJ's review of national measures. By applying the ECHR directly, the ECJ appears to endorse exactly the same role as the EctHR. By referring directly and solely to the ECHR, the ECJ gives a special status to that Convention as a source of Community law. Such a shift of emphasis, in my view, may be appraised in the light of the recent constitutional developments and the possible accession to the ECHR. At the end of the day, the conclusion to which we are inescapably led is that the multiple references to the ECHR case-law and the direct application of the ECHR provisions point towards an equivalent standard of protection. Going further, it may be argued that the direct application of ECHR provisions may create an environment favourable to maximalist interpretation. Before entering into the thorny issue of equivalent standard of protection, it should be demonstrated in a systematic analysis how is mirrored the increasing use of the ECHR by the ECJ jurisprudence.

Article 2[642]
Article 3[643]

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to the Single European Act and by Article 6(2) EU, are protected in the Community legal order. *See also* AG Mischo in Roquette, para. 28, "regard must be have to the ECHR".

[640] *Carpenter*, *supra n.628,* para. 41.

[641] *Ibid.*, AG Stix-Hackl in *Carpenter*, para. 81. In that regard, the AG opined that, *"the Court has to ensure that fundamental rights are observed. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. The ECHR has special significance in that respect. Those principles have, moreover, been restated in Article 6(2) [TEU]"*.

[642] *See,* AG Van Gerven in Case C-159/90 *Grogan* [1991] ECR I-4605, AG Stix-Hackl in Case 36/02 *Omega* [2004] n.y.r.

[643] *See,* AG Capotorti in Case 115/81 and 116/81 *Adoui & Cornuaille* [1982] ECR 1665, AG Jacobs in Case C-168/91 *Konstantinidis* [1993] ECR I-1191, AG La Pergola in Case C-299/95 *Kremzow* [1997] ECR I-2405.

Article 5[644]
Article 6[645]
Article 6 and 13[646]
Article 7[647]
Article 8[648]

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[644] *See,* AG Capotorti in Case 115/81 and 116/81 *Adoui & Cornuaille* [1982] ECR 1665, AG Jacobs in Case C-168/91 *Konstantinidis* [1993] ECR I-1191, Case C-148/02 *Garcia Avello* [2003] ECR I-11613 (using citizenship provisions).

[645] *See,* Case T-213/95 *SCK and FNK* v. *Commission* [1997] ECR II-1739, Case C-185/95 P *Baustahlgewebe v. Commission* [1998] ECR I-841, Case T-154/98 *Asia Motor France* [2000] II-3453, *see also* Case 98/79 *Pécastaing* [1980] ECR 691 (first reference by the ECJ to Article 6, the compatibility of the Directive with the Article 6 ECHR was not considered necessary *in casu*). Article 6 ECHR and the Commission (non applicability), Case 209-215/78, 218/78 *Van Landewyck* [1980] ECR 3125, confirmed in Case 100-103/80 *Musique Diffusion Francaise* v. *Commission* [1983] ECR 1825 and Opinion of "AG" Vesterdorf in Case T-7/89 *Hercules NV* v. *Commission.* [1991] ECR II-1711. *See also* Case T-68/169 *Societa Italiano Vetro SpA* v. *Commission* [1992] ECR II-1403. Right of appeal: Case 297/88 and 197/89 *Dzodzi* [1990] ECR 3763. Proceeding in the Community judicature and Article 6 ECHR: Order T-107/94 *Kick* v. *Council and Commission* [1995] ECR II-1717, *see also* Order C-175/96 P, *Orlando Lopes* v. *Court of Justice of The European Communities* [1996] ECR I-6409, Presumption of innocence: Case C-235/92 P *Montecatini* v. *Commission* [1999] ECR I-4539. National legislation and Article 6: Case C-29/95 *Eckehard Pastoors and Another* [1997] ECR I-285, *see also* Case C-299/95 *Kremzow* [1997] ECR I-2405. (outside the scope of Community law), Case C-276/01 *Joachim Steffensen* [2003] ECHR I-3775. National Courts and Article 6: AG Ruiz-Jarabo in Case C-17/00 *De Coster* [2001] ECR I-9445 (the AG proposed a definition of the Court and Tribunal (particularly the question of independence) inspired by Article 6(1) ECHR). Advocates General and Article 6: Case C-17/98 *Emesa Sugar* [2000] ECR I-665, AG Ruiz-Jarabo in Case C-466/00 *Kaba* [2003] ECR I-2219. State aids proceedings (Commission) and Article 6, Case 323/82 *Intermills* [1984] ECR 3809. Nulla poena sine culpa and Article 6: AG Van Gerven in Case C-326/88 *Hansen & Son* [1990] ECR 2911.

[646] *See*, Case 222/84 *Johnston* [1986] ECR 1651 at p. 1682, Case 222/86 *Heylens* [1987] ECR 4097, AG Van Gerven in Case C-70/88 *Parliament* v. *Council* [1991] ECR I-4529 paras. 10-12, Case C-97/91 *Oleificio Borelli* v. *Commission* [1992] ECR I-6313, para. 14, Case T-111/96 *ITT Promedia* v. *Commission* [1996] ECR II-2937, Case C-226/99 *Siples* [2001] ECR I-277, para. 17, Case C-1/99 *Kofisa Italia* [2001] ECR I-207, para. 46, Case C-424/99 *Commission* v. *Austria* [2001] ECR I-9285, para. 45, Case C-459/99 *MRAX* [2002] ECR I-6591, para. 101, Case T-177/01 *Jégo-Quéré* [2002] ECR II-2365, para. 41, Case C-50/00 P *Unión de Pequeños Agricultores* [2002] ECR I-6677 para. 40, and Case C-263/02 P *Jégo-Quéré* [2004] n.y.r.

[647] *See,* Case 63/83 *Kent Kirk* [1984] ECR 2689. Case C-331/88 *MAFF and Others,ex parte Fedesa* [1990] ECR 4023, Case C-74/95 and C-129/95 *Criminal Proceedings against X* [1996] ECR I-6609, and AG Kokott in Case C-387/02, C-391/02 et C-403/02 *Berlusconi* [2004] n.y.r.

[648] *See,* Case 136/79 *National Panasonic* v. *Commission*, Case C-5/85 *Akzo Chemie BV* v. *Commission* [1987] ECR 2585. Case 249/86 *Commission* v. *Germany* [1989] ECR 1263, Case 46/87 and 227/88 *Hoechst AG* v. *Commission* [1989] ECR 2859, Case C-94/00 *Roquette* [2002] ECR I-9011, Case T-59/99 *Ventouris* v. *Commission* [2003] n.y.r, Case T-66/99

Article 9[649]
Article 10[650]
Article 11[651]
Article 12[652]
Article 14[653]
Article 1 of the 1st Protocol[654]
Article 2 of the 4th Protocol[655]
Article 3 of the 4th Protocol[656]
Article 4 of the 7th Protocol.[657]

Minoan Lines v. *Commission* [2003] n.y.r., Right to medical secrecy: Case T-121/89 and T-13/90 *X* v. *Commission* [1992] ECR II-2195. *See also* Case T-19/93 *A* v. *Commission* [1994] ECR II-179, Familly life: Case C-413/99 *Baumbast* [2002] ECR I-7091, C-60/00 *Carpenter* [2002] ECR-6279, Case C-109/01 *Akrich* [2003] 3 CMLR 26, AG in Case 117/01 *KB* [2004] n.y.r. (right to marry for transexuals), C-139/01 *Rechnungshof and Rundfunk* [2003] ECR I-4989, and Case C-200/02 *Chen* [2004] n.y.r.

[649] *See,*. Case 130/75 *Prais* v. *Council* [1976] ECR 1589.

[650] AG Warner in Case 34/79 *Henn&Darby* [1979] ECR 379. Case 43/82 and 63/82 *VBVB&VBBB* v. *Commission* [1984] ECR 19, Case C-60-61/84 *Cinéthèque* [1985] ECR 2605, Case C-260/89 *Elliniki Radiophonia Tileorassi* [1991] ECR I-2925, Case C-159/90 *Grogan* [1991] ECR I-4605 (*See* in particular AG Van Gerven in *Grogan*), Case C-23/93 *TV 10 SA* v. *Commission* v. *Commissariat Voor de Media* [1994] ECR I-4795, Case C-368/95 *Familiapress* [1997] ECR I-621, Case C-274/99 P *Connolly* [2001] ECR I-1611, Case C-112/00 *Schmidberger* [2003] ECR I-5659, Case C-245/01 *RTL Television* [2003] 1 CMLR 4, Case C-101/01 *Bodil Lindqvist* [2003] ECR I-1611, Case C-71/02 *Herbert Karner* [2004] n.y.r.

[651] Case C-415/93 *Bosman* [1995] ECR I-4921.

[652] AG Lenz in Case 236/87 *Bergeman* [1988] ECR 5125, Case 117/01 *KB* [2004] n.y.r.

[653] Case 149/77 *Defrenne*[1978] ECR 1365, Case 50-55/82 *José Dorca Marina* [1982] ECR 3949, Opinion of AG Rozès in Case C-314-316/81 and C-83/82 *Waterkeyn* [1982] ECR 4337, Case C-23/93 *TV 10 SA* [1994] ECR I-4795, Case C-13/94 *P* v. *S and Cornwall County Council* [1996] ECR I-2143, Case C-249/96 *Grant* [1998] ECR I-621.

[654] Case 44/79 *Hauer* [1979] ECR 3727, Case 154/78 *Valsabbia* [1980] ECR 1980, Case 265/87 *Shräder HS Kraftfutter* [1989] ECR 2237, AG Jacobs in Case 5/88 *Wachauf* [1989] ECR 2609, Case R v. *Commissioners of Customes and Excise, ex parte Faroe Seafood Co Limited and Others* [1996] ECR I-2465, AG Jacobs in Case C-84/95 *Bosphorus* [1996] ECR I-3953, Cases C-20/00 and C-64/00 *Booker Aquaculture* [2003] 3 CMLR 6.

[655] AG Darmon in Case C-192/89 *Sevince* [1990] ECR 3461.

[656] Case C-370/90 *IAT & Surinder Singh, ex parte Home Secretary* [1992] ECR I-4265.

[657] Joined Cases 18/65 and 35/65 *Gutmann* v. *Commission* [1966] ECR 103, 119, and Case 7/72 *Boehringer* v. *Commission*, para. 3, Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v. *Commission* [1999] ECR II-931, para. 96, Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *LVM* v. *Commission* [2002] ECR I-8375, para. 59, Case T-223/00 *Kyowa Hakko Kogyo* v. *Commission* [2003] ECR II-2553, paras. 96-105, Case T-224/00 *Archer Daniels Midland Company* v. *Commission* [2003] ECR II-2597, para. 85.

2.3. EQUIVALENT STANDARD AND ECHR

In a recent AG Opinion, the ECHR has been described as a *"yardstick"* against which the relevant provisions of secondary law are to be measured.[658] This section analyzes the standard of protection afforded by fundamental rights (as general principles) in the light of the ECHR. First, it is considered that even though there may be divergences in interpretation, the ECJ standard of protection appears equivalent to the Strasbourg system (2.3.1). Second, the recent years have shown an increasing number of (indirect) complaints directed towards the Community. This may be a sign that the EC law standard is lower than the ECHR standard. Perhaps, the accession of the Community to the ECHR constitutes a providential solution. However, before drawing such conclusions, one should analyse, in detail, the jurisprudence of both systems (2.3.2). Third, the ECHR establishes a minimum standard of protection (Article 60 ECHR), meaning that its provisions may be interpreted extensively. The recent case-law of the ECJ appears to demonstrate such a maximalist interpretation and, thus, should be studied cautiously (2.3.3).

2.3.1. Diverging Interpretation and the Principle of Equivalence

As is well known, some problems of interpretation may arise between the ECJ and the EctHR (and the EcoHR before the reform). The ECJ seems extremely conscious of this situation and AG Darmon in *Al-Jubail Fertilizer* stressed the utmost importance of avoiding such discrepancies.[659] Notably, the risk of divergent interpretation is raised again by the Charter of Fundamental Rights. In that sense, it is worth remarking that the horizontal provisions of the Charter make explicit references to the ECHR (Articles 52(3) and 53). [660]

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[658] AG Stix-Hackl in *MRAX*, *supra n.646,* para. 62.

[659] AG Darmon, in Case C-49/88 *Al-Jubail Fertilizer* v. *Council* [1991] ECR I-3187, "[f]urthermore, the situation is not really satisfactory in terms of fundamental rights. If the European Commission of Human Rights declared inadmissible applications directed against national decisions enacted pursuant to a Community act, the main reason is that, through its successive judgments, the Court has established that principle that it reviews the Community institutions' observance of fundamental rights. It is therefore far from unimportant to avoid conspicuous discrepancies between the construction this Court puts on the right to a fair trial and the requirements already laid down by the European Court of Human Rights. On this point, there seems to be no doubt that the anti-dumping proceeding, although conducted by an administrative authority, must meet the needs of a `fair hearing', which implies that an 'equality of arms' must prevail between the parties. Furthermore, observance of the principle of hearing arguments from both sides demands that the party or his representative have the opportunity of consulting and criticizing the case documents, and in particular the evidence on which the decision was based. Accordingly, it does not appear that the procedure followed in this case met those requirements".

[660] 52(3): In so far as this Charter contains rights which corresponds to rights guaranteed by the Convention for the Protection of human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said convention. This provision shall not prevent Union law providing more extensive protection. Article 52 focuses

In the light of Article 53 of the Charter, Lenaerts and De Smijter contend that "[w]here the text of the Charter departs from that of the ECHR, it can never be at the expense of the level of protection offered by the ECHR. It follows that the Charter can not be qualified as an alternative for the ECHR". [661]

One of the major problems that a binding Charter could raise is that of diverging interpretations with the ECHR. It may be argued that the Charter could indeed increase the risk of divergence, since the text of the Charter does not correspond exactly to the ECHR. Moreover, since the Charter does not entail an accession to the ECHR, which would thus permit the EU institutions to fall directly under the scope of it, there are still, practically, two courts ensuring human rights protection, and theoretically two standards of protection.[662] Such a difficulty existed already in relation to the general principles and has since been the object of a flourishing literature.[663] In this sense, Grief has stressed that the risk of inconsistencies of interpretation exists between the two courts, even if informal contacts between them do exist, mainly due to the lack of a reference mechanism to the EctHR on the interpretation of the ECHR.[664] Similarly, Van Dijk and Van Hoof underline the risk of conflicting case-law, particularly for the EU Member States having a dualist

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more particularly on the scope of the guaranteed rights. It recognizes the principle of equivalence between the Charter and ECHR provisions. Finally, Article 53 deals with the level of protection afforded by the Charter and states that *"nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions"*.

[661] Lenaerts and De Smijter, "A Bill of Rights for the European Union", CMLRev. 2001, pp.273-300, at p. 297.

[662] Lenaerts and De Smijter, "The Charter and the Role of the European Courts", MJ 2001, pp.90-101, at pp. 96-99.

[663] Besselink, "Entrapped by the Maximum Standard: On Fundamental Rights Pluralism and Subsidiarity in the European Union", CMLRev. 1998, pp. 629-680, Jacobs, "European Community Law and the European Convention on Human Rights", in Lawson and de Bloijs (eds.), *The Dynamics of the Protection of Human Rights in Europe,* Essays in Honour of Henry G. Schermers, vol. II, Dordrecht, 1994, pp. 261-271, Lawson, "Confusion and Conflict? – Diverging Interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg", in Lawson and de Bloijs (eds.), *The Dynamics of the Protection of Human Rights in Europe*, Essays in Honour of Henry G. Schermers, vol.III, Dordrecht, 1994, pp. 219-252, Spielmann, "Human Rights Case Law in the Strasbourg and Luxembourg Courts: Conflicts, Inconsistencies and Complementarities", in Alston (eds.), *EU and Human Rights*, 1999, 757, and Turner, "Human Rights Protection in the European Community: resolving Conflict and Overlap Between The European Court of Justice and the European Court of Human Rights", EPL 1999, pp. 453-470.

[664] Grief, "The Domestic Impact of the European Convention on Human Rights as Mediated through Community Law", PL 1991, 555-567, at p. 566.

system, when it comes to the interpretation of ECHR by the ECJ and the EctHR.[665] One of the classical examples of diverging hermeneutic concerns Article 8 of the ECHR and the *Hoechst* case. In *Hoechst*, the ECJ had to interpret Article 8 ECHR in order to determine if this provision could embody a principle protecting the business premises against Commission's "dawn raid". The ECJ concluded that Article 8 could not apply to legal persons. A few years later, in *Chappell*[666] and *Niemietz*,[667] the Strasbourg institutions came to the opposite conclusion. In *Niemietz*, the EctHR, citing the *Hoechst* case, ruled that, *"[t]he search of the applicant's office constituted an interference with his rights under Article 8"*.[668] According to Cooper and Pillay,[669] the CFI in the recent case *LVM and others*,[670] refused to follow the "Niemietz approach" and consequently affirmed the diverging stance of the Court of Justice towards the right to privacy. As the CFI ruled,

> "[i]n so far as the pleas and arguments put forward today by LVM and DSM are identical or similar to those put forward at that time by Hoechst, the Court sees no reason to depart from the case-law of the Court of Justice . . . That case-law is, moreover, based on the existence of a general principle of Community law, as referred to above, which applies to legal persons. The fact that the case-law of the European Court of Human Rights concerning the applicability of Article 8 of the ECHR to legal persons has evolved since the judgements in Hoechst, Dow Benelux and Dow Chemical Ibérica therefore has no direct impact on the merits of the solutions adopted in those cases".[671]

The problem is not simply that the two jurisdictions take a diverging view on the same fundamental right, but that such conflicts may mature into a conflict of jurisdiction. [672] So far as the acts of Community institutions are concerned, a tangible conflict is unlikely because the Community is not party to the ECHR[673] and is thus outside Strasbourg's jurisdiction. The situation is different in respect of action by domestic authorities falling within the scope of Community law, since these actions are, in principle, subject to the ECHR. The fundamental rights form a part of Community law. Consequently, they can be invoked against the Member

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[665] Van Dijk and Van Hoof, *Theory and Practice of the European Convention on Human Rights*, Kluwer, 1998, at p. 21. *See also* Grief, "The Domestic Impact of the European Convention on Human Rights as Mediated through Community Law", PL 1991, 555-567, at p. 566.
[666] *Chappell* v. *United Kingdom* (10461/83) [1989] ECHR 4 (30 March 1989).
[667] *Niemietz* v. *Germany* (13710/88) [1992] ECHR 80 (16 December 1992).
[668] *Ibid*.
[669] Cooper and Pilley, "Through the Looking Glass: Making Visible Rights Real", in Feus (eds.), Federal Trust, 2000, pp. 111-128, at p. 116.
[670] Joined cases T-305/94 *Limburgse Vinyl Maatschappij* v. *Commission* [1999] ECR II-931, paras. 419-420.
[671] *Ibid*., *LVM*, paras. 419-420.
[672] *Niemietz* v. *Germany*, *supra, Funke* v. *France* (10828/84) [1993] ECHR 7 (25 February 1993).
[673] *Infra*, *CFDT* and *Dufay* cases.

States acting within the scope of Community law. The Convention can be seen as being part of Community law, and may thereby benefit from the domestic status of Community law within the national legal orders.[674] Thus, a national decision may be challenged as infringing the Convention rights before the European Court of Human Rights (EctHR), and this challenge may succeed in one case, but not in the other.[675] For instance, in *Open Door Counselling*, the EctHR found that the restrictions imposed on the information on abortion services were not necessary in a democratic society and thus infringed Article 10(1) ECHR. In *Grogan*,[676] the ECJ did not assess the free movement of services in the light of Article 10 as proposed by AG Van Gerven. In addition, the EctHR,[677] in *Lentia*, ruled that the broadcasting monopoly in Austria constituted an encroachment of Article 10(1) ECHR, whereas the ECJ in *ERT*,[678] left the issue to be settled by the domestic court (thus contingent to national discrepancies in the exercise of the proportionality test).[679]

The risk of concurrent jurisdiction is in reality rather weak due to the "subsidiary" character of the EctHR jurisdiction. According to AG Jacobs in *Konstantinidis*:

> "the danger of an overlap between the jurisdiction of the Court of Justice and the European Court of Human Rights would not in fact be great. The latter has always stressed that its jurisdiction is subsidiary, in the sense that it is primarily for the national authorities and the national courts to apply the Convention. In any event, applicants must first, under Article 26 of the Convention, exhaust the remedies available under domestic law, which includes of course the possibility of a reference for a preliminary ruling under Article 177 [new 234] of the Treaty. Thus, if the Convention may be invoked under Community law, the result would simply be to increase the likelihood of a remedy being found under domestic law, without the need for an application to the organs established by the Convention".[680]

One point appears to be rather clear. The acts of the Community are not susceptible as such to be directly challenged in front of the EctHR, as the European Community is not a party to the ECHR. Such an approach results from the *CFDT* decision of the European Commission on Human Rights in the late seventies.[681] In France, the Council of Ministers refused to admit representatives of a French Union (CFDT) in

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[674] Van Dijk and Van Hoof, *Theory and Practice of the European Convention on Human Rights*, Kluwer, 1998, at pp. 20-21.
[675] *Open Door and Dublin Well Woman* v. *Ireland* (14234/88) [1992] ECHR 68 (29 October 1992).
[676] Case C-159/90 *Grogan* [1991] ECR I-4685.
[677] *Informationsverein Lentia and Others* v. *Austria* (13914/88) [1993] ECHR 57 (24 November 1993).
[678] Case C-260/89 *Elliniki Radiophonia Tileorassi* [1991] ECR I-2925.
[679] *See also* Case C-368/95 *Familiapress* [1997] ECR I-3889 (referred to *Lentia*).
[680] AG Jacobs in *Konstantinidis*, *supra n.360*, para. 50.
[681] EcoHR Decision of 10 July 1978 on Application No 8030/77, *Confédération francaise démocratique du travail* v. *European Communities*, Alternatively, their Member States on their Member States taken individually.

a Consultative Committee established under the ECSC Treaty. The CFDT lodged an application to the EcoHR, in 1977, against the European Communities and their Member States, alleging violations of the Articles 11, 13 and 14 of the ECHR. CFDT claimed that the Member States (all of them signatories to the ECHR) could be held responsible for human rights violations by the acts of the institutions that had been founded on their behalf.[682] The EcoHR rejected the complaint on the basis that the challenged act emanated from an EC institution, which is not subject to the ECHR and the EcoHR did not possess the competence *ratione personae* to examine the alleged violation. The decision of the EcoHR was clearly based on the wording of Article 34 ECHR,[683] according to which the Court is authorized to receive complaints from victims of a Convention infringement by one of the High Contracting Parties.[684] This approach was confirmed by the *Dufay* case.[685]

In *Dufay*, after Christine Dufay was fired from the European Parliament where she was employed on a temporarily basis, she attempted to challenge this decision before the ECJ. However, the time limit for action was foreclosed and the action was consequently dismissed.[686] Then, Dufay turned to the EcoHR, which considered that in the case of a lawsuit directed against the Member States of the EC, such an action would have to respect the rule on exhaustion of domestic remedies as enshrined in Article 26 ECHR [new 35].[687] The competence of the EcoHR would be established only after the exhaustion of the remedies specifically provided for the control of Community acts. According to the EcoHR, the system of remedies provided by EC law would be assimilated to the remedies referred to in Article 26 ECHR. Finally, the EcoHR declared the action to be inadmissible due to the fact that the applicant did not correctly use the domestic remedies available. Nevertheless, Peukert underlined that the EcoHR did not declare such a type of action as necessarily inadmissible.[688]

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[682] The argument was founded on a EctHR decision. App. No. 235/56, *X* v. *Germany*, (1958) 2 Yearbook ECHR 300, "if a State contracts treaty obligation and subsequently concludes another international agreement which disables it from performing its obligations under the first treaty, it will be answerable for any resultant breach of its obligations under the earlier treaty".

[683] The other type of complaint (Member State complaint) is founded on Article 33 ECHR.

[684] The Articles 11-15 of the Vienna Convention on the Law of Treaties reflect the principle of international law according to which an international agreement is solely binding upon their parties after they have expressed a "consent to be bound" by it.

[685] EcoHR Decision of 19 January 1989 on Application No 13539/88, *Christine Dufay* v. *European Communities*, secondarily, the Collectivity of their Member States and their Member States Taken individually.

[686] Case 257/85 *Dufay* v. *European Parliament* [1987] ECR I-1561.

[687] According to Article 35 (2) (b) ECHR, the ECtHR will refuse the application as inadmissible when *"...already been submitted to another procedure of international investigation or settlement and contains no relevant new information"*.

[688] Peukert, "The Importance of the European Convention on Human Rights for the European Union", in Mahoney, Matscher, Petzold and Wildhaber (eds.), *Protection des droits de l'homme: la perspective européenne,* 2000, pp. 1107-1122, at p. 1112.

In light of those two cases, it appears rather clear that the Strasbourg organs are unwilling to allow the individuals to engage the Member States' responsibility in the case of an alleged violation of fundamental rights by an act of the European Union. It can be argued that it is possible to challenge indirectly the Community measure, that is to say, to challenge the national legislation implementing the Community measure. Examples can be found in the decisions of the EcoHR and EctHR in *Melchers (M&Co)*, *Procola* and *Cantoni*.[689]

For instance, in the field of competition, there is always the possibility of challenging the national measure implementing a Community sanction. The *M&Co*[690] decision of the EcoHR offers an interesting illustration. M&Co was fined by the European Commission for violating the EC competition rules. The company challenged the Commission's decision before the ECJ by claiming that the procedure followed did not provide for a fair hearing. The ECJ rejected the action and the German Federal Minister of Justice issued a writ of execution for the fine. The company started proceedings against Germany before the EcoHR, claiming that the judgment of the ECJ infringed Article 6 ECHR and that therefore, the writ of execution was wrongfully issued. The EcoHR declared the application inadmissible ruling that only the ECJ could review the legality of Community act and subsequently ensure that the fundamental rights were protected. Firstly, the EcoHR recalled the decision in the *CFDT* case to the effect that it was not competent to examine proceedings before, or decision of, the organs of the European Communities, since those institutions are not parties to the ECHR. Secondly, it referred to the so-called "principle of equivalent protection". In that respect, the EcoHR stated that:

> "This does not mean however that by granting executory power to a judgement of the European Court of Justice the competent German authorities acted quasi as Community organs and are to that extent beyond the scope of control exercised by the Convention organs.
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> . . . The Commission considers that a transfer of powers does not necessarily exclude a State's responsibility under the convention with regard to the exercise of the transfer of powers. Otherwise the guarantees of the Convention would wantonly be limited or excluded and thus be deprived of their peremptory character. The object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted so as to make its safeguards practical and effective. Therefore the transfer of powers to an international organisation is not incompatible with the Convention provided that within that organisation fundamental rights will receive an equivalent protection.

[689] For an assessment of M&Co, Cantoni and Matthews, *see* Oliver, "Fundamental Rights in European Union Law after the Treaty of Amsterdam", in O'Keeffe and Bavasso (eds.), *Judicial Review in European Union Law*, Kluwer, 2000, pp. 319-342, at pp. 331-335.

[690] EcoHR, Decision of 9 February 1990 on Application No 13258/87, *M. & Co*. v. *Federal Republic of Germany.*

> The Commission notes that the legal system of the European Communities not only secures fundamental rights but also provides for control of their observance: (…) The Court of Justice of the European Communities has developed a case-law according to which it is called upon to control Community acts on the basis of fundamental rights, including those enshrined in the European Convention on Human Rights. (…) It follows that the application is incompatible with the provisions of the Convention ratione materiae".

The EcoHR thus established the "principle of equivalent protection", under which it will declare inadmissible the applications against one or more Member States for acts of the Community, if the applicant has been granted protection of his or her fundamental rights at the Community level which is equivalent to the protection afforded under the Convention. It can be added that the principle of equivalent protection is also a matter of jurisdiction. Indeed, if the Strasbourg Court considers that the fundamental rights protection offered by the ECJ is sufficient, it will decline jurisdiction by considering that the complaint is unfounded and thus inadmissible. In other words, using the "*Solange* formulation",[691] as long as the ECJ will afford an equivalent standard of protection, the [EcoHR or] EctHR will not review the national act implementing the Community measure.

Serious doubts have been raised, in this respect, concerning the appraisal of the standard of protection afforded by the ECJ through the general principles of Community law.[692] Others have argued that the ECJ should refer to the EctHR jurisprudence.[693] In my view, this criticism is unfounded, especially in light of the recent jurisprudence of the ECJ. In the wake of Opinion 2/94[694], it cannot be denied that the ECJ has taken fundamental rights seriously. Indeed, we have seen an expansion of the fundamental rights case-law not only in terms of quantity, but also quality. The "post-Opinion 2/94 jurisprudence" is marked by a painstaking analysis in the field of fundamental rights, where the AG and the ECJ used significantly and abundantly the ECHR provisions and related case-law.[695] Conversely, it could always be argued that the general principles lack visibility which is necessary in order to ensure an adequate standard of protection. Nevertheless, as demonstrated previously, the Charter of Fundamental Rights represented the missing stone of the

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[691] Zampini, "La Cour de justice des Communautés européennes gardienne des droits fondamentaux dans le cadre du droit communautaire", RTDE 1999, pp. 659-707, at p. 692.

[692] Peukert, "The Importance of the European Convention on Human Rights for the European Union" in Mahoney, Matscher, Petzold and Wildhaber (eds.), *Protection des droits de l'homme: la perspective européenne, 2000,* pp. 1107-1122, at p. 1114.

[693] Van Dijk and Van Hoof, *Theory and Practice of the European Convention on Human Rights*, Kluwer, 1998, at p. 21.

[694] Opinion 2/94 on Accession by the Community to the ECHR [1996] ECR I-1759.

[695] *See e.g.,* Case C-13/94 *P* v. *S and Cornwall County Council* [1996] ECR I-2143, Case T-213/95 *SCK and FNK* v. *Commission* [1997] ECR II-1739, Case C-249/96 *Grant* [1998] ECR I-621, Case C-235/92 P *Montecatini* v.*Commission* [1999], Case C-185/95 P *Baustahlgewebe* v. *Commission* [1998] ECR I-841, Case T-154/98 *Asia Motor France* v. *Commission* [2000] ECR II-3453, Case C-274/99 P *Connolly* v. *Commission* [2001] ECR I-1611, and Case T-112/98 *Mannesmannröhren-Werke AG* v. *Commission* [2001] ECR II-729.

edifice. Consequently, it seems to me difficult to argue nowadays that the fundamental rights protection orchestrated under the aegis of the ECJ contains a lower standard of protection than the ECHR. The substantive protection appears to me equivalent.

In addition, it is notable that the ECJ and the AG in their Opinions stress increasingly the equivalence of protection between the ECHR provisions (including the corollary jurisprudence) and the case-law of the ECJ. In this respect, we should mention the Opinion of AG Mischo in *Roquette*, which declared that *"the application of the principle of the inviolability of the home to business premises, are such as to call in question the principles resulting from the judgement in Hoechst v Commission. Those principles accord undertakings protection equivalent to that which the European Court of Human Rights infers from Article 8 of the Convention."* [696] Interestingly, the Opinion refers to the EctHR jurisprudence (*Niemietz*[697] and *Funke*[698]) and accomplishes a full-fledged analysis of the Strasbourg case-law.[699] Identically, the CFI in *Mannesmannröhren*[700] emphasised that,

> "Community law does recognise as fundamental principles both the rights of defence and the right to fair legal process (see Baustahlgewebe v Commission, cited above, paragraph 21, and Case C-7/98 Krombach [2000] ECR I-1935, paragraph 26). It is in application of those principles, which offer, in the specific field of competition law, at issue in the present case, protection equivalent to that

[696] AG Mischo in Case 94/00 *Roquette Frères* [2002] ECR I-9011, para. 48.

[697] *Ibid*., para. 37, "[h]owever, it must be pointed out that, in paragraph 31 of its judgement in *Niemietz*, the European Court of Human Rights stated as follows: '[...] to interpret the words private life and home as including *certain* professional or business activities or premises would be consonant with the essential object and purpose of Article 8 (art. 8), namely to protect the individual against arbitrary interference by the public authorities (see, for example, the Marckx v. Belgium judgement of 13 June 1979, Series A no. 31, p. 15, para. 31). Such an interpretation would not unduly hamper the Contracting States, for they would retain their entitlement to interfere to the extent permitted by paragraph 2 of Article 8 (art. 8–2); *that entitlement might well be more far-reaching where professional or business activities or premises were involved than would otherwise be the case*".

[698] *Ibid*., para. 44, "[h]owever, the criterion of the necessity of the investigation must be fulfilled in each specific case. In this connection, the European Court of Human Rights, in paragraph 55 of its judgement in *Funke* v *France*, expressed itself as follows: '[t]he Court has consistently held that the Contracting States have a certain margin of appreciation in assessing the need for an interference, but it goes hand in hand with European supervision. The exceptions provided for in paragraph 2 of Article 8 (art. 8–2) are to be interpreted narrowly (*see* the Klass and Others v. Germany judgement of 6 September 1978, Series A no. 28, p. 21, para. 42), and the need for them in a given case must be convincingly established".

[699] Notably, the Court (para. 47) mentioned the recent *Colas Est* case of the EctHR (Judgment of 16 July 2002 *Colas Est* v. *France*). The EctHR considered that Article 8 ECHR may be applicable to business premises under certain circumstances. It ruled that France had violated Article 8 ECHR by requiring the search of business premises without a prior authorization (which should have been furnished by a judge).

[700] Case T-112/98 *Mannesmannröhren-Werke AG* v. *Commission* [2001] ECR II-729.

> guaranteed by Article 6 of the Convention, that the Court of Justice and the Court of First Instance have consistently held that the recipient of requests sent by the Commission pursuant to Article 11(5) of Regulation No 17 is entitled to confine himself to answering questions of a purely factual nature and to producing only the pre-existing documents and materials sought and, moreover, is so entitled as from the very first stage of an investigation initiated by the Commission".[701]

It is worth noting that the principle of equivalence is codified implicitly in Article 52(3) of the Charter:

> "In so far as this Charter contains rights which corresponds to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, *the meaning and scope of those rights shall be the same as those laid down by the said convention.* This provision shall not prevent Union law providing more extensive protection".

Unsurprisingly, it was the AG who started to use the principle of equivalence in relation to the Charter. In *Booker Aquaculture*, AG Mischo referred to Article 17 of the Charter[702] and underlined that the scope and structure of that provision is similar to the equivalent Article in the ECHR.[703] According to the Commission, *"[t]he solutions adopted by Article 52(3) of the draft are entirely satisfactory . . . The rights set forth in the Charter correspond in their meaning and scope to rights already secured by the European Convention, without prejudice to the principle of the autonomy of Union law"* .[704]

2.3.2. Indirect Challenge of Community Acts and Accession to the ECHR

The possibility to challenge the acts of the Community indirectly (by challenging the implementation of Community law at the national level) has been confirmed not only by the decisions of the EcoHR but also by the EctHR. Concerning the EcoHR, in *Procola* (1995), [705] the applicant challenged the domestic measure (règlement grand-ducal du 7 juillet 1987) in Luxembourg related to a Community Regulation on

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[701] *Ibid*., para. 77.

[702] Article 17 of the Charter states that, "1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest. 2. Intellectual property shall be protected".

[703] AG Mischo in *Booker Aquaculture*, *supra n.140*, para. 127, "[o]n reading this text, it is immediately apparent that it adopts the distinction already laid down in the European Convention of Human Rights, and carefully distinguishes between deprivation of property, and control of the use of goods, requiring the payment of compensation for the former, but having no word on the subject for the latter".

[704] Second Communication of the Commission of the 11 October 2000.

[705] EcoHR, Decision of 1995 on application No 14570789, *Procola and others* v. *Luxembourg.*

Milk quotas,[706] alleging that those measures were incompatible with Article 7 ECHR (non-retroactivity of penal legislation) and Article 1 of Protocol No 1 (right to property) of the ECHR. The EcoHR declared that application inadmissible as it was manifestly ill-founded. However, the EcoHR did not rule on the question whether it was *ratione materiae* incompetent. Similarly in *Cantoni* (1996),[707] the applicant challenged the national measure implementing a directive.[708] According to Tulkens, *Cantoni* represented the first case where the EctHR had to control the conformity with the ECHR of a national act executing Community law. More precisely, Article L.511 of the Public Health Code (the national measure) was implementing Directive 65/65 of the Council of Ministers concerning the definition of medical product. According to the EctHR, a ruling that Article L-511 was defective would amount to reaching the same conclusion in respect of Directive 65/65.[709] The applicant argued that the national measure was incompatible with Article 7 ECHR, which embodies, *inter alia*, the principle of *nullum crimen*, *nulla poena sine lege* and the principle that the criminal law must not be construed extensively. The Court stated that, "*from these principles it follows that an offence must be clearly defined in law".*[710] Then, the Court rejected clearly what one could *call "l'exception communautaire",* [711] in the sense that *"the fact . . . that Article L.511 of the Public Health Code is based almost word for word on Community directive 65/65 does not remove it from the ambit of Article 7 of the Convention".*[712] The Court concluded that no violation of Article 7 ECHR had occured.[713] The general approach of the EctHR regarding the invalidation of national legislation (implementing Community law) must be seen as prudent.[714]

More recently, in *Bosphorus* (2001), the EctHR had to examine the admissibility of an application directed against Ireland, concerning the possible infringement of Article 1 of Protocol 1 ECHR due to the imposition of sanctions, which impounded a leased aircraft.[715] These sanctions were the result of a UN

[706] Autin et Sudre, "La dualité fonctionnelle du Conseil d'État en question devant la Cour européenne des droits de l´homme, à propos de l'arrêt Procola c/ Luxembourg du 28 septembre 1995", RFDA 1996, p. 777.
[707] EctHR, Decision of 22 October 1996 on Application No 17862/91, *Cantoni* v. *France*.
[708] Clément, "Le Droit du médicament après la juripsrudence cantoni du 15 novembre 1996", petites affiches, 1997, no 56, at p. 7.
[709] *Cantoni, supra n.707,* para. 28.
[710] *Ibid*., para. 29.
[711] Tulkens, "L'Union européenne devant la Cour européenne des droits de l'homme", RUDH 2000, pp. 50-57, at p. 54.
[712] *Cantoni, supra n. 707,* para. 30.
[713] De Schutter and l'Hoest, "La cour européenne des droits de l´homme juge du droit communautaire: Gibraltar, l'Union Européenne et la convention européenne des droits de l´homme", at p. 206.
[714] Duvigneau, "From Advisory Opinion 2/94 to the Amsterdam Treaty: Human Rights Protection in the European Union", LIEI 1999, pp. 61-91, at p. 83.
[715] Decision on admissibility of 13 September 2001 Appl. No 45036/98 *Bosphorus Hava Yollari Turizm AS* v. *Ireland.*

Resolution implemented through a self-executing EC Regulation. On 4 June 1993, pursuant to EC Regulation 990/93, was adopted the European Communities (prohibition of Trade with the Federal Republic of Yugoslavia) Regulations 1993 (S.I.144 of 1993). The applicant leased two Boeing planes from Yugoslav Airlines ("JAT"), the domestic airline company of the former Yugoslavia. The two aircraft were registered in the Turkish Civil Aviation Register as being owned by JAT but operated by the applicant. Bosphorus Airways claimed that the impounding of the leased aircraft in Ireland constituted a disproportionate interference with its peaceful enjoyment of its possessions. Interestingly, in 1995, the Supreme Court referred a question for preliminary ruling to the ECJ on the interpretation of Article 8 of EC Regulation 990/33.[716] The ECJ, following the Opinion of AG Jacobs,[717] ruled that:

> "As compared with an objective of general interest so fundamental for the international community, which consists in putting an end to the state of war in the region and to the massive violations of human rights and humanitarian international law in the Republic of Bosnia-Herzegovina, the impounding of the aircraft in question, which is owned by an undertaking based in or operating from the Federal Republic of Yugoslavia, cannot be regarded as inappropriate or disproportionate".[718]

In the application for admissibility submitted to the EctHR by Bosphorus Airlines, the Irish government claimed that the EC law provided for an equivalent standard of human rights protection, which is confirmed by Article 6(2) TEU, and the ruling of the ECJ in *Bosphorus*. This government concluded that the complaint was inadmissible both *ratione materiae* (in relation to the responsibility of the Irish State in the implementation of the EC Regulation) and *ratione personae* (in relation to the acts of the EC). By contrast, the applicant stressed that it was not challenging the acts of an international organisation, but the implementation of those acts by the Irish State.[719] Accordingly, the State responsibility arose from the State's "residual human rights discretion" through the adoption of S.I 144 of 1993 without which the EC Regulation had no autonomous application in Irish law. The EctHR considered that the application was not manifestly ill-founded and declared it admissible in

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[716] Case C-84/95 *Bosphorus Hava Yollari Turizm AS* [1996] ECR I-3953.

[717] AG Jacobs in *Bosphorus* considered that the decision did not "strike an unfair balance between the demands of the general interest and the requirements of the protection of the individual's fundamental rights. That conclusion seems consistent with the case-law of this Court in general. Nor has the applicant suggested that there is any case-law under the Convention supporting its own conclusion".

[718] *Ibid*., *Bosphorus*, para. 26.

[719] *See also*, Judgment of 26 mars 2002, *SA Dangeville* v. *France*, the failure to implement a EC tax Directive constitutes a breach of Article 1 of the First Protocol (right to property), Judgment of 19 Mars 1997, *Hornsby* v. *Greece,* para. 45, "[b]y refraining for more than five years from taking the necessary measures to comply with a final enforceable judicial decision [ECJ judgment C-147/86 (Commission v. Greece), ECR 1988, p. 1637] in the present case the Greek authorities deprived the provisions of Article 6 para.1 of the Convention of all useful effect".

order to determine the merits. The decision of the EctHR on the merits of the case will be of great interest. Indeed, if the EctHR concludes that an infringement of Article 1 of Protocol 1 has taken place, this would clearly go against the findings of the ECJ. Such a result might constitute a cataclysm in the relationship between the Luxembourg and Strasbourg courts in the sense that the latter would question the level of fundamental rights protection afforded by the ECJ and would seriously impair the further application of the principle of "equivalent protection".

In the famous *Matthews* case,[720] the EctHR assessed once again the scope of the relationship between the EC and ECHR legal orders.[721] This case involved a challenge of the UK application of EC rules concerning the election of representatives of the European Parliament by direct universal suffrage (the 1976 Act). In an annex to the 1976 Act,[722] it was stipulated that, albeit Gibraltar was a territory dependent of the United Kingdom, the said Act did not apply to it. A British citizen, who lived in Gibraltar, wanted to register as a voter for the European Parliament elections. However, the application was turned down by the Electoral Registration Officer on the grounds of the prohibition provided in the 1976 Act. Consequently, British citizens residing in Gibraltar were not entitled to vote in elections for the European Parliament. One of the main questions at stake was to determine if the absence of elections to the European Parliament in Gibraltar constituted an infringement of Article 3 of Protocol 1. This query led to another series of questions, such as the question of the applicability of this Protocol to the European Parliament. In other words, can the European Parliament be regarded as a "legislative body"? Can the UK be held responsible under the auspices of the Convention for the absence of elections in Gibraltar? The case reached the EctHR. The UK government put forward the argument according to which the acts adopted by the Community should not be related to the Member States, whereas Matthews considered that the UK should be held responsible. Indeed, such acts constituted a kind of international agreement rather than an act of an institution whose decisions were not subject to review. According to the EctHR:

> "The Court observes that acts of the EC as such cannot be challenged before the Court because the EC is not a Contracting party. The Convention does not exclude the transfer of competence to international organisations provided that Convention rights continue to be secured. Member States's responsibility therefore continues even after such a transfer.
>
> In the present case, the alleged violation of the convention flows from an annex to the 1976 Act entered into by the United Kingdom, together with the extension to the European's Parliament competences brought about by the Maastricht Treaty. The

[720] Decision of 18 February 1999 on Application No. 24833/94 *Matthews* v. *United Kingdom*, 28 EHRR 361.

[721] De Schutter and l'Hoest*, supra n.713,* at pp. 209-214. *See also*, Cohen-Jonathan and Flauss, "A propos de l'arrêt Matthews c/ Royaume-Uni", RTDE 1999, pp. 637-657.

[722] Annex II states that the UK will apply the provisions of this act only in respect of the United Kingdom.

> Council Decision and the 1976 Act, and the Maastricht Treaty, with its changes to the EEC Treaty, all constituted international instruments, which were freely entered into by the United Kingdom. Indeed, the 1976 Act cannot be challenged before the European Court of Justice for the very reason that it is not a "normal" act of the Community, but is a treaty within the Community legal order. The Maastricht Treaty, too, is not an act of the Community, but a treaty by which a revision of the EEC Treaty was brought about. The United Kingdom, together with all the other parties to the Maastricht Treaty, is responsible ratione materiae under Article 1 of the Convention and, in particular, under Article 3 of protocol No 1, for the consequences of the treaty".[723]

The EctHR recalled its earlier reasoning expressed in *CFDT* and *Dufay*, namely that an act of the EC could not be challenged directly because the EC is not a party to the ECHR. However, the Court stressed that the Convention does not prohibit a Member State from transferring powers to international organisations. It continued by considering that such a transfer of powers does not necessarily exclude the State's responsibility under the Convention. Indeed, in the hypothesis of such an exclusion, the guarantees of the Convention would be severely limited or excluded, thus being deprived of their far-reaching character. The object and purpose of the Convention as a tool for the protection of individuals requires that its provisions be interpreted so as to make its safeguards pragmatic and adequate. Hence, the transfer of powers to an international organisation is not incompatible with the Convention provided that within that organisation, fundamental rights will benefit from an equivalent level of protection.

The EctHR stated that the UK was responsible (as well as all the parties to the Maastricht Treaty) under Article 1 of the ECHR for securing the rights guaranteed by Article 3 of Protocol No 1 in Gibraltar, regardless of whether the election was purely domestic or European. The UK government contested the fact that the European Parliament could be deemed to constitute a "legislative body" under Article 3 of Protocol No 1. The applicant submitted that the power of the European Parliament had shifted from advisory and supervisory to more legislative functions since the entry into force of the TEU. Finally, the EctHR ruled that the UK was in breach of Article 3 of Protocol No 1 even though the law that denied voting rights in Gibraltar implemented a Treaty concluded between the fifteen Member States.

The EctHR did not refer explicitly to the jurisprudence of the EcoHR (*M&Co*). However, it could be deduced from paragraph 33 of the judgment that the EctHR was following the same line of reasoning used in *M&Co* and *Heinz*.[724] Indeed, the

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[723] *Matthews*, *supra n.720*, paras. 32-33.

[724] App. No 21090/92, *Heinz* v. *Contacting States and Parties and Parties to the European Patent Convention*, 76A D &R 125. For comments on Heinz, *see*, King, "Ensuring Human Rights Review of Intergovernmental Acts in Europe", ELR 2000, pp. 79-88, at p. 80 and at pp. 84-85, Eicke, "European Charter of Fundamental Rights – Unique Opportunity or Unwelcome Distraction", EHRLR. 2000, pp. 280-296, at p. 294. In Heinz, the complainant pleaded that European Patent Office had violated Article 1 of protocol no 1. The Commission declared the application inadmissible by considering that an equivalent standard of protection

EctHR applied implicitly the *"principle of equivalence test"* and found *in fine* that the standard of protection offered by the EU in the *Matthews* case was not analoguous to the Strasbourg legal system. It is worth noting that the ECJ did not have jurisdiction *in casu*. The 1976 Act could not be challenged before the ECJ because it constitutes a treaty such as the Maastricht Treaty. What has been called by the French, *"la doctrine Matthews"* [725] establishes, to a certain extent, the possibility to directly challenge an international Treaty (which is not a normal act of the EC) ratified by the Member States of the European Community. Nevertheless, it can be implied from *Matthews* that the EctHR will not challenge directly a "normal act" of the EC. First, the basic and logical reasoning is that that the EC is not a party to the European Convention on Human Rights. Second, the normal acts of the EC are subject to the review of the ECJ. In the hypothesis of a normal act of the EC being subject to review by the ECJ, it might be argued that the EctHR would probably reiterate its *stare decisis*. One could extrapolate that if the 1976 act had been subject to the ECJ review, it would have provided an equivalent standard of protection. In a similar vein, on the same day as the *Matthews* judgment, the EctHR in *Waite and Kennedy*[726] restated that:

> "Where States establish international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution. It should be recalled that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective". [727]

Interestingly, the EctHR declared that there was no infringement of the ECHR in a complaint alleging that Germany had violated the right of access to court (Article 6(1) ECHR).[728] The applicant worked for the European Space Agency (ESA) and unsuccessfully attempted, due to the ESA immunity from national jurisdiction, to bring proceedings before the domestic court for breach of his employment contract. The German government argued that an independent appeal board provided a system of equivalent review.[729] Such arguments convinced the EcoHR[730] and then

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was provided by the existence of an independent Board of Appeal which was able to review the alleged infringements concerning fundamental rights.

[725] *See,* Cohen-Jonathan and Flauss.

[726] Application No. 26083/94, February 18, 1999.

[727] *Ibid*., *Waite and Kennedy*, para. 67.

[728] *Ibid*., para. 74.

[729] *Ibid*., para. 65, "the Government submitted that the limitation was proportionate to the objective of enabling international organisations to perform their functions efficiently. With regard to ESA, they considered that the detailed system of legal protection provided under the ESA Convention concerning disputes brought by staff and under Annex I in respect of other disputes satisfied the standards set in the Convention. In their view, Article 6 § 1 required a

also the EctHR. The EctHR rejected the application. Apparently, the possibility to review a decision or the act of an international organisation is central to the reasoning of the Strasbourg Court in both *Matthews* and *Waite*. Such decisions might pave the way to hear complaints in regard to acts of the EU not subject to the review of the ECJ.[731]

In the aftermath of *Matthews*, we have witnessed an acceleration of applications to the EctHR directed against the fifteen Member States. In *Guérin* (2000),[732] the complainant argued that two letters of the European Commission in the course of competition investigation infringed Articles 6 and 13 of the ECHR.[733] The complainant was notably holding that these acts should mention the delays, possible remedies and relevant jurisdictions. The EctHR rejected the complaint due to the fact that the allegations did not correspond to the scope *ratione materiae* of the Convention. Indeed, the rights enshrined in the said Articles did not correspond to the rights invoked by Guérin. The court decided to declare the complaint inadmissible *ratione materiae*. However, the EctHR noted that the application was directed against the fifteen contracting Member States and not towards the European Union. The EctHR pointed out that the question of the compatibility *ratione personae* would have been a necessary question to examine in the case of a potential finding of admissibility *ratione materiae*.

The same year, a company called Senator Lines[734] challenged before the CFI, a Commission decision imposing a fine of 13,75 million Euros for violations of EC competition rules.[735] After the CFI upheld Commission's decision, the applicant

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judicial body, but not necessarily a national court. The remedies available to the applicants were in particular an appeal to the ESA Appeals Board if they wished to assert contractual rights, their years of membership of the ESA staff and their integration into the operation of ESA. According to the Government, the applicants were also left with other possibilities, such as claiming compensation from the foreign firm which had hired them out."

[730] *Ibid*., para. 66, "[t]he Commission in substance agreed with the Government that in private-law disputes involving ESA, judicial or equivalent review could be obtained, albeit in procedures adapted to the special features of an international organisation and therefore different from the remedies available under domestic law."

[731] King, "Ensuring Human Rights Review of Intergovernmental Acts in Europe", ELR 2000, pp. 79-88, at p. 85. For commentaries on Waite and Kennedy, *see also*, Canor, "Primus Inter Pares, Who is the Ultimate Guardian of Fundamental Rights in Europe", ELR 2000, pp. 3-21, at pp. 18-20.

[732] EctHR, Decision on Admissibility of 4 July 2000 on Application No 5171/99, *Société Guérin Automobiles* v. *15 Member States of the European Union*.

[733] Article 6 reads in conjunction with Article 13 affords the right to an effective judicial protection.

[734] Application No 56672/00, *Senator Lines* v. *The Member States of the European Union*. *See also* Application No 38837/97, *Manfred, Erika and Volker Lenz* v. *Germany and the Other Member States of the European Communities*.

[735] The applicant is the second largest German shipping liner with an annual turnover of about 2,5 Billion DEM.The applicant was seeking an exemption under article 81(3). On 16 September 1998, the EU commission adopted a decision finding that the applicant had

brought an appeal against the judgment. Subsequently, it had no obligation to pay the fine, but was obliged to provide an adequate bank guarantee in order to cover it. The applicant filed a request for interim relief (Article 242 EC) in order to be exempted from the bank guarantee. Senator Lines argued that it could not supply the guarantee due to a difficult financial situation and a risk of bankruptcy. Furthermore, the applicant maintained that the rights to presumption of innocence, to judicial recourse and fair hearing had been infringed.[736] On 21 July 1999, the CFI rejected the application for interim relief.[737] Senator Lines then lodged an appeal against the order of the CFI before the ECJ,[738] reiterating the contentions relative to the fundamental rights infringements. By order of 14 December 1999, the ECJ rejected the appeal considering that the existence or imminence of serious and irreparable damage had not been established.[739]

In parallel, proceedings were brought in the EctHR. The memorial addressed to the Court declared that the application should be declared admissible on the following grounds:[740]

1) The EctHR is competent to rule on the compatibility of the decisions of the EC institutions with the ECHR.
2) The fifteen Member States are individually and collectively responsible for the acts of Community institutions.
3) The admissibility criteria set out in Article 35 of the ECHR (exhaustion of domestic remedies) were met by the applicant.[741]

The applicant's memorial reiterated the above mentioned *Matthews* case and held that since all the Member States are parties to the ECHR, they must be held responsible even where power and competencies have been transferred to the European Communities. The fact that the EU in itself is not a party to the ECHR does not mean that an application can be held inadmissible. The EctHR, in *Matthews* (paragraph 32), stated that the transfer of competencies to an international organization is not incompatible with the ECHR, provided that such an organization has an adequate and equivalent protection, but also observes and controls the fundamental rights. The main difference between *Senator Lines* and *Matthews* was that in the latter, there was no remedy possible under EC law to challenge the 1976 Act. In the former case, EC law does provide for remedies, which the applicant had exhausted. However, it is worth remarking that the president of the EctHR cancelled

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infringed Articles 81 and 82. The fine represents 11,53% of the world-wide annual turnover in the last year of the alleged infringement,

[736] Memorial to the Court, 21 HRLJ, No.1-3, 2000, pp. 112-128, at p. 113.

[737] Case T-191/98 R. *DSR-Senator Lines* v. *Commission* [1999] ECR II-2531

[738] The Government of Germany intervened in support of the applicant.

[739] Case C-364/99 P (R), *DSR-Senator Lines* v. *Commission* [1999] ECR I-8733.

[740] Memorial to the Court, 21 HRLJ, No.1-3, 2000, pp. 112-128, at p. 116.

[741] Article 35 provides that "the Court may only deal with the matter after all domestic remedies have been exhausted, according to generally recognised rules of international law".

the hearing, fixed for 22 October 2003.[742] The decision could have been taken in the light of the decision of the CFI setting aside a fine imposed by the Commission on the company.[743]

It may be said that the acceleration of the direct complaints before the EctHR reflects a certain *malaise*.[744] Alternatively, no solution exists for precluding the conflicts of interpretation and jurisdiction, which is a threat to legal certainty.[745] Consequently, the debate on the accession to the ECHR has been given new impetus.[746] The question of the accession has been much discussed during the Charter's negotiation. However, it was also certain that the Convention drafting the Charter did not have the adequate mandate to accomplish such an adhesion. As the Commission made it clear, *"[t]he Charter neither requires nor precludes accession to the European Convention on Human Rights. The development of the Charter has once again highlighted the question of the Community or the Union signing up to the ECHR. In view of the mandate given to the Convention by the Cologne European Council, the Convention has admitted ever since its work began that this matter does not concern it".* [747]

The main reasons for acceding to the ECHR are to improve the uniform protection of fundamental rights by eliminating the detrimental conflicts of interpretation between the two Courts and rendering the EctHR competent *ratione personae* to examine, as such, the acts of the European institutions.[748] Lenaerts and De Smijter pointed out that those problems would be solved by accession.[749] Similarly, the eighth report of the House of Lords highlighted a number of gaps concerning the protection of fundamental rights in Europe and presented accession to the ECHR as a salutary gesture.[750] In the same vein, Cooper and Pilley declared

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[742] Press release issued by the Registrar concerning application no. 56672/00, 16 October 2003.

[743] Case T-119/98 and T-212/98-T-214/98 *Atlantic Container Line* (*Senator Lines)* [2003] judgment of 30 September 2003, n.y.r.

[744] Tulkens, *supra n.711,* at p. 56.

[745] Janis, Kay, Bradley, *European Human Rights Law*, Oxford, 2000, at p. 506.

[746] Harmssen, "National Responsibility for European Community Acts under the European Community Acts Under the European Convention on Human Rights: Recasting the Accession Debate", EPL 2001, at pp. 625-649.

[747] First Communication of the Commission of the 13 September 2000.

[748] Lenaerts and De Smijter, *supra n.661,* CMLRev. 2001, at p. 297. Other types of arguments such as the increasing of the scope *ratione materiae* and *personae* of fundamental rights have been assessed to be unconvincing. We can only agree with such a comment.

[749] Lenaerts and De Smijter, *supra n.662,* MJ 2001, at p. 100.

[750] The House of Lords EU Committee, "The EU Charter of Fundamental Rights", Session 1999-2000, 8th Report, HL paper 67, conclusions, para. 154, "[a] declaration by the European Council of rights already existing and protected in EC law might provide a list of rights that would be clear and accessible to the public and reinforce the protection of ECHR rights as an integral part of Community law. But a political act of that kind would close none of the gaps that currently exist in Community law in the protection of fundamental rights within the EU. While skilful drafting might side-step questions of potential conflict with the ECHR and

that accession is of *"crucial importance"* and that the development of the CFR does not constitute a *"mutually exclusive option"*. [751] Nevertheless, it should be stressed that the idea of accession to the ECHR is not merely the product of "*une pensée unique*". The European Commission, for instance, seems to assess the current situation as satisfactory in the light of the principle of equivalence.[752] Personally, I would be tempted to argue in the same way. As has been submitted previously, the substantive protection of fundamental rights in the EU is consistent. The ECJ has referred widely to the EctHR jurisprudence. The Charter of Fundamental Rights injected a copious amount of stability and consistency in the foundations of the fundamental rights in the Union by making the rights visible. Moreover, the Charter implicitly codified the said principle in Article 52(3). Going further, Article 53 of the CFR has been interpreted by the Council of the European Union as making clear that "the level of protection afforded by the Charter may not, in any instance, be lower than that guaranteed by the ECHR, with the result that the arrangements for limitations may not fall below the level provided in the ECHR".[753] *In fine*, the principle of equivalence seems nowadays to be well respected.

In this sense, some recent cases of the ECJ and the EctHR appear to provide strong claims for the increasing respect of the principle of equivalence and the intensifying interaction between the two courts.[754] In *Vermeulen*, [755] the EctHR found that the procedure of delivering the opinion by the *Procureur de la République* of the *Cour de Cassation*, was in breach of Article 6 ECHR. This opinion was given to the Court with no right to reply and the *Procureur* was participating in the deliberations. The European Court of Human Rights ruled that the *Procureur Général*'s department at the Belgian Court of Cassation had as *"its main duty, at the hearing as at the deliberations . . . to assist the Court of Cassation*

EctHR, a non-binding Charter would not prevent alternative rights or interpretations of ECHR rights being adopted by the Community courts. Accession of the EU to the ECHR, enabling the Strasbourg Court to act as an external final authority in the field of human rights, would go a long way in guaranteeing a firm and consistent foundation for fundamental rights in the Union".

[751] Cooper and Pillay, "Through the Looking Glass: Making Visible Rights Real", in Feus (eds.), pp. 111-128, at p. 118. *See also* at p. 126, "[a]ccession to the ECHR remains the most desirable and potentially the most effective means by which the gap in EU human rights protection can be filled, and the EU legal system brought into line with the national legal systems of Europe".

[752] *See* second Communication of the Commission of the 11 October 2000, *supra*.

[753] Council of the European Union, "Charter of Fundamental Rights of the European Union: Explanations Relating to the Complete Text of the Charter", 2000, at p. 77.

[754] *See also*, *Pafitis* v. *Greece*, Judgment of the EctHR of 26 February 1998, para. 90. The EctHR did not take into account the duration of the stay of proceedings due to the preliminary ruling procedure (Case C-441/93 Pafitis [1996] ECR I-1347). Notably, the EctHR referred to the "effectivity argument". Indeed, it "would adversely affect the system instituted by Article 177 of the EEC Treaty and work against the aim pursued in substance in that Article".

[755] Decision of 22 January 1996, Application No 1907/91, *Vermeulen* v. *Belgium*.

and to help ensure that its case-law is consistent . . . with the strictest objectivity".[756] The Strasbourg Court also stressed that:

> "great importance must be attached to the part actually played in the proceedings by the member of the Procureur Général's department, and more particularly to the content and effects of his submissions. These contain an opinion, which derives its authority from that of the Procureur Général's department itself. Although it is objective and reasoned in law, the opinion is nevertheless intended to advise and accordingly influence the Court of Cassation".[757]

The EctHR established an *ipso facto* breach of Article 6(1) by finding an infringement of the rights to adversarial proceedings due to the impossibility for the applicant to reply to the opinion before the end of the hearing.[758] In *Emesa Sugar*, [759] the Opinion of the AG was challenged before the ECJ. The applicant referred to Article 6(1) ECHR and to the *Vermeulen* case.[760] The ECJ clarified, in detail, the status and role of the AG [761] and came to the conclusion that, having regard to the

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[756] *Ibid*., paras. 29-30.
[757] *Ibid*., para. 31.
[758] *Ibid*., para. 33, "the fact that it was impossible for Mr Vermeulen to reply to them before the end of the hearing infringed his right to adversarial proceedings. That right means in principle the opportunity for the parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed, even by an independent member of the national legal service, with a view to influencing the court's decision".
[759] Order of the Court of 4 February 2000 in Case C-17/98 *Emesa Sugar* [2000] ECR I-665.
[760] *Ibid*., para. 3.
[761] *Ibid*., paras. 11-15, "In accordance with Articles 221 and 222 of the EC Treaty, the Court of Justice consists of Judges and is assisted by Advocates General. Article 223 lays down identical conditions and the same procedure for appointing both judges and Advocates General. In addition, it is clear from Title I of the EC Statute of the Court of Justice, which, in law, is equal in rank to the Treaty itself, that the Advocates General have the same status as the Judges, particularly so far as concerns immunity and the grounds on which they may be deprived of their office, which guarantees their full impartiality and total independence . . . Moreover, the Advocates General, none of whom is subordinate to any other, are not public prosecutors nor are they subject to any authority, in contrast to the manner in which the administration of justice is organised in certain Member States. They are not entrusted with the defence of any particular interest in the exercise of their duties . . . The role of the Advocate General must be viewed in that context. In accordance with Article 222 of the EC Treaty, his duty is to make, in open court, acting with complete impartiality and independence, reasoned submissions on cases brought before the Court of Justice, in order to assist the Court in the performance of the task assigned to it, which is to ensure that in the interpretation and application of the Treaty, the law is observed . . . Under Article 18 of the EC Statute of the Court of Justice and Article 59 of the Rules of Procedure of the Court, the Opinion of the Advocate General brings the oral procedure to an end. It does not form part of the proceedings between the parties, but rather opens the stage of deliberation by the Court. It is not therefore an opinion addressed to the judges or to the parties which stems from an authority outside the Court or which 'derives its authority from that of the Procureur Général's department. Rather, it constitutes the individual reasoned opinion, expressed in open court, of a Member of the Court of Justice itself . . . The Advocate General thus takes part, publicly and

organic and functional link between the AG and the ECJ,[762] the *Vermeulen* case was not transposable to the situation of AG Opinion. In addition, the ECJ stressed that even if "*constraints inherent in the manner in which the administration of justice is organised within the Community cannot justify infringing a fundamental right to adversarial procedure" [763]* a right to submit observation in reply to the AG Opinion would notably extend the length of the procedure.[764] This approach was implicitly confirmed in the *Kaba* case (2003).[765]

By contrast, in *Kress* (2001),[766] in a proceeding relating to the potential breach of Article 6(1) by the Opinion of the *"commissaire du gouvernement"* in the French *Conseil d'État*, the EctHR found a violation of the right to a fair trial based on the participation of the commissioner in the deliberation of the Court.[767] According to the EctHR, this approach was confirmed by the ECJ in *Emesa Sugar*.[768] However, the Strasbourg court considered unanimously that the non-disclosure of the Opinion before the hearing did not constitute a transgression of Article 6(1) of the ECHR.[769] Interestingly, the function of the AG of the ECJ has been modeled on the French experience.[770] Nonetheless, unlike the French model,[771] the AG does not participate in the deliberations of the Court.[772] Thus, in the light of the *Kress* case, it could be asserted that the *Emesa Sugar* used the right argumentation to find that the impossibility for the parties to reply to the Opinion of the AG did not amount to an infringement of the ECHR. Moreover, it should be highlighted that in *Kress*, the EctHR made an explicit[773] and lengthy (citing the paragraphs 11 to 19)[774] reference

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individually, in the process by which the Court reaches its judgement, and therefore in carrying out the judicial function entrusted to it. Furthermore, the Opinion is published together with the Court's judgement".

[762] *Ibid*., para. 16.

[763] *Ibid*., para. 18.

[764] *Ibid*., para. 17.

[765] Case C-466/00 *Kaba* [2003] ECR I-2219**.** *See,* in particular the Opinion of AG Ruiz-Jarabo Colomer, paras. 96–116. The main issue is whether the procedure before the Court of Justice, and in particular the limited right of the parties to be heard once the Opinion of the Advocate General has been delivered, meets the requirements of a fair hearing, as construed by the European Court of Human Rights. The Court did not assess the compatibility of the proceedings regarding the AG Opinion with Article 6 ECHR.

[766] Decision of 7 June 2001 on Application No. 39594/98, *Kress* v. *France*.

[767] *Ibid*., para. 87, (10 votes to seven). The *Conseil d'Etat* in *Escatine* (29 July 1998) ruled that Article 6 ECHR does not preclude a right to respond to the CG opinion.

[768] *Ibid*., para. 86.

[769] *Ibid*., para. 76.

[770] *Ibid*., para. 52.

[771] *Ibid*., para. 50, "[a]fter the public hearing it is customary for the Government Commissioner to attend the deliberations but he has no vote. As a general rule, he intervenes orally only to answer any specific question that are put to him. He is after all, the member of the court who has seen the case file most recently and is therefore supposed to have the most detailed knowledge of it".

[772] Article 27 para. 2 of the Rules of Procedure of the Court of Justice.

[773] *Kress*, *supra n.766,* para. 53.

to the *Emesa* order. Finally, it might be concluded that the *Kress* case represents a clear example of the *"cross-fertilization"* of the two legal orders. According to Zampini, *"on ne peut nier un convergence substantielle spontanée, naturelle, un jus commune. Ce phénomène de tropisme n'est bien sûr pas étonnant, au moins parce que les juges de ces systèmes coexistants sont issus de la même tradition"*. [775] To my knowledge, it is the first time that a ruling of Strasbourg made such a consequential reference to the arguments of the ECJ. The order of the Court of Justice in *Emesa* establishes an equivalent standard of protection as the ECHR.[776] In turn, the ECHR legitimises the ECJ jurisprudence by reproducing it. In the light of this example, one might wonder if the accession to the ECHR is necessary when the ECJ respects the "principle of equivalence".[777]

To summarize, in Article 234 (ex Article 177) EC proceedings, the probability of a conflict of jurisdiction would still persist and might lead to a conflict of interpretation. However, as demonstrated previously, such a risk of overlap is particularly low due to the "subsidiary" nature of the EctHR jurisdiction.[778] Of course, after a 230 (ex Article 173) EC proceeding, the individuals would still be unable to challenge directly the act of the institutions in front of the EctHR. However, in light of the "*Matthews* doctrine", the collective responsibility of the Member States could be invoked if the principle of equivalence falls short. In other words, the breach of the principle of equivalence opens the door to a direct proceeding before the EctHR. Of course, inconsistencies of interpretation may persist. However, those conflicts, such as the antagonisms of jurisdiction, are extremely sporadic. Furthermore, those conflicts could be seen as positive. In fact, it may be considered that they favour the fundamental rights jurisprudence by stimulating the dialogue between the ECJ and the EctHR.[779] Of course, accession to the ECHR would solve both the conflicts of jurisdiction (the EctHR would be competent to admit direct complaints against the institutions) and interpretation. However, in the light of the existence of other alternatives it is doubtful that

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[774] *Ibid*., para. 54.

[775] Zampini, *supra n.577*, at p. 692, "one cannot deny a natural and spontaneous substantial convergence, a jus commune. This phenomenon of tropism is not so astonishing since the judges of both systems are imbued with the same traditions" (my translation).

[776] The Order is also making wide reference to the case-law.

[777] *See also*, the *P* case (ECJ) reproduced in the EctHR *Goodwin* case [2002] and then referred by the ECJ in *KB* [2004].

[778] All the national remedies must be exhausted. This includes the preliminary reference under Article 234 EC. (leading to the stay of proceeding at the national level).

[779] For example, the *Orkem* case of the ECJ (recognizing the principle against-self-incrimination) stimulated the jurisprudence of Strasbourg. Two years afterwards, the EctHR recognized the principle against-self incrimination in Funke. *See also Roquette* [2002]. The ruling of the ECJ in Roquette concerning the revision of the *Hoechst* case is of particular interest.

accession to the ECHR is the best solution.[780] At the end of the day, the principle of equivalence appears fully respected.

2.3.3. Towards Maximalist Interpretation?

As seen above, it may be stated that the EU standard of fundamental rights is equivalent to the ECHR standard. One final question, and not the least important one, needs however to be answered. Can the EU standard afford a higher degree of protection than the ECHR standard? Arguably, it is without doubt that the EC standard may go further than the ECHR one, since it is stated in Article 60 ECHR

[780] These alternatives are manifold e.g., a modification of Article 230 EC, establishement of a mechanism of constitutional complaint (De Witte, "The Role of the ECJ in Human Rights", in Alston, *The EU and Human Rights,* Oxford, 1999, pp. 859-897, at pp. 893-896), establishment of a formal bridge between the ECJ and the EctHR (Lenaerts, "Fundamental Rights to be included in a Community Catalogue", ELR 1991, at p. 380). Yet, it should be noted that informal meetings between the two courts are already organised twice a year. Moreover, a system of reference (concerning fundamental rights case) would amount to a case law overloading and then to delays in the proceedings. In the recent years, the informal system has demonstrated a certain efficacy. (*See* AG Mischo's report, "Visite à la Cour de Justice d'une délégation de la CEDH: exposé sur la jurisprudence récente de la CJCE en matière de droits fondamentaux", October 2001). In fact, no major cases of diverging interpretation can be noticed since the Opinion 2/94. Other types of reform have also been proposed. Turner argued for the creation of a chamber of human rights (Turner, "Human Rights Protection in the European Community: Resolving Conflict and Overlap between the European Court of Justice and the European Court of Human Rights", EPL 1999, at p. 466-469). Toth advocated a more radical proposal, that is to say the withdrawal of the Member States from the Strasbourg System (Toth, "The European Union and Human Rights: The Way Forward", CMLRev. 1997, pp. 491-529, at pp. 512-527). Going further, in light of the Charter of Fundamental Rights, the values of the European Union are going further than the ECHR. In the hypothesis of a binding charter, what would be the object to have the EctHR competent only for certain violations of the Charter (overlapping with the ECHR) and not the others? Further, a control over the institutional acts by the EctHR would extend the length of the judicial proceedings and would come probably at the same findings than the Court of Justice. In addition, would there be any guarantee that the EctHR demonstrates readiness to take into account the effectiveness of Community law to the potential detriment of a fundamental right? In others words, the EctHR would have to afford a wide margin of appreciation to the Community institutions so as not to undermine the effectiveness of Community law. To put it in a nutshell, such a system may undermine the legitimacy of the EU legal order. In fact, the development of the fundamental rights through the jurisprudence of the ECJ has permitted to inject legitimacy in the Community legal order. In turns, it has also legitimised the very function of the ECJ. By giving the EctHR jurisdiction over the ECJ, one may drain one of the most precious sources of legitimacy. The ECJ should remain, in this sense, the master of the fundamental rights (institutional) adjudication (For a contrary view, *see* Canor, "Primus Inter Pares, Who is the Ultimate Guardian of Fundamental Rights in Europe", ELR 2000, pp. 3-21). The "legitimacy thesis" is particularly true when looking back to the dialogue between the ECJ and certain constitutional courts regarding the relationship between fundamental rights and the domestic constitutions.

that the convention constitutes a minimal standard. In other words, there is nothing that impedes the ECJ from using a maximalist interpretation regarding the ECHR Articles. A distinction may be made, in this respect, between the ECJ case-law prior to and post Opinion 2/94.

As to the case-law before Opinion 2/94 (the first wave of case-law), it may be said that the ECJ was somewhat reluctant to use a maximalist interpretation. This attitude is illustrated by two cases given at the end of the 1980s where the ECJ might have taken a maximalist interpretation concerning Articles 6 and 8 ECHR. First, as is well-known, in the *Hoechst* case, the applicant submitted that the search undertaken by the Commission's agents constituted an infringement of Article 8 ECHR. The Court remarked that the laws of the Member States were divergent in this particular fieldand then declared that: [781]

> "no other inference is to be drawn from Article 8(1) of the European Convention on Human Rights which provides that, 'Everyone has the right to respect for his private and family life, his home and his correspondence'. The protective scope of that article is concerned with the development of man's personal freedom and may not therefore be extended to business premises. Furthermore, it should be noted that there is no case law of the European Convention on Human Rights on that subject".[782]

Secondly, in *Orkem*, the ECJ emphasized once again that neither the wording of Article 6 of the European Convention on Human Rights nor the decisions of the European Court of Human Rights indicate that it upholds the right not to give evidence against oneself.[783] Similarly, the Court jettisoned the application of Article

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[781] Case 46/87 and 227/88 *Hoechst* v. *Commission* [1989] ECR 2859, para. 17, "[s]ince the applicant has also relied on the requirement stemming from the fundamental right to the inviolability of the home, it should be observed that, although the existence of such a right must be recognized in the Community legal order as a principle common to the laws of the Member States in regard to the private dwellings of natural persons, the same is not true in regard to undertakings, because there are not inconsiderable divergences between the legal systems of the Member States in regard to the nature and degree of protection afforded to business premises against intervention by the public authorities".

[782] *Ibid*., para. 18. *See also*, AG Lenz in *TV 10 SA*, para. 84, "[t]he Court has invariably held back from applying in practice the general legal principles defined in the European Convention. In Hoechst v. Commission, in which a violation of Article 8 of the European Convention was alleged, the Court stated in one sentence that the provision was not applicable to the actual facts of the case and went on to observe as follows: Furthermore it should be noted that there is no case law of the European Court of Human Rights on that subject". It seems worth noting that the *Roquette Frères* case [2002], referred to the *Niemietz* and *Colas Est* cases of the EctHR as to the application of Article 8 ECHR to business premises.

[783] *Orkem, supra n.345,* para. 30, "[a]s far as Article 6 of the European Convention is concerned, although it may be relied upon by an undertaking subject to an investigation relating to competition law, it must be observed that neither the wording of that article nor the decisions of the European Court of Human Rights indicate that it upholds the right not to give evidence against oneself ".

14 of the International Convention on Civil and Political rights as it relates only to criminal offences.[784] The ECJ analyzed rather synthetically the scope of Article 6 ECHR[785] and Article 14 of the ICCPR.[786] It concluded that the principle against self-incrimination could not be extracted from the wordings of these provisions and the relevant jurisprudence. Even if rejecting the existence of a general principle against self-incrimination in administrative proceedings, in *Orkem*, the ECJ did, in order to safeguard the rights of the defence in the preliminary stage, create a principle (the "*Orkem* principle") limiting the powers of the Commission.[787] This finding demonstrates that the ECJ may elaborate a (limited) principle through a maximalist interpretation. However, as it stems from the case-law, the principle is limited to the application of Article 11 of Regulation 17.

To conclude, *Hoechst* and *Orkem* referred respectively to Articles 6 and 8 of the European Convention on Human Rights. In both cases, the ECJ ruled that the principles in question did not fall within the scope of these Articles. In *Hoechst*, Article 8 was said to apply only to personal freedoms, whereas in *Orkem*, Article 6 could not be read as implying a general right against self-incrimination. It may be said that the Court appears extremely cautious in interpreting ECHR provisions that are not covered by the Strasbourg case-law.[788] Nevertheless, the situation may have changed in the aftermath of Opinion 2/94.

As to the post 2/94 case-law (second wave of case-law), it may be said that the ECJ resorted to a maximalist interpretation in several decisions. This trend is particularly discernable regarding the application of the principle of non-discrimination and the interconnected concept of citizenship. The same holds true in relation to the interpretation of Article 8 ECHR. As to the former, one may argue that the ECJ went further than the ECHR case-law in the *P* v. *S* case (1996).[789] As seen before, the Court through the vectors of dignity and non-discrimination protected a transsexual whereas no ECHR jurisprudence existed in this field. Consequently, it may be argued that the ECJ went further than the EctHR. Interestingly, the EctHR in *Goodwin* (2002) made a thorough reference to the ECJ case law in order to elaborate such a similar protection within the Strasbourg system. Notably, it seems that the ECJ makes use of the principle of non-discrimination and

[784] *Ibid*., para. 31.
[785] *Ibid*., para. 30.
[786] *Ibid*., para. 31, "Article 14 of the international covenant which upholds, in addition to the presumption of innocence, the right (in paragraph 3(g)) not to give evidence against oneself or to confess guilt, relates only to persons accused of a criminal offence in court proceedings and thus has no bearing on investigation in the field of competition law".
[787] *Ibid*., para. 32, "[i]t is necessary, however, to consider whether certain limitations on the Commission's powers of investigation are implied by the need to safeguard the rights of the defense which the court has held to be a fundamental principle of the Community legal order (judgment of 9 November 1983 in Case 322/82 Michelin v. Commission [1983] ECR 3461, para. 7)".
[788] *See,* by contrast, the dynamic interpretation regarding articles 6 and 13 ECHR.
[789] *See P* v. *S*, *supra n.599.*

the concept of citizenship as tools in order to develop a maximalist interpretation. This assertion appears correct in the light of the *KB* case (2004).[790] *In casu*, the ECJ recognized a right to marry (Article 12 ECHR) for transsexuals in the light of a breach of the principle of non-discrimination as to pensions schemes (refusal of survivor's pension to a transsexual partner). In a similar vein, the citizenship provision may be used to serve a maximalist interpretation. Arguably, the ECJ in *Garcia Avello* (2003) implicitly recognized a right to a (double) family name through the prism of citizenship.[791] It may be stated that this jurisprudence reflects a more ideological standard based on active citizenship.[792]

As to the latter, it seems clear to me that the ECJ in two recent cases used a maximalist interpretation concerning Article 8 ECHR and, more specifically, the right to family life. In that regard the ECJ stated in *Carpenter* (2002) that,

> "[e]ven though no right of an alien to enter or to reside in a particular country is as such guaranteed by the Convention, the removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life as guaranteed by Article 8(1) of the Convention. Such an interference will infringe the Convention if it does not meet the requirements of paragraph 2 of that article, that is unless it is 'in accordance with the law', motivated by one or more of the legitimate aims under that paragraph and 'necessary in a democratic society', that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued (see, in particular, *Boultif* v *Switzerland*, no. 54273/00, §§ 39, 41 and 46, ECHR 2001-IX)".[793]

To put it in a nutshell, the ECJ expressly stated that its standard of protection goes further than the ECHR standard. More precisely, the maximalist stance results from interpreting that the criteria for family life are met, even though Mrs Carpenter takes care of the children from her husband's first marriage, and from considering that the denial of a residence permit constitutes an interference with family life.[794] In a similar vein, the ECJ applied the same reasoning and a rather analogous formulation in the *Akrich* case (2003).[795] At the end of the day, it appears clear from this analysis

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[790] *See KB*, *supra n.375*.

[791] *See* AG Jacobs in *Konstantinidis*, *supra n.360*.

[792] Bengoetxea, "The Scope for Discretion, Coherence and Citizenship", in *Judicial Discretion in European Perspective*, Wiklund (eds.), Kluwer, 2003, pp. 48-74, at pp. 71-74.

[793] *Carpenter*, *supra n.628.,* para. 42.

[794] Lavranos, *supra n.463*.

[795] *Hacene Akrich, supra n.639*, paras. 59-60, "[e]ven though the Convention does not as such guarantee the right of an alien to enter or to reside in a particular country, the removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life as guaranteed by Article 8(1) of the Convention. Such an interference will infringe the Convention if it does not meet the requirements of paragraph 2 of that article, that is unless it is in accordance with the law, motivated by one or more of the legitimate aims under that paragraph and necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued (Case C-60/00 *Carpenter* [2002] ECR I-6279, paragraph 42) . . . The limits of what is necessary in a democratic society where the spouse

of the case-law that the ECJ has increased its maximalist interpretation of the ECHR in the recent years. Such a stance should be most warmly welcomed. Also, it may be argued that such a development enters within a more global frame and is, thus, closely linked to the incorporation of the citizenship provision within the Treaty, the adoption of the Charter of Fundamental Rights and the current use of the ECHR as a direct source.

The discussion above prompts three concluding remarks. First, in 1974, in *Nold*, the Court specified the methodology followed at this time. Indeed, when the Court moulds a principle, inspiration will also be taken from international treaties concerning human rights. In the light of the subsequent jurisprudence of the Court, different international instruments have been used, e.g., ICCPR, ESC, ILO and ECHR. It was only in 1986, with the *Johnston* case, that the ECJ affirmed that the ECHR had *"special significance"*. The importance of the ECHR is confirmed by Article 6(2) TEU that refers uniquely to the ECHR and places it before the common constitutional traditions. In the early years, the Court made either explicit or implicit references to Articles of the ECHR.[796] Sometimes, it was not possible to rely on the ECHR provisions since the Strasbourg text is silent on a specific matter. For instance, in the *AM&S* case, AG Warner stressed that the right to confidentiality between the lawyers and their clients was not a fundamental right (as submitted by the parties), due to its absence in the ECHR and in the constitutions of the Member States.[797] Notably, the ECHR case-law was rarely explicitly used by the Court and can be found essentially in the Opinions of the AG.

Secondly, it is argued that Opinion 2/94 and Article 6(2) TEU have acted as the triggering stimuli of the increasing use by the ECJ of ECHR jurisprudence. Opinion 2/94 makes clear that the European Union cannot accede to the European Convention on Human Rights. Article 6(2) TEU ackowledges the importance of the ECHR. In the wake of the Opinion 2/94, the doctrine suggests that the ECJ and the Advocates General increasingly made references to the Strasbourg jurisprudence and, thus, demonstrated an astonishing capacity of adaptation and great loyalty

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has committed an offence have been highlighted by the European Court of Human Rights in *Boultif* v. *Switzerland*, judgment of 2 August 2001, *Reports of Judgments and Decisions* 2001-IX §§ 46 to 56, and *Amrollahi* v. *Denmark*, judgment of 11 July 2002, not yet published in the Reports of Judgments and Decisions, §§ 33 to 44".

[796] *See* Schwarze, ELR 1991*, supra n.415.*

[797] AG Warner in *AM&S, supra n.254,* "[t]here is . . . one point on which I think that the submissions of the applicant and of the CCBE went too far. They submitted that the right to confidential communication between lawyer and client was a fundamental human right. I do not think it is. There is no mention of it, as such, in the European Convention on Human Rights, or, seemingly, in the Constitution of any Member State, and your lordship have already seen that, in England and in France at least, it is acknowledged to be a right that can be overridden or modified by an appropriately worded statute. The material placed before the Court by the CCBE shows that that is also in Belgium. In my opinion it is a right that the laws of civilised countries generally recognize, a right not lightly to be denied, but not one so entrenched that, in the Community, the Council could never legislate to override authorized inspectors to examine the documents in question in their entirety".

towards the interpretation of the ECHR. This phenomenon has been lucidly described by Sudre as *"un transfert du droit de la CEDH vers le système juridique communautaire"*. This transfer is divided into three phases: First, an *"instrumentalisation"* of the Convention by the ECJ through the general principles of Community law, then, a *"communautarisation"* of the ECHR law and, finally, a *"hybridation"* of Community law.[798] Furthermore, in the recent case-law (2002-2004), it appears that the Court increased even more the use of references to the ECHR jurisprudence. This is particularly true in relation to Articles 6, 8, 10 and 12 ECHR. In some instances, the ECHR arguably appears as a direct source of Community law. This recent trend may be explained by the adoption of the CFR in December 2000 and the suggestion included in the Constitutional Treaty to accede to the ECHR.

Thirdly, it is concluded that divergences of interpretation are difficult to avoid since there are practically two Courts interpreting fundamental rights. The solution, as suggested by the Constitutional Treaty, would be that the EU should accede to the ECHR. By way of consequence, the EctHR would then be the final authority to interpret and apply fundamental rights in the Community legal order. Personally, I disagree with this solution. The conflict of interpretation, as seen before, is sporadic since the ECJ elaborated a standard of protection equivalent to the ECHR. In that regard, the principle of equivalence is recognized both by the EctHR and the CFR (Article 52(3)). The conflicts of jurisdiction and interpretation stimulate the fundamental rights jurisprudence, as may be seen in the *Goodwin* case (EctHR). As described before, the ECJ may use a maximalist interpretation of the ECHR provisions, e.g. *P* v. *S*, *Carpenter* and *Akrich*. Moreover, the citizenship provisions provide an interesting seed or ideological standard for the development of the fundamental rights protection, as can be seen in *Garcia Avello*.[799]

[798] Sudre, "L'apport du droit international et européen à la protection communautaire des droits fondamentaux, Colloque de Bordeaux, in Droit international et européen des droits de l'homme, PUF, 1997. *See also* Monjal, *Les normes de droit communautaire*, 2000, PUF, at pp. 119-120.

[799] *See* case-law 2003-2005 regarding citizenship, *e.g. Bidar, Chen*, *Trojani*, *Akrich*, *infra Part 2 Chapter 6.2.3*.

CHAPTER 3. GENERAL PRINCIPLES TAKING INDIVIDUAL RIGHTS SERIOUSLY

The third Chapter focuses on legal theory, legitimacy and the issue of activism. It is demonstrated that the ECJ takes individual rights seriously. In that sense, the Charter of Fundamental Rights that codifies the general principles must be analysed thoroughly. Its impact on the case-law of the Court must also be taken into consideration. Furthermore, the research is closely linked to the question of adjudication and attempts to categorize the process of elaboration within the consensus model. This consensus model is associated with the rational application of the law and institutional legal positivism. Finally, this Chapter assesses the legitimacy of the general principles and considers the process of elaboration as "legitimate activism".

3.1. GENERAL PRINCIPLES, FUNDAMENTAL RIGHTS AND CODIFICATION IN THE CFR

The last few years have sown the seeds of rich developments as to the constitutionalization of the European Union. In December 2000, the Charter of Fundamental Rights (CFR) was adopted, even though it does not explicitly have legally binding status.[800] More recently, in a speech given on 16 April 2003, the

[800] Already in the seventies, a memorandum proposed by the Commission stated the significance of a Community bill of rights. In reason of the reluctance of certain Member States, the project was left aside. Under the German presidency (The Charter has been described as the "godchild of Germany", Besselink, "The Member States, the National Constitutions and the Scope of the Charter", at p. 68.) the Cologne European Council of 3 and 4 June 1999 formally approved the drafting of the Charter of Fundamental Rights. Moreover, not only did it stress the importance of such a Charter and the rights it would embed for the Union and its citizens (The European Council stated that "there appears to be a need, at the present stage of the Union's development, to establish a Charter of fundamental rights in order to make their overriding importance and relevance more visible to the Union's citizens", http://www.europarl.eu.int/dg3/charte_df/en/index.htm.) but also set forth the sources of those rights, the composition of the body which would be dealing with the drafting and the time limit for such a drafting. Following upon the general pattern set by the Cologne European Council, the Tampere European Council of October 1999 set out the details for the process of drafting. A Convention, originally called the "body" (The body changed named to Convention on the 17 December 1999. For the little English sarcastic story, as told by Lord Goldsmith, the French representative did not appreciate the French translation, namely "l'enceinte") was set up. The modification of the terminology might seem harmless; however it also reflects an interesting historical parallel. The European Council decided that it should be composed of sixty-two members, representing four constituencies: fifteen civil servants, one each from governments, one from the Commission, sixteen members of the European Parliament, and thirty members representing the national parliaments (The Bureau of the Convention, acting as the "drafting committee", consisted of the president, Roman Herzog, and representatives of the European Parliament (Méndez de Vigo), the national parliaments (Mr Jansson), the

president of the European Convention, Giscard d'Estaing, reported to the Athens European Council the work already accomplished regarding the draft of the Constitutional Treaty (DCT). The final work was presented on 20 June 2003 during the Thessaloniki European Council. Interestingly, Article 5 of the DCT (February 2003) proposed to incorporate the CFR as an integral part of the Constitutional Treaty.[801] The same holds true, in a less direct formulation, regarding Article 7 of the DCT (June 2003). The effect of such an inclusion would appear to turn the CFR into a legally binding document.

Generally, it can be argued that the EU is undergoing a three-step process of constitutionalization regarding fundamental rights.[802] The first step corresponds to

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Commission (Mr Vitorino) and the Council Presidency (Mr Bacelar). Furthermore, there were observers from the European Court of Justice (Judge Skouris and Advocate General (AG) Alber) and the Council of Europe. The Tampere European Council (The European Council held 15 and 16 October 1999) also concluded that the Ombudsman, the Economic and Social Committee, and the Committee of the Regions should be invited to give their views. The candidate States applying to join the European Community were also invited to provide their views, and so were other bodies, social groups or experts. The objective of this working process was to make it transparent. It is worth noticing that a dissent draft was launched by Lord Goldsmith (Lord Goldsmith's proposal can be found at http://db.consilium.eu.int/df/default.asp?lang=en.) which divided the Charter into two parts (Part A and Part B). The Part A was dealing with the statement of the rights, whereas the Part B was referring to the legal sources of such rights and how they would be justiciable in front of either the ECJ or the European Court of Human Rights (EctHR). The proposal was left aside mainly due to the objections raised in relation to its high degree of similarity with the European Convention on Human Rights (ECHR). The first preliminary draft was submitted on 28 July 2000 and the final draft was presented on 28 September 2000. Following the publication of the first draft of the Charter of Fundamental Rights at the end of July 2000, a resolution of the Economic and Social Committee was adopted on 20 September 2000. It provides strong support to the idea that European Union is, and should be, more than a mere economic community: By adopting the Charter, the Union will become a real political Union. On 2 October 2000, the Convention delivered its work to the European Council meeting in Biarritz, which acquiesced to formally adopt the Charter at the Nice Summit in December. One of the challenges raised by the Laeken declaration (Declaration of the 15th of December 2001) for the next IGC in 2004 is the evolution of the Union towards a constitution for European citizens. According to the Declaration, "*[t]hought would also to be given to whether the Charter of Fundamental Rights should be included in the basic treaty and to whether the European Community should accede to the European Convention on Human Rights"*.

[801] Praesidium, 6 February 2003, "Draft of Articles 1 to 16 of the Constitutional Treaty", CONV 528/03, pp. 1-19. *See also* Article 7(1) Draft Treaty establishing a Constitution for Europe submitted to the European Council meeting in Thessaloniki, 20 June 2003, CONV 820/1/03 REV1. This Article replaced Article 5 of the February DCT.

[802] The term "constitutionalization" is seen here in a narrow sense as closely linked to the protection of fundamental rights. The protection of fundamental rights is, in my view, the basic feature for elaborating a constitution. In other words, a constitution cannot be named so if not protecting implicitly or explicitly fundamental rights. Constitutionalization is perceived as a synonymous to the concept of Europeanization of the fundamental rights.

the elaboration by the ECJ of an unwritten bill of rights through the use of the general principles of Community law (justiciable principles). The second step concerns the adoption of the Charter of Fundamental Rights and the subsequent codification of the general principles in a written document, which does not possess a binding character though. The final step will be the possible incorporation of the CFR into the Constitutional Treaty and the Charter's acquisition of a legally binding status. This section will analyze the relationship between those three steps, though it will mainly focus on describing the second and the third steps of the process in the light of the general principles of Community law. As to the first step, it is worth underlining again that the general principles have been described by the President of the European Court of Justice (ECJ) "*as the main tool of judicial development in Community law"*.[803] Nevertheless, the visibility was limited to a few lawyers specialised in EC law. The codification of the fundamental rights in a Charter contributes to the increased visibility of the general principles for European citizens. In this section, the Charter will be perceived as a "*living thing"*[804] and scrutinised from the two points of view. On the one hand, its content and legal character have been subject of evolution in the framework of the Inter-Governmental Conference (IGC). On the other hand, the Charter may serve as a source of inspiration for the Luxembourg judges in the elaboration of the general principles reflecting the common European values needed in a changing society. The first section will deal with the content of the non-binding CFR and its relationship with the justiciable general principles (3.1.1). The second section will focus on the effect of the Charter on the jurisprudence of the Court regarding the general principles of Community law (3.1.2.). The final section (3.1.3) will assess the work of the European Convention, particularly the work of Working Group II, Article 5 (February 2003) DCT/ Article 7 (June 2003) DCT in the light of the general principles and the incorporation of the CFR into the Constitutional Treaty (Article 9 Constitutional Treaty).

3.1.1. The Content of the Charter of Fundamental Rights

Whereas the French revolution was founded on the values of the famous triplet *"Liberté, égalité, fraternité"*, the Charter of Fundamental Rights of the European Union, which recognizes the rights, freedoms and principles,[805] is articulated around six values (each reflected in one chapter of the Charter). Those six values are reflected in 50 Articles and six substantive Chapters (Dignity, Freedoms, Equality,

[803] Rodríguez Iglesias, "Reflections on the General Principles of Community Law", CJLS 1999, pp. 1-16, at pp. 15-16. The President of the ECJ stresses with strength that the general principles are not invented from nowhere but are to be found in the laws common to the Member States, International law and sometimes the Treaty. The elaboration of the principles is "strictly judicial" and cannot be named "activism".

[804] Justice Harlan, Dissenting in *Poe* v. *Ullman*, 367 U.S 497, 544 (1961). Expression used by justice Harlan to describe due process in the light of the traditions, described as a "living thing".

[805] Preamble of the Charter of Fundamental Rights, recital 7.

Solidarity, Citizen's rights and Justice). The Charter is composed of 54 Articles. The last four articles are the so-called horizontal provisions. Those general provisions (Chapter VII) are of extreme importance and of a rather complex nature.

The text of the Charter of Fundamental Rights is instructive and follows a wide conception of the fundamental rights in the European legal order. The preamble of the Charter of Fundamental Rights refers to values of the European Union as *"common",* [806] but also *"universal"* [807] (only the first four Chapters, specifying, dignity, freedoms, equality and solidarity).[808] This wide definition of the fundamental rights in the preamble results "*in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice and of the European Court of Human Rights"*.[809] The definition given by the preamble corresponds precisely to the sources of law used by the ECJ in the elaboration of the general principles.

The Charter must be seen as a clear reflection of a politico-judicial compromise. The text of the Charter carries the marks of a harsh and intensive battle during those nine months of hectic negotiations. An example of such a battle can be reflected by the divergent positions of the French and German governments concerning the contents of the Charter. The German government favoured a rather restrictive and conservative content with merely classical fundamental rights and freedoms, while the French government encouraged the inclusion of social rights, finally abandoned. Another example illustrates the desire of Herzog, former German President, to include a reference to "God and to religious heritage" in the preamble of the Charter. France, of course, strongly opposed such a reference, which would have clearly gone against and might have endangered the idea of secularism. Consequently, two versions were envisaged in the process of drafting - the French one, which refers to the spiritual and moral patrimony *("patrimoine spirituel et moral"*), and the German version, stressing the spiritual and religious patrimony *("geistig-religiös"*).[810]

Obviously, the Charter does not constitute a perfect document.[811] Such imperfections can be easily criticized, perhaps too easily. One of the strongest critical reactions is attributable to Pescatore, who argues that *"[t]he Charter's content is to a large extent not much more than a shorthand remake of the European Convention on Human Rights, enriched by some 'economic', 'social', and*

[806] Preamble of the Charter of Fundamental Rights, recitals 1 and 3.
[807] Preamble of the Charter of Fundamental Rights, recital 2.
[808] "[t]he Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice".
[809] Preamble of the Charter of Fundamental Rights, recital 5.
[810] The English version refers to the "spiritual and moral heritage", recital 2.
[811] Heringa and Verhey, "The EU Charter: Text and Structure", MJ 2001, pp. 11-32, at p. 31.

'administrative rights', which add nothing intrinsically to them".[812] Going further, he even qualifies the Charter as a *"spurious document"* and strongly hopes that the Charter, by remaining in the C series of the official Journal, will never acquire a legal "status".[813] Similar pessimistic views (maybe expressed in a less dramatic manner or maybe in a more political way) are also expressed by Vaz, qualifying the Charter as a *"show case of existing rights"*. [814] In any event, it seems difficult to contest the assertion that the mandate of the Convention was not to create more rights, but to make rights more visible by identifying them.[815] Consequently, the Charter should not and did not provide for any new rights.[816] The Charter is not a revolution in the codification of the rights. Indeed, those rights constitute a synthesis of the rights already enshrined either in the national constitutions or the international Conventions. The Charter is, by contrast, revolutionary in the sense that the fifteen Member States, each with its own history and culture, have declared their adhesion to these common fundamental values.[817] In the same vein, the Charter, according to Wathelet, constitutes a message to the European public opinion. This message has been summarized, in the words of the former judge, as *"[v]otre Europe, ce n'est pas seulement une machine bureaucratique qui harmonise la dimension des lames des tondeuses de gazon, ce n'est pas seulement une machine économique, monétaire et commerciale, c'est aussi un ensemble de valeurs communes auxquelles nous tenons tous"*.[818] Arguably, the Charter appears as a novelty in the sense that it constitutes a unique document in Europe, as it embodies civil and political rights, economic and social rights and rights of the third generation (environment, consumption, right to peace). The actual content of the Charter is substantially well formulated, precisely because the most reticent observers were convinced that the Charter would not acquire a binding effect.[819] Finally, drawing a rapid comparison with the ECHR, it can be said that the Charter of Fundamental Rights contains more substantive rights (such as the social rights) than the ECHR.[820] Furthermore, some of the rights are not expressly stated by the ECHR, such as the freedom of the arts and sciences (Article 13 CFR) and the rights of the child (Article 24 CFR) even if these rights appear in

[812] Pescatore, "Nice-Aftermath", CMLRev.2001, pp. 265-271, at p. 267.
[813] *Ibid*., at p. 268.
[814] Eighth Report of the Select Committee of the House of Lords, para. 47.
[815] Lord Goldsmith, "A Charter of Rights, Freedoms and Principles", CMLRev. 2001, pp. 1201-1216, at p. 1207.
[816] *Ibid*., at p. 1209.
[817] Rousseau, in "Libération" of 12 October 2000, at p. 16.
[818] Wathelet. "La Charte des droits fondamentaux: un bon pas dans une course qui reste longue", CDE 2001, pp. 585-593, "your Europe is not only a bureaucratic machinery which harmonises the size of lawnmower's blades, it is not only an economic, monetary and commercial machinery, it is also an ensemble of common values shared by anyone" (my translation).
[819] *Ibid*., at p. 590.
[820] The Charter contains 50 substantive Articles, whereas the ECHR contains 18 substantive provisions (without mentioning the protocols).

the case-law of the ECHR, respectively in Articles 10 (freedom of expression) and 8 (right to respect for family life) ECHR.[821]

Certain Member States, such as Belgium, Italy, and France,[822] were in favour of elaborating a legally binding Charter. Nevertheless, on 17 December 1999, Herzog declared during the first meeting of the drafting body that *"we are going to draft a text that will not be immediately binding as European Law or Community law. Despite this, we should constantly keep the objective in mind that the Charter which we are drafting must one day, in the not too distant future, become legally binding"*.[823] What has been described as the *"as if approach",*[824] has also been severely criticized. Lord Goldsmith emphasized that the aim previously enounced by the president Herzog is unattainable, due to the impossibility to incorporate the Charter into the Treaty because of the vague nature of the rights drafting,[825] and stressed that the Charter should be interpreted as a *"broad political declaration of rights and freedoms and widely drawn principles"* [826] and not as a legally binding document. Indeed, this view represents the United Kingdom Government's position, which strongly goes against the incorporation of the Charter into the Treaties.[827]

The main consequence of such an incorporation would be to render the Charter justiciable towards the European institutions through the general principles. More precisely, the ECJ could use the Charter as an explicit source of reference. However, one may wonder if the reality is so far from the fiction, after all. One might be tempted to consider that the Charter will be given binding force through the ECJ case-law. In this sense, the French Constitutional Council is offering an interesting example. In 1971, it gave binding force to the 1789 Declaration of Human Rights through the general principles of law ("*les principes à valeur constitutionnels"*). Can we expect the ECJ to do the same? Or more precisely, could we expect the ECJ to cross the Rubicon by referring explicitly to the Charter in its jurisprudence? Before answering this question in the light of the recent case-law, it should be kept in mind that already a good half of the Charter is *de facto* binding. Indeed, it could be argued

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[821] Lemmens, "The Relation between the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights – Substantive Aspects", MJ 2001, pp. 49-67, at pp. 55-67.

[822] France decided to support the inclusion of the social rights and to abandon the idea of legally binding Charter.

[823] http://db.consilium.eu.int/df.

[824] De Witte, "The Legal Status of the Charter: Vital Question or Non-issue?, MJ 2001, pp. 81-89, at p. 81.

[825] Goldsmith, "A Charter of Rights, Freedoms and Principles", CMLRev. 2001, pp. 1201-1216, at p. 1215.

[826] *Ibid*., Lord Goldsmith also considers that the choice of a political charter was the right approach. Indeed it is easier in such a document to assert values, which people can understand.

[827] According to the UK Government, their position was supported by Denmark, Finland, Ireland, Spain and Sweden. *See* the Times, 20 June 2000, cited by Betten, "Human Rights – Current development: European Community Law", ICLQ, vol. 50, 2001, pp. 690-701, at p. 690.

that the Charter represents a codification *in parte* of the general principles. Those general principles constitute legally binding norms and are justiciable. This view is clearly confirmed by AG Tizzano, who without wishing to enter into the debate on the binding effect, enters into it by the back-door:

> "[t]he Charter of Fundamental Rights of the European Union has not been recognised as having genuine legislative scope in the strict sense. In other words, formally, it is not in itself binding. However, without wishing to participate here in the wide-ranging debate now going on as to the effects which, in other forms and by other means, the Charter may nevertheless produce, the fact remains that it includes statements which appear in large measure to reaffirm rights which are enshrined in other instruments. In its preamble, it is moreover stated that this Charter reaffirms, with due regard for the powers and tasks of the Community and the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights".[828]

In this regard, it is to be noted that by relying on the general principles of law, derived from the constitutions of the Member States, and on the relevant international treaties, such as the European Convention on Human Rights, the ICCPR, the European Social Charter and the ILO conventions, the Court has set up a range of human rights recognized and protected in the Community legal order. Moreover, it should be stressed that the Advocates General have developed certain general legal concepts, not accepted by the ECJ, or have interpreted the ECHR in a way different from the ECJ (generally in a more extensive and progressive way), or have simply referred to, or interpreted, the ECHR (refuting or not the existence of the right in the Convention). The Charter of Fundamental Rights has recognised the principles elaborated by the ECJ and also by the AGs, although the principles elaborated by the latter have never been explicitly recognised by the ECJ. The following chronological analysis will offer a systematic comparison of the case-law of the ECJ on fundamental rights with the corresponding provisions enshrined both in the Charter of Fundamental Rights and the ECHR. The aim is to determine the general principles of Community law crystallised in the Charter and to assess the dissimilarities between the CFR and the ECHR. The analysis can be summarized as follows:

> The right to dignity (Case 29/69 Stauder, Case C-36/02 Omega): *Article 1* (No explicit provision in the ECHR).The right to property (Case 4/73 Nold v Commission): *Article 17* (Article 1 of Protocol no 1 ECHR). Freedoms of association (Case 175/73 Union Syndicale v Council): *Article 12* (Article 11 ECHR). The doctrine of margin of appreciation (Case 36/75 Rutili): *Article 17 and*

[828] AG Tizzano in Case C-173/99 *Broadcasting Entertainment Cinematographic and Theatre Union* (BECTU) [2001] ECR I-4881, para. 27.

52. (Articles 8-11, paragraphs 2 and 8 ECHR). Freedom of religion (Case 130/75 Prais v Council): *Article 10* (Article 9 ECHR). The principle of equality/non discrimination (Case 149/77 Defrenne): *Articles 20-23* (Articles 14 ECHR and Article 1 protocol 12 ECHR). The right to privacy (Case 136/79 National Panasonic v Commission): *Article 7* (Article 8 ECHR). Freedom to pursue a trade or profession (Case 44/79 Hauer): *Articles 15 and 16* (No explicit provision in the ECHR). Non-retroactivity of penal provisions (Case 63/83 Kent Kirk): *Article 49* (Article 7 ECHR). *Nulla poena sine culpa* (Case C-326/88 Hansen)*: Article 49 (*Article 7 ECHR). *Nulla poena sine lege* (Case 80/86 Kolpinghuis)*: Article 49 (*Article 7 ECHR). *Non bis in idem*: *Article 50* (Article 4 of Protocol no 7). Effective judicial protection (Case 222/84 Johnston: *Article 47* (Articles 6 and 13 ECHR). Freedom of expression (Case 43/82 and 63/82 VBVB&VBBB v Commission): *Article 11* (Article 10 ECHR). Right against arbitrary intervention (Case 46/87 and 227/88 Hoechst AG v Commission). Right to a fair legal process (such as presumption of innocence: Case C-235/92 P Montecatini and the right to be heard in a reasonable time: Case T-213/95 SCK and FNK v. Commission, Case C-185/95 P Baustahlgewebe): *Articles 47 and 48* (Article 6 ECHR). Transparency (Case C-58/94 Netherlands v Council): *Article 42* (No provision in the ECHR). Right to good administration (Case 64/82 Tradax Graanhandel): (right to be heard: Case 17/74,Transocean Marine Paint v. Commission, access to file: Case T-7/89, Hercules Chemicals v. Commission, duty to give reasons: Case 222/86 UNECTEF v Heylens Case C-367/95 P Commission v. Sytraval and Brink's France): *Article 41* (Article 6 ECHR). Right to collective bargaining: *Article 28* (Article 11 ECHR). Right to marry and to found a family (AG Lenz in Bergemann): *Article 9* (Article 12 ECHR). Right to liberty of movement (AG Darmon in Sevince): *Article 45* (Article 2 of protocol no 4). Right to life (AG Van Gerven in Grogan): *Article 2* (Articles 2 and 1 of protocol no 6). Right to a name (AG Jacobs in Konstantinidis): (No explicit provision in the Charter and the ECHR, However can be interlinked to *Article 3* (Article 8 ECHR). Right to liberty and security of person (AG La Pergola in Kremzow*): Article 6* (Article 5 ECHR).

In conclusion, in the light of the systematic analysis, half of the substantive provisions of the Charter are directly inspired from the case-law of the European Court of Justice and AGs. Using deductive reasoning, this analysis also confirms the views of Lenaerts and De Smijter. According to them, "*[i]t may be said that the Charter contains ratione materiae more fundamental rights than the Court of Justice has so far effectively guaranteed"*. [829] One can only agree with such a statement. The definition of the ECJ with regard to fundamental rights is more limited than the definition given by the Charter. Only Chapter VI, dealing with the principles of justice, is fully based on the general principles of Community law developed by the ECJ. Moreover, the relationship between the Charter and the general principles leads to the major question: how can we benefit from a codification of the general principles? Indeed, one can argue that the elaboration of the Charter would not improve the protection of individuals, since the general principles already protect them. Thus, the Charter would merely favour the

[829] Lenaerts and De Smijter, "A Bill of Rights for the European Union", CMLRev. 2001, pp. 273-300, at p. 289.

proliferation of fundamental rights, which *in fine*, might chill the constitutional dialogues between the ECJ and the national courts.[830] On the one hand, quoting Schermers at the time of the negotiations, *"the codification is desirable but not necessary"*.[831] Attempting to interpret those words, I believe that the author seems to consider that the level of protection in the field of fundamental rights was rather well protected through recourse to the "unwritten" general principles. Nevertheless, their codification will possibly improve the situation or, at least, it won't do harm. On the other hand, the situation concerning fundamental rights elaborated through the general principles was assessed to be unsatisfactory, due to their "invisible character" (their very nature), rendering them, in the eyes of the public, ambiguous and unable to afford an adequate level of protection.[832] The question of visibility is intricately related to the issue of consolidating the legitimacy of the European Union. To put it differently, making the fundamental rights more evident to the European citizen will enhance the legitimacy of the European Union.

3.1.2. The Effect of the Charter of Fundamental Rights

It has previously been argued that the Charter is already, in part, *de facto* binding. The aim of this second section is, first, to pursue the inquiry on the judicial status of the Charter and to stress the increasing importance of the Charter, explicit (in the AG Opinions and the CFI) and implicit (in the ECJ case-law), in the jurisprudence. Secondly, it will focus on the potential problems linked to the codification of the general principles. More precisely, it has often been contended that the general principles draw their evolutive dynamic and creative character from their unwritten nature. Thus, it could be maintained that the codification crystallises their dynamic nature and impedes the evolution of the case-law. The present section will not follow such an approach, but will, on the contrary, assert that the Charter will nurture the case-law in the field of fundamental rights.[833]

The Charter, as any new instrument, has triggered numerous reactions. It is not surprising that the year 2001 has subsequently been the seed for frequent and, to a certain extent frenetic, references to the Charter. As has already been frequently noted, it is in the very nature of lawyers to use any type of instruments, whether binding or not.[834] In that sense, AG Mischo stated in *Booker Aquaculture*[835] that,

[830] Weiler, "Editorial: Does the European Union Truly Need a Charter of Rights?", ELJ 2000, pp. 95-97, at p. 96.
[831] The House of Lords EU Committee, "The EU Charter of Fundamental Rights", Session 1999-2000, 8th Report, HL Paper 67, para. 48.
[832] That was notably the position of the International Commission of Jurists and Toth as reported in the Eighth Report of Select Committee on European Union of the House of Lords, paras. 40 and 44, http://www.publications.parliament.uk/pa/ld199900/ldselect.
[833] For a broader discussion on the effect of the CFR on constitutionalism, *see* De Búrca and Aschenbrenner, "European Constitutionalism and the Charter", in Peers and Ward, *The EU Charter of Fundamental Rights: Politics, Law and Policy,* Hart 2004, pp.3-34.
[834] Wathelet, *supra n.818,* at p. 592. For instance, *see* the comments on BBC, by the English Minister of Europe, Keith Vaz "It is the case that all courts will draw upon and look upon and

"the Charter is not legally binding, but it is worthwhile referring to it given that it constitutes *the expression, at the highest level, of a democratically established political consensus* on what must today be considered as the catalogue of fundamental rights guaranteed by the Community legal order".[836] The first reference by an AG to the Charter of Fundamental Rights was made by Tizzano in *BECTU* (February 2001).[837] According to the AG, the right to paid annual leave (or the right to paid holidays) is a fundamental social right; that is enshrined in diverse international conventions and is consecrated in Article 31(2) the Charter of Fundamental Rights of 7 December 2000. The Opinion of AG Tizzano led to a strong political reaction in the United Kingdom.[838]

More recently in April 2003, AG Geelhoed in *Debra Allonby* stated that the principle of equal treatment is laid down both in the EC Treaty (Articles 13 and 141 EC) and the Charter (Articles 21(1) and 23 of the CFR).[839] Sometimes, the AGs only refer to the Charter in their footnotes. The Opinion of AG Léger in *Wouters*[840] offers an interesting example since it combined the reference to the preamble of the Charter, concerning the respect of the rule of law,[841] together with Article 47 of the Charter (right to an effective remedy and to a fair trial).[842] In 2005, AG Maduro made reference to Article 34 CFR in *Nardone*.[843] From an overall analysis of those Opinions, it seems clear that the Charter of Fundamental Rights is acquiring an increasingly important status. The AG refer to the CFR in order to confirm the existence of a right already discovered by the ECJ through the use of the general principles of Community law or in order to assert the existence of a "new right", i.e. a right which was not elaborated previously by the Community judicature (e.g. the

look at any documents that have ever been produced, it is in the nature of lawyers to use anything for argument, this and anything else". *See also* De Witte, *supra n.824,* MJ 2001, at p. 83.

[835] AG Mischo in Case C-20/00 *Booker Aquaculture*, *supra n.140*.

[836] *Ibid*., para. 126 (italics added).

[837] AG Tizzano in Case C-173/99 *Broadcasting Entertainment Cinematographic and Theatre Union* (BECTU) [2001] ECR I-4881, paras. 26 and 28.

[838] Shaw, "The Treaty of Nice: Legal and Constitutional Reactions", EPL 2001, pp. 195-215, at pp. 199-200. Shaw made reference to Fletcher's Article in the Times of the 9 February 2001 ("Freelances gain the right to paid leave") attempting to demonstrate the creation of an EU super-state.

[839] AG Geelhoed in Case C-256/01 *Debra Allonby* [2004] n.y.r., para. 53.

[840] AG Léger in Case 309/99 *Wouters* [2001] ECR I-1577.

[841] *Ibid*., para, 173, "[i]t is established that the European Union and its Member States are based on the principle of the rule of law . . . " , fn 176.

[842] *Ibid*., para, 175, "[f]urthermore, the importance of the role played by lawyers has prompted the European Union and its Member States to include among fundamental rights that of being advised, represented and defended by a legal adviser". fn 181.

[843] Case C-181/03 P *Albert Nardone* v. *Commission* [2005] n.y.r, para 51. Article 34 concerns the fundamental right of access to social security benefits in cases of e.g illness, maternity, industrial accident, loss of employment, old age.

right to access to services of general economic interest).[844] However, it should be emphasised that the ECJ, by contrast to the CFI, has never made an explicit use of the Charter.[845]

Presumably, such a reference will be rendered imaginable when the Charter will acquire a binding effect. Until such recognition of the justiciability of the Charter's rights has occured, it appears reasonable to expect that the provisions of the Charter will be mentioned particularly in the AG Opinions. Thus, until such a drastic evolution, the ECHR and the common constitutional traditions remain the "starting points" of "special significance". Nevertheless, it seems logical to argue that the Charter may already have an impact on the jurisprudence of the Court of Justice concerning the general principles of Community law. It is extremely plausible that the Charter constitutes a *"clear guide for the interpretation of human rights"*. [846] In this sense, the ECJ will probably seek inspiration from the Charter when it will have to identify a fundamental right as a general principle of Community law.[847] The CFR may also be used to reinforce the existence of a general principle formerly decocted by the jurisprudence of the Court of Justice.

The basic problem can be summarized, using the words of de Witte, as to assess whether or not the Charter will freeze, expand or inhibit the general principles of Community law.[848] This section will argue that the Charter may act as a catalyst and, consequently, foster the human rights jurisprudence. Such a conclusion will be realized in the light of two recent judgments of the Court of First Instance (CFI) in *Dunnett* (2001),[849] and the Court of Justice (ECJ) in *Netherlands* v. *Parliament and Council of the European Union* (2001).[850] The former case deals with social rights, the latter concerns the right to human dignity and integrity. Before entering into a detailed analysis of this jurisprudence, it is important to note that the ECJ, as opposed to the AG, did not, understandably, expressly quote the Charter of Fundamental Rights.

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[844] *See, e.g*. AG Alber in Case C-340/99 *TNT Traco Spa* [2001] ECR I-4109, para. 94. *See also* AG Jacobs in Case C-126/01 *GEMO SA* [2003] n.y.r., para. 126, "[a] second advantage of the proposed distinction is that it gives appropriate weight to the importance now attached to services of general interest, as recognised in Article 16 EC and in *Article 36 of the EU Charter of Fundamental Rights,* while avoiding the risk of circumvention of the State aid rules. It thus strikes a balance between those potentially conflicting policies; it also avoids the objections which may be made to the exclusive use of one or other of the compensation approach on the one hand or the State aid approach on the other hand".

[845] *See infra*, the decision of the CFI in *Max-Mobil* (2002).

[846] De Witte, MJ 2001, *supra n.824*, at p. 84.

[847] Curtin and Van Ooik, "The Sting is always in the Tail. The Personal Scope of Application of the EU Charter of Fundamental Rights", MJ 2001, pp. 102-114, at p. 110. *See also* Lenaerts, "Respect for Fundamental rights as a Constitutional Principle of the European Union", CJEL, 2000.

[848] De Witte, MJ 2001, *supra n.824*, at p. 85.

[849] Case T-192/99 *Roderick Dunnett* v. *European Investment Bank* [2001] II-813.

[850] Case C-377/98 R *Netherlands* v. *Parliament and Council of the European Union* [2001] ECR I-6229**.**

In *Netherlands* v. *Parliament and Council of the European Union*, a case dealing with the legal protection of biotechnological inventions, the ECJ stated that "it is for the Court of Justice, in its review of the compatibility of acts of the institutions with the general principles of Community law, to ensure that the fundamental right to human dignity and integrity is observed".[851] The ECJ used the language of the Charter without mentioning it expressly. It is submitted that the Charter appears as an "invisible" formal source, since the Court refers neither to the constitutional traditions common to the Member States, nor to the relevant provisions of the ECHR, nor to its previous jurisprudence (Stauder).[852] Indeed, the implied reference to the Charter appears sufficient in order to deduce the consensus of value (generally inferred from the constitutions and the international instruments) required to recognise a general principle.

In the same vein, the CFI in *Dunnett* alluded to *a "general principle of labour law common to all the Member States"*[853] concerning the consultation of staff representatives and its breach by the European Investment Bank.[854] To my knowledge, it is the first time that the Court or the CFI refers explicitly to a general principle of labour law. It is contended that the Charter, which includes a "solidarity chapter", is valuable in such an appreciation. It would be a mistake to think that the Charter will not influence the reasoning of the judges. Once again, the judgement of the CFI exudes the text of the Charter. Following De Witte, *"[t]he Charter may, here as in other areas, have the effect of redirecting the course of the general principles case law and making the ECJ more attuned to the need to offer protection to social rights. But judicial creativity is rendered more difficult than in other areas because social rights typically require positive action for the progressive achievement of their full realization"*. [855] Indeed, we cannot expect the Court of Justice to get involved in such a type of activism by incorporating the "positive actions" in its jurisprudence.[856] Nevertheless, the *Dunnett* case seems to propose a

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[851] *Ibid*., para. 70.

[852] It should be noted that in *Stauder,* the ECJ simply stated the famous *obiter dictum* establishing the relationship between the fundamental rights and the general principles of Community law. However, it did not recognise explicitly the right to dignity and integrity of the person.

[853] *Dunnett*, *supra n.849,* para. 89. *See also* paras. 86 and 105.

[854] *Ibid.,* paras. 89 and 105, "[t]he consultation of staff representatives, which the Bank is obliged to organise under a general principle of labour law common to all the Member States in no way implies that those representatives have a right of co-decision on any abolition of a financial benefit such as that derived from the system of special conversion rates . . . it must be held that the Bank breached the general principle of employment law expressed in Article 24 of the Convention in that it did not hold bona fide consultations with staff representatives before adopting the decision of 11 June 1998".

[855] De Witte, in MJ 2001, *supra n. 824*, at p. 86. *See also*, Lenaerts and Foubert, "Social Rights in the Case-Law of the European Court of Justice: The Impact of the Charter of Fundamental Rights on Standing Case-Law", LIEI 2001, pp. 267-296.

[856] *Ibid*., at p. 87. In the words of De Witte that would constitute a "*major exercise of judicial activism"*.

brighter future for the development of social rights, which have often been the object of a bitter appraisement because of their alleged political, programmatic and rather unclear character.

Historically, in *Max-Mobil* (2002),[857] judgment by the second chamber of the CFI, of which Lenaerts was a member, made the first explicit reference to the Charter of Fundamental Rights. The case concerns the Commission's rejection of a complaint made by an Austrian private GSM operator, seeking a finding that the Republic of Austria had infringed the combined provisions of Article 82 EC and Article 86(1) due to the alleged difference between the fees charged to the applicant and to Mobilkom (the semi-public operator). The applicant, in the second plea of law, claimed under Article 253 EC [ex Article 190] that the Commission had an obligation to state reasons in relation to the arguments that appear to be of particular importance to the persons concerned[858]. In order to confirm the existence of such a right in the European legal order, the CFI bluntly mentioned two Articles of the Charter regarding the principle of good administration (Article 41(1)) and the principle of effective judicial protection (Article 47).[859]

The *Max-Mobil* case is of extreme interest for any study dealing with the development of the fundamental rights in the Community legal order. It raises an important number of questions. In my opinion, three main interrelated queries can be determined and discussed briefly. Which type of dialectic and reasoning will the Community judicature use in the elaboration of the fundamental rights? What is the link between the provisions of the Charter and the general principles of Community law? Will the ECJ follow the jurisprudence of the CFI?

Concerning the first question, it needs to be said that in *Max-Mobil*, the CFI did not mention the equivalent ECHR provisions. While this is not so surprising in relation to the principle of good administration, which does not exist *per se* in Article 6 ECHR, the non-reference to Articles 6 and 13 ECHR in connection with the right to an effective judicial protection is much more unanticipated. The traditional formula used by the European Court of Justice can be read as follows:

> "It is settled case-law that fundamental rights form an integral part of the general principles of law whose observance the Community judicature ensures. For that purpose, the Court of Justice and the Court of First Instance draw inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. The European Convention on Human Rights has special significance".[860]

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[857] Case T-54/99 *Max-Mobil* v. *Commission* [2002] ECR II-313.

[858] *Ibid*., para. 42, "whilst it is true that under Article 190 of the EC Treaty (now Article 253 EC) the Commission is not obliged to give a view on all the arguments put forward by complainants, it is none the less obliged to do so regarding those which appear to be of particular importance to the persons concerned".

[859] *Ibid*., para. 48 and paras. 56-57.

[860] SCK and FNK, *supra n.645*, para. 53. *See also*, Case C-299/95 Kremzow [1997] ECR I-2629, para. 14.

By contrast, the CFI in *Max-Mobil* offers twice a new formulation, which suggests that the general principles "are observed in a State governed by the rule of law and are common to the constitutional traditions of the Member States". Immediately after this laconic formulation, the CFI makes reference to the CFR as a confirmation of the existence of the declared rights. Thus, it seems that the ECHR is not anymore seen as an instrument of special significance but appears to be included in the very vague concept of the rule of law that entirely dilutes its weight. Obviously, the CFR seems to take priority over the ECHR. It might be said that the sui generis nature of the Community legal order in the fundamental rights field is marked by the CFR label. Interestingly, the remaining reference to the common constitutional traditions of the Member States (similar to the old formulation) could be seen as a means to reinforce the relationship between the national and European legal order and the spirit of co-operation enhanced by previous jurisprudence. In addition, the CFI in the *Jégo-Quéré* case referred for the second time to Article 47 of the CFR, which codifies the general principle of effective judicial protection.[861] However, in contrast to the *Max-Mobil* case, the CFI here explicitly referred to Articles 6 and 13 of the ECHR.[862] Does this mean that the CFI went too far in *Max-Mobil* by not referring to the ECHR as a source of special significance? The ruling in *Jégo-Quéré* seems to me to indicate a positive answer.

In relation to the second question, it is to be noted that Articles 41 and 47 CFR constitute a codification of the general principles as formulated by the Court of Justice. In *Johnston*,[863] the ECJ elaborated the principle of effective judicial protection (Article 47 of the CFR) drawing inspiration from Articles 6 and 13 of the ECHR. Interestingly, the ECJ in *Heylens* deduced an obligation to state reasons from the principle of effective judicial protection.[864] Furthermore, in relation to the principle of good administration (Article 41 of the CFR, which also includes an obligation on the EU institutions to state reasons), the CFI ruled in *SCK and FNK* that, *"it is a general principle of Community law that the Commission must act within a reasonable time in adopting decisions following administrative proceedings relating to competition policy"*.[865]

The provisions of the Charter are clearly used by the ECJ to confirm its preceding jurisprudence. However, we may distinguish between two sets of rights, i.e. the rights already formulated by the ECJ, and the rights never recognised as

[861] Case T-54/99 *Jégo-Quéré* [2002] 2 CMLR 44, para. 42, "[i]n addition, the right to an effective remedy for everyone whose rights and freedoms guaranteed by the law of the Union are violated has been reaffirmed by Article 47 of the Charter of Fundamental Rights of the European Union proclaimed at Nice on 7 December 2000 (OJ 2000 C 364, p. 1)". *See also* para. 47.
[862] *Ibid*., para. 41, "[t]he Court of Justice bases the right to an effective remedy before a court of competent jurisdiction on the constitutional traditions common to the Member States and on Articles 6 and 13 of the ECHR (Case 222/84 *Johnston* [1986] ECR 1651, paragraph 18)".
[863] Case 222/84 *Johnston* [1986] ECR 1651, para. 18.
[864] Case 222/86 *Heylens* [1987] ECR 4097.
[865] *SCK and FNK*, *supra n.645*, para. 56.

general principles by the ECJ ("new rights"), such as certain social rights included in the Charter. In other words, will the ECJ refer to the CFR so as to "confirm" a right, which has not been created by the Community judicature? Or will the CFR merely be used in connection with the codified general principles? At the first glance, it might be said that the CFR could not be used to "confirm" a right, which does not exist. However, it is also clear that the non-formulation of a principle by the ECJ does not imply its non-existence. Furthermore, in the light of AG Opinions, it appears that the CFR can be referred to in relation to "new rights".

Thirdly, it is worth emphasising that *Max-Mobil* is the judgment of the Court of First Instance. The CFI may be perceived as more progressive, but also more frustrated, than the European Court of Justice. Will the Court of Justice, in the future, cite expressly the CFR? And if so, will it apply the same formulation as the CFI? As discussed previously, the Court of Justice has already made implicit reference to the Charter of Fundamental Rights. However, the ECJ judges seem quite reticent or quite prudent in the possible reference to a non-binding instrument. In my view, there is nothing wrong in referring to the CFR in order to confirm the existence of a binding general principle of Community law.

In conclusion, a constant overlapping marks the relationship between the Charter and the general principles. Indeed, a part of the Charter may be appraised as already *de facto* binding in the light of the general principles. Thus, on the one hand, it may be stated that the general principles stimulate the legal character of the Charter. On the other hand, it is submitted that the Charter will reciprocally stimulate the scope of the fundamental rights protection (as general principles). More precisely, the Charter, which represents the synchronization of common European values, will help the Court in construing the next generation of general principles. At the end of the day, it seems difficult to interpret the Charter as an element of *"judicial pusillanimity"* for the Luxembourg judges. On the contrary, it should be perceived as a precious tool in the hand of the judges to extract the common values needed in order to elaborate the principles common to the Member States on the basis of Article 6(2) TEU[866] and 220 TEC. The general principles and the substantive provisions of the Charter may be assessed both as tools of judicial development and cross-fertilisation. In the words of Van Gerven, we are witnessing a *"Europeanization of Community law"*[867] or more specifically a *"Communitarization" of the fundamental rights"*.[868]

[866] Lenaerts and De Smijter, CMLRev. 2001, *supra n.661*, at p. 289, "It may be said that the Charter contains *ratione materiae* more fundamental rights than the Court of Justice has so far effectively guaranteed, but less than the Court could guarantee on the basis of Article 6(2) *juncto* Article 46(d) EU".

[867] Van Gerven, "Comparative Law in a Texture of Communitarization of National Laws and Europeanization of Community Law", in O'Keeffe and Bavasso (eds.), 2000, pp. 433-445.

[868] Daübler-*Gmelin, "Vers un communautarisation des droits fondamentaux",* RMUE 2000, pp. 345-346.

3.1.3. Incorporation into the Constitutional Treaty.

This last section will look at the process of incorporation of the EU Charter of Fundamental Rights into the Constitutional treaty.[869] The Member States have signed, in Rome (29 October 2004) the Constitutional Treaty (CT). First, it will focus, in the light of Article 5 DCT (February)/ 7 DCT (June) and the report from the Working Group II, on the modifications which have been made in the CFR before the incorporation in Part II of the CT (Articles II-61 to II-114). Second, it will consider how the CFR has been incorporated into the Constitutional Treaty. Regarding the former, the Working Group II has underlined that the substantive content of the Charter should be respected, since it represents the result of a consensus reached by the previous Convention and adopted by the Nice European Council. In other words, the substantive provisions of the Charter (Articles 1-50) should not be modified. Nevertheless, it has considered that some horizontal provisions (Articles 51-53) necessitate certain drafting adjustments. Accordingly, those adjustments do not concern the substance of the Articles, but merely permit confirmation of the scope of the provisions.[870] Put bluntly, those confirmations can be summarized as follows:

- Confirmation that there is no modification of the competences allocated between the Union and the Member States (Article 51.1 and Article 51.2).
- Confirmation of the compatibility between the EC Treaty and the Charter's Articles restating those rights (Article 52.2).
- Confirmation of the equivalent scope of protection between the ECHR and Charter Articles (Article 52.3).
- Confirmation of the importance of the Member States' common constitutional traditions in the origin of the Charter (new Article 52.4, new Article 52.6 and see also Article 5(3) of the Constitutional Treaty).
- Confirmation of the distinction between rights and principles (new Article 52.5).

Those "confirmative adjustments" may be divided into three groups, as they reflect either a slight amendment of the text of an existing paragraph (Article 51.1,[871]

[869] *See also*, Groussot, "A Third Step in the Process of EU Constitutionalization: A Binding Charter of Fundamental Rights", ERT 2003, pp.537-558, Arnull, "Protecting Fundamental Rights in the Europe's New Constitutional Order", in Tridimas and Nebbia, *European Union Law for the Twenty-First Century*, Hart 2004, volume I, pp.95-112, at pp.102-105.
[870] Final Report of the Working Group II, CONV 354/02, pp. 1-17, at pp. 4-5.
[871] Article 51 (1): "The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective *powers and respecting the limits of the powers of the Union as conferred on it by other parts of [this Treaty / the Constitutional Treaty]."* (emphasis added).

Article 51.2 [872] and Article 52.2) or the creation of new paragraphs to an existing Article (new Article 52.4,[873] new Article 52.5,[874] new Article 52.6) or a simple confirmation without any textual adjustment (Article 52(3)).[875] Succinctly, as to the latter, the Working Group II pointed out that the Charter's rights that correspond to ECHR rights have the same scope and meaning as laid down in the ECHR, and that Article 52(3) does not prevent the application of a (existing or potential) higher standard of protection, e.g. Article 50 CFR concerning the *non bis in idem* principle. Some adjustments are noticeable if one compares the text of the Constitutional Treaty (Articles II-111 and II-112) with Articles 51 and 52 of the CFR.

As to the first group, the final report made clear twice that the incorporation of the Charter will not modify the allocation of competences between the Union and the Member States. To use the words of the proposed adjustments, the Charter is not going beyond the power of Union law. Article 51(1) states that *"[t]he provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member Sates only when they are implementing Union law."* Surprisingly, the Charter refers merely to the obligation of the Member States to respect the provisions of the Charter only when they are implementing Union law. The wording of the text appears at odds with the jurisprudence of the ECJ. In this sense, Judge Wathelet noted that, "*on s'étonnera d'abord que les auteurs de la Charte n'aient pas repris la formule plus large utilisée par la jurisprudence de la Cour de justice en matière de droits de l'homme, à savoir, les règles nationales entrant dans le champs d'application du droit communautaire.*"[876] As put by several commentators, the wording of the Charter is much more restrictive than the jurisprudence of the Court of Justice.[877] Less

[872] Article 51 (2): "This Charter does not *extend the scope of application of Union law beyond the powers of the Union or* establish any new power or task for [the Community or] the Union or modify powers and tasks defined by the other [Chapters / parts] of [this Treaty / the Constitutional Treaty]." (emphasis added).

[873] "52(4) Insofar as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions."

[874] "52 (5) The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions and bodies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality."

[875] "52 (6) Full account shall be taken of national laws and practices as specified in this Charter."

[876] Wathelet, "La Charte des droits fondamentaux: un bon pas dans une course qui reste longue", CDE, 2001, pp. 585-593, at p. 589. *See also*, Lenaerts and De Smijter, "A Bill of Rights for the European Union", CMLRev. 2001, pp. 273-300, Lenaerts, "Fundamental Rights in the European Union", ELR 2000, pp. 575-600, at p. 600.

[877] Besselink, "The Member States, the National Constitutions, and the Scope of the Charter", MJ, 2001, pp. 68-80, at pp. 76-79, De Witte, "The Legal Status of the Charter. vital question or non-issue?, MJ 2001, pp. 81-89, at pp. 85-86.

surprising, but even more puzzling in the light of the CFR, are the explanations given by the Council of the European Union. In this document, it is declared that, *"[a]s regards Member States, it follows unambiguously from the case law of the Court of Justice that the requirement to respect fundamental rights defined in a Union context is only binding on the Member States when they act in the context of Community law."*[878] According to the view expressed the wording "implementation of Union law" includes also the ERT-style of review or more generally any types of national measures falling within the scope of Community law. One can only agree with such an assertion though the wide interpretation of implementation of Union law might be perceived as misleading or at least confusing.[879]

Finally, as put by AG Jacobs, one may see the wording of the Charter of Fundamental Rights as an *"inadvertent omission"*.[880] However, in the light of the *travaux préparatoires*, it has also been stressed that the wording was not accidental. It was, indeed, a matter of constant attention during the drafting of the process.[881] For the time being, one may say that the wording of the Charter is not so preoccupying since the Charter is not yet binding. Nevertheless, if hypothetically the document was or became binding, it might lead to a critical situation in which the rights of the Charter would be limited to the "implementation of Union law". This would be the case even if the explanations give an extensive interpretation to such a wording. Of course, it might be said that the case law of the ECJ, concerning the scope of application of the general principles on the Member States, would remain applicable. However, at the end of the day, the conclusion to which we are inescapably drawn seems to be that the text of the Charter should be modified for the sake of legal certainty. Unfortunately, the Working Group II did not propose such an amendment.

As to the second cluster, the Working Group II confirmed the full compatibility between the fundamental rights of the EC Treaty and the Charter Articles, restating them, e.g. citizenship provisions. The so-called referral clause should be the object of a minor drafting adjustment - which should be carried out later as it closely depends on the general structure of the Treaty - in order to clarify that the referral is made to other parts of Treaty law and that such replication does not constitute any detrimental obstacle. In addition, the WG II confirmed the importance of the distinction between rights and principles. Accordingly, the provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by the institutions and bodies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. This distinction is fundamental as to certain social rights. In other words, on the one

[878] Council of the EU, "Charter of Fundamental Rights of the European Union: Explanations Relating to the Complete Text of the Charter", December 2000, at p. 73. Interestingly, the Wachauf and ERT jurisprudence are expressly cited.
[879] *See* Declaration 12 of the CT concerning the explanations relating to the CFR.
[880] Jacobs, "Human Rights in the European Union: The Role of the Court of Justice", ELR 2001, pp. 331-441, at pp. 338-339.
[881] De Witte, MJ 2001, *supra n.877,* at p. 86, fn.15.

hand, it makes clear that some rights are directly justiciable, e.g. civil and political rights, and on the other hand, certain programmatic rights would necessitate positive measures from the EC legislator, e.g. certain economic and social rights.

What is more, it underlined the significance of the common constitutional traditions in the interpretation of the CFR. The Working Group stressed that the Charter has firm roots in the Member States' common constitutional traditions. The large majority of the Groups proposed to include a rule of interpretation in the general provisions. This rule would be based on the wording of the current Article 6 (2) TEU and would take account of the approach to common constitutional traditions followed by the Court of Justice as explained by Judge Skouris at the hearing of 17 September.[882] In his words:

> "it should be borne in mind that *common constitutional traditions do not form a direct source of Community law and the Court of Justice is not bound by them as such*, they constitute a source of inspiration for it in discerning and defining the scope of the general principles of law that apply in the Community legal order. *It follows that its is not the Court's duty to discern, and, as it were, mechanically transpose into the Community legal order, the lowest common denominator of constitutional traditions common to the Member States*. The Court draws inspiration from those traditions in order to determine the level of protection appropriate within the Community legal order and for that very reason appreciate them more freely".[883]

Under that rule, rather than following a rigid approach of lowest common denominator, the Charter's rights concerned should be interpreted in a way offering a high standard of protection which is adequate to the law of the Union and is in harmony with common constitutional traditions.[884] In that sense, the new proposed Article 52(4) CFR states that, *"[i]nsofar as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions."*

By confirming the fundamental importance of the national constitutions, it also demonstrates the close link between the CFR and the general principles of Community law. Indeed, as seen previously, in elaborating the general principles, the ECJ is inspired by the constitutional traditions as indirect sources. Notably, in the future, we may wonder whether it would be necessary to refer to the general principles of Community law and subsequently to the common constitutional traditions as indirect sources for fundamental rights, since these will merely form a subsidiary and complementary source. Thus, one may argue that the Court of Justice would have recourse to the general principles of Community law only in order to fill the unavoidable lacunae relating to the text of the Charter and would simply refer to the relevant provision of the CFR in order to confirm an "existing right". As stated above, this is not the approach followed in *Max-Mobil* by the CFI, where it quoted

[882] Final Report of the Working Group II, CONV 354/02, pp. 1-17, at p. 7.
[883] Skouris, "Hearing of Judge Mr. Vassilios Skouris on 17 September 2002", WD No 19, CONV 295/02, pp. 1-9, at p. 8. (italics added).
[884] Final Report of the Working Group II, CONV 354/02, pp. 1-17, at pp. 7-8.

expressly, for the first time, the wording of an Article of the CFR (Article 47) in relation to the right to effective judicial protection. By contrast, as stated previously, in this case, the CFI did not make reference to the ECHR. However, this formulation was not adopted in the *Jégo-Quéré* case, which mentioned both the ECHR and the common constitutional traditions. Moreover, this approach appears not to be confirmed by Article 5(3) DCT which states that *"fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law"*. The same holds true in relation to Article 7(3) of the Draft Constitutional Treaty presented to the European Council in *Thessaloniki* and Article 9(3) CT.

Interestingly this provision underlines that the Union also recognises fundamental rights as general principles resulting from the ECHR and the constitutional traditions common to the Member States. In the light of the explanatory notes regarding the DCT, the purpose of this provision is to make clear that the incorporation of the Charter does not preclude the ECJ from formulating supplementary fundamental rights in the future. In other words, the Charter will not freeze the elaboration of general principles via the ECJ jurisprudence, as certain authors wrongly advocate it. Accordingly, such reasoning results from the classic constitutional doctrine, which never assesses the constitution as an exhaustive document but as a living thing.[885] In my view, this approach is absolutely right. In elaborating the new general principles, the ECJ will be guided by the ECHR and the common constitutional traditions. The importance to refer to national constitutions reflects the *dual legitimacy* of the EU legal order, i.e. it is a new type of international legal order the subject of which are not only the Member States but also the individuals. This concept is of the utmost importance and derives from the very nature of the European legal order and has already been affirmed in the early case law of the ECJ (*Van Gend en Loos* and *Costa* v. *Enel*). Arguably, the dual legitimacy of the European legal order should continue to be reflected in the ECJ case-law, the Charter of Fundamental Rights and the Constitutional Treaty.

Regarding the Constitutional Treaty, three modalities of insertion of the Charter have been proposed in order to make it legally binding. The first possibility is to include the Charter in a Title or Chapter of the Constitutional Treaty. The second option envisaged the reference to the Charter in one of the Articles of the Constitutional Treaty. Interestingly, the full text of the Charter might be annexed either in the form of a protocol or as a specific part of the Constitutional treaty. The final proposition concerns "an indirect reference" to the Charter, which will make the Charter legally binding without giving it a constitutional status.[886] As to this last option, it seems to me that it will go against the very nature of the Charter of fundamental rights, the codification of fundamental rights being *per se* constitutional. As to the second option, it appears as the most pragmatic. In fact, it

[885] Praesidium, "Draft of Articles 1 to 16 of the Constitutional Treaty", CONV 528/03, pp. 1-19, at p. 13.
[886] Final Report of the Working Group II, CONV 354/02, pp. 1-17, at p. 3.

permits a direct reference to the Charter in one of the opening Articles of the Constitutional Treaty without, possibly, interfering with its structure.

It should be noted that the incorporation of the Charter into a specific part of the Treaty has been preferred to attachment in a Protocol, since the latter would have presented the Charter as a separate text and could have consequently minimized its importance. As to the first option, it constitutes the most seducing option in the sense that the Charter clearly appears as an intrinsic part of the Constitutional Treaty. In that regard, the Charter perfectly fulfils one of its basic functions, i.e. ensuring the visibility of fundamental rights. The final report of the Working Group II stressed that a large majority supported the first option. Subsequently, it seems that the most practical solution has been favoured. Citing the explanatory note, this technique *"will safeguard its fully binding legal nature and allow the general rules concerning future amendments of the Constitution to be applied to the Charter. Moreover, that technique will also keep the structure of the Charter intact and avoid making the first part of the Constitution more lengthy. At the same time, the reference to the Charter in the first few articles of the constitution will underline its constitutional status"*.[887]

This is also confirmed by the wording of Article 7(1) of the new DCT presented during the Thessaloniki conference and Article 9 CT. The version submitted to the Member States is different from the DCT of February 2003. Indeed, Article 5 DCT is replaced by Article 7 DCT, which states that, *"[t]he Union shall recognize the rights, freedoms and principles set out in the Charter of Fundamental Rights which constitutes Part II of this Constitution"*.[888] This wording corresponds to the last sentence of the CFR preamble. Its formulation appears less powerful or, perhaps, more diplomatic than the previous draft ("shall form an integral part of the Constitutional Treaty"). However, the incorporation of the CFR into the second part of the CT gives the former a constitutional status and, arguably, binding force. This view was confirmed by Giscard d'Estaing, who considered that, *"Part two contains the Charter of Fundamental Rights, a vital element of any constitutional text, which thus acquires legal force. It can be stated that, of all the men and women in the world, it is the citizens of Europe who will have the most extensive rights"*.[889]

One can only agree with such an assertion - though the inclusion of the full text of the CFR into one of the opening provisions would have make the Charter look as the preamble of the Constitutional Treaty - as it maintains the integral structure of the Charter, avoids making the first part of the Constitutional Treaty too extensive and, finally, the reference to the Charter in the very first provisions stresses its constitutional nature. Furthermore, in a speech given by Giscard d'Estaing, on 16 April 2003, regarding the development of the work of the European Convention, the

[887] Praesidium, "Draft of Articles 1 to 16 of the Constitutional Treaty", CONV 528/03, pp. 1-19, at p. 13.
[888] Draft Treaty establishing a Constitution for Europe submitted to the European Council meeting in Thessaloniki, 20 June 2003, CONV 820/1/03 REV1
[889] Giscard d'Estaing, "Oral Report Presented to the European Council in Thessaloniki", 20 June 2003, pp. 1-21, at p. 5.

president of the Convention emphasized that the Charter of Fundamental Rights may be given constitutional ranking by integrating it into the second part of the Constitution.[890] Apparently, the incorporation into a specific part of the Treaty was conspicuously given preference**.** As seen above, it appears to be the most pragmatic and adequate solution.

At the end of the day, it might be said that the CFR is on track to acquiring a formal binding status, especially in the light of the new Constitutional Treaty which may now enter into force. This incorporation constitutes a third step in the process of constitutionalization or Europeanization of fundamental rights. Notably, the Constitutional Treaty incorporates the Charter of Fundamental Rights in a specific part (Part II [Articles II-61-114] and clearly refers to the legally binding CFR in one of the opening provisions (Article 9 CT).[891] Hence, after the entry into force of the Treaty, it would represent a decisive step in the enhancement of EU fundamental rights, since the Charter is going further than the protection afforded by the general principles and also make those "unwritten principles" even more visible. Importantly, such a binding instrument will not freeze the future development of general principles of Community law by the ECJ. In that sense, it seems that time has not yet come to chant: *"Les principes généraux sont morts. Vive les principes généraux du droit!"*

3.2. GENERAL PRINCIPLES, RIGHT AND CONSENSUS MODELS

The aim of this section is to determine the adjudicative model(s) in which the ECJ falls when it comes to the elaboration of the general principles. On the one hand, the protection afforded by the general principles may be appraised within a rights-based model. In this model, the Court does not make law by creating rights since it uses the argument of principle (Dworkinian approach). On the other hand, the consensus model takes into consideration the argument of policy, e.g. effectiveness. In this model the Court uses its discretion and makes law. This model is closely linked to the centrist approach or the institutional legal positivist approach and epistemic coherence (coherence of the legal reasoning). The section is divided into two parts. First, it considers the various models of adjudication in the light of the theory of Bell (3.2.1). Second, it assesses whether the ECJ may be perceived as a Dworkinian Court regarding the elaboration of general principles (3.2.2).

3.2.1. Different Models of Adjudication.

Arguably, the ECJ derives the general principles from different sources, e.g. international instruments and constitutional traditions. Additionally, different

[890] Giscard d'Estaing, "Rapport oral sur l'état d'avancement des travaux de la convention européenne presenté au conseil européen d'Athènes", 16 of April 2003, pp. 1-6, at p. 3.
[891] *See* Protocol 32 relating to Article I-9(2) of the Constitution on the accession of the Union to the ECHR.

approaches may be chosen to elaborate the general principles of Community law.[892] It is contended that the various approaches taken by the ECJ in the formulation of general principles reflect the use of different models of adjudication (right and consensus models). Also, the models of adjudication are closely related to the two major schools of jurisprudence, i.e. naturalist and positivist schools. In the EU context, it is argued, however, that a third school of jurisprudence is more suitable than a pure legal positivist model.[893] This third school of jurisprudence, or "in-between theory" may be defined in the light of the works of Posner,[894] MacCormick

[892] AG Léger in *Hautala*, *supra n.291,* paras. 67-69.

[893] The "third school" appears of particular relevance in a research concerning the general principles of Community law, where the case law of the ECJ constitute the heart of their elaboration. According to Professor Cappelletti, there exists a third school of jurisprudence in relation to what he calls "comparative phenomenology". This school is defined by him as a "combination of the virtues of both natural law and positivism, which adopts the realistic method of positivism in the search for common elements in legal institutions and for the common values that they express. The approach taken by Cappelletti (Cappelletti, *Judicial Process in a Comparative Perspective*, Preface at xx) is of course orientated towards comparative methodology. However, the third school of jurisprudence should be seen as extremely valuable in the whole assessment of EC law. In the EU context, it will be stressed that positivism is too much related to the state to be applied, whereas certain legalist theories such as the one of Dworkin, (even if it is an interesting tool for an appreciation of the role of the principle of EC law), may be perceived as to incline too metaphysical considerations in order to establish a plausible description of the elaboration of the general principles of Community law. The method, thus, followed will use analytical jurisprudence and will attempt to discover the rational discourse of the ECJ in the elaboration of the general principles. The ECJ will be seen as the central institution particularly in the creation of the normative principles. A pure positivist approach also appears difficult to endow. It appears to be the approach followed by Hartley. In few words, Hartley (*The Foundations of European Community Law)* criticized the ECJ for being activist by reducing the justifiable decision to the use of literal interpretation. Moreover, this positivist approach seems to be the method followed by Rasmussen (*On Law and Policy in the European Court of Justice*) in connection with the policy arguments. In other words, the judge (using policy arguments) appears as an interstitial legislator and is thus making law.

[894] Posner, *The Problems of Jurisprudence*, Harvard, 1990. The neutral orientation of Posner can be deduced from his views on the legitimacy of adjudication. More precisely, what should be the place or the model chosen for adjudication? As will be seen later, models of adjudication are closely related to the schools of jurisprudence. In this sense, Posner rejects expressly the "interstitial model" and advocates in favour of the consensus one. The assessment of the judge as an interstitial legislator is, using his words, "unedifying and misleading" (Posner at p. 130). The judge is only seen as an instrument to fill the gaps left by the legislator without taking into consideration the apolitical role of the judge. According to him, "consensus is a necessary condition for objectivity in all but the weakest sense . . . The weaker the consensus, the more difficult it is for the judge to fix the premises of decision, and by doing so, to make legal reasoning approximate legal induction". (Posner at pp. 126-127). Posner consideres that if he had to chose he will range himself as "skeptic" (legal positivist), but do not deny the approach taken by certain natural lawyers and resist the effort to make a dichotomy between positive and natural law (Posner at p. 25). Posner, who has said that

and Weinberger,[895] as well as Bengoetxea.[896] The institutional legal positivist (analytical legal positivism) approach taken in this research assumes that the ECJ is the heart of the institutional process. Consequently, the law analyzed in the present study reflects the jurisprudence of the Court of Justice seen as the central institution in the EC context.

As to the models of adjudication, Bell proposes different models for the application of the law. More precisely, one may identify three types of models.[897] The thesis advanced by Bell (Dworkin being his supervisor) appears extremely important in order to understand the extent and nature of judicial discretion. Indeed, Bell's idea was to establish a clear framework of the different models of adjudication that a judge may follow when confronted with a particular case. The author, consequently, established a tripartite non-rigid system and analyzed with the help of empirical evidence which system the UK judges might fall into. The first

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"extreme positions are more fun, but in jurisprudence the true as well as the good is to be found between the formalistic and realistic extremes" (Posner at p. 32), who went further by stating that his position "may be seen boringly centrist, but it will provoke both the true centrists in the profession, who want very much to believe that law is autonomous and apolitical and the political activists who want to move the law sharply to the left or the right. It will be criticized by the left as authoritarian and complacent and by the right as cynical and amoral" (*Ibid*).

[895] MacCormick and Weinberger, *An Institutional Theory of Law*, Kluwer, 1986. The Institutional Theory of Law (ITL) clearly enters within the centrist approach of the law. ITL and Institutional Legal Positivism (ILP) possess a close link with legal positivism (even if going further) and sociological studies. Those theories have recourse to legal dogmatic and analytical jurisprudence. According to those authors the "Institutional Theory of Law" permit to avoid the traps of both "Idealism and Reductionism". This theory goes beyond legal positivism in the sense that it takes into consideration "elements of principles, of value and of consequentialist argumentation"(Mac Cormick and Weinberger, at p. 8). Accordingly, *"[o]ur institutional Theory of Law aims first to provide a…foundation for two equally valid and mutually complementary discipline: legal dogmatics and the sociology of law. It aims secondly to make a contribution to the understanding of legal structure and to the methods proper to legal study. And it aims finally to show the place (and the limits) of practical reason in law and on human social life* (MacCormick and Weinberger, at p. 27).

[896] Bengoetxea, *The Legal Reasoning of the European Court of Justice*, Oxford, 1993. Institutional Legal Positivism as defined by Bengoextea may be appraised as a refinement of ITL in the sense that the ECJ is seen as the central institution. In the European context such an approach is extremely useful in order to assess the importance of the ECJ. The theory proposed by Bengoetxea is largely inspired by the ITL described previously. As MacCormick and Weinberger proposed, such a theory can be used in the EU context. This is precisely what Bengoetxea has realized. According to Bengoextea, "legal positivism can be seen as an approach to the study of law which treats law as an institutional fact". The approach taken in this research assumes that the ECJ is as the heart of the institutional process. Consequently, the law analyzed in the present research reflected the jurisprudence of the Court of Justice seen as the central institution in the EU context. Institutional Legal Positivism is also called "analytical legal positivism".

[897] Bell, *Policy Arguments in Judicial Decisions*, Oxford, 1983.

model is called the "consensus model".[898] The second is called the "rights model"[899] and the third "the interstitial legislator model".[900] Each model reflects the particular philosophical leanings of the judges.[901] Indeed, the interstitial law model is akin to legal positivism. The rights model is directly inspired by Dworkin and the legalist school. Finally, the consensus model reflects the "centrist approach" generally chosen by judges.

First, as to the interstitial legislator model, it appears that the legal positivist Holmes built the foundation for this model. According to Posner, legal realism did not bring anything new in this domain after Holmes and Cardozo. In his words, *"[w]hen the rules run out or fail to fit, the judges have discretion to modify, trim, or extend them as may be necessary to make him cover the case at hand. Alternatively, one of the rules that compose the law is a jurisdictional rule authorizing judges to exercise discretion whenever there is a gap or ambiguity in the substantive rules. In this view the judge is as Holmes put it an "interstitial legislator".*[902] Similarly, Hart also considered that when a judge is confronted with an unregulated case, the judge would be faced with an "inescapable situation" and a task of interstitial law-making. In those instances, the judge will have recourse to reasoning by analogy in order to legitimate their reason as being already part of the law. To quote Hart, *"very often, in deciding such cases, they cite some general principle or some general aim or purposes which some considerable areas of the existing law can be considered as*

[898] *Ibid*., at pp. 10-14 and at pp. 184-202.
[899] *Ibid*., at pp. 14-17 and at pp. 204-226.
[900] *Ibid*., at pp. 17-20 and at pp. 226-247.
[901] The debate on the judicial discretion of the judge, is the judge making law? Is the judge the mere mouth of the written law? Is the judge a legislator? Is the judge an interstitial law maker? Is the judge a legitimate law-maker? Or is the judge not a legislator? Those interrelated questions and the interrelated given solutions reflect the choice of a particular philosophy of law. A legal positivist or "skeptics" will argue in one way, whereas a natural lawyer will argue in the other. Finally, a third school of jurisprudence can also be followed, this in-between theory, this centrist approach to law may be an appropriate solution to solve the unsolvable theoretical conflict between both schools. The research is based on the creative and "applicative" process of the general principles of Community law. It consequently means that I will focus principally and fundamentally on the analysis of the jurisprudence of the European Court of Justice. It means also that the question of the judicial discretion of the European Judge in the elaboration and application of the general principles will be taken with high consideration. It means also that the particular affiliation to a particular school will guide the reasoning and the conclusions. It means, finally, that the appreciation of the situation would not be neutral but political. Well, such a contention is easy to argument, if one can establish a clear dichotomy between the "two first schools of jurisprudence". However, if pertaining to the third school, the conclusion may be more neutral, more apolitical, and more effective. I do believe that such a clear-cut distinction between natural and positive law is impossible to establish in the new type of legal order such as the European Union. Especially, in the context of the general principles of Community law, where the judicial process is at the heart, such choices may lead to establish a truncate appreciation of the possible rational discourse taken by the ECJ in this field.
[902] Posner, *supra n.894,* at p. 18.

exemplifying or advancing a point towards a determinate answer for the instant hard case".[903]

Secondly, the rights model is clearly inspired by the views taken by Dworkin. Consequently, this means that the law is conceived as a coherent and perfect concept (integrity of law). A judge confronted with hard cases must rely on arguments of principles and not of policy in order to render the legal system coherent. Reliance on principles that embody individual rights, does not lead to judicial law-making, since the system is seen as a whole and the judge does not have any discretion. Bell, describing the theory of Dworkin, pinpoints the prominent role of the individual in the common law. In his words, *"the judicial process is structured around the paradigm cases of disputes either between individuals or between the individual and the State which necessary focus attention on issue of rights*".[904]

Thirdly, the consensus model is seen by Bell as the most popular within the judiciary. The judge will not make but interpret the law. Quoting Bell, *"such a claim can make sense of the view that the judge acts in a neutral way in making rules, whereas the legislator and the executive are more partisans".*[905] It can, in fact, be asserted that the legislature has the possibility to drastically alter the legal framework, whereas the judge works and interprets in the framework established by the former. Further, the judge is seen as the reflector and not the guide of the social attitudes. The consensus of values makes up the determining rationale establishing the decision. Finally, *"the validity of the consensus theory depends on the acceptance of judicial decisions by the community as representing its values".*[906]

To conclude, due to the reasons explained before, the rights and consensus models will be used in this research. The rational application of the law may be defined and developed in the light of the theories of Aarnio, Alexy, Peczenik and Wróblewski.[907] Can one argue that the consensus model relates to the "model of rational application of the law" (RAL)? The consensus and RAL models pursue the same "consequential aim", which is the possible validity and neutrality of the judicial decision. However, the theories are different in their content. Indeed, the consensus model is founded on two fundamental elements. First, it analyses the nature of adjudication and the place of the judiciary in democratic society. Secondly,

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[903] Hart, *The Concept of Law*, Oxford, 2nd edition, 1994, at p. 274.
[904] Bell, *supra n.897,* at pp. 223-224.
[905] *Ibid*., at p. 11.
[906] *Ibid*., at p. 200.
[907] Wróblewski, *The Judicial Application of Law*, Kluwer, 1992. One may draw a parallel with Wróblewski and his theory of judicial application models (descriptive model, normative model and model of rational application of the law) and ideological point of view (ideology of bound judicial decision making, ideology of free judicial decision-making and the ideology of legal and rational judicial decision-making). Indeed, one can establish a strong connection (in the consequences of both models) between the ideology of legal and rational judicial decision making (or the model of rational application of the law) and the "consensus model" as developed by Bell.

it focuses on the consensus of values in the community and not on the legal reasoning of the Court.

In that sense, it may be said that the consensus model does not consider as such the rational discourse of the Court as a theory of justification. However, it could be argued that a judge involved in legal reasoning attempts to use the consensus of values as a potential argument. For instance, a European judge involved in the formulation of fundamental rights may refer to the common constitutional traditions of the Member States. This type of argument is a reflection of the consensus of values (constitutional values) in the European Community. Consequently, the consensus model is, to a certain extent, rather close to theories on rational discourse. What is more, it appears interesting to note that the protection of fundamental rights has been prompted by the violent reactions of the Italian and German constitutional courts condemning the absence of human rights in the Community. The ECJ answered those demands by providing human rights guarantees through the theory of the general principles of law. In this instance, the lack of consensus in the Community has boasted the establishment of a human rights regime formulated and protected by the Court. The interest of such theoretical models for the following research lies in the possible application of one of the models in the European legal order. More precisely, what is the model chosen by the judges of the ECJ in the elaboration and application of the general principles? Is the ECJ a Dworkinian Court? Or is the Court more neutral in its adjudicative process? And finally, can one perhaps even say that the Court uses different models?[908]

3.2.2. Is the ECJ a Dworkinian Court?

The main question at issue is to determine whether the ECJ may be considered as a Dworkinian Court. More precisely, does the Court follow the rights model in its elaboration of the general principles of Community law? As seen before, the last decades have witnessed a multiplication of the use of principles by the ECJ. The same logic seems to apply to general principles. Indeed, the recent years have been marked by an abundant elaboration and application of general principles.[909] Does this phenomenon constitute a sign of the Dworkinian nature of the Court? Before

[908] A second interest lies in the discovering of the strategy followed by the Court of Justice. In other words, is the European judge making law or not when he elaborates a particular principle? If the Court follows the rights model, in the light of the theory the judge will not make law (according to Dworkin). If the type of adjudication enters in the IL model, the judge will make law (subject however to certain exceptions that ought to be studied carefully). Following the consensus model, the Court will not make law subject also to certain conditions. For a defender of a strong role and function of the ECJ, it is clear that Dworkin's theory would be the ideal to justify the legitimacy of adjudication. An opponent to this kind of liberal theory might prefer to look at the Court as an interstitial legislator, as a judicial activist. Maybe, the judge will be tempted to classify himself/herself in the "consensus model".

[909] AG Tesauro in *Kefalas*, *supra n.158,* para. 23.

answering that question, an inquiry of the concept of principles, in order to extract its basics features, is necessary.

Hart considers the law as a system of rules and the principles constitute a kind of rules, a weak or vague rule, like a presumption (illustrating a weak rule) or a standard, such as negligence (illustrating a vague, or multifactored rule), or sometimes even a latent rule.[910] By contrast, according to Dworkin,[911] the law does not entirely consist of rules, since it also includes principles. Dworkin defines a principle as a standard that is to be observed not because it will advance or secure an economic, political or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality.[912]A strict definition of a principle can only be realized by comparing it with the notion of a rule. It is in the distinction between principles and rules that one may find the basic and proper characteristics attached to the principles.

Principles differ from rules in a number of ways. First, rules apply in an "all or nothing" fashion; either they apply or do not. A principle, by contrast, gives a reason for deciding the case in one way, but not a conclusive reason. If a rule applies, and it is a valid rule, the case must be decided in accordance with it. Because principles do not apply in an "all or nothing way", they have a weight, that is to say that conflicting principles can be balanced, which means that each has a particular "weight", some taking precedence over others. Rules do not have this dimension, since when two rules conflict one of them cannot be a valid one.[913] The positivists, like Raz,[914] reject this premise and claim that the principles differ from rules only by being more general. In this situation, rules outweigh principles. The concept of weight of the principles is of intrinsic importance for the research. In that sense, if one adopts the view that each principle has a particular weight, the principles developed by the European Court of Justice consequently boast this character. The question of weight is of crucial importance when one deals with the different principles created by the ECJ.

The concept of principles has been the object of a lively debate between Hart and Dworkin. Notably, Hart, in the postscript to "The Concept of Law", admitted that the principles have certain "uncontroversial features",[915] namely their generality and non-conclusiveness. The first uncontroversial feature is constituted by the broadness or the generality of the principles. This first feature merits a comparison with the notion of general principles. Does the generality of the principles

[910] Hart, *The Concept of Law*, Oxford, 1997, (postscript), at p. 268. *See also* Hart, "Definition and Theory in Jurisprudence", 70 LQR 37-60 (1954). Bix, *Jurisprudence: Theory and Context*, Westview press, 1996.
[911] Dworkin, *Taking Rights Seriously*, Duckworth, 8th edition, 1996, *See also* of the same author, *A Matter of Principle*, Harvard, 1986, *see also* Gaffney, *Ronald Dworkin on Law as Integrity*, 1996, at p. 43.
[912] *Ibid*., at p. 22.
[913] *Ibid*., at pp. 26-27.
[914] Raz, "Legal Principles and the Limits of Law", YLJ 1972, pp. 823 *et seq*.
[915] Hart, *supra n.910,* at p. 260.

automatically turn them into general principles? In other words, are the normative principles all general principles or principles which are general? By drawing a comparison with the European legal order, it may be observed that not all the principles constitute general principles of law. Indeed, in the European legal order, the general principles are all fundamental principles of law but all the fundamental principles are not *per se* general principles. The "*Orkem* principle" (protecting against self-incrimination) constitutes a perfect argumentation for such a statement. It can be said that a normative principle is general, but it cannot be claimed that all normative principles are general principles, particularly in the EU legal order. Thus, the general principles constitute a particular class of the normative principles, in the same way that the moral, doctrinal and normative principles constitute particular classes of the concept of principle. Moreover, it is worth noting that principles may have a different degree of generality. According to Bayles, *"a principle can be supported by another more general one. Indeed, general principles are often used to justify more specific ones"*. [916] In that sense, specific principles may also intervene as backing up a more general one. This view is interesting and relevant if one transplants the theory in the European context, where the ECJ has developed general principles like legal certainty (justifying non-retroactivity and legitimate expectations) or the *audi alteram partem* principle (justifying for instance the principle of right to access to files). [917] In a similar vein, a multiplicity of other principles can be deduced from a general principle, as the exemplification of the said principle shows. In other words, a great number of more specific principles can be matured from a more general principle. For instance, in EC law the principle of the right to be heard as an "umbrella concept", has been exemplified by other more specific principles, such as the principle of right to access to files or the principle to be heard in a reasonable time. The same reasoning may be applied to the principle of legal certainty, which, arguably, "gives birth" to legitimate expectations or non-retoactivity.

The second uncontroversial feature is to appraise the principles as not conclusive. In that regard, Hart (in his postscript) gives a short and limited definition of the term principles and further assumes that the so-called "non-conclusive

[916] Bayles, *Principles of Law: a Normative Assessment*, Law and Philosophy, 1987.

[917] Raz, *Ethics in the Public Domain. Essays in the Morality of Law and Politics*, 1994, at p. 232. *See also* by the same author, *The Authority of Law,* Oxford, 1979. For a clear appreciation of the views of Dworkin, Hart and Raz, *see* Posner, *Law and Legal Theory in the UK and USA*, Oxford, 1996, at pp. 7-19. According to Raz, Whenever a judicial decision does not follow directly from a statute, from another judicial decision or from custom the decision is making rather than applying the law. In deciding a case in which the outcome is not dictated by one of the sources of law, judges necessary are making moral choices and morality is not a source of law in the positivist view. Consequently, in its reformulation of legal positivism, Raz excludes the principles as part of the law, because their sources (the common morality, the teaching of the great philosophers or whatever) are not a source of law. In a similar vein, Hart considered previously, that "when the judge decides an *indeterminate case*, that is a case in which no decision either way is dictated by law, he is stepping outside the law" (Hart, *The Concept of Law*, *supra n.910,* at p. 273).

principles" are essential in the legal system.[918] The non-conclusiveness of the principles reflects, indeed, one of the basic distinctions with the rules. The rules are conclusive since an infringement of a rule dictates purely and simply the judicial decision, whereas the hypothetical encroachment of a principle does not prescribe *per se* the decision, but entails a certain evaluation. According to Dworkin, the principles do not necessitate a decision, but points towards a decision. In other words, the principles are not conclusive, but are "orientative". Are the general principles of Community law non-conclusive principles? Arguably, in the European legal order, the general principles are all non-conclusive.[919] Indeed, the application of general principles of Community law necessitates a balancing of interest realized in the circumstances of the case. Concerning fundamental rights, the judge will assess the extent of the violation in connection with the doctrine of "margin of appreciation".[920] The same holds true in relation to administrative general principles. For example, the proportionality principle involves a balancing test between the means employed and the end to be achieved. The principle of equality includes a proportionality test. Also, the application of legitimate expectations requires the use of a significant balancing test.

Furthermore, the principles have a dimension of "weight" and have to be balanced between each other. In conflict with a principle of higher weight, the "lower principle" is overridden. In the EU, when the Court has to apply a principle to a particular case, the dimension of weight is present. It remains to determine the types of principles, and especially the higher principles, which may override the lower ones. In that sense, the discussion relates to the "collision between the principles". Do higher principles exist in EC law, that may take precedence over lower principles? For instance, can one consider the principle of effectiveness of Community law as a higher principle outweighing the creation or application of a particular lower principle? According to Hart,

> "in any hard cases different principles supporting compelling analogies may present themselves and a judge will often have to choose between them, relying, like a conscientious legislator, on his sense of what is best and not any already established

[918] Hart, *supra n.910,* at pp. 260-263.

[919] For instance, the procedural principles in EC may be comparable, to a large extent, to the fifth and fourteenth amendments. As pointed out by Dworkin, the first, fifth and fourteenth amendments are non-conclusive principles such are the most essential limitations on the power of the state and congress (Dworkin, *Taking Rights Seriously*, *supra n.911,* at pp. 26-27).

[920] More precisely, if an individual invokes the principle of freedom of expression, the principle is infringed if and only if the act under scrutiny is unnecessary in the relevant context. It should be stressed that the human rights developed by the ECJ are subject to limitations. These rights enshrined, for instance, in Articles 8 to 11 of the European Convention of Human Rights contain a paragraph 2 authorizing the public authority to limit those rights in proportion of what is necessary in a democratic society. In that sense, the fundamental rights in EC law are not conclusive since they do not automatically necessitate the juridical decision.

> order of priorities prescribed for him by law . . . Only if for all such cases there was always to be found in the existing law some unique set of higher-order principles assigning relative weights or priorities to such competing lower-order principles, would the moment for judicial law-making be not merely deferred but eliminated".[921]

As stressed previously, the principles are non-conclusive. This terminology, used by Dworkin but also recognized by Hart, signifies that the principles point towards a decision. In other words, the principles are "contributing" reasons. And the recourse to one particular principle does not instantaneously dictate the solution of law. In other words, colliding reasons must be balanced on a case-by-case basis.

One of the last questions at stake, and not the least, is to determine the ECJ's position as to the formulation and application of the general principles of law. Can one argue, in the light of the foregoing, that the ECJ is a Dworkinian Court? In that sense, it is worth stressing that the theory of Dworkin has been of influence concerning the interpretation and perception of the notion of principle. The views of Dworkin, regarding the importance of principles in connection with the rules, are nowadays undeniable. It is suffice to look at the postscript of Hart, where the author explicitly recognizes his mistake in minimizing the significance of the principles. In the European legal order, the general principles of law appear to have a wide and blurred meaning. The "principles" (general or not) are clearly and largely present in European law and the general principles of Community law developed by the jurisprudence of the ECJ have taken such a wide-ranging scope that it is a cumbersome task to agree on their meaning and content. However, it appears that the general principles of Community law contain the two proper characteristics attributed to principles, i.e. generality and non-conclusiveness. In that sense, through the place attributed by the European judge to principles, it may be said that the ECJ is a kind of Dworkinian Court.

At the same time, it seems rather difficult to assess all of the principles developed by the ECJ as strictly following the theory established by Dworkin. Indeed, according to him, hard cases should be resolved by an "argument of principles". The author draws a distinction between policies and principles. As to the former, it includes the types of arguments that follow a goal of an economic, political or social nature. As to the latter, it makes up a standard, which ought to be observed so as to secure justice, fairness or morality. Thus, "arguments of policy" are used to justify a political decision, which protects the collective goals of the community, whereas the "arguments of principles" will substantiate the defence of individual or group rights. If a parallel with the general principles of Community law is established, only a certain class of principles may be categorized as falling under the rather limited definition of Dworkin. This "individual-orientated" characterization of the principles may, for instance, be identified with fundamental rights, procedural principles and administrative principles. Previously, those types of principles have been called the "operative general principles", since they provide

[921] *Hart, supra n.910, at p. 275.*

review to the individuals against the acts of the institutions or the Member States. As stressed above, it seems that the general principles (fundamental rights, procedural principles and administrative principles) do fall *prima facie* under this uncontroversial appellation. It may be said that these general principles, protecting individual rights, constitute the concretization of the principles of justice, fairness or certainty.[922] In the light of the theory of Dworkin, the Court does not make law, since it is under the obligation to apply the argument of principles in hard cases. However, it seems clear from the case-law of the ECJ that arguments of policy are taken into consideration as to the elaboration and application of the general principles of Community law, e.g. in *Grogan*, *Hoechst*, *UPA*.[923] Thus, in the present situation, it seems safe to say that the Dworkinian approach is difficult to apply to general principles of Community law where arguments of policy are rubbing shoulders with arguments of principle.

[922] However, those principles are not the unique set of general principles that one can find in the European legal order. For instance De Witte (in Bernitz and Nergelius, *supra n.75*) makes reference to the "institutional principles". Those "institutional principles" which are both horizontal, as they apply in relation to the institutions of the Community, (the principles of institutional balance, sincere co-operation and democracy) and vertical, as they apply in relation to the institutions or the Member States (principle of loyalty, principle of supremacy, principle of subsidiarity and proportionality in its institutional sense). Those principles are deemed to be general principles and have been recognized expressly as general principles in the *Deutsche Milchkontor* case where the ECJ referred to the "general principles on which the institutional system of the Community is based and which govern the relations between the Community and the Member States" (Joined Cases 205 to 215/82 *Deutsche Milchkontor v. Germany* [1983] ECR 2633, para. 17), maybe with the exception of the principles of supremacy and justiciability which are in the words of De Witte "pseudo-principles". As opposed to the traditional principles (principles of justice, fairness or certainty), the institutional principles do not protect the individual and cannot be used by the individual to challenge the acts of the institutions. Thus, those principles cannot fall under the definition of Dworkin. However, in a recent case from 1998, the Court of First Instance in *UEAPME* seemed to consider an action possible for the individual in the case of the breach of the principle of democracy Case T-135/96 *UEAPME* [1998] ECR II-2335, para. 89).

[923] Moreover, the principle of supremacy, which is assimilated by certain authors as a general principle or the principle of free movement which, has been recognized expressly by the ECJ as a general principle of Community law cannot enter in the Dworkinian's definition. Those kinds of principles can be featured as meta-norms or secondary rules in the sense that they reflect the very nature of the European legal order. Moreover it can be asserted that the principle of supremacy does not correspond to a non-conclusive principle. Indeed, the simple reason that the Community law is superior to national law (even constitutional law) seems to correspond to a decisive reason and not a contributive one. The notion of principle in the EC context is thus relatively complex. Some principles may fall under the Dworkinian's classification other not. As stressed before, the two uncontroversial features (both recognized by Dworkin and Hart) of the principles; that is to say their generality and non-conclusiveness; may be seen as hallmarks of the appellation principle. It remains to determine the principles of European law that may endorse such attributes.

To conclude, one may suggest that, *prima facie*, the ECJ acts as a Dworkinian Court (rights model). This assertion appears realistic if one considers the frequent elaboration and application of (general) principles by the ECJ. Notably, the general principles of Community law are closely linked to the protection of individual rights and, arguably, maximise the protection of subjective rights within the European legal order. In that regard, the maximalist interpretation of the ECHR, e.g. *P* v. *S*, *Carpenter* and *Akrich* and to a certain extent *Orkem*, enters into this logic. Moreover, the two basic features proper to the theory of principles, i.e. generality and non-conclusiveness, apply to the general principles of Community law. However, two arguments point against the full application of the Dworkinian model. First, it seems clear from an analysis of the ECJ jurisprudence that the argument of policy plays a very important role regarding the elaboration and application of the general principles. The consensus model may therefore constitute an alternative to the rights model, since it enables it to take the argument of policy into consideration. Second, the rights model is easily criticised, since it justifies the judge-made law of the Court through the argument of principle. In the words of Koopmans, *"the principles don't fall from heaven"*. Subsequently, there may be a need to further study the rational discourse followed by the Court of Justice in the elaboration of the principles.

3.3. THE LEGITIMACY OF GENERAL PRINCIPLES AS FUNDAMENTAL SUBJECTIVE RIGHTS.

This section contains the concluding remarks as to Part 1 of this study. It focuses both on the internal and external legitimacy of the general principles. As to the former (internal legitimacy), it results from case-law which recognizes that national law and international instruments provide justification for the elaboration of the general principles (3.3.1). As to the latter (external legitimacy), it appears that the general principles have been codified within the Charter of Fundamental Rights. This instrument acknowledges (accepts) the ECJ jurisprudence regarding general principles and makes it visible (3.3.2). Arguably, the acceptance of the jurisprudence results from the "legitimate activism" of the Court (3.3.3).

3.3.1. The Legitimacy of National and International Law.

The two sources of the general principles, i.e. national and international law, inject legitimacy into the process of their elaboration. This legitimacy stems from the very nature of the sources and from the fact that these sources provide justifications (reasons) regarding the formulation of general principles of Community law so as to fill the gaps. According to Koopmans,

> "[t]he importance of a reasoned argument increases as courts tend to rely on principles or on broad guidelines rather than on specific paragraphs of legal provision. Many new problems simply cannot be solved by just applying a provision to be found in the code or in the statute books: judges often resort to principles of law. But principles don't fall from heaven, except perhaps in a very

> metaphorical sense, they have to be found and to be elaborated, and there is only one way to do that by reasoned argument".[924]

Taking the example of *AM&S* concerning the principle of confidentiality, Koopmans continues by stating that, "the Court had to clarify how it has been able to arrive at that finding. It did so by comparing legal principles existing in the legal systems of the Member States, such as the professional secrets (*secret professionnel*) and the common law legal privilege. By stating the rationale it discovered for the existence of such legal principles".[925] Consequently, it is argued that the Court resorted to comparative methodology in order to provide a reasoned argumentation for the creation of a particular principle. The approach taken by the ECJ may differ, i.e. between convergence of the MS law or a common approach.[926]

As seen before, the ECJ may have recourse to administrative, procedural and constitutional law. Also, it may be said that continental, common and to a certain extent, North Western European Law have influenced the elaboration of general principles. The same reasoning may be seen in connection with the accession of the ten new Member States regarding the forthcoming jurisprudence. The recourse to national law legitimizes the elaboration of the general principles by constituting reasoned arguments that are inherently legitimate. As to constitutional law, it seems clear that the use of the language of human rights by the ECJ may be seen as containing a "legitimacy function". According to De Witte,

> "[t]he affirmation of fundamental rights can be a means of bolstering the integration process by convincing citizens and national courts that cherished constitutional values are in safe hands with the Court of Justice. But the same case law may also be a divisive force, if it appears that the ECJ is not taking rights seriously enough or when the affirmation of Community fundamental rights upsets strongly national policy preferences".[927]

Indeed, in the words of Clapham, the rights can be a *"vehicle of disintegration"*.[928] However, it is worth noting that it follows from an analysis of the case law that the

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[924] Koopmans, "Judicial Activism and Procedural Law", ERPL 1993, at p. 78.
[925] *Ibid*., at p. 79.
[926] AG Léger in *Hautala*, *supra n.291,* paras. 68-69, "[e]xamination of the case-law reveals, however, that the convergence of the constitutional traditions of the Member States may suffice in order to establish the existence of one of those principles without the need to obtain confirmation of its existence or content by referring to international rules. Moreover, a general principle of Community law may be recognised without first establishing the existence of either constitutional rules common to the Member States or rules laid down in international instruments in which the Member States have cooperated or to which they have acceded. It may suffice that Member States have a common approach to the right in question demonstrating the same desire to provide protection, even where the level of that protection and the procedure for affording it are provided for differently in the various Member States".
[927] De Witte, "The Past and Future Role of the ECJ in the Protection of Human Rights", in Alston, *The EU and Human Rights,* 1999, at p. 883.
[928] Clapham, "A Human Rights Policy for the European Community", YEL 1990, pp. 309 *et seq*, at p. 311. Clapham makes reference to issues such as abortion, divorce and contraception.

ECJ is extremely cautious when it comes to elaborating general principles with the help of national law. In other words, the Court appears as the reflector of common constitutional or legal values rather than the guide of dynamic and new legal trends. It is argued that the lack of consensus between the laws of the Member States may impede the elaboration of a general principle, e.g. *Orkem*, *Hoechst*, *Hautala*, *Jippes*, *Baustahlgewebe*, and *Booker Aquaculture*. By contrast, the AG sometimes seems to favour a maximalist approach, e.g. AG Tesauro in *P* v. *S*, AG Lenz in *Grant*, AG Tesauro in *Netherlands* v. *Council*, AG Léger in *Hautala*, and AG Kokott in *Berlusconi*. Also**,** it is stressed that recourse to a functional (evaluative) approach of comparative law may explain the impossibility to follow a maximalist approach. Indeed, the evaluative approach takes into consideration the arguments of policy, since the principle must fit the objectives of the Community legal order, e.g. *Internationale Handelsgesellschaft* and *Hoechst* (effectivity of the Community legal order).[929] Importantly, the use of the evaluative approach, as to national law, does not necessarily lead to a minimum standard of protection.

As to international law, it may be said, since Opinion 2/94 and the incorporation of Article 6(2) TEU, that international law and more particularly the ECHR constitutes a special source of inspiration for the ECJ in the elaboration of fundamental rights.[930] To put it differently, one assists to the hybridizing of Community law by the use of regional human rights law. As seen before, the ECHR may be sometimes used as a direct source (*Carpenter*, *Baumbast*) and interpreted extensively (*P* v. *S*, *Carpenter*, *Akrich*). At the end, the ECHR appears, thus, as a much more flexible instrument than the constitutional traditions of the Member States, which may explain the widespread use of the ECHR. This approach contrasts sharply with the *Hoechst* case, where the ECJ refused to interpret Article 8 ECHR, since the EctHR did not rule on the issue of business premises. Arguably, the CFR and the CT are important in the recent jurisprudential trend. Finally, it is worth remarking that the CT authorizes the accession of the Community to the ECHR. Such an accession may also be appraised as fostering the legitimacy of the European legal order. Accordingly, it would solve both the conflicts of jurisdiction (the EctHR would be competent to admit direct complaints against the institutions) and of interpretation. However, in my view, this solution is not necessary, since the principle of equivalence appears fully respected and the CFR will acquire a binding status when the Constitutional Treaty will enter into force.

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[929] In the sense that the law of one Member State cannot be used in order to define the "Community Standard" of fundamental rights protection. According to de Witte, the Hoechst case represents "the clearest affirmation . . . that the common constitutional standard does not comprise the rights protected in each country separately" ("The role of the ECJ in Human Rights", in Alston, 1999, at p. 879).

[930] AG Léger in *Hautala, supra n.291,* para. 68, "[t]he Court of Justice ensures compliance with fundamental rights. It contributes to their recognition and participates in the definition of their content. The general principles of Community law, of which fundamental rights are an integral part, are often derived from international instruments such as the European Human Rights Convention or the 1966 Covenant".

The Charter makes explicit reference to the constitutions of the Member States and the international agreements. In that respect, Article 53 of the CFR states that,

> "[n]othing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental, and by the Member States'constitutions".

The Council of the European Union explained that, "this provision is intended to maintain the level of protection currently afforded within their respective scope by Union law, national law and international law". [931] In other words, the provision ascertains a minimum guarantee standard in the application of the rights enshrined in the Charter.[932] Besides, Article 53 may arguably be used by the ECJ in order to elaborate fundamental rights (as general principles) not enshrined in the Charter.[933]

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[931] Council of the EU, *Charter of Fundamental Rights of the European Union: Explanations Relating to the Complete Text of the Charter*, December 2000, at p. 77.

[932] *Ibid*., **"**[o]wing to its importance, mention is made of the ECHR. The level of protection afforded by the Charter may not, in any instance, be lower than that guaranteed by the ECHR, with the result that the arrangements for limitations may not fall below the level provided for in the ECHR." Such a reference is not a surprise. In fact, the relationship between the constitutions of the Member States (and their constitutional courts) and the fundamental rights jurisprudence of the ECJ constitutes an old and endemic debate. In *Solange II, t*he FCC took account of the evolution of the ECJ case law and recognized that as long as the level of protection was adequate, the FCC would respect the supremacy of Community law. According to the FCC, the national constitutional protection is applicable in order to ensure that the protection afforded by Community law is appropriate (*Solange II* and *banana* case). The FCC will examine the compatibility of European acts or their national implementing measures only if the necessary protection is not generally given. In the light of those cases, an important part of the German doctrine asserted that the development of fundamental rights in the EC (through the debate on supremacy) was grandly due to the reaction of the FCC, which stimulated, in turn, the ECJ jurisprudence. The "open conflict" between the FCC and the ECJ on the supremacy of Community law resulted in the elaboration of an "unwritten bill of rights". In the light of the foregoing, it might be argued that the fundamental rights were construed in order to permit an effective application of the supremacy principle. Thus, it would be extremely odd and dreadful if Article 53 could be interpreted as a potential threat to the said principle. According to Liisberg, *"Article 53 is a kind of general ratification of the Court's current and future case law. The Court pays attention to common agreements and draws inspiration from the constitutional traditions common to the Member States."* (Liisberg, "Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?", CMLRev. 2001, pp. 1171-1199, at p. 1193. The mere reference to the constitutions and not to the common constitutional traditions is explained as being a compromise between Member States who wanted a reference to the national law and the others who desired a reference to the common constitutional traditions). Finally, the author submits that Article 53 CFR is a *"politically useful inkblot meant to serve as an assurance to Member States, and eventually the electorate, that the Charter does not replace national constitutions and that it does not, by itself, threaten higher level of protection. The legal*

3.3.2. The Charter of Fundamental Rights and Legitimacy

The question of visibility is intricately related to the issue of consolidating the legitimacy of the European Union. To put it differently, by making the fundamental rights more evident to the European citizen, the legitimacy of the European Union will be enhanced. This view is clearly aided by the declarations of the European institutions (European Parliament, the Commission and the European Council) as well as the preamble of the Charter. Already in 1999, the European Parliament stressed that, *"in order to increase the citizen's rights, Germany is proposing the long term development of the European Charter of basic rights . . . For us it is a question of consolidating the legitimacy and identity of the EU, the European Parliament which has already provided the groundwork with its 1994 draft should be involved in the drawing up of the Charter of basic rights, as well as the national parliaments and as many social groups as possible".*[934] In June 1999, the Cologne European Council suggested a political declaration rather than a legally binding charter. According to the Council, *"at the present stage of development of the European Union, the fundamental rights applicable at Union level should be consolidated in a Charter and thereby made more evident."* [935] It should be noted that the Commission shares the same view as the Parliament and the Council and

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significance of Article 53 of the Charter is identical to that of Article 53 ECHR. And by its political nature and purpose, it is similar to e.g Article 17(1) EC which provides that Citizenship of the Union does not replace national citizenship."(*Ibid*., Liisberg, CMLRev. 2001, at p. 1198).

[933] In the words of Black, writing on the Ninth Amendment, it could be used as a *"fountain of law*" (quoted in Liisberg). Indeed, as any written text, the Charter constitutes an imperfect document in the sense that it is impossible to codify all the fundamental rights in a single document. The fundamental rights are subject to evolution and reflect the need and the characteristics of a particular society. Consequently, in the future, it is certain that the ECJ would have to have recourse to the general principles in order to fill the potential gaps of the judicial system established by a binding Charter. However, it may be argued that the very existence of a Charter goes stalwartly against the creative role of the ECJ. In other words, the existence of a written document freezes the elaboration of principles. Such a kind of reasoning is, however, partially wrong. On the one hand, it seems clear that the reality of a Charter (particularly if the Charter does not constitute a simple crystallization of the case-law) limits instantly the role of the Court in the elaboration of principles. On the other hand, in the light of a binding charter, it is alleged that the ECJ could refer to Article 53 CFR in order to create the principles not included in it. A parallel can be drawn with Lenaerts's comments on Article 27 of the Declaration of Fundamental Rights. According to him, such an Article could have allowed the ECJ to construe further rights. As stressed previously, Article 53 CFR appears equivalent to Article 27 DFR. Subsequently, it might be asserted that such reasoning is applicable to Article 53 CFR. In conclusion, Article 53 CFR may support the protection of unenumerated rights. Such a stance goes perfectly with the sense of the Charter's words that hails the development of common constitutional values.

[934] EP Minutes, 12 January 1999, in the Eighth Report of the House of Lords, *supra n.750,* at p. 7.

[935] European Council Conclusions 44, Cologne, 3-4 June 1999.

declared in October 2000, namely *"[t]he draft Charter should meet two fundamental objectives: visibility for the citizen and certainty as to the law that the Charter must offer in areas where Union law applies"*.[936] Finally, The Charter itself, in its preamble states that, *"it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter"*. It seems conspicuous from the wording of the preamble that the enhancement of the fundamental rights will certainly reinforce their protection and will subsequently foster the legitimacy of the European legal order.

In the wake of the Laeken declaration of 2001, one might presume that the Charter would be one of the major fields of current interests. Even if the legal status of the Charter does not yet offer expressly a *force juridique contraignante* or *obligatoire,* the Charter raises a multitude of legal questions, particularly in relation to the general principles of law. Between 2000 and 2004, the Charter has been the object of wide discussions, not only as to its elaboration and contents, but also as to the future legal and constitutional implications of the document. The relationship between the Charter and the general principles leads to the major question: what can we benefit from a codification of the general principles? Indeed, it could be argued that the elaboration of a Charter would not improve the protection of individuals, since the general principles already shield them. Hence, the Charter would merely favour the proliferation of fundamental rights, which *in fine*, might chill the constitutional dialogues between the ECJ and the national courts.[937] On the one hand, quoting Schermers at the time of the negotiations, *"the codification is desirable but not necessary"*.[938] Attempting to interpret those words, the author seems to consider that the level of protection in the fundamental rights field was rather well protected through recourse to the "unwritten" general principles. Nevertheless, their codification will possibly ameliorate the situation or, at least, it won't harm it. On the other hand, the situation concerning fundamental rights elaborated through the general principles was assessed to be unsatisfactory due to their "invisible character" (their very nature), rendering them consequently ambiguous for the general public and defective in providing an adequate level of protection.[939]

More generally, the Charter must clearly be perceived as an instrument of integration and legitimacy, since it embodies the characteristics of a Constitution.[940]

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[936] Second Communication of the European Commission of 11 October 2000.

[937] Weiler, "Editorial: Does the European Union Truly Need a Charter of Rights?", ELJ 2000, pp. 95-97, at p. 96.

[938] Eighth Report of the Select Committee of the House of Lords, *supra n.750,* para. 48.

[939] That was notably the position of the International Commission of Jurists and Toth as reported in the Eighth Report of Select Committee on European Union of the House of Lords, paras. 40 and 44, http://www.publications.parliament.uk/pa/ld199900/ldselect.

[940] Two different types of definition (i.e. maximalist and minimalist) can be provided in order to determine the constitutive components of a constitution. Generally, the doctrine supplies a two-fold definition (or minimalist), that consists in focusing on the attribution of competence

Indeed, the listing of enforceable fundamental rights is an unequivocal component of a Constitution. Nevertheless, both the integrative and legitimacy potential could be have been seriously undermined if the CFR had remained a non-binding instrument. Indeed, it should not be forgotten that the mighty question of judicial (constitutional) review is closely inter-linked to the concept of a Constitution. A list of enumerated fundamental rights, which cannot be enforced before the courts, is apparently futile. Thus, a non-enforceable Charter would have entailed the risk of weakening its integrative dynamic and finally endangering its legitimacy.[941] As rightly stated by Duff,

> "a non-binding declaration would fail to resolve one of the existing serious contradictions in the constitutional development of the European Union. The Union would be laying claim to the existence of fundamental rights at Union level, yet in striking breach of the constitutional traditions of Member States that it is pledged to uphold, it would not be installing a concomitant legal remedy. Due process of judicial review and the capacity to seek redress is an integral part of the rights

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between the respective entities of the State (or institution) and on the existence of a bill of fundamental rights for the individuals which ensures their protection. To quote Van Gerven, "*in a constitution basic principles and rules are to be found which, on the one hand, recognise fundamental rights and freedoms of individuals…and, on the other hand, establish institutions and organs through which public authority is exercised, and define competencies belonging to each of them."(* Van Gerven, "Toward a Coherent Constitutional System within the European Union", EPL 1996, pp. 81-101, at p. 82. *See also infra*, Schwarze, ICLQ, at p. 30). Subsequently, in the light of the above definition, it seems convincing to contend that the Charter of Fundamental Rights, which is already partially *de facto* binding, enters perfectly in the first constituent. Moreover, it seems plausible to consider that the "degree of constitutionalism" would be substantially increased when the CFR would acquire a full binding status by being incorporated into the Treaties. A magnificent example of the maximalist definition is afforded by Piris (Piris, "Does the European Union have a Constitution? Does it need one?", ELR 1999, pp. 557-585, at p. 5589). The author considers that a constitution can be divided into 6 elements:

- a constitution organises the government of the entity to which it applies.
- a constitution prescribes the extent and manner of the exercise of sovereign powers.
- a constitution is the absolute rule of law of action: any official act in breach of it is illegal (this presupposes a constitutional or supreme court).
- a constitution frequently lists rights of the individual and guarantees their protection.
- a constitution derives its authority from the governed and is agreed upon by the people
- a constitution is the fundamental law of a Nation or State.

It is important to remark that the third and especially the fourth criteria correspond to the existence of an enforceable list of fundamental rights.

[941] Di Fabio, "A European Charter: Towards a Constitution for the Union", CJEL 2001, pp. 159-172, at p. 161.

> regimes of the Member States. Do we really want the Union to be less than the sum of its parts in respect of citizen's rights?". [942]

Again, the necessity to provide legal remedies so as to enforce the Charter appears as an essential requirement for ensuring the proper functioning of a binding instrument. It is now crystal clear that the CFR, as incorporated in Part II of the CT, will acquire binding force when the CT will enter into force.

For the time being, such a review is contingent to the general principles of Community law. The codification of those binding principles has permitted the elaboration of a non-binding Charter. In light of the foregoing, we might respectfully but stalwartly disagree with Lord Goldsmith's statement that the Charter could not be seen as an *"embryo constitution"*.[943] The Charter enters, in my view, perfectly into the process of constitutionalization and represents its corner stone. The next step, in this process, has been the incorporation of the CFR into Article I-9 and Part II of the Constitutional Treaty (Articles II-61 to II-114). Thus, it might be said that the complex relationship between the general principles and the Charter gave birth to such an integration. Be that as it may, the Charter of Fundamental Rights bears the trappings of a *sui generis* Constitution. Admittedly, the Charter (in part) is already *de facto* binding through the general principles of Community law.

In the end, the codification of the general principles in the CFR brings in return visibility and legitimacy. As stated earlier, the CFR confirms the rights enshrined in the ECHR and, in some instances, goes further than the ECHR. [944] In that respect, the role of the ECJ in the elaboration of fundamental rights protection, through the unwritten general principles, should not be minimized. It appears to me extremely difficult to apprehend the reality of a Charter of Fundamental Rights without the reciprocal existence of the general principles of Community law. These binding norms of Community law constitute the heart of the Charter. In the words of Lenaerts and De Smijter, *"[t]he Charter is to be regarded as an emanation of those common constitutional traditions . . . the Charter is thus part of the acquis communautaire even if it is not part yet of the Treaties on which the Union is founded"*. [945] Interestingly, the CFR has been welcomed by the highest national judicial authorities, e.g Belgium (TC), France (CE) Spain (TC) and United Kingdom (HC).[946] The reference to the CFR in the domestic jurisprudence demonstrates the legitimacy exuding from this non-binding document.

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[942] Duff, "Towards a European Federal Society", in Feus (eds.), 2000, pp. 13-26, at p. 20. *See also* Dutheil de la Rochère, "Droits de l'homme, la Charte des droits fondamentaux et au delà", Jean Monnet Working Paper No 10/01, 2001, www.jeanmonnetprogramm.org, at p. 19.

[943] Goldsmith, CMLRev. 2001, *supra n.815,* at p. 1216.

[944] *Ibid*., at pp. 296-297, "[w]e can state that the Charter mainly confirms the role of the ECHR in the EU legal order. Almost all fundamental rights stated in the ECHR are taken up in the Charter".

[945] *Ibid*., at p. 299.

[946] National courts referring to the CFR (*see* TC Spain and Belgium, Netherlands). More recently, the French Conseil d'Etat referred to the CFR in CE 25 April 2003, *Syndicat national des praticiens hospitaliers anesthésistes réanimateurs* (SNPHAR), the plaintiff

3.3.3 On Legitimate Judicial Activism

Arguably, the Court is extremely careful in elaborating general principles and takes rights seriously. In turn, the operative general principles permit review (and thus legitimacy) of the actions of the Community institutions and of the Member States. This "legitimacy function" is only conceivable if the "elaborative process" of general principles is itself legitimate. As indicated above, the general principles bear the signs of both internal and external legitimacy. In this respect, the jurisprudence relating to fundamental rights that is codified by the Charter of Fundamental Rights may reflect the acceptance (legitimacy) of general principles. It is contended that the process of elaboration constitutes a legitimate kind of judicial activism. Notably, the concept of legitimate activism is closely linked to the consensus model. Indeed, though one may venture to suggest that, *prima facie*, the ECJ acts as a Dworkinian Court (rights model), the consensus model constitutes an alternative to the rights model, since it permits consideration of the policy argument. This assertion appears true since, in the EU context, a strict distinction between arguments of rights and policy is untenable. Before embarking upon legitimate activism, it is important to distinguish and analyze the two components of this concept.

As to legitimacy, the frequent references to fundamental rights, arguably, reinforce the legitimacy of the European legal order subject to the rule of law. Interestingly, Weiler analyses the human rights issue as imbued with a basic tension that also reflects a paradox. Indeed, on the one hand, human rights contain common values that provide great incentives towards integration. On the other hand, the function of human rights is to permit the individuals to challenge and further review the actions of public authorities. Thus, the fundamental values might be confronted with the EU institutional acts and the Community values or objectives.[947] In the early nineties, Coppel and O'Neill formulated a comprehensive criticism of the ECJ approach towards fundamental rights.[948] According to those authors, the ECJ used the language of fundamental rights in order to reassert the principle of supremacy (this is called the *"defensive use of human rights"*).[949] Furthermore, they argued that the ECJ referred to the discourse of rights so as to extend the scope of application of Community law (which is called the *"offensive use of human rights"*).[950] They

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argued a breach of the right to a good administration (Article 41 CFR) and in CE 19 March 2003, *Association des élus de montagne*. In the UK, the High Court referred to Article 8 CFR (right of protection of personal data) in *R* v. *City of Wakefield Metropolitan Council and the Home Secretary, ex parte Robertson* [2001] EWHC (admin) 915, and to Article 24 CFR (rights of the child) in *R* v. *Secreatry of the State for the Home Department, ex parte Howard League for Penal Reform* [2002] EWHC (admin) 2497.

[947] Weiler, "Methods of Protection: Towards a Second and Third Generation of Protection", in Cassese, Clapham and Weiler (eds.), *Human Rights and the European Community: Methods of Protection,* volume II, EUI, Baden-Baden, 1991, pp. 555-642, at pp. 569-570.

[948] Coppel and O'Neill, "The European Court of Justice: Taking Human Rights Seriously?", CMLRev. 1992, pp. 669 *et seq.*

[949] *Ibid*., at pp. 670-672.

[950] *Ibid*., at pp. 673-681.

concluded that *"in adopting and adapting the slogan of protection of human rights the Court has seized the moral high ground. However, the high rhetoric of human rights protection can be seen as no more than a vehicle for the Court to extend the scope and impact of European law.* [951] This view was, three years later, criticized with virulence by Weiler and Lockhart.[952] As seen before, the Court, on a case-by-case basis, had recourse to constitutional traditions and international instruments as sources of Community law in order to fill the gaps in the legal system. These two sources provide reasons (justifications) as to the elaboration of the general principles of Community law.

As to the activism, the proactive role of the ECJ has been the object of criticisms. One of the strongest claims in this sense is the thesis of Rasmussen according to which the Court has *"trespassed into the realm of politics"*. In his words,

> "[t]he fact remains that the Court invented a Community Bill of Rights with a textual basis virtually non-existent in the Treaties. Neither the preamble no the principles (contained in the general provisions of the Treaty) yield even a modest textual support for the Court's decision. Without such support, the EC-judges lack the trappings of authority, which prima facie should be required for any court to create anything like the sweeping constitutional protection of Community citizens' fundamental rights. The Court's interpretative creativity was amazing indeed".[953]

As noted earlier, the necessity to fill the gaps of Community law (lack of a bill of rights reflecting the failure of the legislature) through recourse to principle constitutes the rational of the Court's intervention and may be supported by Article 220 EC. Consequently, it is argued that the ECJ did not lack the authority to elaborate the fundamental rights protection and that the mechanism of elaboration is closer to the reasoned argument and the consensus approach than to wild judicial activism and, thus, may be considered as legitimate activism.

As to the concept of legitimate activism, it is asserted that the general principles are, undeniably, the result of judge-made law. In other words, the Court is active, and makes use of discretion regarding the elaboration of general principles. However, the judge-made law appears legitimate by a multitude of elements, e.g. failure of the legislature, gap filling, and reasoned argument. Bengoetxea has emphasized, in this respect, that the Court should use its discretion to safeguard fundamental and citizen rights.[954] Interestingly, the development of individual rights through citizenship is required by the Treaty. Thus, one may say that the Treaty is integrationist and also provides justifications for the development of general

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[951] *Ibid*., at p. 692.
[952] Weiler and Lockhart, "Taking Rights Seriously: The European Court and its Fundamental Rights Jurisprudence", CMLRev. 1995, at p. 52 and at p. 579.
[953] Rasmussen, *supra n.164,* at p. 400.
[954] Bengoetxea, "The Scope for Discretion, Coherence and Citizenship", in *Judicial Discretion*, Wiklund (eds.), 2003, pp. 48-74, at p. 55.

principles.[955] The Court may be perceived as fostering integration through providing individual rights. As seen before, the Court takes individual rights seriously by providing an elevated standard of protection. Moreover, the principles have been codified in the CFR, which will become binding with the entry into force of the Constitutional Treaty. Therefore, it may be said that the general principles of law strengthen (constitutional) integration.[956]

To conclude, I return to my starting point. The Court of Justice has two faces. On the one hand, it protects individual rights. On the other hand, it ensures the effectiveness of the Community legal system. Arguably, the Court reconciles both types of arguments in elaborating general principles,[957] which seems to be confirmed by the concept of legitimate activism, since it reflects the ambivalence between rights and policy.

[955] *Ibid*., at p. 49. The problem is that individual rights constitute here policy arguments. This is not the aim here to discuss this interesting but thorny issue.

[956] Law and Integration (Fernandez Esteban). Principle and Integration/ integrity. Integrity of law (integration), general principles as integrity principles. *See* Moral (at p. 302) and Dworkin (Law as integrity in Law's Empire). Political and economic integration may be perceived as legitimizing the active role of the ECJ (Bengoetxea, MacCormick and Moral, "Integration and Integrity in the Legal Reasoning of the European Court of Justice", in De Búrca and Weiler, *The European Court of Justice,* Oxford, 2001, at pp. 43-85.)

[957] Moral, "A Modest Notion of Coherence in Legal Reasoning. A Model for the European Court of Justice", Ratio Juris 2003, pp. 296-323. According to the author, "[t]he Court does not approach rights and policies as distinct and mutually opposed spheres, but rather as interlocking spheres, for both can be connected in order to elaborate coherent supportive structures".

PART 2 DEVELOPMENT OF THE GENERAL PRINCIPLES OF COMMUNITY LAW

Part 2 is divided into three Chapters. The first Chapter deals with the administrative principles and the fundamental rights. The second Chapter focuses on the procedural principles. The third Chapter concerns, more specifically, the development of the general principles in the context of the acts of the Member States.

CHAPTER 4. ADMINISTRATIVE PRINCIPLES AND FUNDAMENTAL RIGHTS

This Chapter is divided into three sections. The first section deals with the principle of proportionality. The second section analyses the principle of equality. The third section focuses on the principle of legal certainty.

4.1. Proportionality in European Community Law

Proportionality is the keystone principle of all the general principles. The aim of this section is to determine the substantive scope of the proportionality principle. At first glance, it may appear to be an awkward task defining the exact boundaries of such a principle, since the hallmark of the principle is precisely its thoroughness and flexibility.[1] Admittedly, this is without doubt the area where the superlatives have been used the most extensively. In this sense, it has been said that the principle is the most complex,[2] the vaguest,[3] the most unsystematic,[4] the most often relied on principle in litigation,[5] the most effective tool of review[6] and, as seen above, the most flexible. Notably, the dialectic of the Court is always the same. Even if the

[1] *See e.g.*, Jacobs, "Recent developments on the Principle of Proportionality in European Community Law", in Ellis, *The Principle of Proportionality in the Laws of Europe,* 1999, Hart, pp.1-21, Jans, "Proportionality Revisited", LIEI 2000, pp.239-265, Snell, "True Proportionality and Free movement of Goods and Services", EBLR 2000, pp.50-75, Van Gerven, "The Effect of Proportionality on the Actions of Member States of the European Community: National Viewpoints from Continental Law", in Ellis, 1999, Hart, pp.37-63, and Tridimas, "Proportionality in Community Law: Searching for the Appropriate Standard of Scrutiny", in Ellis, 1999, Hart, pp.65-84.

[2] Emiliou, *The Principle of Proportionality in European Law*, Kluwer, 1996.

[3] Van Gerven, s*upra n.1,* at p.60.

[4] Kapteyn and Verloren van Themaat, *Introduction to the Law of the European Communities,,* edited and revised by Gormley, Kluwer, 1998, at p.656, "[t]he Court is…not always systematic in its approach. In most of the judgments in which Article 36 EC or the rule of reason is applied, the Court applies the necessity and/or proportionality test implicitly or explicitly, but in view of the fact that much of the case-law consists of rulings on Article 177 EC references then concrete evaluation is frequently in the hands of the national courts…"

[5] Tridimas, s*upra n.1,* at p.66.

[6] *Ibid.*, at p.69.

general principle of proportionality may be traced back to certain national legal systems, the ECJ always points out the Community nature of the principle.[7] The national principle making its way in European law is losing its national nature and becomes a pure Community principle, with its own rules of application chosen by the European judge in order to fit in the European context.

Firstly, this part defines the various areas where the principle is proactive. As seen previously, the general principles can act like "institutional" and/or "quasi-federal"(Member States measures) principles. Obviously, this holds true also for proportionality (4.1.1). Secondly, it is stressed that proportionality is often related to other principles, i.e. fundamental rights, non-discrimination and subsidiarity. This relationship appears to reflect the vagueness and complexity of the principle (4.1.2). Thirdly, it focuses on the review function and considers in detail the different elements of the proportionality test, i.e. suitability, necessity and proportionality *stricto sensu*, used by the ECJ when scrutinizing the institutional and national measures (4.1.3). It is pointed out that the ECJ does not systematically make use of the three-pronged test. In addition, this Chapter assesses the difficult role of the national courts in the application of the principle of proportionality. It is demonstrated that certain areas are much more responsive than others when it comes to judicial review. It thus contemplates the mighty problems of scaled review and double standards.

[7] The concept of proportionality can be said to be present either implicitly or explicitly in the laws of the Member States (Ziller, "Le principe de proportionnalité", AJDA 1996, pp.185-188, at pp.185-186). The principle of proportionality in the European countries is mainly an unwritten principle developed by the jurisprudence and the doctrine. For instance, in Belgium and France, the principle is only referred to by the doctrine. The principle of proportionality in Belgium can be deemed to be contained in the notion of "reasonable appreciation", whereas in Greece, the principle is inserted in the general concept of good administration. Furthermore, in certain countries (Germany, Portugal and Sweden), the principle appears as implicitly stated by the constitution. For instance, the Swedish constitution embodies the principle of proportionality implicitly. Indeed, The Swedish basic law reflects the text of the ECHR by allowing certain derogation to the constitutional rights. However, these restrictions must pursue aims, which are legitimate in a democratic society and must not go beyond what is necessary to the legitimate aim (Regeringsformen, 2 Kap, 12 §, "begränsning som avses i första stycket får göras endas för att tillgodose ändamål som godtagbart it ett demokratisht samhälle. Begränsningen får aldrig gå utöver vad som är nödvändigt med hänsyn till det ändamål som har föranlett den och ej heller sträcka sig så långt att den utgör ett hot mot den fria åsiktsbildingen såsom en av folkstyrelsen grundvavlar. Etc". By contrast, in other countries, the principle of proportionality is stated explicitly either in the jurisprudence or in the legislation. Regarding the former, Austrian courts use the expression *"Verhältnissmässigkeit"* in their judgement. In Netherlands, the principle of proportionality is mentioned explicitly in the administrative legislation (administrative law section 3.2.). *See*, Van Gerven, "The Effect of Proportionality on the Actions of Member States of the European Community: National Viewpoints from Continental Law", in Ellis, *"The Principle of Proportionality in the Laws of Europe"*, 1999, Hart, pp.37-63.

4.1.1. From Institutional Review to National Measure Review

According to Emiliou, "proportionality embodies a basic concept of fairness which has strengthened the protection of individual rights at both national and the supranational level".[8] However, "it is difficult to describe in abstract terms the precise meaning and scope of the principle in question".[9] In order to determine the scope of this principle, this section considers the scope of review against the acts of the institutions and of the Member States. When the principle is used against the institutions, it is principally in the areas of CAP, competition and staff matters.

a) Institutional review

Generally, the principle of proportionality evolved as a general overriding principle seeking to restrict those Community legislative measures that impose burdens.[10] In other words, proportionality prohibits that a given action is disproportionate to its objectives. This was already clear in the jurisprudence of the Court in the early years of the ECSC. To quote the *Fédéchar case*, "in accordance with a generally accepted rule of law, such an indirect reaction by the High Authority to illegal action on the part of the undertakings must be in proportion to the scale of that action". [11]

The principle of proportionality can be traced back to fundamental rights. In *Internationale Handelgesellschaft*,[12] AG Dutheillet de Lamothe stressed that a "*reasonable relationship"* must exist between the measures taken by the institutions and the aim pursued by the Community.[13] This view was later confirmed by the ECJ jurisprudence.[14] Interestingly, AG Dutheillet de Lamothe in *Internationale Handelsgesellschaft* underlined the presence of proportionality in the core Treaty provisions.[15] The AG referred to the inclusion of the proportionality principle in seeking its legal sources and stated that *"the source of this principle is an express and very clear provision of the Treaty."* Indeed, the principle can be found in Article 40(3) [new Article 34(3)], but also Article 115 [new Article 134] related to the CCP (Common Commercial Policy). In addition, it has been incorporated in Article 3B (new Article 5 EC) in the Treaty of Maastricht[16] and is expressly joined in the Protocol on subsidiarity from the Treaty of Amsterdam 1997. The Treaty of Amsterdam considers, in the same vein, that the institutions of the EC shall respect

[8] Emiliou*, supra n.2,* at p.1.
[9] *Ibid.,* at p.2.
[10] Schwarze, *European Administrative Law,* Sweet and Maxwell, 1992, at p.679 and at p.714.
[11] Case 8/55 *Fédération Charbonnière de Belgique* v. *High Authority* [1956] ECR 245.
[12] Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1123.
[13] AG Dutheillet de Lamothe in Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1123, at pp. 1146-47
[14] Case 44/79 *Hauer* [1979] ECR 3237 at p.3747. In relation to Member States actions, *e.g.* Wachauf (implementing measure) and ERT (national measure derogating from a EC freedom).
[15] *Internationale Handelsgesellschaft*, *supra n.12*, at p.1147.
[16] Article 5 states, "that any action by the community shall not go beyond what is necessary to achieve the objectives of this Treaty".

the principle of subsidiarity and also ensure compliance with the principle of proportionality as defined in the last paragraph of Article 5 EC. Thus, in light of the above comments, it might be concluded that the principle is constitutional in its origin.

The principle of proportionality has been extensively relied on against Community legislation particularly in the CAP field. A dual test may be endeavoured. Firstly, it may be checked weather the means employed by the institutions correspond to the importance of its aim, and secondly, whether those measures are necessary for the achievement of the aim.[17] One commentator rightly pointed out that:

> "if the principle of proportionality experiences and has experienced its best possibilities in the agricultural field of Community law; this is because in such an area Community legislation necessarily aims at regulating in depth the activity of production and trade and is, more than elsewhere inclined to invade the sphere of actions of individuals. The Community agricultural law constitutes an "ideal zone" for the application of the principle of proportionality".[18]

This "institutional review" was, particularly, directed towards economic regulations[19] and regulations imposing penalties (security deposit).[20] In the *Buitoni case* ("release of security"), the Court using the principle of proportionality invalidated the penalty laid down in Article 3 of Regulation No 499/76. The penalty was held to be excessively severe in relation to the objectives of administrative efficiency in the context of import and export licenses. [21] It is worth noting that though the violation of the principle can be alleged as such,[22] proportionality generally makes its way through an alleged infringement of the equal treatment principle[23] or a human rights complaint.[24] In other words, proportionality is tested indirectly by the ECJ. Still, it may be argued that the principle of proportionality is

[17] Case 66/82 *Fromançais* [1983] ECR 395 at p. 404.
[18] Neri, "Le principe de proportionnalité dans la jurisprudence de la Cour relative relative au droit communautaire agricole, RTDE 1981, pp. 652 *et seq*., at p.678, quoted by Emiliou at p.223.
[19] Case 114, 116, 119-120/76 *Bela-Mühle*[1977] ECR 1211, Case C-331/88 *R v.Minister for Agriculture, Fisheries and Food,.ex parte Fedesa* [1990] ECR I-2515, Case C-133, C-300 and C-362/93 *Crispoltoni* [1994] ECR I-4863.
[20] Case 122/78 *Buitoni* [1979] ECR 677, Case 181/84 *Man Sugar* [1985] ECR 2889.
[21] *Ibid*., at p.684.
[22] One can invoke that the penalty is disproportionate. The same holds true in relation to penalties in the Competition field.
[23] *Crispoltoni, supra n.19*, para. 52, *see also* Case C-280/93 *Germany v Council* [1994] ECR I-5039.
[24] *Internationale Handelsgesellschaft* and *Hauer*, *supra n. 12*. In relation to implementing measure, *see e.g.* Case 10/88 *Wachauf* [1989] ECR 2609, Case C-63/93 *Duff* [1996] ECR I-598.

of limited significance in the CAP area.[25] Indeed, it appears that the ECJ gives wide discretionary powers to the Community institutions in order to pursue economic policies.[26] Consequently, Community legislation will be quashed only if it is manifestly disproportionate. Similarly, in the field of Community anti-dumping policy, the ECJ demonstrates judicial self-restraint in the application of proportionality when it comes to reviewing EU legislation.[27] It confirms the view that the *mise-en-oeuvre* of an economic policy permits discretionary powers to be vested in the hands of the EU institutions. The ECJ is not ready to review drastically those types of policy choices. More recently, this view was confirmed, in the area of social policy, by the ECJ in the *Working Time Directive* case:

> "As to judicial review…the Council must be allowed a wide discretion in an area which, as here, involves the legislature in making social policy choices and requires it to carry out complex assessments. Judicial review of the exercise of that discretion must therefore be limited to examining whether it has been vitiated by manifest error or misuse of powers, or whether the institution concerned has manifestly exceeded the limits of its discretion". [28]

In addition, the proportionality review extends to the decisions of the institutions. In that sense, the decisions of the Commission to impose a fine in competition law[29] or to order the recovery of unlawful aid may be submitted to proportionality review. In the former, the Court may sometimes be inclined to consider the fine as disproportionate. In the latter, the "proportionality plea" is generally dismissed. In *CETM*,[30] the applicant claimed that the recovery of unlawful aid must comply with the principle of proportionality.[31] The CFI ruled that, *"[t]he recovery of unlawful aid, for the purpose of restoring the previously existing situation, cannot in principle be regarded as disproportionate to the objectives of the Treaty in regard to State aid… Even if such a measure is implemented long after the aid in question was granted, it cannot constitute a penalty not provided for by Community law".* [32]

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[25] Barents, "Recent development in Community Case Law in the Field of Agriculture", CMLRev.1997, pp. 811-843.
[26] *Ibid.,* at p.843.
[27] Egger, "The Principle of proportionality in Community Anti-Dumping law", ELR 1993, pp.367-387. *See* Case C-69/89 *Nakajima* v. *Council* [1991] ECR I-2069. According to the author, the applicant alleged the infringement of the principle of proportionality. The Court implicitly rejected the application of the principle of proportionality following its constant case law (express provision in the Regulation 3651/88, Article 2(3)(b)).
[28] Case C-84/94 *United Kingdom* v. *Council* [1996] ECR I-5755, para. 58.
[29] *See also* in anti-dumping cases.
[30] Case T-55/99 *Confederacion Española de Transporte de Mercancias v Commission* [2000] ECR II-3207.
[31] *Ibid.*, para. 155.
[32] *Ibid.,* para.164, *e.g.* Case C-142/87 *Belgium* v. *Commission*, para. 66, Joined Cases C-278/92 to C-280/92 *Spain* v. *Commission,* para. 75, and Case C-169/95 *Spain* v. *Commission,* para. 47.

b) National Measure Review

The principle of proportionality construed by the ECJ also permits the legality of national measures falling within the scope of Community law to be tested.[33] This use of the principle is much more rigorous than its application against EC legislation. According to Tridimas, *"the principle is applied as a market integration mechanism and the intensity of review is much stronger"*.[34] In relation to the "economic freedoms", it protects the citizen against States' actions that impose obligations, restrictions and penalties causing a heavy obstacle to one of the economic freedoms.[35] For instance, the ECJ stated in the *Casati* case[36] that the administrative measures or penalties must not go beyond what is strictly necessary. Consequently, the measures must not be conceived in such a way as to restrict the freedom required by the Treaty and they must not be accompanied by a penalty that is so disproportionate to the gravity of the infringement that it becomes an obstacle to the exercise of the free movement of capital. The ECJ ruled that the imposition of a disproportionate penalty in relation to the failure for non-nationals to notify their presence could be contrary to the freedom of movement.[37] Similarly, in the *Skanavi* case, the ECJ ruled that the imposition of a penalty (which *in casu* is no less than one year of imprisonment) in connection with the obligation to possess a German driving licence was proportionate and not able to restrict the freedom of movement.[38]

In the early 1980s, the principle of proportionality has largely been used against the Member States attempting to derogate from one of the economic freedoms. The principle thus constituted an instrument of economic integration. In the first place, the principle has been extensively used in the field of free movement of goods (though the same development can be remarked in relation to free movement of services[39] and persons) [40] in order to assess the reasonableness of the national derogation based on Article 36 [new Article 30], such as the derogation on grounds

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[33] Craig and de Búrca, EU Law, Oxford, at p. 349.
[34] Tridimas, *supra n.1*, at p.66.
[35] Case 16/78 *Choquet* [1978] ECR 2293 at p.2302, Case 796/79 *Testa* [1980] ECR 1979 at p. 1997, Case 203/80 *Casati* [1981] ECR 2595 at p. 2618, Case 261/81 *Rau* [1982] ECR 3961 at p. 3972.
[36] *Ibid.*, *Casati*, para. 27.
[37] *See e.g.* Case 48/75 *Roye*r [1976] ECR 497.
[38] Case C-193/94 *Skanavi and Chryssankthakopoulos* [1996] ECR I-929.
[39] Case 33/74 *Van Binsbergen* [1974] ECR 1299, Case 39/75 *Coenen* [1975] ECR 1547, Case C-55/94 *Gebhard* [1995] ECR I-4165, "the exercise of fundamental freedoms guaranteed by the Treaty "must be suitable for securing the attainment of the objectives which they pursue and must not go beyond what is necessary in order to attain it", Case C-60/00 *Mary Carpenter* [2002] ECR I-6279, Case C-385/99 *Müller-Fauré* [2003] ECR I-4509, para. 68, Case C-243/01 *Gambelli* [2003] n.y.r., para. 65 (for a link between free movement of services and establishment).
[40] Case 48/75 *Royer* [1976] ECR 497, Case 118/*75 Watson and Belmann* [1976] ECR 1185, Case 203/80 *Casati* [1981] ECR 2618, Case 379/87 *Groener* [1989] ECR 3967, Case C-285/01 Burbaud [2003] ECR I-8219, para. 104.

of public policy/security (*Cullet* v. *Leclerc*,[41] *Campus Oil*,[42] *Commission* v. *Greece*,[43] *Richardt*[44]) or public health (*De Peijper*, [45] *"UHT* case*"*, [46] *"poultry* case*"*,[47] *"beer purity* case*"*,[48] *Monsees,* [49] *"Swedish ban on advertising"*,[50] *"internet sales of medicinal products"*[51]). As put by one author, the Court stressed the significance of the principle of proportionality as a means of restricting the scope of invocation of public security under Article 30 EC [ex Article 36].[52] Such a comment is applicable to all the derogations.

Furthermore, this principle can be invoked in order to assess the proportionality of the mandatory requirements or rules which justify a derogation.[53] Here, the Court will also apply the principle of proportionality with rigour. [54] The list of mandatory requirements that may be alleged in support of indistinctly applicable rules is not closed.[55]Accordingly, it covers the listed derogations such as public health exception (*Eyssen "nisin"*), [56] but also extends to consumer protection (*Walter Rau "margarine packages"*, [57] *Oosthoeck "free gift"*),[58] social protection *("Sunday trading* cases*"*, *Cinéthèque*,[59] *Torfaen*[60]) and protection of the environment *("deposit-return system"*).[61] Then, at the end of the 1980s, the principle spilled over into the context of fundamental rights. The *Wachauf* case that established an

[41] Case 231/83 *Leclerc* [1985] ECR 305.
[42] Case 72/83 *Campus Oil* [1984] ECR 2727.
[43] Case C-347/88 *Commission* v. *Greece* [1990] ECR I-4747
[44] Case C-367/89 *Richardt* [1992] 1 CMLR. 61.
[45] Case 104/75 *De Peijper* [1976] ECR 613.
[46] Case 124/81 *Commission* v. *UK* [1983] ECR 203.
[47] Case 40/82 *Commission* v.*UK* [1982] ECR 2793.
[48] Case 178/84 Commission v. Germany [1987] ECR 1227.
[49] Case C-350/97 *Wilfried Monsees* [1999] ECR I-2921.
[50] Case C-405/98 *Gourmet International* [2001] ECR I-1795, *see*, Biondi, "Advertising Alcohol and the Free Movement Principle: the Gourmet Decision", ELR 2001. *See also,* Rodríguez Iglesias, "Drinks in Luxembourg – Alocoholic Beverages and the Case-Law of the European Court of Justice", in O'Keefe and Bavasso (eds.), *"Judicial Review in European Union Law",* 2000, pp.523-539.
[51] Case C-322/01 *Deutscher Apothekerverbrand* [2003] n.y.r., para. 104.
[52] Weatherill, "The Free Movement of Good: A Survey of the Decisions of the Court of Justice in 1991: Public Security", ELR 1992, at pp.423-424.
[53] Case 120/78 "Cassis de Dijon", *Rewe* [1979] ECR 649.
[54] Weatherill and Beaumont, *EC Law,* 1993, at p.446.
[55] *Ibid.*, at p.453.
[56] Case 97/83 *Eyssen* [1984] ECR 2367
[57] Case 261/81 *Rau* [1982] ECR 3961.
[58] Case 286/81 *Oosthoek* [1982] ECR 4575. *See also*, Case 382/87 *Buet* [1989] ECR 1235. *See also*, Gormley , "Recent Case Law on the Free Movement: Some Hot Potatoes", CMLRev. 1990, pp.825 *et seq*., at pp.837-839.
[59] Case 60,61/84 *Cinéthèque* [1985] ECR 2605.
[60] Case 145/88 *Torfaen Borough Council* [1989] ECR 765. *See also,* Oliver, "Sunday Trading and Article 30 of the Treaty of Rome", ILJ 1991, pp.298 *et seq*.
[61] Case 302/86 *Commission* v. *Denmark* [1988] ECR 4607.

obligation for the Member States to respect fundamental rights in implementing Community law paved the way for human rights actions concerning national measures derogating from Community law.[62] The jurisprudence of the 1990s, such as *ERT*[63] and *Familiapress*,[64] and the most recent cases clearly confirm that fundamental rights must be observed whenever a national measure restricts one of the economic freedoms.[65] In light of the ECJ case-law, the Member State may invoke reasons of public interest to justify a national measure which is likely to obstruct the exercise of the freedom only if that measure is compatible with the fundamental rights whose observance the Court ensures.[66] Notably, in the recent *Schmidberger*[67] and *Omega*[68] cases, proportionality has been used to assess fundamental rights derogations from the free movement of goods and services.

4.1.2.Proportionality and its Relationship with other Principles.

It is important to stress that the principle of proportionality is often related to other principles. In this sense, proportionality appears in "human rights actions" and in the non-discrimination context. Moreover, it follows from the wording of Article 5 [ex Article 3B] EC, that the principle is often attached to the principle of subsidiarity.

a) Proportionality and Fundamental Rights

As seen above, the principle of proportionality is intertwined with fundamental rights. AG Warner, in *R v Henn and Derby*, [69] pinpoints the close link between the principle of proportionality and the ECHR. He considers that, "the solution of the problem lies in applying the concept of reasonableness, referred to the Court in *De Peijper's* case, or which comes, I think to the same thing, that of proportionality referred to by the European Court of Human Rights in the *Handyside case* and by this Court in *Commission v Germany* (12 July 1979, § 15 of that decision, case 153/78".[70] Moreover, it appears that the principle of proportionality has a dual function. As put by AG Fennelly,

> "[t]his test can be employed both to determine whether the Advertising Directive complies with the general principle of proportionality under Community law…and to assess whether it permissibly limits the exercise of fundamental rights such as

[62] Case 5/88 *Wachauf* [1989] ECR 2609.
[63] Case C-260/89 *ERT* [1991] ECR I-2925.
[64] Case C-368/95 *Familiapress* [1997] ECR I-3689.
[65] Case 60/00 *Carpenter* [2002] ECR I-6279, *Schmidberger* [2002] *infra*, *Omega [*2004], *infra* .
[66] *See, ERT*, para. 43, *Familiapress*, para. 24, *Carpenter*, para. 40.
[67] Case C-112/00 *Eugen Schmidberger* [2003] ECR 5659.
[68] Case C-36/02 *Omega* [2004] n.y.r.
[69] Case 34/79 *R* v. *Henn and Derby* [1979] ECR 3795.
[70] *Ibid.*, AG Warner in *Henn and Derby*.

> freedom of expression. However, this test will not necessarily lead to identical results in the two contexts because of the different factors placed in the balance".[71]

In the last sense, the principle of proportionality is used by the ECJ in its creative jurisprudence as "*a substitute for fundamental rights."* [72] Indeed, in the *Stauder* case (1969), according to Schwarze, "the principle was resorted to as interpretation guidelines, more exactly in the sense of an interpretation conforming to the constitution or to fundamental rights used in German law".[73] The reason for this is that the test of proportionality is necessary in order to assess the extent of the permissible limitation in the exercise of fundamental rights. It is worth noticing that most of the fundamental rights enshrined in the ECHR, e.g. Articles 8 to 11, Articles 17 and 18 and Article 2 of Protocol 4, are subject to limitations. From the foregoing, it follows that the State is under an obligation to restrict the rights in question only to a degree, which is "necessary in a democratic society". In that regard, the ECJ constantly stated that human rights are not absolute and must be viewed in the light of their social function. For example, the ECJ has observed that:

> "Both the right to property and the freedom to pursue a trade or business form part of the general principles of Community law. However, those principles are not absolute, but must be viewed in relation to their social function. Consequently, the exercise of the right to property and the freedom to pursue a trade or profession may be restricted, particularly in the context of a common organization of a market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed (Case 265/87 Schraeder v Hauptzollamt Gronau [1989] ECR 2237, paragraph 15, Case 5/88 Wachauf [1989] ECR 2609, paragraph 18, and Kuehn, cited above, paragraph 16)".[74]

In the first place, fundamental rights can be invoked to challenge EC legislation. In this instance, using a direct action, it could be argued that a Directive or a Regulation infringes fundamental rights protected by the ECJ.[75] In the second place, as already stated, the "human right argument" can be used to contest the legality of a Member State action through a preliminary ruling procedure. Here, we have a close connection between the free movement provisions and the fundamental rights. Indeed, according to the standard case-law, a Member State that attempts to derogate from one of the economic freedoms will have to respect fundamental rights. A good illustration is provided by the *Carpenter* case.[76] A woman from the Philippines, who arrived in the UK in September 1994, married an EU national (from the UK) in

[71] AG Fennelly, in Case C-376/98 *Germany* v. *European Parliament and Council* (Tobacco Advertising Directive) [2000] ECR I-8419, para. 148.
[72] Schwarze, *supra n.10,* at p.720.
[73] *See also Internationale Handelsgesellschaft* case (1970) and *Hauer* case (1979).
[74] Case 280/93 *Germany* v. *Council* [1994] ECR 4973.
[75] Barents, *supra n.25*.
[76] *Carpenter* [2002], *supra n.65*.

1996. Mrs Carpenter was leading a true family life, in particular by looking after her husband's children from a former marriage. She received a deportation order according to which she had infringed the immigration laws of the United Kingdom by not leaving the country prior to the expiry of her permission to remain as a visitor. Interestingly, the matter falls within the scope of the provision on the freedom of services. Indeed, according to the Court, Mr Carpenter exercised the right to provide services guaranteed by Article 49 EC by carrying on a significant part of his business within another Member State. The UK government argued that the deportation decision constituted a measure of public interest. The Court noted that the effect of the decision, i.e. the separation of the couple, would be detrimental to their family and thus to the effective exercise of the freedom to provide services.[77] In this sense, the ECJ stated that:

> "A Member State may invoke reasons of public interest to justify a national measure which is likely to obstruct the exercise of the freedom to provide services only if that measure is compatible with the fundamental rights whose observance the Court ensures (see, to that effect, Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 43, and Case C-368/95 *Familiapress* [1997] ECR I-3689, paragraph 24)".[78]

The Court considered that the decision to deport Mrs Carpenter clearly infringes the right to respect the family life as enshrined in Article 8 ECHR.[79] Then, the Court stressed the importance of striking a balance between the right to family and the interests of public order.[80] In this respect, it observed that the conduct of Mrs Carpenter since her arrival did not appear to constitute a threat to the UK public

[77] *Ibid.,* para. 39, "[i]t is clear that the separation of Mr and Mrs Carpenter would be detrimental to their family life and, therefore, to the conditions under which Mr Carpenter exercises a fundamental freedom. That freedom could not be fully effective if Mr Carpenter were to be deterred from exercising it by obstacles raised in his country of origin to the entry and residence of his spouse (see, to that effect, *Singh*, cited above, paragraph 23)".

[78] *Ibid.*, para. 40.

[79] *Ibid.*, paras. 41-42, "[t]he decision to deport Mrs Carpenter constitutes an interference with the exercise by Mr Carpenter of his right to respect for his family life within the meaning of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (hereinafter the Convention), which is among the fundamental rights which, according to the Court's settled case-law, restated by the Preamble to the Single European Act and by Article 6(2) EU, are protected in Community law…Even though no right of an alien to enter or to reside in a particular country is as such guaranteed by the Convention, the removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life as guaranteed by Article 8(1) of the Convention. Such an interference will infringe the Convention if it does not meet the requirements of paragraph 2 of that article, that is unless it is in accordance with the law, motivated by one or more of the legitimate aims under that paragraph and necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued (see, in particular, *Boultif* v *Switzerland*, no. 54273/00, §§ 39, 41 and 46, ECHR 2001-IX)".

[80] *Ibid.,* para. 43.

order. [81] Finally, the ECJ ruled that the decision was disproportionate to the objective to protect the public order and safety.[82]

In *Schmidberger*,[83] the Court had to answer a preliminary reference from an Austrian Court concerning the balancing of interest between the free movement of goods (Article 28 EC) and the freedom of expression. More specifically, the case concerned the extent of the Member State's obligation to keep an important traffic route open in order to ensure the free movement of goods and for that reason to prohibit an environmental demonstration. The next question was whether the fact that the demonstration was permitted can be justified in light of the principle of proportionality. According to AG Jacobs,

> "where a Member State invokes the necessity to protect a given fundamental right the normal proportionality test should be applied. The situation is comparable with cases involving national public policy or national public security. In both situations the uniform application and the effectiveness of the fundamental freedoms laid down by the Treaty are at stake … where however as in the present case the restriction is primarily attributable to private individuals it is perhaps less justifiable to apply too strict a proportionality test. The issue is not so much what the Austrian authorities did, but whether they failed to prevent action by others and what action they should have taken to do so. Where it is for a Member State actively to protect a fundamental Treaty freedom from interference from private individuals the Member State concerned unquestionably enjoys a margin of discretion in determining when to take action and which measures are most appropriate to eliminate or limit that interference".[84]

The Austrian authorities did not overstep the bounds of their margin of discretion and the authorisation of the demonstration did not create a restriction on the free movement of goods which was disproportionate to the objective pursued. Firstly, the disruption caused was of a relatively short (28 hours) duration and the only allegation of a similar disruption concerned another isolated incident two years later. Secondly, measures were taken to limit the disruption caused. Thirdly, excessive restrictions on the demonstration itself would have been liable to deprive the demonstrators of the rights that the authorities sought to protect. Schmidberger and the national court suggest that the demonstration could have been held in proximity to the motorway or limited in time so as not to cause any appreciable hold up. But the demonstrators could not have made their point nearly as forcefully if they had not blocked the motorway long enough for the demonstration to bite. Their demands for action by the national and Community authorities may well have been heard only faintly, if at all, had they been required to demonstrate in a field beside the motorway, or allowed to cause only a brief stoppage of traffic.[85] The Court ruled that the national measure was therefore not disproportionate.

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[81] *Ibid.*, para. 44.
[82] *Ibid*., paras. 44-45.
[83] *Schmidberger* [2003], *supra n.67*.
[84] *Ibid.,* AG Jacobs in *Schmidberger,* paras. 105-106.
[85] *Ibid.,* paras. 108-110.

b) Proportionality and Non-Discrimination

Furthermore, the principle of proportionality is closely connected with the non-discrimination principle.[86] In the first place, the non-discrimination principle can also be seen as a fundamental right. As seen above, fundamental rights may be subject to certain restrictions. In this sense, Article 12 (ex Article 6) of the EC Treaty provides that any discrimination on the grounds of nationality is prohibited. This provision is, indeed, intimately linked to the concept of citizenship and fundamental rights. Interestingly, the new Article 13 complements Article 12 and enables the Council to take appropriate action to combat discrimination based on gender, racial or ethnic origin, religion or belief, disability, age or sexual orientation. When the Council acts on the basis of Article 13, it does so unanimously on a proposal from the Commission and after consulting the European Parliament. At the same time, Article 141 (ex Article 119) lays down the principle of non-discrimination between men and women, though only as far as equal pay is concerned. The Treaty of Amsterdam restated the principle of non-discrimination in stronger terms, adding two new provisions to the EC Treaty. Article 2 of the Treaty provides that it is the Community's task to promote the harmonious, balanced and sustainable development of economic activities, environmentally-friendly growth, a high degree of convergence of economic performance, a high level of employment and social protection, the raising of the standard of living and quality of life, economic and social cohesion and solidarity among Member States. Article 3 lists the various measures that the Community should take to carry out the tasks specified in Article 2. The Treaty of Amsterdam extends those two Articles to include equality between men and women, which previously figured only in Article 141 (ex Article 119) of the EC Treaty (more restricted in scope since it relates only to equal pay).[87] It seems arguable that the extension of the scope of the provision had a significant effect on the ECJ case-law.

In the second place, the principle of non-discrimination appears like an administrative principle in the free movement context (Articles 39, 43 and 49-50 [ex 48, 52 and 59-60]), in the CAP (Article 34(2) [ex Article 40(3)]) and in relation to taxation (Article 90 [ex Article 95]). The link to the proportionality principle arises particularly in relation to indirect discrimination. The Court has consistently held that the rules of equal treatment prohibit not only overt discrimination based on nationality, but also all covert forms of discrimination which, by applying other

[86] Ellis, "The Concept of proportionality in European Community Sex Discrimination Law", in Ellis, *The Principle of Proportionality in the Laws of Europe,* 1999, Hart, pp.165-181. *See also* Chapter 6.2.3. For the relationship between the principle of proportionality and citizenship.

[87] The two additions made are as follows: Amendment of Article 2, where the list of tasks facing the Commission includes the promotion of equality between men and women. Amendment of Article 3, where a new paragraph has been added, reading as follows: "In all the other activities referred to in this Article, the Community shall aim to eliminate inequalities, and to promote equality, between men and women".

distinguishing criteria, achieve in practice the same result.[88]It is well known that discrimination may be subject to statutory exceptions (*e.g.* Article 30 and 39(4)[89]) or that indirect discrimination may be justified on objective grounds. Here, the Court has recourse to the principle of proportionality in order to determine whether the justifications are objective (proportionate) or not. For instance, the Community legislature in the exercise of its discretionary powers may treat situations differently if it is objectively justified.[90] According to the Court:

> "the fact that a measure adopted within the framework of the common organization of a market may affect producers in different ways, depending on the particular nature of their production, does not constitute discrimination if that measure is determined on the basis of objectives rules, which are formulated to meet the needs of the general common organization of the market". [91]

In the free movement context, the Austrian government, in *Clean Car*,[92] argued that the residence requirement for appointing a manager was necessary in order to ensure the effective enforcement of the fines on the undertaking.[93] The Court considered that the situation seemed to constitute indirect discrimination.[94] However, the ECJ stressed that *"it would be otherwise only if the imposition of such a residence requirement were based on objective considerations independent of the nationality of the employees concerned and proportionate to a legitimate aim pursued by the national law".*[95] Then, the ECJ applied, *inter alia*, the test of less restrictive means, which is an important element of the principle of proportionality.[96] It finally considered that the national measure was not objectively justified and, by consequence, indirectly discriminatory.[97]

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[88] Case C-266/95 *Merino Garcoa* [1997] ECR I-3279, para. 33.

[89] The so-called public service exception, "[t]he provisions of this Article shall not apply to provision in the public service." Being an exception, this provision has been interpreted narrowly. *See e.g.* C-293/99 *Commission v Italy* [2001] ECR I-4363. This case concerned the domestic nationality criterion for school teachers. Such a requirement was considered as falling outside the scope of Article 39(4).

[90] Case C-120/92 *Friedrich Schulz* [1993] ECR I-6902, para. 18.

[91] *Crispoltoni, supra n. 19,* para. 52.

[92] Case C-359/96 *Clean Car Autoservice Gmbh* [1998] ECR I-2521.

[93] *Ibid.,* para. 33.

[94] *Ibid.,* para. 30, "[a] requirement that nationals of the other Member States must reside in the State concerned in order to be appointed managers of undertakings exercising a trade is therefore such as to constitute indirect discrimination based on nationality, contrary to Article 48(2) of the Treaty".

[95] *Ibid.*, para. 31.

[96] *Ibid.,* para. 36, "..other less restrictive measures, such as serving notice of fines at the registered office of the undertaking employing the manager and ensuring that they will be paid by requiring a guarantee to be provided beforehand, would make it possible to ensure that the manager can be served with notice of any such fines imposed upon him and that they can be enforced against him".

[97] *Ibid.,* para. 38.

c) Proportionality and Subsidiarity[98]

The principle of subsidiarity made its first appearance in Article 130r (4) EEC, which was introduced by the Single European Act in the limited sphere of the new Community competence in the field of environmental policy.[99] It was introduced, more comprehensively, by the Maastricht Treaty in Article 3B [new Article 5] of the EC Treaty. The second paragraph of Article 3B provides that, "with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community". Furthermore, Articles A(2) [new Article 1] et B [new Article 2] TEU also enshrine the principle of subsidiarity.[100] According to the former, *"[t]he Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen".* The conceptual differences between Articles 1 EU and 5(2) EC are large. Indeed, whereas Article 5 is concerned with choices between Community and Member State action, Article 1 is concerned with the broader objective of creating an ever-closer association. Consequently, one may distinguish between a narrow concept of subsidiarity as defined in Article 5 TEC and a wider principle as enshrined in Article 1 TEU. Such a distinction seems to be of some interest in the litigation brought before of the ECJ.[101] In addition, whereas Article 5 EC may be

[98] For further reading, s*ee e.g.* Bermann, "Taking subsidiarity Seriously: Federalism in the European Community and the United States, CLR 1994, Bernard, "The Future of European Economic law in the Light of the principle of Subsidiarity", CMLRev. 1996, pp.633-666, De Búrca, "Proportionality and Subsidiarity as General Principles of Community Law, in Bernitz and Nergelius (eds.), 2000, pp. 95-112, Emiliou, "Subsidiarity: An effective Barrier against the "Enterprises of Ambition", ELR 1992, pp.383-407, Kapteyn, "Community Law and the principle of subsidiarity", RAE 1991, Lenaerts, "Le principe de subsidiarité et son contexte: Étude de l'article 3B du Traité CE", CDE 1994, and finally Toth, The Principle of Subsidiarity in the Maastricht Treaty, CMLRev.1992, pp. 1079 *et seq*.

[99] Article 130 states, "The Community shall take action relating to the environment to the extent to which the objectives referred to in paragraph 1 can be attained better at Community level than at the level of the individual Member States". For recent developments in light of the Constitutional Treaty, *see* Hettne, *Subsidiaritetsprincipen: politisk granskning eller juridisk kontroll*?, Siepsrapport 2003:4, Tridimas, "The European Court of Justice and the Draft Constitution: A Supreme Court for the Union", in Tridimas and Nebbia, *European Union Law for the Twenty-First Century*, Volume I, Hart, 2004, pp. 113-141, at pp. 132-135.

[100] AG Fennelly in Case C-376/98 *Germany* v. *European Parliament and Council* (Tobacco Advertising Directive) [2000] ECR I-8419, paras 132-133, "…[t]he objectives of the Union shall be achieved as provided in this Treaty and in accordance with the conditions and timetable set out therein while respecting the principle of subsidiarity as defined in Article 5 of the Treaty establishing the European Community".

[101] *Ibid.,* para 133, " [t]he principle is concerned only with choices between Community and Member State action. For this reason, if there were no other, it is at most a partial reflection of the aspiration, declared in the Preamble and Article A of the Treaty on European Union (now, after amendment, Article 1 EU), that 'decisions [be] taken as closely as possible to the citizen. In the case of Member State action, the level of closeness to the citizen depends on the

justiciable, Article 1 EU does not appear to be justiciable in the light of Article 46 TEU [ex L].

Interestingly, the principle of subsidiarity has often been described both as a political and judicial principle.[102] The doctrine has extensively written on the justiciability of the principle of subsidiarity.[103] In the recent years, it seems possible to argue that subsidiarity is amenable to judicial review.[104] This section does not enter into a wide debate between Articles 1 and 5 EC, or between the various facets of the principle of subsidiarity *e.g.* political/judicial,[105] narrow/wide,[106] principle/rule,[107] subsidiarity "from above"/ "bottom up" subsidiarity,[108] or *ex ante* monitoring/*ex post* monitoring.[109] Instead, it focuses on a narrow definition of subsidiarity (Article 5) i.e. as an instrument of limitation of the Community competence/powers. It also tries to establish its degree of relationship with the principle of proportionality as well as its scope of review (limited or wide?). It is seen that the justiciability of the principle of subsidiarity is closely linked to the principle of proportionality. Accordingly, Article 3 B [new Article 5 EC] states:

> "The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.
>
> In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as

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constitution and internal workings of the Member State concerned. For the same reason, it does not appear useful to discuss the content or application of the broader objective that '... a larger and higher association [should not] arrogate to itself functions which can be performed efficiently by smaller and lower societies. For these, and for one additional reason, my discussion of the principle of subsidiarity is quite narrow".

[102] Temple Lang, "What powers should the European Community have?", EPL 1995, pp.97-115, at p.107. The article 3B(2), "is more likely to be effective as a political argument for limiting the Community's powers, as a sort of presumption against their exercise, rather than as a legal argument".

[103] Emiliou, *supra n.98*, fn.74, Hettne, *supra n.99,* Shilling, *infra*, at p.5, Strozzi, *infra*, at pp.386-389, Temple Lang, *supra n.102*, at pp.106-107.

[104] Wyatt, "Subsidiarity and Judicial Review", in O'Keeffe and Bavasso (eds.), *Judicial Review in the EU,* 2000, pp. 505-519, *see also* Shaw, "Law of the European Union", Palgrave, 2000, at p.230.

[105] Strozzi, "Le principe de subsidiarité dans la perspective de l'intégration européenne: une énigme et beaucoup d'attentes", RTDE 1994, pp.373-390, at p. 380. The author considered that the principle of subsidiarity as a limitation of the Community competences resembles more to a political principle or a principle of political legisaltion. Conversely, one might consider also Article 5, in comparison with Article 1 and 2 TEU, as a judicial regulatory principle. *See also*, Temple Lang, *supra n. 102*.

[106] AG Fennelly in *Tobacco Advertising Directive*, *supra n.100*.

[107]Shilling, "Subsidiarity as a Rule and as a Principle, or: Taking Subsidiarity Seriously", http://www.jeanmonnetprogram.org.papers/95, pp.1-26.

[108] Emiliou, *supra n. 98*, at pp.383-384. The former benefits central institutions and the latter assumes that the central institutions are subsidiary to the lower levels of power.

[109] Oliver, "EU Law and National Constitutions", Community Report, FIDE, 2002, at p.16.

> the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.
>
> Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty".

This Article is divided into three paragraphs. The second and third paragraphs are of particular interest. The second paragraph embodies the subsidiarity rule *stricto sensu*, while the third expressly lays down the principle of proportionality. More precisely, paragraph 2 constitutes a test, which permits designation of the institution (central or local) entitled to exercise the competence. This test is often referred to as the "better attainment test" or "comparative efficiency test". The Amsterdam Protocol, which codifies the guidelines adopted in 1992 during the Edinburgh European Council on the application of the principles of subsidiarity and proportionality, gives three criteria in order to assess whether the conditions in paragraph 2 have been fulfilled:

- Does the action have transnational aspects that cannot be satisfactorily regulated by the Member States?
- Would action by Member States or lack of action conflict with the requirement of the Treaty?
- Would action at Community level produce clear benefits?

The legal scope and applicability of the principle of subsidiarity as expressed in Article 5 of the EC Treaty is defined and limited by the opening expression in Article 5, second indent: "In areas which do not fall within its exclusive competence". It is worth noting that the application of the principle presupposes the existence of concurrent (shared) powers. In other words, the classification of a power as exclusive will automatically exclude the application of the principle of subsidiarity. This is exemplified by the Opinion of AG Fennelly in the *Tobacco Directive* case. As put by the AG,

> "[t]he application of the principle in the present cases turns on the question whether harmonising action pursuant to Articles 57(2) and 100A of the Treaty falls within the exclusive competence of the Community. If that is the case, the principle does not apply. On the other hand, the applicants in both cases appear to presuppose that the legal basis upon which the Directive was adopted did not fall within the exclusive competence of the Community. If that assumption is incorrect, as I think it is, it is unnecessary to consider whether the principle was, in fact, respected".[110]

Shilling used the comparative analysis with the laws of the US, Canada, Germany, Switzerland, Belgium and Austria in order to suggest that exclusive competence can be defined as the following: "insofar as the competences of one level of government are exclusive, the other level is barred from legislating irrespective of any legislative

[110] AG Fennelly in the *Tobacco Directive* case, *supra n. 100*, para. 135.

activity by the first level".[111] The major problem remains to define precisely the boundaries between exclusive and concurrent powers. Indeed, as opposed to a federal system, such as the United States, where there exists a list of the exclusive and shared powers, the European Community Treaties do not provide (yet?) such a substantial list.[112]

The doctrine is far from being unanimous on the precise content of "exclusive competence". Certain authors argue for a wide definition of "exclusive competence",[113] others stress the danger of such an approach[114] and advocate a narrow interpretation.[115] Concerning the former view, on the basis of the *ERTA* case,[116] it has been argued that *"in all matters transferred to the Community from the Member States, the Community's competence is, in principle exclusive and leaves no room for concurrent competence on the part of the Member States."*[117] Consequently, almost all matters concerned with the EEC Treaty are seen as exclusive powers. This includes commercial policy, transport policy, CAP, competition, and free movement. Such a view does not appear, for other authors, wholly convincing. For instance, one might plausibly argue that the internal market is an area of shared powers after the TEU.[118] Conversely, some "new areas", introduced by the SEA or the Maastricht Treaty, could be classified rather clearly as concurrent competences, e.g. environment, social policy, consumer protection, public health, education, vocational training, culture. The rationale behind this is that the Treaty Articles in question are construed in such a way as to give limited competences to the Community.

In addition, certain areas may seem to fall rather logically within the area of exclusive powers, i.e. common commercial policy, customs, external trade, or EMU.[119] In this sense, it has been stressed that the common commercial policy and the common custom tariffs provided for a phasing out of the Member States' competences in specific areas, i.e. exclusive competence became effective at the end

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[111] Shilling, s*upra n.107,* at p.9.
[112] Temple Lang, *supra n. 102* at p.98. *See* Constitutional Treaty.
[113] Toth, "A Legal Analysis of Subsidiarity", in O'Keeffe and Twomey, *Legal Issues of the Maastricht Treaty,* 1994.
[114] Shilling, s*upra n. 107*.
[115] Steiner, "Subsidiarity under the Maastricht Treaty", in O'Keeke and Twomey (eds.), *Legal Issues of the Maastricht Treaty,* 1994. In contrast to Toth, Steiner argues that the Community must have exercised its powers in order to be classified as exclusive.
[116] Case 22/70 *Commission* v. *Council* [1971] ECR 263, at p.276. According to the ECJ, "the existence of Community powers exlude the possibility of concurrent powers on the part of the Member States".
[117] Toth, *supra n.113,* at pp.39-40.
[118] Shilling, *supra n. 107***,** at pp.14-15. The author considered that since Maastricht the internal market constitutes an area of shared competence. In his words, "[t]he Maastricht Treaty has charcaterized the establishment of the internal market in Artilce 3(c) ECT as a deregulatory exercise".
[119] *Ibid.*

of the transitional period.[120] Generally, it has been said that those are the areas where the Court ruled that the Community must be able to act as a unit. [121] The conclusion to which we are inescapably drawn is that the ECJ has a decisive role in determining on a case-by-case basis the limits of both types of power, or, as expressed by Temple Lang, "*the operation of the subsidiarity principle will also depend on the attitude of the Court of Justice"*. [122] Finally, if the ECJ interprets the "exclusive competence" extensively, it will give a limited significance to the principle of subsidiarity as enshrined in Article 5. Subsequently, the principle of subsidiarity would then constitute an empty shell.

In the *Working Time Directive* case,[123] which concerned the challenge by the UK of a Directive related to the organisation of working time, the ECJ considered that Article 118a (health and safety) was an area of shared competence. The Court found no breach of subsidiarity as enshrined in the ex Article 3B.[124] The Court held that the second paragraph of the test of compliance with the principle of subsidiarity set out in Article 3B of the Treaty, i.e. that the objective in question would be better achieved at the Community level than at the national level, was satisfied by the need for Community action. In that respect, the Court notes that:

> "…it is the responsibility of the Council, under Article 118a, to adopt minimum requirements so as to contribute, through harmonisation, to achieving the objective of raising the level of health and safety protection of workers which, in terms of Article 118a(1), is primarily the responsibility of the Member States. Once the Council has found that it is necessary to improve the existing level of protection as regards the health and safety of workers and to harmonise the conditions in this area while maintaining the improvements made, achievement of that objective through the imposition of minimum requirements necessarily presupposes Community-wide action, which otherwise, as in this case, leaves the enactment of the detailed implementing provisions required largely to the Member States". [125]

Such an approach appears to be confirmed by AG Fennelly in the *Tobacco Advertising Directive* case. The AG stressed that whereas the adoption of harmonising measures is exclusive, the enactment of such rules in the field of protecting and improving the quality of the environment does not have the unique objective of achieving uniformity, but also to carry out material objectives, which are also endeavoured by the Member States.[126] Indeed, *"there is a choice between*

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[120] *Ibid.*, at p.14. According to the author, CAP might also be considered as an area of exclusive competence.
[121] Temple Lang, *supra n. 102*, at p.112.
[122] *Ibid.*
[123] Case C-84/94 *United Kingdom* v. *Council* [1996] ECR I-5755.
[124] *Ibid.,* para. 55, [t]he argument of non-compliance with the principle of subsidiarity can be rejected at the outset. It is said that the Community legislature has not established that the aims of the directive would be better served at Community level than at national level. But that argument, as so formulated, really concerns the need for Community action."
[125] *Ibid.,* para. 47.
[126] AG Fennelly in the *Tobacco Advertising Directive* case, *supra n.100,* para. 137.

Community and Member State action in pursuit of the same ends. The principle of subsidiarity is applicable, but it will be satisfied, it seems, upon the establishment of the need for the adoption of common harmonised measures, an instrument which can only be employed at Community level".[127] By contrast, AG Fennelly considered that the exercise of the Community's competence to adopt harmonising measures in pursuit of the objectives of the internal market falls within the field of exclusive competence. The AG concluded that the principle of subsidiarity was not applicable due to the exclusive character of the Community provisions.[128] The reasoning used by the AG to come to such a conclusion was as follows:

> "…Articles 57(2) and 100A of the Treaty create a general Community competence of a horizontal, functional character. Where disparate national rules give rise either to obstacles to trade in goods or the provision of services or to distortions of competition, the Community has an interest in achieving uniformity of trading conditions which is quite distinct from its interest in the substantive content of the uniform rules adopted. The coordination or approximation of national rules which affect economic activity is the very essence of these competences, *provided* it serves the purposes of the internal market, and is not merely an instrument for achieving some separate, materially defined objective. It is clear that only the Community can adopt measures which satisfy these requirements. The Member States may attempt to remedy some of the effects of disparate laws, by enacting mutual recognition provisions, for example, but they cannot themselves achieve uniformity as such in the relevant field. The fact that the Member States are competent in a material domain that may be affected by internal market measures, such as that of health protection, does not imply that the Community's internal market competences are concurrent. Just as the objectives pursued are of a different order, so too are the underlying competences". [129]

Finally, in light of the foregoing, it appears that the principle of subsidiarity is justiciable. However, due to its vagueness or subjective character, the ECJ may have enormous difficulties ensuring an effective judicial review of compliance with the principle of subsidiarity.[130]

In the wake of the Maastricht Treaty, an important doctrinal debate took place in order to determine whether the principle of subsidiarity was amenable to judicial review. The Amsterdam Protocol made clear that subsidiarity is justiciable. In this sense, Article 13 of the Protocol on Proportionality and Subsidiarity states that,

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[127] *Ibid.*

[128] *Ibid.,* para. 142, "finally, I conclude, therefore, that the exercise of Community competence under Articles 57(2) and 100A of the Treaty is exclusive in character and that the principle of subsidiarity is not applicable. There can be no test of comparative efficiency between potential Member State and Community action. If there were, even more difficult questions of principle would arise. How, in particular, does one weigh the comparative benefits of Community harmonising action in pursuit of the internal market with individual Member State rules in respect of entirely different national preoccupations of a substantive character?".

[129] *Ibid.,* para. 139.

[130] Oliver, *supra n.109*, at pp.16-17.

"compliance with the principle of subsidiarity shall be reviewed in accordance with rules laid down by the Treaty." As seems clear from the Amsterdam Protocol, subsidiarity should not undermine the power conferred on the European Community by the Treaty, as interpreted by the Court of Justice. It should be stated that the Court made clear that the principle of subsidiarity could not have retroactive effects.[131] Nevertheless, the main problem remains that the subsidiarity test involves a policy judgement.[132] In other words, the Court may be reluctant to invalidate EU legislation on the grounds of breach of the principle of subsidiarity.[133] In addition, it should be pointed out that the scope of review of the subsidiarity principle embodies both substantive and procedural aspects. In *Deposit Guarantee*,[134] the argument did not concern substantive observance of the principle, but the duty to give reasons (Article 253 [ex Article 190]).[135] Indeed, the German government did not argue that the directive infringed the principle of subsidiarity, but merely that the Community legislature did not set out the grounds to substantiate the compatibility of its actions with that principle.[136]

The scope of review of the subsidiarity principle is still quite fuzzy. The principle appears clearly justiciable when it can be linked to the principle of proportionality.[137] Indeed, the third paragraph of Article 5 makes an explicit reference to the principle of proportionality. In the cited provision, proportionality appears as a principle permitting a control of the exercise and extension of Community competence. It should be stressed that although the two concepts enshrined in paragraphs 2 and 3 are closely connected, they are not exactly similar. One author has stressed that subsidiarity and proportionality sometimes integrate

[131] Joined Cases C-36/97 and C-37/97 *Kellinghusen* [1998] ECR I-6637, para. 35, "lastly, as to the breach of the principle of subsidiarity, it should be stated that the second paragraph of Article 3b of the Treaty was not yet in force when Regulations No 1765/92 and No 2066/92 were adopted and that provision cannot have retroactive effect".
[132] Temple Lang, *supra n.102*, at p.106. *See also*, Strozzi, *supra n.105*, at p.387.
[133] Toth, "The Principle of Subsidiarity in the Maastricht Treaty", CMLRev. 1992, pp.1079-1105.
[134] Case C-233/94 *Germany* v. *European Parliament and Council* [1997] ECR I-2405, *see also* AG Jacobs in Case 377/98 *Netherlands* v. *EP and Council* [2001] ECR I-7079, paras. 79-84.
[135] *Ibid., Deposit Guarantee*, para. 24.
[136] *Ibid.*, para 22, "[t]he German Government claims that the Directive must be annulled because it fails to state the reasons on which it is based, as required by Article 190 of the Treaty. It does not explain how it is compatible with the principle of subsidiarity enshrined in the second paragraph of Article 3b of the Treaty. The German Government adds that, since that principle limits the powers of the Community and since the Court has power to examine whether the Community legislature has exceeded its powers, that principle must be subject to review by the Court of Justice. Moreover, the obligation under Article 190 to state the reasons on which a measure is based requires that regard be had to the essential factual and legal considerations on which a legal measure is based, which include compliance with the principle of subsidiarity".
[137] Strozzi, *supra n. 105*, at p.388.

each other reciprocally. In other words, the existence of a concurrent power that does not respect the principle of subsidiarity will be assessed as *ipso facto* disproportionate.[138] Interestingly, this argument was submitted *a contrario* by Germany in the *Working Time Directive* case. In this sense, *"a measure will be proportionate only if it is consistent with the principle of subsidiarity."*[139] In the same vein, according to Shaw,

> "[t]he test of comparative efficiency for Community legislative action introduced by Article 5 EC cannot really be considered in isolation from the final paragraph of the same provision which requires Community action to be proportionate. That idea can be reduced to the question of how the Community should act and is closely linked with the subsidiary nature of the Community action: that is, not to go beyond what is necessary to achieve the objectives of the Treaty".[140]

By contrast, the principle of proportionality may be seen as a wider principle. It is suffice to recall here that subsidiarity is only applicable to the relationship between the institutions and the Member States. It permits the imposition of limitations on the Community powers. Nevertheless, it does not apply to the relationship between the individuals and the EU institutions like the principle of proportionality. By the same token, proportionality also applies to the field of exclusive competence.[141] What is more, subsidiarity precedes the application of the principle of proportionality.[142] Indeed, the principle of proportionality enables the scope of the Community action to be defined after it has been considered necessary.[143] Such an assertion is illustrated by the reasoning of the ECJ in the *Working Time Directive* case. The ECJ considered the breach of the principle of subsidiarity and finally rejected the argument of non-compliance with the said principle.[144] Then, the ECJ assessed the proportionality of the EC legislation. The Court stated in *Working Time* that:

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[138] *Ibid.,* at p.380.
[139] *Working Time*, *supra n.123*, para. 54.
[140] Shaw, *supra n.104,* at pp.227-228.
[141] Tridimas, *supra n.1,* at p.81.
[142] Strozzi, *supra n.105,* at p.379, Tridimas, *ibid.*, the latter argues that the principle of proportionality is also directed to the political institution and thus applies *ex ante*.
[143] AG Léger in *Working Time*, *supra n.123,* para. 126.
[144] *Ibid., Working Time*, paras. 55-56, "the argument of non-compliance with the principle of subsidiarity can be rejected at the outset. It is said that the Community legislature has not established that the aims of the directive would be better served at Community level than at national level. But that argument, as so formulated, really concerns the need for Community action, which has already been examined in paragraph 47 of this judgment…Furthermore, as is clear from paragraph 17 of this judgment, the applicant bases its argument on a conception of 'minimum requirements' which differs from that in Article 118a. That provision does not limit Community action to the lowest common denominator, or even to the lowest level of protection established by the various Member States, but means that Member States are free to provide a level of protection more stringent than that resulting from Community law, high as it may be".

> "As to judicial review of those conditions, however, the Council must be allowed a wide discretion in an area which, as here, involves the legislature in making social policy choices and requires it to carry out complex assessments. Judicial review of the exercise of that discretion must therefore be limited to examining whether it has been vitiated by manifest error or misuse of powers, or whether the institution concerned has manifestly exceeded the limits of its discretion".[145]

The Court concluded that the measure was suitable[146] and necessary.[147] It may be argued that the limited (marginal) review of Community legislation is justified in the light of the policy judgement that the Court ought to realize, i.e. limited to ascertain whether there is a manifest error.[148] Finally, it ought to be remarked that the ECJ has never annulled a legislative act for non-compliance with the principle of subsidiarity. In that regard, the Court rejected the argument based on the breach of the principle of subsidiarity in both *"Working Time"* and *"Biotechnology Directive"*.[149] Thus, the principle of subsidiarity appears as a weak standard of review.[150] The same is not true for the principle of proportionality.

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[145] *Ibid.,* paras. 57-58.

[146] *Ibid.*, para. 59, "so far as concerns the first condition, it is sufficient that, as follows from paragraphs 36 to 39 of this judgment, the measures on the organization of working time which form the subject-matter of the directive, save for that contained in the second sentence of Article 5, contribute directly to the improvement of health and safety protection for workers within the meaning of Article 118a, and cannot therefore be regarded as unsuited to the purpose of achieving the objective pursued".

[147] *Ibid.,*para. 60, "[t]he second condition is also fulfilled. Contrary to the view taken by the applicant, the Council did not commit any manifest error in concluding that the contested measures were necessary to achieve the objective of protecting the health and safety of workers".

[148] Tridimas, *supra n.1,* at p.84.

[149] Case 377/98 *Netherlands* v. *Parliament and Council* [2001] ECR I-7079. *See also* Case C-491/01 *British American Tobacco* [2002] ECR I-11453, paras. 177-185, Case C-103/01 Commission v Germany [2003] ECR I-5369, paras. 46-48 (PPE Directive). In British American Tobacco, the Court, first, considered that the Directive's objective (to eliminate the barriers raised by the differences which still exist between the Member States, while ensuring a high level of health protection, in accordance with Article 95(3) EC) could not be sufficiently achieved by the Member States individually. Then, it assessed the principle of proportiontality and held that the intensity of the action undertaken by the Community in this instance was also in keeping with the requirements of the principle of subsidiarity in that it did not go beyond what was necessary to achieve the objective pursued.

[150] De Búrca, *supra n.98,* at p.108 and at pp.111-112. Interestingly, the author considers that by looking only to the standard and scope (Member States actions) of review, subsidiarity has not yet acquired the status of a general principle of Community law. However, the principle is important both to assess the legality of the acts of the institutions and to guide the political process.

4.1.3 The Principle of Proportionality and Judicial Review

a) The Test of Proportionality and its Flexibility

As seen previously, the test of proportionality in German law is composed of three elements, i.e. suitability, necessity and proportionality *sensu stricto*. In the European legal order, the ECJ sometimes examines the legality of an institutional or national measure in the light of this three-pronged test. Arguably, it might be contended that the use of this three-step process entails a higher standard of review than an examination merely based on one or two elements.[151] In the first place, the aim of this section is to describe precisely the test of proportionality. Three basic elements may be part of the test of proportionality and must be analysed and defined separately in detail. In the second place, the section focuses on the use by the ECJ of each element(s) (*per se*, *in pari materia* or *in toto)* and pinpoints the test's flexibility.

The test may be summarized as follows:

1) Suitability (appropriateness)
2) Necessity (less restrictive means)
3) Proportionality *stricto sensu* (proportionality in the true sense[152] or proportionality in its narrow sense)[153]

Suitability:

This criteria concerns the relationship between the means (employed by the measure) and the end (the objective). The measure must be appropriate (suitable, reasonably likely) for attaining the objective. In the words of Jans[154] and AG Jacobs,[155] it presupposes a causal relationship between the measure and the objective pursued. Indeed, it may be said that the determination of the suitability is tantamount to assess whether or not the measure is taken arbitrarily.[156] This measure can either be a national measure or a measure from an EU institution. Clearly, in the latter case, the objective refers to the Community objectives. The former case is more complex as the objectives correspond both to Community and national objectives. In this sense, the national measure may be aimed to derogate from one of the economic freedoms. The aim of the domestic measure is to implement a national policy (which represents a national objective such as public health, consumer protection or protection of the environment), which, in turn, must be balanced with the Community objective (free movement).

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[151] Van Gerven, *supra n.1,* at p.61.
[152] Snell, "True Proportionality and Free Movement of Goods and Services", EBLR 2000, pp.37-50, "true proportionality", and Jans, "Proportionality Revisited", LIEI 2000, pp.239-265, "proportionality in its true sense."
[153] Jacobs, *supra n. 1,* at p.1.
[154] Jans, "Proportionality Revisited", LIEI 2000, pp.239-265, at p.243.
[155] AG Van Gerven in Case C-169/89 *Gourmetterie* [1990] ECR 2143*,* para. 10.
[156] Emiliou, *supra n.2,* at p.192.

The test of suitability is applied both regarding actions against the institutions and Member States. For example, the ECJ in *Fromançais* held that *"in order to establish whether a provision of Community law is consonant with the principle of proportionality it is necessary to establish, in the first place, whether the means it employs to achieve the aim corresponds to the ...aim."*[157] In a situation concerning the proportionality of an "institutional measure", the ECJ assesses the suitability in the light of the Community objective. Interestingly, as to Member States actions, the ECJ may either decide on the suitability of the national measure[158] or leave it to the national court.[159] Thus, in relation to the concept of "objective justification", in the instance of indirect discrimination on grounds of sex (Article 141 EC [ex Article 119]), it is for the national court to assess whether *"the measures…are appropriate with a view to achieving the objective pursued"*.[160]

Necessity:
Through the test of necessity, it is determined whether the measure is necessary (legitimate) in order to achieve the objective pursued. In other words, it is assessed whether other less restrictive means capable of realising the same end exist. According to AG Jacobs in *Gourmetterie*, *"The assessment of the requirement of necessity involves ascertaining whether there is a relationship of necessity between the measure adopted and the attainment of the objective pursued. This has two implications: in the first place, the existence of a causal connection between the measure adopted and the aim pursued, that is to say the measure is relevant or pertinent, and secondly there is no alternative to it which is less restrictive of the free movement of goods"*.[161] In my view, the first implication seems to correspond to the test of suitability. Logically, this test must be endeavoured before the application of a test of less restrictive means. However, it seems to me important to establish a clear distinction between two types of situations, i.e. the examination by the ECJ of national and institutional measures respectively. Indeed, it appears that when a Community economic policy (through the challenge of a legislative Community measure) is involved, the ECJ applies the so-called "manifestly inappropriate test". In *Fedesa*,[162] a case concerning the challenge of a Council Directive imposing a complete prohibition on the use of certain hormone substances to animals, the Court ruled that:

> "The Court has consistently held that the principle of proportionality is one of the general principles of Community law. By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question when there is a choice

[157] Case 66/82 *Fromançais* [1983] ECR 395.
[158] Case C-189/95 *Franzén* [1997] ECR I-5909.
[159] Case C-67/98 *Diego Zenatti* [1999] I-7289.
[160] Case 170/84 *Bilka-Kaufhaus GmbH* [1986] ECR 1607.
[161] AG Van Gerven, in *Gourmetterie*, *supra n*. 155, para. 8.
[162] Case C-331/88 *ex parte Fedesa* [1990] ECR I-4023.

> between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued. However, with regard to judicial review of compliance with those conditions it must be stated that in matters concerning the common agricultural policy the Community legislature has a discretionary power which corresponds to the political responsibilities given to it by Articles 40 and 43 of the Treaty. Consequently, the legality 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 institution is seeking to pursue (see in particular the judgment in Case 265/87 Schraeder [1989] ECR 2237, paragraphs 21 and 22)".[163]

The manifestly inappropriate test applies in areas in which the Community institutions have a wide discretion.[164] The same holds true in the appreciation of a complex economic or technical situation. Accordingly, the ECJ ruled in *Balkan II* that:

> "as the evaluation of a complex economic situation is involved, the commission enjoys, in this respect a wide measure of discretion. In reviewing the legality of the exercise of such discretion, the Court must confine itself to examining whether it contains a manifest error or constitutes a misuse of power or whether the authority did not clearly exceed the bound s of its discretion".[165]

In the recent case *Commission v. ECB*, the court considered that, in the context of Community financial interests, the Community legislature must be allowed a wide discretion "so that the legality 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 institution is seeking to pursue".[166] The application of a different test leads to a minimal or marginal review of the Community legislation. This differentiation may be linked to the idea of minimum control of legislation in French law and to the subsequent delicate question of scaled review.[167] Thus, it may be said that the field of application of the "less restrictive means test" is related to the review of the national measures. Generally speaking, in Article 234 proceedings, following the guideline of the ECJ, it is for the national courts to apply the test to the merits of the case.[168] In *Familiapress*, the Court stated that, *"the provisions of*

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[163] *Ibid.,* paras. 13-14.

[164] For instance, the Community institutions have wide discretion in the CAP context, *e.g.* Case 103/77 *Royal Scholten-Honig* [1978] ECR 2037.

[165] Case 55/75 *Balkan* [1976] ECR 19, at p.30.

[166] Case C-11/00 *Commission* v. *ECB* [2003] ECR I-7147, para. 157. *See also* Case C-491/01 *British American Tobacco and Imperial Tobacco* [2002] ECR I-11453, para. 123. In the latter, the Court applies this test in relation to the judicial review of the Tobacco Direction. The Court considers that the legislature has broad discretion since it is called upon to undertake complex assessments and entails political, economical and social choices.

[167] *Infra, Part 3 Chapter 8.*

[168] *See Familiapress* and *Schindler, supra n.64. See* Jans, at pp.245-246, for an interesting comparison of the cited cases. According to the author, the nature of the interest to be protected is relevant to the manner in which the Court will apply the proportionality principle.

national law in question must be proportionate to the objective pursued and that objective must not be capable of being achieved by measures which are less restrictive of intra-Community trade".[169] However, it may happen, e.g. in *Alpine Investment* and *Franzén*, that the ECJ undertakes such a test. [170]

Before entering into the definition of the last criterion (proportionality *stricto sensu*), it should be emphasised that the requirements of necessity and proportionality are frequently considered at the same time.[171] These two requirements are part of the analysis, which adheres closely to the specific legal and factual situation.[172] An illustration of such an analysis is offered by the *De Peijper* case.[173] In this case, a criminal proceeding was instituted against a Dutch trader who had imported medicinal preparation from the UK without the consent of the national authorities. The Court held that:

> "with regard to the documents relating to the medicinal preparation in general, if the public health authorities of the importing Member State already have in their possession, as a result of importation on a previous occasion, all the pharmaceutical particulars relating to the medicinal preparation in question and considered to be absolutely necessary for the purpose of checking that the medicinal preparation is effective and not harmful, it is clearly unnecessary, in order to protect the health and life of humans, for the said authorities to require a second trader who has imported a medicinal preparation which is in every respect the same, to produce the above mentioned particulars to them again…Therefore national rules or practices which lay down such a requirement are not justified on grounds of the protection of health and life of humans within the meaning of Article 36 of the Treaty".[174]

In other words, if the national measure is clearly unnecessary, it would be deemed disproportionate. Those national measures cannot be invoked to justify derogations from Community law. The national interest (protection of public health) will not override the Community interest (free movement). Consequently, a strict examination of the proportionality *sensu stricto* is not required. The analysis of the criterion of proportionality may be implicit. According to Kapteyn and Verloren van Themaat, "*the Court is…not always systematic in its approach. In most of the judgments in which Article 36 EC or the rule of reason is applied, the Court applies the necessity and/or proportionality test implicitly or explicitly"*.[175]

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[169] *Ibid., Familiapress*, para. 19.
[170] Case C-384/93 *Alpine Investments* [1995] ECR I-4101.
[171] AG Van Gerven, in *Gourmetterie*, *supra n.*155*,* para. 8. *See also*, *Familiapress*, *supra n. 64*, para. 19, Tridimas, *supra n.1,* at p.68. According to this author, "in practice the Court does not distinguish in its analysis between the second and the third tests".
[172] AG Van Gerven in Case C-312/89 *Conforama* [1991] ECR I-997*,* para. 14.
[173] Case 104/75 *De Peijper* [1976] ECR 613. *See also*, Case 124/81 *Commission* v. *United Kingdom* [1983] ECR 203, para. 16.
[174] *Ibid.,* paras. 21-22.
[175] Kapteyn and Van Themaat, *Introduction to the Law of the European Communities*, edited and revised by Gormley, Kluwer, 1998, at p.656.

Thus, the ECJ is under no obligation to apply the test of *proportionality sensu stricto*. Such an argument was clarified by AG Van Gerven in *Conforama*.[176] In the words of the AG, *"the absence of any reference to the criterion of proportionality…is not of fundamental importance and that the reason of the omission lay in the specific circumstances of the case, from which it was clear that any obstacles which might be created were not particularly serious".* [177] Indeed, the ECJ has no obligation to lean on the principle of proportionality, since it was obvious that the obstacles created by the domestic legislation did not compel the Member States to dispense with a measure necessary for the attainment of a justified objective.[178] It is only after the determination of the causal relationship (between the measure and the objectives) and the non-availability of less restrictive means that the application of the test of true proportionality remains open. Subsequently, it appears necessary to analyse the test of proportionality in its narrow sense.

Proportionality *stricto sensu*

This test involves the balancing of interest. Put bluntly, it seems worth noticing that the balancing test would differ according to the type of measures under review. Indeed, a distinction needs to be made between the application of the test on Community action, i.e. when it concerns the validity of legislative measures (Directives, Regulations) taken by the Community,[179] on the one hand, and the use of the test on a Member States action, i.e. the appreciation of the legality of national measures taken by the Member States derogating from Community law, on the other.[180]

In the former case, the balancing of interests is realised between an individual right and the Community interest. Significantly, AG Mischo in *Fedesa* assessed the proportionality in the narrow sense as *"weighing the damage caused to the individual rights against the benefits accruing to the general interest".* [181] In addition, this definition is illustrated by the *Hauer* case, in which the legality of a Community Regulation was challenged for an alleged breach of the right to property and freedom to pursue a trade or profession. The Court ruled that the fundamental rights were not infringed. Indeed, according to the Court, certain limitations may be imposed on the exercise of fundamental rights. Those restrictions were justified by

[176] *Conforama*, *supra n.172*. The analysis is realised in the light of the Case C-145/88 *Torfaen* v *B&Q* [1989] ECR 3851.
[177] *Ibid.,* AG Van Gerven in *Conforama*, para. 14.
[178] The national legislation is seen as compatible with Article 30 [new Article 28].
[179] Case 44/79 *Hauer* [1979] ECR 3727, Case C-5/88 *Wachauf* [1989] ECR 2609.
[180] Case 120/78 *Rewe* (Cassis de Dijon) [1979] ECR 649 (rule of reason), Case 104/75 *De Peijper* [1976] ECR 613 (free movement of goods), Case 33/74 *Van Binsbergen* [1974] ECR 1299 (free movement of services), Case 118/75 *Watson and Belmann* [1976] ECR 1185 (free movement of persons).
[181] AG Mischo in *Fedesa*, *supra n.162*, para. 42.

objectives of general interest pursued by the Community.[182] According to the standard formula, these rights "may be restricted, particularly in a common organization of the market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed".[183]

In the latter situation (Member States action), the Court appraises the national measure in carrying out a balancing of interest between the national and Community interest. In this sense, the Court stated in *Stoke-on-Trent*[184] that,

> "appraising the proportionality of national rules which pursue a legitimate aim under Community law involves weighing the national interest in attaining that aim against the Community interest in ensuring the free movement of goods. In that regard, in order to verify that the restrictive effect on intra-Community trade of the rules at issue do not exceed what is necessary to achieve the aim in view, it must be considered whether those effects are direct, indirect, or purely speculative and whether those effects do not impede the marketing of imported products more than the marketing of national products".[185]

In the words of AG Van Gerven, concerning the application of the test to a national measure derogating from a Treaty provision, this test *"is concerned with the existence of a relationship of proportionality between the obstacle introduced, on the one hand, and, on the other, the objective pursued thereby and its actual attainment"*. [186] This test of proportionality in the strict sense ought to be realised after the application of the tests of suitability and necessity. As put by the AG, "a measure which has a causal connection with the objective it pursues, and to which there is no less restrictive alternative, must subsequently be assessed in the light of the criterion of proportionality between the obstacle introduced and the objective pursued and/or the result actually achieved thereby". [187] Here, the conclusion to which we are inescapably drawn is to consider the application of true proportionality as the last criterion of a comprehensive and tripartite test. It may be argued that, under the specific circumstances described above, proportionality is co-extensive from necessity and suitability.

This situation is illustrated by the *Danish bottle* case, [188] which concerned the challenge by the Commission of the Danish deposit-and-return system. This system compelled the manufacturers to market beer and soft drinks only in re-usable containers. Significantly, the producers and importers could only use containers

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[182] *Hauer, supra n.179*, para. 30. *See also Wachauf*, *supra n.179,* in which the Court stated that a measure will be legal so long as it does not constitute "a disproportionate and intolerable interference impairing the very substance of those rights".
[183] Case C-280/93 *Germany* v. *Council* [1994] ECR I-5039, para. 78.
[184] Case C-169/91 *Council of the City of in Stoke-on-Trent* [1992] ECR I-6635.
[185] *Ibid*., para. 15.
[186] AG Van Gerven, in *Gourmetterie*, *supra n.* 155*,* para. 8.
[187] *Ibid*., para. 10.
[188] Case 302/86 *Commission* v. *Denmark* [1988] ECR 4607.

approved by their National Agency for the Protection of the Environment, which had the power to approve or reject new sorts of container. Rejection resulted in the return of the non-approved containers. The Court considered that the Danish system of deposit-and-return that aimed to protect the environment constituted a mandatory requirement, which may limit the application of Article 30 (new Article 28) of the Treaty.[189] The Commission, applying the test of necessity, argued that those national rules were contrary to the principle of proportionality in so far as the aim of the protection of the environment may be achieved by means less restrictive to intra-community trade.[190] In the first place, the ECJ considered that the rules under review appeared necessary to achieve the aims pursued. Consequently, the limitation, which it imposed on the free movement of goods, could not be regarded as disproportionate.[191] Then, the ECJ turned to consider the approval and returning system in light of the objective pursued. It weighed the protection of the environment (national interest) with the free movement of goods (Community interest). Finally, the Court ruled that:

> "The system for returning non-approved containers is capable of protecting the environment and, as far as imports are concerned, affects only limited quantities of beverages compared with the quantity of beverages consumed in Denmark owing to the restrictive effect which the requirement that containers should be returnable has on imports. In those circumstances, a restriction of the quantity of products which may be marketed by importers is disproportionate to the objective pursued".[192]

Interestingly, the balancing of interests is not merely limited to the situation directly involving a free movement provision but also in connection with the principle of non-discrimination on ground of nationality. In *Pastoors*,[193] the appellant argued that the enforcement system established by the Belgian legislation, implementing EC Regulations,[194] was contrary*, inter alia*,[195] to Article 6 (new Article 12) of the EC Treaty.[196] The national rule applicable in the main proceedings impose an obligation to pay the sum of BFR 15 000, by way of security for payment of the fine and any legal costs, only on non-residents who opt for the continuation of normal criminal proceedings.[197] The Belgian government asserted that the difference of treatment could be objectively justified by considering the difficulties of investigation and enforcement in criminal proceedings.[198] The ECJ ruled that the national legislation was manifestly disproportionate, and thus prohibited by Article 6

[189] *Ibid.*, para. 9.
[190] *Ibid.,* para. 10.
[191] *Ibid.,* para. 13.
[192] *Ibid.,* para. 21.
[193] Case C-29/95 *Eckehard Pastoors* [1997] ECR I-285.
[194] Council Regulations Nos 3820/85 and 3821/85.
[195] The plaintiffs alleged also infringement of Article 6 ECHR.
[196] *Eckehard Pastoors*, *supra n.193*, para. 10.
[197] *Ibid.*, para. 25.
[198] *Ibid.,* para. 11.

of the Treaty.[199] The Community interest (that is to say to avoid discrimination on the ground of nationality) took precedence over the national interest (the need to ensure the effectiveness of criminal proceedings).[200]

b) The Flexible Application of the Proportionality Test by the ECJ

The discussion regarding the definition of the different elements composing the test of proportionality prompts a number of conclusions and further comments on the application of the test by the ECJ. First, it is important to establish a distinction between action against the institutions and the Member States. From the analysis above, it is apparent that the tests of suitability and necessity may differ. Concerning the former, we have seen that the manifestly appropriate test can replace the test of less restrictive means. As to the latter, the element involved in the balancing of interests varies according to the situation. In the second place, it should be highlighted that the ECJ does not always apply the threefold test. In this sense, the application of the test of proportionality is extremely flexible. The jurisprudence of the ECJ demonstrates that the Court might refer to only one element of the test, such as proportionality *sensu stricto*. This assertion is exemplified by the *Hauer* and *Stoke-on-Trent* cases. Also, it should be underlined that in the situation where the measure under review fails to pass the first part of the test, i.e suitability, there is no need to apply the other parts of the test as the measure will be considered disproportionate anyway.[201]

Much more often, according to the standard case-law, the ECJ resorts to two criteria of the test, i.e. suitability and necessity. For instance, in *Fromançais*, the Court stressed the dual nature of the test of proportionality by stating that, *"in order to establish whether a provision of Community law is consonant with the principle of proportionality it is necessary to establish, in the first place, whether the means it employs to achieve the aim corresponds to the importance of the aim. In the second place, whether they are necessary for the achievement"*.[202] Such a dual test has been

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[199] *Ibid.,* para. 26.

[200] *See also*, Case C-224/00 *Commission* v. *Italy* [2002] ECR I-2925, para. 29. The Court found that Article 207 of the Italian Highway Code constituted a disproportionate difference of treatment between offenders based on the place of registration of their vehicles. According to the Italian government the discrimination was essential in order to ensure an effective payment of the fines.

[201] AG Fennelly in *Tobacco Advertising Directive*, *supra n.100*, para. 149, "…the Directive is disproportionate in the wider sense of that term, in that it fails to satisfy the first of the three requirements of proportionality…"

[202] Case 66/82 *Fromançais* [1983] ECR 395, para. 8, *see also*, Case 15/83 *Denkavit* [1984] ECR 2171, para. 25, Case 137/85 *Maizena* [1987] ECR 4587, para. 15, Case 47/86 *Roquette frères* [1987] ECR 2889, para. 19, Case 291/84 *Zuckerfabrik* [1987] ECR 49, para. 46, Case C-353/99 P *Hautala* [2001], para. 28 (in relation to access to documents), Concerning the proportionality of a penalty laid down by a Regulation, *e.g.* Case C-210/00 *Käserei Champignon Hofmeister* [2002] ECR I-6453, para. 59, "…[i]t should be borne in mind that the principle of proportionality, which is one of the general principles of Community law, requires that measures implemented through Community provisions are appropriate for

used in cases involving a challenge to Community legislation[203] and measures, e.g. in order to recover unlawful aids.[204] In the same vein, the ECJ has referred to the two-pronged test when it gives guidelines to the national courts. This is true in the context of free movement. For instance, in *Monsees*,[205] the ECJ stated that, *[i]t must accordingly be determined whether the national legislation was suitable for achieving the objective of protecting the health of animals and whether it went beyond what was necessary to achieve it."*[206] Similarly, the Court in *Gebhard*, in a preliminary ruling concerning freedom of establishment, stated that "the exercise of fundamental freedoms guaranteed by the Treaty *"must be suitable for securing the attainment of the objectives which they pursue and must not go beyond what is necessary in order to attain it."*[207] Such analysis seems to be confirmed by the recent judgment in *Canal Satélite Digital*.[208] Furthermore, in the field of sex

attaining the objective pursued and must not go beyond what is necessary to achieve it". More recently, *see* Case C-11/00 *Commission* v. *ECB* [2003] ECR I-7147, para. 156, Case C-15/00 *Commission* v. *BEI* [2003] ECR I-7281, para. 162, Case 353/01 P *Mattila* [2004] n.y.r., para. 30. In the latter, the reference is implicit, since it refers to paras. 21-31 of the *Hautala* case.

[203] *Working Time*, *supra n.123*, para. 57, "[a]s regards the principle of proportionality, the Court has held that, in order to establish whether a provision of Community law complies with that principle, it must be ascertained whether the means which it employs are suitable for the purpose of achieving the desired objective and whether they do not go beyond what is necessary to achieve it (see, in particular, Case C-426/93 Germany v Council [1995] ECR I-3723, paragraph 42)". *See also* Case C-491/01 *British American Tobacco and Imperial Tobacco* [2002] ECR I-11453 para. 122.

[204] *CETM*, *supra n.30*, para. 163, "[n]ext, it must be borne in mind that the principle of proportionality requires that the measures adopted by Community institutions must not exceed what is appropriate and necessary for attaining the objective pursued; where there is a choice between several appropriate measures, the least onerous measure must be used (see, for example, Case 15/83 *Denkavit Nederland* v *Hoofdproduktschap voor Akkerbouwprodukten* [1984] ECR 2171, paragraph 25, and Case 265/87 *Schräder* v *Hauptzollamt Gronau* [1989] ECR 2237, paragraph 21)".

[205] Case C-350/97 *Monsees* [1999] ECR I-2921.

[206] *Ibid.,* para. 28.

[207] Case C-55/94 *Gebhard* [1995] ECR I-4165, para 37. *See also* Case C-19/92 *Kraus* [1993] ECR I-1663, para. 32.

[208] Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, para. 43, "[n]ational legislation which makes the marketing of apparatus, equipment, decoders or digital transmission and reception systems for television signals by satellite and the provision of related services by operators of conditional-access services subject to a prior authorisation procedure restricts both the free movement of goods and the freedom to provide services. Therefore, in order to be justified with regard to those fundamental freedoms, such legislation must pursue a public-interest objective recognised by Community law and comply with the principle of proportionality; that is to say, it must be appropriate to ensure achievement of the aim pursued and not go beyond what is necessary in order to achieve it." In the context of free movement of goods and health control, *see also* Case C-491/01 *British American Tobacco and Imperial Tobacco* [2002] ECR I-11453, para.122. In the context of estalishment, *see* Case C-153/02 *Neri* [2003] n.y.r., para.46. In the context of services, *see* Case C-243/01 *Gambelli* [2003] n.y.r., para. 65.

discrimination, the two-pronged test is clearly apparent from the *Bilka* case.[209] Similarly, in *Commission* v. *ECB,* the Court held, in the context of Community financial interests, that it must be borne in mind that the principle of proportionality, which is one of the general principles of Community law, requires that measures implemented through Community provisions should be appropriate for attaining the objective pursued and must not go beyond what is necessary in order to achieve it.[210]

Finally, some commentators argue that the application of proportionality entails a tripartite test.[211] This view is to be found and developed particularly in the Opinions of AG Van Gerven,[212] but also other Advocates General (AG Léger in *Working Time*,[213] AG Fennelly in *Tobacco Advertising Directive*).[214] However, as seen above, the ECJ rarely establishes a clear-cut distinction between the necessity and proportionality test.[215] Some cases concerned with actions against Community measures, e.g. *Fedesa*,[216] *Crispoltoni*,[217] and *Jippes,*[218] have explicitly applied the threefold reasoning. In *Crispoltoni*, the Court held that:

> "The principle of proportionality, which is one of the general principles of Community law, requires that measures adopted by Community 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,

[209] Case 170/84 *Bilka - Kaufhaus GmbH* [1986] ECR 1607, para. 36, "[i]t is for the national court, which has sole jurisdiction to make findings of fact, to determine whether and to what extent the grounds put forward by an employer to explain the adoption of a pay practice which applies independently of a worker ' s sex but in fact affects more women than men may be regarded as objectively justified economic grounds. If the national court finds that the measures chosen by bilka correspond to a real need on the part of the undertaking, are appropriate with a view to achieving the objectives pursued and are necessary to that end, the fact that the measures affect a far greater number of women than men is not sufficient to show that they constitute an infringement of Article 119".

[210] Case 11/*00 Commission* v. *ECB* [2003] ECR I-7147, para. 156.

[211] *See e.g.,* De Búrca, "The Principle of Proportionality and its Application in EC Law", YEL 1993, pp. 105 *et seq.*

[212] AG Van Gerven in Case C-159/90 *Grogan* [1991] ECR I-4605, AG Van Gerven in *Conforama*, *supra n.172*, AG Van Gerven in *Gourmetterie*, *supra n.155*, AG Mischo in *Fedesa*, *supra n.162.*

[213] AG Léger in Case C-84/94 *United Kingdom* v. *Council* [1996] ECR I-96, para. 96, "[t]he principle of proportionality ... requires that measures adopted by Community 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".

[214] AG Fennelly, in *Tobacco Advertising Directive* case, *supra n.100*, para. 147.

[215] Tridimas, *supra n.1,* at p.68.

[216] *Supra n. 162.*

[217] Joined cases C-133/93, C-300/93 and C-362/93 *Crispoltoni* [1994] ECR I-4863.

[218] Case C-189/01 *H.Jippes* [2001] ECR I-5689, para. 81.

> and the disadvantages caused must not be disproportionate to the aims pursued (see, for example, the judgment in Fedesa and Others, cited above, paragraph 13)."[219]

More recently, the tripartite test made its way into the case law of the ECJ in the field of sex discrimination law. Indeed, the judgments in *Sirdar*,[220] *Kreil*[221] and *Lommers*[222] provide illustration of such an extension of the criteria. Significantly, the test is more stringent than the twofold "*Bilka* test". In that regard, it is worth quoting the *Lommers* case:

> "Nevertheless, according to settled case-law, in determining the scope of any derogation from an individual right such as the equal treatment of men and women laid down by the Directive, due regard must be had to the principle of proportionality, which requires that derogations must remain within the limits of what is appropriate and necessary in order to achieve the aim in view and that the principle of equal treatment be reconciled as far as possible with the requirements of the aim thus pursued".[223]

According to this statement, proportionality requires the application of suitability and necessity. Furthermore, the principle of equal treatment must be reconciled as far as possible with the aim pursued. In other words, the Community objective (equal treatment) must be balanced with the national objective. Such national objectives can be national security (*Sirdar* and *Kreil*) or positive discrimination (*Lommers*). This balancing of interests constitutes the core element of proportionality *sensu stricto*. The first question which comes to my mind is whether we are going towards an "uniformitization" of the tripartite test. In that regard, it may be said that the systematic application of the tripartite test may go against the very essence of proportionality, i.e. its flexibility. At the end of the day, the fundamental questions remain. Do we need an adaptable, interchangeable, malleable principle? Or do we need an established, potent and legally certain three-pronged test? Flexibility versus effectivity? Vagueness versus rigidity? Both contenders possess intrinsic qualities and inevitable weaknesses.

To end, I return to my starting point, where I contended that the tripartite test may be compared to the German test of proportionality. Arguably, the application of a more stringent test allows a higher degree of review of the measure. This assertion seems to be tenable. According to Tridimas, the application of the test of suitability and necessity allows, to a certain extent, the Court to review the merits of the measures. This in particular permits one to consider the principle of proportionality as a potent tool of judicial review.[224] However, in the light of *Fedesa*, *Crispoltoni* and *Jippes* that involve an explicit application of the threefold test, the Community measure was not declared illegal. Conversely, in *Kreil*, the ECJ held that the national

[219] *Crispoltoni*, *supra n.217*, para. 40.
[220] Case C-273/97 *Sirdar* [1999] ECR I-7403.
[221] Case C-285/98 *Kreil* [2000] ECR I-69.
[222] Case C-476/99 *Lommers* [2002] ECR I-2891.
[223] *Ibid., Lommers,* para. 39. Similarly, *e.g. Sirdar*, para. 26, *Kreil,* para. 23.
[224] Tridimas, *supra n.1,* at pp.68-69.

measure was disproportionate.[225] A rapid conclusion to be drawn might be that the Court applies a marginal review to the Community measure, whereas the scrutiny appears more rigorous concerning national measures falling within the scope of Community law. Needless to say, such a conclusion should to be verified by analysing in more detail the ECJ standard of review through a comprehensive analysis of the doctrine and jurisprudence.

c) Application of the Proportionality Test by the ECJ and National Courts: Double Standards and Scaled Review

It seems important to establish a distinction between the measures taken by the EC institutions and the Member States. Concerning the former, an act of the institution can be challenged by using a direct action proceeding (Article 230), but also indirectly through a validity ruling by challenging the national measure implemented at the national level. In the latter, the matter is brought before the ECJ in a preliminary reference. Interestingly, the standard of review appears to be distinct. In challenging an act of the institutions, the review operated by the ECJ is marginal, i.e. the ECJ is circumscribed to determine whether the measure is manifestly unfounded. By contrast, in the challenge of a Member State act, the review is more intensive.[226] At first blush, it may be argued that the principle of proportionality is used as a tool of market integration in relation to the Member States action. This stance explains the rigorous review undertaken by the ECJ. Although the policy argument may be regarded as convincing, it is unfortunately too over-simplistic. The application of the principle of proportionality and particularly its degree of review depends on a number of elements.

In this respect, De Búrca, in 1993, has stressed the complexity of the principle of proportionality and the scaled review exercised by the ECJ according to the different factors involved. To quote the author:

> "what is important then, for an understanding of the use of the proportionality principle, is a proper articulation of the various competing interests or rights in any given case, and a proper articulation of the various factors which will lead a court to engage in the proportionality inquiry in a deferential or a rigorous manner".[227]

In the same vein, some years later, Tridimas has argued that, "[t]he Court applies the test of suitability and the test of necessity with varying degrees of strictness

[225] Conversely, in *Sirdar*, para. 31, the ECJ ruled that the national measure was not disproportionate since the Royal Marines's function is based on their interoperability.

[226] Ward, *Judicial Review and the Rights of Private Parties in EC Law,* Oxford, 2000, at p.277, "[a]pplication of the concept of proportionality will lead to diverse results depending on whether the applicant is challenging a policy choice made by a Community institution, or the restrictions of their rights through administrative action. With regard to the former, a measure will only be considered inappropriate or unnecessary to achieve its objective when it is manifestly so. With regard to the latter, it will be enough if the applicant can show that there is a less restrictive way of achieving the legitimate aim."

[227] De Búrca, "The Principle of Proportionality and its Application in EC Law", YEL 1993, pp. 105 *et seq.,* at pp.111-112.

depending on a number of factors".[228] Both authors gave a non-exhaustive list of the diverse factors influencing the review by the ECJ of the measure. Although it is tenable to determine a rather clear differentiation between the two justiciable areas (Member States measure and institutional measure), it should be borne in mind that a particular area may also be subject to scaled review.

Concerning the institutional measure, a dichotomy may be realized between the areas where the EU institutions are given wide discretionary powers and the others, e.g. involving the imposition of a fine. For instance, the EU legislature is given broad discretionary powers in the fields of economic policy (CAP, antidumping) and social policy. Those are areas where the adoption of new rules necessitates complex and technical evaluations and where the exercise of the discretionary powers involves a political appreciation and responsibility. In those cases, the review will be marginal. In this respect, in relation to CAP, the ECJ in *Crispolton*i clearly stated:

> "With regard to judicial review of compliance with the abovementioned conditions, in matters concerning the common agricultural policy the Community legislature has a discretionary power which corresponds to the political responsibilities given to it by Articles 40 to 43 of the Treaty. Consequently, the legality 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 institution is seeking to pursue".[229]

Similarly, the ECJ made clear in the context of social policy that the review is limited:

> "As to judicial review of those conditions, however, the Council must be allowed a wide discretion in an area which, as here, involves the legislature in making social policy choices and requires it to carry out complex assessments. Judicial review of the exercise of that discretion must therefore be limited to examining whether it has been vitiated by manifest error or misuse of powers, or whether the institution concerned has manifestly exceeded the limits of its discretion".[230]

In performing the review, it seems interesting to note that the ECJ carefully assesses the Community objectives at stake. In this sense, some Community objectives may appear more significant, e.g. public health or to put an end to a state of war.[231] AG Mischo in *Fedesa* stressed that, *"it should be stated that the maintenance of public health must take precedence over any other consideration. Once the Council had taken the view, in the context of its discretionary power that it could not ignore the doubts felt by many Member states, and a large proportion of public opinion, as to the harmlessness of these substances, it was entitled to impose financial sacrifices on the persons concerned".*[232]

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[228] Tridimas, *supra n.1,* at pp.76-77.
[229] *Crispoltoni, supra n.217*, para. 41. *See also*, *Fedesa, supra n.162,* para. 14.
[230] *Working Time*, *supra n.123*, paras. 57-58.
[231] Case C-84/95 *Bosphorus* [1996] ECR I-3953, Case C-177/95 *Ebony* [1997] ECR I-1111.
[232] AG Misho in *Fedesa*, *supra n.162* , para. 42.

Finally, the application of marginal review by the ECJ inevitably leads to a low level of legislative invalidation. A study in the field of CAP demonstrated the limited significance of fundamental rights (thus implying the test of proportionality) to invalidate measures of economic policy. [233] It may be said that the ECJ is not prepared to review vigorously the policy choices of the institutions.[234] However, it appears that the stance taken by the ECJ is logical and can be justified on the basis of two interrelated ideas, i.e. the effectivity of the system and the restricted (general) role of the judge in reviewing policy choices. Obviously, a judge that endeavours a vigorous review of the policy measures jeopardize the effectiveness of the system but also, more theoretically, may endanger the separation of powers between the judiciary and the legislature. Although the ECJ has been criticised for its double standard, Jacobs notably argued that this approach is understandable in order to avoid vitiating the effectiveness of the Community measure. Interestingly, such a double standard is also present in the federal systems.[235] In addition, in light of the comparative research undertaken previously, it should be highlighted that even the judiciary in a non-federal system such as France applies a marginal review of measures involving policy choices and wide discretionary powers.[236]

Von Bogdandy has argued that the ECJ lacks a sufficient basis to strongly review a policy measure. In his words, "a tight control of European legislation and broad and well-entrenched human rights positions would seriously endanger an important function of European integration, namely, of allowing for political reform where the national political systems are largely blocked. In sum, the conviction of this article is that, given the constitutional and social setting of the ECJ, human rights should not be used to move the ECJ and its case law to a position of centrality in the European political process".[237] The author rightly concluded that a radical shift in reviewing the European policy measures is not desirable.[238] In my view, the marginal review operated by the ECJ regarding EC legislation may be deemed legitimate.

By contrast, the ECJ adopts a stronger position when reviewing Member States measures. In this sense, the jurisprudence on the fundamental freedoms appears to corroborate the possibility and necessity of strict scrutiny of the Union's acts on a human rights basis. As lucidly explained by Von Bogdandy, there is a fundamental

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[233] Barents, "Recent Developments in Community Case Law in the Field of Agriculture", CMLRev.1997, pp.811-843, at p.834, "[i]n the period under review, the Court's case law confirmed once again the limited significance of fundamental rights for the protection of the individual against general and specific measures of economic policy".
[234] *Ibid.,* at p.843.
[235] Jacobs, "Recent developments on the Principle of Proportionality in European Community Law", in Ellis (eds.), *The Principle of Proportionality in the Laws of Europe,* 1999, Hart, pp.1-21, at p.21.
[236] *Infra, Part 3, Chapter 8.*
[237] Von Bogdandy, "The European Union as a Human Rights Organization? Human Rights and the Core of the European Union", CMLRev.2000, pp.1307-1338, at p.1329.
[238] *Ibid.,* at pp.1329-1330.

difference between human rights and fundamental freedoms jurisprudence. This difference lies in the fact that the ECJ applies the freedoms only if there is no secondary instrument, i.e. if the area is not harmonized.[239] As put by this commentator:

> "no decision of the Court that a national obstacle is illegal because it violates a basic freedom is written in stone, because it can be overturned through a later regulation or directive. Therefore…a decision on the basis of the four freedoms [but also competition law and gender discrimination law] does not put the issue out of the reach of the normal political process. The balance of interest is, in the end, left to the political process".[240]

Nevertheless, it is a mistake to think that the Member States measures are always subject to a uniform and strict review. The review also depends on a number of factors. It may vary according to the national context at stake. In this sense, Ellis has pondered that the ECJ, in the context of sex discrimination, adopts a deferential attitude towards social policy (social security cases[241] and part-time workers[242]) implemented by the Member States.[243] In a similar vein, in the basic freedoms context, the review varies according to the nature of the interest that the Member States raise to justify the national measure derogating from one of the freedoms. The ECJ may be more sensitive towards certain types of interests alleged by the Member States, e.g. public security, public policy or public morality,[244] and thus may adopt a more lenient or prudent approach.[245]

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[239] Case C-350/97 *Monsees* [1999] ECR I-2921, para. 24, "[b]efore considering whether there is a justification based on the protection of animals under Article 36 of the Treaty, it is first necessary to establish whether harmonising directives applied in this area. While Article 36 allows the maintenance of restrictions on the free movement of goods, justified on grounds of the protection of the health and life of animals, which constitutes a fundamental requirement recognised by Community law, recourse to Article 36 is no longer possible where Community directives provide for harmonisation of the measures necessary to achieve the specific objective which would be furthered by reliance." For the application of the reversed reasoning, *See also, Carpenter*, para. 36, "[s]ince the Directive does not govern the right of residence of members of the family of a provider of services in his Member State of origin, the answer to the question referred to the Court therefore depends on whether, in circumstances such as those in the main proceedings, a right of residence in favour of the spouse may be inferred from the principles or other rules of Community law".

[240] Von Bogdandy*, supra n.237,* at p.1327.

[241] Case 30/85 *Teuling* [1987] ECR 2497.

[242] Case C-360/90 *Bötel* [1992] ECR I-3589.

[243] Ellis, "Proportionality in European Community Sex Discrimination Law", in Ellis (eds.), *The Principle of Proportionality in the Laws of Europe*, 1999, Hart, pp.165-181, at pp.175-181.

[244] *See e.g. Grogan* [1991] and *Omega* [2004].

[245] De Búrca, "The Principle of Proportionality and its Application in EC Law", YEL 1993, 105-149, at p.147. The author listed the various factors that may influence the degree of review, i.e. matters which are outside the sphere of Community competence except in so far they affect the operation of other Community rules or which involve complex political

The final delicate issue is whether, in preliminary references cases concerning Member States measures, the domestic courts or the ECJ should apply the principle of proportionality. Indeed, in a preliminary ruling, where the principle of proportionality is invoked, the national court may appraise the compatibility of the domestic measure with Community law. Conversely, it is worth noting that the ECJ, in a preliminary ruling concerned with the validity of Community legislation, always assesses the proportionality of the legislation at stake.[246] In a general way, it may be said that this depends on the factual circumstances of the case and the nature of the matter put before the ECJ.[247]

Significantly, the ECJ has held that it does not have jurisdiction to rule on the compatibility of a national measure with Community law.[248] In other words, *"under the division of jurisdiction provided for by Article 234 EC, it is in principle the task of the national court to ensure that the principle of proportionality is duly observed"*.[249] However, in light of the standard case law, the ECJ is competent to provide the national court with all criteria for the interpretation of Community law that may enable it to determine the issue of compatibility for the purposes of the decision in the case before it.[250] It seems interesting to point out that the guidelines provided to the national court may vary in intensity. For instance, it has been considered in the light of *Familiapress*[251] that the ECJ established a *"far reaching*

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objectives (abortion, Sunday working, pornography, national security, social policy), or interests where there are no agreed standards of protection (public policy, cultural concerns), but also areas which may impose an important financial burden on the Member States (social policy).

[246] *Wachauf, supra n.179*. *See also* Case C-365/92 *Henrik Schumacher* [1993] ECR I-6071, para. 31, "[t]he answer to the fourth question is therefore that Article 9(1) of Regulation No714/89, in so far as it provides that no premium may be paid in the event of failure, even in part, to comply with the time-limit provided for in Article 11(2), is not contrary to the principle of proportionality".

[247] Tridimas, "Proportionality in Community Law: Searching for the Appropriate Standard of Scrutiny", in Ellis (eds.), *The Principle of Proportionality in the Laws of Europe,* 1999, Hart, pp.65-84, at pp.78-80. According to the doctrine (Jacobs and Tridimas), matters such as direct taxation, criminal penalties and measures restricting free trade in the area of national security are better appraised by the national courts.

[248] *Bilka, supra n.209,* para. 19.

[249] *Lommers, supra n.222,* para. 40.

[250] Case C-63/94 *Groupement National des Negociants en Pommes de Terre de Belgique (Belgapom)* [1995] ECR I-2478, para. 7. *See also Bilka*, para. 19 and *Lommers,* para. 40, "according to the Court's case-law, the Court may provide the national court with an interpretation of Community law on all such points as may enable that court to assess the compatibility of a national measure with Community law for the purposes of the judgment to be given in the case before it. In the present case, as appears from paragraph 22 of the present judgment, the national court has also raised a number of specific queries which should be answered".

[251] *See also Canal Satellite*, *supra n.208*, para. 43.

test".[252] Kapteyn and Van Themaat stress that, in the context of free movement of goods, the national courts often assess the matter. However, "*the Court of Justice sometimes makes that evaluation a merely mechanical process by clearly expressing its own assessment"*.[253]

Thus, the ECJ may provide the national court with a clear answer concerning the proportionality of the national measure. This is apparent from cases dealing with the free movement principle (*Stoke-on-Trent* or *"Sunday Trading" case*, *Schumacher*, *Alpine Investment*, *Carpenter*) and the non-discrimination principle (*Kreil*, *Sirdar*, *Pastoors*). Obviously, the ECJ will either deem the measure disproportionate (*Sunday Trading*, *Schumacher*, *Carpenter*, *Kreil*) or proportionate (*Sirdar*, *Alpine Investment*). Such an assessment may be seen as a method to ensure uniform application of Community law.[254] In effect, some disparities may appear not only between the national courts of a particular Member State,[255] but also between the courts of the Member States. Be that as it may, there is no clear demarcation line deciding whether or not the proportionality of the national measure should be tested by the ECJ or the national court. In this sense, according to Jacobs, *"there are cases where it may be wise for the Court to leave the issue to the national courts…Where however the Court is in possession of the necessary facts (and has the necessary technical expertise) it may be preferable for the Court to make the ultimate assessment itself. Once again, it may be difficult always to draw the dividing line in the right place"*.[256]

Rather strong criticism, in the light of *Sirdar* and *Kreil,* has been launched concerning the intervention of the ECJ in order to assess the proportionality of a

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[252] Van Gerven, "The Effect of Proportionality on the Actions of Member States of the European Community: National Viewpoints from Continental Law", in Ellis (eds.), *The Principle of Proportionality in the Laws of Europe,* 1999, Hart, pp.37-63, at p.42.

[253] Kapteyn and Van Themaat, *supra n.4.*

[254] AG Van Gerven in *Conforama*, *supra n.172*, para. 7, "… the Commission argues that the assessment of the need for and proportionality of specific legislation cannot be left to the national courts, and the arguments which it advances in support of that view are in my opinion persuasive. Admittedly, it is not for the Court to rule in proceedings under Article 177 of the Treaty on the validity of national legislation nevertheless the Court has always emphasized that, in the interest of the co-operation with the national judicial authorities which that provision envisages, it is empowered to set out the elements of Community law which will enable the national court to give judgment on the dispute before it in accordance with the rules of Community law. Only in that way is it possible to safeguard the main purpose of the preliminary ruling procedure, namely to ensure the uniform application in the Community of the provisions of Community law in order to prevent their effects from varying according to the interpretation given to them in the different Member States…in the present cases, the need for precise criteria is admittedly not so great since, following the judgment in B & Q, the issue can easily be resolved. Nevertheless, even in clear-cut cases it is still necessary to set the solution in a general context. Otherwise there is a risk of creating an obscure line of cases of little assistance to the national courts".

[255] *Sunday Tradings*, *supra n.184.*

[256] Jacobs, *supra n.1*, pp.1-21, at p.20.

national measure.[257] In this sense, Canor has argued that maximum discretion should be given to the national courts.[258] The role of the ECJ should be limited to giving clear guidelines to the domestic jurisdiction.[259] In the words of the author, *"in the long run, the ECJ should let the pendulum swing towards national courts and limit its own actions, so that it will take only small steps concerning the protection of human rights which do not offend the judiciary within the national legal systems"*.[260] However, as stressed by the same author,[261] but also by Tridimas,[262] such an approach is not without drawbacks. Indeed, it could be argued that such a stance creates some disparities in the application of Community law. Further, it goes against the very purpose of Article 234, which is to ensure the uniform application of Community law. Canor has also considered that such a policy is the correct one in order to ensure a proper balance between uniform application and autonomy of the Member States.[263] One may disagree with such an analysis. Particularly, in the present state of the application of the principle of proportionality, it may be a risky business to confer a wide discretion to the national court. In this sense, Jans has emphasized that the third part of the test of proportionality (proportionality *stricto sensu*) may lead to great difficulties of interpretation as to the level of protection, which should apply in the Community.[264] This test should be realised by the ECJ and not the national courts.

On the one hand, it seems safe to argue that the ECJ should carry on the test of proportionality whenever it has the relevant facts in its hands.[265] This solution appears to be the most effective in order to ensure a uniform application of Community law and helps avoid situations such as the *Sunday Trading* saga. On the other hand, it cannot be ruled out that the national courts are sometimes better placed than the ECJ to apply the principle of proportionality. In such cases, the ECJ should leave the issue decided by the domestic jurisdiction. Accordingly, it has been

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[257] Canor, "Harmonizing the European Community's Standard of Judicial Review", EPL 2002, pp. 135-166, at p.159. According to Canor, the ECJ used these cases in order to lay down the foundation of a harmonized judicial review of proportionality at the domestic level. We might disagree since if that was the case, the ECJ would certainly have resort to a very clear and stringent test of proportionality.

[258] *Ibid.,* at pp.164-165. Canor argued for a wide margin of national discretion to the national court. The margin given to the national courts can be a flexible instrument in the hands of the ECJ, shifting from a margin, a certain margin or a wide margin.

[259] *Ibid.,* at p.160, "[t]he ECJ should, as a rule, refer the proportionality question back to the national court, while providing the national courts with guidance as to what considerations should be taken into account and leaving enough leeway for the national authorities to find the appropriate measures which should be adopted for achieving the aim."

[260] *Ibid.,* at p.162.

[261] *Ibid.,* at p.166.

[262] Tridimas, *supra n.1*, at p.79.

[263] Canor, *supra n.257.*

[264] Jans, *supra n.1. See also* Snell, "True Proportionality and Free movement of Goods and Services", EBLR 2000, pp.50-75.

[265] *Ibid.,* Jans, at p.255.

argued that the ECJ has been generally consistent in its approach.[266] It should be stressed that the result of the principle's application by the national courts highly depends on the attitude of the ECJ in providing tidy guidelines.

4.2. THE PRINCIPLE OF EQUALITY

The concept of equality has been the object of a wide doctrinal debate.[267] On a theoretical level, the concept of equality may be divided into two models, i.e., on the one hand, the model of procedural or formal equality and, on the other hand, the model of substantive equality. The *modus operandi* of these two models is fundamental in order to understand the evolution of the concept in the European legal order. As to the former, it entails that "things that are alike should be treated alike".[268] It requests equality before the law and the need of a comparator. Put bluntly, it is for the judiciary to redress the inequalities on a case-by-case basis. In this sense, this model appears as "reactive". In other words, it intervenes *ex post facto* and subsequently does not prevent the discrimination. For instance, in relation to gender discrimination, it is often linked to the concept of "equality of opportunities". As to the latter, it corresponds to a more proactive stance. Equality appears as a societal goal. It concerns the content of the law. For instance, in relation to gender discrimination it is often linked to the question of "equality of results", i.e. in order to overcome barriers that are historical or those that arise from male domination in the system, women and men may need to be treated differently through the recourse to positive action. This section analyses the general principle of equality in the light of procedural and substantive equality.[269] First, equality is analysed as a general principle of Community law (4.2.1), second, as an administrative principle (4.2.2), and third, as a fundamental right (4.2.3). It is worth noting that this section does not focus on the jurisprudence regarding Article 12 EC and the related concept of citizenship.[270]

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[266] Tridimas, *supra n. 1,* at p.80.

[267] *See e.g.* Bell, "Anti-Discrimination Law and the European Union", Oxford, 2002, Dashwood and O'Leary, "The Principle of Equality Treatment in EC law", Sweet and Maxwell, 1997, Lenaerts, "L'égalité de traitement en droit communautaire: un principe unique aux apparences multiples", CDE 1991, pp.3-41. Barbera, "Not the same? The Judicial Role in the New Community Law Context", ILJ 2002, pp.82-91, Barnard, "The Principle of Equality in the Community Context: P, Grant, Kalanke and Marshall: Four Uneasy Bed fellows?", CLJ 1998, pp. 352-373, and Fenwick, "From Formal to Substantive Equality: The Place of Affirmative Action in EU Sex Equality Law", EPL 1998, pp.507-516.

[268] Barnard, "Gender Equality in the EU: A Balance Sheet", in *The EU and Human Rights*, pp.216-279, at pp.223-224.

[269] In other words, can one say that the system is more procedural or substantive? Are we going towards a more substantive model? In a similar vein, can one define equality as a free-standing human right? (*Ibid,* Barnard, at p.232). Is their any "fundamentalization" of the principle of equality? Is equality merely a market unifier principle?

[270] This is to be found instead in *Part 2, Chapter 6*, below.

4.2.1. Equality as a General Principle of Community law

Generally and according to the settled case law, the principle of equality permits to prevent similar situations from being treated differently, but also different situations from being treated similarly, unless the difference of treatment is objectively justified.[271] In contrast to unwritten fundamental rights, the principle of non-discrimination appears explicitly in the provisions of the Treaty, *e.g.* Article 12 [ex Article 6] (discrimination on grounds of nationality),[272] Article 34(2) [ex Article 40(3)] (CAP),[273] Article 39 [ex Article 48] (free movement of workers), Article 90 [ex Article 95] (taxation),[274] and Article 141 [ex Article 119] (sex discrimination).[275] Further, it may be said that the principle of non-discrimination based on nationality is implicit in certain free movement provisions, e.g. Article 28 [ex Article 30] (free movement of goods), Article 43 [ex Article 52] (freedom of establishment), Article 49 [ex Article 59] (free movement of services).

In light of the foregoing, one may discern the different areas in which the principle of equality applies, i.e. free movement, CAP and taxation.[276] However, it also applies where there is an arbitrary unequal treatment in an area of Community competence, e.g. staff cases.[277] It ought to be noted that two general provisions are based on discrimination on grounds of nationality (Article 12 EC, national approach to equality) and of gender (Article 141 EC, gender approach to equality).[278] These

[271] Joined Cases 117/76 & 16/77 *Ruckdeschel* [1977] 1753, para. 7. For "different situations", *see* Case 106/83 *Sermide* [1984] ECR 4209, para. 28.

[272] Case 293/83 *Gravier* [1985] ECR 593, Case 24/86 *Blaizot* [1988] ECR 379, Case 186/87 *Cowan* [1989] ECR I-4661, C-47/93 *Commission* v. *Belgium* [1994] ECR I-1593, Case C-43/95 *Data Delecta Aktiebolag* [1996] ECR I-4661.

[273] Cases 103 and 145/77 *Royal Scholten Honig* [1978] ECR 2037, Case 165/84 *Krohn* [1985] ECR 3997, Case C-309/89 *Codorniu* v. *Council* [1994] ECR I-1853, and Case C-280/93 *Germany* v. *Council* [1994] ECR I-4973.

[274] Case 168/78 *Commission* v France [1980] ECR 347, Case 112/84 *Humblot* [1985] ECR 1367, Case C-279/93 *Schumacker* [1995] ECR I-225, and Case C-80/94 *Wielockx* [1995] ECR I-2493.

[275] Case 149/77 *Defrenne* [1978] ECR 1364, Case C-450/93 *Kalanke* [1995] ECR I-3051, Case C-237/97 *Sirdar* [1999] ECR I-7403, Case C-285/98 *Kreil* [2000] ECR I-69.

[276] *See e.g.,* Bernard, "Discrimination and Free Movement in EC Law", ICLQ 1996, pp-82-108, Hilson, "Discrimination in Community Free Movement Law", ELR 1999, pp.445-462, and O'Leary, "The Free Movement of Persons and Services", in Craig and de Búrca, *The Evolution of EU Law*, Oxford, 1999, pp. 377-414, at pp.399-40.

[277] Cases 75 and 117/82 *Razzouk and Beydoun* v. *Commission* [1984] ECR 1509.

[278] Barnard, "Gender Equality in the EU: A Balance Sheet", in *The EU and Human Rights*, pp.216-279, Denys, "Homosexuality: A Non-Issue in Community Law", ELR 1999, pp.419-425, Ellis, "Recent Development In European Community Sex Equality Law", CMLRev.1998, pp.379 et seq., Ellis, "The Recent Jurisprudence of The Court of Justice in the Field of Sex Equality", CMLRev.2000, pp 1403-1426, Ellis, "The Concept of Proportionality in European Community Sex Discrimination Law", in Ellis (eds.), *The Principle of Proportionality in the Laws of Europe,* Oxford, 1999, pp.165-181, Koutrakos, "Community Law and Equal Treatment in the Armed Forces", ELR 2000, pp. 433-442, and Mancini and

provisions are general in the sense that they may spill over into different fields of Community law without touching a specific area or policy. Concerning Article 12 EC, the case law has often linked it conscientiously to the free movement provisions. However, the recent jurisprudential development makes it a self-standing provision.

In light of the fact that it is unwritten in certain areas and covers various fields of EC law, it is not so surprising that the ECJ stated that the written principle as enshrined in Article 40(3) constituted *"merely a specific enunciation of a general principle of equality which is one of the fundamental principles of Community law"*.[279] Interestingly, the recognition by the Court of a general principle of Community law paves the way for an extension of its scope. In other words, it appears possible to fill the gaps of the legislature. In this sense, the scope of equality may be extended, through jurisprudence and despite the restrictive wording of Article 141 EC, to protect sexual minorities.[280] Next, certain areas of Community law are obviously more propitious to the development of the principle, e.g. staff cases.[281] Also, it is worth noticing that, just like the principle of proportionality, the principle of equality may be binding not only on the acts of the institutions but also on the measures taken by the Member States. For instance, in connection with the CAP, the principle of equality is used both as an "institutional principle" and "federal" principle.[282] Conversely, Article 12 EC only applies in relation to the Member States.

Arguably, the EC law concept of discrimination is generally marked by a comparably situated approach to equality. In that regard, the *Pfizer* case (free movement of goods)[283] offers an interesting example. In 1970, a Directive 70/524/EEC was adopted concerning additives in feed stuffs. More precisely, this Directive laid down the Community rules applying to the authorisation, and withdrawal of authorisation, of additives for incorporation in feed stuffs. Virginiamycin was authorised as an additive in feed stuffs for certain poultry and pigs when the Directive entered into force and was included in Annex I to that Directive. However, Regulation No 2821/98, withdrew the authorisation of certain additives in feed stuffs, *inter alia*, virginiamycin. Notably, when the contested regulation was adopted, Pfizer was the only producer in the world of "Stafac", which is the trade name for virginiamycin. Pfizer argued that the Regulation violated the principle of non-discrimination since other antibiotics, some of which may be

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O'Leary, "The New Frontiers of Sex Equality Laws in the European Union", ELR 1999, pp.331-353.

[279] Cases 201 & 202/85 *Klensch* [1986] ECR 3477, para. 9.

[280] *See*, *P* v. *S* [1996], *infra.*

[281] Case 20/ 71 *Sabbatini* v. *Parliament* [1972] ECR 345, Case 21/74 *Airola* v. *Commission* [1975] ECR 221, Case 75 and 117/82 *Razzouk* and *Beydoun* [1984] ECR 1509, Case C-37/89 *Weiser* [1990] ECR I-2395, Case C-122/99 *D* v. *Council* [2001] ECR I-4319.

[282] Cases 201 and 202/85 *Klensch* v. *Luxembourg Secretary of state for Agriculture* [1986] ECR 3477.

[283] Case T-13/99 *Pfizer Animal Health SA* [2002] ECR II-3305.

used in veterinary or perhaps even human medicine, were not banned.[284] The CFI observed that:

> "the principle of non-discrimination, which constitutes a fundamental principle of law, prohibits comparable situations from being treated differently or different situations from being treated in the same way, unless such difference in treatment is objectively justified (see, for instance, Case C-174/89 *Hoche* [1990] ECR I-2681, paragraph 25; Case C-354/95 *National Farmers' Union and Others* [1997] ECR I-4559, paragraph 61; the *BSE* judgment, cited at paragraph 114 above, paragraph 114; and Case 203/86 *Spain* v *Council* [1988] ECR 4563, paragraph 25)".[285]

The CFI noted that the aim of the Regulation was to withdraw from the market antibiotics which are used not only as growth promoters but also in human medicine or which are known to select cross-resistance with antibiotics used in human medicine. In this respect, it observed that the antibiotics still available on the market do not belong to either of those categories. Finally, it concluded that Pfizer had not established that the position of virginiamycin was comparable to that of other antibiotics, and held that the principle of non-discrimination was not breached by the Regulation.[286]

Further, it is worth distinguishing two sub-concepts of the concept of discrimination, i.e. direct and indirect discrimination. As to the former, it concerns *de jure* discrimination, e.g. national legislation that reserves exclusively and explicitly an occupation for its own nationals or legislation that prohibits women from having access to a particular type of job. As to the latter, it concerns *de facto* discrimination. The discrimination does not appear in law, but its effect is discriminatory. The most common example can be found in relation to gender equality and part time workers (part time workers are paid less than full time workers, and statistically most of the part time workers are women) or in relation to national discrimination and languages/studies clauses (a home state language or diploma requirement indirectly discriminates foreigners). The interest of the distinction lies in the grounds for justifying the discriminatory treatment. In the first place, a direct discrimination is subject to a fairly limited number of exhaustive and statutory exceptions, which are found either in primary law or secondary legislation, e.g. Article 30 EC, public services exception in relation to nationality (39(4)), or exception in relation to gender (Article 2 of Directive 76/207 CEE). Being an exception from Community law, these limitations are interpreted restrictively. In the second place, indirect discrimination may be justified on a variety of non-exhaustive grounds. This is the so-called "objective justification" (e.g. enforcement of judgment, prevention of fraud or consumer policy). Interestingly, the term "mandatory requirement" used in the context of the free movement of goods corresponds to the concept of objective justification. Indirect discrimination can either be deliberate or unintentional. In the case of (proved) deliberate

[284] *Ibid.*, para. 477.
[285] *Ibid.*, para. 478.
[286] *Ibid.,* paras. 482-484.

discrimination, it may be said that the ECJ will be harsher in interpreting the tangibility of the given justification.

In addition, the concept of reverse discrimination, i.e. discrimination by a Member State of its own nationals, is important. Strictly defined, it signifies that a Member State discriminates its own nationals against foreigners. In that sense, this type of discrimination is not forbidden under Community law.[287] However, more leniently defined, one may distinguish between free movement of goods/services and free movement of persons. Concerning the latter, the ECJ has invalidated legislation that discriminates against the State's own nationals. Importantly, this legislation did not discriminate on the basis of nationality. For instance, in the *Kraus* case,[288] the German national legislation obliged the holder of a foreign diploma to seek authorization before using the German title. Dieter Kraus, a German national, who obtained a LLM from Scotland, was thus the subject of discriminatory treatment though not on the ground of his nationality. The Court ruled that the domestic measure was contrary to Community law. The reasoning of the ECJ is based on the fact that Dieter Kraus had exercised his freedom of movement. Also, it can be considered that the German legislation is indirectly discriminatory towards nationals from other States.

More recently, the Court of Justice in *Doris Kaske*[289] dealt with a similar issue. In the main proceedings, Ms Kaske (an Austrian national since 1968 and prior German national) brought an action against a decision of the regional bureau of the Vienna Labour and Employment Office rejecting her application for unemployment benefits on the ground*, inter alia,* that she had neither resided in Austria for 15 years, nor moved to Austria for the purpose of reuniting a family (Article 14(5) of the Law on unemployment insurance). More precisely, this Article provided that the application for unemployment benefit did not necessarily need to be made in the last State where the worker completed a period of insurance or employment, but could be made in Austria in two situations, i.e. a stay of at least 15 years in Austria or unification of the family. The Austrian Court (*Verwaltungsgerichtshof*) asked for a preliminary ruling. One of the main questions at stake was to determine whether the national provision was compatible with the principle of non-discrimination enshrined in Article 48 [new Article 39] of the Treaty. The Court of Justice considered that:

> "It is settled case-law that Community law does not preclude more favourable rules under national law than those under Community law itself provided that such rules are compatible with Community law (see Case 34/69 *Duffy* [1969] ECR 597, paragraph 9; Case 100/78 *Rossi* [1979] ECR 831, paragraph 14; Case 733/79 *Laterza* [1980] ECR 1915, paragraph 8; Case 807/79 *Gravina and Others* [1980]

[287] Case 98/86 *Mathot* [1987] ECR 27
[288] Case C-19/92 *Kraus* [1993] ECR I-1663
[289] Case C-277/99 *Doris Kaske* [2002] ECR I-2161.

> ECR 2205, paragraph 7; *Rönfeldt*, cited above, paragraph 26, and Case C-370/90 *Singh* [1992] ECR I-4265, paragraph 23)".[290]

However, it held that the domestic legislation constituted a restriction on the right to freedom of movement and should be regarded as discriminatory on grounds of nationality. Consequently, the Court ruled that a Member State that favours workers who spent 15 years in that Member State before their last employment abroad is acting in violation of the principle of equality laid down in Article 48 [new Article 39] of the Treaty.[291]

4.2.2. Equality as an Administrative Principle

The general principle of equality is often described as a dual concept. In that regard, an author lucidly described the evolution of the principle of equal treatment from a market unifier to a fundamental right.[292] Also, it should be borne in mind that, in both contexts, the principle of proportionality is closely connected with equality. In the first place, the principle of non-discrimination may appear as an administrative principle in the free movement context (Articles 39, 43 and 49-50 [ex Articles 48, 52 and 59-60]), in the CAP (Article 34(2) [ex Article 40(3)]) and concerning taxation (Article 90 [ex Article 95]). The link with the proportionality principle arises particularly in relation to indirect discrimination. The Court has consistently held that the rules of equal treatment prohibit not only overt discrimination based on nationality, but also all covert forms of discrimination which, by applying other distinguishing criteria, achieve in practice the same result.[293] As seen above, it is well known that discrimination may be subjected to statutory exceptions (e.g. Article 30 and 39(4)[294]) or that indirect discrimination may be justified on objective grounds. Thus, the Court has recourse to the principle of proportionality in order to determine whether the justifications are objective (proportionate) or not. For instance, the Community legislature in the exercise of its discretionary powers may treat situations differently if this is objectively justified.[295] According to the Court, *"the fact that a measure adopted within the framework of the common organization of a market may affect producers in different ways, depending on the particular nature of their production, does not constitute discrimination if that measure is*

[290] *Ibid.,* para. 37.
[291] *Ibid.,* paras. 38-39.
[292] More, "The Principle of Equal Treatment: From Market Unifier to Fundamental Right?", in Craig and De Búrca, *The Evolution of EU Law*, pp.517-553.
[293] Case C-266/95 *Merino Garcoa* [1997] ECR I-3279, para. 33.
[294] The so-called public service exception, "[t]he provisions of this Article shall not apply to provision in the public service". Being an exception, this provision has been interpreted narrowly. *See e.g.* C-293/99 *Commission* v. *Italy* [2001] ECR I-4363. This case concerned the domestic nationality criterion for school teachers. Such a requirement was considered as falling outside the scope of Article 39(4).
[295] Case C-120/92 *Friedrich Schulz* [1993] ECR I-6902, para. 18.

determined on the basis of objectives rules, which are formulated to meet the needs of the general common organization of the market".[296]
In the free movement context, the Austrian government, in *Clean Car*,[297] argued that the residence requirement for appointing a manager was necessary in order to ensure the effective enforcement of fines on the undertaking,[298] but the Court considered that the national measure was not objectively justified and thus indirectly discriminatory.[299]

The Treaty provisions on agriculture immediately follow those on the free movement of goods. The Articles focus on determining the objectives and means of the CAP. In this sense, Article 34 [ex Article 40] states that a common organisation of agricultural markets shall be established. This organisation shall be limited to the objectives contained in Article 33 and shall not discriminate. More specifically, Article 34(2) [ex Article 40(3)] provides expressly that common organisation "shall exclude any discrimination between producers or consumers within the Community". This sentence has been interpreted by the Court as concerning discrimination between producers or between consumers and not related to discrimination of producers over consumers and *vice versa*.[300] As stated previously, the principle of discrimination set out in this provision constitutes a specific enunciation of the general principle of equality.[301] Subsequently, it may be relied on both against the acts of the institutions and of the Member States. As to the former example, the *Walter Rau* and *Germany* v *Council* ("Banana") cases offer good exemplification.

In *Walter Rau* ("Christmas butter case"), the Community sold surplus butter from its stocks at reduced prices on the basis of the "Christmas butter" scheme. Margarine producers alleged, *inter alia*, a breach of the principle of non-discrimination. The applicant argued that the contested scheme led to unjustified discrimination between milk and margarine producers.[302] The ECJ considered that the principle of non-discrimination enshrined in Article 40(3) clearly applied. Indeed, butter and margarine are both covered by the CAP and compete with each other.[303] However, the ECJ underlined that "according to a settled case law the prohibition of discrimination laid down in the second subparagraph of Article 40(3) of the Treaty, as a specific expression of the general principle of equality, does not prevent comparable situations from being treated differently if such a difference in

[296] *Crispoltoni, supra*, para. 52.
[297] Case C-359/96 *Clean Car Autoservice Gmbh* [1998] ECR I-2521. *See supra*., *Chapter 4.1*. for a more comprehensive analysis of this case.
[298] *Ibid.,* para. 33.
[299] *Ibid.,* para. 38.
[300] Case 5/73 *Balkan* [1973] ECR 1091.
[301] Cases 117/76 and 16/77 *Ruckdeschel* [1977] ECR 1753, Case C-177/90 *Kuehn* [1992] ECR I-35, para. 18, Case C-98/91 *Herbrink* [1994] ECR I-223, para. 27, "*Banana* case", para. 67, Case 137/00 *NationalFarmer's Union* [2003] ECR I-7975, para.126.
[302] Case 261/81 *Walter Rau* [1982] ECR-3961, para. 26.
[303] *Ibid.,* para. 27.

treatment is objectively justified".[304] In that regard, the ECJ noted that three objective differences between the milk and margarine markets could be established:

- The milk market was conceived in a very special context having regard to the importance of this market in the Community.
- The products in their respective market organisation are entirely different, i.e margarine does not play a comparable role in the market in oils and fats.
- The market in oils and fats is not affected by problems comparable to those affecting the market in milk products.[305]

Finally, the ECJ ruled that the Christmas butter scheme, which is part of the very functioning of the common organisation of the market in milk products, cannot be regarded as giving rise to discrimination against producers of margarine".[306] It appears from this case law that the reasoning of the Court is three-fold. First, the Court will assess whether the two products are in a comparable situation. Second, in the light of the positive answer to the first question, it will be assessed whether there is a difference of treatment. Third, it will consider whether this difference of treatment can be objectively justified by the institutions.

Importantly, it should be noted that the application of the principle of equality is conditioned by the use of objective justification. The Community institutions are given wide discretionary powers in order to ensure the proper functioning of the CAP. In other words, the predominant objective of market integration permits an ample difference in treatment between the various operators. In this respect, Barents has argued that, "the basic elements of the CAP have been rendered immune from review in the light of the equality principle".[307] Indeed, it may be safely argued that the ECJ is not ready to challenge fundamental policy choices.[308] Such an assessment seems to be confirmed by the *"Banana* cases*"*.[309]

As to the *Banana case*, the Council Regulation No 404/93 established a common organization of the market regarding bananas.[310] It replaced thus the existing various domestic markets. The applicant challenged this Regulation in the light of, *inter alia*, [311] the principle of equal treatment, and argued that the

[304] *Ibid*., para. 28. *See also* Joined Cases 201/85 and 202/85 *Klensch* [1986] ECR 3477, para. 9.
[305] *Ibid.,* paras. 29-31.
[306] *Ibid.,* para. 32.
[307] Barents, "Recent Development in Community Case-Law in the Field of Agriculture", CMLRev.1999, pp.811-843, at p.841.
[308] *Ibid,* at p.843.
[309] Case C-280/93 *Germany* v. *Council* [1994] ECR I-5039, Case C-122/95 *Germany* v. *Council* [1998] ECR I-98, Case C-364 & 365/95 *T-port GmbH* [1998] ECR I-1028. *See also*, Everling, "Will Europe Slip on Bananas? The Bananas judgement of the Court of Justice and National Courts", CMLRev.1996, pp. 401-437.
[310] *Ibid.*, *Germany* v. *Council.*
[311] *Ibid.,* para. 64, "[t]he Federal Republic of Germany argues that the subdivision of the tariff quota constitutes unjustified discrimination against traders in third-country bananas. The loss

subdivision of the tariff quota in favour of importers of Community and/or traditional ACP bananas in fact corresponds to a transfer to them of 30% of the market share. Consequently, the subdivision to the detriment of the class of operators trading in third-country bananas, without any justification, constitutes a breach of the principle of non-discrimination.[312]

The Court underlined that, under the second subparagraph of Article 40 (3) of the Treaty, the common organization of agricultural markets to be established within the framework of the common agricultural policy must "exclude any discrimination between producers or consumers within the Community". As seen above, it went on to say that it is settled law that the prohibition of discrimination laid down in that provision is only a specific expression of the general principle of equality that is one of the fundamental principles of Community law.[313] This principle requires that comparable situations are not treated in a different manner unless the difference in treatment is objectively justified.[314]

As emphasized in the *Walter Rau* case, the ECJ followed a tripartite reasoning. Firstly, it interestingly stressed that because of the general nature of the principle of non-discrimination, it also applies to other categories of economic operators who are subject to a common organization of a market.[315] Indeed, the common organization of the market for the banana sector covers economic operators who are neither producers nor consumers.

Secondly, the Court examined whether the Regulation at stake treated comparable situations differently. It found that, "since the Regulation came into force those categories of economic operators have been affected differently by the measures adopted. Operators traditionally essentially supplied by third-country bananas now find their import possibilities restricted, whereas those formerly obliged to market essentially Community and ACP bananas may now import specified quantities of third-country bananas".[316]

Thirdly, it verified whether objective justifications could be used. In this respect, it held that:

> "such a difference in treatment appears to be inherent in the objective of integrating previously compartmentalized markets, bearing in mind the different situations of the various categories of economic operators before the establishment of the

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of market shares suffered by those operators constitutes an infringement of their right to property, their freedom to pursue their trade or business and their acquired rights. The introduction of the tariff quota is contrary to the principle of proportionality, both as regards the formula for allocating the quota and the prohibitive rate for imports over and above the quota, given that a system of direct aid to producers would have sufficed to ensure the disposal of Community and ACP production".

[312] *Ibid.,* para. 65.

[313] *Ibid.,* para. 67. Citing Case C-177/90 *Kuehn* [1992] ECR I-35, para. 18, Case C-98/91 *Herbrink* [1994] ECR I-223, para. 27.

[314] *See* Joined Cases 201/85 and 202/85 *Klensch* [1986] ECR 3477, para. 9.

[315] *"Banana case", supra n.309*, para. 68

[316] *Ibid.,* para. 73.

> common organization of the market. The Regulation is intended to ensure the disposal of Community production and traditional ACP production, which entails the striking of a balance between the two categories of economic operators in question".[317]

Finally, it rejected the allegation of the applicant regarding the breach of the principle of non-discrimination.[318] It is worth noting that the Court expressly referred to and acknowledged mere policy grounds, i.e. the objectives of achieving the CAP, in order to justify the unequal treatment.

At the end of the day, it may be said that the CAP is quasi-immune from judicial review. Indeed, the CAP is an area where the Community institutions have wide discretionary powers. Consequently, a Community measure is annulled if and only if the objective justifications for it are manifestly disproportionate. In the seventies, the ECJ annulled a series of Community acts on the basis of the principle of equality. For instance in the *Isoglucose* case, [319] the ECJ found an unequal treatment between isoglucose and sugar producers. One year earlier, it held that a difference of treatment between quellmehl and starch producers was discriminatory.[320] More recently,[321] in *Codorniu*, a Spanish company, using the trade mark "Gran Cremant de Codorniu", since 1924, challenged a Council Regulation protecting the term "crémant" to sparkling wines produced in France and Luxembourg. The ECJ found that the Regulation treated similar situations differently and could not be objectively justified. Consequently, it was held that the Community measure was in breach of, *inter alia*, Article 40(3) [new Article 34(2)] EC.

Finally, it should be remarked that the principle of equality does not apply merely against the Community measure, but also in connection with the acts of the Member States. This situation is illustrated by the *Klensch* and *Mulligan* cases. In *Klensch*,[322] the ECJ had to answer the question whether the prohibition of discrimination laid down in Article 40 (3) of the EEC Treaty precludes a Member State from choosing 1981 as the reference year if the implementation of that option in its territory leads to discrimination between producers in the Community.[323] The Court analyzed the scope of the principle of non-discrimination as enshrined in Article 40(3) EEC.[324] It underlined that the principle "is merely a specific

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[317] *Ibid.,* para. 74.
[318] *Ibid.,* para. 75.
[319] Joined Cases 103 and 145/77 *Royal Scholten-Honig* [1978] ECR 2037. For comments, *see* Usher, *General Priciples of EC Law,* Longman, 1998, at pp. 33-35, and Tridimas, *The General Principles of EC Law*, Oxford, 1999, at pp.49-51.
[320] Joined Cases 117/76 and 16/77 *Ruckdeschel* [1977] ECR 1753.
[321] Case C-309/89 *Codorniu* v. *Council* [1994] ECR I.1853.
[322] Cases 201 & 202/85 *Klensch* [1986] ECR 3477.
[323] *Ibid.*, para. 6.
[324] *Ibid.*, para. 8, "[u]nder Article 40 (3) of the EEC Treaty the common organization of the agricultural markets to be established in the context of the common agricultural policy must exclude any discrimination between producers or consumers within the Community. That

enunciation of the general principle of equality which is one of the fundamental principles of Community law".[325] The Court ruled that when the provisions of a Regulation leave it open to Member States to choose between various options of implementation, they must respect the principle of non-discrimination. This general principle is binding on the Member States as it covers all measures relating to the common organization of agricultural markets. Thus, the said principle is binding on the Member States when they are implementing a Regulation, which leaves the choice of implementation up to the Member States.[326]

This case was explicitly confirmed in the *Mulligan* judgment.[327] Four farmers in Ireland brought an action before the Irish High Court seeking judicial review of a Ministerial decision. The validity of the decision was challenged on the ground that in the case of the sale or lease of a dairy holding to which a milk quota is attached, part of the milk quota is added to the national reserve by means of a clawback measure. As a result of the application of the 20% clawback, Mr Mulligan's holding was sold to Mr O'Sullivan for a sum less than its real value. [328] The High Court of Ireland referred for preliminary ruling a question concerning the interpretation of Council Regulation (EEC) No 3950/92, establishing an additional levy in the milk and milk products sector. The Court, citing Klensch,[329] stressed that it is settled case-law that where Community rules leave Member States to choose between various methods of implementation, the Member States must exercise their discretion in compliance with the general principles of Community law.[330] It then held that:

> "…a clawback measure such as that at issue in the main proceedings must be established and applied in compliance with the principles of legal certainty and protection of legitimate expectations (see, to that effect, in particular Case C-63/93 *Duff and Others* [1996] ECR I-569, paragraph 34). Moreover, it must be proportionate to the aim pursued (see, to that effect, in particular Case C-22/94 *Irish Farmers Association and Others* [1997] ECR I-1809, paragraphs 30 and 31) and applied without discrimination (see, to that effect, in particular *Klensch and Others,* paragraph 8). Similarly, such a measure must respect fundamental rights, such as the right to property (see, to that effect, in particular Case C-2/92 *Bostock* [1994] ECR I-955, paragraphs 16 and 20) and the freedom to pursue a trade or profession

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provision covers all measures relating to the common organization of agricultural markets, irrespective of the authority which lays them down. Consequently, it is also binding on the Member States when they are implementing the said common organization of the markets."

[325] *Ibid.,* para. 9.

[326] *Ibid.,* para. 10, "[c]onsequently, where Community rules leave Member States to choose between various methods of implementation, the Member States must comply with the principle stated in Article 40 (3). That principle applies, for instance, where several options are open to the Member States as in this case, where they may choose as the reference year 1981, or, subject to certain conditions, either 1982 or 1983."

[327] Case C-313/99 *Gerard Mulligan* [2002] ECR I-5719.

[328] *Ibid.,* para. 13.

[329] *Klensch, supra n.322*, para. 10.

[330] *Mulligan, supra n.327,* para. 35.

(see, to that effect, in particular Joined Cases C-90/90 and C-91/90 *Neu and Others* [1991] ECR I-3617, paragraph 13)".[331]

To summarize, a clawback mechanism must be adopted and applied in accordance with the general principles of Community law such as, in particular, the principles of legal certainty and protection of legitimate expectations, proportionality, non-discrimination and respect for fundamental rights. To be complete, it is worth remarking that a Community measure may also be challenged at the national level through a preliminary ruling on validity. For instance, in *Käserei,*[332]the applicant challenged the validity of the Community measure at the national level via the penalty imposed by the national authorities. *In casu*, it concerned a preliminary ruling from the Federal Finance Court in Germany as to the validity of a Community Regulation.[333] Interestingly, in the main proceeding, Käserei Champignon Hofmeister (KCH) was imposed a penalty on the basis of the Regulation. This Regulation provided for a penalty even where, through no fault of his own, an exporter has applied for an export refund exceeding that to which he is entitled. Consequently, KCH argued that the Regulation was invalid because it infringed fundamental principles of criminal law inherent in the principle of the rule of law, i.e. the principle of *nulla poena sine culpa.*[334] In addition, KCH considered that the Regulation imposed wholesale punishment on different types of behaviour, regardless of whether it was non-culpable or characterised as simple negligence, negligence or serious negligence. In other words, it applied the same penalty to all of those types of conduct. In this sense, KCH maintained that it breached the principle of non-discrimination laid down in Article 40(3) [new Article 34(2)] of the EC Treaty. Further, KCH assessed that such a difference of treatment cannot be objectively justified either by the effort to combat fraud, which presupposes intent, or by reasons of administrative simplicity. Conversely, the Commission contended that the lack of differentiation was objectively justified. It stressed that fault was difficult, if not impossible, to prove.[335] Also, it reiterated that the Community legislature has wide discretionary power and that there should be a finding of a breach of the principle of non-discrimination only if the institution concerned had committed a manifest error of assessment.[336] The Court restated its traditional formulation according to which the principle of non-discrimination requires that comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified.[337] However, it did not consider that the principle of non-discrimination was breached,

[331] *Ibid.,* para. 36.
[332] Case C-210/00 *Käserei Champignon Hofmeister* [2002] ECR I-6453.
[333] Article 11(1) of Commission Regulation (EEC) No 3665/87 of 27 November 1987 lays down common detailed rules for the application of the system of export refunds on agricultural products.
[334] *Käserei*, *supra n.332,* para. 13.
[335] *Ibid.,* para. 69.
[336] *Ibid.,* para. 70.
[337] *Ibid.,* para. 71.

since the penalty had a deterrent function and was consequently objectively justified.[338]

4.2.3 Equality as a Fundamental Right

Article 141 [ex Article 119] EC enshrines the principle that men and women should receive equal pay for equal work. Interestingly, Barnard has stressed that the inclusion of this Article was rendered possible by the insistence of the French government, which feared that its legislation in this field would otherwise create a competitive handicap.[339] Already in 1976, the ECJ in *Defrenne II,* recognized the direct effect of the principle of equal pay for equal work enshrined in Article 119.[340] In *Defrenne III,* the Court stated that "respect for fundamental personal human rights is one of the general principles of Community law…there can be no doubt that the elimination of discrimination based on sex forms part of those fundamental rights".[341] In a similar vein, the Court, in *Razzouk and Beydoun*,[342] confirmed that gender equality constituted a fundamental right in the context of staff cases. Significantly, this principle excludes not only the application of provisions leading to direct gender discrimination, but also the application of provisions, which maintain different treatment between men and women at work as a result of the application of criteria not based on gender.[343]

a) Direct and Indirect Discrimination

As to indirect discrimination, the *Seymour-Smith* case is of interest.[344] Ms Seymour-Smith, a secretary, and Ms Perez, working in the restoration sector, were dismissed in May 1991. Both complained to the Industrial Tribunal that their former employers had unfairly dismissed them. The Industrial Tribunal rejected the complaints of unfair dismissal and claims for compensation submitted by the two applicants, on the ground that they did not fulfil the condition of two years employment required

[338] *Ibid.,* para. 72, "…the provision has a deterrent function and is aimed at preventing both conduct which is subjectively careless and reprehensible and information which is simply inaccurate from an objective standpoint. In the light of the objective of deterrence, the culpable or non-culpable nature of the conduct in question becomes of no importance and, consequently, the application of the same penalty to all of these types of conduct cannot be considered to be contrary to the principle of non-discrimination".

[339] Barnard, *supra n.268,* at pp.216-217.

[340] Case 43/75 *Defrenne* [1976] ECR 455.

[341] Case 149/77 *Defrenne* [1978] ECR 1378 paras. 26-27, Case C-13/94 *P.* v. *S. and Cornwall County Council* [1996] ECR I-2143, para. 19, Case C-25/02 *Rinke* [2003] n.y.r., para. 25.

[342] Cases 75 and 117/82 *Razzouk and Beydoun* v. *Commission* [1984] ECR 1509.

[343] Joined Cases C-399/92, C-409/92, C-425/92, C-34/93, C-50/93 and C-78/93 *Helmig* [1994] ECR I-5727, para. 20.

[344] Case C-167/97 *ex parte Nicole Seymour-Smith and Laura Perez* [1999] ECR I-623. *See also* Case C-187/00 *Kutz Bauer* [2003] ECR I-2741, Case C-4/02 and C-5/02 *Schönheit* [2003] n.y.r.

by the Unfair Dismissal Order 1985.[345] The applicants applied to the High Court of Justice for judicial review of the disputed rule. In 1994, the High Court dismissed the application for judicial review, holding that, although the disputed rule affected more women than men, the statistics did not prove that such an effect was disproportionate. If, however, that had been the case, it did not see any objective grounds capable of justifying such discrimination. The Court of Appeal, in 1995, held that the disputed rule was indirectly discriminatory and was not objectively justified. The Secretary of State and the applicants in the main proceedings appealed to the House of Lords, which referred the case to the Court for a preliminary ruling on the interpretation of Article 119 of the EC Treaty and Council Directive 76/207/EEC.

The national court sought to ascertain the legal test for establishing whether a measure adopted by a Member State has disparate effect as between men and women to such a degree as to amount to indirect discrimination. The Court emphasised that, "*it must be ascertained whether the statistics available indicate that a considerably smaller percentage of women than men is able to satisfy the condition of two years' employment required by the disputed rule"*.[346] In the light of the order for reference, 77.4% of men and 68.9% of women fulfilled that condition in 1985.[347] Thus, the ECJ underlined that the statistics do not *prima facie* demonstrate that considerably smaller percentage of women than men are able to fulfil the requirement imposed by the disputed rule.[348] In addition, the Court remarked that, even if the statistics evidenced indirect discrimination, the measures might be justified by recourse to objective factors unrelated to any discrimination based on gender.

In response to the national court's question to determine the legal criteria for verifying the objective justification,[349] the ECJ forcefully underlined that it is for the national court to assess the facts and interpret the domestic legislation.[350] However, it also held that it may itself provide guidance based on the documents in the file and on the written and oral observations which have been submitted to it, in order to enable the national court to give judgment.[351] The United Kingdom Government argued that extension of the qualifying period for protection against dismissal would stimulate recruitment and thus constituted a legitimate aim of social policy.[352] Nevertheless, the ECJ ruled that:

> "Although social policy is essentially a matter for the Member States under Community law as it stands, the fact remains that the broad margin of discretion available to the Member States in that connection cannot have the effect of

[345] *Ibid.,* para. 13.
[346] *Ibid.,* para. 60.
[347] *Ibid.*, para. 63.
[348] *Ibid.,* para. 64.
[349] *Ibid.*, para. 66.
[350] *See also, Kutz Bauer, supra n.344,* para. 52, *Schönheit, supra n.344,* paras. 82-83.
[351] Case C-278/93 *Freers and Speckmann* [1996] ECR I-1165, para. 24.
[352] *Ibid.,* paras. 70-71.

> frustrating the implementation of a fundamental principle of Community law such as that of equal pay for men and women".[353]

The Court added that, "mere generalisations concerning the capacity of a specific measure to encourage recruitment are not enough to show that the aim of the disputed rule is unrelated to any discrimination based on sex nor to provide evidence on the basis of which it could reasonably be considered that the means chosen were suitable for achieving that aim".[354] Finally, the Court made clear that in a situation of indirect discrimination, it is for the Member States to prove that the aim was legitimate.[355]

As to direct gender discrimination, the judgments in *Kreil* and *Sirdar* provide good illustrations.[356] Regarding the former case, Tanja Kreil, who had been trained in electronics, applied for voluntary service in the Bundeswehr, and requested to undertake duties in weapon electronics maintenance. Her application was rejected by the Bundeswehr's recruitment centre and then by its head staff office, on the ground that women are barred by law from serving in military positions involving the use of arms. Tanja Kreil then brought an action in the Administrative Court claiming, in particular, that the rejection of her application on grounds based solely on gender was contrary to Community law. The national court asked whether the Council Directive 76/201 concerning the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions precludes the application of national provisions, such as those of German law, which bar women from military posts involving the use of arms and which allow them access only to the medical and military-music services. The applicant argued that this bar constituted direct discrimination contrary to the Directive. The German government contended that Community law does not, in principle, govern matters of defence, which form part of the field of common foreign and security policy and which remain within the Member States' sphere of sovereignty.[357] The Court first remarked that even if the Member States must adopt appropriate measures to ensure their internal and external security, decisions concerning the organization of their armed forces do not entirely fall outside the scope of Community law.[358] Finally, it held that:

> "… only articles in which the Treaty provides for derogations applicable in situations which may affect public security are Articles 36, 48, 56, 223 (now, after amendment, Articles 30 EC, 39 EC, 46 EC and 296 EC) and 224 (now Article 297 EC), which deal with exceptional and clearly defined cases. It is not possible to infer from those articles that there is inherent in the Treaty a general exception excluding from the scope of Community law all measures taken for reasons of public security. To recognise the existence of such an exception, regardless of the

[353] *Ibid.,* para. 66.
[354] *Ibid.*
[355] *Ibid*., para. 77. *Kutz Bauer, supra n. 344,* para. 62, *Schönheit, supra n. 344,* para. 87.
[356] Case C-285/98 *Kreil* [2000] ECR I-69, Case C-273/97 *Sirdar* [1999] ECR I-7403.
[357] *Ibid.,* paras. 11-12.
[358] *Ibid.*, para. 15.

> specific requirements laid down by the Treaty, might impair the binding nature of Community law and its uniform application (see, to that effect, Case Sirdar, cited above, paragraph 16)".[359]

The Court particularly stressed that the derogations do not apply to the social provisions of the Treaty, of which the principle of equal treatment between men and women forms part. The Court ruled that the said principle was general in application and that the Directive was applicable to employment in the public service. In conclusion, it held that the Directive was applicable to the situation arising in the main proceedings.[360] The German decision was then considered disproportionate. Notably, the decision of Germany, to prohibit women from holding military positions involving the use of arms, was founded on Article 12 A of the Basic Law (*Grundgesetz*). The judgment of the ECJ was given on 27 October 2000. A project to conform Article 12 A with EC law was approved by a large majority of deputies (512 on 543) in the *Bundestag* and the said Article was modified on 1 December 2000.[361] This situation clearly exemplifies the impact of the general principles of Community law. In other words, the breach of the general principle of equality may lead to domestic amendments of legislations. *In casu*, the general principle of Community law prevailed, though indirectly, over a constitutional provision. These principles allow any national decision (falling within the scope of Community law) to be reciewed directly. Also, it should be stressed again that general principles of Community law, through the ruling of the ECJ, indirectly influence the amendment of national law, even national constitutional law.

As regards the *Sirdar* case, it deals with the following situation. Mrs Sirdar had served as a chief in a commando regiment of the Royal Artillery.[362] She received an offer of transfer to the Royal Marines. However, the responsible authorities in the Royal Marines became aware of the fact that she was a woman and realised that the offer was, indeed, a mistake. Consequently, they informed Mrs Sirdar that she was ineligible by reason of the policy of excluding women from that regiment. She then brought an action before the industrial tribunal to challenge the refusal to employ her. The main question referred to the ECJ for the preliminary ruling was to assess whether the exclusion of women from service in combat units might be justified under Article 2(2) of the Equal Treatment Directive. Article 2 (2) of the Directive states that:

> "This Directive shall be without prejudice to the right of Member States to exclude from its field of application those occupational activities and, where appropriate, the training leading thereto, for which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor".

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[359] *Ibid*., para. 16.
[360] *Ibid.,* paras. 18-19.
[361] Mengozzi, "Les principes fondamentaux du droit communautaire et le droit des États membres", RDUE 2002, pp.435-460, at p.453.
[362] Case C-273/97 *Sirdar* [1999] ECR I-7403.

Before answering this question, the ECJ acknowledged that, generally, the principle of equal treatment was not subject to any reservation concerning measures for the organisation of the armed forces taken on the basis of the protection of public security.[363] Consequently, the national measures taken in the armed forces fall within the scope of Community law, as far as their impact on gender equality is concerned.[364] Concerning the main question, the Court noted that Article 2(2) of the Directive must be interpreted restrictively due to its derogative character.[365] Also, it emphasized that sex may constitute a decisive factor for certain types of employment, e.g. prison wardens.[366] Further, it held that in determining the scope of any derogation from an individual right, the general principle of proportionality must also be observed. In this respect, the principle requires that derogations remain within the limits of what is appropriate and necessary in order to achieve the aim pursued.[367]

The ECJ noted that the reason given for refusing to recruit the applicant was based on the interoperability rule established for ensuring combat effectiveness. More specifically, it was signified that this rule results from the structure and function of the Royal Marines. Indeed, that is a small force intended to be in the first line of attack. Thus, it has been established that, within this corps, chiefs are also required to serve as front-line commandos, that all members of the corps are engaged and trained for that purpose, and that there are no exceptions to this rule at the time of recruitment. Finally, the ECJ held that the rule of interoperability is proportionate and justifies the exclusive male composition. Subsequently, it answered that the exclusion of women from service in special combat units such as the Royal Marines may be justified under Article 2(2) of the Directive.[368]

b) Gender Discrimination and Positive Actions

Article 141(4) EC provides that, "the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers". The jurisprudence offers a precious exemplification of the difficult relationship between the principle of equal treatment and positive discrimination. In my view, those difficulties may represent the more general conceptual clash between formal and substantive equality. In this respect, the first preliminary ruling dedicated to positive actions reflected the strength of the concept of formal equality.

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[363] *Ibid.,* para. 19.
[364] *Ibid.,* para. 20.
[365] *Ibid.,* para. 23.
[366] *Ibid*., para. 22. *See e.g.* Case 318/86 *Commission* v. *France* [1988] ECR 3559, paras 11-18.
[367] *Ibid.,* para. 26.
[368] *Ibid.*, paras. 29-32. *See also* Case C-186/01 *Dory* [2003] ECR I-2479, where the Court considered that the limitation of compulsory military service to men was compatible with the principle of equal treatment.

In *Kalanke,* the Bremen law on civil servants established special positive treatment.[369] This legislation provided that "in the case of an appointment which is not made for training purposes, women who have the same qualifications as men applying for the same post are to be given priority in sectors where they are under-represented and that qualifications are to be evaluated exclusively in accordance with the requirements of the occupation, post to be filled or career bracket". On this basis, Ms Glissman, an equally qualified woman, was appointed as section manager in the Bremen parks department. Mr Kalanke contended that he had been unfairly discriminated and contested the decision on the ground that it was contrary to Article 2(1) of the equal treatment Directive. By contrast, Bremen relied on Article 2(4) of the Directive, which provides an exception to the principle of equal treatment. This provision states that the Directive *"shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities*".

The Court considered that a rule stating that, when candidates of different sexes shortlisted for promotion are equally qualified, women are automatically to be given priority in sectors where they are under-represented was contrary to Article 2(1) of the Directive, inasmuch as it involved discrimination on grounds of sex.[370] As to Article 2(4) of the Directive, the Court stressed that this provision allows a specific advantage to women to be given with a view to improving their ability to compete on the labour market and to pursue a career on an equal footing with men.[371] However, such derogation from an individual right must be interpreted restrictively.[372] Consequently, the ECJ held that "national rules which guarantee women absolute and unconditional priority for appointment or promotion go beyond promoting equal opportunities and overstep the limits of the exception in Article 2(4) of the Directive".[373] The Court added that, "in so far as it seeks to achieve equal representation of men and women in all grades and levels within a department, such a system substitutes for equality of opportunity as envisaged in Article 2(4) the result which is only to be arrived at by providing such equality of opportunity".[374]

Finally, the ECJ ruled that the Bremen law was incompatible with Article 2(4) of the equal treatment Directive. As already stated, domestic measures, which permit an absolute and unconditional priority for appointment and promotion oversteps promoting equal opportunities and infringes the exception contained in Article 2(4) of the Directive. This Article being an exception, it seems that the Court wished to interpret it restrictively. Also, it may be said that the Court appears quite reluctant to use substantive equality (equality of representation). Indeed, it transpires from the case that equality of representation can only be achieved through ensuring equality of opportunity (formal or procedural equality). At the end of the day, it is to be noted

[369] Case 450/93 *Kalanke* [1995] ECR I-3051.
[370] *Ibid.*, para. 16.
[371] *Ibid*., para. 19.
[372] *Ibid.*, para. 21.
[373] *Ibid.*, para. 22.
[374] *Ibid.,* para. 23.

that the Bremen law appears to boast an automatic character. In other words, the *Kalanke* case corresponds to circumstances where women are automatically given preference. One may wonder if the ruling of the ECJ would be the same in the situation where the legislation allows a more flexible application. This question was indeed answered in the *Marshall* case. This case is of utmost importance, as it may be said that the ECJ used, for the first time, the language of substantive equality.

In the case of *Marshall*,[375] the preliminary ruling concerned the German law on Civil servants of the *Land* of North Rhine-Westphalia, which provides that, where there are fewer women than men at the level of the relevant post in the career category, women should be given precedence for promotion in the event of equal suitability, competence and professional performance. However, the law provided for a saving clause according to which the employer may abstain from complying with that provision if reasons specific to an individual male candidate shift the balance in his favour. In the circumstances of the case, Mr Marshall, a teacher, applied for a promotion. Nevertheless, an equally qualified woman was appointed by virtue of the applied State law. The compatibility of the law was challenged in the light of Article 2(1) and (4) of the Directive.

AG Jacobs, though in the light of the saving clause, found that the domestic law was still discriminatory. However, the Court examined whether the system was sufficiently flexible and then not precluded by the equal treatment Directive. Still, the ECJ did not follow his reasoning, but found, by using for the first time the language of substantive equality, that the German Law was compatible with Article 2(4):

> "As the Land and several governments have pointed out, it appears that even where male and female candidates are equally qualified, male candidates tend to be promoted in preference to female candidates particularly because of prejudices and stereotypes concerning the role and capacities of women in working life and the fear, for example, that women will interrupt their careers more frequently, that owing to household and family duties they will be less flexible in their working hours, or that they will be absent from work more frequently because of pregnancy, childbirth and breastfeeding…For these reasons, the mere fact that a male candidate and a female candidate are equally qualified does not mean that they have the same chances".[376]

The Court reiterated the limitation to Article 2(4) already stated in *Kalanke*, that is to say that the derogation must be interpreted restrictively and that a measure specifically favouring female candidates cannot guarantee absolute and unconditional priority for women.[377] In this respect, the Court considered that the situation in *Marshall* was different from *Kalanke,* since the present Land law contained a saving clause.[378] The Court also stated that such a rule is not precluded by Article 2(1) and (4) of the Directive, provided that "in each individual case the

[375] Case C-409/95 *Marshall* [1996] ECR I-2143.
[376] *Ibid.,* paras. 29-30.
[377] *Kalanke, supra n.369*, para. 32.
[378] *Ibid.*, para. 33.

rule provides for male candidates who are equally as qualified as the female candidates a guarantee that the candidatures will be the subject of an objective assessment which will take account of all criteria specific to the candidates and will override the priority accorded to female candidates where one or more of those criteria will shift the balance in favour of the male candidate" and provided that "such criteria are not such as to discriminate against the female candidates".[379] Finally, it held that it was for the national courts to assess whether those conditions were fulfilled.[380]

In the *Badeck* case,[381] it may be argued that promoting measures, which require priority to be given to female candidates and, to that end, sets quotas for women to be employed in the public administration, are to be regarded as lawful from the point of view of the Community legal order if they allow the employer to choose the candidate with the most appropriate professional profile.

The Court recalled the two criteria already examined in *Kalanke* and *Marshall* that determine the lawfulness of a national legislation promoting positive discrimination. In this sense, it held that a measure which is intended to give priority in promotion to women in sectors of the public service where they are under-represented must be regarded as compatible with Community law:

- where it does not automatically and unconditionally give priority to women when women and men are equally qualified (*Kalanke*), and
- where the candidatures are the subject of an objective assessment which takes account of the specific personal situations of all candidates (*Marshall*).[382]

In contrast to the domestic legislation on positive discrimination seen in *Kalanke*, *Marshall* and *Badeck,* the national legislation in *Abrahamsson* allows preference to be given to a candidate of the under-represented gender who, although sufficiently qualified, does not possess qualifications equal to those of other candidates of the opposite sex. [383] On 3 June 1996, the University of Göteborg announced a vacancy for the chair of Professor of Hydrospheric Sciences. It was indicated that the appointment to that post should contribute to the promotion of equality of the sexes in professional life and that positive discrimination might be applied in accordance with Regulation 1995:936. Eight candidates applied, including Ms Abrahamsson, Ms Destouni, Ms Fogelqvist, and Mr Anderson. The appointment committee of the Faculty of Science considered that Ms Destouni should be appointed, expressly stating that the appointment of that candidate instead of Mr Anderson did not constitute a breach of the requirement of objectivity within the meaning of the third paragraph of Article 3 of Regulation 1995:936. Referring, in both cases, to experts' reports, the selection board placed Mr Anderson second and Ms Fogelqvist third.

[379] *Ibid.*
[380] *Ibid.,* para. 34.
[381] Case C-158/97 *Badeck* [2000] ECR I-1875.
[382] *Ibid.*, para. 23.
[383] C-407/98 *Abrahamsson* [2000] ECR I-5539.

However, Ms Destouni withdrew her application. The Rector of the University then decided to refer the matter back to the selection board. Finally, on the basis of its opinion, Ms Fogelqvist was appointed as Professor of Hydrospheric Science at the University of Göteborg.

Ms Abrahamsson and Mr Anderson engaged a proceeding against her appointment. The applicants argued, *inter alia*, that the appointment was contrary both to Article 3 of Regulation 1995:936[384] and to the judgment of the Court of Justice in *Kalanke*. The Universities' Appeals Board (*Överklagandenämnden för Högskolan*) referred to the Court for a preliminary ruling under Article 177 [new Article 234] of the EC Treaty a question regarding the interpretation of Article 2(1) and (4) of the Directive on the implementation of the principle of equal treatment for men and women. [385] One of the main questions at stake, asked by the national board, was whether the equal treatment Directive precludes national legislation under which an applicant of the under-represented sex possessing sufficient qualifications for a public post is to be selected in priority over an applicant of the opposite sex who would otherwise have been selected (positive special treatment). This question raised the scope of positive national action and the limits imposed on such action by Community law. The national court wanted to determine whether Article 2(1) and (4) of the Directive precluded the Swedish legislation from positive discrimination in recruitment in favour of candidates of the under-represented sex.

The ECJ remarked that the aim of the Swedish legislation was to promote substantive equality pursuant to Article 141(4) EC.[386] Accordingly, the domestic law, used as a basis during the selection procedure, was not founded on clear and unambiguous criteria in order to prevent or compensate for disadvantages in the professional career of members of the under-represented sex.[387] Indeed, the Court emphasized that:

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[384] Article 3 of Regulation 1995:936 provides that "[w]hen appointments are made, the provisions of Article 15a of Chapter 4 of [Regulation 1993:100] shall be replaced by the following provisions. A candidate belonging to an under-represented sex who possesses sufficient qualifications in accordance with the first paragraph of Article 15 of Chapter 4 of [Regulation 1993:100] must be granted preference over a candidate of the opposite sex who would otherwise have been chosen (positive discrimination) where it proves necessary to do so in order for a candidate of the under-represented sex to be appointed. Positive discrimination must, however, not be applied where the difference between the candidates qualifications is so great that such application would give rise to a breach of the requirement of objectivity in the making of appointments".

[385] Council Directive 76/207/EEC of 9 February 1976. Article 2(1) and (4) of the Directive provides: "1. For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status". and 4, "[t]his Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas referred to in Article 1(1)".

[386] *Abrahamsson, supra n.383,* para. 48.

[387] *Ibid.,* para. 50.

> "the legislation at issue in the main proceedings automatically grants preference to candidates belonging to the under-represented sex, provided that they are sufficiently qualified, subject only to the proviso that the difference between the merits of the candidates of each sex is not so great as to result in a breach of the requirement of objectivity in making appointments".[388]

Thus, this lack of objectivity regarding the examination of the candidates' specific situations makes it difficult to consider the selection permitted under the wording of Article 2(4) of the Directive.[389] Consequently, the Court considered it necessary to assess whether Article 141(4) could justify the legislation. It found that the method of selection was disproportionate to the aim pursued. Finally, the ECJ concluded that Article 141(4) and the Directive precludes national legislation of the kind at issue.[390]

c) Equality as an Unwritten Fundamental Right: Between Activism and Self-restraint

This section discusses the scope *ratione materiae* of gender equality law and its limits. More precisely, it will be seen that its scope might be extended through the jurisprudence of the Court of Justice, *e.g. P* case. Conversely, the Court can also set limits to the scope by adopting a more conservative stance, *e.g. Grant* and *D* cases.

In *P v S* and *Cornwall County Council*,[391] the Court examined the purview of Community rules prohibiting discrimination based on gender. The case dealt with an employee ("P.") who was dismissed due to his decision to undergo gender reassignment. The ECJ had to interpret the scope of the Equal Treatment Directive. In other words, can the general principle of equality surpass the provisions of Community legislation? Arguably, the Court viewed the principle of equality as a fundamental right, and considered that the scope of the Directive cannot be limited to discrimination based solely on the fact that a person is of one or the other sex.[392] Hence, it appears quite clearly that the finding arising from this case may challenge the traditional distinction between man and woman used in relation to the principle of formal equality.[393]

This traditional approach was indeed reflected by the argument of the UK government, which submitted that such a dismissal did not constitute gender

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[388] *Ibid.,* para. 52.
[389] *Ibid.,* para. 53.
[390] *Ibid.,* paras. 55-56. For a recent case in the context of positive discrimination, *see* AG Maduro in Case C-319/03 *Briheche,* Opinion delivered on 29 June 2004.
[391] Case C-13/91 *P* v. *S and Cornwall County Council* [1996] ECR I-2143. *See also* Case 117/01 *KB* [2004] 1 CMLR 28.
[392] *Ibid.,* paras. 23-24, "[d]ismissal of such a person must therefore be regarded as contrary to Article 5(1) of the directive, unless the dismissal could be justified under Article 2(2). There is, however, no material before the Court to suggest that this was so here… It follows from the foregoing that the reply to the questions referred by the Industrial Tribunal must be that, in view of the objective pursued by the directive, Article 5(1) of the directive precludes dismissal of a transsexual for a reason related to a gender reassignment".
[393] *Infra,* AG in *Grant*, para. 15.

discrimination for the purposes of the Directive.[394] In this sense, it added that the employer would also have dismissed P. if P. had previously been a woman and had undergone an operation to become a man.[395] In other words, the Directive prohibited only discrimination based on the fact that the worker concerned belonged to one sex or the other, not discrimination based on the worker's gender reassignment. The Court did not follow the UK argument and ruled that the dismissal constituted discrimination based on sex contrary to Directive 76/207. This case is central to the concept of equality. Thus, it appears necessary to analyse more deeply the reasoning of the ECJ, but also the Opinion of the AG, which in my view constituted a strong element in the final decision taken by the Court.

In fact, through a stalwart, well-written and progressive Opinion, AG Tesauro asked the Court to take, in his words, a *"courageous decision"*.[396] The AG drew a parallel between the unfavourable treatment suffered by women and transsexuals. According to him, this is often connected with a negative moral judgement that has nothing to do with their capacities.[397] Also, he stressed that the transsexual person should be offered a minimum protection and that the *"true essence"* of equality does not permit to maintain that "the unfavourable treatment suffered by P. was not on grounds of sex because it was due to her change of sex or else because in such a case it is not possible to speak of discrimination between the two sexes".[398]

Concerning whether the lack of explicit legislation regarding transsexuals means that they are not legally protected, or whether the Directive can be interpreted in such way as to protect transsexuals, [399] Tesauro referred to a judgment of the FCC according to which:

> "it is in the interests of legal certainty that the legislature should regulate questions concerning personal legal status connected to a change of sex and their effects. But until such legislation is adopted, the task of the courts is none other than that which arises from the principle of equality between men and women before the entry into force of a law putting them on an equal footing".[400]

In relation to the scope of the Directive, Tesauro noted that transsexuals are protected. First, they should be covered "as a matter of principle", since they do not constitute a third sex. Second, this should be the case because the Directive is a specific enunciation of a general principle and a fundamental right.[401] Further, it is interesting to refer to the most powerful passage of the Opinion, where the AG based the existence of this fundamental right on a maximalist approach, i.e. by referring to the constitutions of the most advanced countries:

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[394] *P* v. *S* and *Cornwall, supra n.391*, para. 14.
[395] *Ibid.,* para. 15.
[396] *Ibid.*, AG Tesauro in *P* v. *S and Cornwall*, para. 24.
[397] *Ibid.,* para. 20.
[398] *Ibid.*
[399] *Ibid.,* AG Tesauro in *P* v. *S and Cornwall*, para. 21.
[400] *Ibid.*
[401] *Ibid.*, paras. 21-22.

> "what is at stake is a universal fundamental value, indelibly etched in modern legal traditions and in the constitutions of the more advanced countries: the irrelevance of a person's sex with regard to the rules regulating relations in society. Whosoever believes in that value cannot accept the idea that a law should permit a person to be dismissed because she is a woman, or because he is a man, or because he or she changes from one of the two sexes (whichever it may be) to the other by means of an operation which - according to current medical knowledge - is the only remedy capable of bringing body and mind into harmony. Any other solution would sound like a moral condemnation - a condemnation, moreover, out of step with the times - of transsexuality, precisely when scientific advances and social change in this area are opening a perspective on the problem which certainly transcends the moral one. I am quite clear, I repeat, that in Community law there is no precise provision specifically and literally intended to regulate the problem but such a provision can readily and clearly be inferred from the principles and objectives of Community social law, the statement of reasons for the directive underlining. The harmonization of living and working conditions while maintaining their improvement and also the case-law of the Court itself, which is ever alert and to the fore in ensuring that disadvantaged persons are protected. Consequently, I consider that it would be a shame to miss this opportunity of leaving a mark of undeniable civil substance, by taking a decision which is bold but fair and legally correct, inasmuch it is undeniably based on and consonant with the great value of equality. Finally, I would point out in the words of Advocate General Trabucchi in an Opinion now twenty years old, that, if we want Community law to be more than a mere mechanical system of economics and to constitute instead a system commensurate with the society which it has to govern, if we wish it to be a legal system corresponding to the concept of social justice and European integration, not only of the economy but of the people, we cannot disappoint the [national] court's expectations, which are more than those of legal form".[402]

To put it in a nutshell, it may be said that the AG attempts to justify the maximalist approach (or the most progressive solution) by referring to two set of arguments. Firstly, he uses a teleological interpretation in order to fill the gaps of the EC legislative, i.e. by inferring the principles and objectives of Community social law. Secondly, Tesauro reiterates AG Trabucchi' s argument, according to which Community law is not only an economic system, but also reflects the concept of social justice and European integration.

The Court partly followed the AG and recognized the fundamental right approach towards equality. First of all, the Court defined the term transsexual in the light of the EctHR jurisprudence.[403] It emphasised that the Directive was a specific

[402] *Ibid.,* para. 24.

[403] *Ibid.,* para. 16, "the European Court of Human Rights has held that 'the term 'transsexual' is usually applied to those who, whilst belonging physically to one sex, feel convinced that they belong to the other they often seek to achieve a more integrated, unambiguous identity by undergoing medical treatment and surgical operations to adapt their physical characteristics to their psychological nature. Transsexuals who have been operated upon thus form a fairly well-defined and identifiable group' (judgment of 17 October 1986, in Rees v United Kingdom, paragraph 38, Series A, No 106)".

expression of the fundamental principle of equality[404] and that the ECJ case-law consistently found sex discrimination to be a fundamental right.[405] Having assessed sex discrimination as a fundamental right, the Court went on to determine the existence of an infringement of this principle. In this sense, the Court held that:

> "Such discrimination is based, essentially if not exclusively, on the sex of the person concerned. Where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment".[406]
>
> …To tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard".[407]

Those two paragraphs appear central to the reasoning of the Court. Interestingly, they might be seen as two diametric examples of the approach to equality, i.e. procedural and substantive equality. In this sense, a dismissal based on the intended or undergone gender reassignment constitutes, essentially if not exclusively, sex discrimination. Accordingly, this person is a victim of a less favourable treatment in comparison with persons to which he or she was deemed to belong before undergoing gender reassignment. In other words, it may be said that transsexuals should be treated like a person of the sex they belonged to formerly.[408]

This approach seems to correspond to a mere definition of formal (or procedural) equality. Indeed, it is necessary to determine a comparator in order to answer the question "equal to what".[409] In the present case, it may be argued that the Court found unequal treatment on the basis of a comparison between men and women. More precisely, the same person was discriminated on the ground of his/her change of status from male to female. The unequal treatment was established on the basis of a comparison between the treatment the person received before the operation (male) and after (female).[410] Finally, this argument appears quite traditional, since it implies a mere application of gender discrimination law.

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[404] *Ibid.*, para. 18.
[405] *Ibid.,* para. 19, "[m]oreover, as the Court has repeatedly held, the right not to be discriminated against on grounds of sex is one of the fundamental human rights whose observance the Court has a duty to ensure (see, to that effect, Case 149/77 Defrenne v Sabena [1978] ECR 1365, paragraphs 26 and 27, and Joined Cases 75/82 and 117/82 Razzouk and Beydoun v Commission [1984] ECR 1509, paragraph 16)".
[406] *Ibid.,* para. 21.
[407] *Ibid.,* para. 22.
[408] Barnard, *supra n.278,* at p.224.
[409] *Ibid.*, at p.223.
[410] More, *supra n.292,* at p.545.

Conversely, Flynn lucidly remarked that the Court never specified that P. became a woman.[411] If this approach is correct, it would mean that the Court did not use the "similarly situated test" (procedural equality) so as to establish the less favourable treatment. That would also mean that the Court used a more substantive test. In that regard, it ought to be noted that the forceful language employed in paragraph 22 points towards substantive equality.[412] Indeed the Court ruled that *"to tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the court has a duty to safeguard"*.

In my view, this language may suggest that the discrimination was founded on a breach of the fundamental right to dignity and not exclusively on a formal comparative test. This would signify that the fundamental right approach paves the way to something more than a simple comparative approach. This approach is reflected in the progressive concept of substantive equality. Further, this discussion is of interest regarding the question of sexual orientation. Indeed, whereas, by applying formal equality, it seems impossible to find a breach of the principle of equality, a substantive approach based on the dignity of the person would permit an effective protection of homosexuals to be afforded in their employment relationship.

At the end of the day, the *P v S and Cornwall* judgment constitutes a fundamental case from a theoretical point of view and thus prompts a number of conclusions. As stated above, protection against gender discrimination is clearly seen as a fundamental right. This fundamental right appears to be based on written provisions of primary and secondary legislation. What is more, the ECJ similarly assessed the protection of transsexuals, although unwritten, as a fundamental right included in the concept of protection against sex discrimination.

In doing so, it may be said that the ECJ explodes the traditional methodology used in the elaboration of fundamental rights, i.e. by referring to the common constitutions of the Member States and international instruments (especially the ECHR). By the same token, it should be mentioned that the law of the Member States and the ECHR follow a disparate approach towards transsexuality. In other words, it would have been impossible to elaborate such a level of protection by using the traditional methodology. Consequently, this explains why the ECJ accepted the maximalist approach recommended by the AG, though it never alluded to such a method in its judgment, neither to the constitutions of the Member States nor to the ECHR.

In addition, it should be underlined that the *P* case not only strongly impacted ECHR case-law, but also on the laws of the Member States. In that regard, one can refer to two recent Strasbourg cases from 2002, namely *Goodwin* v. *United*

[411] Flynn, "Equality between Men and Women in the Court of Justice", YEL 1998, pp.259-287, at pp.279-280, "[a]t no time, the Court stated that P was a female nor attempted any definition of sex on the basis of which such a classification could be made. It seems that the Court treated the more favourable treatment afforded to the member's of P's own sex as proof of discrimination on grounds of sex".

[412] *See* Mancini and O'Leary, *supra n. 278*.

Kingdom[413] and *I* v. *United Kingdom,*[414] where the EctHR found a violation of Article 8 ECHR regarding the dismissal of transsexuals. In both cases, the EctHR explicitly cited the ECJ judgments. [415] These EctHR cases also emphasised that the ruling of the ECJ was applied by the Employment Appeal Tribunal in a decision handed down on 27 June 1997.[416] Ultimately, the EctHR emphasized that, in the UK, the Sexual Discrimination (Gender re-assignment) Regulations 1999 were issued to comply with the ruling of the European Court of Justice in *P.* v. *S. and Cornwall County Council*. This legislation provides generally that transsexual persons should not be treated less favourably in employment merely because they are transsexual (whether pre- or post-operative).[417]

Last but not least, the final observation is that the elaboration of a fundamental right through a maximalist approach leads to important consequences both at the Strasbourg and national levels. On the one hand, one can only applaud the courageous stance of the ECJ towards maximal protection. On the other hand, on a more pragmatic level, one can wonder about the possibility or the willingness of the ECJ to follow such a consistent line of "maximal protection" cases. This last assertion seems to be confirmed by the ECJ case-law regarding the issue of homosexuality.

As seen above, the substantive approach taken in *P* v. *S (*paragraph 22) may lead to serious improvements regarding the protection of homosexuals. Notably, a progressive interpretation of the cited paragraph would certainly extend the "P-type" of reasoning to discriminatory situations involving lesbians and gays. In this respect, AG Elmer dangerously remarked that *"[i]n P v S, conceptions of morality in connection with transsexuality were thus irrelevant to the Court's decision. The Court has thus confirmed that the Treaty cannot be interpreted on the basis of the moral conceptions of a Member State (in this respect see also Case C.-159/90*

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[413] *Christine Goodwin* v. *the United Kingdom* (28957/95) [2002] ECHR 583 (11 July 2002).
[414] Case of *I* v. *the United Kingdom*. Application number 25680/94, 11/07/2002.
[415] *Goodwin, supra n.413*, para. 43, "[i]n its judgment of 30 April 1996, in the case of *P.* v. *S. and Cornwall County Council*, the European Court of Justice (ECJ) held that discrimination arising from gender reassignment constituted discrimination on grounds of sex and, accordingly, Article 5 § 1 of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions, precluded dismissal of a transsexual for a reason related to a gender reassignment. The ECJ held, rejecting the argument of the United Kingdom Government that the employer would also have dismissed P. if P. had previously been a woman and had undergone an operation to become a man, that... where a person is dismissed on the ground that he or she intends to undergo or has undergone gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment. To tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled and which the Court has a duty to safeguard." (paras. 21-22).
[416] *Chessington World of Adventures Ltd* v. *Reed* [1997] 1 Industrial Law Reports.
[417] *Goodwin, supra n.413,* para. 45.

Society for the Protection of Unborn Children v Grogan)".[418] This statement reflects, in my view, the whole problematic of the judgment.

Particularly, the hope of jurisprudential evolution was high in light of the *Grant* case, [419] which concerns a preliminary reference to determine whether a refusal by an employer to grant travel concession to a lesbian employee and her partner, who were involved in a stable relationship, constituted a breach of Article 119 [new Article 141 EC] or Directive 75/117 regarding the principle of equal pay for men and women. In other words, can the protection afforded in *P* on the basis of substantive equality, be extended to homosexual relationships?

Grant's defence was articulated around three arguments. Firstly, Grant stressed that the male worker who previously occupied her post had obtained travel concessions for his female partner, without being married to her. Consequently, the discrimination appears to be based on sex.[420] Secondly, on the basis of the *P* v. *S* judgment, sexual orientation can be seen as included in Article 119.[421] Thirdly, the refusal to allow her the benefit was not objectively justified.[422] The Commission contended that discrimination based on the sexual orientation of workers may be seen as a discrimination based on sex. Nevertheless, it argued that, *in casu*, there was no discrimination based on sexual orientation.

Although the AG submitted that Article 119 [new Article 141 EC] covers all cases concerning *de jure* or *de facto* objective gender discrimination,[423] the Court was not ready to protect homosexuals by using the maximalist fundamental rights approach. By contrast, the reasoning of the Court can be perceived as a strong revival of the traditional methodology pointing towards judicial self-restraint. In addition, the Court restrictively interpreted the *P* v. *S* case. Finally, it considered that the question of sexual orientation fell outside the Community competence.

As to the former point, the ECJ undertook a comparative assessment of the national and ECHR law concerning homosexual relationships. Firstly, it stressed that in most of the Member States cohabitation between two persons of the same sex is considered as equivalent to a stable heterosexual relationship outside marriage only with respect to a limited number of rights, or else is not recognised in any particular way.[424] Secondly, it highlighted that the EctHR assesses *"that despite the modern evolution of attitudes towards homosexuality, stable homosexual relationships do not fall within the scope of the right to respect for family life under Article 8 of the Convention"*. [425] Further, it added that the EctHR interprets Article 12 of the

[418] AG Elmer in Case C-249/96 *Grant* [1998] ECR I-621, para. 17.
[419] *Ibid., Grant* [1998] ECR I-621.
[420] *Ibid.,* para. 17.
[421] *Ibid.,* para. 18.
[422] *Ibid.,* para. 19.
[423] *Ibid.,* AG Elmer in *Grant,* paras. 17-18.
[424] *Ibid., Grant,* para. 32, "while in some of them cohabitation by two persons of the same sex is treated as equivalent to marriage, although not completely".
[425] *Ibid.,* "…(see in particular the decisions in application No 9369/81, X. and Y. v the United Kingdom, 3 May 1983, Decisions and Reports 32, p. 220 application No 11716/85, S. v the

Convention as applying only to the traditional marriage between two persons of the opposite biological sex.[426]

In light of the foregoing, the ECJ came to the conclusion that "stable relationships between two persons of the same sex are not regarded as equivalent to marriages or stable relationships outside marriage between persons of opposite sex. Consequently, an employer is not required by Community law to treat the situation of a person who has a stable relationship with a partner of the same sex as equivalent to that of a person who is married to or has a stable relationship outside marriage with a partner of the opposite sex".[427] The ECJ reaffirmed its self-restraint in this matter by stating that it is for the legislature to adopt measures, which may modify this situation.[428]

As to the second point, Grant argued that, according to *P* v. *S*, differences of treatment based on sexual orientation are included in the discrimination based on sex prohibited by Article 119 of the Treaty.[429] The Court in *Grant* reaffirmed that, in *P* v. *S*, discrimination was in fact based, essentially if not exclusively, on the sex of the person concerned. However, it stated that the "reasoning, which leads to the conclusion that such discrimination is to be prohibited just as is discrimination based on the fact that a person belongs to a particular sex, is limited to the case of a worker's gender reassignment and does not therefore apply to differences of treatment based on a person's sexual orientation".[430] In other words, the Court interpreted restrictively the *P* v. *S* case by considering that unequal treatment directed toward homosexual relationships could not be classified as gender discrimination. It may be said that the ECJ thus established a clear-cut distinction between discrimination based on sex and sexual orientation.

Finally, as to the third point, Grant submitted that in the light of certain provisions of national law or of international conventions (Article 28 of International Covenant on Civil and Political Rights of 1966), the Community provisions on equal treatment of men and women should be interpreted as covering discrimination based on sexual orientation.[431] The Court reaffirmed that

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United Kingdom, 14 May 1986, D.R. 47, p. 274, paragraph 2 and application No 15666/89, Kerkhoven and Hinke v the Netherlands, 19 May 1992, unpublished, paragraph 1), and that national provisions which, for the purpose of protecting the family, accord more favourable treatment to married persons and persons of opposite sex living together as man and wife than to persons of the same sex in a stable relationship are not contrary to Article 14 of the Convention, which prohibits inter alia discrimination on the ground of sex (see the decisions in S. v the United Kingdom, paragraph 7 application No 14753/89, C. and L.M. v the United Kingdom, 9 October 1989, unpublished, paragraph 2 and application No 16106/90, B. v the United Kingdom, 10 February 1990, D.R. 64, p. 278, paragraph 2)".

[426] *Ibid.,* para. 34, "…(see the Rees judgment of 17 October 1986, Series A no. 106, p. 19, 49, and the Cossey judgment of 27 September 1990, Series A no. 184, p. 17, 43)".

[427] *Ibid.,* para. 35.

[428] *Ibid.,* para. 36.

[429] *Ibid.,* para. 37.

[430] *Ibid.,* para. 42.

[431] *Ibid.*, para. 43.

international instruments may be used in applying the fundamental principle of Community law.[432] Nevertheless, the ECJ stated that:

> "…although respect for the fundamental rights which form an integral part of those general principles of law is a condition of the legality of Community acts, those rights cannot in themselves have the effect of extending the scope of the Treaty provisions beyond the competences of the Community (see, inter alia, on the scope of Article 235 of the EC Treaty as regards respect for human rights, Opinion 2/94 [1996] ECR I-1759, paragraphs 34 and 35)".[433]

It may be said that the Court considers that sexual orientation falls outside Community competence and that Article 119 [new Article 141] should not be used as a basis for judicial activism. This case provides an excellent illustration of the limits of the general principles as unwritten fundamental rights. The reluctance of the ECJ to adopt a progressive decision may be appraised in the light of judicial self-restraint and the potential effect of a "maximalist" ruling on the laws of the Member States. In the words of Tridimas, "judicial interpretation is simply no substitute for law reform".[434] However, it may still remain a trigger for such a "legislative reform". Interestingly, Article 13 EC was not yet ratified at the time of the judgment. The Court pointed out that in the present state of the law, stable relationships between two persons of the same sex are not regarded as equivalent to marriages or stable relationships outside marriage between persons of opposite sex. What is more, it considered that, "in those circumstances, it is for the legislature alone to adopt, if appropriate, measures which may affect that position".[435] This statement may be interpreted as an *appel du pied* from the judiciary towards the legislature. Significantly, sexual orientation received particular acknowledgment in the Framework Directive (2000)[436] and Article 21(1) of the Charter of Fundamental Rights. However, the restrictive approach of the ECJ was confirmed in a staff case which concerned, in contrast to *Grant*, a situation involving a legal recognition of the relationship and consequently was also related to the interpretation of the right to a family and the concept of marriage.

Similarly to *Grant,* the Court in *D* v. *Council* constrained itself to apply the traditional line of reasoning, which may be deduced from the *Grant* case.[437] This staff case may be perceived, as one author noted, as a *"dramatic example of a*

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[432] *Ibid.,* para. 44, "[t]he Covenant is one of the international instruments relating to the protection of human rights of which the Court takes account in applying the fundamental principles of Community law (see, for example, Case 374/87 Orkem v Commission [1989] ECR 3283, paragraph 31, and Joined Cases C-297/88 and C- 197/89 Dzodzi v Belgian State [1990] ECR I-3763, paragraph 68)".

[433] *Ibid.,* para. 45.

[434] Tridimas, *supra n.319,* at p.73.

[435] Grant, *supra,* para. 36.

[436] For sexual orientation discrimination, national implementing measures must be in place before December 2003.

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

decline in the scale of fundamental rights".[438] A Swedish official of the Council, registered in his home country with a partner of the same sex, applied to the Council for his status (registered partnership) to be treated as being equivalent to marriage in order to obtain the household allowance provided for in the Staff Regulations. The Council rejected the application, considering that the provisions of the Staff Regulation could not be interpreted as allowing a registered partnership to be treated as being equivalent to marriage. D lodged an action under Article 230 before the CFI. The Tribunal held, *inter alia*, that the Council was under no obligation to refer to the laws of the Member States, *in casu* Sweden, in order to interpret the Staff Regulations, [439] and dismissed the application. Finally, D appealed to the ECJ. The appellant submitted that the decision of the Council constituted discrimination based on sex, in breach of Article 119 (new Article 141 EC) of the Treaty.[440]

The AG started by giving a general definition of the principle of equal treatment. In this sense, AG Mischo reiterated the traditional definition according to which discrimination exists whenever individuals in identical situations are treated differently and this differentiation is not objectively justified.[441] It appeared thus important to qualify whether in Community law a registered partnership is identical to marriage. Firstly, in the light of national law, the AG remarked that the Swedish legislation created a specific judicial category regarding partnership between persons of the same sex. This distinct category includes rules, which may appear contradictory to the marriage, e.g. interdiction to adopt children.[442] Secondly, in the light of Community law, the AG considered that the Court in *Grant*, after a deep analysis of the ECHR case-law, ruled that the partners of the same sex under a stable relationship are not in an identical situation with married persons of the opposite sex.[443] According to the AG, that reasoning was applicable by analogy to registered partnership.[444] Thirdly, in light of the Charter of Fundamental Right, the AG submitted that the reference to Article 9 of the CFR leads to a restrictive appreciation. Indeed, according to the AG, the wording of Article 9 CFR confirms the difference of situation between marriage and registration between partners of the same sex.[445] In other words, it may be stated that in the present situation, the CFR inhibits the extension *ratione materiae* of the general principle of equality. [446]

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[438] Ward, *Judicial Review and the Rights of the Private Parties in EC Law*, Oxford, 2000, at p.276.
[439] Case T-264/97 *D* v. *Council* [1999] ECR II-1, paras. 22-34.
[440] *Ibid., D* v. *Council*, para. 45.
[441] AG Mischo in *D* v. *Council, supra n.439,* para. 75.
[442] *Ibid.*, para. 77.
[443] *Ibid.*, paras. 80-83.
[444] *Ibid.,* para. 88.
[445] *Ibid.*, para. 97, "[s]ignalons enfin que l'article 9 de la charte des droits fondamentaux de l'Union europeenne proclamee a Nice en decembre 2000 dispose que le droit de se marier et le droit de fonder une famille sont garantis selon les lois nationales qui en regissent l'exercice Dans les explications etablies sous la responsabilite du Presidium de la convention qui n'ont pas de valeur juridique mais qui sont simplement destinees a eclairer les dispositions de la charte a la lumiere des discussions qui se sont tenues au sein de la convention, on peut lire

Interestingly, the Court rejected the approach of the AG as to the application by analogy of the *Grant* case to registered partnership.[447] However, it ruled that the principle of equality is inapplicable in the present situation (registered and married partnership). In that regard, the Court remarked that the grant of the allowance is in fact not based on whether the official is a man or a woman. Also, it added that it is not the sex of the partner that determines whether the household allowance is granted, but the legal nature of the ties between the official and the partner. Finally, the Court held that the principle of equal treatment only applies to persons in comparable situations.[448] It considered that this is not the case in the present situation. One can notice here that the Court uses the language of formal equality. By consequence, it considered it necessary to assess whether the situation of an official who has registered a partnership between persons of the same sex, is comparable to that of a married official. In this respect, the ECJ observed that *"the existing situation in the Member States of the Community as regards recognition of partnerships between persons of the same sex or of the opposite sex reflects a great diversity of laws and the absence of any general assimilation of marriage and other forms of statutory union"*. In the light of foregoing, the Court concluded that the two situations cannot be said to be comparable and thus rejected the plea.

Going further, D argued that Article 8 ECHR (right to respect for private and family life), applies to homosexual relationships. In that regard, the appellant contended that by requiring recognition of the existence and effects of a civil status acquired by law, this Article prohibits the interference constituted by the transmission of incorrect data to third parties.[449] Previously, the CFI decided that, *"the Council could not have infringed that provision since long-term homosexual relationships are not covered by the right to respect for family life protected under that article"*.[450] However, the ECJ did not entirely follow the CFI's stance, but remarked in a more subtle manner that the "refusal by the Community administration to grant a household allowance to one of its officials does not affect the situation of the official in question as regards his civil status and, since it only concerns the relationship between the official and his employer, does not of itself give rise to the transmission of any personal information to persons outside the Community administration".[451] In other words, the ECJ circumvented a painstaking analysis of the right to family life in the light of sexual orientation by finding that Article 8 ECHR could not be infringed since the documents remain in the

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que l'article 9 n'interdit ni n'impose l'octroi du statut du mariage a des unions entre personnes du meme sexe. Ceci, selon nous, confirme la difference de situation entre le mariage, d'une part, et l'union entre personnes du meme sexe, d'autre part".

[446] Groussot, "A Third Step in the Process of EU Constitutionalization: A Binding Charter of Fundamental Rights?", ERT 2003, pp.537-558.

[447] *D v. Council*, *supra n. 439*, para. 33.

[448] *Ibid.*, paras. 46-48.

[449] *Ibid.,* para. 58.

[450] *Ibid.,* para. 14. *See* CFI judgment, paras. 39-41.

[451] *Ibid.*, para. 59.

Community administration. Therefore, it held that the plea should be rejected.[452] Nevertheless, it ought to be noted that the ECJ did not confirm the judgement of the CFI as to the non-application of Article 8 ECHR to long-term homosexual relationships. In this sense, it might be stated that the ECJ does not exclude such an application in the light of other factual circumstances. However, the ECJ, in *D v Council*, did not embark into the analysis of these sensitive issues. Once again, like in the *Grogan* case concerning abortion,[453] the Court demonstrated a clear reluctance to embark into a morally sensitive question.[454]

4.3. THE PRINCIPLE OF LEGAL CERTAINTY AND LEGITIMATE EXPECTATIONS

This section looks, generally at the concept of legal certainty and its interpretative function (4.3.1). Then, it focuses on the corollaries of the principle of legal certainty, i.e. the principle of non-retroactivity and acquired rights (4.3.2). Finally, it analyses in detail another substantive corollary, i.e. the principle of legitimate expectations (4.3.3).

4.3.1. The Concept of Legal Certainty

Arguably, the concept of certainty makes up the essence of the law and, in a similar vein, may be appraised as its *raison d'être*.[455] In few words, it reflects the ultimate necessity of clarity, stability and intelligibility of the law.[456] The principle of legal certainty constitutes a very wide concept that appears axiomatic to democratic societies and, consequently, common to the legal orders of the Member States. In this respect, Community law does not escape from the general rule, though no provision can be found in the EC Treaty making explicit reference to this concept.[457] Indeed, this principle forms an integral part of unwritten Community law.[458]

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[452] *Ibid.,* paras. 60-61.
[453] Case C-159/90 *Grogan* [1991] ECR I-2925.
[454] Bell, *supra n.267,* at p.207.
[455] Fromont, "Le principe de sécurité juridique", AJDA 1996 édition spéciale, pp.178-184, at p.178
[456] *See e.g.*, Case C-63/93 *Duff* [1996] ECR I-569, para. 20.
[457] Usher, *General Principles of Community Law*, Longman, 1998, at p.52. According to Usher, legal certainty is the principle most often employed by the Court of Justice. The term legal certainty has been used, until 1997, more than 900 times by the ECJ (700 times for proportionality and 500 times for legitimate expectations. *See* new search on Westlaw realised on September 2004: around 2000 references to legal certainty, 1650 legitimate expectations, 100 non-retroactivity and 70 to vested rights.
[458] By contrast, in the French legal order, the principle appears much vaguer and its precise contours still remain to be defined. It ought to be remarked that the doctrine demonstrates a certain curiosity and stresses its increasing influence. *See e.g.,* Cahiers du Conseil Constitutionnel no 11, 2001. The journal offers a compilation of Articles as to the scope of the principle of legal certainty into constitutional, administrative, civil, ECHR and Community law.

According to Temple Lang, the principle of legal certainty may be categorized both as a principle of administrative law and a fundamental human right.[459] It is worth noting that the principle of revocability of (unlawful) administrative acts constitutes the first implicit jurisprudential appearance of legal certainty in the European legal order. One can recall, in this respect, the important comparative analysis undertaken, in the *Algera* case, both by AG Lagrange and the Court.[460] Going further, in *SNUPAT*, the Court made the first explicit reference to legal certainty.[461] Interestingly, the Court considered that the principle of legal certainty is not absolute, since its application must be combined with the principle of legality.[462]

More recently, the Court has defined the principle of legal certainty as requiring that legal rules be clear and precise, and aiming to ensure that situations and legal relationships governed by Community law remain foreseeable.[463] The Union institutions and the Member States must observe this principle.[464] What is more, it is an "umbrella principle" in the sense that it is composed of specific sub-concepts ("corollaries"), e.g. non-retroactivity, acquired rights and legitimate expectations.[465] A clear borderline between the various principles is sometimes difficult to draw. In that sense, the principle of legal certainty may be described as the most complex of

[459] Temple Lang, "Legal Certainty and Legitimate Expectation as General Principles of Community Law", in Bernitz and Nergelius (eds.), Kluwer, 2000, pp. 163-184, at p.163. Recently, the CFI the duty to act in a reasonable time with good administration and legal certainty (*see Chapter 5.3.1*.)

[460] Joined Cases 7/56 and 3/57, 4/57, 5/57, 6/57 and 7/57 *Algera* v. *Common Assembly* [1957] ECR 39, *supra Chapter 1.1.1 (b)*, For a more comprehensive analysis of *Algera*, unlawful measures may be revoked, at least within a reasonable period of time, that period must be calculated in relation to the date on which the measure was adopted and that the Court has held that decisions revoked more than six months after they were adopted had been withdrawn within a reasonable period of time. It is suffice to remark here that the principle of revocability of administrative acts was common to the Member States. Also, it should be stressed that the subsequent case-law clearly linked it to legal certainty or legitimate expectations

[461] Joined Cases 42/59 and 49/59 *SNUPAT* v. *High Authority* [1961] ECR 53.

[462] Dutheil de la Rochère, "Le principe de légalité", AJDA 1996 édition spéciale, pp.161-167. Indeed, the withdrawal of an illegal act (respect of the principle of legality) may infringe the principle of legal certainty. The determination of the primacy of one principle on the other, must be realize on a case by case analysis in the light of the balancing (confrontation of the public interest with the private interest).

[463] *Duff*, *supra n.456,* para. 20.

[464] Joined Cases C-487/01 and C-7/02 *Gemeente Leusden* [2004] n.y.r., para. 57, "[t]he principles of the protection of legitimate expectations and legal certainty form part of the Community legal order. They must accordingly be observed by the Community institutions (Case 74/74 CNTA v. Commission [1975] ECR-533), but also by the Member States when they exercise the powers conferred on them by Community directives (Belgocodex, paragraph 26;Schlossstrasse, paragraph 44; and Case C-62/00 Marks & Spencer [2002] ECR I-6325, paragraph 44)".

[465] Non-retroactivity of penal provisions is a fundamental right, defined as such by the ECJ.

the general principles of Community law.[466] As seen previously, this complexity is also illustrated by the ambivalence of its relationship with the principle of legality. This complexity goes against the very aim of the principle, i.e. to ensure clarity. However, it may be said that the Court is not really preoccupied by its complexity and it is highly improbable that the Court will modify this situation.[467] Finally, as all general principles of Community law, it applies both as a rule of interpretation and a substantive right.[468] The former type of application seems to constitute the hallmark of the principle of legal certainty. This aspect of the principle of legal certainty will now be examined.

Legal certainty is highly useful in order to interpret Community law, but also national laws that fall within the scope of Community law.[469] In that regard, the ECJ jurisprudence offers an important number of exemplifications. It is worth noting that the case-law regarding direct/indirect effect and remedies is particularly fertile as to the use of legal certainty as a tool of interpretation. Furthermore, the recent case-law dealing with the reopening of national administrative decisions in the Community context constitutes an interesting illustration.

Firstly, it appears from the case-law on direct, horizontal and indirect effect that legal certainty has been used extensively to aid interpretation. As to primary law, the Court established the direct effect of Article 81 EC by referring to legal certainty.[470] As to secondary law, the direct effect of Directives was supported by reference to legal certainty.[471] Further, the Court in *Defrenne II* established the direct effect of Article 141 EC and also defined the temporal scope of the rulings in the light of

[466] Temple Lang, *supra n.459,* at p.164.

[467] Puissochet and Legal, "Le principe de sécurité juridique dans la jurisprudence de la Cour de justice des Communautés européennes", Cahier du Conseil constitutionnel no 11, 2001.

[468] Tridimas, *The General Principles of EC Law*, Oxford, 1999, at p.170, Raitio, *The Principle of Legal Certainty in EC law*, Kluwer 2003, at pp. 372-376. On a more theoretical level, one may draw a distinction between between procedural (predictability) and substantive (acceptability) legal certainty. Raitio establishes a tripartite classification and concludes that the principle of legal certainty may be related to the balancing of formal justice and material fairness in legal decision making (*Ibid*., Raitio, at p.387). *See Carpenter* [2002], *supra n.65,* where the Court stated expressly that general principles may be used both to interpret and review**.**

[469] *Ibid.,* Tridimas considers that legal certainty possesses a static character since it requires the rules to be clear and precise at a given time. The author draws an interesting distinction between the static character of legal certainty and the legitimate expectations that are enjoyed for the future. By this reasoning, he considers that it may explain the different functions of the principle, i.e. legal certainty used as a rule of interpretation and legitimate expectation used as a substantive right.

[470] Case 48/72 *Brasserie de Haecht* [1973] ECR 77.

[471] Case 41/74 *Van Duyn* [1974] ECR 1337, para. 13, "… because Member States are thereby obliged, in implementing a clause which derogates from one of the fundamental principles of the Treaty in favour of individuals, not to take account of factors extraneous to personal conduct, legal certainty for the persons concerned requires that they should be able to rely on this obligation even though it has been laid down in a legislative act which has no automatic direct effect in its entirety".

legal certainty.[472] In this respect, the Court considered that the direct effect could only be invoked from the date of the judgment and thus, refused to retroactively apply its ruling.[473] Also, in connection with the horizontal effect of Directives, it may be argued that the text of Article 249 EC read in the light of legal certainty does not point towards an application of Directives between individuals.[474] What is more, regarding indirect effect, it is worth remarking that the Court has recourse to legal certainty in order to limit the scope of indirect effect. In that sense, the Court in *Kolpinghuis* considered that, if a Member State has not implemented a Directive, but the deadline for implementation has not yet passed, the Directive could not be used to determine or increase the criminal liability of persons who infringe its provisions.[475] Similarly, in *Arcaro,* where an Italian was prosecuted for discharging cadmium into a river without authorization though the EC Directives were not correctly transposed into the national legislation, the Court reiterated the same reasoning.[476] More recently, the Court in *Rolex* (2004), extended this reasoning to

[472] Case 43/75 *Defrenne* [1976] ECR 455. *See also*, Case C-262/88 *Barber* [1990] ECR I-1889. Raitio considers that he Court of Justice's judgments, especially the preliminary rulings under Article 234 EC, but also the judgments regarding direct actions, may have retroactive effect, since they have their effect *ex tunc* rather than *ex nunc*, i.e. from the date the provision concerned entered into force (Raitio, at p. 196. *See also* Case C-137/94 *Richardson* [1995] ECR I-3407). The main reason is the need to ensure the uniform application and interpretation of European Community law (Case 128/79 *Salumi* [1980] ECR 1237). The limitations of the Court of Justice of these retroactive effects of its judgements, however, have been exceptional in its jurisprudence (Cases 43/75 *Defrenne* [1976] ECR 455, C-415/93 *Bosman* [1995] ECR I-4921).

[473] *Ibid.,* "[i]n these circumstances, it is appropriate to determine that, as the general level at which pay would have been fixed cannot be known, important consideration of legal certainty affecting all the interests involved".

[474] Case 152/84 *Marshall* [1986] ECR 723, paras. 48-49, Case C-91/92 *Faccini Dori* [1994] ECR I-3325, para. 20 (contrast AG's opinion with that of the Court), Case C-201/02 *Wells* [2004] ECR n.y.r., para. 56, Joined Cases C-397/01 & C-403/01 *Pfeiffer* [2004] paras. 108 and 109. In *Dori,* AG Lenz considered that it is necessary to recognise the general applicability of precise, unconditional provisions in directives in order to respond to the legitimate expectations nurtured by citizens of the Union following the achievement of the internal market and the entry into force of the Treaty on European Union. The Advocate General named several members of the Court (para. 47 and fn 36), who supported the horizontal effect of directives prior to 1994 (*see also* AG Opinion in *Pfeiffer*, paras. 57-58 and fn. 26-28). In *Pfeiffer,* AG Ruiz-Jarabo, had called for the recognition of horizontal direct effect of directives. However, the Court confirmed it previous case-law The case-law on the possibility of relying on directives against state entities is based on the fact that under Article 249 EC [ex Article 189] a directive is binding only in relation to each Member State to which it is addressed (*See e.g. Marshall,* paras. 48-49, *Dori,* para. 22).

[475] Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969. The Court stated that, "a directive cannot, in itself and independently of a law adopted in order to implement the directive, determine or increase the criminal liability of persons who infringe its provisions".

[476] Case C-168/95 *Arcaro* [1997] 1 CMLR 179. the ECJ held that the obligation to interpret national law in accordance with EC law reaches a limit where the obligation has not been transposed and that a directive could not, of itself and independently of a national law adopted

EU Regulations.[477] This interpretation of legal certainty echoes, to a certain extent, the principle of good faith or the Latin maxim *nemo auditur suam propiam turpitudinem allegens*. In other words, that case-law seeks to preclude the State from taking advantage of its own failure to comply with Community law.

Secondly, the Court relied on legal certainty to ensure the coherence of the system of legal remedies regarding preliminary rulings on validity and also in relation to the overlap between Articles 230 and 234 EC. As to preliminary rulings on validity, the Court in *Foto-Frost* used legal certainty to guarantee the coherence of the Community legal order.[478] More precisely, it considered that the national court cannot declare a Community act invalid, since this would jeopardize the unity of the Community legal order.[479] As to the relationship between Articles 230 and 234, the principle of legal certainty was applied in the context of state aid in the *Textilwerke Deggendorf* (*TWD*) case.[480] In this case, the Commission ordered the recovery of aid paid by Germany to TWD. The German Government communicated this Decision to the undertaking, informing it of its possibility to contest the Commission's Decision under Article 230 EC.[481] However, TWD did not start an action under Article 230 EC. Then on the basis of the Commission's Decision, the German government ordered the undertaking to repay the aid. TWD challenged this decision, arguing that the Decision of the Commission was invalid, since the aid was

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by a member state for its implementation, have the effect of determining or aggravating the criminal liability of persons who acted in contravention of that directive. The Italian law failed to implement correctly two directives which required prior notification of all (rather than merely new) discharges of cadmium.

[477] C-60/02 *Rolex* [2004] n.y.r., para. 61, "[h]owever, a particular problem arises where the principle of compatible interpretation is applied to criminal matters. As the Court has also held, that principle finds its limits in the general principles of law which form part of the Community legal system and, in particular, in the principles of legal certainty and non-retroactivity. In that regard, the Court has held on several occasions that a directive cannot, of itself and independently of a national law adopted by a Member State for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive (see, in particular, Pretore di Salò, paragraph 20; Case C-168/95 Arcaro [1996] ECR I-4705, paragraph 37, and Joined Cases C-74/95 and C-129/95 X [1996] ECR I-6609, paragraph 24)".

[478] Case 314/85 *Foto Frost* [1987] ECR 4199.

[479] *Ibid.,* para. 15, "[n]ational courts against whose Decisions there is a judicial remedy under national law may consider the validity of a Community act and, if they consider that the grounds put forward before them by the parties in support of invalidity are unfounded, they may reject them, concluding that the measure is completely valid. In contrast, national courts, whether or not a judicial remedy exists against their Decisions under national law, themselves have no jurisdiction to declare that acts of Community institutions are invalid. That conclusion is dictated, in the first place, by the requirement for Community law to be applied uniformly. Divergences between courts in the Member States as to the validity of Community acts would be liable to place in jeopardy the very unity of the Community legal order and detract from the fundamental requirement of legal certainty".

[480] Case C-188/92 *TWD Textilwerke Deggendorf* [1994] ECR I-833.

[481] Priess, "Recovery of Illegal State Aids", CMLRev. 1996, pp.69 *et seq.,* at p.88.

compatible with the common market. In the subsequent preliminary ruling, the ECJ held that, in the interest of legal certainty, TWD was precluded from challenging the validity of the Commission's Decision because it did not bring an action under Article 230 EC within the two months time limit, even though it could have done so.[482] Interestingly, this reasoning was extended to the contexts of anti-dumping[483] and CAP. [484] Thus, the Court held, in the *National Farmer Union* case, that a Member State which is an addressee of a Decision and which has not challenged its legality within the time-limit laid down by Article 230 EC does not, consequently, have standing before a domestic court to invoke its illegality so as to dispute the merits of an action brought against it.[485] This reasoning is, indeed, intended to ensure that Community measures, which produce legal effects, are not challengeable for an indefinite period.

Thirdly, the recent *Kühne & Heitz* (2004) case offers an illustration of the recourse to legal certainty as a tool of interpretation regarding national administrative decisions falling within the scope of EC law.[486] It concerned a decision regarding customs nomenclature given by a national administrative body (Board for poultry and eggs). The decision was confirmed by the administrative board for Trade and Industry, using the *acte clair* doctrine. Nevertheless, the decision appeared inconsistent with a subsequent ruling from the ECJ. By consequence, the plaintiff asked for the re-opening of the administrative procedure, which resulted in a preliminary reference procedure. The Court stated that legal certainty is one of a number of general principles recognized by Community law and that the finality of an administrative decision contributes to such legal certainty. Therefore, Community law does not require that administrative bodies be placed under an obligation, in principle to re-open administrative decisions which have become final upon the expiry of reasonable time-limits for legal remedies or by exhaustion of those remedies.[487] However, the Court resorted to four circumstantial arguments in order to counter the primacy of legal certainty:

1) Dutch law confers on the administrative body the power to re-open its final decision

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[482] *See* Struys and Abbott, "The Role of National Courts in State Aid Litigation", ELR 2003, pp.172-189, at pp.185-188.

[483] Case C-239/99 *Nachi Europe* [2001] ECR I-1197, paras. 29-37. This case makes clear that the principle of legal certainty applies where a Member State lets the time limit (contained in Article 230) pass by and then tries to claim a measure is invalid as a defence in infringement proceedings for violation of that measure.

[484] C-241/*01 National Farmer Union* [2002] ECR I-9079. This case concerned a decision taken as to the BCE disease (*vache folle*). The Court referred expressly to the *TWD* case.

[485] *Ibid.,* para. 36, the Court held that the "same considerations of legal certainty explain why a Member State, which is a party to a dispute before a national court, is not permitted, before that court, to plead the unlawfulness of a Community decision addressed to it in respect of which it did not bring an action for annulment within the time-limit laid down for that purpose by the fifth paragraph of Article 230 EC". *See also Nachi Europe*, para. 30.

[486] Case C-453/00 *Kühne & Heitz* [2003] ECR I-10239.

[487] *Ibid.*, para. 24.

2) The administrative decision became final only as a result of a national judgment against whose decision there is no legal remedy.
3) That judgment was based on an interpretation of Community law which, in the light of a subsequent judgment of the Court of Justice was incorrect and which had been adopted without a question referred to the Court of Justice for a preliminary ruling.
4) The person concerned complained to the administrative body immediately after becoming aware of the judgment of the Court of Justice.[488]

In such circumstances, the Court concluded that the administrative body concerned is, in accordance with the principle of cooperation arising from Article 10 EC, under an obligation to review the decision in order to take into account the interpretation of the relevant Community law provision given in the meantime by the Court.[489] Arguably, the principle of legal certainty conflicts with Article 10 EC. It, thus, appears as a limitation of the effective application of Community law.[490] At the end, these various examples reflect the ambivalence of the principle of legal certainty, as a rule of interpretation that may both foster and restrict the effective application of Community law.

4.3.2. Legal Certainty and its Corollaries as Substantive Rights

As said previously, though legal certainty is often used as a principle of interpretation, it may also be used as a substantive right. The substantive aspect of legal certainty particularly appears in relation to its corollaries.[491] Indeed, legal certainty makes up an umbrella concept and it is settled jurisprudence that legal certainty enshrines corollaries.[492] Three main corollaries may be determined, i.e. acquired rights, non-retroactivity and legitimate expectations.[493] Notably, the

[488] *Ibid.,* para. 26.
[489] *Ibid.,* para. 27.
[490] *One may also deduce an obligation to make a preliminary ruling. The administrative body is obliged to review its decision in order to take into account of the interpretation of community law given by the ECJ.*
[491] The corollaries may be invoked separately and also in relation to legal certainty.
[492] Case C-63/93 *Duff* [1996] ECR I-569, para. 20, Case C-107/97 *Max Rombi* [2000] ECR I-3367 para. 66, "[i]t is true that, as Arkopharma has observed, the principle of the protection of legitimate expectations is the corollary of the principle of legal certainty which requires that legal rules be clear and precise, and aims to ensure that situations and legal relationships governed by Community law remain foreseeable".
[493] Other corollaries may be identified, e.g. *non bis in idem*. *See* Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon* [2004] n.y.r., para. 130, "[i]t follows from the case-law that the principle ne bis in idem, also enshrined in Article 4 of Protocol No 7 to the ECHR, is a general principle of Community law upheld by the Community judicature (Joined Cases 18/65 and 35/65 Gutmann v. Commission [1966] ECR 103, 119, and Joined Cases C-238/99P, C-244/99P, C-245/99P, C-247/99P, C-250/99P to C-252/99P and C-254/99P *Limburgse Vinyl Maatschappij* v. *Commission* [2002] ECR I-8375,

principle of legitimate expectation is the most often invoked corollary. It appears, however, interesting to look at the scope of the two other main corollaries that also boast a strong connection with legitimate expectations.

a) Acquired/Vested Rights

Acquired rights are synonymous with vested rights and well-established rights. They are often associated, in the early case-law, with the principle of revocation of administrative acts (unlawful[494] / favourable administrative acts).[495] This principle, that perfectly reflects legal certainty, establishes the irrevocability of legal acts that create substantive rights. In other words, these administrative acts cannot, in principle, be retroactively withdrawn. An illegal measure may, however, be

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paragraph 59, and Boehringer v Commission, cited at paragraph 120 above, paragraph 3)". Article 50 CFR enshrines the right not to be tried or punished twice in criminal proceedings for the same criminal offence. *Ibid., Tokai*, para. 137, "[i]t is true that Article 50 of the Charter of Fundamental Rights provides that no one may be tried or punished again in criminal proceedings for an offence of which he has already been finally acquitted or convicted within the Union in accordance with the law. However, that charter is clearly intended to apply only within the territory of the Union and the scope of the right laid down in Article 50 is expressly limited to cases where the first acquittal or conviction was handed down within the Union".

[494] *See Algera*, *supra n.460*, *SNUPAT*, *supra n.461, see also* Case 14/61 *Hoogovens* v. *High authority* [1962] ECR 253, Case 111/63 *Lemmerz-Werke* v. *High Authority* [1965] ECR 677, Case 14/81 *Alpha Steel* v. *Commission* [1982] ECR 749, Case 15/85 *Consorzio Cooperative d'Abruzzo* v. *Commission* [1987] ECR 1005, Case C-248/89 *Cargill* v. *Commission* [1991] ECR I-2987, Case C-365/89 *Cargill* [1991] ECR I-3045.

[495] Case 54/77 *Herpels* v. *Commission* [1978] ECR 585, Case C-90/95 P *Henri de Compte* v. *European Parliament* [1997] ECR I-1999. In these cases, the Court stated that the retroactive withdrawal of a favourable administrative act is subject to very strict conditions. Going further, it may be linked to the maxims *Legem patere quam fecisti* (an authority must respect its own rules) or *nemo contra factum propium* (an authority must not repudiate its own promises). *See* AG Warner in Case 81/72 *Commission* v. *Council* [1973] ECR 575, at pp. 592-593. The Opinion of AG Warner in *Commission* v. *Council* is of particular interest. In this case, the Commission relied on the maxim *Legem patere quam fecisti*. The AG interpreted the maxim in the light of continental law: *"It seems that, in those systems, that maxim has been interpreted to mean, at its widest, that when a public authority has adopted a rule for dealing with a particular category of cases, it may not so long as the rule stands, depart from it in any individual case falling within that category. But this does not preclude the authority from changing the rule"*. In English law, a comprehensive comparative analysis of the case-law did not reveal the evidences of this principle. The maxim was, indeed, deemed to be unknown to English law. The maxim bears the hallmark of the general principle of legal certainty and might tend to demonstrate the existence of divergences between the laws of the Member States in this area. The AG considered that this maxim dealt with binding rules and not simple expectations (simple course of actions). In the light of the Opinion, it seemed that the maxim, as applied by the Member States, could not permit an applicant to allege a breach of its legitimate confidence. However, the Court did not follow the Opinion of Warner and found that the Council Decision (even if not binding) could give rise to a legitimate expectation.

withdrawn with retroactive effect if the revocation happens within a reasonable time and if it respects the legitimate expectations of the beneficiary of the measure.[496] Notably, Mertens de Wilmars considered that acquired rights and legitimate expectations may be confused,[497] which is not so surprising since both principles are intricately related.[498] In that regard, AG Roemer linked the principles of legitimate expectations and legal certainty with acquired rights.[499] Furthermore, it may be said that the use of the notion of "acquired rights" is also confusing, since situations may always change.[500] It may be difficult, indeed, to contest that the Community institutions are not entitled to adapt rules and regulations.[501]

As stated above, a favourable act that creates an acquired right cannot be revoked.[502] However, the principle of acquired rights is not absolute.[503] A delicate balance must be struck between between the individual interest (certainty) and the public interest (legality). For instance, the Court of Justice upheld in *Eridania* that "an undertaking cannot claim a vested right to the maintenance of an advantage

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[496] *See, supra n.494 and 495, Alpha Steel, Consorzio Cooperative d'Abruzzo, Cargill, Henri de Compte.* The determination of a "reasonable time" depends on the circumstances of the case. For instance, in *Algera* a period of six months was deemed reasonable. By contrast in *De Compte*, a period of two months and 25 days was deemed unreasonable by the ECJ (*see* by contrast the CFI). The reasonableness of the delay is closely linked to the balancing between legitimate expectations and legality. In *De Compte*, the argument regarding legality was tenuous, the applicant had acted in good faith in providing information as to the administrative decision, he had strong interests and there was no overriding public interest.

[497] Mertens de Wilmars, "The Case-Law of the Court of Justice in Relation to the Review of the Legality of Economic Policy in Mixed-Economy Systems", LIEI 1983, pp.1-16, at pp.15-16.

[498] *See, supra n.494, Algera, SNUPAT, Hoogovens*. Indeed, it may be argued that acquired rights propelled the elaboration of the principle of legitimate expectations. Further, one establishes, below, that the recent jurisprudence on legitimate expectations embraces the principle of acquired rights.

[499] AG Roemer in *Westzucker,* at p.739. The AG, first, acknowledged that the principles of legal certainty and legitimate expectations have already been recognized in Community law. Then, AG Roemer, turned to the national law of three Member States. He confirmed the existence of such principles in German constitutional law by citing expressly a decision of the Federal Constitutional Court. Also, the AG stressed the existence of such principles in Belgium and French law through the concept of "acquired rights" (*droits acquis*).

[500] Temple Lang, *supra n.459,* at p.171.

[501] *See* Case 230/78 *Eridania* [1979] ECR 2749, para. 22, Case T-472/93 *Campo Ebro* [1995] ECR II-421, para. 52. Case T-243/94 *British Steel* [1997] ECR II-1887, para. 77.

[502] *Herpels, supra n.495*, para. 38, *De Compte*, *supra n.495,* para. 35.

[503] *Ibid., De Compte*, para. 35. The court used the terminology of legitimate expectations in relation to the withdrawal of a favourable administrative act. *See, supra n.494*, *Algera,* at p.56, *Hoogovens* para. 5, *Alpha Steel* paras. 10-12, *Consorzio Cooperative d'Abruzzo* paras. 12-17, *Cargill I* para. 20, *Cargill II*, para. 18. *See also* Case T-118/00 *Conserve Italia* [2003] ECR II-719, para. 77, "the administration may withdraw with retroactive effect an advantageous administrative act vitiated by illegality, provided that it does not infringe either the principle of legal certainty or that of the protection of legitimate expectations".

which it obtained from the establishment of the common organization of the market and which it enjoyed at a given time", due to the fact that the market is variable in terms of the economic factors which affect the development of the market.[504] In other words, where the Community authorities have a broad discretion, traders cannot claim a vested right in the maintenance of an advantage which they obtained from the Community rules.[505] Indeed, the Court of Justice tries to balance the various interests at stake.[506] In *SNUPAT,* it emphasized that the principle of certainty must be combined with the principle of legality. Furthermore, it considered that the prevalence of one of the interests depends on the circumstances of the case in comparing the private interest (good faith of the beneficiary) with the public interest (interest of the Community).[507] In a similar vein, the Court held in *Hoogovens* that, "in weighing up the conflicting interest on which the choice between the *ex nunc* and *ex tunc* revocation of an illegal decision is to depend, it is important to bear in mind the actual situation of the parties concerned".[508]

In this respect, it may be said that the balancing test is intricately close to the weighing test endeavoured in relation to legitimate expectations. Therefore one may venture to argue that the acquired rights and legitimate expectations are, to a certain extent, similar. Though one case of the CFI distinguishes between both principles, it may be said that legitimate expectations embrace the principle of vested rights.[509] In

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[504] Case 230/78 *Eridania* [1979] ECR 2749 para. 22, *See also*, Case 59/83 *Biovilac* v. *EEC* [1984] ECR 4080 para. 23, Joined Cases 133/85, 134/85, 135/85 and 136/85 *Rau* [1987] ECR 2289, para. 18, Case C-69/89 *Nakajima All Precision* v. *Council* [1991] ECR I-2069, para. 119.

[505] *Ibid.*

[506] Schønberg, *Legitimate Expectations in Administrative Law*, Oxford, 2000, at pp.97-101.

[507] *SNUPAT*, *supra n. 494,* at p.87.

[508] *Hoogovens, supra n. 494,* para. 5.

[509] Case T-113/96 *Edouard Dubois* [1998] ECR-II 125, paras. 66-68, "[s]econdly, in cases where…the Community authorities have a broad discretion, traders cannot claim a vested right in the maintenance of an advantage which they obtained from the Community rules….It follows that, even if Regulation No 3632/85 did in practice grant a specific advantage to the professional category of customs agents, the applicant is still not justified in claiming a vested right in the maintenance of that advantage, since the Community institutions are entitled to adapt rules and regulations to the necessary developments which they must undergo. That right of the institutions to undertake adaptations is all the more evident in this case since, as is clear from the first recital of Regulation No 3904/92, the completion of the internal market is a fundamental objective for the development of the Community. …As regards the principle of protection of legitimate expectations, the right to rely on this principle extends to any individual who is in a situation in which it is apparent that the Community administration has led him to entertain reasonable expectations (see, for example, Exporteurs in Levende Varkens and Others v Commission, cited above at paragraph 54, paragraph 148). On the other hand, a person may not plead a breach of this principle unless the administration has given him precise assurances (see, for example, Lefebvre and Others v Commission, cited above at paragraph 60, paragraph 72)". This case confirmed that there is no breach of vested rights in a context where the Community institutions have a broad discretion and also are entitled to

that regard, it is worth noting that recent case law of the ECJ and the CFI appear to have blended the principle of legitimate expectations with vested rights. To exemplify, the Court of Justice in *Crispoltini II,* a case concerning the question whether or not the introduction of guaranteed quantities regarding the production of tobacco breached the legitimate expectation of the producers, held that producers could not claim a vested right in the maintenance of a certain market system since a possible reduction in their earnings would not infringe the principle of legitimate expectations when the maximum guaranteed quantities were known in advance.[510] Similarly, in *ATB* (2000), the Court observed that,

> "whilst the protection of legitimate expectations is one of the fundamental principles of the Community, economic operators cannot have a legitimate expectation that an existing situation which is capable of being altered by the Community institutions in the exercise of their discretion will be maintained; this is particularly true in an area such as the common organisation of the markets, the object of which entails constant adjustments to meet changes in the economic situation. It follows that economic operators cannot claim a vested right to the maintenance of an advantage which they derive from the establishment of the common organisation of the markets and which they enjoyed at a given time".[511]

Thus, if one compares this paragraph with paragraph 66 of the *Dubois* case, it appears that the ECJ substituted legitimate expectations with vested rights. The new reasoning is as follows: economic operators (traders) cannot have a legitimate expectation in areas where the Community institutions have broad discretion in order to adapt to changing economic conditions. It results from such a finding that the economic operators cannot claim vested rights. To summarize, it appears that the breach of vested rights clearly depends on the existence of a legitimate expectation. Consequently, it may be argued that this reasoning includes the principle of vested rights within the wider principle of protection of legitimate expectations. Finally, in contrast to legitimate expectations, the principle of vested rights appears to be less and less used by the Court. This shift is probably linked to the submission of the parties. In this respect, it may be stated that though parties still continue, in very few cases, to argue a breach of vested rights before the CFI, the Tribunal is not so

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adapt legislation. This case must be compared with the recent jurisprudence of the ECJ and CFI.

[510] Joined Cases C-133, C-300 and C-362/93 *Crispoltini* [1994] ECR I-4863, paras. 57-58, Case C-372/96 *Pontillo* [1998] ECR I-5091, paras. 22-23.

[511] Case C-402/98 *Agricola Tabacchi Bonavicina Snc di Mercati Federica (ATB)* [2000] ECR I-5501, para. 37, Case T-196/99 *Area Cova SA* [2002] ECR II-3597, para. 122, "[w]hilst the protection of legitimate expectations is one of the fundamental principles of the Community, economic operators cannot have a legitimate expectation that an existing situation which is capable of being altered by the Community institutions in the exercise of their discretion will be maintained, especially in an area such as the common agricultural policy, in which the institutions have a wide discretion. It follows that economic operators cannot claim a vested right to the maintenance of an advantage arising from Community legislation and which they enjoyed at a given time.

inclined to make good a breach of vested rights or even to dwell into detail with the arguments of the parties as to the alleged infringement.[512]Also, as seen previously, the ECJ and CFI often assess the breach of vested rights under the principle of legitimate expectations. In other words, an absence of a legitimate expectation leads to the impossibility to invoke a breach of vested rights. Indeed, the principle of legitimate expectations includes the illegal act creating subjective rights. It may be concluded that the principle of vested right becomes, to a certain extent, obsolete (*tombe en désuètude)*. In the early years, it helped the Court to develop the principle of legitimate expectations. Nowadays, it appears to be embraced by the very extensive principle of legitimate expectations.

b) Non-retroactivity

Arguably, the principle of non-retroactivity constitutes the most obvious application of the concept of legal certainty and a clear illustration of the need to respect the rule of law. Looking at both the laws of the Member States and Community law, one may deduce two important principles related to the scope of application, *ratione temporis*, of the law (*application de la loi dans le temps)*. Firstly, the new law does not apply to situations prior to its entry into force and, thus, cannot be retroactive. Secondly, the new law applies immediately to situations after its entry into force. According to a settled case-law**,** a measure cannot take effect before it is published.[513] Put differently, a law cannot be applied to a person who could not have known its existence. In *Exportation des Sucres,*[514] the Court considered that an EC measure was precluded to take effect from the time before its publication, since the principle of legal certainty should be respected.[515] Similarly in *Racke,* the Court stated that *"in general the principle of legal certainty precludes a Community measure from taking effect from a point in time before its publication*".[516] However,

[512] Case T-162/04, Action brought on 30 April 2004 on by Eugenio Branco Lda against the Commission of the European Communities, Case T-195/00 *Travelex Global & Financial Services Ltd* [2003] ECR II-1677, Case T-251/00 *Lagardère SCA* [2002] ECR II-4825, Case T-52/99 *T Port GmbH* [2001] ECR II-981.

[513] *See* wording of Article 253 EC.

[514] Case 88/76 *Exportation des Sucres* v. *Commission* [1977] ECR 709.

[515] *Ibid.,* the "fundamental principle in the Community legal order (…) that a measure adopted by the public authorities shall not be applicable to those concerned before they have had the opportunity to make themselves acquainted with it", has led to the refusal by the Court to accept accidental retroactivity. This accidental retroactivity is the result of a law being accidentally published later than the date set out for its entry into force, without being intended by the author of the act to be retroactive. The Court held that in these cases, the laws could only be validly applied from the date of the actual publication and on. *See* Raitio, at p.192.

[516] Case 98/78 *Racke* [1979] ECR 69. *See also* Case 99/78 *Decker* [1979] ECR 101, Case 224/82 *Meiko-Konservenfabrik* [1983] ECR 2539. In *Racke*, a Regulation provided for the levying of monetary compensatory amounts on imports of wine from Yugoslavia from an earlier date prior to the date of its adoption. In *Meiko-Konservenfabrik,* at p.2548. the Court making reference to the general principle of legal certainty declared that it was contrary for a

non-retroactivity is not absolute. There are certain exceptions. In that regard, true retroactivity (actual retroactivity) concerns the situation where a rule is introduced and applied to events that have already been concluded at the time of its adoption.[517] Furthermore, immediate application of the law (material/apparent/quasi-retroactivity) concerns the application of a rule to an act or transaction in progress.[518] The rule applies to the future consequences of situations which arose under the former law. It is worth noticing that a justified retroactive measure must be properly motivated and thus provide adequate reasoning.[519]

True retroactivity, (actual retroactivity), may occur in several cases. Either where the date of the entry into force precedes the date of publication or where the rule applies to circumstances that have already been concluded, before the entry into force of the measure.[520] The Court of Justice recognized true retroactivity for the first time in the *Rewe-Zentrale* Case.[521] The Court considered a retroactive decision to be justified merely on the ground that the retroactive effect was necessary in order to maintain a certain level of agricultural prices. By contrast, non-justified retroactive measures are illegal and must be declared invalid.[522] The violation of the principle of non-retroactivity leads to the invalidity of the EC legislation only if the legitimate expectations are not duly respected and where there is no Community objective that requires a temporal limitation.[523] In *Crispoltini I*, the ECJ ruled that Council Regulations fixing maximum guaranteed quantities of tobacco that were adopted and became applicable after the producers had made their production decisions for the current year, were deemed to be invalid.[524] Indeed, the decisions regarding production had already been taken and the legitimate expectations of those

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Community measures to specify a date prior to its publication as the date on which is to take effect (principle of non retroactivity).

[517] Schwarze, *European Administrative Law, Sweet and Maxwell, 1992,* at p. 1120.

[518] Schermers and Waelbroeck, *Judicial Protection in the European Union*, Kluwer, 2001, pp.77-79, Tridimas, *supra n.468,* at p.180.

[519] A measure that has retroactive effect must indicate the necessity of such an effect in its statement of reasons in accordance with Article 253 EC The Court of Justice ruled in *Diversinte* (Joined Cases C-260 and C-261/91 *Diversinte and Iberlacta* [1993] ECR I-1885) that measures having retroactive effect "must include in the statement of the reasons on which they are based, in a clear and unequivocal fashion, with particulars which justify the desired retroactive effect". Even if the retroactive application could be objectively justified, the failure to provide adequate reasons is in itself a ground of annulment. However, in the *Moskof* Case (Case C-244/95 *Moskof* [1997] ECR I-6441) the Court refused to annul a Commission Regulation that applied retroactively though the Regulation did not provide sufficient reasoning to justify retroactivity.

[520] Case 258/80 *Rumi* [1982] ECR 487.

[521] Case 37/70 *Rewe-Zentrale* [1971] ECR 23.

[522] Tridimas, *supra n.468,* at pp.174-175.

[523] Case 224/82 *Meiko-Konservenfabrik* [1983] ECR 2539, Case C-331/88 *Fedesa* [1990] ECR 4023. The only exception permitted was the due respect of the principle of legitimate expectations. In these circumstances, the principle of legitimate expectations was also breached. The Commission Regulation was consequently declared invalid.

[524] Case C-368/89 *Crispoltoni* [1991] ECR I-3695.

concerned had been infringed because they were introduced at a time when they could no longer be taken into account in formulating investment decisions.[525]

Importantly, the Court has consistently held that although, in general, the principle of legal certainty precludes a Community measure from taking effect from a point in time before its publication, it may exceptionally be otherwise where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected.[526] In other words, retroactivity may be justified, thus, non-retroactivity is not absolute.[527] Also it is worth remarking that the two conditions (overriding public interest and respect for legitimate expectations) justifying retroactivity are cumulative and not independent, such as in relation to the immediate application of the law. However, those two conditions may not be required where the purpose of retroactive application is to protect the interests of individuals.[528] Furthermore, Tridimas has pinpointed that the two conditions are closely linked and reflect the conflicting interests at issue. In other words, the Court will have to balance, according to the circumstances of the case, the two conditions and may decide that the public interest (legality) overrides legitimate expectations (certainty) or vice versa.[529]

As to the protection of a general interest, it constitutes the first condition of retroactivity and relates to the purpose to be achieved. In other words, the protection of the general interest (compulsory reasons) in order to achieve an objective may justify the retroactivity in certain circumstances.[530] This is where, like in the first

[525] Another reason for a retroactive measure not to be justified may be if a sufficient observation of the market concerned makes it possible for the Commission to revise its forecasts, long before the adoption of retroactive Regulations, as the Court decided in *Agricola Commerciale Olio* (Case 232/81 *Agricola Commerciale Olio* [1984] ECR 388) and *Savma* (Case 264/81 *Savma* [1984] ECR 3915). Concerning the retroactive cancellation of a sale due to altered market conditions. Furthermore, a legislative provision cannot be interpreted to the same effect as a future legislative provision because to do so would be to give retroactive effect to the latter (Case C-209/96 *UK* v. *Commission* [1998] ECR I-5655).

[526] *Moskof, supra n.519,* para. 77, *Crispoltoni*, *supra n.524,* para. 17, Case 98/78 *Racke [*1979] ECR 69, Case 99/78 *Decker* [1979] ECR 101. The Member States' constitutions accept the possibility of exceptions in practice to the principle of non-retroactivity. Even the German *"Bundesverfassungsgericht",* according to which a law may not have retroactive effect if it violates legitimate expectations, allows for true retroactivity where such a rule might have been foreseen or this is required for general interest (BVerfGE 2, 285 (380)).

[527] *See infra*, non-retroactivity of penal law. It may be argued (*see* Schermers and Tridimas) that non-retroactivity in criminal matters is absolute. Such an assertion must be debated.

[528] Tridimas*, supra n. 468*, at pp. 170-171. *See e.g.* Case 111/63 *Lemmerz-Werke* [1965] ECR 677, AG Warner in Case 27/77 *Cargill* [1977] ECR 1552, Case 127/80 *Grogan* v. *Commission* [1982] ECR 869, Case 154/84 *Schultz and Berndt* [1985] ECR 3165, Case C-345/88 *Butterabsatz Osnabrück-Emsland* [1990] ECR I-159. In *Grogan,* transitional arrangements must be introduced with retroactive effects, since the measure infringed the principle of legitimate expectations.

[529] *Ibid.*, Tridimas at p.173.

[530] Schermers and Waelbroeck, *supra n.518,* at p.73.

Rewe case, pressing economic reasons require retroactive legislation.[531] More recently, the Court considered, in the *SAFA* case, that the retroactive effect of transitional measures regarding the accession of Greece was necessary in order to avoid speculative movements of agricultural products.[532] In a similar vein, the Court held that due to the accession of new Member States, the uniform application of the *acquis communautaire* in the Union makes up a reason justifying the retroactive application of measures adapting existing Community acts.[533]

As to the respect of legitimate expectations, it reflects the importance of the foreseeability or predictability of the measure. In other words, the legitimate expectation must be worthy of protection. This is well illustrated by the *Isoglucose* cases. In *Roquette* and *Maizena*, the Court annulled a Regulation regarding the production of isoglucose, by rejecting all the substantive arguments, on procedural grounds since it was adopted without prior consultation with the Parliament.[534] In the wake of these judgments, another Regulation (No 387/81) adopted by the Council reimposed the system with retroactive effect. The purpose of the retroactive application was merely to reinstate the effects of a previous measure declared void on procedural grounds. The new Regulation was challenged by Amylum, which argued a breach of the principle of non-retroactivity.[535] The Court of Justice accepted a long period of retroactivity,[536] and stated that the requirements for retroactivity had been met, since the retroactive application was needed in order to ensure the stabilization of the sugar market and that the retroactive application was foreseeable because the traders concerned knew about the intention to take measures to that effect. As to the latter argument, the affected traders may not be able to claim a breach of legitimate expectations if it was foreseeable that a measure was likely to

[531] Case 37/70 *Rewe* [1971] ECR 36, paras. 15-16. In that case, the court held that the adjustments to agricultural prices have retroactive effect from the date of the parity change. *See also* the case-law on monetary compensatory amounts. Indeed, retroactivity may be allowed in the case of monetary compensation which by definition can only be established some time after the value of the currency changes. According to the Court in *IRCA* (Case 7/76 *IRCA* [1976] ECR 1229),"…the fact that the factors necessary for their calculation are only determined after the period during which the said amounts have become applicable is frequently inherent in the system itself, and cannot therefore be considered, on such grounds, as giving the rules a retroactive effect". This case-law demonstrates that the argument relating to the inherency of the system is close from the economic reasons argument. Raitio (at p.193) considers that the case-law on compensatory amounts has affected the principle of non-retroactivity. (*See supra IRCA*, *Rewe-Zentrale*, *Racke* and *Dekker*).

[532] Case C-337/88 *SAFA* [1990] ECR I-1.

[533] Case C-259/95 *Parliament* v. *Council* [1997] ECR I-5303.

[534] Case 138/79 *Roquette Frères* SA [1980] ECR 3333. *See also* Case 139/79 *Maizena* [1980] ECR 3393.

[535] Case 108/81 *Amylum* [1982] ECR 3107.

[536] Tridimas, *supra n.468* at p.178. This judgment was criticized (Hartley, at p.145) because it established the validity of a Regulation that entirely nullified the effect of the Court's judgment in an earlier case. The author considered, however, that it is difficult to argue that the judgment was in breach of legal certainty.

have retroactive application.[537] To determine whether a retroactive application of a measure is foreseeable may appear rather difficult, since it depends on a multitude of elements,[538] e.g. the circumstances of the particular situation, the existence of advance warning[539] and also whether the context is subject to frequent changes in the law.[540] Furthermore, it must be pointed out that measures, ensuring the regular functioning of administration, which apply, for instance, to a fiscal year and are published a short time after the beginning of that period, are not considered to be genuinely retroactive, since the parties concerned are fully able to adjust their behaviour in order to take into account the new rules and thereby avoid any infringement.[541]

As said previously, immediate application of the law occurs where a rule applies to an act or a transaction in progress and, thus, to the future consequences of situations which arose under the former law. This exception to the principle of non-retroactivity arises mainly in the CAP context though one may also indentify other areas of application, e.g. tax law.[542] In the *Hessische Knappschaft* case, the Court upheld that the Community legislation *"must be regarded as taking effect as soon as it enters into force, in so much as they determine the present legal consequences of actions in the past"*.[543] The Court confirmed this principle in the *Brock* case, where it ruled that *"laws amending a legislative provision apply, unless otherwise provided, to the future consequences of situations which arose under the former law"*.[544] In the *Westzucker* case,[545] export licences were delivered before the exports had been made. The legislation was modified and, consequently, the exporters could no longer benefit from an increase in the intervention price, since the former law did not confer on the persons concerned the certainty of profiting from an increase in the

[537] *See also*, Case C-331/88 *Fedesa* [1990] ECR I-4023. In that case, the Court of Justice confirmed the *Amylum* case. It concerned a retroactive Directive that replaced a Directive declared invalid on procedural grounds.
[538] Tridimas, *supra n.468* at pp. 179-180. a qualitative change of the law requires a sufficient advance warning to the economic operators affected
[539] The existence of the warning is linked to the determination whether a reasonable trader would have been able to foresee the change in the law.
[540] Case T-489/93 *Unifruit Hellas* [1994] ECR II-1201.
[541] Case 258/80 *Rumi* [1982] ECR 487. In that case, a decision, published on 31 October 1980, imposing steel quotas from 1 October 1980.
[542] Joined Cases C-487/01 and C-7/02 *Gemeente Leusden* [2004] n.y.r., para. 77, "[i]t would be contrary to that objective to prohibit a Member State to require immediate application of its law withdrawing the right to opt for taxation of certain lettings of immovable property entailing an obligation to adjust deductions made, where that State has become aware that the right of option was being used as part of tax avoidance schemes. A taxable person cannot thus justify a legitimate expectation of maintenance of a legislative framework allowing tax evasion, avoidance and abuse".
[543] Case 44/65 *Hessische Knappschaft* [1965] ECR 965.
[544] Case 68/69 *Brock* [1970] ECR 171.
[545] Case 1/73 *Westzucker* [1973] ECR 273.

intervention price.[546] The Court followed the well established principle and upheld the immediate application of the law.

Notably, the Court may accept implicitly that the legislation can be applied to transactions already entered into. In that regard, the Court ruled, in *SOPAD,* that, "the consequences of contracts existing at a date of a legislative change must not continue to be determined by the law in force at the time when the contracts came into existence".[547] In a similar vein, it held that the validity of the Regulation in question was not affected by the fact that it was to enter into force immediately *"as any transaction which had already taken place and been executed at the moment of its entry into force would be excluded from its application"*.[548]

It is worth remarking that the immediate application of the law can only be accepted if one of two conditions are met, namely either if the legitimate expectations of those concerned are duly respected or if there is a general interest.[549] The requirements are thus alternative instead of cumulative. As to legitimate expectations, in *CNTA,* the Court stated that, "in the absence of an overriding matter of public interest, the Commission has violated a superior rule of law…by failing to include…transitional measures for the protection of the confidence which a trader might legitimately have had in the Community rules".[550] By contrast, in *Tomadini,*[551] a case concerning monetary compensatory amounts, the Court held that the principle of legitimate expectations cannot prevent new rules from applying to the future effects of situations which arose under former rules. [552] Also, immediate application is allowed where the individuals concerned cannot claim a vested right to the maintenance of advantages which they had obtained over a certain period from the system and when prudent traders were able to foresee the measure.[553]

Importantly, in criminal proceedings the application of the principle of non-retroactivity appears much more rigorous. Indeed, it constitutes a fundamental right. In that respect, it may be noted that the retroactive application of criminal laws is prohibited by Article 7 of the ECHR and Article 49 of the EU Charter of Fundamental Rights ("lighter penalty").[554] The principle that penal provisions may not have retroactive effect is common to all the legal orders of the Member States. In

[546] Tridimas, *supra n.468* at p.181.
[547] Case 143/73 *SOPAD* [1973] ECR 1433.
[548] Case 17/67 *Neumann* [1967] ECR 441.
[549] Schermers and Waelbroeck, *supra n.518* p. 78.
[550] Case 74/74 *CNTA* [1975] ECR 550.
[551] Case 84/78 *Tomadini* [1979] ECR 1801.
[552] *See e.g.* Case 278/84 *Germany* v. *Commission* [1987] ECR 1. The judgment in *Tomadini* has been followed in subsequent cases.
[553] Case C-350/88 *Delacre* [1990] ECR I-395.
[554] Article 49 Principles of legality and proportionality of criminal offences and penalties: "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable".

Kirk, the Court of Justice declared this principle to be one of the general principles of law whose observance is ensured by the Court.[555] The concept was successfully invoked against an EC Regulation. The doctrine has widely recognized that the application of the principle of non-retroactivity in criminal matters is absolute.[556] Recently, this assertion appeared to be implicitly verified by the Court of First Instance.[557]

However, the immediate application of the more lenient criminal law (*loi penale plus douce* / less severe criminal law/ mildest criminal law or retroactivity *in mitius*), to situations that have occurred before its publication, may constitute an exception to the absolute non-retroactivity of the criminal law. The *Berlusconi* case, where AG Kokott analyses the existence of such a principle, constitutes an important illustration in that respect.[558] It is worth noting that the question whether it constituted a general principle had already been raised by AG Fennelly.[559] Later, AG Léger, referring to the *Duisbourg* case, considered that there was no such general principle of Community law.[560] In 2004, AG Kokott considered that it should be recognized as a general principle of Community law since it is anchored in most of the laws of the twenty five Member States.[561] For instance, it may be found in Article 2 of the Italian *Codice Penale* (Criminal Code) and Article 2 of the German *Strafgesetzbuch* (criminal code).[562] Notably, only the United Kingdom and Ireland do not seem to recognize the existence of this principle.[563] Also, it is accepted by Article 15(1) of the ICCPR and by European secondary law.[564] As to the latter, a recent case in the CAP context made reference to the principle of less severe penalties.[565] Finally, it is mentioned in Article 49(1) of the EU Charter of

[555] Case 63/83 *Kirk* [1984] ECR 2689.
[556] *See, supra n.468 and 518*, *Raitio, Schermers, Tridimas* (at pp. 170-71).
[557] Case T-144/02 *Richard J. Eagle* [2004] n.y.r., para. 64, "[m]oreover, contrary to the submissions of the applicants, the requirement that a claim be brought within a reasonable time, far from undermining the principle of legal certainty, is liable to safeguard the certainty of legal relationships. Nor does it affect the principle of non-retroactivity, as retroactivity is acceptable outside the criminal sphere (Case C-331/88 *Fedesa* and Others [1990] ECR I-4023, paragraph 45)".
[558] AG Kokott, Joined Cases C-387/02, C-391/02 & C-403/02 *Silvio Berlusconi* [2005] n.y.g.
[559] AG Fennelly in Case C-341/94 *Allain* [1995] para. 43.
[560] AG Léger in Case C-230/97 *Awoyemi* [1999] para. 31. *See also* Case 234/83 *Gesamthochschule Duisburg* [1985] ECR 327, para. 20.
[561] AG Kokott in *Berlusconi*, *supra n.558,* paras. 156-157.
[562] *See also* Article 2(2) of the Belgium Criminal Code and Article 112-2 of the French Criminal Code.
[563] AG Kokott in *Berlusconi, supra n.558,* para. 156.
[564] Article 2, para 2 of Regulation n° 2988/95. Administrative sanctions. *See also* Article 8 UDHR.
[565] Case C-295/02 *Gisela Gerken* [2004] n.y.r., paras. 56-57, "[i]t follows that, in the area of checks and penalties for irregularities committed under Community law, the Community legislature has, by adopting Regulation No 2988/95, laid down a series of general principles and has required that, as a general rule, all sectoral regulations comply with those principles…Nothing in Regulation No 2419/2001 suggests that that regulation intended to

Fundamental Rights.[566] Thus, it may be concluded that the recognition of retroactivity *in mitius* as a general principle of Community law will put an end to the absolute nature of the principle of non-retroactivity in criminal matters.

4.3.3. Legitimate Expectations

The principle of legitimate expectation is a corollary to the principle of legal certainty.[567] This principle has generally been applied as an overriding principle so as to test the legality of the acts of the institutions and the Member States.[568] As noted above, it is closely connected with non-retroactivity and vested rights, though it boasts an evident autonomous function.[569] Generally speaking, the principle of legitimate expectations is based upon the concept that reliance on the Community legal order must be respected.[570]According to AG Trabucchi, *"[a]ssurances relied*

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exclude the principle of the retroactive application of less severe penalties in Article 2(2) of Regulation No 2988/95".

[566] The retroactive application of a more lenient later law constitutes an exception to the principle that penalties must be lawful. However, such an exception is justified only if the later, more lenient, law is compatible with Community law. *In casu*, the AG opined that the failure to apply a subsequent, more lenient criminal law which infringes Community law is compatible with the principle that penalties must be lawful.

[567] Case C-63/93 *Duff* [1996] ECR I-569, para. 20, Case C-107/97 *Max Rombi and Arkopharma SA* [2000] ECR I-3367*,* para. 66.

[568] Case Joined Cases C-487/01 and C-7/02 *Gemeente Leusden* [2004] n.y.r., para. 57, "[t]he principles of the protection of legitimate expectations and legal certainty form part of the Community legal order. They must accordingly be observed by the Community institutions (Case 74/74 CNTA v Commission [1975] ECR-533), but also by the Member States when they exercise the powers conferred on them by Community directives". *See also* Case 316/86 *Krucken* [1988] ECR 2213, para. 22, Joined Cases C-31/91 to C-44/91 *Lageder* [1993] ECR I-1761, para. 33, Case C-381/97 *Belgocodex* [1998] ECR I-8153, para. 26, Case C-396/98 *Schlossstrasse* [2000] ECR I-4279, para. 44, Case C-62/00 *Marks & Spencer* [2002] ECR I-6325, para. 44., Case *Max Rombi*, *supra n.*567*,* para. 65, "[t]he Court has consistently held that the requirements flowing from the protection of general principles recognised in the Community legal order, including the principle of the protection of legitimate expectations, are also binding on Member States when they implement Community rules**,** and that consequently they are bound, as far as possible, to apply the rules in accordance with those requirements. Where national rules fall within the scope of Community law and reference is made to the Court for a preliminary ruling, the Court must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with the general principles the observance of which is ensured by the Court".

[569] It may also be linked to equality and proportionality. As to equality, *see e.g.* Case T-289/02 *Telepharmacy Solutions Inc* [2004] n.y.r., paras. 59-61, concerning the publication of a trade-mark application The Court ruled that, "observance of the principle of equal treatment must be reconciled with observance of the principle of legality, according to which no person may rely, in support of his claim, on unlawful acts committed in favour of another (see, to that effect, Case 188/83 Witte v Parliament [1984] ECR 3465, paragraph 15, and Case 134/84 Williams v Court of Auditors [1985] ECR 2225, paragraph 14)".

[570] AG Trabucchi in Case 5/75 *Deuka* [1975] ECR 759 at p.776.

upon in good faith should be honoured".[571] The expectation is legitimate in the sense that it is worthy of protection. However, it is important to point out that the expectation worthy of protection is not absolute, since an overriding matter of public interest may supersede it. The principle has been widely used in staff matters and the CAP.

As to the staff salaries case, legitimate expectations have been applied as a general principle in *Commission* v. *Council* (Staff salaries case).[572] The case dealt with the validity of a Council Regulation (deemed to be) adopted in accordance with a previous Decision concerning the adjustment of staff salaries. One of the main questions at stake was the possible binding effect of the Decision (policy statement), which might impede the adoption of the Regulation. The Court referred to the rule of protection of confidence, that implies that the prior Decision bound the Council in its following action. According to the Court, *"whilst this rule is primarily applicable to individual decisions, the possibility cannot by any means be excluded that it should relate, when appropriate, to the exercise of more general powers"*.[573] The Court ruled that a Council Regulation was invalid as contravening the policy enshrined by a former informal Council Decision. [574]

As to the CAP, the ECJ clearly articulated this principle in *Töpfer*.[575] The plaintiff, a sugar exporter, adhered to a Community scheme where he could cancel his export licence if the value of a particular refund went down due to currency fluctuations. An EC Regulation suddenly withdrew this right of cancellation, evidently to the disadvantage of the plaintiff. Furthermore, the Commission calculated incorrectly the monetary compensatory amounts resulting from the fluctuation of the currency. Töpfer sought the annulment of this Regulation and also argued a breach of the principle of legitimate expectations as to the calculation of the amounts. More precisely, the applicant argued that the holders of licences were disadvantaged, because when the Commission fixed the amounts in 1977 it departed from the procedure which it had adopted until then. The amount of the compensation had been fixed at a rate lower than that which the holders of licences could expect in view of the procedure, which had been applied in previous years, and of the Commission's behaviour. Despite the failure on the merits, the ECJ upheld the principle.[576] Interestingly, the Court considered that an alleged breach of the principle of legitimate expectations was admissible under Article 173 (new Article

[571] Case 169/73 *Compagnie Continentale* v. *Council* [1975] ECR 117 at p.140.
[572] Case 81/72 *Commission* v. *Council* [1973] 575.
[573] *Ibid.* at p.584, para. 10.
[574] *Ibid.* at p.585, para. 11. Notably, the Court did not follow the Opinion of AG Warner, who referred to case-law in the Member States such as in England and France to suggest that there was no such principle. The AG, using the *legem paterem quam fecisti* principle, considered that such policy statement did not produce any binding obligations.
[575] Case 112/77 *August Töpfer* v. *Commission* [1978] ECR 1019. *See also* Case 74/74 *CNTA* v. *Commission* [1975] ECR 533 at p.556. This case concerns monetary compensatory amounts conferred to compensate the fluctuations of exchange rates in the CAP.
[576] *Ibid.,* paras. 19-20.

230 EC). Indeed the principle was deemed to form part of the Community legal order. By consequence, any failure to comply with it would constitute an infringement of the Treaty or of any legal rule relating to its application. As stems from above, the principle of legitimate expectations is generally used in order to review secondary Community law, but also the conduct of an institution.

Arguably, the application of the principle of legitimate expectations, like proportionality, may be described as a tripartite test.[577] First, the expectation must arise from a specific/precise assurance resulting either from legislation or a conduct. Secondly, the expectation must be worthy of protection or justified. In other words, the expectation must be legitimate. Thirdly, a balancing of interest must be undertaken. For instance, a matter of public interest may override the legitimate expectation. Thus, an expectation worthy of protection or a justified expectation is not absolute. The test may be summarized in three questions:

- Is there an expectation arising from EC legislation or a conduct?
- Is there an expectation worthy of protection?
- Is there an overriding interest?

It may be said that the three elements of the test come close to the three-pronged proportionality test, i.e. suitability, necessity and proportionality *stricto sensu*. As to the first part, the expectation, in order to be appropriate, must result from a specific assurance created either by legislation or a particular course of conduct. As to the second part, the legitimacy of the expectation must be determined. In other words, it must be assessed whether it is necessary to protect the expectation. As to the third part, the legitimate expectation, that represents the private interest (certainty), may be balanced with a public interest (legality).[578]

a) A Specific Assurance Arising from Legislation or Course of Conduct

As to the first part of the test, the expectations must be provoked by an authoritative (general or individual) action of a public authority, e.g. when the administration has given precise/specific assurances in a certain direction.[579] According to the settled case-law, the principle applies where the Community institution gave to those

[577] *See*, AG Geelhoed in Case C-491/01 *British American Tobacco* [2002] ECR I-11453, para. 274, "[f]irst, this involves protection against interference with existing rights. This right…is not absolute. …Second, the principle of legitimate expectations is connected to the protection of expectations that are justified". The AG seems to implicitly apply a dual test to the principle of legitimate expectations. First, he points out that the principle of legitimate expectations is not absolute. Second that the expectation must be justified".

[578] This third part constitutes the problematic of the tripartite test since, in light of the jurisprudence, there is an overlapping between the second and third part of the test.

[579] Case 74/74 *CNTA* v. *Commission* [1975] ECR 533 at p.556, para. 42, the Court stated "a trader may legitimately expect that for transactions irrevocably undertaken by him because he has obtained, subject to a deposit, export licences fixing the amount of the refund in advance, no unforeseeable alteration will occur which could have the effect of causing inevitable loss, by re-exposing him to the exchange risk".

concerned specific assurances giving rise on their part to reasonable expectations.[580] It is worth remarking that the expectation arises either from the legislation (general) or a course of conduct (individual).

As to the former, it results from the case law that the expectation may be enshrined in a Community Regulation or other general measure. For instance, in *Sofrimport*, a change of regulations occurred while a cargo of Chilean apples was actually at sea. The result of the new Regulation was that the freight could not be landed. The Court found a breach of the principle of legitimate expectations, since the Commission did not issue a warning and there was no overriding public interest.[581] In the context of milk quotas,[582] the Court, in *Mulder,* struck down a Regulation (Council Regulation No 857/84) which infringed the principle of legitimate expectations.[583] Due to important milk surplus, the Council Regulation No 1078/77 introduced a system of premiums for the non-marketing of milk and milk products. This Community measure, in the name of general interest, favoured the suspension of the milk marketing for a limited period and against the payment of a premium. In the aftermath, other measures were introduced by Regulation No 856/84 to limit milk production, i.e. quotas (reference quantity). Another Regulation (No 857/84) permitted the calculation of milk quotas. However, this Regulation did not provide for the allocation of quotas for producers benefiting from the premium under Regulation No 1078/77 and wishing to return to production. The Court held that,

> "...a producer…[that] has been encouraged by a community measure to suspend marketing for a limited period in the general interest and against the payment of a premium…may legitimately expect not to be subject, upon the expiry of his undertaking, to restrictions which specifically affect him precisely because he availed himself of the possibilities offered by the Community provisions".[584]

Similarly, in *Spagl,* milk producers were being made to suffer a particular penalty by reason of having earlier given undertakings not to produce.[585]

As to the latter, it was in *Forges de Châtillon*, that the Court considered for the first time the protection of a course of conduct by the principle of legal certainty.[586] This case concerned the revocation of an administrative measure, i.e. an agreement concerning the description of "ferrous scrap". The applicant argued that he had every reason to have confidence in the stability of the position created by these

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[580] T-489/93 *Unifruit Hellas* v. *Commission* [1994] ECR II-1201, para. 51, Case T-113/96 *Dubois et Fils* v. *Council and Commission* [1998] ECR II-125, para. 68.
[581] C-152/88 *Sofrimport* [1990] ECR I-2477.
[582] Sharpston, "Milk Lakes, SLOMS and Legitimate Expectations – A Paradigm in Judicial Review", in O'Keeffe and Bavasso (eds.), pp.557-567..
[583] Case 120/86 *Mulder* [1988] ECR 2321, Case 170/86 *Von Deetzen* [1988] ECR 2355.
[584] *Ibid., Mulder*, para. 24. A submission that to do otherwise would have disturbed the balance of the milk market was rejected on the ground that the reduction could and should have been differently spread.
[585] Case C-189/89 *Spagl* [1990] I ECR. 4539.
[586] Case 54/65 *Forges de Châtillon* ECR [1966] 185.

"agreements". The Court held that, "the High Authority has the power to revoke decisions and may even do so retroactively, subject in exceptional circumstances to considerations of legal certainty. This power is even greater when the revocation concerns not a formal decision, but a simple statement".[587] Finally, the court dismissed the application for annulment on the basis that the submissions were not justified. In the *staff salaries* case, the Court found a breach of the principle of legal confidence (legitimate expectation) arising from an informal Council policy followed for three years.[588] In doing so, the Court recognised a binding effect of an undertaking/decision (policy statement) regarding the adjustment of staff salaries that, in turn, impeded the adoption of a Regulation. The Court stated that "[t]aking account of the particular employer-staff relationship which forms the background to the implementation of Article 65 of the Staff Regulations, and the aspects of consultation which its application involved, the rule of protection of the confidence that the staff could have that the authorities would respect undertaking of this nature, implies that the Decision of 21 March 1972 binds the Council in its future action".[589]

In a similar staff context, the Court in *Mavridis* held that an expectation may arise from a failure to divulge pertinent information.[590] *In casu*, Mr Mavridis had his application rejected, for the Community civil service, on the ground that he exceeded the maximum age limit. This age limit was not published in the Official Journal and was discretionarily fixed by the selection committee. The applicant argued that by imposing an age limit, as an additional condition for eligibility and without giving any prior indication, the selection committee breached the principle of legitimate expectations.[591] Interestingly, the Court stated that the principle is not only restricted to staff matters, but extends to any individual who is in a situation in which it is apparent that the Community administration has led him to entertain reasonable expectations.[592]

Also in the CAP context, the Court considered that an expectation may arise from a departure of procedure regarding the calculation of monetary compensatory amounts. However, it found that legitimate expectation was not justified.[593]

To conclude, one may quote Schwarze:

> "the mere existence of a legal rule is not normally a suitable basis for a legitimate expectation which must be taken into account. Adequate grounds for a solid expectation can be provided on the one hand by the fact of having entered into certain obligations towards the authorities, or on the other hand by a course of conduct on the part of the authorities giving rise to specific expectations which in

[587] *Ibid.,* at pp.195-196.
[588] *Commission* v. *Council* [1973], *supra*.
[589] *Ibid.,* at p.584.
[590] Case 289/81 *Mavridis* v. *European Parliament* [1983] ECR 1731.
[591] *Ibid.*, para. 19.
[592] *Ibid.*, para. 21.
[593] *Töpfer, supra n.575.*

> certain circumstances may arise out of a commitment entered into by the authorities".[594]

In the light of the jurisprudence, one can only agree with this statement. In this respect, one may remark that declarations by a civil servant, the silence of the administration, or a mere chance do not create a solid expectation.[595]

b) Expectations that are Worthy of Protection (Justified Expectations)

As to the second part of the test, it must be determined whether the expectations provoked are legitimate. Indeed, the expectation must be worthy of protection.[596] It must be a justified expectation. According to the settled case-law, the principle applies where the Community institutions gave to those concerned specific assurances giving rise on their part to reasonable expectations.[597] The right to rely on this principle extends to any individual, e.g. trader or staff member who is in a situation in which it is apparent that the Community administration has led him to entertain reasonable expectations.[598] In other words, the individual is entitled to rely on the apparent legality of the act.[599] Indeed, an individual/MS applicant must generally be able to rely on the version of legislation in force when he takes a decision. Expectations are only considered to be legitimate after looking at both the conduct of the applicant and the administration. Notably, the respective conduct of the applicant and the administration, as to the valuation, are clearly interlinked.[600]

As to the applicant, it is worth noting that an expectation is worthy of protection if a party has actually relied upon that expectation and would suffer a loss resulting from the breach of that expectation. This is particularly true when the applicant has undertaken irrevocable transactions.[601] By contrast, an expectation cannot be relied

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[594] *Schwarze, supra n.517,* at pp.1134-1135.

[595] *See, Westzucker, supra n.545*, (a chance is not enough to create a specific assurance entertaining an expectation). Similarly, silence is not enough (case T-123/89 *Chomel* [1990] ECR II-131, para. 26). A mere declaration of a civil servant, even a director general, cannot create an expectation (Case C-44/00 P *Sodima* [2000] ECR I-11231).

[596] Case 2/75 *Mackprang* [1975] ECR 616.

[597] T-489/93 *Unifruit Hellas* v. *Commission* [1994] ECR II-1201, para. 51, Case C-22/94 *Irish Farmers Association* [1997] ECR I-1809, para. 19, Case T-113/96 *Dubois* v. *Council and Commission* [1998] ECR II-125, para. 68, *Max Rombi* [2000], *supra,* para. 67**,** "[t]he protection of legitimate expectations may be relied on in order to challenge Community rules only to the extent that the Community itself has previously created a situation which can give rise to a legitimate expectation".

[598] *See e.g.* Joined Cases C-37/02 and C-38/02 *Di Lenardo* [2004] n.y.r., para. 70, "[a]ny trader on the part of whom an institution has promoted reasonable expectations may rely on the principle of the protection of legitimate expectations".

[599] *De Compte*, *supra n.495 ,* para. 38.

[600] *See infra*., the close relationship regarding the foreseeability between the conducts of the applicant and the administration.

[601] *CNTA, supra n.579*, para. 42. The trader had obtained export licences.

upon if it is based on false or incomplete information.[602] In a similar vein, the principle of legitimate expectations may not be invoked by an applicant who has committed a manifest infringement of the Community legislation in force.[603]

Expectations are only considered to be legitimate if they are held by a reasonable (prudent) person (trader). It results from this that a person is entitled to act (and conduct his business) in the reasonable expectation that the law as it exists will continue to apply. [604] Nevertheless, if a prudent applicant (trader) could have foreseen that the adoption of a Community measure is likely to affect his interests, he cannot claim the breach of that principle if the measure is adopted.[605] In that regard, the Court has constantly established that applicants (traders) cannot have a legitimate expectation that an existing situation which is capable of being altered by the Community institutions in the exercise of their discretionary power will be maintained.[606] This is particularly true in the CAP context, where the economic circumstances may vary in a way that obliges the Community institutions to modify the legislation.[607] Also, in relation to the steel market, another regulated area, the case-law of the Court reflects the same line of reasoning. For instance, in *British Steel*, the Court stated that the applicant could not legitimately expect that a given legal situation would remain unchanged even though the economic conditions in the steel market were subject to changes which, in some cases, called for specific measures of adjustment.[608] Furthermore, the Court of Justice emphasized that, "in certain circumstances, it is possible to foresee the adoption of specific measures intended to deal with clear crisis situations, with the effect that the principle of the protection of legitimate expectations cannot be relied upon".[609] Finally, it appears that the institutions possess important discretion in the economic field. This is not

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[602] *See*, to that effect, Joined Cases 42/59 and 49/59 *SNUPAT* v. High Authority [1961] ECR 53, Case 14/61 *Hoogovens* v. *High Authority* [1962] ECR 253, and *Henri de Compte*, *supra n. 495,* para. 37.

[603] Case 67/84 *Sideradria* [1985] ECR 3983, para. 21, Joined Cases T-551/93, T-231/94, T-233/94 and T-234/94 *Industria Pesqueras Campos* [1996] ECR II-247, para. 76, Case T-336/94 *Efisol* [1996] ECR II-1343, para. 36, Case T-73/95 *Oliveira* [1997] ECR II-381, para. 28.

604 The conduct of the administration is also important to look at. Indeed, the administration may issue warning and take transitional measures that affect the position of the applicant.

[605] Case 265/85 *Van den Bergh en Jurgens* and *Van Dijk Food Products* v. *Commission* [1987] ECR 1155, para. 44, Case C-22/94 *Irish Farmers Association* [1997] ECR I-1809, para. 25.

[606] Case 245/81 *Edeka Zentrale* [1982] ECR 2745 para. 27, Case 52/81 *Werner Faust* [1982] ECR 3745, para. 27, Case C-350/88 *Delacre* v. *Commission* [1990] ECR I-395, para. 33, *Duff, supra n.*456, para. 20, Case T-243/94 *British Steel* [1997] ECR II-1887 para. 76, Joined Cases C-37/02 and C-38/02 *Di Lenardo* [2004] n.y.r., para. 71.

[607] *See,* Case 84/78 *Tomadini* [1979] ECR 1801 para. 22, Case C-350/88 *Delacre* [1990] ECR I-395 para. 33, Case C-63/93 *Duff* [1996] ECR I-569.

[608] Case C-1/98 P *British Steel* [2000] ECR I-10349, para. 52, Case T-243/94 *British Steel* [1997] ECR II-1887 para. 76.

[609] Case 78/77 *Luhrs* [1978] ECR 169, *British Steel*, *ibid*., para. 77.

surprising, since this area is highly regulated, e.g. agriculture and steel.[610] Arguably, the wide margin of discretion allows a balancing in the sense of the public interest though it is couched, in the jurisprudence, in terms of foreseeability.

As to the administration, it is worth remarking that an error on the part of the administration as to the applicable rule can with difficulty give rise to legitimate expectations.[611] Also, a promise from the administration that infringes EC law or renders its application less effective does not create a legitimate expectation. In *Lucchini*, the applicant claimed that the Commission had failed to fulfil its legitimate expectation by temporarily adopting a permissive attitude towards other undertakings guilty of the same actions whereas putting aside his conduct.[612] The Court considered that a concession on the part of the authorities cannot make an infringement legitimate.[613]

Furthermore, the attitude of the administration in issuing warnings appears of importance. Indeed, it may be said that, when the administration issues warning and adopts transitional measures as to a change of law, it is difficult, for the applicant, to claim a legitimate expectation. Using *a contrario* reasoning, this situation is clearly exemplified by the *CNTA* case, which concerned the revocation by the Commission, without warning, of fixed monetary compensation amounts on the basis of which CNTA had obtained an export licence. The Court stated that, "the Commission is therefore liable if …the Commission abolished with immediate effect and without warning the application of compensatory amounts in a specific sector without adopting transitional measures which would at least permit traders either to avoid the loss which would have been suffered in the performance of export contracts, the existence and irrevocability of which are established by the advance fixing of the refunds, or to be compensated for such loss".[614] Going further, it upheld that, "in the absence of an overriding matter of public interest, the Commission has violated a superior rule of law, thus rendering the Community liable, by failing to include in Regulation 189/72 transitional measures for the protection of the confidence which a trader might legitimately have had in the Community rules".[615] So, the absence of transitional measures infringes the principle of legitimate expectations. As noted previously, the assessment of the conduct of the administration is closely linked to

[610] Sharpston, "Milk Lakes, SLOMS and Legitimate Expectations – A Paradigm in Judicial Review", in O'Keeffe and Bavasso (eds.), pp.557-567.

[611] Case 1252/79 *Lucchini* v. *Commission* [1980] ECR 3753, Joined Cases 311/81 and 30/82 *Klockner-Werke* v. *Commission* [1983] ECR 1549, Case 162/84 Vlachou v. *Court of Auditors* [1986] ECR 481) and Case C-90/95 P. *Henri de Compte* v. *European Parliament* [1997] ECR I-1999, para. 32. However, in De Compte, the expectation could not be vitiated by the illegal conduct of the administration (misinterpretation of of the definition of occupational illness). This case reflects, to a certain extent, equitable estoppel since the administration cannot benefit from its own wrong.

[612] *Ibid.,* para. 8. The applicant argued also a breach of the principle of non-discrimination.

[613] *Ibid.,* para. 9. Also it held that the fact that the Commission may have shown some laxity does in no way justifies, for instance, selling at prices lower than the minimum prices.

[614] *Ibid.*, para. 43.

[615] *Ibid.*, para. 44.

the conduct of the applicant. Indeed, the existence of warnings or transitional measures clearly determines whether a prudent trader (applicant) could foresee the changes.

Finally, it may be argued that the determination of whether an expectation is worthy of protection (legitimate/justified) is based on two fundamental requirements: good faith and foreseeability. Interestingly, these two conditions are to be found both into the conduct of the applicant and the administration. As to the former, it comes close to estoppel and the *nemo auditur* principle, since the applicant cannot raise a legitimate expectation if he has given false or wrong information or acted in a way contrary to Community law or rendered its application less effective. The same holds true if the administration has committed an error. As to the latter, the applicant cannot raise a legitimate expectation if the change of law was foreseeable. More precisely, if a prudent applicant (trader) could have foreseen that the adoption of a Community measure is likely to affect his interests, he cannot plead that principle if the measure is adopted. The same holds true if the administration issued warnings or transitional measures. At the end of the day, the existence of an expectation worthy of protection can only be established on the merits of the case. The same assertion may be verified in relation to the third part of the test.[616]

c) Balancing of Interests

As to the third part of the test, it should be verified whether a legitimate expectation (private interests) is overridden or not by a matter of public interest. In other words, the legitimate expectation is not absolute since it may be defeated. In the context of acquired rights, in *SNUPAT,* the Court considered that the principle of legal certainty is not absolute, since its application must be combined with the principle of legality.[617] Indeed, the withdrawal of an illegal act (respect of the principle of legality) may infringe the principle of legal certainty. The determination of the primacy of one principle over the other must be realized on a case by case analysis in the light of the balancing of interests (confrontation of the public interest with the private interest). A delicate balancing must be realized between the individual interest (certainty) and the public interest (legality). Going further, the Court considered that the prevalence of one of the interests depends on the circumstances

[616] *Barret*, "Protecting Legitimate Expectations in European Community Law and in Domestic Irish Law", YEL 2001, pp.191-243, at p.203. According to the author there is a good deal of relativity involved in their application. Similarly, Temple Lang (*supra n.459* at p.173) considers that legitimate expectations are not applied mechanically. This assertion reflects, indeed, the very nature of the general principles and that the balancing of interests is generally linked to the principle proportionality (see supra *Chapter 1 Part II*, proportionality is the keystone principle).

[617] Joined Cases 42/59 and 49/59 *SNUPAT* v. *High Authority* [1961] ECR 53. *Supra n.494 and 495*, *Hoogovens,* para 5, *Alpha Steel,* paras. 10-12, *Consorzio Cooperative d'Abruzzo,* paras. 12-17, *Cargill I*, para. 20, *Cargill II,* para. 18, *De Compte*, para. 35. In *De Compte,* the court used the terminology of legitimate expectations in relation to the withdrawal of a favourable administrative act.

of the case in comparing the private interest (good faith of the beneficiary) with the public interest (interest of the Community).[618] In a similar vein, the Court held in *Hoogoven*s that "in weighing up the conflicting interest on which the choice between the *ex nunc* and *ex tunc* revocation of an illegal decision is to depend, it is important to bear in mind the actual situation of the parties concerned".[619]

In the context of legitimate expectations, the Court in CNTA held that, "in the absence of an overriding matter of public interest, the Commission has violated a superior rule of law, thus rendering the Community liable, by failing to include in Regulation 189/72 transitional measures for the protection of the confidence which a trader might legitimately have had in the Community rules".[620] What is more, the Court, in a case concerning the recovery of illegal state aids, considered that**,**

> **"**the fact that national legislation provide for the same principles to be observed in a matter such as the recovery of unduly-paid community aids cannot, therefore, be considered contrary to the same legal order. Moreover, it is clear from a study of the national laws of the Member States regarding the revocation of administrative decisions and the recovery of financial benefits which have been unduly paid by public authorities that the concern to strike a balance, albeit in different ways, between the principle of legality on the one hand and the principles of legal certainty and the protection of legitimate expectations on the other is common in the laws of the Member States".[621]

In the famous *Mulder* case, the Court established a balancing test between private and public interests.[622] It is worth quoting the case:

> **"**The fact remains that where such a producer, as in the present case, has been encouraged by a Community measure to suspend marketing for a limited period in the general interest and against payment of a premium he may legitimately expect not to be subject, upon the expiry of his undertaking, to restrictions which specifically affect him precisely because he availed himself of the possibilities offered by the Community provisions…contrary to the Commission's contention, total and continuous exclusion of that kind for the entire period of application of the Regulations on the additional levy, preventing the producers concerned from resuming the marketing of milk at the end of the five-year period, was not an occurrence which those producers could have foreseen when they entered into an undertaking, for a limited period, not to deliver milk. There is nothing in the provisions of Regulation no 1078/77 or in its preamble to show that the non-marketing undertaking entered into under that Regulation might, upon its expiry, entail a bar to resumption of the activity in question. Such an effect therefore

[618] *Ibid., SNUPAT,* at p.87.
[619] *Hoogovens*, *supra n.494,* para. 5.
[620] *CNTA, supra n.579*, para. 74.
[621] Joined Cases 205-215/82 *Deutsche Milchkontor* [1983] 2633, para. 30, Joined Cases C-31/91 to C-44/91 *Lageder* [1993] ECR I-1761, para. 33, Joined Cases C-80/99 to C-82/99 *Flemmer* [2001] ECR I-7211, para. 60, C-336/00 *Huber* [2002] ECR I-7699 para. 56.
[622] Case 120/86 *Mulder* [1988] ECR 2321.

> frustrates those producers' legitimate expectations that the effects of the system to which they had rendered themselves subject would be limited".[623]

Consequently, the Regulations must be declared invalid.

This case reflects the balancing between the private interest (possibility to re-enter the market) and the public interest (necessity to reduce milk surplus). In *casu,* the individual private interest took priority over the general public interest. *Mulder* may be said to constitute a triumph for individual rights.[624] As put by Craig,

> "[the *Mulder* case] demonstrates that Community law has no difficulty in recognizing legitimate expectations to what are substantive benefits. It also shows that the willingness to accept this species of legitimate expectation will not ossify policy within the relevant area: the Commission and the Council were perfectly entitled to alter the rules on entitlement to milk quotas, but the new regime could not operate so as to prevent those who had taken the bargain in 1979 from re-entering the market. The public interest in the orderly operation of the milk market, as encapsulated in the modified rules on quotas, could not serve to justify the harsh effect upon those who had taken part in the earlier scheme".[625]

Hence, it may be said that the public interest allows the justification of a negative effect on private individuals.

In the context of regulated areas, e.g. CAP, the institutions boast extended discretionary powers. Therefore, it appears difficult to let an individual interest take priority over the public interest. As noted above, when the public interest appears overriding, an implicit balancing is realized by the ECJ in the context of the foreseeability of the measure.[626] By contrast, when the private interest takes priority,

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[623] *Ibid.,* para. 24.

[624] Sharpston, "Milk Lakes, SLOMS and Legitimate Expectations – A Paradigm in Judicial Review", in O'Keeffe and Bavasso (eds.), pp.557-567, at p.563.

[625] Craig, "Substantive Legal Expectations in National and Community Law", CLJ 1996, pp.289-310, at p.308.

[626] Arguably, the Court, regarding the second part of the test, applies a kind of necessity test in order to determine whether the expectation is justified (worthy). This assessment may be related to the necessity test in the context of proportionality and, more precisely, to the use of the manifestly inappropriate test in connection to EC legislation. In that regard, it should be recalled that the EC legislature is given wide discretionary power. Also, it should be noted that the third part of the test (proportionality *stricto sensu*) is not often visible in the ECJ jurisprudence. Indeed, most of the cases refers to the suitability and necessity test (*supra, Chapter 4 Part II*) and not the balancing test. This is logical since in most cases the applicant fails the necessity test due to the wide power of discretion. The same may be said in relation to the principle of legitimate expectations. Moreover, it may be difficult to distinguish the second and third part of the text, since the existence of an overriding public interest is closely linked to the determination whether a prudent applicant should have foreseen the change of law. The case-law of the Court does not distinguish between the two stages. *See Di Lenardo*, *supra n.598*, paras. 70-71, *British Steel, supra n.608*, para. 78, "[i]n that context, the applicant should, on any view, having regard to its very substantial economic importance and its participation on the ECSC Consultative Committee, have realized that an overriding need to adopt effective measures to safeguard the interests of the European steel industry would arise

the balancing appears more visible.[627] In practice, however, it is unusual for private interests to override public interests and that claims based on legitimate expectations are upheld. In light of the case-law, the balancing of interest appears mostly in relation to the revocation of administrative acts, when the private interest (certainty) is balanced with the public interest (legality).

To end, it may be said that the challenges to Community legislation on the basis of a breach of legitimate expectations are frequent, but rarely succeed.[628] This is partly due to the wide powers of discretion given to the Community legislature in regulated areas.[629] In this context, the ECJ holds, generally, that the expectation is not worthy of protection, since the applicant should have foreseen the change of the law due to market circumstances.[630] Though it is difficult to correctly plead a breach of legitimate expectations, the principle has been used abundantly. In that respect, it is worth noting that the principle, more recently, has been extensively used in the context of recovery of unlawful state aids.[631]

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and that recourse to Article 95 of the Treaty might justify the adoption of ad hoc decisions by the Commission, as had already happened on several occasions whilst the Aid Code was in force". Similarly, as to vested rights, where the Community authorities have a broad discretion, traders cannot claim a vested right in the maintenance of an advantage which they obtained from the Community rules. *See also* Case 230/78 *Eridania* [1979] ECR 2749 para. 22, Case 59/83 *Biovilac* v. *EEC* [1984] ECR 4080 para. 23, Joined Cases 133/85, 134/85, 135/85 and 136/85 *Rau* [1987] ECR 2289, para. 18, Case C-69/89 *Nakajima All Precision* v. *Council* [1991] ECR I-2069, para. 119.

[627] Craig, *supra n.625,* at p.118. As emphasized by the author, "if reasonable creations have been created, the administration must balance the policy reasons…if this balance is in favour of the individual interest, the expectation is legitimate and must be respected by the administration".

[628] In cases of success, it may be followed by an action in damages (Article 288(2) EC). *See e.g. Crispoltoni II* and *Mulder II*.

[629] By contrast, in staff matters, the ECJ seems to be more relaxed. This may be explained by the special relationship between the institutions and its employees. Further, it does not concern an economic policy and, thus , the degree of discretion is less important.

[630] For a counter example, *supra n.622, Mulder*.

[631] Case 223/85 *RSV* v. *Commission* [1987] ECR 4617, Case 5/89 *Commission* v. *Germany* (*BUG-Alutechnik*) [1990] ECR I-3437, Case C-24/95 *Alcan Deutschland* [1997] ECR I-1591, Case C-99/02 *Commission* v. *Italy* [2004] n.y.r.

CHAPTER 5. PROCEDURAL PRINCIPLES AS JUSTICE AND CITIZENS' RIGHTS

This Chapter comprehensively analyses the procedural principles. These principles constitute *"hybrid rights"*. Indeed, it may be argued that they enshrine both administrative and constitutional values common to the Member States.[632] In the light of the Charter of Fundamental Rights (Articles 41, 42, 47 and 48), procedural principles may be said to be articulated around two concepts, namely the concepts of justice rights (due process rights and effective judicial protection) and citizens' rights (good administration and access to documents). [633] The aim of this section is to give a clear definition of the procedural principles and to analyze them in light of the general principles of Community law. In other words, can one say that the procedural principles constitute *mutatis mutandis* general principles of Community law? This Chapter is divided into three sections. The first section focuses on the right to a fair hearing or due process principles. The second section concerns the principle of effective judicial protection. The third section deals with the so-called citizens' rights (good administration and transparency).

5.1. PROCEDURAL DUE PROCESS PRINCIPLES

The expression "due process" corresponds to the right to a fair hearing,[634] the right to a fair administration of justice[635] or the "rights of the defence"[636] directly translated from the French *"droits de la défense"*.[637] In the EC legal order, the Court and the doctrine refer generally to the rights of the defence. In this research, the

[632] It should be stressed that the EU has no comprehensive legislation concerning procedural rights. However, the procedural principles can be expressly mentioned in secondary legislation relating to specific areas, *e.g.* competition. Regulation 17 in Article 19 made explicit reference to the right to be heard, whereas Regulation 99 dealt in more details with the application of such a principle in competition proceedings. The new Regulation (1/2003) makes reference to the right to a hearing (Article 27) and professional secrecy (Article 28). Furthermore, certain procedural principles can also be found in the Treaty itself, *e.g.* Articles 88, 253, 255 and 287 EC.

[633] Articles 41 and 42 (citizen rights) are clearly and solely directed towards the institutions, whereas Articles 47 and 48 (justice rights) may apply against the acts of the institution but also the acts of the Member States *e.g.* effective judicial protection. Significantly, it will be seen that the two concepts are not mutually exclusive but complement and interact between each other. In this sense, the notion of due process taken in this research will embody certain rights contained in the citizen's chapter. The notion of due process is wider than the justice rights as it embodies the due process rights applicable in relation to the European institutions such as the Commission.

[634] Schermers and Waelbroeck, *supra n.518,* at p.55.

[635] Terminology used by the EctHR in relation to Article 6 ECHR.

[636] Tridimas, *supra n.468,* at p.244.

[637] Lenaerts, "Procedures and Sanctions in Economic Administrative Law", 17 FIDE Kongress, Berlin, 1996, pp.105 *et seq.*

common law version has also been chosen inasmuch as this notion is often assimilated to the unwritten law and the concept of "natural justice". The right to be heard is the broadest paradigm (5.1.1) and is accompanied by so-called "corollary rights", such as the right to access to files or the right to be heard in a reasonable time (5.1.2). Other principles may enter under the scope of due process, such as the principles of confidentiality between lawyers and clients and the principle against self-incrimination (5.1.3). Those principles are extensively used in the field of competition law proceedings. The research, consequently, focuses on this area. However, the possible spill-over of those principles in other areas is also taken into consideration. Furthermore, the fundamental right of effective judicial protection is perceived as a due process principle.

The justice Chapter of the CFR embodies certain due process rights that are enshrined in Articles 47 and 48 CFR.[638] The due process principles are often characterized as rights of the defence. Although not all the rights of the defence (used to) constitute general principles of Community law, the rights of the defence, according to a settled case-law, correspond to fundamental principles of Community law. To exemplify, in *Hoffmann*, the Court stated that, "respect of the rights of the defence in all proceedings in which sanctions may be imposed is a fundamental principle of Community law, which must be respected in all circumstances, even if the proceedings in question are administrative proceedings".[639] Significantly, the

[638] Also, it should be emphasized that the due process rights can be found in the citizen's rights. According to explanations relating to the CFR (at pp. 65-67), Articles 47 and 48 are respectively considered to be the counterparts of Article 6(1) ECHR, for the former, and Article 6(2) ("[e]veryone charged with a criminal offence shall be presumed innocent until proved guilty according to the law"). However, from the wording of Article 47(2) (in fine) CFR ("[e]veryone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented"), relating to right to legal counsel, it seems quite clear that that the provisions refers also to Article 6(3) (c) ECHR ("[e]veryone charged with a criminal offence has the following minimum rights:…(c) To defend himself in person or through legal assistance of his own choosing or, he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require".). Article 48 entitled "presumption of innocence and right of the defence" states that, "[e]veryone who has been charged shall be presumed innocent until proved guilty according to law. Respect for the rights of the defence of anyone who has been charged shall be guaranteed. Further, in the light of the explanations given by the Council of the European Union, it appears that the EctHR interpreted broadly Article 6 ECHR. Thus, in *Delcourt* v. *Belgium* (1970), the EctHR stated that "in a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that the restrictive interpretation of Article 6(1) would not correspond to the aim and purpose of the convention." (*Ibid.*, Council of the EU, at p.65).

[639] Case 85/76 *Hoffmann-la Roche* v. *Commission* [1979] ECR 461, paras. 9-11, Case 322/81 *Michelin* v. *Commission* [1983] ECR 3461, para. 7, Case 46/87 and 227/88 *Hoechst* v. *Commission* [1989] ECR 2859, para. 15, Case 85/97 *Dow Benelux* v. *Commission* [1989] ECR 3137, paras. 24-25, Cases 97 to 99/87 *Dow Chemical Ibérica* v. *Commission* [1989] ECR 3165, paras. 10-11,Case 374/87 *Orkem v. Commission [1989] ECR 3283,* para. 32, *Case*

rights of the defence apply in all circumstances where the individual is prejudiced by the Community institution, not only in the situations where he must face a sanction.

In competition law proceedings, the rights of the defence apply both in the preliminary and administrative procedural stages.[640] Indeed, according to the Court, "the rights of the defence must be observed in administrative procedures which may lead to the imposition of penalties, but it is also necessary to prevent those rights from being irremediably impaired during preliminary inquiry procedures".[641] In this sense, the right to legal representation, the principle of legal privilege or the right against self-incrimination must be respected from the preliminary inquiry stage. In addition, it should be stressed that the so-called corollary rights also form an integral part of the rights of the defence. For instance, the Court of Justice deemed that the right of access to files was one of the procedural guarantees intended to protect the rights of the defence and to ensure in particular that the right to be heard is exercised effectively.[642]

5.1.1. The Audi Alteram Partem Principle or the Right to be Heard.

a) A Developing Right to be Heard: from Alvis to Lisretal

The right to be heard is an evolutive concept. In this respect, it will be seen that the principle spilled over into different contexts, from staff cases to customs matters, through competition law proceedings. As early as 1963, in the *Alvis* case,[643] the Court upheld in Community law the generally accepted principle of administrative law in the Member States, whereby a civil servant must be allowed the opportunity to reply to allegations against him before to being sanctioned. Finally, the right of Community officials to be heard before a disciplinary measure may be imposed upon them must be mentioned.[644] The right to be heard is even applicable in non-disciplinary proceedings where the measure is able to prejudice the interest of the individual.[645]

C-60/92 Otto BV v. *Commission* [1993] ECR I-5683, para. 12, Case T-30/91 *Solvay* v. *Commission* [1995] ECR II-1775, para. 59, Case T-36/91 *ICI* v. *Commission* [1995] ECR II-1847, para. 69, Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C- 252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij* v. *Commission* [2002] ECR I-8375, para. 85 and Joined cases T-125/03 R and T-253/03 R *Akzo Nobel* [2004] 4 CMLR 15, para. 99.

[640] The preliminary stage corresponds to the investigative power of the Commission under Article 11 and 14 of Regulation 17. The administrative stage starts after the delivery of the statement of objection.

[641] Case 155/79 *AM&S* v. *Commission* [1982] ECR 1575*, Hoechs*t para. 15-16, *Dow Benelux*, paras. 26-27, *Dow Chemical Ibérica*, paras 12-13 and *Orkem*, para. 34, *supra n.639*.

[642] *See, Cimenteries,* para. 38, *Solvay,*para. 59, and *ICI,* para. 69*, supra n.639*.

[643] Case 32/62 *Alvis* v. *Council* [1963] ECR 49.

[644] *Ibid.*, at p.55, *see also* Case 35/67 *Van Eick* v. *Commission* [1968] ECR 329, at p.344.

[645] Case 121/76 *Mo*li v. *Commission* [1978] ECR 897 at p. 908, Case 75/77 *Mollet* v. *Commission* [1978] ECR 897, at p. 908.

In the *TMP* case,[646] the ECJ established the existence of a right to be heard in competition law proceedings. More exactly, the Court extended the notion of the right to be heard in the context of Article 85(3) [new 81(3)] and Regulation 17. The major question to be answered by the Court was to determine whether the right to be heard could be applied in a proceeding relating to an exemption (ex Article 85(3)), whereas Articles 2 and 4 of Regulation 99,[647] did not relate to decisions granting exemption.[648] Significantly, AG Warner undertook a general comparative analysis of the laws of the Member States, in relation to the right to a fair hearing. AG Warner clarified the existence of the *audi alteram partem* principle in the law of the UK, (being a principle of natural justice), but also in Denmark, Germany, Ireland and Scotland.[649] Then, the AG analysed the situation in France, Belgium and Luxembourg,[650] where the respective *Conseils d'Etat* have developed such *principes généraux du droit de la défense* in administrative law, applicable in the absence of any specific legislative provisions. Finally, Warner came to the third group, composed of Italy and the Netherlands, where this principle does not exist in administrative proceedings.[651] He then concluded that *"a person whose interests are perceptibly affected by a decision taken by a public authority must be given the opportunity to make his point of view known"*.[652]

Thus, it may be said that the *audi alteram partem* principle was not common to the whole Community. Two States did not recognize the existence of this principle in their administrative proceedings. Nevertheless, the Court did not stress the existence (or non-existence) of the right to be heard in the respective laws of the Member States and preferred to emphasize the presence of such a principle in the Community legal order. The Court made clear that Regulation 99 applies also to procedures regarding Article 85(3) [new Article 81(3)].[653] The Court ruled that this Regulation, *"notwithstanding the access specifically dealt with in Articles 2 and 4, applies the general rule that a person whose interest are perceptibly affected by a decision taken by a public authority must be given the opportunity to make his point of view known. This rule requires that an undertaking be clearly informed, in good time, of the essence of conditions to which the commission intends to subject an exemption and it must have the opportunity to submit its observations to the commission"*.[654]

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[646] Case 17/74 *Transocean Marine Paint* (TMP) v. *Commission* [1974] ECR 1063. *See also Hoffmann- la Roche, supra n. 639*.
[647] Regulation 99 implemented Article 19 of Regulation 17 (Article 19 concerned the right to be heard in competition proceedings).
[648] *TMP, supra,* para. 9.
[649] *Ibid.,* AG Warner in *TMP*, at p.1088.
[650] The case-law in Belgium and Luxembourg is deemed to be less hesitant than in France in developing this principle .
[651] AG Warner in *TMP*, *supra n.646,* at pp.1088-1089.
[652] *Ibid.,* at pp. 1088 *et seq*.
[653] *Ibid.*, *TMP,* para. 13.
[654] *Ibid.,* para. 15.

One may underline that the ECJ did not use the expression "general principle", but referred instead to a "general rule". However, in the circumstances of the case, the terminology appears to me conceptually identical. Such an assertion is confirmed by the subsequent jurisprudence of the ECJ. A few years later, in *Hoffmann*, [655] the Court referred expressly to the right to be heard as a general principle. In the first place, the Court stressed that the respect of the rights of the defense constitutes a fundamental principle of Community law. [656] Then, the Court went on to say that Article 19 of Regulation 17 and Article 4 of Regulation 99 give effect to a general principle.[657] This principle of the right to be heard ensures that *"the undertaking concerned must have been afforded the opportunity during the administrative procedure to make known their views on the truth and relevance of the facts and circumstances alleged and on the documents used by the commission to support its claim that there has been an infringement of Article 86 of the Treaty"*. [658] At the end of the day, the approach taken in *TMP* appears to be progressive. Another innovative approach, in the anti-dumping field, appears to have been taken in the *Al-Jubail* case.

b) The Right to be Heard as a Fundamental Right? : Al-Jubail

It was only in 1991, that the Court recognized the application of the right to be heard in anti-dumping matters.[659] It is worth noting that, in this case, the ECJ used the dialectic of fundamental rights in relation to procedural rights.[660] Interestingly, AG Darmon in *Al-Jubail* made explicit reference to AG Warner[661] and further added that, "the loss of the Community market as a result of the imposition of a high anti-dumping duty - as in this case - has financial consequences which are comparable to those which follow the imposition of a fine for an infringement of Articles 85 or 86 of the Treaty of Rome". [662] In the light of an article by Ole Due,[663] the AG pondered

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[655] Case 85/76 *Hoffmann-la Roche* v. *Commission* [1979] ECR 461.

[656] *Ibid.*, *Hoffmann-la Roche* para. 9, *see e.g.* Case 322/81 *Michelin* v. *Commission* [1983] ECR 3461, para. 7, Case 46/87 and 227/88 *Hoechst* v. *Commission* [1989] ECR 2859, para. 15, Case 85/97 *Dow Benelux* v. *Commission [*1989] ECR 3137, paras. 24-25, Case 97 to 99/87 *Dow Chemical Ibérica* v. *Commission* [1989] ECR 3165, paras. 10-11,Case 374/87 *Orkem* v. *Commission* [1989] ECR 3283, para. 32, Case C-60/92 *Otto BV* v. *Commission* [1993] ECR I-5683, para. 12, Case T-30/91 *Solvay* v. *Commission* [1995] ECR II-1775, para. 59, Case *ICI* v. *Commission* [1995] ECR II-1847, para. 69.

[657] According to Court, "it emerges from the provisions quoted above and also from the general principle to which they give effect…"

[658] *Hoffmann-la Roche* , *supra n.655,* para. 11.

[659] Case C-49/88 *Al-Jubail Fertilizer* v. *Council* [1991] ECR I-3187.

[660] Nehl, *Principles of Administrative Procedure in EC Law*, Hart, 1999, at p.75.

[661] AG Darmon in *Al-Jubail*, *supra n.659*, para. 72.

[662] *Ibid.,* AG Darmon in *Al-Jubail*, para. 73.

[663] Due, "Le respect des droits de la défense dans le droit administratif communautaire", CDE 1987, pp.383-396, "the differences may be explained, at least in part, by the particular nature of this field: the measures are adopted in the form of legislative provisions the investigation is not necessarily directed at specified undertakings but may equally take issue with the conduct

that the rights to a fair hearing could not be transplanted integrally from competition to anti-dumping matters.[664] However, the AG considered that the right to be heard seemed to apply in both proceedings. In this sense, AG Warner stated that *"a principle as general as the one defined by the court in its judgment in Hoffmann-la Roche v Commission, namely that the Commission may not base its Decision on facts, circumstances or documents on which the party concerned has been unable to make its views known, would seem to apply to dumping proceedings as well"*. [665]

For its part, the Court ruled that:

> "… according to the well-established case-law of the Court (see most recently the judgment of 18 June 1991 in Case C-260/89 ERT [1991] ECR I- 2925), fundamental rights form an integral part of the general principles of law, whose observance is ensured by the Court. Consequently, it is necessary when interpreting Article 7(4) of the basic regulation to take account in particular of the requirements stemming from the right to a fair hearing, a principle whose fundamental character has been stressed on numerous occasions in the case-law of the Court (see in particular the judgment of 17 October 1989 in Case 85/87 Dow Benelux v Commission [1989] ECR 3137). Those requirements must be observed not only in the course of proceedings which may result in the imposition of penalties, but also in investigative proceedings prior to the adoption of anti-dumping regulations which, despite their general scope, may directly and individually affect the undertakings concerned and entail adverse consequences for them.[666]
>
> It should be added that, with regard to the right to a fair hearing, any action taken by the Community institutions must be all the more scrupulous in view of the fact that, as they stand at present, the rules in question do not provide all the procedural guarantees for the protection of the individual which may exist in certain national legal systems.[667]
>
> Consequently, in performing their duty to provide information, the Community institutions must act with all due diligence by seeking, as the Court stated in its judgment of 20 March 1985 in Case 264/82 Timex v Council and Commission [1985] ECR 849, to provide the undertakings concerned, as far as is compatible with the obligation not to disclose business secrets, with information relevant to the defence of their interests, choosing, if necessary on their own initiative, the appropriate means of providing such information. In any event, the undertakings concerned should have been placed in a position during the administrative procedure in which they could effectively make known their views on the

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of governments of non-member countries...; every request for the confidential treatment of the information supplied must be observed. Lastly, the Community provisions must comply with the obligations of the communities under the GATT, which rests on the principle of reciprocity, and there may be justification for aligning even the procedural rules on those of the other members of that organization".

[664] AG Darmon in *Al-Jubail, supra n.659*,para. 74.

[665] *Ibid.*, para. 75.

[666] *Ibid.*, *Al-Jubail*, para. 15.

[667] *Ibid.,* para. 16.

> correctness and relevance of the facts and circumstances alleged and on the evidence presented by the Commission in support of its allegation concerning the existence of dumping and the resultant injury".[668]

This reasoning is threefold. First, the Court referred to the human rights language and identified the right to be heard as a fundamental right. Second, it emphasized that certain discrepancies exist with the scope of protection afforded in certain domestic legal orders. Interestingly, Nehl lucidly asserted that the Court was deviating from its traditional approach of adopting a maximalist standard.[669] Third, it confirmed, using the traditional formulation, that the undertaking concerned should have been able to exercise its right to be heard. Finally, the Court concluded that there was nothing to show that the Community institutions had discharged their duty to place at the applicant's disposal all the information which would have enabled it effectively to defend its interests, and annulled the provision imposing an anti-dumping duty on them. In short, it may be said that the fundamental rights approach taken in *Al-Jubail* was particularly progressive. It ought to be noticed that the following jurisprudence followed a more traditional path in the formulation of the right to be heard. Yet it seems safe to say, the *Al-Jubail* case paved the way for the development of the right to be heard in other fields. To put it in a nutshell, the ECJ recognized the application of the right to be heard in the following contexts:

Staff cases[670]
Competition proceedings[671]
Anti-dumping proceedings[672]
Custom matters[673]
Fund program (energy, social fund)[674]
Fishing licenses[675]
State aids[676]

In light of the foregoing, the right to be heard appears as a widely applicable general principle of Community law. In addition, the right to be heard has developed

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[668] *Ibid.,* para. 17.
[669] *Nehl, supra n.660*, at p.75.
[670] Case 32/62 *Alvis* [1963] ECR 49, at p.55, Case 35/67 *Van Eick* v. *Commission* [1968] ECR 329, at p.344, Case 121/76 *Moli* v. *Commission* [1978] ECR 897 at p. 908, Case 75/77 *Mollet* v. *Commission* [1978] ECR 897, at p. 908, Case 115/80 *Demont* v. Commission [1981] ECR 3147, at p. 3158, Case 142/84 *De Compte* v. *Parliament* [1985] ECR 1951, at p. 1966, and Case 319/85 *Misset* [1988] ECR 1870.
[671] *TMP*, *supra n.646.*
[672] *Al-Jubail*, *supra n.659.*
[673] *Infra, TUM.*
[674] Case T-450/93 *Lisretal* v. *Commission* [1994] ECR II-1177, and Case C-32/95 P *Commission* v. *Lisretal* [1996] ECR I-5373.
[675] Case C-135/92 *Fiskano* v. *Commission* [1994] ECR I-2885.
[676] Case C-294/90 *British Aerospace* v. *Commission* [1992] ECR I-493.

a set of corollary rights, which subsequently have extended the scope of the principle.

5.1.2 Corollary Rights of the Right to be Heard

As stated above, the right to be heard includes "satellite rights" or "corollary rights". At first blush, in the guise of exemplification, one may refer, *inter alia*, to the right to be assisted by counsel of one's own choice having access to the judicial file,[677] as well as the compulsory presence of the counsel when witnesses are heard and the possibility to ask any relevant questions for the defense[678] or the right to be given sufficient notice of the hearing.[679] In this section, I focus, however, only on one particular example, i.e. the right to access to files. Indeed, this right provides an interesting example of a corollary right of the right to a fair hearing. This is partly due to the evolutive jurisprudence regarding this field. It will be seen that three lines of cases have marked this right until its final explicit recognition as a general principle of Community law. In this sense, the case-law relating to access to files provides an interesting example.

Access to files is a procedural safeguard intended to protect the rights of the defense. The proper existence of this principle is realized through the need to submit observations on the truth and relevance of the facts, charges, and circumstances relied on by the Commission. Accordingly, access to files is a necessary prerequisite for an effective exercise of the right to be heard. In the words of the CFI:

> "…it is clear from settled case-law that the purpose of access to the file is in particular to enable the addressees of a statement of objections to acquaint themselves with the evidence in the Commission's file, so that they can express their views effectively**,** on the basis of that information, on the conclusions reached by the Commission in its statement of objections (C-310/93 P BPB Industries and British Gypsum v Commission [1995] I-865, paragraph 21, Baustahlgewebe v Commission, cited above, paragraph 89, and Case C-51/92 P Hercules Chemicals v Commission, cited above, paragraph 75)".[680]

The close connection between the right to be heard (included in the wider concept of the rights of the defense) and access to files was emphasized by the CFI in the *Cimenteries case*.[681] The Tribunal ruled that, "observance of the rights of the defense, in all proceedings in which sanctions may be imposed is a fundamental principle of Community law. *Due observance of that general principle* requires that the undertakings concerned must have been afforded the opportunity during the administrative procedure to make known their views on the truth and relevance of

[677] Case 115/80 *Demont* v. *Commission* [1981] ECR 3147, at p. 3158.
[678] Case 142/84 *De Compte* v. *Parliament* [1985] ECR 1951, at p. 1966.
[679] Case 319/85 *Misset* [1988] ECR 1870.
[680] Joined cases T-45/98 and T-47/98 *Krupp Thyssen* v. *Commission* [2001] ECR II-3757, para. 45, Case T-16/99 *Logstor Ror* v. *Commission* [2002] ECR II-1633, para. 141.
[681] T-15/92 *Cimenteries* v. *Commission* [1992] ECR II-2667.

the facts and circumstances alleged by the Commission".[682] It may be asserted that the ECJ implicitly assimilated the right to access to file as a general principle of law. Indeed, by using this phrasing, the Court seems to define access to files as a corollary of the rights of the defense, more precisely as a corollary of the *audi alteram partem* principle.

The scope of the right to access was furthermore confirmed and developed in the *Solvay* and *ICI* cases.[683] The main problem remaining was the extent of the Commission's discretionary powers in determining the documents' accessibility. The Court ruled that it could not be for the Commission alone to decide which documents are of use for the defense. The judgment resorted to a general principle of "*equality of arms*" in order to justify that the undertaking should have the same knowledge of the files as the Commission. The Court went on to say that, "the principle of equality of arms and its corollary in competition cases, namely the principle that the information available to the Commission and the defense should be the same, required that the applicant should be able to assess the probative value of documents of another firm, which the Commission has not annexed to the statement of objections".[684] Interestingly, the principle of equality of arms has been resorted to and confirmed by the CFI.[685]

In *Solvay* and *ICI,* on the one hand, the CFI clearly assimilates, once again, access to files to a corollary of the right to be heard. The right to be heard, according to the case-law, is a general principle. So, it may be assumed that the right of access to files constitutes a general principle. On the other hand, the Tribunal made explicit reference to a general principle of "equality of arms". What is the borderline between this principle and the right to access? In my view, access to files is an expression of the wider general principle of equality of arms, which gives the applicant a right to assess the probative value of the Commission's files in order to be on equal footing to ensure his defence.

Drawing a parallel with the European Convention on Human Rights, Article 6(1) ECHR contains a significant principle which has been further developed by the ECtHR jurisprudence.[686] This principle enshrines the concept that the parties in a proceeding should have equal opportunity to submit their case and that they should not benefit from substantial advantage over their respective opponent, e.g. the parties must be given the opportunity of appearing to argue the case,[687] they must be ensured availability of experts' reports in order to be able to comment on them,[688]

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[682] *Ibid., Cimenteries*, para. 39, *See also Solvay*, *infra*, para. 59, and ICI, *infra,* para. 69.
[683] Case T-30/91 *Solvay* v. *Commission,* [1995] ECR II-1775, Case T-36/91 *ICI* v. *Commission* [1995] ECR II-1847.
[684] *Ibid., Solvay* paras. 81 and 99, and *ICI* paras. 91 and 93.
[685] *Logstor Ror*, *supra n.680,* para. 142.
[686] Jacobs and White, *The European Convention on Human Rights*, Oxford, 1996, at pp.124-125.
[687] *Feldbrugge* v. *The Netherlands* (8562/79) [1986] ECHR 4 (29 May 1986).
[688] *Ibid.*

parties must be represented at all points in the examination of a case[689] and parties' expert witnesses must be heard.[690] For its part, the CFI did not refer explicitly to the EctHR case-law, but simply to the "general principle of equality of arms".

Next, it should be stressed that the definition given by the Court is favorable to the administration in the sense that the Commission is only obliged to give access to the documents it has itself decided to use as objections or evidence. The Court in various cases such as *AEG, Akzo* or *VBVB,* has ruled that *"there are no provisions which requires the Commission to divulge the contents of its file to the parties concerned"*.[691] Nevertheless, being a general principle and given that Regulation 99 is silent on the question of disclosure, the right to access is subject to potential evolution. Consequently in *Hercules*,[692] following "AG" Vesterdorf reasoning, the Tribunal considered that, except for non-communicable documents, the Commission had an obligation to disclose to the firms all documents, whether incriminatory or exculpatory, which it had obtained in the course of an investigation. Nowadays, it is settled case-law that the Commission has an obligation to make available to the undertakings to which a statement of objections has been addressed, all documents, whether in their favour or otherwise, which it has obtained during the course of the investigation, with the exception of confidential documents, such as the internal documents of the Commission, business secrets of other companies or other confidential information (legal privilege).[693]

In the *Hercules* case,[694] the ECJ stated explicitly that the general principles of Community law governing the right of access to the Commission's files are designated to ensure an effective exercise of the rights of the defense, including the right to be heard enshrined in Regulation No 17 and 99.[695] This case-law is not revolutionary in itself, but it demonstrates the potential of the Court to specify through its jurisprudence the extent of the rights of the defense in competition law proceedings on a case by case analysis. Here it goes from being a corollary of the right to be heard to an autonomous general principle of Community law, passing through a sub-concept of the general principle of equality of arms. This final line of

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[689] *Neumeister* v. *Austria (*1936/63) [1968] ECHR 1 (27 June 1968).
[690] *Bönish* v. *Austria* (1985).
[691] Case 43 and 63/82 *VBVB and VBBB* v. *Commision* [1984] ECR, para. 25, Case 107/82 *AEG* v. *Commission* [1983] ECR 3151, para. 24, Case 62/96 *Akzo* v. *Commission* [1991] ECR I-3359, para. 16.
[692] Case T-7/89 *Hercules Chemicals* v. *Commission* [1991] ECR II-1711, para. 54.
[693] *Logstor Ror*, *supra n.680*, para. 141, *Krupp Thyssen Stainless*, *supra n.680*, para. 46, Case T-65/89 *BPB Industries and British Gypsum* v. *Commission* [1993] II-389, para. 29, Case T-221/95 *Endemol* v. *Commission* [1991] ECR II-1299, para. 66.
[694] Case C-51/92 P *Hercules Chemicals NV* [1999] ECR I-4250.
[695] *Ibid*., para. 76, "[t]hus the general principles of Community law governing the right of access to the Commission's file are designed to ensure effective exercise of the rights of the defence, including the right to be heard provided for in Article 19(1) of Regulation No 17 and Articles 3 and 7 to 9 of Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Regulation No 17 (OJ, English Special Edition 1963-1964, p. 47)".

jurisprudence was confirmed, concerning the competition rules in the ECSC Treaty, in the *Stainless Steel Cartel* case. It is suffice to recall here the relevant paragraph of the judgment from the CFI:

> "It must be borne in mind, at the outset, that the general principles of Community law governing the right of access to the Commission file are intended to ensure effective exercise of the rights of the defence, including the right to be heard (Case C-51/92P Hercules Chemicals v Commission [1999] ECR I- 4325, paragraph 76), which, in the case of competition proceedings initiated under the ECSC Treaty, is provided for in the first paragraph of Article 36 of that Treaty, according to which the Commission, before taking a decision imposing one of the pecuniary sanctions provided for in that Treaty, must allow the person concerned an opportunity to submit his observations".[696]

In sum, a three-step process marked the final evolution to an explicit general principle of Community law. First, access to files is clearly linked to the effective exercise of the right to be heard. Second, it is implicitly assimilated to a concept referred to in the ECHR system, i.e. the principle of equality of arms. Third, it is explicitly recognized and confirmed as a general principle of Community law. One may venture to suggest that the jurisprudence regarding access to files, though evolutive, refuses unequivocally to link the issue to fundamental rights. Nevertheless, as indicated above in the *Al-Jubail* case, the right to be heard can also be closely linked to fundamental rights. More recently, it may be said that the Court tended to assimilate the due process principles with fundamental rights. This trend is clearly exemplified by the *Baustahlgewebe* case.[697] There, the Court recognized the right to a hearing within a reasonable time as a fundamental right.

The appellant argued that the time taken by the CFI to render its judgment (66 months) was excessive and, consequently, that Article 6(1) of the ECHR was violated. The applicant pointed out that the time taken for the proceedings was not due to the circumstances of the case, but should be blamed on the Tribunal. Subsequently, *"such a delay constitutes a Prozesshindernis (a bar to proceedings with the case) justifying the setting aside of the contested judgement, the annulment of the decision, and closure of the proceedings"*.[698] AG Léger in his Opinion stressed that all the Member States and Article 6(1) of the ECHR recognized the right to a hearing within a reasonable time. Finally, he considered that even if the ECJ did not mention it yet, Article 6(1) ECHR is applicable to legal persons according to the so-called *Stenuit* opinion of the European Commission on Human Rights in 1991.[699]

The Court ruled that Article 6(1) of the ECHR provides that in the determination of a person's civil rights obligations, or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an

[696] *Krupp Thyssen Stainless*, *supra n.680*, para. 44.
[697] Case C-185/95 P *Baustahlgewebe* v. *Commission* [1998] ECR 8417.
[698] *Ibid.*, para. 26.
[699] *Ibid.,* AG Léger in *Baustahlgewebe* , in IV, A. 1.a) *la norme invoquée*.

independent and impartial tribunal established by law.[700] The Court highlighted that the general principle of Community law, according to which everyone is entitled to a fair legal process, has its source in the fundamental rights and is applicable to the proceedings concerning undertakings on which the Commission has issued a decision imposing a fine.[701] The general principle of Community law on the right to a fair hearing includes the right to a hearing within a reasonable time. This right appears as a corollary right of the *audi alteram partem* principles, precisely as the right to access to the Commission's files.

The Court estimated that the duration was extremely important.[702] Nevertheless, the Court stressed, citing expressly the jurisprudence of the European Court of Human Rights, e.g. *Erkner and Hofauer*,[703] *Kemache*[704] and *Phocas* v. *France*,[705] that in the appraisal of the length of the period, the circumstances specific to each case and particularly the importance of the case for the person, the complexity and the behaviour of the applicant and of the concerned authorities should be taken into consideration.[706] *In casu*, the Court ruled that despite the complexity of the case, where indeed fourteen manufacturers of welded steel mesh had infringed Article 85 of the Treaties by a series of agreements or concerted practices,[707] the fine fixed to the sum of three million ECU should be revised.[708] However, considering the outcome of the case, the duration of the proceedings had no impact on the judgment. Consequently, the ruling could not be set aside in its entirety.

5.1.3 Other Specific Principles tied to the Right to a Fair Hearing

The case-law relating to due process principles that are not directly connected to the right to be heard, i.e. the principle of confidentiality, the principle against self-incrimination and the presumption of innocence, will now be examined.

a) Principle of Confidentiality

The principle of confidentiality is an umbrella concept covering a variety of principles and is used particularly in competition law proceedings.[709] Indeed, it may protect, for instance, the correspondence between a lawyer and a client and it also

[700] *Ibid., Baustahlgewebe ,* para. 20.
[701] *Ibid.*, para. 21.
[702] *Ibid.*, para. 29.
[703] *Erkner and Hofauer* v. *Austria* (9616/81) [1987] ECHR 5 (23 April 1987), para. 66.
[704] *Kemmache* v. *France* (Nos. 1 and 2) (12325/86) [1993] ECHR 51, para. 60.
[705] *Phocas* v. *France* (17869/91) [1996] ECHR 17 (23 April 1996), para. 71. *See also Garyfallou AEBE* v. *Greece* (18996/91) [1997] ECHR 74 (24 September 1997) para. 39.
[706] *Baustahlgewebe, supra n.697,* para. 29.
[707] *Ibid.*, paras. 35 and 47.
[708] The Court reduced the fine to 2950000 Euros.
[709] The principle can be used in relation to the medical findings in the staff recruitment (*supra n.645, Moli* and *Mollet*).

permits the protection of business secrets[710] in the communication of information to the Commission. For instance, in the *Akzo* case,[711] the ECJ elaborated the principle of confidentiality so as to protect the undertakings' business secrets *vis-à-vis* third parties. The Court ruled that business secrets must be afforded special protection and went on to say that despite the existence of Articles 19 and 21 in Regulation 17, those provisions must be regarded as an expression of a general principle, which applies during the course of the administrative procedure.[712] In the *SEP* case,[713] concerning the protection of business secrets, the Court applied the principle to the national authorities. The ECJ, by referring to *Akzo*, extended the scope of protection, *"where an undertaking has expressly raised before the Commission the confidential nature of a document as against the national authorities, on the grounds that it contains business secrets, and where the argument is not irrelevant, the general principle of the protection of the business secrets, may limit the Commission's obligation...to transmit the document to the competent national authorities".*[714] It should be noted that the ECJ did not refer to a general principle of Community law, but to a general principle of the protection of business secrets. Does that formulation have the same meaning and scope as the "general principles of Community law"? Interestingly, the ECJ employs a similar formulation in the context of transparency. In fact, there the Court refers to the concept of "general principle of access".[715]

Rules on professional secrecy can be found both in primary and secondary legislation.[716] Article 287 [ex Article 214] EC provides that Community officials must not disclose information covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their competitors. Put bluntly, the rights of the defence compel the Commission to inform the undertaking of the facts alleged against it. This is said to be necessary in order to effectively exercise the right to be heard. In this respect, as mentioned above, the Court has stated that except non-communicable documents, the Commission has an obligation to disclose to firms all documents, whether incriminatory or exculpatory, which it has obtained in the course of an investigation. [717] Non-communicable documents are indeed covered by an obligation of secrecy. According to the CFI, the Commission regards the following documents as confidential and accordingly inaccessible to the undertaking concerned:[718]

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[710] *AG Lenz* in Case 53/85 *Akzo Chemie* v. *Commission* [1986] ECR 1965, at p. 1977. The AG proposed to replace the term professional secrecy (deemed too narrow) by the term official secrecy.
[711] Case 53/85 *Akzo Chemie* v. *Commission* [1986] ECR 1965.
[712] *Ibid.,* at p.1992, para. 28.
[713] Case C-36/92 P, *Samenwerkende Elektriciteits-produktiebredrivjen (SEP)* v. *Commission* [1994] ECR, I-1911.
[714] *Ibid., SEP*, at p. 1942, paras. 36-37
[715] *See e.g.* T-83/96 *Van der Wal* v. *Commission* [1998], ECR II-545, *infra*, *Part 2 Chapter 5.3*
[716] *See e.g.* Article 28 of Regulation 1/2003 / Article 20 Regulation 17.
[717] Case T-7/89 *Hercules Chemicals* v. *Commission* [1991] ECR II-1711, para. 54.
[718] *Ibid.,* para. 53.

> "(i) documents or parts thereof containing other undertakings' business secrets
>
> (ii) internal Commission documents, such as notes, drafts or other working papers
>
> (iii) any other confidential information, such as documents enabling complainants to be identified where they wish to remain anonymous, and information disclosed to the Commission subject to an obligation of confidentiality."

The dialectic may be summarized by the applicant's argument in *Ajinomoto and Nutrasweet*, i.e. "[t]he Community institutions cannot shelter behind their duty to preserve the secrecy of confidential information to such an extent that the right of the undertakings concerned to receive information is deprived of its substance".[719] Consequently, professional secrecy appears closely linked to the issue of access to file. In the first place, the obligation to disclose may come into conflict with the obligation of professional secrecy. In the second place, the refusal to disclose a file may be justified by the need to protect another undertaking's business secrets or other confidential information.

Next, it is worth emphasizing that the principle of confidentiality includes the principle of legal privilege**.** The principle of legal professional privilege flows from the *AM&S* case.[720] As the Court emphasized there, this principle can be appraised as an essential corollary of the rights of the defense.[721] AM&S brought an action for annulment of a Commission's Decision requiring the firm to give access to various documents for which it had claimed legal privilege. Interestingly, Regulation 17 was silent as to the protection of confidentiality between the undertakings and their lawyers. Furthermore, the principle does not explicitly appear in the Member States' constitutions nor in the ECHR. This legislative gap pushed the French Government to argue that Article 14 of Regulation 17 should be applied without limitation, since Community legislation did not contain any provisions for protecting confidential documents between lawyers and their clients.[722] The ECJ did not follow such an approach and, following the AG Opinion, focused on the potential existence of this principle in the laws of the Member States.

According to AG Slynn, *"[t]he Court has to weigh up and evaluate the particular problem and search for the best and most appropriate solution"*.[723] He went on to say that, "what matters is the overall picture. Thus the question is not whether legal professional knowledge is identical with the *secret professionnel*, but whether from various sources a concept of the protection of the legal confidence emerges. For instance in England from the 'privilege', in France from an amalgam

[719] Joined Cases T-159/94 & T-160/94 *Ajinomoto and Nutrasweet* [1997] ECR II-2461, para. 73.
[720] Case 155/79 *AM &S Europe* v. *Commission* [1982] ECR 1575.
[721] *Ibid.,* para. 23.
[722] *Ibid.,* para. 11.
[723] *Ibid.*, AG Slynn in *AM&S,* at p.1649. AG Slynn makes a direct reference to AG Lagrange in *Hoogovens* v. *High Authority.*

of *le secret professionnel, les droits de la défense* and rules applicable to *le secret des lettres confidentielles*".[724]

The ECJ, partly following the Opinion, elevated the principle of confidentiality between lawyers and their clients to a general principle of Community law and thus limited the Commission's investigative powers. Although the *AM&S* case concerned investigations under Article 14 of Regulation 17, the principle must also be applied to the requests for information under Article 11. Whereas this principle is well known in common law, it is not developed to the same extent in the continental legal orders. In the words of Schwarze, *"the Court had to analyze the different national approach, make a synthesis and find a common principle, which can fit in the European legal order"*.[725] The reasoning of the ECJ may be summarized as follows.

Firstly, the Court considered that it is apparent from the laws of the Member States that the protection of written communications between lawyers and clients constitutes a generally recognized principle.[726] In the second place, the Court found that the standards of protection diverge among the Member States. As put by the Court, *"in some Member States the protection against disclosure afforded to written communications between lawyer and client is based principally on the recognition of the very nature of the legal profession, in others it is based by the need to protect the rights of the defence"*.[727]

Finally, the Court stated that, apart from those differences, common criteria could be found in the domestic laws of the Member States.[728] In this sense, the principle was subject to certain conditions, which were said to represent the common criteria enshrined in the systems of the Member States.[729] The first condition requires that the communications are made for the purposes and interest of the client's rights of the defence. This includes not only the communication made after the initiation of the proceeding but also the previous written communication.[730] The second condition imposes that the communication emanates from independent lawyers, i.e. lawyers bound to clients by an employment relationship.[731] In addition, the protection afforded applies only to lawyers entitled to practise their profession in one of the Member States. Consequently, communications between a client and a lawyer registered in a third country is not covered by the privilege.[732]

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[724] *Ibid.,* at p.1650.

[725] *See,* Schwarze, "Tendencies towards a Common Administrative Law in Europe", ELR 1991, pp. 3-19, "The Administrative Law of the Community and the Protection of human Rights", CMLRev. 1986, pp-401-417.

[726] *AM&S, supra n.720,* para. 19.

[727] *Ibid.*, para. 20.

[728] *Ibid.,* para. 21.

[729] *Ibid.,* para. 22. The Court ruled that, "Regulation 17 must be interpreted as protecting the confidentiality of written communications between lawyers and clients subject to two conditions, and thus incorporating such elements of the protection as common to the laws of the Member States".

[730] *Ibid.,* para. 23.

[731] *Ibid.*, paras. 21 and 24.

[732] *Ibid.,* paras. 25-26.

From the foregoing discussion, it may be said that the principle of confidentiality affords a decent degree of protection to the undertakings. Nevertheless, the scope of protection appears to remain below the level afforded in common law. In this respect, a large numbers of criticisms have been issued. Indeed, commentators have argued that the principle should be extended to in-house lawyers who are under the same professional rules as the independent lawyers. In this sense, the *rules of professional ethics and discipline,* as AG Slynn stressed, may be the relevant criteria in order to assess the relationship between lawyers and clients. Moreover, the principle does not apply to non-member States lawyers, including lawyers from the States affording such a protection to Community lawyers, which creates discriminatory treatment.

In *Hilti,*[733] the Tribunal extended the scope of the legal professional principle to the internal notes of the companies addressed to the members of the company. More precisely, this concerned notes internal to the undertaking reporting the content of advice received from independent legal advisers.[734] Despite the fact that the advice was not received by way of correspondence, it was held that the principles of legal privilege could not be violated on the sole ground that the legal advice was reported in documents internal to the undertaking.[735] Furthermore, the Tribunal appreciated the scope of protection afforded to the documents covered by the legal privilege. In comparison with the US case-law,[736] a document can lose its protection if it is distributed outside the undertaking or largely diffused in the firm. In this instance, the judge will use the concept of "group control" in order to assess the extent of the protection. In the *Hilti* case, the fact that the document was widely spread between the staff managers in the undertaking did not affect its privileged nature. Perhaps future case-law will develop this area of law.

According to Winckler, "AM&S and Hilti ne constituent qu'un début de jurisprudence, mais la comparaison avec le système du "legal privilege" permet d'apprécier clairement les lignes directrices du débat futur".[737] AM&S and Hilti have been criticized by the doctrine. Despite the recognition of a general principle protecting the legal privilege, its scope remains narrower than the common law concept. Two main modifications might be undertaken. Firstly, the Court may widen the scope to in-house lawyers who are under the same rules of professional ethics as independent lawyers. Secondly, the principle may apply to notes and advice given before the initiation of the proceedings. The dynamic nature of the general principle offers a perfect framework for any extension of the legal privilege's scope of

[733] T-30/89 *Hilti Aktiengesellschaft* v. *Commission* [1990] II-163.
[734] *Ibid.*, para. 16.
[735] *Ibid.,* para. 18.
[736] *Upjohn* v. *United States*, 449 US 383.
[737] Winckler, "Legal Privilege et Droit Communautaire de la Concurrence", in *Rights of Defence and Rights of the European Commission in EC Competition Law*, at p.62.

protection. However, it is worth remarking that the recent jurisprudence still confirms the restrictive interpretation of the principle of legal privilege.[738]

b) The Principle against Self-incrimination and the Presumption of Innocence

The ECJ has also elaborated the principle against self-incrimination and shaped the presumption of innocence. In the former, the court referred to a fundamental principle of Community law, whereas in the latter it used the "fundamental rights" methodology. Interestingly, there is a close link between these two principles.[739] Three cases will help us understand this evolution. Firstly, the *Orkem* case-law focuses on the principle against self-incrimination *stricto sensu*. Secondly, *Mannesmannröhren* and *Tokai* allow us to link the principle against self-incrimination and the presumption of innocence. Thirdly, *Montecatini* provides a tidy example of the recognition of the presumption of innocence as a fundamental right.

The principle against self-incrimination is not expressly stated in primary or secondary legislation. In order to supplement the Community legislative gaps, the Court had to rule on the existence of the principle, which prohibits the use of incriminatory questions by the Commission during the investigatory proceeding under Article 11 of Regulation 17. The scope of this principle was established in *Orkem*[740] and *Solvay*[741] and, subsequently, enlarged to criminal penalties in *Otto* v. *Postbank*.[742] AG Darmon in *Orkem* undertook a comprehensive comparative analysis of the Member States legislation. This analysis stressed that the principle was common to the Member States in the field of criminal law. However, the principle applied to administrative proceedings only in two member States, i.e. Germany and Spain.[743] In the words of AG Darmon, *"an analysis of national laws has indeed shown that there is a common principle enshrining the right to give evidence against oneself, but it has also shown that that principle becomes progressively less common as one moves away from the area of what I shall call classical criminal procedure"*.[744] Finally, the AG concluded that this general principle existed in criminal law, but not in administrative proceedings.[745]

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[738] Joined cases T-125/03 R and T-253/03 R *Akzo Nobel* [2004] 4 CMLR 15, paras. 95-96 and 100-102.

[739] Case T-112/98 *Mannesmannröhren-Werke AG* [2001] ECR II-729, para. 58. The Commission stressed clearly the close relationship between the presumption of innocence and the right not to incriminate oneself.

[740] Case 374/87 *Orkem* v. *Commission* [1989] ECR 3283.

[741] Case 27/88 *Solvay* v. *Commission* [1989] ECR 3255.

[742] Case C-60/92 *Otto* [1993] ECR I-5683, para. 16.

[743] In Spain, it constitutes a constitutional principle under Article 24 of the Constitution. In Germany, it does not appear among the fundamental rights enshrined in the Basic Law. However, in competition proceedings, this principle may be relied upon by legal persons in administrative proceedings.

[744] *Ibid.*, AG Darmon in *Orkem*, at p.3327, para. 98.

[745] *Ibid.,* at p.3331, para. 111. In this sense, the AG stressed that France, Greece and Luxembourg excluded the right not to give against oneself in administrative proceedings.

Similarly, the Court made explicit references to the laws of the Member States and came to the same conclusion as AG Darmon. In this sense, the Court held that,

> "in general, the laws of the Member States grant the right to give evidence against oneself only to a natural person charged with an offence in criminal proceedings. A comparative analysis of national law does not therefore indicate the existence of such a principle, common to the laws of the Member States, which may be relied upon by legal persons in relation to infringements in the economic sphere, in particular infringements of competition law".[746]

Moreover, the ECJ emphasized that neither the wording of Article 6 of the ECHR, nor the decisions of the EctHR indicate the existence of the right not to give evidence against oneself.[747] Similarly, it refuted the application of Article 14 of the ICCPR as it only relates to criminal offences.[748] Finally, even if the Court in *Orkem* rejected the existence of a general principle protecting against self-incrimination in administrative proceedings, it has in order to safeguard the rights of the defence in the preliminary stage created a principle (the "*Orkem* principle") limiting the powers of the Commission. In this aspect, the Court pointed out that respect for the rights of the defense, a fundamental principle of the Community legal order, precluded the Commission from using its powers under Article 11(5) to compel an undertaking to provide its answers which might involve an admission on its part of an infringement which it is incumbent upon the Commission to prove.[749] Furthermore, the European Court of Justice in *Otto* extended the scope of the principle to criminal penalties, while not recognising the existence of a general principle. Similarly, in the judgment *Société Générale* of 1995, the CFI confirmed the "narrow" case-law (in the sense that it applies in relation to Article 11(5)) regarding self-incrimination.[750]

A commentator has suggested that the general principles should build into the Community legal order the necessary flexibility to further judicial development of fundamental rights, perhaps beyond the scope of the ECHR.[751] In this respect, Lenaerts has argued that the ECJ went beyond the application of the European Convention on Human Rights in certain cases.[752] For example, in connection with Article 6 ECHR, the protection afforded at the Community level appears larger than the one afforded by the Strasbourg Court. However, a few years after the *Orkem* case, the European Court of Human Rights in the *Funke* case, indicated that Article 6 ECHR protected the right to remain silent and the right not to contribute to incriminating oneself.[753] Although this right seems to be restricted to those "charged

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[746] *Ibid., Orkem*, at p. 3350, para. 28, *Otto*, para. 11.
[747] *Ibid.,* at p.3350, para. 30, *Otto*, para. 11.
[748] *Ibid.,* at p.3350, para. 31, *Otto*, para. 11.
[749] *Ibid.,* paras. 34 -35, *Otto*, para. 12.
[750] T-34/93 *Société Générale* v. *Commission* [1995] ECR II-545, para. 75.
[751] *See,* Flauss,"Droit Communautaire, Convention Européenne des Droits de l'Homme et Droit Administratif", AJDA, 1996.
[752] Lenaerts, "Fundamental Rights to be Included in a Community Catalogue", ELR 1991, pp. 367-390.
[753] *Funke* v. *France* (10828/84) [1993] ECHR 7.

with a criminal offence", the expression has an independent meaning, not limited to what a particular State may designate as criminal. The principle also seems to cover administrative proceedings, such as competition law procedures. It may be said that the European Court on Human Rights has here been influenced by the case-law of the ECJ. If this is true, it thus constitutes a typical example of interaction between Community law and ECHR law.

Whereas, in *Orkem*, the principle did not exist in the Strasbourg system, in *Otto* and *Société Générale,* the right to remain silent, in the meantime, had been expressly recognized by the EctHR. The ECJ could have found the existence of a general principle based on the existence of the principle in the Strasbourg order. Practically, it was impossible for the ECJ to adopt such a view without undermining the effectiveness of Regulation 17. AG Darmon in *Orkem* stressed that for one reason or another, the Commission was deprived of the right to request information, or to ask for information. It would therefore have to make systematic use of more coercive measures.[754] In a similar vein, the ECJ stated that the Commission is entitled to oblige an undertaking to provide all necessary information in order to preserve the useful effect of Article 11(2) and (5).[755] From this, it appears that the "effectivity argument" is central in the reasoning of the ECJ. However, it is also clear that the Commission may not undermine the rights of the defense by compelling an undertaking to provide it with answers, which may lead to the admission of an infringement.[756]

As stated previously, the principle of self-incrimination in administrative proceedings only expressly existed in Germany and Spain, whereas in France, Luxembourg and Greece, it was categorically excluded. However, in the wake of *Orkem*, the judicial authorities in three national legal orders have taken measures in order to comply with the Community law requirements. For instance in France, in 1990 the Court of Appeal in *BOCCRF* protected the right against self-incrimination as the right of the defense in national proceedings against the *conseil de la concurrence.* [757] One may argue that the ECJ, by elaborating the said principle, facilitated its impact at the national level. In this sense, Koopmans has observed that,

> "[t]he Court of Justice has become one of the major sources of legal innovation in Europe not only because of its position as the Community's judicial institution, but also because of the strength of its comparative methods. National courts take heed to the Court's way of reasoning. As a result, we sometimes see that legal principles which have made their way from the national's systems to the Court case law, in order to be transformed into principles of Community law, make their way back to the national courts. This happens of course, not only because of their willingness to

[754] AG Darmon in *Orkem*, *supra n.740,* at p. 3342.
[755] *Ibid., Orkem*, para. 34.
[756] *Ibid.,* para. 35.
[757] *Arrêt de la Cour d'Appel* (1er ch. Sef. Concur.) 21 May 1990, *BOCCRF*, n 13 du 1er Juin 1990. *See also* Pliakos, "La protection des droits de la défense et les pouvoirs de vérifications de la Commission des Communautés européennes: une issue heureuse?", RTDE 1995, at p. 449.

> adopt a certain method of law finding; besides, national courts are often under an obligation to apply rules of Community law".[758]

The European Association of Lawyers pinpointed the important modifications arising at the national level. They argued that the position taken in *Orkem* and *Solvay* should be revisited. In their words,

> "the position adopted by the Court in *Orkem* and *Solvay* was based on the fact that the right to silence was not sufficiently recognized in the Member States. At the time many Member States did not have any legislation comparable to Articles 85 and 86 [new Articles 81 and 82] of the Treaty. Since 1989, several Member States including Belgium, Italy and Denmark have adopted legislation heavily inspired by Article 85 and following. One can therefore reasonably expect that in these states the competition authorities and the courts will be confronted with the defense of the right to silence. The comparative analysis of the legal systems on which the Court based its reasoning in the *Orkem* and *Solvay* decisions should be therefore brought up to date".[759]

At the end of the day, the principle against self-incrimination may seem like an old advertisement. The *Orkem* principle has the same smell, colour and the same taste as a general principle, but it is not a general principle. What is it then? An *Ersatz?* The *Orkem* principle is clearly part of the rights of the defense. According to the rich case-law of the Court the safeguard of the rights of the defense is held to be a fundamental principle of Community law. So the need to respect the *Orkem* principle is a fundamental principle of Community law, but is not a general principle of Community law[760]. In light of those developments, the question is whether the ECJ should reconsider *Orkem* and recognize the existence of a general principle. From a practical point of view, on the one hand, the protection against self-incrimination is a fundamental principle of Community law, protected as such in the Community legal order. From a theoretical point of view, on the other hand, one may consider that the jurisprudence of the ECJ appears inconsistent with recent developments. Recently, in *LVM*, the ECJ recognized the existence of a general principle of self-incrimination and stated that,

> "the Orkem judgment thus acknowledged as one of the general principles of Community law, of which fundamental rights are an integral part and in the light of which all Community laws must be interpreted, the right of undertakings not to be compelled by the Commission, under Article 11 of Regulation No 17, to admit their participation in an infringement (see Orkem paragraphs 28, 38 in fine and 39). The protection of that right means that, in the event of a dispute as to the scope of a question, it must be determined whether an answer from the undertaking to which

[758] Koopmans, "The Birth of European Law at the Crossroads of Legal Traditions", AJCL 1991, pp.493-507, at pp.505-506.

[759] "Rights of Defence and Rights of the European Commission in EC Competition Law: Symposium organized on 24 and 25 January 1994 by the European Association of Lawyer", Bruylant 1994, at p.346.

[760] One can pinpoint here, that all the rights of the defence do not constitute general principles of law.

> the question is addressed is in fact equivalent to the admission of an infringement, such as to undermine the rights of the defence".[761]

Also, it is worth remarking that the principle against self-incrimination is often linked to the presumption of innocence. This is clearly illustrated by the *Mannesmannröhren* case, where the Commission started an investigation in the steel tubes sector.[762] On a number of occasions, it carried out inspections at the premises of the applicant and requested certain information. The applicant's lawyers replied to certain questions in the request for information, but declined to reply to others.[763] The Commission then took a decision providing that a fine of ECU 1 000 per day of delay would be imposed if the applicant failed to furnish the information. The applicant argued a breach of the principle against self-incrimination, articulated around two pleas based respectively on an infringement of Article 6(1) (second plea) and 6(2) (third plea) of the ECHR.

In the first place (second plea), the applicant alleged infringement of Article 6(1) of the ECHR.[764] Indeed, according to the applicant (citing the *Funke* judgment of the EctHR),[765] *"the protection afforded by Article 6 of the Convention goes appreciably beyond the principles recognised in Orkem. Article 6 not only enables persons who are the subject of a procedure that might lead to the imposition of a fine to refuse to answer questions or to provide documents containing information on the objective of anti-competitive practices, but also establishes a right not to incriminate oneself by positive action".*[766] In the second place (third plea), the applicant asserted that the right not to give evidence against oneself is protected by the presumption of innocence as laid down in Article 6(2) of the Convention and by the right to freedom of expression provided for in Article 10 ECHR.[767]

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[761] C-238/99 P *LVM* v. *Commission* [2002] ECR I-8375, para. 273.

[762] Case T-112/98 *Mannesmannröhren-Werke AG* [2001] ECR II-729, Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon* v. *Commission* [2004] n.y.r, paras. 401-406.

[763] An example of the question asked is offered by the question 1.6: "in the case of meetings for which you are unable to find the relevant documents, please describe the purpose of the meeting, the decisions adopted and the type of documents received before and after the meeting".

[764] *Mannesmannröhren, supra n.762*, para. 33, "[t]he applicant submits that, in procedures before it, the Commission is required to comply with Article 6 of the Convention (Case T-213/95 and T-18/96 *SCK and FNK* v *Commission* [1997] ECR II-1739, paragraphs 41, 42 and 53). The fundamental rights guaranteed by the Convention, as general principles of Community law, take precedence over the ordinary rules of law laid down by Regulation No 17. Furthermore, it is clear from the 11th recital in the preamble to the contested decision that the Commission regards itself as being obliged to comply with the Convention". *See also* the argument of the Commission, para. 48.

[765] *Ibid.,* para. 37.

[766] *Ibid.,* para. 36.

[767] *Ibid.,* para. 57, "[t]he applicant contends that the right not to give evidence against oneself is protected by the presumption of innocence as laid down in Article 6(2) of the Convention and by the right to freedom of expression provided for in Article 10 (opinion of the European

In addition, the applicant claimed (by a letter sent on 18 December 2000) that the Charter of Fundamental Rights had established new law in regard to the application of Article 6(1) ECHR and asked for the oral procedure to be re-opened.[768] The CFI ruled that,

> "as regards the potential impact of the Charter, to which the applicant refers (see paragraph 15 above), upon the assessment of this case, it must be borne in mind that that Charter was proclaimed by the European Parliament, the Council and the Commission on 7 December 2000. It can therefore be of no consequence for the purposes of review of the contested measure, which was adopted prior to that date. That being so, there is no reason to accede to the applicant's request for the oral procedure to be re-opened".[769]

The Commission contended that the principles deriving from Article 6 of the Convention were not applicable to the preliminary investigation procedure conducted by the Commission. More precisely, it emphasised that the Commission does not have the jurisdiction of a court and, consequently, that the procedure at stake does not constitute a criminal procedure.[770] Next, it underlined the close connection between the presumption of innocence and the right not to incriminate oneself.[771]

The CFI stressed twice that it does not have jurisdiction to apply the ECHR directly.[772] In this regard, it stated that, "it must be emphasised at the outset that the Court of First Instance has no jurisdiction to apply the Convention when reviewing an investigation under competition law, inasmuch as the Convention as such is not part of Community law (Case T-374/94 *Mayr-Melnhof* v *Commission* [1998] ECR II-1751, paragraph 311)".[773] Nevertheless, fundamental rights form an integral part of the general principles of Community law. The CFI stated once again that the ECHR has a special significance.[774] Notably, the Tribunal forcefully ruled that the protection afforded by Community law in competition law proceedings (through the use of the rights of defence and the right to a fair legal process) was *"equivalent"* to

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Commission of Human Rights annexed to Eur. Court H. R., K. v Austria judgment of 2 June 1993, Series A, no. 255-B). The applicant indicates in its application that it limits itself to that statement because the ECHR held, in Funke, that infringement of Article 6(1) of the Convention relieved it of the need to consider the alleged infringement of another principle of the Convention".

[768] *Ibid.,* para. 15.

[769] *Ibid.,* para. 76.

[770] *Ibid.,* para. 54.

[771] *Ibid.,* para. 58.

[772] *Ibid.,* para. 75, "[a]s regards the arguments to the effect that Article 6(1) and (2) of the Convention enables a person in receipt of a request for information to refrain from answering the questions asked, even if they are purely factual in nature, and to refuse to produce documents to the Commission, suffice it to repeat that the applicant cannot directly invoke the Convention before the Community courts".

[773] *Ibid.,* para. 59.

[774] *Ibid.,* para. 60.

Article 6 ECHR.[775] The CFI emphasised that the powers of investigation are necessary in order to ensure the observance of the rules on competition, and the undertaking is thus placed under a duty to co-operate.[776] Also, the Court pointed out the importance of the rights of the defense in the preliminary stage of investigation, particularly the need to avoid the impairment of those rights in the absence of any right to silence in Regulation 17.[777]

The Court ruled that the Commission is entitled to compel an undertaking to provide all necessary information in order to ensure the effectiveness of Article 11(2) and (5) of Regulation No 17.[778] Consequently, it appeared that the recognition of an absolute right to silence would undermine such effectiveness.[779] Finally, the CFI confirmed the limited "*Orkem* formulation", according to which "an undertaking in receipt of a request for information pursuant to Article 11(5) of Regulation No 17 can be recognised as having a right to silence only to the extent that it would be compelled to provide answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove (*Orkem*, paragraph 35)".[780]

Then, it reviewed the legality of the Commission's questions. The CFI noticed that the last indent of each of the questions did not concern entirely factual information. Indeed, according to the Court, the Commission called upon the applicant to describe in particular the purpose of the meetings it attended and the decisions adopted during them, even though it is clear that the Commission suspected that their purpose was to arrive at agreements, in respect of selling prices, of a nature such as to prevent or restrict competition. The applicant was therefore

[775] *Ibid.,* para. 77, "[h]owever, it must be emphasised that Community law does recognise as fundamental principles both the rights of defence and the right to fair legal process (see *Baustahlgewebe* v *Commission*, cited above, paragraph 21, and Case C-7/98 *Krombach* [2000] ECR I-1935, paragraph 26). It is in application of those principles, which offer, in the specific field of competition law, at issue in the present case, protection equivalent to that guaranteed by Article 6 of the Convention, that the Court of Justice and the Court of First Instance have consistently held that the recipient of requests sent by the Commission pursuant to Article 11(5) of Regulation No 17 is entitled to confine himself to answering questions of a purely factual nature and to producing only the pre-existing documents and materials sought and, moreover, is so entitled as from the very first stage of an investigation initiated by the Commission".

[776] *Ibid.,* paras. 61-62.

[777] *Ibid.,* paras. 63-64, "[i]n the absence of any right to silence expressly provided for in Regulation No 17, it is necessary to consider whether certain limitations on the Commission's powers of investigation during a preliminary investigation are, however, implied by the need to safeguard the rights of defence (*Orkem*, paragraph 32)…In this respect, it is necessary to prevent the rights of defence from being irremediably impaired during preliminary-investigation procedures which may be decisive in providing evidence of the unlawful nature of conduct engaged in by undertakings (*Orkem*, paragraph 33, and *Société Générale*, paragraph 73)".

[778] *Ibid.,* para. 65.

[779] *Ibid.,* para. 66.

[780] *Ibid.*, para. 67.

under no obligation to provide answers in response to those requests. These questions were contrary to the Community rules on competition and, thus, infringed the rights of the defence.[781]

In *Dow Chemical Ibérica* and, more recently, in *Solvay* (1995), the defendant invoked a principle of presumption of innocence. The ECJ rejected the submission without examining the existence of such a right in the Community legal order.[782] Drawing a parallel with the ECHR legal order, such a right is enshrined in Article 6(2) of the European Convention on Human Rights. According to this Article, "everyone charged with a criminal offence shall be presumed innocent, until proven guilty according to the law". The scope of this Article was correctly confirmed in the *Öztürk case* in the field of criminal law.[783]

Can one apply such a principle in the EC competition law order? More precisely can one apply this principle of criminal law to the competition law proceedings? AG Darmon in his Opinion in *Orkem* observed that the *Öztürk* judgment should not be seen as being so far-reaching. The concept of "charged with a criminal offence" within the meaning of the Convention should be taken to extend to undertakings that are the subject of administrative proceedings. According to Darmon, competition law, in the Member States, is largely administrative law. Therefore, there is no certainty that the Strasbourg Court would, in competition matters, follow the same reasoning as in the *Öztürk* case.[784] Consequently, in this situation, it is clear that no general principle of presumption of innocence could be sculpted. Nevertheless, it is also clear from the recent case-law of the Strasbourg Court, such as *Saunders* (1996),[785] that the presumption of innocence is linked to the concept of self-incrimination.

In the *Montecatini* case, the defendant invoked once again the principle of presumption of innocence against the "polypropylene decision" of the CFI as a "principle common to all the civilized judicial orders".[786] The Court finally recognized that the principle of presumption of innocence is a fundamental right protected by the case-law of the Court as reaffirmed in the preamble of the Single European Act and Article F (2) of the TEU, and which results notably from Article 6(2) of the European Convention on Human Rights.[787] Also, the Court, referring to the *Öztürk* and *Lutz* jurisprudence of the ECHR,[788] highlighted that this general principle applies to all types of proceedings against undertakings leading to fines or penalties.[789] According to Montecatini, the Tribunal had introduced a presumption

[781] *Ibid.*, paras. 71 and 73.
[782] *Dow Chemical Ibérica, supra n.639,* at p.3195, para. 56.
[783] *Öztürk* v. *Germany* (8544/79) [1984] ECHR 1 (21 February 1984),
[784] AG Darmon in *Orkem, supra n.740*, at p.3337.
[785] *Saunders* v. *The United Kingdom* (19187/91) [1996] ECHR 65, para. 68.
[786] Case C-235/92 P *Montecatini* v. *Commission* [1999] ECR I-4539, paras. 135 and 173.
[787] *Ibid.,* para. 175.
[788] *Öztürk* v. *Germany* (8544/79) [1984] ECHR 1 (21 February 1984), *Lutz* v. *Germany* (9912/82) [1987] ECHR 20 (25 August 1987).
[789] *Montecatini, supra n.786,* para. 176.

of culpability in affirming that Montecatini did not contest its participation in the meetings and consequently had assumed that the firm had participated in the whole meetings. However, the Court did not consider that the principle of presumption of innocence was infringed, as the conclusion of the CFI is based on the existence of a proved anti-competitive agreement.[790]

A final observation may be that the *Montecatini* case constitutionalized the principle of presumption of innocence. As seen above, in relation to the right to access to file, a stage process marks the process of recognition. Firstly, the Court elaborated a fundamental principle of Community law in the form of a limited right of the defense, i.e. the principle against self-incrimination or "*Orkem* principle". Secondly, the Court confirmed the need of a limited principle against self-incrimination and the danger of an absolute right to silence. In that sense, it may be argued that the Court assimilated the "*Orkem* principle" to the notion of presumption of innocence. Thirdly, the Court elaborated the presumption of innocence as a fundamental right. At the end of the day, the "*Orkem* principle" may be seen as an ingredient of the presumption of innocence and as a fundamental right. Interestingly, the evolution goes further than in the jurisprudence regarding access to file, since the right at stake is conceived as a fundamental right. This evolution may take all its sense, if one perceives the principle of effective judicial protection as the absolute procedural guarantee and a fundamental right.

5.2. EFFECTIVE JUDICIAL PROTECTION

First, the principle of effective judicial protection is defined in light of the case-law of the ECJ (5.2.1). Second, this section focuses on the use of the principle of effective judicial protection in relation to standing rules (5.2.2).

5.2.1. Defining the Principle of Effective Judicial Protection

It is extremely difficult to give an exact "positioning" of the general principle of effective judicial protection. As Caranta expressed it, using a metaphor normally applied to the English doctrine of equity; "the principle of effective judicial protection works like a shield, not like a sword: it only forbids the application of an existing domestic provision, but does not dictate a new rule".[791] It appears, however, from the case-law that this principle constitutes a fundamental right. What is more, the principle has important implications in the field of procedural law. Consequently, it may be qualified as a "hybrid principle". As stressed by Usher, *"[t]he overarching procedural guarantee is the principle of effective judicial protection. However, while the procedural rights have been essentially concerned with the conduct by Community institutions of procedures laid down by Community law, the principle of effective judicial protection has also been used in the context of*

[790] *Ibid.,* para. 180.
[791] Caranta, "Judicial Protection against Member States: a New Jus Commune Takes Shape", CMLRev. 1995, at p. 706.

Member States acting within the scope of Community law".[792] Next, it should be recognised that the classification of this principle, even if important, does not constitute the most important issue. Indeed, the principle of effective judicial protection is obviously a fundamental right, which is deflected into the procedural field. In other words, the principle is part of both groups.

Already in *Johnston*,[793] the Court analysed the prerequisites of judicial control under Article 6 of Directive 76/207. In the circumstances of the case, Article 53(2) of the sex discrimination order allowed the authority to prevent an individual from asserting rights by judicial process conferred by the Directive. More precisely, Article 6 of the Directive 76/207 on equal treatment on men and women requires the Members States to introduce in their national legislation, all the necessary measures in order to permit the individuals to "pursue their claim by judicial process".[794]According to the ECJ, this requirement of judicial control reflects the general principles of law, which underlines the constitutional traditions common to the Member States and that principle is also laid down in Article 6 and 13 of the European Convention on Human Rights.[795] Consequently, Article 6 of Directive 76/207 interpreted in the light of the general principle confers a right for the individuals to obtain an effective remedy in a national court against measures, which they consider contrary to the principle enshrined in the Directive.

In *UNECTEF* v. *Heylens*,[796] in a reference for a preliminary ruling by the TGI of Lille, a Belgium football trainer tried to obtain an equivalence of his national diploma by a French special committee. The ECJ was asked to consider whether Article 48 [new Article 39] of the EC Treaty on the freedom of movement of workers could be violated in the case of a decision, in which the Committee rejected his application without giving any reasons in the decision and without providing any specific legal remedy. The ECJ ruled that the Belgian trainer was entitled to judicial redress when the fundamental right to free access to employment is endangered by a national public authority: "Since free access to employment is a fundamental right, which the Treaty confers individually on each worker in the Community, the existence of a remedy of a judicial nature against any decisions of a national authority refusing the benefit of that right is essential in order to secure for the individual effective protection for his rights".[797]

Significantly, the ECJ gave a definition of the right to effective judicial review in the light of the duty to give reasons. It went on saying, "the effective judicial review presupposes in general that the court to which the matter is referred may

[792] Usher, *The General Principles of Community Law*, Longman, 1998, at p.85.
[793] Case 222/84 *Johnston* [1986] ECR 165.
[794] It follows from that provision that the Member States must take measures, which are sufficiently effective to achieve the aim of the Directive, and that they must ensure that the rights thus conferred may be effectively relied upon before the national courts by the persons concerned.
[795] *Johnston*, *supra n.793,* para. 18, *see also infra Heylens*, para. 14 and *Borelli* para. 14.
[796] Case 222/86 *Heylens* [1987] ECR 4097.
[797] *Ibid.,* para. 14.

require the competent authority to notify its reasons". However, the Court considered that in the present situation this was not the case, and ruled that the competent national authority has a duty to inform the applicant derived from the obligation to secure the effective protection of a fundamental right.[798]

Arguably, it seems that the ECJ assimilated the duty to give reasons, (enshrined already in Article 190 [new Article 253] EC in relation to the institutions) with the right to an effective remedy. The duty to give reasons constitutes, indeed, a corollary right. In *Sodemare*, [799] the Court ruled that the obligation to state reasons in Article 190 concerned only the act of the institutions. It went on to say that the *Heylens* jurisprudence concerns only adversary individual decisions and not the national measures of general scope.[800] Hence, in the instance of a decision refusing the equivalence of a diploma to a worker of another Member Sate, it must be possible to contest the validity under Community law of such a decision by a judicial proceeding where the person concerned would be able to ascertain the reasons.[801] Nevertheless, the existence of a judicial remedy and the duty to give reasons are limited to final decisions and do not extend to opinions and other measures occurring in the preparation and investigation stage.[802]

Interestingly, AG Darmon in *Johnston* did not analyse the scope of a potential general principle in the field of judicial protection. However, it is submitted that the analysis is implied in its reference to the concept of the rule of law. Indeed, the AG considered that the right to challenge a measure before the Courts is inherent in the rule of law. In this sense, he went on to say that *"formed of States based on the rule of law, the EC is necessary a Community of law, which was created and works on the understanding that all Member States will show equal respect for the Community legal order"*.[803] In a similar vein, AG Mancini in *Heylens* did not enter into a debate on the general principles. The AG simply stated that Article 8 of Directive 64/221 EEC (on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy; public security or public health), requires the Member States to guarantee all Community citizens access to the legal remedies available to nationals.[804]

More surprisingly, neither the ECJ nor the AG made references to the ECHR jurisprudence in the field of effective judicial protection. By way of consequence, it is worth noting that Article 6 ECHR in paragraph 1 states that, "in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". Concerning the interpretation of Article 6(1), the European Court of Human Rights stated in 1970 in *Delcourt* v. *Belgium* that

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[798] *Ibid.*, para. 15.
[799] Case C-70/95 *Sodemare* [1997] 3 CMLR 591.
[800] *Ibid.,* paras. 19-20.
[801] *Heylens, supra n.796,* para. 17.
[802] *Ibid.*, para. 16.
[803] *Johnston*, *supra n.793*, at p.1656.
[804] *Heylens*, *supra n.796,* at p.4117.

paragraph 1 had to be interpreted broadly.[805] In this sense, the EctHR ruled that, "in a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that the restrictive interpretation of that article would not correspond to the aim and purpose of that provision". Furthermore, in a case from 1975, *Golder* v. *United Kingdom,* the EctHR ruled that the State cannot impede judicial review in certain areas,[806] since according to Article 13 ECHR, *"everyone whose rights and freedoms as set forth in this convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity"*.

It is suffice to recall here that this Article should be read in conjunction with Article 6 ECHR, in order to provide the concept of effective judicial remedies from which the ECJ seems to base its inspiration. However, it has been accepted, in certain instances, by the Commission of Human Rights that Article 13 ECHR could be read as implying a right to an effective remedy without the combining it with Article 6 ECHR. It is worth noticing that Article 13 ECHR has led to some difficulties regarding its interpretation. In a case from 1983, *Silver* v. *United Kingdom*, the EctHR emphasised that, *"[w]here an individual has an arguable claim to be the victim of a violation of the rights set forth in the Convention, he should have a remedy before a national authority in order both to have his claim decided and if appropriate, to obtain redress".*[807] The doctrine of wide margin of appreciation conferred to the States in relation to the effectiveness of a remedy was established by the European Court of Human Rights, in *Leander* v. *Sweden (*1987), where the particular situation (national security consideration) led the Court to consider that, *"the right to an effective remedy could be subject to the inherent limitations of the context"*.[808] Such a doctrine of wide margin of appreciation appears difficult to apply in the EC system, since it seems that the Member States are compelled to provide an effective remedy to European citizens each time that a Community law right is infringed.

In the words of AG Jacobs in *UPA*, the case-law on the principle of effective judicial protection is evolving. The AG considered that, "*[w]hile that principle was enunciated in 19826, in the case of Johnston, its implications have only gradually been spelt out in the Court's case-law in the subsequent period"*.[809] In this sense, in *Borelli*,[810] the Court stated the traditional formula and ruled that effective judicial control must be observed by the Member States regarding an opinion given by the national authorities (the region of Lombardia) concerning an application for aid

[805] *Delcourt* v. *Belgium* (2689/65) [1970] ECHR 1 (17 January 1970).
[806] *Golder* v. *The United Kingdom* (4451/70) [1975] ECHR 1 (21 February 1975).
[807] *Silver and Others* v. *United Kingdom* (5947/72) [1983] ECHR 5 (25 March 1983).
[808] *Leander* v. *Sweden* (9248/81) [1987] ECHR 4 (26 March 1987).
[809] AG Jacobs in Case C-50/00 P *Unión de Pequeños Agricultores* v. *Council* [2002] 3 CMLR 1 para. 97.
[810] Case C-97/91 *Borelli* ECR [1992] I-6313.

from the Agricultural Guidance and Guarantee Fund. Quoting AG Darmon,[811] the opinion provided in Article 13 of Regulation No 355/77 (which is binding on the Commission if unfavourable) was not an intermediate measure. Indeed, it was a measure, which had an adverse effect on the undertakings applying for aid from the fund, as it prevented the Commission from granting the aid. Therefore, it must as such be susceptible of judicial review. And the national courts were entrusted with the task to rule on the legality of such an opinion, even if the domestic rules of procedures did not provide for any remedy in the situation.[812]

More recently, in Case C-424/99 *Commission* v *Austria*,[813] regarding domestic appeal procedures against decisions concerning applications for inclusion of medical products on the register, the Commission argued that the Austrian legislation did not provide for any genuine judicial protection and constituted an infringement of Article 6(2) of the Directive. This Directive provides that, "the applicant shall be informed of the remedies available to him under the laws in force and of the time-limits allowed for applying for such remedies". [814] According to the Commission, neither the complaint against the first recommendation of the small technical advisory board nor against the opinion of that board if it is again negative, could be described as appeals since that remedy lies not before the courts but before the administrative authorities.[815] The ECJ stated that, *"[t]he requirement of judicial review reflects a general principle of Community law stemming from the constitutional traditions common to the Member States and enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms"*.[816] It then ruled that the Commission's action should be held well founded on that point and the failure to comply with the provisions of the Directive was confirmed.[817]

In addition, it may be argued, as AG Jacobs did,[818] that the principle of effective judicial protection requires the domestic court to review the national legislative measures, to grant interim relief and to grant individuals standing to bring proceedings.[819] In my view, this assertion prompts an interesting conclusion and also raises a number of interrogations. The principle of effective judicial protection with a wide meaning enshrines the rights developed by the Court with the help of Article 10 EC [ex Article 5]. Do these rights constitute general principles of Community

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[811] *Ibid.,* AG Darmon in *Borelli,* at p.6328, paras. 31-32.
[812] *Ibid., Borelli,* para. 13.
[813] Case C-424/99 *Commission* v. *Austria* [2001] ECR I-9285.
[814] *Ibid.,* para. 39.
[815] *Ibid.,* para. 40.
[816] *Ibid.,* para. 45. Interestingly, the ECJ referred to the following case-law, Case 224/84 *Johnston* [1986] ECR 1651, para. 18, Case C-97/91 *Oleificio Borelli* v. *Commission* [1992] ECR I-6313, para. 14, Case C-1/99 *Kofisa Italia* [2001] ECR I-207, para. 46, and Case C-226/99 *Siples* [2001] ECR I-277, para. 17.
[817] *Commission* v. *Austria*, *supra n.813*, para. 46.
[818] AG Jacobs in *UPA*, *supra n.809,* para. 97.
[819] Case C-213/89 *Factortame* [1990] ECR I-2433, paras. 19-22. *See also* Joined Cases C-87/90, C-88/90 and C-89/90 *Verholen* [1991] ECR I-3757, paras. 23-24.

law? If a positive answer is given, then it might be said that the ECJ departed from its usual line of reasoning. By contrast, the ECJ never explicitly stated that these principles constituted general principles of Community law. Another question is why did the ECJ not use the traditional formulation based on Articles 6 and 13 ECHR?

In this sense, it may be argued that the ECJ could have used the general principle of effective judicial protection in its reasoning. However, the Court preferred to rely on Article 10 EC. Notably, this article has been given tremendous importance since 1989, three years after the *Heylens* case.[820] In light of the foregoing, it may be said that there exists a strong relationship between the principle of effective protection and other principles developed by the Court in the light of Article 10 EC (such as the principle of State liability). In other words, the basic assumption is to reckon that the principle of effective judicial protection interacts with the principle of effectiveness.

The term "effectiveness" (*effet utile*) can be characterized as one of the key words in EC law. Indeed, the concept of effectiveness imbued the constitutional development of EC law and constituted a primary source of inspiration for the reasoning of the European Court of Justice. In that regard, the concept of effectiveness may be seen as the corner stone for the functioning of the EC legal order. The most flagrant example can be taken from the case-law on direct effect and the famous *Van Gend en Loos* case,[821] where the Court was asked on the potential justiciability of Article 12 EEC.

According to the well-known formula, "[t]he Community constitutes a new legal order of International Law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subject of which comprise not only Member States but also their nationals". Then, the Court ruled that a private litigant could invoke Article 12. The doctrine of direct effect implies that in each Member State, an individual can assert a directly effective provision or legal act of the EC in front of a national court. The motivation underlying the ruling in *Van Gend en Loos* is the concept of effectivity, i.e. that in order to ensure the effectiveness of the European legal order, an individual must be able to assert directly effective community rights at the national level. Consequently, to ensure the effectiveness, the national courts have been bestowed with the task of protecting individual rights at the domestic level. The subsequent case-law such as *Simmenthal II*,[822] *Ariete*,[823] *Mirecco*,[824] *Factortame I*,[825] or for the CFI in *Bemim*[826] has emphasized the role of national courts to provide effective protection for those

[820] *Supra Introductive Chapter 3.3.*
[821] Case 26/62 *Van Gend en Loos* [1963] ECR 1.
[822] Case 106/77 *Simmenthal* [1978] ECR 629 para. 16.
[823] Case 811/79 *Ariete* [1980] ECR 2545.
[824] Case 826/79 *Mireco* [1980] ECR 2559.
[825] Case C-213/89 *Factortame* [1990] ECR I-2433, para. 19.
[826] Case T-114/92 *Bemim* v. *Commission* [1995] ECR II 147, para. 62.

rights. To recapitulate, the reasoning has normally been based on the principle of co-operation stemming from Article 10 EC.

In *Factortame I,* the ECJ stated that, "[a]ny provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law, by withholding from the national court to apply such a law, the power to do so should be set aside even temporarily".[827] It stressed that "the full effectiveness of Community law would be as much impaired if a rule of national law could prevent a court seized of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgement to be given on the existence of the right claimed under Community law".[828] Going further, the ECJ in the *Francovich* case[829] could not rely on the direct effectivity of directive 80/987. As a result, the breach of a substantive obligation could not be alleged in accordance with the relevant case law.[830] The Court circumvented the problem by basing its reasoning on Articles 5 [new Article 10] and 189 [new Article 249] EC Treaty and pinpointed the *Van Gend en Loos* jurisprudence[831] in order to assert that the principle of state liability was inherent in the EC system.[832] Furthermore, the Court considered, once again, in its reasoning that, "the national courts whose tasks is to apply provisions of Community law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals".[833] Similarly to the reasoning in *Factortame*, the ECJ highlighted the risk of impairment regarding the effectiveness of Community law.[834]

Yet it should be borne in mind that, in the words of Temple Lang,[835] the national courts appear as the allies of the European Court of Justice. Similarly, quoting Tesauro, *"they constitute the natural forum for EC law"*.[836] Next, in the

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[827] *Factortame I, supra n.825,* para. 20.
[828] *Ibid.,* para. 21.
[829] Case C-6/90 and 9/90 *Francovich* [1991] ECR I-5357.
[830] Case 60/75 *Russo* [1975] ECR-45. If a damage occurred through an infringement of Community law, the principle of state liability applies.
[831] *Francovich, supra n.829*, para. 31.
[832] *Ibid.,* para. 34-35
[833] *Ibid.,* para. 32. *See also Simmenthal II* para. 16 and *Factortame I* para. 19.
[834] *Ibid.,* para. 33, "[i]f individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible, the full effectiveness of Community law will be impaired and the protection of the rights which they grant would be weakened".
[835] Temple Lang, "The Duties of National Courts under EC Constitutional Law", Speech at the Institute of European Law, Cambridge, 1996, at http://europa.eu.int/comm/competition/speeches/text/sp1996. *See also* ELR 1997, pp. 3 *et seq.*
[836] *Ibid.,* Temple Lang, quoting Tesauro , "The Effectiveness of Judicial Protection and Cooperation between the Court of Justice and National Courts ", in Festskrift til Ole Due : Liber Amicorum ,1994, Copenhagen, at p. 355.

Zwartveld case,[837] the ECJ stated that the national courts are "responsible for ensuring that Community Law is applied and respected in the national legal systems". Finally, it could be stated that the national courts are the guardians of the effectiveness of EC law. At the end of the day, the principle of effective judicial protection *lato sensu* appears to include the rights developed through Article 10 EC. However, this study will merely focus on the principle of effective judicial protection developed by reference to Articles 6 and 13 ECHR and recognized explicitly as a general principle of Community law. In that regard, the Charter of Fundamental Rights and its Article 47 codifies the principle of effective judicial protection.

5.2.2. Standing Rules and Effective Judicial Protection.

During the year 2002, the principle of effective judicial protection provoked an intensive debate in relation to the standing rules under Article 230(4) EC. The main questions at stake were to determine whether the proceedings before national courts may provide effective judicial protection for individual applicants and whether alleged lack of judicial protection at the domestic level, under the preliminary ruling procedure (Article 234 EC), could justify a reform of the standing rules regarding Article 230 EC. In this sense, it appears interesting to analyse the Opinion of AG Jacobs in *UPA* and the judgments of the CFI and ECJ in both *Jégo-Quéré and UPA*.[838]

Jégo-Quéré is a fishing company established in France which operates in Irish waters. It brought an action under the fourth paragraph of Article 230 EC for annulment of Articles 3(d) and 5 of Commission Regulation (EC) No 1162/2001. The basic aim of this Regulation is to reduce catches of juvenile hake by imposing minimum mesh sizes. In addition, it should be noticed that this Regulation applies automatically without requiring implementing measures by the national authorities.[839] This is a so-called "self-executing" Regulation.

The Commission raised an objection of inadmissibility based on the argument that the Regulation was not of individual concern to Jégo-Quéré due to the nature of the measure, i.e. a measure of general application, which does not permit any derogation. In this sense, it argued that the general ban on the use of nets of less than a given mesh size applies to all operators fishing in the given area (South of Ireland),

[837] Case C-2/88 *Zwartveld* [1990] ECR I 3365. *See also* Case T-51/89 *Tetrapak* [1990] ECR II at p.364, where the CFI ruled that, "when applying Article 86, the national Courts are acting as Community courts of general jurrisdiction ".

[838] Case T-54/99 *Jégo-Quéré* [2002] 2 CMLR 44, P Case T-173/98 *Unión de Pequeños Agricultores* v. *Council* [1999] ECR II-3357, Case C-50/00 P *Unión de Pequeños Agricultores* v. *Council* [2002] 3 CMLR 1, Case C-263/02 P *Jégo-Quéré* [2004] n.y.r.

[839] *See, e.g.* Case C-386/96 P *Dreyfus* v. *Commission* [1998] I-2309, para. 43, Joined Cases T-198/95, T-171/96, T-230/97, T-174/98 and T-255/99 *Comafrica and Dole Fresh Fruit Europe* v. *Commission* [2001] ECR II-1975, para. 96

irrespective of the type of fish, which they are seeking to catch.[840] Therefore, it claimed that Jégo-Quéré did not have *locus standi* to bring an action for annulment of the contested provisions. By contrast, the applicant argued that the Community measure had a significantly adverse effect on its business [841] and constituted a bundle of individual decisions, i.e. it comprised of a series of decisions adopted to meet the specific positions of various fishing companies in the Member States.[842] Furthermore, Jégo-Quéré contended that Article 230 EC must be read in the light of Article 6 ECHR, which permits a broad interpretation of the rules on standing,[843] and remarked that no implementing measure has been adopted at the domestic level. Consequently, it maintained that it would have no right of action before the national courts.[844]

The Court assessed whether the contested provisions, despite their general scope, could be regarded as being of of direct and individual interest. It stressed that, according to the jurisprudence, the fact that a provision is of general application does not prevent it from being of direct and individual concern to some of the economic operators whom it affects.[845] In the first place, the CFI ruled that the criterion of direct concern was fulfilled. In this respect, it noticed that the contested provisions affected the legal situation of the applicant and did not leave any discretion to the addressee in order to implement it.[846] In the second place, the applicant contended that the provisions were of individual concern, since it was the only operator fishing for whiting in the Celtic sea with vessels over 30 metres in length, and that the application of the contested provisions had significantly reduced its catches. However, the CFI considered that *"the contested provisions are of concern to it only in its objective capacity as an entity which fishes for whiting using a certain fishing technique in a specific area, in the same way as any other economic operator actually or potentially in the same situation"*.[847] According to the CFI, the applicant did not show any evidence of this and consequently, it

[840] *Jégo-Quéré* (CFI), *supra n.838*, para. 15.
[841] *Ibid.,* para. 18, "[i]t states that its catches of hake are negligible, whereas fishing for whiting forms a key element of its activities, and that the enlargement of the mesh sizes of nets prescribed by the contested provisions will lead to a significant decrease in its catches of small whiting, so as to penalise it, even outside the areas covered by the regulation where it also fishes, since the rules do not permit nets of both types of mesh sizes to be carried on board. It argues that the contested provisions, which it claims to be unlawful since they were adopted in breach of the principles of proportionality and equality and of the obligation to state reasons, have a significantly adverse effect on its business" (emphasis added).
[842] *Ibid.,* para. 19.
[843] *Ibid.,* para. 21.
[844] *Ibid.,* para. 40.
[845] *See e.g.* Case C-358/89 *Extramet Industrie* v. Council [1991] ECR I-2501, paras. 13-14, Case C-309/89 *Codorniu* v. *Council* [1994] ECR I-1853, para. 19, and Case C-451/98 *Antillean Rice Mills* v. *Council* [2001] ECR I-8949
[846] *Jégo-Quéré*, *supra n. 838*, para. 26.
[847] *Ibid.,* para. 30.

followed that the applicant cannot be regarded as individually concerned within the meaning of the fourth paragraph of Article 230 EC.[848]

The CFI stressed the importance of access to justice in the European legal order. In this respect, it noted, in the light of the ECJ jurisprudence *Les Verts* and *Johnston* that the Community has a complete system of legal remedies and recognises the right to an effective remedy before a competent court.[849] Interestingly, it referred directly, and only for the second time,[850] to Article 47 of the CFR, which codifies the general principle of effective judicial protection.[851] Then, it remarked that two "procedural routes" appear as alternatives to the inadmissibility of the direct action. Going further, the CFI underlined that those proceedings permit an individual applicant to obtain a ruling before the Community courts, that a Community measure is unlawful, i.e. a preliminary ruling on the validity and an action for damages.[852] It also assessed whether those remedies comply with the principle of effective judicial protection. Before assessing the judgment of the CFI as to this particular point, it appears important to critically analyze the mechanisms of ruling on validity and action for damages.

Concerning the ruling on validity procedure, Article 234(1)(b) EC provides the individual applicant with an indirect action to challenge the validity of Community acts. According to the said Article, the national courts can refer questions to the ECJ concerning the validity and interpretation of acts of the institutions of the Community. In the light of *Foto-Frost*,[853] the national courts cannot declare acts of the Community institutions invalid. Indeed, "*divergences between courts in the Member States as to the validity of Community acts would be liable to place in jeopardy the very unity of the Community legal order and detract from the fundamental requirement of legal certainty"*.[854] The preliminary ruling procedure to challenge the validity of a general measure may be seen as not providing strong effective judicial protection. AG Jacobs, in his Opinion in *UPA,* highlighted those lacunae with strength. In the first place, referring to the *Foto-Frost case*, he stressed that the domestic court cannot declare a Community act invalid.[855] Secondly, the decision to make the reference depends entirely on the national court. Although there is an obligation to refer for the national court of last instance, it may refuse to refer a question of validity to the Court of Justice.[856] In addition, the national court

[848] *Ibid.,* para. 38.
[849] *Ibid.,* para. 41.
[850] The first mentioning of the CFR was in Case T-54/99 *Max-Mobil* v. *Commission* [2002] 4 CMLR 32. This was also in relation to Article 47 of the CFR.
[851] *Jégo-Quéré*, *supra n.838,* para. 42.
[852] *Ibid.,* paras. 43-44.
[853] Case 314/85 *Foto-Frost* [1987] ECR 4199, para. 20.
[854] *Ibid.*, para. 15.
[855] AG Jacobs in *UPA, supra n. 838*, para. 41.
[856] *See,* Tridimas, "Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure", CMLRev.2003, pp 9-50, at pp.41-48 (this part of the Article relates to the *acte clair* doctrine).

has a wide discretion in formulating the question.[857] Thirdly, it is extremely difficult to challenge the Community measure in the situation of self-executing regulations, i.e. a regulation that does not require any implementing measure. Thus, the only solution remains to violate the Community regulation and wait for the sanction at the domestic level. As put rightly by Jacobs, "individuals cannot be required to breach the law in order to gain access to justice".[858] Finally, in comparison with the Article 230 procedure, there are a number of procedural disadvantages e.g. delays, costs and lack of interim measures provided by the ECJ.[859]

Concerning the action for damages, Article 235 EC states that, "the Court of Justice shall have jurisdiction in disputes relating to compensation for damage provided for in the second paragraph of Article 288". Further, Article 288(2) provides that, "in the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damages caused by its institutions or by its servants in the performance of their duties". For instance, the laws of the Member States have been used in connection with the assessment of damages[860] or to fix the time bars.[861] It constitutes an independent cause of action, which can be invoked within a time-limit of five years. Practically, it is used after the ECJ has annulled a Community provision (Article 230 EC) or ruled a provision to be invalid (Article 234 EC). Notably, the admissibility of such an action is dependent on the exhaustion of national remedies. This requirement has been assessed as minimizing direct access to the Community Courts and as forming a complicated system of recovery between the ECJ and the domestic jurisdictions.[862] In addition, the applicant must demonstrate much more than illegal conduct so as to support a successful action. Indeed, this requires a sufficiently serious breach of a superior rule of law for the protection of the individual, e.g. proportionality, non-discrimination, legitimate expectations, non-retroactivity, the right to be heard or the right to property.[863] An author lucidly stressed that the breach of a superior rule of law for the protection of individuals resembles the Schutznormtheorie. In other words, the effective breach of a legal norm safeguarding a subjective right will constitute a decisive factor in engaging the liability.[864] Also, it ought to be remarked that the *Bergaderm* case[865]

[857] AG Jacobs in *UPA, supra n. 838,* para. 42.
[858] *Ibid.,* para. 43.
[859] *Ibid.,* paras. 44 and 102. However, it should be stressed that the national court may issue an order granting interim relief while the case is pending, *see* Cases *Zuckerfabrik* [1991] and *Atlanta* [1996].
[860] Case 261/78 *Interquell Stärke-chemie* [1981] ECR 4327.
[861] Case 20/88 *Roquette Frère* v. *Commission* [1989] ECR 1553.
[862] Ward, *Judicial Review of the Rights of Private Parties in EC Law*, Oxford, 2000, at p.303.
[863] *See*, Case 74/74 *CNTA* v. *Commission* [1975] ECR 533 (legal certainty, legitimate expectation, non-retroactivity), Case 135/92 *Fiskano* v. *Commission* [1994] ECR I-2883 (right to be heard), and T-390/94 *Shröder* v. *Commission* [1997] ECR II-501 (right to property).
[864] Tridimas, "Liability for Breach of Community Law: Growing Up and Mellowing Down?", CMLRev.2001, pp. 301-332, at pp.327-328.

unified the conditions of State and Community institutions liability, i.e. the rule must be intended to confer rights on individuals, the violation must be serious, and there must be a direct causal link between the violation and the damage suffered by an individual.[866] This test does not refer any longer to the breach of a superior legal rule. It could be argued that such a modification does not make any substantial difference, since liability arises from the breach of a higher-ranking legal rule by an illegal Community act.[867] Besides, the action for damages does not provide any review. In other words, it cannot lead to the elimination of an illegal act, which could be seen as a lack of judicial protection.

Interestingly, the CFI in *Jégo Quéré* followed a similar line of reasoning and ruled that,

> "the procedural route of an action for damages based on the non-contractual liability of the Community does not, in a case such as the present, provide a solution that satisfactorily protects the interests of the individual affected. Such an action cannot result in the removal from the Community legal order of a measure which is nevertheless necessarily held to be illegal".[868]

More precisely, the CFI, in the first place, considered that an Article 234 proceeding does not constitute an adequate means of judicial protection, since there is no act of implementation capable of forming the basis of an action before national courts. Subsequently, citing the Opinion of AG Jacobs in *UPA,*[869] it noted that individuals cannot be required to breach the law in order to gain access to justice.[870] In the second place, it determined that an action for damages does not provide an adequate solution, since such an action cannot lead to the removal of the contested illegal measure.[871] The CFI concluded that both procedures *"can no longer be regarded, in the light of Articles 6 and 13 of the ECHR and of Article 47 of the Charter of Fundamental Rights, as guaranteeing persons the right to an effective remedy enabling them to contest the legality of Community measures of general application which directly affect their legal situation".*[872] Finally, the CFI stated that, even if those elements cannot be used to modify the system of remedies,[873] there is no compelling reason to read into the notion of individual concern, a requirement that an individual applicant seeking to challenge a general measure must be differentiated from all others affected by it in the same way as an addressee.[874] It held that the strict interpretation of Article 230(4) must be reconsidered in order to

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[865] Case C-352/98 P *Bergaderm* v. *Commission* [2000] ECR I-5291.
[866] *Ibid.,* paras. 41-42 and 62.
[867] Tridimas, *supra n.864*, at p.328.
[868] *Ibid., Jégo Quéré*, para. 46.
[869] AG Jacobs in Case C-50/00 P *Unión de Pequeños Agricultores* v. *Council*, para. 43.
[870] *Jégo-Quéré, supra n. 838*, para. 45.
[871] *Ibid.,* para. 46.
[872] *Ibid.,* para. 47.
[873] *Ibid.,* para. 48.
[874] *Ibid.,* para. 49, quoting AG Jacobs in *UPA,* para. 59.

achieve effective judicial protection.[875] In other words, an individual applicant who, in the circumstances of the case (*e.g.* self-executing regulation), does not receive effective judicial protection should be granted *locus standi.*[876] The standing rules interpreted in the light of the general principle of effective judicial protection give rise to an extensive interpretation.[877] However, one may wonder what is the borderline between a wide interpretation, which allows standing and the actual adjustment of *locus standi*. A rhetorical trick? Or a certain reticence to use the terminology generally affiliated to judicial activism?

Anyway, and perhaps more interesting, it seems to me unambiguous that the general principle of effective judicial protection (unwritten law) prevailed over the wording of the Treaty (written primary law). In my view, the significance of the case lies precisely in this interpretation. Indeed, in the light of this jurisprudence, it may be argued that fundamental rights as general principles of Community law constitute a higher-ranking norm than Treaty provisions. Nevertheless, it ought to be noticed that the very generous interpretation of the CFI appears to me limited to the "circumstances of the case". In other words, it is limited to the context of self-executing regulation. It will be seen later that the interpretation submitted by AG Jacobs may seem much broader. At the end of the day, the *Jégo-Quéré* case clearly appeared as a ray of hope on restrictive interpretation. But is it merely a sunny spell? The answer (or part of it) seems to be given some months later by the Court of Justice itself.

In 1998, *Unión de Pequeños Agricultores (UPA),* a Spanish trade association which represents and acts in the interests of small farmers, brought an action for annulment before the CFI regarding the Regulation reforming the common organisation of the olive oil markets. The Council raised an objection of inadmissibility, which was upheld by the CFI.[878] Interestingly, the Court of First Instance examined whether the situation entailed a risk that *UPA* would not receive effective judicial protection. First, the CFI remarked that there was no legal remedy available in domestic law to review the legality of the Community act through a preliminary ruling procedure.[879] Second, it observed that the Member States must, in accordance with the principle of sincere cooperation (Article 10 EC), implement the system of judicial review framed by the EC Treaty.[880] Finally, the CFI concluded that, "these factors do not provide the Court of First Instance with a reason for departing from the system of remedies established by the fourth paragraph of Article

[875] *Ibid.,* paras. 50-51.
[876] *Ibid.,* para. 51, "… a natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him…".
[877] Surprisingly, this extensive interpretation in not assessed as an amendment of the Treaty system on standing.
[878] Case T-173/98 *Unión de Pequeños Agricultores* v. *Council* [1999] ECR II-3357.
[879] *Ibid.,* para. 61.
[880] *Ibid.*, para. 62.

173 of the Treaty, as interpreted by case-law, and exceeding the limits imposed on its powers by that provision". [881]

Consequently, the trade association appealed against the order of the CFI and put forward four arguments that can be summarized as follows: Firstly, a declaration of inadmissibility would not in the present case meet the requirement of effectiveness attaching to the fundamental right relied upon. Secondly, the order did not address the arguments of fact and of law put forward in its application and in its observations on the objection of inadmissibility. Thirdly, the principle of sincere cooperation requires the creation of a remedy under national law enabling, where necessary, a reference to be made for a preliminary ruling on the question of the validity of a Community measure. Fourthly, the contested order infringed the fundamental right to effective judicial protection by failing to examine the fact of declaring the application inadmissible.[882] The central element in the appellant's defence is based on the denial of justice arising at the national level due to the nature of the disputed measure. In that regard, according to the appellant, the impugned provisions did not require any national implementing legislation and did not occasion the taking of any measures by the Spanish authorities. Consequently, the appellant cannot, under the Spanish legal system, seek annulment of a national measure relating to the disputed provisions. Therefore, a reference for a preliminary ruling to assess their validity was impossible without breaking the law.

Relying on an extensive interpretation of the Greenpeace judgment,[883] the UPA submitted that, "a right cannot be truly effective unless consideration is given to its effectiveness in practice. In reality, such an examination necessarily entails an inquiry into whether, in the particular case, there is an alternative legal remedy".[884] In other words, the absence of a remedy at the domestic level to review the Community act authorizes locus standi before Community Courts. Conversely, the Council and the Commission stressed that the breach of the principle of effective judicial protection by a national court cannot be remedied by twisting the wording of Article 230 paragraph 4.[885] The Court observed the necessity to examine whether, in

[881] *Ibid,* para. 63.
[882] *UPA* (ECJ), *supra n.838,* para. 18.
[883] Case T-585/93 *Greenpeace* v. *Commission* ECR [1996] ECR II-2205, paras. 32-33.
[884] *UPA* (ECJ), *supra n.838,* para. 28.
[885] *Ibid,* para. 30, "[t]he Council and the Commission recall a complete system of legal remedies designed to enable the Court to review the legality or validity of acts of the institutions and, in particular, of acts of general application. Admittedly, according to the Commission, a Member State which makes it excessively difficult, or even impossible, to submit a question for a preliminary ruling infringes the fundamental right to effective judicial protection and thereby fails to fulfil its duty of sincere cooperation laid down in Article 5 of the Treaty. However, even in that case, such infringement cannot be overcome by straining the meaning of the fourth paragraph of Article 173 of the Treaty. Instead, infringement proceedings should be brought against the Member State in question, in accordance with Article 226 EC".

the absence of any legal remedy, the right to effective judicial protection necessitates the individual to have standing in order to bring an action for annulment.[886]

The Court noted that the Community is based on the rule of law and thus the acts of the institutions are subjected to judicial review in the light of the Treaty and the general principles of Community law.[887] Using the traditional formula, it emphasised that the principle of effective judicial protection constitutes a general principle of Community law, which derives from the common constitutional traditions and the ECHR.[888] Then, it stressed that the system of legal remedies is comprehensive and affords protection both before the Community Courts (direct action and plea of illegality) and the national courts (preliminary ruling on validity). Concerning the latter protection, it stated that,

> "it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection… in accordance with the principle of sincere cooperation laid down in Article 5 of the Treaty, national courts are required, so far as possible, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the legality of any decision or other national measure relative to the application to them of a Community act of general application, by pleading the invalidity of such an act".[889]

Subsequently, it rejected the applicant's arguments according to which a direct action will be available where it can be proved that domestic procedural rules do not permit the individual to bring proceedings to dispute the validity of the Community measure. According to the Court, such reasoning is in line with the Opinion of AG Jacobs.[890] The rejection is based on two arguments. First, such an interpretation would require the Community Court, in each individual case, to examine and interpret national procedural law. This would go beyond its jurisdiction when reviewing the legality of Community measures.[891] Second, though the requirement of direct and individual concern must be interpreted in the light of the principle of

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[886] *Ibid.,* para. 33.
[887] *Ibid.,* para. 38.
[888] *Ibid.,* para. 39, "[i]ndividuals are therefore entitled to effective judicial protection of the rights they derive from the Community legal order, and the right to such protection is one of the general principles of law stemming from the constitutional traditions common to the Member States. That right has also been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (see, in particular, Case 222/84 Johnston [1986] ECR 1651, paragraph 18, and Case C-424/99 Commission v Austria [2001] ECR I-9285, paragraph 45)".
[889] *Ibid.,* paras. 41-42.
[890] *Ibid.*, para. 43, "[a]s the Advocate General has pointed out in paragraphs 50 to 53 of his Opinion, it is not acceptable to adopt an interpretation of the system of remedies, such as that favoured by the appellant, to the effect that a direct action for annulment before the Community Court will be available where it can be shown, following an examination by that Court of the particular national procedural rules, that those rules do not allow the individual to bring proceedings to contest the validity of the Community measure at issue".
[891] *Ibid.,* para. 43.

effective judicial protection, such an interpretation cannot have the effect of setting aside the conditions laid down in the Treaty without going beyond the jurisdiction conferred by the Treaty on the Community courts.[892] As stated by the Court, it is for the Member States to reform the system of judicial review presently in force.[893] Finally, the Court found that the Court of First Instance did not err in law and dismissed the appeal.[894]

It may be said that the Court here refuses to embed into judicial activism such as in *les Verts* or *Chernobyl*.[895] In relation to both arguments, the Court clearly stated that an extensive interpretation would go beyond its jurisdiction. In this sense, one may suggest that the court confirms its self-restraint which is already visible in some rather recent case-law, e.g. *Grant* and *Hautala*.[896] In addition, it may be said that it reverses the ruling of the CFI in *Jégo-Quéré*. Indeed, it considered that an extensive interpretation of the principle of effective judicial protection would modify the wording of the *locus standi* requirements. It did not assess, such as in *Jégo-Quéré*, that a wide interpretation may extend the scope of Article 230 EC without any Treaty amendment.[897] Incidentally, it may be said that it rejected the notion that fundamental rights prevail over the wording and scheme of the Treaty. Finally, one may wonder whether *UPA* constitutes the end of the story, since the *malaise* surrounding the *locus standi* of individuals appears profound.[898]

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[892] *Ibid.,* para. 44, "[f]inally, it should be added that, according to the system for judicial review of legality established by the Treaty, a natural or legal person can bring an action challenging a regulation only if it is concerned both directly and individually. Although this last condition must be interpreted in the light of the principle of effective judicial protection by taking account of the various circumstances that may distinguish an applicant individually (see, for example, Joined Cases 67/85, 68/85 and 70/85 Van der Kooy v Commission [1988] ECR 219, paragraph 14; Extramet Industrie v Council, paragraph 13, and Codorniu v Council, paragraph 19), such an interpretation cannot have the effect of setting aside the condition in question, expressly laid down in the Treaty, without going beyond the jurisdiction conferred by the Treaty on the Community Courts".

[893] *Ibid.,* para. 45, "[w]hile it is, admittedly, possible to envisage a system of judicial review of the legality of Community measures of general application different from that established by the founding Treaty and never amended as to its principles, it is for the Member States, if necessary, in accordance with Article 48 EU, to reform the system currently in force".

[894] *Ibid.,* paras. 46-47.

[895] Case 294/83 *Parti écologiste Les Verts* v. *European Parliament* [1986] ECR 1339, Case C-70/88 European *Parliament* v. *Council* [1990] ECR I-2041.

[896] Case C-249/96 *Grant* [1998] ECR I-621, Case C-353/99 P *Council* v. *Hautala* [2001] ECR I-9565.

[897] *Jégo-Quéré* (ECJ), *supra n.838*, [2004]. The Court overruled explicitly the CFI. *See also* AG Jacobs in *Jégo-Quéré,* para. 47. The AG, still considers that there are powerful arguments to introduce a more liberal standing. However, in light of the ruling of the ECJ in *UPA*, he considers that the legislature should enter into play.

[898] Groussot, "The EC System of Legal Remedies and Effective Judicial Protection: Does The System Really Need Reform?", LIEI 2003, pp. 221-248. It appears necessary to analyse what could be the solution(s), in terms of legislative reform, in order to improve the present state. *See also* the new wording of Article III-270 of the Constitutional Treaty.

5.3. PRINCIPLES OF GOOD ADMINISTRATION AND TRANSPARENCY AS CITIZENS' RIGHTS.

The citizen Chapter of the CFR enshrines the principles of good administration (Article 41 CFR) and the right of access to documents (Article 42 CFR).[899] Importantly, the two Articles are merely directed towards the institutions of the Community. This specific feature constitutes the main difference from the "principles of justice" (Articles 47 and 48 CFR), which may apply against the Member States' measure, e.g. the principle of effective judicial protection. Access to documents is often referred to as the principle of transparency, while it is also true that a wide definition of transparency embodies the principles of good administration.[900] Reciprocally, access to information may be seen as a principle of good administration.[901] Nevertheless, the principle of access has rarely been used in connection with the principle of good administration.[902] Here, this section will follow a narrow definition of the transparency principle. In this respect, the principle of transparency will be seen as the equivalent to access to document. First, this section will analyse the contents of the principle of good administration (5.3.1). Then, it will focus on the scope of the principle of transparency (5.3.2). Finally, it will determine the relationship between procedural principles and fundamental rights (5.3.3).

5.3.1. The Principles of Good Administration

The attempt to define the principles of good administration appears as an awkward task, since the scope and significance of those principles are extremely difficult to extract from a rather terse jurisprudence. However, this section will emphasize that

[899] The research does not focus on the role of the European Ombudsman (see Bonnor, "The European Ombudsman: A Novel Source of Soft Law in the European Union", ELR 2000, pp.39-56). In passing, one can notice the initiative of the European Parliament, which has adopted a resolution on 6 September 2001, based on Söderman's proposal (the European Ombudsman). The first proposal on such a code of conduct was realised by a MEP (Perry) in 1998. The Ombudsman drafted the document and presented it as a special report. The resolution approved a Code of Good Administrative Behaviour to be respected by the European institutions and bodies, as well as their administrations and officials (Article 1 of the Code of Good Administrative Behaviour). The basic aim of the code is to explain in greater details what the Charter's right to good administration (Article 41CFR) signifies in practice and to stress the possibility to complain to the European Ombudsman against maladministration (Article 43 CFR). The European Ombudsman defined maladministration in his annual report of 1997 as follows: "maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it". The European Ombudsman defined maladministration in his annual report of 1997 as follows: "maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it".

[900] *See,* Vesterdorf, "Transparency – Not Just a Vogue Word, FILJ 1999, pp. 902-929.

[901] *See, e.g.* Case 64/82 *Tradax Graanhandel BV* v. *Commission* [1984] ECR 1359.

[902] Nehl, *Principles of Administrative Procedure in EC Law*, Hart, 1999, at p.30.

the recent case-law has been much more accurately formulated and thus offers a more precise picture of the principles of good administration. In addition, the Charter of Fundamental Rights, in the citizen Chapter, makes an explicit reference to the principles of good administration and thus renders this principle more visible to citizens. This Article 41 is divided into four paragraphs.[903] Article 41(1) states that, *"[e]veryone has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union"*.

It seems that the first paragraph corresponds to a definition of the principle of care (or diligence). Thus, it may be said that the principles of care and good administration are twin concepts. However, it appears from the wording of paragraph 2 that the definition of the principles of good administration is much wider. In effect, paragraph 2 defines the contents of the principles of good administration as including,

> "the right of every person to be heard, before any individual measure which would affect him or her adversely is taken; the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy; the obligations of the administration to give reasons for its decision".

Article 41 CFR is based on the existence of a Community subject to the rule of law whose characteristics were developed by case-law, which enshrined *inter alia* the principle of good administration.[904] The wording of this principle in the first two paragraphs results from the case-law, e.g. right to be heard,[905] right to access to files,[906] duty to give reasons,[907] and from the Treaty (Article 253 EC Treaty).

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[903] The paragraph 3 provides that, "[e]very person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles to the laws of the Member States". It corresponds to a codification of Article 288 of the EC Treaty. The paragraph 4 states that "[e]veryone may write to the institutions in one of the languages of the Treaties and must have an answer in the same language". It corresponds to Article 21(3) of the EC Treaty.

[904] Case 64/82 *Tradax Graanhandel BV* v. *Commission* [1984] ECR 1359, Joined Cases 96-102, 104, 105,108 and 110/82 *IAZ* v. *Commission* [1983] ECR 3369, Case T-5/93 *Tremblay* v. *Commission* [1995] ECR II-185, Case 223/85 *RSV* v. *Commission* [1987] ECR 4617, Joined Cases T-213/95 and T-18/96 *SCK and FNK* v. *Commission* [1997] II-1739, para. 56 and Case T-193/04 R *Tillack* v. *Commission* [2004] n.y.r., para. 60.

[905] Case 17/74 *Transocean Marine Paint* v. *Commission* [1974] ECR 1063, Case 85/76 *Hoffmann la Roche* v. *Commission* [1979] ECR 461, Case 322/81 *Michelin* v. *Commission* [1983] ECR 3461, Case C-49/88 *Al Jubail Fertilizer* v. *Council* [1991] ECR I-3187, Case C-269/90 *Hauptzollamt München-Mitte* v. *Technische Universität München* [1991] ECR I-5469, Case C-294/90 *British Aerospace* v. *Commission* [1992] ECR I-493, Case C-135/92 *Fiskano* v. *Commission* [1994] ECR I-2885, Cases T-39-40/92 *CB and Europay* v. *Commission* [1994] ECR II-39, Case T-450/93 *Lisretal* v. *Commission* [1994] ECR II-1177, and Case C-32/95 P *Commission* v. *Lisretal* [1996] ECR I-5373.

[906] Case T-7/89 *Hercules Chemicals* v. *Commission* [1991] ECR II-1711, Case T-15/92 *Cimenteries CBR* v *Commission* [1992] ECR II-2667, Case T-30/91 *Solvay* v. *Commission* [1995] ECR II-1775, and Case T-36/91 *ICI* v. *Commission* [1995] ECR II-1847.

In this study, the right to be heard and the right to access to files have been analysed under the due process principles. However, it is important to underline that the principles can be classified *mutatis mutandis* under the principles of good administration and citizens' rights. In this respect the Court stated, as early as 1962, in *Alvis*, that,

> "according to a generally accepted principle of administrative law in force in the Member States of the European Community, the administrations of these States must allow their servants the opportunity of replying to allegations before any disciplinary decisions is taken concerning them. This rule, which meets the requirements of sound justice and good administration, must be followed by Community Institutions".[908]

In this section, I will not concentrate on the right to be heard or the right to access to files as these principles have been previously studied. The main concern will focus on the definition of the principle of care in the light of the jurisprudence and paragraph 1 of Article 41 CFR. Then, the close link between the duty to state reasons and the principle of care will be stressed. Nevertheless, it will be seen that the right to be heard and the duty to state reasons constitute essential procedural requirements whereas the principle of care tends towards substantive legality. This difference seems to be one of emphasis since it leads to a complex entanglement of rights, which sometimes appear in the case-law.[909]

In a recent comprehensive study, an author argued that,

> "[t]he principle of good administration exclusively exists as a phrase but not as a procedural standard with a particular content and meaning. The notion of good administration as such, however, will continue to play its part in the constitutional debate on the future development of the European Community and its administrative system".[910]

In a similar vein, already in Tradax, AG Slynn rejected the idea that the general principles of law required by good administration will necessarily amount to a legally enforceable rule. In his words,

> "to keep an efficient filing system may be an essential part of good administration but is not a legally enforceable rule. Legal rules and good administration may overlap (e.g. in the need to ensure fair play and proportionality), the requirements of the latter may be a factor in the elucidation of the former. The two are not necessarily synonymous. Indeed, sometimes when courts urge that something

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[907] Case 24/62 *Germany* v. *Commission* [1963] ECR 63, Case C-367/95 P *Commission* v. *Sytraval and Brink's France* [1998] ECR I-1719, in relation to the national authorities, Case 222/86 *Heylens* [1987] ECR 4097, in relation to the CFI, Case C-283/90 P *Vidrányi* v. *Commission* [1991] ECR I-4339, Case C-188/86 P *Commission* v. *V* [1997] ECR I-6561, and Case C-401/96 P *Somaco* v. *Commission* [1998] ECR I.2587.

[908] Case 32/62 *Alvis* [1963] ECR 55.

[909] *See e.g.* Case C-269/90 *Technische Universität München* [1991] ECR I-5469, Case C-367/95 P *Commission* v. *Sytraval and Brink's France* [1998] ECR I-1719.

[910] Nehl, *supra n.902,* at p.37.

> should be done as a matter of good administration, they do it because there is no precise legal rule".[911]

In other words, the principle of good administration constitutes an interpretative principle, i.e. with a function to fill the gaps of the system, but not an operative principle, i.e. when trying to review the acts of the institutions. This section determines whether this assertion is still true. To put it differently, can one say that the principle of good administration has acquired a legally enforceable status? It thus appears important to give a proper definition of the principle of care.

a) The Principle of Care

Generally, allegations of a breach of the principles of good administration have regularly been made in relation with the so-called principle of care or principle of diligence.[912] In the light of Article 41(1) CFR, it seems tenable to argue that the principle of care and the principles of good administration have a similar scope. Indeed, the definition given in this paragraph appears to me identical to the one given by the Court of Justice in defining the principle of care. However, by turning to the second paragraph, the principle of good administration seems to possess a wider scope than the principle of diligence as it includes explicitly also the right to be heard, the right to access to file and the duty to state reasons. According to the standard case-law, it is to be noted that the duty to give reasons and the principle of care are closely related. However, the duty to give reasons and the right to be heard constitute essential procedural requirements, whereas the principle of care tends towards substantive legality. This section demonstrates that the duty of care appears as falling under the wider principle of good administration.[913]

The principle of care, or the duty of care in the words of AG Van Gerven,[914] emanates from the need to set up certain limitations to the discretionary powers of the administration and also constitutes a rule that protects individuals. The principle may be traced back, to the seventies and eighties, from rulings of the court in the context of State aid *(Lorenz)* and competition law proceedings *(IAZ)* and then spilled over, in the nineties to anti-dumping *(Nölle)* and custom matters *(TUM)*. It is contended that this spill-over has helped the Court define the principle more accurately, and also giving it a general character. This section pinpoints two different, but also closely interlinked, lines of case-law in the context of the principle of care. Indeed, the principle of diligence (or principle of care) may be said to cover the duty to reply to requests and the duty to act in due time. The latter duty appears to add a time requirement to the principle of care. Interestingly, this is the duty to act in a reasonable time, which has been primarily and tersely formulated in the context of State aid proceedings. This laconic formulation of the principle of

[911] Case 64/82 *Tradax* v. *Commission* [1984] ECR 1359, at pp.1385-86.
[912] Nehl, *supra n. 902,* at p.32.
[913] AG Van Gerven in Case 16/90 *Eugen Nölle* [1991] ECR I-5163, para. 28. *See also* Case T-62/98 Volkswagen AG v. Commission [2002] ECR II-2707, para. 269.
[914] *Ibid.*

care is also visible in the case-law concerning the duty to reply and to examine fairly and impartially a request.

Regarding the duty to reply, it is worth noting that the formulation of the principle of care has undergone a quite clear evolution. This evolution is marked, in the early case-law, by a laconic formulation (*IAZ* and *Nölle*) and then a more precise definition of the principle of care was established (AG Van Gerven in *Nölle* and *TUM*). First, in the *IAZ* case,[915] in the context of competition proceedings (breach of Article 85 [new Article 81] EC), the Court recognised the existence of a principle, which requires the institutions to reply to request.[916] More precisely, the Court ruled that the Commission had failed to observe the requirements of good administration by not responding to a draft of a revised agreement between the parties concerned.[917] In this sense, the ECJ stated that the aim of the preliminary administrative procedure is to prepare the way for the Commission's Decision regarding the encroachment of the competition rules although that procedure also provides the undertakings concerned with an opportunity to bring the practices complained of into line with the Treaty. Then, it determined that the absence of reply to the draft special agreement was inconsistent with the requirements of good administration.[918] However, the Court noted that the draft did not take into account all of the Commission's objections. Therefore, it considered that the lack of continuity in the correspondence could not be appreciated as a procedural defect vitiating the legality of the Decision.[919] Consequently, the ECJ merely regretted such conduct and did not annul the Commission's decision.[920]

This case prompts a number of conclusions and also raises number of questions. Firstly, as to the review's scope of the principle of care, the *IAZ* case did not lead to the annulment of the institution's measure. Thus, one may wonder if the principle of care, in its early formulation, also constitutes a principle of review. The following jurisprudence, such as *Nölle* discussed below, provides an affirmative answer. Secondly, as to the formulation of the principle, it seems tenable to argue that the *IAZ* case may be perceived as an early and implicit adoption of a general principle of care.[921] By contrast, it ought to be underlined that the Court does not state explicitly

[915] Cases 96-102, 104, 105,108 and 110/82 *IAZ* [1983] ECR 3369.
[916] *See also*, Case 179/82 *Lucchini* [1983] ECR 3083, in relation to the ECSC Treaty.
[917] *IAZ, supra n.915*, para. 13, "[a]s regards the first contention, anseau points out that, at the beginning of 1981, it sent the Commission draft amendments to the agreement and a draft 'special agreement'. The latter agreement would also have enabled importers who were not parties to the contested agreement to obtain conformity labels on condition *inter alia* that they paid a given amount by way of guarantee. The final draft of the 'special agreement' was sent to the Commission by letter of 15 June 1981 but the Commission adopted the contested Decision six months later without replying to the letter".
[918] *Ibid.,* para. 15.
[919] *Ibid.*
[920] *Ibid.,* paras. 16-17.
[921] Usher, *supra n.792,* at p. 108.

that it constitutes a general principle of Community law.[922] Further, although the ECJ links the principle to the requirements of good administration, it is not clear whether the ECJ placed the principle of care under the principles of good administration.[923] This flaw was however corrected by the case-law of the nineties as seen below. Finally, one may agree with the conclusion of one author arguing that, *"the ambiguous and rather terse reasoning style of the Community Courts, as exemplified in the IAZ case, has considerably reinforced the tendency towards invoking unspecified principles of administrative law in this manner"*.[924] This observation appears to be confirmed by the *Nölle* case, where the Court annulled an anti-dumping Regulation.

In that case,[925] a preliminary ruling from the Finanzgericht Bremen, in which the validity of Council Regulation (EEC) No 725/89 of 20 March 1989 imposing an anti-dumping duty on imports of paint brushes originating from China was put into question, an independent producer had cooperated in anti-dumping investigation leading to the adoption of Regulation No 725/89. The applicant submitted that, during the administrative procedure, Taiwan, and not Sri Lanka, should be used as a reference country in order to determine the normal value of the Chinese products. The main question at stake was to assess whether the EU institutions should have taken into consideration this alternative. The national court doubted the validity of the contested Regulation on the grounds pleaded by the plaintiff in the main proceedings, i.e. infringement of Article 2(5)(a) of Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidized imports from countries not members of the European Economic Community.

Going further than the Court in *IAZ,* AG Van Gerven here explicitly referred to a duty of care. In addition, the AG assessed this duty as being closely linked to the discretionary powers of the administration and included in the principles of good administration. In his words, *"in a matter such as this, in which the Community institutions have a wide discretion, it is all the more important that the decision adopted shall be subject to a careful review by the Court with regard to observation of essential formalities and the principles of good administration, which include the duty of care*".[926] To come to such a conclusion, the AG remarked that the Court also confirms the existence of the duty of care in other fields of Community law in which the institutions have powers of administration or management,[927] such as export licence systems,[928] the determination of levies,[929] the ECSC Treaty,[930] and the law relating to officials.[931]

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[922] *Infra 5.1.2* and *supra 5.3.2.*The section on access to documents contains a similar debate on the formulation of the general principles.
[923] Nehl, *supra n.902,* at p.33.
[924] *Ibid.*, at p.35.
[925] Case 16/90 *Eugen Nölle* [1991] ECR I-5163. *See also* the judgment, some years afterwards, of the CFI in *Nölle* in the action for damages for a breach of the principle of care.
[926] *Ibid.,* AG Van Gerven, para. 28.
[927] *Ibid.,* para. 28, fn 42.
[928] Case 122/78 *Buitoni* [1979] ECR 677, Case 181/84 *Man Sugar* [1985] ECR 2889.

Then, the AG turned to define the role of the Court in assessing such a duty, i.e. whether an authority on which a wide discretion is conferred had determined with the necessary care the features of fact and of law on which the exercise of its discretion depends.[932] Finally, Van Gerven concluded that the duty of care compelled the Community institutions to give serious consideration to the suitability of the suggestion proposed by Nölle. Consequently, there was a duty to collect sufficient information about the Taiwanese market in order to either confirm or reconsider the choice of Sri Lanka.

The Court followed the reasoning of the AG. It observed that the choice of reference country is a matter falling within the discretion enjoyed by the institutions in analysing complex economic situations.[933] However, it stressed that matters of wide discretion are not excluded from review and that the Court will have to verify "whether the relevant procedural rules have been complied with, whether the facts on which the choice is based have been accurately stated and whether there has been a manifest error of appraisal or a misuse of powers".[934] In the circumstances of the case, the Court ruled that the Commission should have examined the proposal made by the plaintiff in greater depth.[935] Consequently, it found that the anti-dumping duty was imposed in contradiction to Article 2(5) of the basic Regulation and thus should be declared invalid.[936] Disappointingly, as in *IAZ,* the Court did not establish a tidy and explicit formulation of the principle of care. Nevertheless, the principle was clearly articulated some months later, in the context of custom tariffs. It may be said that the Opinion of AG Van Gerven paved the way towards a tidy formulation of the principle of care.

In *Technische Universität München*,[937] a preliminary ruling from the Federal Finance Court of Germany, the Commission rejected the demand of the applicant to import, exempted of customs duty, a scientific apparatus on the grounds that an equivalent instrument was manufactured in the Community. Indeed, according to EC legislation, scientific instruments for non-commercial purpose can be imported from

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[929] Case 64/82 *Tradax Graanhandel* v. *Commissio*n [1984] ECR 1359.
[930] Case 11/63 *Lemmerz-Werke* v. *High Authority* [1965] ECR 677, 716 and Case 46/85 *Manchester Steel* v. *Commission* [1986] ECR 2351, paras. 11 and 15.
[931] Case 417/85 *Maurissen* v. *Court of Auditors* [1987] ECR 551, paras. 12 and 13, Case 125/80 *Arning* v. *Commission* [1981] ECR 2539, and Case 105/75 *Giuffrida* v. *Council* [1976] ECR 1395, paras. 11 and 17. *See also* T-11/03 *Afari* v. *ECB* [2004] n.y.r., para.42.
[932] AG Van Gerven in *Nölle, supra n.925,* para. 28.
[933] *Ibid., Nölle*, para 11.
[934] *Ibid.*, para 12, *See also* Case 240/84 *NTN Toyo Bearing Company Limited* v. *Council* [1987] ECR 1809 and Case 258/84 *Nippon Seiko KK* v. *Council* [1987] ECR 1923.
[935] *Ibid.,* para. 32, "[i]t should be pointed out in this connection that although the institutions are not required to consider every reference country suggested by the parties during an anti-dumping proceeding, the doubts which arose in this case with regard to the choice of Sri Lanka ought to have led the Commission to examine the proposal made by the plaintiff in greater depth".
[936] *Ibid.,* paras. 36-38.
[937] Case C-269/90 *Technische Universität München* [1991] ECR I-5469.

third countries, free from custom duties, on the condition that no similar instruments were fabricated in the Community. Although the case reflects a complex entanglement between the right to be heard, the duty to state reasons and the principle of care, the Court made an important statement regarding the definition of the latter right, i.e. the principle of care.

In the first place, the ECJ recognized a wide power of appreciation to the Commission in administrative procedures entailing complex technical evaluation such as custom matters.[938] However, it noted that the respect of the rights guaranteed in administrative procedures is of fundamental importance. Going further, the Court defined the content of those guarantees as including, *inter alia*, the duty to give reasons, the right to be heard and a duty for the institutions to examine a request. It seems important to recall here the relevant paragraph of the judgement:

> "However, where the Community institutions have such a power of appraisal, respect for the rights guaranteed by the Community legal order in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case, the right of the person concerned to make his views known and to have an adequately reasoned decision. Only in this way can the Court verify whether the factual and legal elements upon which the exercise of the power of appraisal depends were present".[939]

For the very first time, the ECJ used a clear formulation of the principle of care, albeit not expressly stated, which can thus be defined as a duty on the EC institutions to examine carefully and impartially a request in administrative proceedings. Although precisely formulated, the definition is not totally complete. Indeed, a temporal element must also be added in order to obtain a comprehensive definition of the principle of diligence.[940] Interestingly, Article 41(1) of the CFR offers an integral definition of the principle of care. In any event, this formulation has been used, *inter alia,* in the fields of: Anti-dumping proceedings,[941] State aid proceedings,[942] competition proceedings[943] and scientific risk assessment [944] ("Human Health proceedings").[945]

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[938] *Ibid.,* para. 13.
[939] *Ibid.,* para. 14.
[940] *See infra., Lorenz, RSV,* and *Guérin.*
[941] Case T-167/94 Nölle (II) [1995] ECR II-2589*,* para. 73.
[942] Case C-367/95 P *Commission v Sytraval and Brink's France* [1998] ECR I-1719, para. 62.
[943] Case T-44/90 *La Cinq* v. *Commission* [1992] ECR II-1, para. 86 (refusal of the commission to adopt interim measures); and Joined Cases T-528/93, T-542/93, T-543/93 and T-546/93 *Métropole Télévision* v. *Commissio*n [1996] ECR II-649, para. 93 (decision to grant an exemption), *infra Volkswagen,* para. 269.
[944] Under the precautionary principle the EU institutions are entitled, in the interests of human health to adopt protective measures which may seriously harm legally protected positions. In this instance, the institutions have wide discretionary powers.
[945] Case T-13/99 *Pfizer Animal Health SA* [2002] ECR II-3305, paras. 171-172, "[h]owever, according to the settled case-law of the Court of Justice and the Court of First Instance, in

Furthermore, in *Technische Universität München*, the ECJ did not emphasize whether the principle of care should be contemplated under the principle of good administration. This flaw was corrected by the CFI in *Volkswagen*.[946] In that case, the applicant asserted that the Commission, in competition law proceedings, did not respect elementary procedural principles. In particular, the applicant reproached a lack of impartiality and care in the selection and appraisal of the evidence by the Commission and a lack of diligence in its observations in reply to the statement of objections.[947] The Court ruled that, "in the light of the case-law, the defects pleaded by the applicant must be considered under the heading of infringements of the principle of good administration, which includes the duty on the Commission to examine carefully and impartially all the relevant aspects of the individual case".[948]
The final observation, which arises in this context, is that it is now clear from this case-law that the principle of care falls under the wider principle of good administration. Interestingly, more or less the same type of evolution, i.e. towards a precise formulation, can be attributed to the Court's jurisprudence in the context of the duty to act in a reasonable time. However, the only difference between the two lines of case-law regarding the principle of care seems to be one of emphasis. In effect, one should stress that the ECJ has never stated explicitly that the duty to act carefully and impartially constituted a general principle of Community law. Conversely, the Court has held that the duty to act in a reasonable time is a general principle of Community law. Thus, the case-law must be analyzed with particular diligence.

b) The Duty to Act in a Reasonable Time

It is worth underlining that the principle of care includes also a duty for the institutions to act in a reasonable time. Interestingly, some time limits are explicitly stated in the Treaties, e.g. Articles 173 and 175 [new Articles 230 and 232] EC, as well as Article 35 ECSC. The Court adopted a principle that the institutions should reply to requests, even when no time limit is fixed or no express obligation to reply is imposed. In the context of State aid proceedings, the ECJ used analoguous reasoning to formulate a duty to act in a reasonable time. Very briefly, State aid proceedings can be divided into two phases, formal [new Article 88.2 EC) and

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such circumstances, the guarantees conferred by the Community legal order in administrative proceedings are of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case (Case C-269/90 *Technische Universitat Munchen* [1991] ECR I-5469, paragraph 14)… It follows that a scientific risk assessment carried out as thoroughly as possible on the basis of scientific advice founded on the principles of excellence, transparency and independence is an important procedural guarantee whose purpose is to ensure the scientific objectivity of the measures adopted and preclude any arbitrary measures".

[946] Case T-62/98 *Volkswagen AG* [2002] ECR II-2707.

[947] *Ibid.,* para. 245.

[948] *Ibid.,* para. 269.

informal [new Article 88.3.EC] procedures.[949] The formal procedure requires a more thorough examination than Article 88(3) EC, and the Commission has a reasonable time to complete the procedure.[950] As to the informal procedure, the ECJ, in *Lorenz*,[951] had to answer several questions relating to the interpretation of Article 93(3) EC [new Article 88(3)].[952] More precisely, this concerned the interpretation of the standstill obligation's length contained in paragraph 3 of Article 93. In this respect, according to the last sentence of Article 93 the Member States shall not put its proposed measures into effect until this procedure has resulted in a final decision. The objective pursued by Article 93(3) is to prevent the implementation of aid contrary to the Treaty, which implies that this prohibition is effective during the whole preliminary period.[953] The Court ruled that the Commission must *"act diligently and take account of the interest of the Member States of being informed of the position quickly in spheres where the necessity to intervene can be of an urgent nature by reason of the effect that these Member States expect from the proposed measures of encouragement"*.[954] The ECJ remarked that despite the absence of a precise legislation, the Commission could not be regarded as acting with proper diligence if it omitted to define its attitude within a due time. In other words, the Member States cannot unilaterally terminate the preliminary phase.[955] Then the Court determined, by analogy with Articles 173 and 175 EC, that a two-month period appeared reasonable.[956]

As to the formal procedure, in *RSV*, [957] the Court elaborated the principle of care under the guise of procedural legitimate expectations. In this case, the Commission took 26 months before it declared an aid incompatible with the common market pursuant to Article 93(2) [new Article 88(2)] EC. According to the applicant, the Commission disregarded the requirements of legal certainty and failed to comply with the rules of good administration.[958] The Court considered that the Commission's delay could establish a legitimate expectation on the applicant to prevent the Commission from requiring the national authorities to order the refund of the aid,[959] and annulled the Commission decision. One may venture to suggest

[949] *See e.g.* AG Van Gerven in Case C-225/91 *Matra SA* v. *Commission* [1993] ECR I-3203.
[950] In practice, according to the twenty-fourth report on competition policy, the commission aims to close the procedure within 6 months.
[951] Case 120/73 *Gebr. Lorenz* [1973] ECR 1471.
[952] Article 88(3) concerns the so-called "preliminary review".
[953] *Ibid., Lorenz*, para. 4.
[954] *Ibid.*
[955] *Ibid.,* "[i]n the absence of any regulation specifying this period, the Member States cannot unilaterally terminate this preliminary period, which is necessary for the Commission to fulfill its role. The latter [the Commission] however, could not be regarded as acting with proper diligence if it omitted to define its attitude within a reasonable period".
[956] *Ibid.,* "[i]t is appropriate in this respect to be guided by Articles 173 and 175 of the Treaty which, in dealing with comparable situations, provide for a period of two months".
[957] Case 223/85 *RSV* v. *Commission* [1987] ECR 4617.
[958] *Ibid.,* para. 12.
[959] *Ibid.,* para. 17.

that this case demonstrates the difficulties faced by the Court of Justice in formulating the principle of care. One should emphasise that, in the aftermath, the Court never linked the duty to act in a reasonable time with the principle of legitimate expectations.

In light of the foregoing, one may establish a dual distinction regarding the application of the principle of care with a time-limit aspect. On the one hand, the principle of care may require a precise time-limit, e.g. as in *Lorenz*. On the other hand, it may only preclude a reasonable, unfixed time-limit, which must be determined according to the context, e.g. *RSV*. This dichotomy and the rationale behind have been clarified by AG Jacobs. In his words,

> "[c]lear-cut time-limits, such as the one established in Lorenz, are only necessary where legal certainty is at stake. In circumstances where the Community Courts rely on the principle of good administration alone, they do not usually postulate precise time-limits. Instead, they determine the reasonableness of the period needed according to the circumstances of the case and in particular in the light of the context, the various procedural stages followed by the Commission, the conduct of the parties in the course of the procedure, the complexity of the case and its importance for the various parties involved".[960]

In this respect, an exemplification is offered by competition proceeding cases. *In Guérin*, a case that deals with a competition proceeding relating to a complaint alleging that Volvo had infringed Article 85 EC [new Article 81],[961] the Court made clear that the definitive Decision of the Commission must respect the principles of good administration and, consequently, must be adopted in due time after the reception of the Complainant's observation.[962] In order to respect this principle, the Court extended the scope of Article 175 EC [new Article 232] to oblige the Commission to make a Decision within a reasonable time regarding the reception of a competition complaint. Accordingly, a complainant can use Article 175 EC to enforce this obligation to decide anytime that the Commission does not make such a decision within the required period of time.[963]

Furthermore, the CFI referred explicitly to the duty of the administration to act in a reasonable time as a general principle of Community law in *SCK/FNK*, another

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[960] AG Jacobs in Case C-99/98 *Austrian Republic* v. *Commission* [2001] ECR I-1101, para. 77.

[961] Case 282/95 *Guérin Automobiles* v. *Commission* [1997] ECR I-1503.

[962] *Ibid.*, para. 37.

[963] *Ibid.,* para. 38, "[i]f the Commission fails either to initiate a proceeding against the subject of the complaint or to adopt a definitive decision within a reasonable time the complainant may rely on Article 175 of the Treaty in order to bring an action for failure to act. The fact that he has already brought an action for failure to act in order to obtain the notification provided for by Article 6 of Regulation No 99/63 in no way prevents him from later bringing a fresh action for failure to act with a different object. In that case, if the Commission has not acted in due time it may be ordered, as a result of its failure to act, to pay the costs incurred by the complainant".

competition law case.[964] The Commission, in Decision 95/551, found that FNK had infringed Article 85 (1) [new Article 81(1)] EC by applying a system of recommended internal rates, which enabled its members to anticipate each other's pricing. It also found that SCK had infringed the same Article by prohibiting its affiliated firms from hiring cranes not affiliated to SCK. Both brought actions under Article 173 EC [new Article 230]. The applicants alleged unlawful conduct by the Commission for infringing Article 6 of the European Convention on Human Rights, by failing to adopt the decision within a reasonable time. The administrative proceedings lasted 46 months.

For its part, the CFI referred to its settled case-law regarding fundamental rights and reaffirmed once again that "the Court of Justice and the Court of First Instance draw inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. The European Convention on Human Rights has special significance in that respect".[965] Next, it referred by analogy to the *Guérin* case, which establishes a duty to reply within a reasonable time in relation to Article 3(1) of Regulation No 17.[966]

Finally, the CFI explicitly recognised the existence of a general principle of Community law, which imposes a duty on the Commission to act in a reasonable time. To this effect, it cited two State aid cases and one competition case that apply this principle. However, in this previous jurisprudence, the Court never expressly

[964] Joined Cases T-213/95 and T-18/96 *SCK and FNK* v. *Commission* [1997] ECR II-1739.

[965] *Ibid*., *SCK/FNK*, para. 53, "[i]t is settled case-law that fundamental rights form an integral part of the general principles of law whose observance the Community judicature ensures (see, in particular, Opinion 2/94 [1996] ECR I-1759, paragraph 33, and Case C-299/95 *Kremzow* v *Austria* [1997] ECR I-2629, paragraph 14). For that purpose, the Court of Justice and the Court of First Instance draw inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. The European Convention on Human Rights has special significance in that respect (Case 222/84 *Johnston* v *Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, paragraph 18, and *Kremzow*, cited above, paragraph 14). Furthermore, as provided in Article F(2) of the Treaty on European Union, the Union shall respect fundamental rights, as guaranteed by the [European Convention on Human Rights] and as they result from the constitutional traditions common to the Member States, as general principles of Community law".

[966] *Ibid.,* para. 55, "[w]hen a party applies to the Commission for negative clearance under Article 2 of Regulation No 17 or gives it notification under Article 4(1) thereof for the purpose of obtaining an exemption, the Commission may not defer defining its position indefinitely. In the interests of legal certainty and of ensuring adequate judicial protection, it is required to adopt a decision or, if such a letter has been requested, to send a formal letter within a reasonable time. Similarly, when it receives an application under Article 3(1) of Regulation No 17 alleging infringement of Article 85 and/or Article 86 of the Treaty, it is required to adopt a definitive position on the complaint within a reasonable time (Case C-282/95 P *Guérin Automobiles* v *Commission* [1997] ECR I-1503, paragraph 38)".

elaborated a general principle of Community law. It seems important to quote the operative part of the judgment:

> "It is a general principle of Community law that the Commission must act within a reasonable time in adopting decisions following administrative proceedings relating to competition policy (see, with regard to the rejection of a complaint, *Guérin Automobiles*, cited above, paragraph 38, and, with regard to State aids, Case 120/73 *Lorenz* v *Germany* [1973] ECR 1471, paragraph 4, and Case 223/85 *RSV* v *Commission* [1987] ECR 4617, paragraphs 12 to 17). Accordingly, without there being any need to rule on the question whether Article 6(1) of the European Convention on Human Rights is, as such, applicable to administrative proceedings before the Commission relating to competition policy, it is necessary to consider whether, in this case, in the proceedings preceding the adoption of the contested decision, the Commission offended against the general principle of Community law requiring it to act within a reasonable time".[967]

Interestingly, the CFI rejected the need to rule on the question whether Article 6(1) of the ECHR was applicable. The Tribunal here seems to consider sufficient to refer to the previous jurisprudence in order to elaborate this general principle of Community law. Also, it may be said that the use of Article 6(1) would have posed some problems, since this Article is clearly related to the judicial system. In other words, it could have been difficult to create a duty on the part of the Commission (a Community institution) on the basis of this Article and connected case law. At the same time, one can wonder as to the exact legal status of this general principle. Does this principle constitute of fundamental right? On the one hand, the CFI stated the settled case-law concerning human rights. On the other hand, it refused to directly apply Article 6 ECHR. Yet, it seems safe to say that the CFI assessed this principle as a fundamental right by asserting the settled jurisprudence in this context.[968] In passing, the ECHR, however, does not appear as an instrument of special significance.

By contrast, the next paragraph, concerning the duration of the proceedings, seems to fill this gap. In this sense, the Tribunal considered, in the light of the EctHR case-law,[969] that in order to determine whether the duration of an administrative proceeding is reasonable, the court must take into consideration "the particular circumstances of each case and, in particular, its context, the various

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[967] *Ibid.,* para. 56. *See also* the recent change of formulation by the CFI in 2004 (Case T-45/01 *Sanders* [2004] n.y.r., para.60 and Case T-144/02 *Eagle* [2004] n.y.r., para.58). The CFI does not refer to a general principle of Community law, but states that the duty to act within a reasonable time is an aspect of good administartion (quoting the *Guérin* case) and derives from the fundmanental need for legal certainty. This change of formulation brings inconsistency and demonstrates, once again, the difficulty to classify the principle of good administration.

[968] *Al-Jubail*, *supra n.659.*

[969] *See, Erkner and Hofauer* v. *Austria* (9616/81) [1987] ECHR 5 (23 April 1987), para 66, *Milasi* v. *Italy* (10527/83) [1987] ECHR 11 (25 June 1987), para 15, and *Schouten and Meldrum* v. *The Netherlands* (19005/91) [1994] ECHR, para. 63.

procedural stages followed by the Commission, the conduct of the parties in the course of the procedure, the complexity of the case and its importance for the various parties involved".[970] In the present case, the proceeding lasted 46 months. The CFI considered that each procedural stage must be examined to see whether its duration was reasonable. Finally, the CFI ruled that the Commission did not infringe the duty to act in a reasonable time,[971] and therefore rejected this plea.[972] At the end of the day, it may be said that the principle of care constitutes a fundamental right. This finding is confirmed by the incorporation of the principle of care in the Charter of Fundamental Rights. Similarly to the other procedural rights, e.g. right to be heard and the right to access to file (also forming part of the principle of good administration), the principle of care has undergone a process of "fundamentalization".

5.3.2. The Principle of Access to Documents

a) The Codification of Access to Documents

The Treaty of Amsterdam in Article 255 EC, to replace the Code of Conduct and the internal measures taken by the institutions, has codified the principle of transparency, with a strong legal basis. In the wake, Regulation No 1049/2001 was adopted in order to give effect to the principle of access to documents. This Regulation binds the European Parliament, the Council, the Commission and all agencies established by these three institutions. The case-law of the ECJ in relation to the principle of transparency has been quite extensive, particularly as to the scope of its exceptions and the determination of the proportionality of the refusal to grant access or partial access.[973]

In principle, all documents of the institutions should be accessible to the public. However, according to Regulation No 1049/2001, certain public and private persons should be protected by way of exceptions.[974] Article 4 of the Regulation concerns exceptions to the principle of access to documents. One can discern between unconditional (Article 4(1)) and conditional exceptions (Article 4(2) and (3)).[975] Indeed, according to the wording of paragraphs 2 and 3, the exception applies unless there is an overriding public interest in disclosure. As to the former, Article 4(1) differentiates between public interest (public security, defence and military matters, international relations, the financial, monetary or economic policy of the Community or a Member State)[976] and private interest exceptions.[977] As to the latter,

[970] *SCK/FNK*, *supra n.964,* para. 57.
[971] *Ibid.,* para. 69.
[972] *Ibid.,* para. 70.
[973] Article 4(6) of the Regulation states, "[i]f only parts of the requested documents are covered by any of the exceptions, the remaining parts of the document shall be released".
[974] Recital 11 of Regulation No 1049/2001.
[975] "The institutions shall refuse access to a document…unless there is an overriding public interest in disclosure".
[976] Article 4(1) (a).

the type of exceptions enshrined in Article 4(2) covers commercial interests of natural or legal persons, including intellectual property, court proceedings and legal advice, inspections, investigations and audits. Article 4(3) deals with the exceptions relating to documents used for internal purpose and a sort of authorship rules.[978]

These exceptions could also be found in the Council, Commission and Parliament Decisions, e.g. Article 4 of Council Decision 93/731. Notably, those Decisions have been adopted on the basis of the institution's power of internal organization and are not legally in force.[979] Nevertheless, it may be appear interesting to compare the content of such Decisions with the new Regulation. Similarly to the Regulation, two categories of exceptions could be determined, namely compulsory and discretionary exceptions. However, the scope of compulsory/unconditional and discretionary/unconditional is not exactly the same.[980] As to the former, Article 4(1) listed the mandatory motives on which access to documents will not be given.[981] As to the latter, Article 4(2) permitted the Council to refuse access to a document in order to protect the confidentiality of its proceedings.

The CFI in *David Petrie*,[982] underlined that the two categories of exceptions to the general principle that citizens have access to Commission documents are set out in the Code of Conduct adopted by the Commission in Decision 94/90. The Tribunal considered that, "[t]he first category…is worded in mandatory terms and provides that the institutions will refuse access to any document where disclosure could undermine…the protection of the public interest (public security, international

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[977] According to Article 4(1)(b), "[t]he institutions shall refuse access to a document where disclosure would undermine the protection of: Privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data".

[978] "Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision making process, unless there is an overriding public interest in disclosure. Access to a document containing opinions for internal use as parts of deliberations and preliminary consultation within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure".

[979] *See e.g.* Case C-58/94 *Netherlands v. Council* [1996] ECR I-2169*,* para. 37.

[980] Article 4(1) of the Council Decision (compulsory exception) included the court proceeding, inspections and investigations. Now, in the Regulation those three exceptions are to be found under Article 4(2) (unconditional exception).

[981] "Where its disclosure could undermine: the protection of the public interest (public security, international relations, monetary stability,), the protection of the individual and of privacy, the protection of commercial and industrial secrecy, the protection of the Community's financial interests, the protection of confidentiality as requested by the natural or legal person who supplied any of the information contained in the document or as required by the legislation of the Member States which supplied any of that information."

[982] T-191/99 *David Petrie* v. *Commission* [2001] ECR II-3677.

relations, monetary stability, court proceedings, inspections and investigations)".[983] Also, a parallel can be drawn with Article 4(3) of Regulation 1049/2001 and Article 2(2) of the Council Decision 93/731 relating to the "authorship rule." Article 2(2) provided that "where the requested document was written by a natural or legal person, a Member State, another Community institution or body, or any other national or international body, the application must not be sent to the Council, but direct to the author". It has been argued that this Article constitutes a "highly questionable provision" and impaired the application of the principle of public access held by the Community administration.[984] However, the authorship rule as an exception has been confirmed by the case law. In *Rothmans*, [985] the CFI held that "the rule on authorship…lays down an exception to the general principle of transparency in Decision 94/90. It follows that this rule must be construed and applied strictly, so as not to frustrate the application of the general principle of transparency".[986] This exception to the principle of openness establishes that the documents held by the institutions must also originate from them.[987] The application of the authorship rule may give rise to difficulty where there is some doubt as to the authorship of a document. In *JT's Corporation*, concerning the application of the authorship rule to documents sent by the Government of Bangladesh, the CFI pinpointed that the authorship rules will apply as long as there is no higher legal rule, i.e. no overriding public interest.[988] Generally speaking, the exception to the general principle of openness must be interpreted restrictively. In relation to the authorship rules, the Court stated that, "the authorship rule…must be construed and applied strictly, so as not to frustrate the application of the general principle of transparency".[989]

The same holds true in relation to the public interest exception. The CFI clearly confirmed that the exceptions to the general principle of giving the widest possible access to documents should be construed and applied strictly in connection to, *inter*

[983] *Ibid.*, para. 65, and, *infra Van der Wal* (CFI) para. 42.
[984] Öberg, "Public Access to Documents after the entry into force of the Amsterdam Treaty: Much Ado About Nothing", European Integraton online Papers (EIoP) vol 2, 1998, No 8, at http://eiop.or.at/eiop/texte/1998-008a.htm, at p.9.
[985] Case T-188/97 *Rothmans International* v. *Commission* [1999] ECR II-2463.
[986] *Ibid.,* para. 55.
[987] Case T-92/98 *Interporc* (II) v. *Commission* [1999] ECR II-3521para. 69, *Rothmans, ibid.,* para. 55.
[988] Case T-123/99 *JT's Corporation* [2000] ECR II-3269 para. 53, "[i]t should be pointed out that the authorship rule may be applied by the Commission when handling a request for access so long as there is no higher rule of law prohibiting it from excluding from the scope of the Code of Conduct documents of which it is not the author. The fact that Decision 94/90 refers to declarations of general policy, namely Declaration No 17 and the conclusions of several European Councils does nothing to alter that finding, since those declarations do not have the force of a higher rule of law (*Interporc*, paragraphs 66, 73 and 74)".
[989] *Interporc II, supra n.987*, para. 69, *Rothmans International, supra n.985*, paras. 53-55.

alia, international relations[990] and Article 226 proceeding.[991] Interestingly, in *Van der Wal*,[992] the Community courts had to decide on the application of the exceptions to the procedure of co-operation between the national courts and the Commission in the field of competition law. The Court of Justice quashed the decision of the CFI refusing to give access to the Commission's document. Indeed, the reasoning used by the CFI appears to be based on an over-extensive interpretation of Article 6 ECHR.[993] The CFI deduced a principle of procedural autonomy from Article 6 ECHR. [994] It inferred from the wording of that Article that the right of every person to a fair hearing by an independent tribunal included that both domestic and Community courts must be free to apply their own rules of procedure concerning the powers of the judge, the conduct of the proceedings in general and the confidentiality of the documents in the file. In this sense, the CFI held:

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[990] Case T-14/98 *Hautala* v. *Council* [1999] II-2489, para. 84, "[n]ext, it should be noted that where a general principle is established and exceptions to that principle are then laid down, the exceptions should be construed and applied strictly, in a manner which does not defeat the application of the general rule (see, to that effect, [Case T-105/95 *WWF UK* v *Commission* [1997] ECR II-313], paragraph 56, and [Case T-124/96 *Interporc* v *Commission* [1998] ECR II-231], paragraph 49). In the present case, the provisions to be construed are those of Article 4(1) of Decision 93/731, which lists the exceptions to the above general principle".

[991] *David Petrie, supra n.982,* para. 66, "[t]he exceptions to document access fall to be interpreted and applied restrictively so as not to frustrate application of the general principle of giving the public the widest possible access to documents held by the Commission' (Case T-309/97 Bavarian Lager v Commission [1999] ECR II-3217, paragraph 39 and the case-law there cited)."

[992] Joined Cases C-174/98 P and C-189/98 P *Kingdom of the Netherlands and Van der Wal* v. *Commission* [2000] ECR I-1.

[993] Case T-83/96 *Van der Wal* v. *Commission* [1998] ECR II-545.

[994] *Ibid., Van der Wal* (*CFI*), paras. 46-47, " [i]t is settled case-law that fundamental rights form an integral part of the general principles of law whose observance the Community judicature ensures (see, in particular, Opinion 2/94 of the Court of Justice [1996] ECR I-1759, paragraph 33; and Joined Cases T-213/95 and T-18/96 *SCK* and *FNK* v *Commission* [1997] ECR II-0000, paragraph 53). For that purpose, the Court of Justice and the Court of First Instance draw inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have agreed or to which they have acceded. In that regard the ECHR has special significance (see, in particular, the judgment in Case 222/84 *Johnston* v *Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, paragraph 18). Furthermore, as provided for in Article F(2) of the Treaty on European Union, which entered into force on 1 November 1993, the Union shall respect fundamental rights as guaranteed by the [ECHR], and as they result from the constitutional traditions common to the Member States, as general principles of Community law…The right of every person to a fair hearing by an independent tribunal means, *inter alia*, that both national and Community courts must be free to apply their own rules of procedure concerning the powers of the judge, the conduct of the proceedings in general and the confidentiality of the documents on the file in particular".

> "The exception to the general principle of access to Commission documents based on the protection of the public interest when the documents at issue are connected with court proceedings, enshrined in Decision 94/90, is designed to ensure respect for that fundamental right. The scope of that exception is therefore not restricted solely to the protection of the interests of the parties in the context of specific court proceedings, but encompasses the procedural autonomy of national and Community courts (see paragraph 47 above)".[995]

Conversely, the Court of Justice noted that the principle of procedural autonomy does not concern all the documents in the proceedings. The principle only applies to documents written by the Commission for the sole purpose of a particular court case (thus excluding other documents which exist independently of such proceedings) and only while the matter is pending.[996] Furthermore, it stressed that it is for the domestic courts to rule on requests for access to those documents on the basis of their national procedural law.[997] Finally, the Court recognised the existence of a general principle of Community law relative to the right of every person to a fair trial.[998] Nevertheless, it ruled with strength that it is impossible to deduce from that right that a court hearing a dispute is necessarily the only body empowered to grant access to the documents of the proceedings in question. Similarly, such a right could not be deduced from the constitutional traditions common to the Member States.[999] The Court of Justice reaffirmed that the exceptions from the principle of access must be interpreted restrictively.[1000]

b) Proportionality of the Exception and Partial Access

Heidi Hautala, a Member of the European Parliament, asked to have access to a report written by the Working Group on Conventional Arms Exports to the Council's Political Committee.[1001] This report was not distributed through the normal channels for scattering Council documents. The General Secretariat of the

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[995] *Ibid.,* para. 48.
[996] *Van der Wal (ECJ), supra n.992,* para. 15.
[997] *Ibid.,* para. 16.
[998] *Ibid.,* para. 17, "[i]t is true that the general principle of Community law under which every person has a right to a fair trial, inspired by Article 6 of the ECHR (see, *inter alia*, Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraphs 20 and 21), comprises the right to a tribunal that is independent of the executive power in particular (on that point, see in particular the judgment of the European Court of Human Rights of 18 June 1971 in the case of *De Wilde, Ooms and Versyp* v *Belgium*, Series A, No 12, paragraph 78)…".
[999] *Ibid.*
[1000] *Ibid.,* para. 27.
[1001] Case T-14/98 *Hautala* v. *Council* [1999] II-2489. Previously, Mrs Hautala submitted a written question in which she stated that she was concerned by the violations of human rights, which were being assisted by arms exports from Member States of the European Union. She asked the Council what the reasons were for the secrecy surrounding the guidelines which the Working Group on Conventional Arms Exports had proposed to the Council's Political Committee with a view to clarifying the criteria governing arms exports.

Council refused access to the report under Article 4(1) of Decision 93/731/EC, stating that it contained highly sensitive information, disclosure of which would undermine the public interest as regards public security. On 13 January 1998, Mrs Hautala brought an action before the Court of First Instance for annulment of the Council's Decision refusing access to the report.[1002] The applicant put forward three legal arguments to support her application. First, Hautala argued an infringement of Article 4(1) of Decision 93/731. In the view of Mrs Hautala and the Member States associated (France and Sweden) with her defence, the right of partial access was required by both the wording and the context of Decision 93/731. The second plea, supported by France, Finland and Sweden alleged infringement of Article 190 of the EC Treaty (now Article 253 EC). Finally, the applicant contended that a breach of the fundamental principle of Community law that citizens of the European Union must be given the widest and fullest possible access to documents of the Community institutions, had taken place.[1003] Interestingly, the French, Swedish and Finish governments did not support the third plea.[1004]

The CFI held that the Council Decision was vitiated by an error of law and annulled the contested decision refusing access to a document without considering the possibility of disclosing certain passages contained in it.[1005] Indeed, the Council should have assessed whether partial access to certain information contained in the report was possible, or whether the report in its entirety was covered by the exceptions from the general principle that the public should have the widest possible access to documents. The Council did not make such an examination, since it considered that the principle of access to documents applies only to documents as such and not to the information contained in them. Significantly, the CFI relied on the principle of proportionality in order to come to such a conclusion. It appears worth quoting the three operative paragraphs linked to the principle of proportionality:

> "Furthermore, the principle of proportionality requires that derogations remain within the limits of what is appropriate and necessary for achieving the aim in view (Case 222/84 Johnston v Chief Constable of the Royal Ulster Constabulary [1986] ECR 1651, paragraph 38). In the present case, the aim pursued by the Council in refusing access to the contested report was, according to the reasons stated in the contested decision, to protect the public interest with regard to international relations. Such an aim may be achieved even if the Council does no more than remove, after examination, the passages in the contested report, which might harm international relations".
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> In that connection, the principle of proportionality would allow the Council, in particular cases where the volume of the document or the passages to be removed would give rise to an unreasonable amount of administrative work, to balance the

[1002] Her views were partially supported by the Finnish and Swedish Governments.
[1003] *Ibid., Hautala*, para. 35 and para. 43.
[1004] *Ibid.,* para. 44.
[1005] *Ibid.,* para. 88.

> interest in public access to those fragmentary parts against the burden of work so caused. The Council could thus, in those particular cases, safeguard the interests of good administration.
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> Accordingly, Article 4(1) of Decision 93/731 must be interpreted in the light of the principle of the right to information and the principle of proportionality. It follows that the Council is obliged to examine whether partial access should be granted to the information not covered by the exceptions".[1006]

First, the CFI stressed that the exceptions must be proportionate to the aim pursued, i.e. to protect international relations in the present case. The tribunal made reference to the classical two-pronged test of proportionality (appropriateness and necessity). Second, it remarked that the principle of proportionality allows the Council to refuse access in order to protect good administration. Finally, it emphasized that the exception must be interpreted in the light of the principle of the right to information and the principle of proportionality. As put by the CFI in *JT's Corporation,*

> "that judgment merely clarifies the scope of the right of access as laid down by the Code of Conduct, by specifying that the exceptions to that right must be interpreted in the light of the principle of the right to information and the principle of proportionality and that, therefore, the institution is required to examine whether partial access should be granted, that is to say access to information that is not covered by the exceptions (Hautala, paragraph 87)".[1007]

Going further, one may venture to suggest that the clear linkage of the principle of access with a well-known general principle of Community law (proportionality) makes the former principle appear as a fundamental right. Indeed, the principle of proportionality is widely used by the ECJ in its fundamental rights jurisprudence in order to assess the degree of encroachment of the right at stake. In the present situation, it may be said that the CFI used the principle of proportionality to evaluate the limitation caused by the exceptions to the principle of the right to information. The institutions are obliged to verify whether partial access should be granted. The mere fact not to verify whether certain passages are accessible, i.e. to verify whether the information falls or does not fall under the scope of the exception, constitutes a manifest error and is, consequently, disproportionate.[1008] In this sense, the right to access applies to the information contained in the document and not to the document as a whole.

The Council, supported by Spain, appealed the *Hautala* judgment on the basis that the CFI had committed an error of law by holding that the principle of proportionality required the Council to consider partial access to the document.[1009]

[1006] *Ibid.,* paras. 85-87.
[1007] *T-123/99 JT's Corporation* [2000] ECR II-3269, para. 44.
[1008] The CFI applies a marginal review in the sense that the measure must be manifestly disproportionate. The application of a marginal review is generally the type of review used to assess the proportionality of the EC institutional measures.
[1009] Case C-353/99 P *Council* v. *Hautala* [2001] ECR I-9565.

The Court of Justice did not follow this argument and confirmed instead that a refusal to grant partial access is manifestly disproportionate for ensuring the confidentiality of the items of information covered by one of the exceptions laid down in the Council's Decision.[1010] In this sense, the Council could have provided partial access by merely removing the passages covered by the public interest exception.[1011] Furthermore, the Court confirmed the argument of the CFI according to which no excessive administrative burden would be entailed by an obligation to ensure partial access.[1012]

The approach taken in *Hautala* was confirmed in *Kuijer II* (2002).[1013] In that case, the Council refused to give access to reports concerning the political situation in third countries by alleging a threat to a particular public interest. The CFI restated the formula used in *Hautala*, according to which the exception contained in the Council decision, must be interpreted in the light of the principle of the right to information and the principle of proportionality.[1014] It further added that, "in exceptional cases, a derogation from the obligation to grant partial access might be permissible where the administrative burden of blanking out the parts that may not be disclosed proves to be particularly heavy, thereby exceeding the limits of what may reasonably be required". [1015] Then, the Court must assess whether the challenged decision was adopted in pursuance of the principles of access and proportionality.

The CFI remarked that the reports at issue did not concern directly or primarily the relations of the European Union with the countries concerned. Indeed, those reports contained an analysis of the political situation and the position of the protection of human rights in general in each of those countries and also refered to the ratification of international treaties concerning human rights. They also contained more specific information regarding the protection of human rights, the possibility of internal migration to escape persecution, the return of nationals to their country of origin and the economic and social situation.[1016] Furthermore, the CFI stressed that the information frequently related to facts, which had already been made public.[1017] The Court held that the Council committed a manifest error of assessment in sustaining that the reasons on which it relied in order to refuse access to the reports at issue applied to the documents in their entirety.[1018] More recently, in *Mattila,* the Court quashed a judgment from the CFI in the context of an exception

[1010] *Ibid.,* para. 28.
[1011] *Ibid.,* para. 29.
[1012] *Ibid*., para 30.
[1013] Case T-211/00 *Kuijer (II)* v. *Council* [2002] ECR II-485.
[1014] *Ibid*., para. 57.
[1015] *Ibid.*
[1016] *Ibid.,* para. 62.
[1017] *Ibid.,* para. 63.
[1018] *Ibid.*, para. 70.

relating to the protection of the public interest in international relations.[1019] In this case, the CFI held that though the Council and the Commission had not considered the possibility of granting partial access to documents, this did not lead to the annulment of the contested decision, since this error would not have effected the outcome of their examination.[1020] By contrast, the Court found, in the light of the settled case-law, that there is an obligation for the institutions to examine whether partial access should be granted to information not covered by the exceptions.[1021]

Notably, the Court does not link, once again, the general principle of transparency to a fundamental right. Though the AGs have considered that the principle of access should be viewed as a fundamental right, the Court has consistently refused to confer it such a status. Moreover, the Court has never stated that transparency constitutes a general principle of Community law but instead, a general principle of access/transparency or a general principle of giving the public the widest possible access to documents. This formulation is at *mi-chemin* between a formal recognition and an implicit rejection. It is true that the principle of transparency only applies in connection with the institutions. Does this limited scope of application *ratione materiae* go against its formal recognition as a fundamental right? As seen above, the duty, for the administration, to act in a reasonable time is recognized, arguably, as a fundamental right, and clearly as a general principle of Community law though its scope of application is similar to the principle of transparency. Furthermore, one has seen that the principle of proportionality constitutes an important element as to the review of the principle of access. Also, the review may lead to the substantive annulment of the decision. Next, the Charter of Fundamental Rights incorporates the principle of transparency in its Article 49. Consequently, it may be concluded that it is just a matter of time before the ECJ will recognize the principle of transparency as a fundamental right.

[1019] Case C-353/01 P *Mattila* v. *Council and Commission* [2004] n.y.r., Case T-204/99 *Mattila* v. *Council and Commission* [2001] ECR II-2265.
[1020] *Ibid.*, *CFI,* para. 71.
[1021] *Ibid., ECJ* paras. 30-31. *See also, Council* v. *Hautala*, paras. 21-30*, supra n.1009.*

CHAPTER 6. JUDICIAL REVIEW OF THE MEMBER STATES ACTIONS THROUGH THE USE OF GENERAL PRINCIPLES

The aim of this Chapter is to provide an analysis of the scope of review regarding the general principles of Community law.[1022] This is a fuzzy and dynamic area that necessitates a cautious analysis of the "scope of Community law". Put bluntly, the Member States are bound to comply with fundamental rights in three situations. Firstly, when EC fundamental rights are enshrined in the Community legislation (primary or secondary).[1023] Secondly, when the Member States implement Community law.[1024] Thirdly, when the Member States derogate from a Community law requirement.[1025] According to AG Jacobs in the *Konstantinidis* case,

> "there are now at least two situations in which Community law requires national legislation to be tested for compliance with fundamental rights: namely (a) when the national legislation implements Community law (paragraph 19 of the Wachauf judgment) and (b) when a Treaty provision derogating from the principle of free movement is invoked in order to justify a restriction on free movement (paragraph 43 of the ERT judgment)".[1026]

Interestingly, in his Opinion, the AG considered that a Community national is entitled to say *civis europeus sum.*[1027] The ECJ did not follow the AG. However, the Treaty of Maastricht (Articles 8 and 8(a) [new Articles 17 and 18 EC] introduced new provisions concerning European citizenship. The ECJ case-law has, consequently, been submitted to an interesting development in the recent years. In my view, such a development can be attached to the first situation described above, i.e. when an EC fundamental right, enshrined in primary or secondary law, arises at the national level. The first section deals with the two most settled situations in relation to the review of a national measure, i.e. the *Wachauf* and *ERT* types of review (6.1.). The second section focuses on the other type of situation where a national measure falls within the scope of Community law, i.e. by invoking an EC fundamental right or a citizen right arising at the national level (6.2). Then, it concentrates on the scope of review of the national measure (6.3).

[1022] The Chapter focuses on the extent of the Member States' obligation to respect fundamental rights. This obligation (and the subsequent availability of review) arises whenever a national measure falls within the scope of Community law. Significantly, the term "operative general principles" must be understood broadly, as it also embodies administrative concepts such as the principle of legitimate expectation (*supra Max Rombi and Arkopharma*, para. 66). As already stated, the operative general principles constitute *lato sensu* fundamental rights.

[1023] *Infra*, *Rutili, Johnston,* and *Baumbast.*

[1024] *Infra, Klensch* and *Wachauf.*

[1025] *Infra, ERT.*

[1026] Case C-168/91 *Konstantinidis* [1993] ECR I-1191, at p 1212.

[1027] *Ibid.,* AG Jacobs, para. 46.

CHAPTER 6

6.1 THE WACHAUF AND ERT TYPES OF REVIEW

6.1.1. The Obligation of the Member States to Respect General Principles in the Implementation of Community Law or "Agency Type of Review"

The principle, according to which the Member States are obliged to observe the fundamental rights, operates in the areas of Community competence, such as the Common Agricultural Policy (CAP), which have been largely regulated by the Community, and where the function of the Member States is circumscribed to the implementation of Community law. In this instance, the role of the Member State is limited to an "agent" implementing Community legislation. As put by Weiler, *"in the EC system of governance, to an extent far greater than any federal state, the Member States often act as, and indeed are, the executive branch of the Community"*.[1028]Already in the late seventies, the Court stated that, "the general principles of Community law…are binding on all authorities entrusted with the implementation of Community provisions".[1029]

The extent of this obligation on the Member States was clarified some years later in connection to the CAP. In *Klensch,*[1030] the ECJ had to answer the question whether the prohibition of discrimination laid down in Article 40(3) of the EEC Treaty precludes a Member State from choosing 1981 as the reference year if the implementation of that option in its territory leads to discrimination between producers in the Community.[1031] First, the Court analyzed the scope of the principle of non-discrimination as enshrined in Article 40(3) EEC.[1032] It underlined that the principle "is merely a specific enunciation of the general principle of equality which is one of the fundamental principles of Community law".[1033] The Court ruled that when the provisions of a Regulation leave Member States to choose between various options of implementation, they must respect the principle of non-discrimination. This general principle is binding on the Member States as it covers all measures relating to the common organization of agricultural markets. Thus, the said principle is binding on the Member States when they are implementing a Regulation, which

[1028] Weiler, "The Jurisprudence of Human Rights in the European Union: Integration and Disintegration, Values and Processes", Harvard Jean Monnet Working Paper No 2/96.
[1029] Case 230/78 *Eridania* [1979] ECR 2749, para. 31.
[1030] Cases 201 & 202/85 *Klensch* [1986] ECR 3477.
[1031] *Ibid.,* para. 6.
[1032] *Ibid.,* para. 8, "[u]nder Article 40 (3) of the EEC Treaty the common organization of the agricultural markets to be established in the context of the common agricultural policy must exclude any discrimination between producers or consumers within the Community. That provision covers all measures relating to the common organization of agricultural markets, irrespective of the authority that lays them down. Consequently, it is also binding on the Member States when they are implementing the said common organization of the markets".
[1033] *Ibid.,* para. 9.

leaves the choice to the Member States between various methods of implementation.[1034]

Following the previous jurisprudence, the *Wachauf* case[1035] provides an interesting field of study as it clearly underlines that the Member States must comply with the general principles, as a whole, in implementing the Community measures. This case dealt with a reference for a preliminary ruling by a German Court concerning the interpretation of Regulation No 857/84 (Articles 4 and 7) on milk quotas. The national court was concerned with the unreasonable result of the transfer of the milk quotas to the landlord (where the landlord never produced milk, nor helped to build up a holding producing milk), and its conflict with the German Constitution. Mr Wachauf, a dairy farmer, was under a tenancy agreement. On the expiry of the lease, Mr Wachauf sought compensation because the benefits of the milk quotas were given exclusively to the landlord, whereas the lessee, had realised the investments necessary to receive a valuable milk quota. The national legislation was based on a Community Regulation governing the organisation of the milk market. The main question at stake was whether, in implementing community rules, the national authorities were enjoined to respect fundamental rights, and more precisely, whether, in implementing the Community milk quota scheme, the Member States were obliged to observe the right of property.

AG Jacobs in Wachauf considered that:

> "I agree with the national court that there may well be cases in which it is necessary to take account of the interest of the tenant in the quota. As the Commission points out in its written observations, the Community legislation is largely silent on the respective interests of the landlord and tenant, leaving it to the Member States to strike the necessary balance. That this should be left to national authorities is logical, given the diversity of national legal systems and implementing legislation and the different circumstances of individual producers. However, this does not, in my view, mean that Community law has nothing to contribute to a solution of the problem. In particular, the court has emphasized in joined cases 201 and 202/85 klensch v secretaire d'etat (1986) ECR 3477 that the prohibition of discrimination laid down in Article 40 of the Treaty covers all measures relating to the common organization of agricultural markets, irrespective of the authority which lays them down consequently, it is also binding on the Member States when they are implementing a common organization and precludes national implementing measures which result in discrimination between producers. Moreover, I consider that when implementing Community law it is also incumbent upon Member States to have regard to the principle of respect for the right to property which, as the court has recognized (see for example case hauer v land rheinland pfalz ((1979)) ECR 3727), is guaranteed in the Community legal order in accordance with the ideas

[1034] *Ibid.,* para. 10, "[c]onsequently, where Community rules leave Member States to choose between various methods of implementation, the Member States must comply with the principle stated in Article 40 (3). That principle applies, for instance, where several options are open to the Member States as in this case, where they may choose as the reference year 1981, or, subject to certain conditions, either 1982 or 1983".

[1035] Case 5/88 *Wachauf* [1989] ECR 2609.

> common to the constitutions of the Member States, which are also reflected in Article 1 of the first protocol to the European convention on human rights. Although the court's case-law has hitherto been concerned with respect for property rights by the Community legislator itself, the same principles must in my view apply to the implementation of Community law by the Member States, since it appears to me self-evident that when acting in pursuance of powers granted under Community law, Member States must be subject to the same constraints, in any event in relation to the principle of respect for fundamental rights, as the Community legislator".[1036]

The ECJ endorsed the position of the AG and held that the Community rules that have the effect of depriving the lessee of property without compensation would be incompatible with the requirements of the protection of fundamental rights in the Community legal order. The ECJ clearly stressed that those requirements are also binding on the Member States when they implement Community rules.[1037] It followed that *"the Member States must, as far as possible, apply those rules in accordance with those requirements"*. [1038] In the circumstances of the case, the Community measures in question left a sufficiently wide margin of appreciation to the national authorities in order to enable them to apply the milk quota rules in a manner consistent with the fundamental rights protected by Community law, that is to say, by giving the lessee the opportunity of keeping the reference quantity if he intends to continue milk production, or by compensating him if he undertakes to abandon such production definitively.[1039] According to Tridimas,

> "Wachauf increases the onus on the national authorities and the national courts. National authorities must take care to ensure that the way they implement Community rules does not infringe fundamental rights. The role of national courts becomes critical. It falls upon them to review national measures on grounds of compatibility with fundamental rights, if necessary by making a reference to the Court of Justice. This way, they acquire a power which they may not possess under national law in relation to domestic measures unconnected with Community law".[1040]

The principle that a domestic measure implementing Community law must observe fundamental rights was restated in the case *C-2/92 R v MAFF, ex p. Bostock*.[1041] In the present case, the High Court of Justice (Queen's Bench Division) referred a preliminary ruling to the ECJ concerning a dispute on an alleged obligation of compensation after the quota's transfer to the landlord, due to the expiry of the

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[1036] *Ibid.,* AG Jacobs in *Wachauf,* para. 22.
[1037] *Ibid., Wachauf,* para. 19, "Community rules which, upon the expiry of the lease, has the effect of depriving the lessee, without compensation, of the fruits of his labour and of his investments in the tenanted holding would be incompatible with the requirements of the protection of fundamental rights in the Community legal order…Those requirements are also binding on the Member States when they implement Community rules".
[1038] *Ibid.,* paras. 17-22.
[1039] *Ibid.,* paras. 20 and 21.
[1040] Tridimas, *The General Principles of EC Law,* Oxford, 1999, at pp. 226-227.
[1041] Case C-2/92 R v. *MAFF, ex parte Bostock* [1994] ECR I-35.

lease's holding. The English legislation did not offer a system of compensation for the tenant upon the surrender of his milk quota to the landlord and the subsequent loss flowing from the transfer of the reference quantity. Mr Bostock, a dairy farmer, argued that under Community law the fundamental principles are binding on the Member States and that these principles comprehend the prohibition of discrimination and respect for property. Consequently, Bostock asserted that Community law covers the rules on compensation for milk quota and that the Member States are under a duty to comply with those principles when they lay down national rules on compensation for tenants.[1042] More specifically, Bostock sustained that the right to property is a fundamental right that requires a Member State to introduce a scheme for payment by a landlord of compensation to an outgoing tenant, or indeed confers directly on the tenant a right to compensation from the landlord.[1043] In other words, according to the plaintiff, the UK government was in breach of those general principles by not providing to the tenant with a system of compensation.

According to AG Gulmann, the decisive question was "whether a positive duty may be derived from Community law principles on the protection of the fundamental rights for Member States to protect the economic interests of tenants when a tenancy comes to an end".[1044] The ECJ emphasized again that the Member States had a duty to respect fundamental rights when they implement Community law (citing *Wachauf*).[1045] However, the Court did not follow the argument of the appellant. Indeed, according to the court, "the right to property safeguarded by the Community legal order does not include the right to dispose, for profit, of an advantage, such as the reference quantities allocated in the context of the common organization of a market, which does not derive from the assets or occupational activity of the person concerned".[1046] Consequently, the Court considered that the protection of the right to property did not oblige a Member State to introduce a scheme for payment of compensation nor was a right to compensation conferred to the tenant.[1047] Interestingly, in Wachauf the ECJ considered that the protection of

[1042] *Ibid.*, para. 11, "[t]he general principles of Community law relied on by Mr Bostock include in particular the right to property and the principle of non-discrimination. He contends that those principles are breached where, in a position such as that in the main proceedings, a tenant is unable to obtain any compensation for the loss flowing from the transfer of the reference quantity. Mr Bostock adds that the relationship between private parties constitutes, in relation to milk quotas, a "natural context" for application of the principle of respect for property and avoidance of unjust enrichment".
[1043] *Ibid.,* para. 18.
[1044] *Ibid.*, AG Gulmann in *Bostock,* para. 16.
[1045] *Ibid., Bostock,* para. 12.
[1046] *Wachauf*, *supra n.1035,* paras. 18-19. *See also* Case C-44/89 *Von Deetzen* [1991] ECR I-5119, para. 27.
[1047] *Bostock*, *supra n.1041,* para. 20, "[i]t follows that the protection of the right to property guaranteed by the Community legal order does not require a Member State to introduce a scheme for payment of compensation by a landlord to an outgoing tenant and does not confer a right to such compensation directly on the tenant".

fundamental rights may require that the outgoing lessee be entitled to compensation. AG Gulmann pinpointed that there were major differences between the Wachauf and the Bostock cases:

> "The Wachauf case concerned the application of the rules concerning compensation on the occasion of definitive discontinuance of milk production. In this case Mr Bostock refrained from applying for such compensation from the outset because he considered, rightly according to the information given, that it was not possible for him to avail himself of the United Kingdom outgoing's scheme. In the Wachauf case, the tenancy was ended by the landlord whereas in this case it was Mr Bostock who terminated the tenancy agreement. In the Wachauf case, milk production on the holding was established in its entirety by the tenant while Mr Bostock has merely increased the milk production already in place on the holding at the start of his tenancy".[1048]

The main difference between the two cases is that, in *Bostock,* the compensation was sought from the landlord. It may be argued that the ECJ was not willing to accept that the general principles impose obligations on individuals.[1049] Concerning the relationship between the private parties, the applicant argued that the landlord was under an obligation to pay compensation, as the fruits of his labour and his investments contributed to the acquisition or the increase in the reference quantity.[1050] Nevertheless, the ECJ stressed that the law of the Member State governed the legal relations between the landlord and the tenant and that the consequences of unjust enrichment were not a matter of Community law.[1051] The ECJ appears reluctant to confer to the general principles a horizontal effect between private parties.[1052]

What is more, the obligation to respect fundamental rights in implementing Community law in the context of the principle of equal treatment was made clear by the Court in the *Caballero* case.[1053] In this case, the High Court of Justice referred to the Court for a preliminary ruling on the interpretation of Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member

[1048] *Ibid.,* AG Gulmann in *Bostock,* para. 16.
[1049] Tridimas, *The General Principles of EC Law*, Oxford, 1999, at pp.31-32 (for comments on the application of the general principles against individuals) and pp.227-228 (for comments on *Bostock*).
[1050] *Bostock, supra n.1041*, para. 25.
[1051] *Ibid.,* para. 26, " [s]uffice it to say, on that point, that legal relations between lessees and lessors, in particular on the expiry of a lease, are, as Community law now stands, still governed by the law of the Member State in question. Any consequences of unjust enrichment of the lessor on the expiry of a lease are therefore not a matter for Community law".
[1052] Tridimas, *supra n.1040,* at pp.31-32. The author considers that certain provision of the Treaty may have a horizontal effect (Article 141 EC). Concerning the general principles, the author stresses that general principles may have an indirect effect on the relationship between individuals, in the sense that a provision of Community law imposing an obligation on individuals may be interpreted in the light of fundamental rights, e.g. *Rutili,* and that issues of fundamental rights may arise between individuals, e.g. *Grogan.*
[1053] Case C-442/00 *Caballero* [2002] ECR I-11915.

States relating to the protection of employees in the event of the insolvency of their employer.[1054] The question arose as to whether the possibility for national law to specify the payments to be made by the guarantee institution is subject to requirements of Community law and whether[1055] Spain had complied with those requirements.[1056] The Court of Justice referred to the *Wachauf* line of reasoning and stated that:

> "According to settled case-law fundamental rights form an integral part of the general principles of law whose observance the Court ensures and, second, that the requirements flowing from the protection of fundamental rights in the Community legal order are also binding on Member States when they implement Community rules. Consequently, Member States must, as far as possible, apply those rules in accordance with those requirements (see Case C-2/92 *Bostock* [1994] ECR I-955, paragraph 16, and Case C-292/97 *Karlsson and Others* [2000] ECR I-2737, paragraph 37)".[1057]

The Court stressed that fundamental rights include the general principles of equality and non-discrimination. In light of the ECJ case-law, that principle precludes comparable situations from being treated in a different manner unless the difference in treatment is objectively justified. Interestingly, the Court considered that the national measure was not objectively justified and was thus disproportionate. [1058] In that regard, the case differs from the rulings given in *Bostock* and *Karlsson,* where the ECJ did not consider that the domestic measure was in breach of a fundamental right.

Finally, it is worth stressing that the obligation to respect the general principles is not merely limited to fundamental rights *stricto sensu,* but also extends to administrative principles such as legitimate expectations. In this sense, the Court in *Max Rombi*[1059] emphasized that,

> "the Court has consistently held that the requirements flowing from the protection of general principles recognised in the Community legal order, including the principle of the protection of legitimate expectations, are also binding on Member States when they implement Community rules, and that consequently they are bound, as far as possible, to apply the rules in accordance with those requirements. Where national rules fall within the scope of Community law and reference is made to the Court for a preliminary ruling, the Court must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with the general principles the observance of which is ensured by the

[1054] Article 1(1) of the Directive states that "[t]his directive shall apply to employees' claims arising from contracts of employment or employment relationships and existing against employers who are in a state of insolvency within the meaning of Article 2(1)".
[1055] Under Article 2(2) of the Directive, it is for national law to specify the term 'pay' and to define it. In the present case the Directive thus refers to Spanish law.
[1056] *Caballero*, *supra n.1053,* para. 29.
[1057] *Ibid.,* para. 30.
[1058] *Ibid.,* paras. 38-39.
[1059] Case C-107/97 *Max Rombi and Arkopharma SA* [2000] ECR I-3367.

> Court (see, on fundamental rights falling within those general principles, Case C-2/92. The Queen v Minister of Agriculture, Fisheries and Food, ex parte Bostock [1994] ECR I-955, paragraph 16)".[1060]

In the end, it appears that the Member States must respect not only the fundamental rights *stricto sensu,* but all the general principles when implementing Community law.

6.1.2. The ERT-Type of Review

In the wake of *Wachauf,* the ECJ extended the scope of review of the Member States actions falling within the scope of Community law. The main question at stake is the competence of the ECJ and national courts to review a domestic measure derogating from a Community law requirement. The obligation of the Member States to respect fundamental rights when derogating from one of the Community freedoms is an area closely connected with the extent of the scope of application of EC law. The scope of Community law is an interesting field for further research and will be carefully studied at a later stage. One may venture to suggest that, in contrast to the *Wachauf*-type of review, the *ERT*-type of review has been marked by a chaotic jurisprudence. Hence, it seems necessary to recall the jurisprudence prior to the *ERT* case.

In this sense, the *Rutili* case,[1061] though it concerned the interpretation of a Community Directive, may be seen as providing an interesting example regarding the possible application of fundamental rights to Member States actions. In this case, an Italian citizen (living in France and married to a French woman) took part in different political and syndicate activities during the events of May 1968. The French authorities forbade him to sojourn in four departments in the Northeast of France (in Lorraine). Those national measures were the object of a preliminary ruling to the ECJ in order to verify the compatibility of such measures with EC law. France was trying to derogate from the freedom of movement provided by invoking public policy reasons under Article 48(3) EEC. Consequently, the ECJ had to interpret the meaning of the sentence*, "subject to the limitations justified on grounds of public policy"*. The ECJ, in *obiter dictum*, after referring to the limitations imposed by the Community legislation on the powers of the Member States on the migrant workers, considered that:

> "Taken as a whole, these limitations placed on the powers of Member States in respect of control of aliens are a specific manifestation of the more general principle, enshrined in Articles 8, 9, 10 and 11 of the Convention for the Protection of Human Rights and fundamental Freedoms signed in Rome on 4 November 1950 and ratified by all the Member States, and in Article 2 of protocol 4 of the same Convention, signed in Strasbourg on 16 September 1963, which provide in identical terms, that no restrictions in the interests of national security or public safety shall

[1060] *Ibid.,* para. 65.

[1061] Case 36/75 *Rutili* [1975] ECR 1219. This case-law could also be linked to the third category of federal fundamental right. In the case, the Community right was derived from an EC Directive.

> be placed on the rights secured by the above-quoted Articles other than such as are necessary for the protection of those interests in a democratic society".[1062]

The ECJ determined that the issue should be interpreted in the light of a general principle stemming from the European Convention on Human Rights. Then, it stated that the limitation of the freedom of movement of a Community worker on grounds of public policy must be necessary in the context of a democratic society.[1063] Weiler saw, in the *Rutili* judgment, a caveat for the development of human rights principles binding on the national authorities.[1064] These principles would be binding only if they fall within the framework of Community law. The author expected that the foreseeable consequences of *Rutili* would lead to a judgment similar to the famous *Gitlow* case of the US Supreme Court,[1065] where the Supreme Court ruled that the Bill of Rights was applicable to the laws and practices of the fifty States.[1066] Mancini, analyzing Weiler's point of view, argued that Weiler had *"underestimated the exceptional political and human nature of the conflict which the Court had to consider in that case",* and then pointed out that the ruling in *Cinéthèque*[1067] some years later seemed to contradict (at this time) Weiler's prediction.[1068]

In *Cinéthèque,* the plaintiff raised the question of the compatibility of Article 89 of the French Law on audio-visual communication with Article 10 of the European Convention on Human Rights on the principle of freedom of expression. The

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[1062] *Ibid.,* para. 32,

[1063] *Ibid.*

[1064] The somewhat similar view (more restrictive as being analyzed in the light of *Cinéthèque* and *Demirel*) on *Rutili* seems to be adopted by Usher, "[i]t is apparent from Rutili that, as a matter of public law, these fundamental rights and general principles may be invoked not simply against Community institutions but also against national authorities to the extent that they are acting in a Community law context", in *General Principles of EC Law*, at pp. 5-6.

[1065] 268 U.S. 652 (1925).

[1066] For a Comment of *Gitlow* in the light of EC Law, *See e.g.,* Mancini, "The United States Supreme Court and the European Court of Justice", in *Democracy and Constitutionalism in the European Union*, Hart, 2000, pp.163-175, at p. 173, Mancini and Di Bucci, "le dévelopement des droits fondamentaux" in "Collected Courses of the Academy of European Law", vol I-1, EUI, 1990, pp.35-52, at p.39, Weiler, "Methods of Protection: Towards a Second and Third Generation of Protection", in Cassese, Clapham and Weiler (eds.), *Human Rights and the European Community: Methods of Protection,* volume II, EUI, 1991, pp.555-642, at p.596, and Jacobs and Karst, "The Federal Legal Order: The U.S.A and Europe Compared: Judicial Perspective", in Cappelletti, Seccombe and Weiler (eds.), *Integration through Law*, Volume I, Book 1, 1986, pp.169 *et seq*.

[1067] Cases 60 and 61/84 *Cinéthèque* [1985] ECR 2605.

[1068] Mancini, "Safeguarding Human Rights: Role of the Court of Justice", in *Democracy and Constitutionalism in the European Union*, Hart, 2000, pp. 81-95, at p.94. *See also* the critics of Weiler on *Cinéthèque*, Weiler, "The European Court at a Crossroads: Community, Human Rights, and Member States Actions", in *Du droit international au droit de l'intégration,* Nomos, 1987, and Weiler and Fries, "A Human Rights Policy for the European Community and Union: The Question of Competences", in Alston, *The EU and Human Rights*, 1999, pp.147-165, at p.156.

national legislation prohibited the marketing of videocassettes of a film for a period of one year after its projection in a cinema. The ECJ ruled that it was a duty for the Court to ensure observance of fundamental rights in the field of Community law. However the Court had no power to examine the compatibility of national law with the ECHR that concerned, *in casu*, an area that fell within the jurisdiction of the national legislator.[1069] The ECJ may have been cautious to review the national measures taken by the Member States in the exercise of their residual powers. According to Weiler, such an argument was not sustainable as the position of the AG and the Commission was, in fact, quite limited. Indeed, it corresponded to a "but/for" test. More clearly, the Court would assess the compatibility of the national measure with fundamental rights merely in the instance of an exception from one of the economic freedoms.[1070] In this sense, AG Slynn in a progressive Opinion, in line with the *Rutili* case, argued that the European Convention on Human Rights provides guidelines for the Court in laying down those fundamental rules of law though the Convention does not bind, and is not part of Community law. In his Opinion, the AG considered it correct that the exceptions in Article 36 EC (new Article 30) and the scope of the mandatory requirements taking a measure outside Article 30 EC (new Article 28) should be construed in the light of the Convention.[1071] It is to be noted that the reasoning of the Commission was rather similar, though broader, as it expressly included all the types of derogations concerning fundamental freedoms.

Following the *Cinéthèque* jurisprudence, the compatibility of national law with the European Convention on Human Rights was appreciated in the *Demirel* case.[1072] The Court there again stated the *Cinéthèque* formula, and ruled that, "there is at present no provision of Community law defining the conditions in which Member States must permit the family reunification of Turkish workers lawfully settled in the Community. It follows that the national rules at issue in the main proceedings did not have to implement a provision of Community law. In those circumstances, the Court does not have jurisdiction to determine whether national rules such as those at issue are compatible with the principle enshrined in Article 8 of the European Convention on Human Rights".[1073] *Demirel* represents a move from *Cinéthèque*, since the Court recognizes its jurisdiction in a case where the national measure falls within the scope of Community law. The relevant provisions of Community law may help to define whether or not the domestic measure can be subject to review by the ECJ. According to Lenaerts,

> "[c]learly, in that case, the material provision of Community law, guaranteed by Community law provides an interpretative yardstick for determining the scope of

[1069] *Cinéthèque, supra n.1067*, para. 26.
[1070] Weiler, "Methods of Protection: Towards a Second and Third Generation of Protection", in Cassese, Clapham and Weiler (eds.), *Human Rights and the European Community: Methods of Protection,* volume II, EUI, 1991, at p.609.
[1071] AG Slynn in *Cinéthèque, supra n. 667*, at p.2616.
[1072] Case 12/86 *Demirel* [1987] ECR 3719.
[1073] *Ibid.,* para. 28.

> Community law within which national legislation must fall in order to be subject to review by the Court of Justice in relation to its compatibility with the European Convention on Human Rights".[1074]

In the present case, no provision of Community law existed in connection with the reunification of Turkish workers and their families. Consequently, the matter fell outside the scope of Community law and the ECJ did not possess jurisdiction to review the national measure at stake. The Court is thus able to review a national measure, which conflicts with a provision of the European Convention on Human Rights, if and only if that measure lies within the scope of Community law.

For the first time, in *ERT* (*Greek television* case),[1075] the ECJ accepted the jurisdiction to review (in a limited way) a national measure derogating from a fundamental freedom. The Mayor of Thessaloniki and Dimotiki Etaita Pliroforissis decided to establish a television station. Such a decision ran counter to Greek legislation that conferred to ERT an exclusive right to broadcast sound and images. ERT brought proceedings in order to stop the broadcasting and to have the equipment seized. The defendants argued that the television monopoly infringed the EC rules on free movement of goods and services, as well as Article 10(1) of the European Convention on Human Rights. First, the ECJ emphasised that the fundamental rights form an integral part of the general principles of law and that the Court has the duty to ensure their respect. Citing *Wachauf,* it stressed that the Community cannot accept measures, which are incompatible with human rights.[1076] Then, the ECJ referred to the *Cinéthèque* case*,* according to which the ECJ has no jurisdiction in matters falling outside the scope of Community law.[1077] However, in the present case, the ECJ held that,

> "where a Member State relies on the combined provisions of Articles 56 and 66 in order to justify rules which are likely to obstruct the exercise of the freedom to provide services, such justification, provided by Community law must be interpreted in the light of the general principles of law and in particular of fundamental rights. Thus the national rules in questions can fall under the

[1074] *See* Lenaerts, "Fundamental Rights in the European Union"*,* ELRev. 2000, pp.575-600, at pp. 592-593

[1075] Case C-260/89 *Elliniki Radiophonia Tileorassi* [1991] ECR I-2925.

[1076] *Ibid.,* para. 41, "[w]ith regard to Article 10 of the European Convention on Human Rights, it, must be first pinpointed out that, as the Court has consistently held, fundamental rights form an integral part of the general Principles of Law, observance of which it ensures. For that purpose the Court draws inspirations from the constitutional traditions common to the member States and from the guidelines supplied by international Treaties for the protection of Human rights on which the member Sates have collaborated or of which they are signatories (see Nold §13). The European Convention on Human Rights has special significance in that respect (see Johnston §18). It follows that as the Court held in its judgment in case 5/88 Wachauf v Federal Republic of Germany, paragraph 19, the community cannot accept measures which are incompatible with observance of human rights thus recognized and guaranteed."

[1077] It is worth noting that *Cinéthèque* was dealing with mandatory requirements, whereas *ERT* concerned an explicit derogation from the EC Treaty.

> exceptions of Articles 56 and 66 only if they are compatible with the fundamental rights the observance of which is ensured by the Court".[1078]

The ECJ ruled that when the rules do fall within the scope of Community law and reference is made to the Court for a preliminary ruling, it must provide all the criteria for the interpretation needed by the national court in order to determine whether those rules are compatible with the fundamental rights, the observance of which the Court ensures and which derive in particular from the European Convention on Human rights. Consequently, it is for the national courts, and if necessary for the ECJ, to appraise the situation in the light of the general principle of freedom of expression embodied in Article 10 of the European Convention on Human rights.[1079] The *ERT* formula has been confirmed in the *Grogan* case, which stated that, "[a]ccording to, *inter alia*, the judgement of 18 June 1991 in [ERT]…(paragraph 42), where national legislation falls within the field of application of Community law, the Court when requested to give a preliminary ruling, must provide the national court with all the elements of interpretation which are necessary in order to enable it to assess the compatibility of that legislation with the fundamental rights – as laid down in particular in the European Convention on Human Rights – the observance of which the Court ensures. However, the Court has no such jurisdiction with regard to national legislation lying outside the scope of Community law".[1080] In the light of the *ERT* case, it may be argued that when a Member State is acting under an express derogation allowed by the EC Treaty, it is acting within the scope of Community law.

In the wake of *ERT,* an interesting question remained. Can one apply the *ERT* reasoning to an implicit derogation (mandatory requirement)? In the light of *Cinéthèque,* such a question may be answered in the negative. However, a few years later, in the *Familiapress* case**,**[1081] that question was raised again in proceedings brought by an Austrian newspaper publisher, against a newspaper publisher established in Germany, for an order that the latter should cease to sell publications in Austria offering readers the chance to take part in games for prizes, in breach of the Austrian Law on Unfair Competition. The national legislation contained a general prohibition on offering consumers free gifts linked to the sale of goods or the supply of services. The Austrian Government and the Commission argued that the aim of the national legislation in question was to maintain press diversity, which is capable of constituting an overriding requirement for the purposes of Article 30.[1082] The Court considered that the maintenance of press diversity may constitute an overriding requirement justifying a restriction on the free movement of goods.[1083] However, it did not dwell on that argument. By contrast, recent cases, like

[1078] *ERT, supra n.1075*, para. 43.
[1079] *Ibid., ERT* para. 44.
[1080] C-159/90 *Grogan* [1991] ECR I-4685, para. 31.
[1081] Case C-368/95 *Familiapress* [1997] ECR I-3689.
[1082] *Ibid.,* para. 13.
[1083] *Ibid.,* para. 18.

Schmidberger and *Omega*, offer interesting illustrations of the conflict of a fundamental right with a free movement principle.[1084] In these cases, the ECJ has held expressly that a Member State must respect the general principles when it invokes a mandatory requirement. To quote the ECJ,

> "where a Member State relies on overriding requirements to justify rules which are likely to obstruct the exercise of free movement of goods, such a justification must also be interpreted in the light of the general principles and in particular of fundamental rights (see Case C-260/89 ERT [1991] ECR I-2925, paragraph 43)".[1085]

Nevertheless, the ECJ, referring explicitly to the *Lentia* decision of the EctHR, noted that certain derogations are permitted from the freedom of expression in order to safeguard press diversity.[1086] It is for the national court, on the basis of an analysis of the Austrian Press market, to determine whether a national prohibition such as that in issue in the main proceedings is proportionate to the aim of maintaining press diversity and whether that objective may not be attained by measures less restrictive of both intra-Community trade and freedom of expression.[1087] De Witte has rightly stressed that,

> "[t]he Bauer Verlag judgment is perfectly in line with the ERT-style review of Member State measures, but it also shows that this strand of the ECJ's jurisprudence fundamental rights doctrine may raise delicate questions in the relationship between the national and Community legal orders. It requires any national court to act as a constitutional court ensuring respect by the national authorities of the fundamental rights of EC law, which may even require them to disregard national constitutional rights, as they are normally understood".[1088]

Finally, it may be argued that *Familiapress* reversed the *Cinéthéque* case. In the light of *Familiapress*, the *ERT*-review is applicable also to the mandatory requirements. Thus, one witnesses an extension of the scope of Community law. The conclusion to which we are inescapably drawn is that the ECJ has demonstrated greater eagerness to review the conformity of the national legislation with the

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[1084] *Supra Chapter 4.1.2 (a).*

[1085] *Familiapress*, *supra n.1081*, para. 24.

[1086] *Ibid.,* para. 26, "[a] prohibition on selling publications which offer the chance to take part in prize games competitions may detract from freedom of expression. Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms does, however, permit derogations from that freedom for the purposes of maintaining press diversity, in so far as they are prescribed by law and are necessary in a democratic society (see the judgment of the European Court of Human Rights of 24 November 1993 in Informationsverein Lentia and Others v Austria Series A No 276)".

[1087] *Ibid., Familiapress,* paras. 27-29.

[1088] De Witte, "The Past and Future Role of the European Court of Justice in the Protection of Human Rights", in Alston, *The EU and Human Rights*, Oxford, 1999, at p.873. Such an assessment on the relationship between the ECJ and the national court will be realised in the last paragraph of this section.

fundamental rights. Such an assertion is verified when analysing the other national measures falling within the scope of Community law.[1089]

In addition, the *Carpenter* case provides a good illustration of the extension of the scope of Community law as well as the expansion of review by the ECJ regarding national measures.[1090] A woman from the Philippines, who arrived in the UK in September 1994, married an EU national (from the UK) in 1996. Mrs Carpenter was leading a true family life, in particular by looking after her husband's children from a former marriage. She then received an order of deportation, according to which she had infringed the immigration laws of the United Kingdom by not leaving the country prior to the expiry of her permission to remain as a visitor. Interestingly, the matter fell within the scope of the provision on the freedom of services. Indeed, according to the Court, Mrs Carpenter's husband exercised the right to provide services guaranteed by Article 49 EC by carrying on a significant part of his business both within his Member State of origin for the benefit of persons established in other Member States, and within those States. The UK government argued that the deportation decision constituted a measure of public interest. The Court noted that the effect of the decision, i.e. the separation of the couple, would be detrimental to their family and thus to the effective exercise of the freedom to provide services.[1091] In this sense, the ECJ stated that:

> "A Member State may invoke reasons of public interest to justify a national measure which is likely to obstruct the exercise of the freedom to provide services only if that measure is compatible with the fundamental rights whose observance the Court ensures (see, to that effect, Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 43, and Case C-368/95 *Familiapress* [1997] ECR I-3689, paragraph 24)".[1092]

The Court considered that the decision to deport Mrs Carpenter clearly infringed the right to respect for family life as enshrined in Article 8 ECHR.[1093] Then, the Court stressed the importance of balancing the interests between the right to family life and the public order interest.[1094] In this respect, it observed that the conduct of Mrs Carpenter, since her arrival, did not appear to constitute a threat to the UK public order.[1095] Finally, the ECJ ruled that the decision was disproportionate to the objective of protecting public order and safety.[1096] It is worth remarking that, in contrast to the *ERT* or *Familiapress* cases, the ECJ did not limit itself to merely providing interpretative guidelines. The Court assessed whether the domestic measure was valid in the light of EC fundamental rights. At the end of the day, it

[1089] Case C-309/96 *Daniele Annibaldi* [1997] ECR I-7493.This case offers a counter argument to the "unlimited extension" of the scope of Community Law.
[1090] Case C-60/00 *Mary Carpenter* [2002] 2 CMLR 64.
[1091] *Ibid.,* para. 39.
[1092] *Ibid.,* para. 40.
[1093] *Ibid.,* paras. 41-42.
[1094] *Ibid.,* para. 43.
[1095] *Ibid.,* para. 44.
[1096] *Ibid.,* paras. 44-45.

may be stated that we are witnessing a rather clear expansion of the review of domestic measures by the Court of Justice. Such an assertion appears to be verified by the *Caballero* (2002) and *Carpenter* (2002) cases. In a similar vein, the *Baumbast* case (2002) also seems to perfectly complement this proposition. This case-law is scrutinized in the next section in the context of rights arising at the national level via EC law.

6.2. FUNDAMENTAL RIGHTS ARISING AT THE NATIONAL LEVEL VIA EC LAW OR THE EXTENT OF THE SCOPE OF COMMUNITY LAW

As noted previously, two types of national measures fall within the scope of Community law, i.e. the national measures implementing Community law and the national measures derogating (explicitly or implicitly) from the EC provisions on fundamental freedoms. These measures are subject to review by the national courts and/or the ECJ. The aim of this section is to analyse the other types of national measures falling within the framework of Community law. The problem then remains to define properly what the scope of Community law is. In the words of AG Léger in *Kaur, "it ought…to be borne in mind that while fundamental rights do form an integral part of the general principles of law with which the Court must ensure compliance, this is subject to the condition that the area which the case before it relates, falls within the scope of Community law".* [1097] At first glance, it seems an awkward task to attempt to define the boundaries of the scope of Community law, since it constitutes *per se* an evolutive concept. According to Toth,

> "[t]he Court has created a highly artificial distinction between national rules which do, and those which do not fall within the scope of Community law. As a result, individuals are subject to two different systems of protection at the supranational level (ECJ or ECHR)…the situation is very confusing and unsatisfactory, the more so as in may instances it is by no means certain whether a matter falls within or outside the scope of Community law. The problem is exacerbated by the fact that with the progress of integration (not to mention the possible application of the principle of subsidiarity) the precise scope of Community law is subject to constant change and reinterpretation…contrary to the principle of legal certainty".[1098]

As such, it may be said that the scope of Community law is extending. Such an extension renders extremely difficult the task to define its limits. The logical consequence is that a number of more important national measures are falling under the scope of Community law and are thus subject to review. This section is divided into three parts. The first part attempts to define negatively the scope of Community law, i.e. by identifying the situations where Community law is not applicable. This is the so-called doctrine of purely internal situation (6.2.1). Then, the second part, offers an example of the extension of the scope of Community law via Article 12 EC

[1097] Case C-192/99 *Kaur* [2001] 2 CMLR. 24, 505, at p.515, fn.16.

[1098] Toth, "Human Rights as General Principles of Law, Past and Future", in Bernitz and Nergelius (eds.) *General Principles of European Community Law*, Kluwer, 2000, pp.73-92, at p.84.

(ex Article 6). It is demonstrated that the recent case-law of the ECJ allows the European citizens to invoke Article 12 EC without connecting it directly to one of the economic freedoms (6.2.2). Finally, we focus on the review exercised through the citizenship provisions (6.2.3).

6.2.1. The Doctrine of Purely Internal Situations

There is no clear test to define the scope of Community law. Consequently, the national courts often find it difficult to determine whether or not a measure falls within the scope of Community law.[1099] At the end of the day, it is for the ECJ to determine the existence of the "Community element".[1100] Interestingly, the AGs have stressed the parallel between the binding scope of the general principles and the jurisdiction of the ECJ to give a preliminary ruling. In this sense, AG Cosmas in *Annibaldi* noted that *"[t]he extent to which the Member States are bound by fundamental rights under Community law matches the extent of the jurisdiction of the Court to give a ruling on questions of interpretation of those rights"*.[1101]

Generally, the connection with Community law may be established with the existence of "extraneous factors", e.g. the existence of a cross-border element. AG La Pergola in *Kremzow* pinpointed that *"the interpretative task imposed on the Community by its recognition of fundamental rights came into play and may be carried out only in regard to provisions connected with Community law, of which the Court is the supreme interpreter of the Treaty"*.[1102] Similarly, AG Gulmann in *Bostock* stated that "is the domestic legislation under review so closely connected with Community law as to fall within its scope".[1103] Where the connection (or link) with Community law is not established, the national measures are said to pertain to an internal situation, which falls within the exclusive competence of the Member States. Subsequently, the ECJ is not competent to review the national measure with the general principles of Community law. To quote AG Léger:

> "The Court's position in regard to internal situations is justified by the need to confine application of the Treaty provisions or the rules of secondary law resulting therefrom to situations involving certain extraneous factors, in particular situations

[1099] Beal, "Sauce for the Goose, Sauce for the Cow, Pig and Fish", ICCLR 2002, pp.192-201, at p.195, "[e]vidently, there must be some nexus between the national measure and Community law in order for the general principles (as a creature of Community law) to apply. However, it is not clear how strong the nexus must be […] It is perhaps not surprising that the national courts have found it difficult to define a clear test for determining whether a particular domestic measure falls within the scope of Community law do as to be the subject to the application of the fundamental rights doctrine".

[1100] *Ibid,* at p.195, "[g]iven the supremacy of Community law, it must ultimately be the ECJ that determines whether the subject matter of a particular dispute or decision falls within the scope of Community law. The difficulty is that there has been no bright line test set down by the ECJ".

[1101] Case C-309/96 *Daniele Annibaldi* [1997] ECR I-7493.

[1102] Case-299/95 *Kremzow* [1997] ECR I-2405.

[1103] *Bostock, supra n.1041.*

> characterised by the existence of cross-border elements… Where such elements are not present, Community law can no longer be applicable to situations which, in that case, fall within the competence of the Member States alone".[1104]

Uecker and Jacquet[1105] is one of the most often cited cases delivered by the Court and is in line with its established case-law which provides that certain provisions of Community law cannot be applied to cases, which have no factor linking them with any of the situations governed by Community law and all elements of which are purely internal to a single Member State. The Court there had to decide whether third-country nationals married[1106] to Community workers who have not exercised their free movement rights under the EC Treaty enjoy the same rights as the spouses of Community workers who have. The ECJ found that the matter constituted an internal situation that falls outside the scope of Community law. In *Uecker and Jacquet* the situation was extremely clear. However, this is not always the case. It may, for instance, happen that the Opinion of the AG differs from the ruling of the Court in the determination of the scope of Community law. Accordingly, the *Grogan* case offers a piquant example.

The Society of Protection of the Unborn Child (SPUC) sought to obtain an injunction prohibiting the distribution of information, by students associations, relating to the identity and location of abortion clinics in the United Kingdom, on the basis of Article 40.3 of the Irish Constitution.[1107] In the preliminary ruling made by the High Court, the student unions contended that Article 59 EC prevented the application of the Irish constitution in such a way as to impede the free movement of services. In addition, the defendant (the student union) argued that the prohibition to distribute information about the identity and location of clinics in the United Kingdom, where voluntary termination of pregnancy is legal, constituted a breach of the freedom of expression enshrined in Article 10(1) of the European Convention of Human Rights. SPUC argued that the matter fell outside the scope of Community law and that consequently the ECJ should refuse to give a ruling. It maintained, firstly, that the defendants did not distribute the information in the context of any economic activity and secondly, that the "element of extraneity" was not present, i.e. that the provision of information took place merely in Ireland and involved no other Member State. The Court found that abortion could be assimilated to a service and ruled that the prohibition to provide information by the students associations was not contrary to Community law, where the clinics were not involved in the distribution

[1104] *Ibid*., AG Léger in *Kaur*, paras. 24-25.
[1105] Joined Cases C-64 and 65/96 *Uecker* and *Jacquet* [1997] ECR.I-3171.
[1106] Mrs Uecker is a Norwegian national who has worked as a teacher of the Norwegian language, mainly in the Federal Republic of Germany. Her husband is a German national and nothing in the order for reference would indicate that he has worked outside that Member State at any material time. Mrs Jacquet is a Russian national, who has been teaching the Russian language in different capacities at Bochum University her husband is a German national.
[1107] C-159/90 *Grogan* [1991] ECR I-4685.

of the information.[1108] According to the Court, such a prohibition lies outside the scope of Community law [1109] as there is no economic connection between the advertiser and the provider of the service.[1110]

Also, the famous Opinion of AG Van Gerven in *Grogan* offers a stimulating field of discussion. Interestingly, the Opinion was given some days before the *ERT* judgment. The discussion to assert the competence of the ECJ on the acts of Member States derogating from one of the four freedoms was thus at its peak. After referring to the previous jurisprudence, e.g. *Cinéthèque, Demirel* and *Wachauf* in order to appreciate the nature and extent of the "scope of Community law", the AG construed the following question:

> "The question now is: must it not be assumed that a national rule which in order to show that it is compatible with Community law has to rely on legal concepts, such as imperative requirement of public interest or public policy falls within the scope of Community law? Admittedly, those concepts may be defined to a considerable degree by the Member States. Yet that does not mean that they should not be justified and delimited in a uniform manner for the whole Community under Community law and therefore taking into account the general principles in regard to fundamental rights and freedoms which form an integral part of Community law and the observance of which the Court is to ensure".[1111]

Van Gerven pinpointed that a national rule having "effects in an area covered by Community law (article 59 EEC Treaty)…no longer falls within the exclusive jurisdiction of the national legislature". AG Van Gerven considered that the said prohibition should be appreciated in the light of Article 10 ECHR, and found that the prohibition was falling under Article 10(1), but was justified by paragraph 2. The State has a wide margin of appreciation in this area[1112] and AG Van Gerven found the restriction to be proportionate.[1113] The *Grogan* case is instructive in the sense that it underlines the main difficulty in the determination of the "scope of Community law", which lies in the very appreciation of this sentence. The "scope of Community Law" has either a broad or a narrow meaning, depending on the evaluation endeavoured by the European Court of Justice. Already at the national level, the Supreme Court did not find that the case at issue was falling under the

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[1108] *Ibid.,* para. 32.
[1109] *Ibid.,* para. 31.
[1110] *Ibid.*, "[a]s regards, first, the provisions of Article 59 of the Treaty which prohibited any restriction on the freedom to supply services, it was apparent from the facts of the case that the link between the activity of the student associations of which Mr Grogan and the other defendants were officers and medical terminations of pregnancies carried out in clinics in another Member State was too tenuous for the prohibition on the distribution of information to be capable of being regarded as a restriction within the meaning of Article 59 of the Treaty."
[1111] *Ibid.,* AG Van Gerven in *Grogan*, para. 31.
[1112] *Ibid.,* para. 34.
[1113] *See* AG Fennelly in *Germany* v. *Council and EP*, "Tobacco Directive case" (2000), referring to AG *Van Gerven* in *Grogan,* para. 173.

scope of Community law,[1114] whereas the High Court referred the case to the ECJ.[1115] The AG, in contrast to the ECJ, asserted that the national measure fell within the framework of Community law. Finally, it may be said that whether a human rights situation falls inside or outside the scope of Community law is not crystal-clear. In the circumstances of *Grogan,* the recognition of the prohibition as falling under the scope of Community law would have led the Court to a painstaking analysis of the right to life of the unborn versus the freedom of expression. The Court, as a constitutional adjudicator, would have had to assess the national measure (derogating from EC law) in the light of the EC principle of proportionality. The *Grogan* case may be seen as a political case - which could have had serious consequences on the assessment of common European values - where the ECJ adopted a position of judicial self-restraint or, to adopt the terminology used by Arnull, of "judicial pusillanimity".[1116] In the words of O'Leary, *"[t]his judicial restraint is legally and logically acceptable, particularly given the delicate and controversial nature of the issue. What is not acceptable is the legal method employed by the Court and its failure substantively to dispose of the case".*[1117]

Finally, an important question remains to be answered. Can it be said that certain matters fall *per se* within the exclusive competence of the Member States? For instance, it may be argued that matters like criminal law,[1118] criminal procedure[1119] and civil procedure[1120] fall automatically outside the scope of Community law. In this sense, Article 35(5) TEU states that *"the Court of Justice shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security."* It may be said that the wording of this Article renders the ECJ incompetent to submit the acts of the Member States to "fundamental rights review".

[1114] *SPUC* v. *Open Door Counselling* [1988] IRLM 19 Supreme Court. In contrast to the *Grogan* case, this concerned the provision of assistance to women in obtaining abortions, either by giving them information on abortion services in the UK or by helping them with the travel arrangements.

[1115] For a discussion on *SPUC* v. *Open Door Counselling*, *see* Clapham, *Human Rights and the European Community: a Critical Overview,* Nomos, 1991, at pp.32-33, *see also* Binder, "The European Court of Justice and the Protection of Fundamental Rights in the European Community: New Developments and Future Possibilities in Expanding Fundamental Rights Review to Member State Action", Harvard Jean Monnet Working Paper No 4/95, http://www.jeanmonnetprogram.org/papers/950417-18.html.

[1116] Arnull, *The European Union and its Court of Justice*, Oxford, 1999, at p. 456.

[1117] O'Leary, "Freedom of Establishment and Freedom to Provide Services: The Court as a Reluctant Constitutional Adjudicator: An Examination of the Abortion Information Case", ELR 1992, pp.138-157, at p.156.

[1118] Case-299/95 *Kremzow* [1997] ECR I-2405.

[1119] Case 186/87 *Cowan* [1989] ECR 195.

[1120] Cases C-43/95 *Data Delecta and Forsberg* [1996] ECR I-4661.

Nevertheless, such reasoning does not seem to me wholly convincing. In *Cowan,* the French government submitted that compensation is not subject to the prohibition of discrimination because it falls within the law of criminal procedure, which is not included within the scope of the Treaty.[1121] The Court clearly held that,

> "although in principle criminal legislation and the rules of criminal procedure, among which the national provision in issue is to be found, are matters for which the Member States are responsible, the Court has consistently held (see inter alia the judgment of 11 November 1981 in Case 203/80 Casati [1981] ECR 2595) that Community law sets certain limits to their power . Such legislative provisions may not discriminate against persons to whom Community law gives the right to equal treatment or restrict the fundamental freedoms guaranteed by Community law".[1122]

Similar to the reasoning used by the ECJ in Cowan, AG la Pergola in Kremzow considered that, "the Community legal order is not all-embracing and hence, generally, it does not interfere with the criminal law of the Member States".[1123] By analysing this sentence, two comments can be realised. First, there are certain areas (such as criminal law), which presumably fall outside the scope of Community law. Second, the AG, by using the term "generally", considers the existence of exceptions. In other words, criminal law may fall within the scope of Community law. This occurs when the national legislation in the fields of penal or procedural law discriminates against a national from another Member State. Another example can be drawn from Kreil, which is of interest, as it concerns the security policy of a Member State.[1124] It demonstrates also the extension of the scope of Community law. Obviously, the scope is clarified through the litigation brought before the ECJ for a preliminary ruling.

The German government argued that Community law does not in principle govern matters of defence, which form part of the field of common foreign and security policy and which remain within the Member States' sphere of sovereignty.[1125] The Court, first, remarked that even if the Member States have to adopt appropriate measures to ensure their internal and external security, to take decisions on the organization of their armed forces, these measures does not entirely fall outside the scope of Community law.[1126] Finally, it held that:

> "… only articles in which the Treaty provides for derogations applicable in situations which may affect public security are Articles 36, 48, 56, 223 (now, after amendment, Articles 30 EC, 39 EC, 46 EC and 296 EC) and 224 (now Article 297 EC), which deal with exceptional and clearly defined cases. It is not possible to infer from those articles that there is inherent in the Treaty a general exception excluding from the scope of Community law all measures taken for reasons of public security. To recognise the existence of such an exception, regardless of the

[1121] Case 186/87 *Cowan* [1989] ECR 195, para. 18.
[1122] *Ibid.,* para. 19.
[1123] AG La Pergola in Case-299/95 *Kremzow* [1997] ECR I-2405, para. 7.
[1124] Case C-285/98 *Kreil* [2000] ECR I-69.
[1125] *Ibid.,* para. 12.
[1126] *Ibid.,* para. 15.

> specific requirements laid down by the Treaty, might impair the binding nature of Community law and its uniform application (see, to that effect, Case Sirdar, cited above, paragraph 16)".[1127]

The Court particularly stressed that the derogations do not apply to social provisions of the Treaty, of which the principle of equal treatment between men and women forms part. The Court ruled that the said principle was of general application and that the Directive was applicable to employment in the public service. In conclusion, it held that the Directive was applicable in situations such as that in question in the main proceedings.[1128]

In addition, *Maurin*[1129] and *Kremzow*[1130] give some clarifications regarding the extent of the scope of Community law or, one should say, provide some limitations as to the scope of Community law. Indeed, the scope of Community law is defined negatively. A judgment issued by the Court of Human Rights in 1993 found that Dr Kremzow's right to defend himself within the meaning of Article 6(1) and (3)(c) of the European Convention on Human Rights had been infringed. According to that decision, Austria committed a violation in so far as the national authorities had failed to allow Dr Kremzow the possibility to defend himself personally on appeal (Dr Kremzow was charged with murder and found guilty at first instance).[1131] The appellant brought proceedings before the national court with a claim for compensation for the damage he suffered on account of his unlawful detention by the Austrian authorities.[1132] According to Dr Kremzow, such a detention impeded him from exercising his freedom of movement under the EC Treaty.[1133] The AG considered that such an argument could not be accepted because it did not fall under the scope of Community law.[1134] There was no factor connecting it with Community

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[1127] *Ibid.,* para. 16.
[1128] *Ibid.,* paras. 18-19.
[1129] Case C-144/95 *Maurin* [1996] ECR I-2909.
[1130] Case-299/95 *Kremzow* [1997] ECR I-2405.
[1131] *Ibid.,* AG La Pergola in *Kremzow*, para. 2.
[1132] *Ibid.,* para. 3.
[1133] *Ibid., Kremzow*, para. 13, "Mr Kremzow argues that the Court has jurisdiction to answer the questions referred for a preliminary ruling, inter alia, because he is a citizen of the European Union and, as such, enjoys the right to freedom of movement for persons set forth in Article 8a of the EC Treaty. Since any citizen is entitled to move freely in the territory of the Member States without any specific intention to reside, a State which infringes that fundamental right guaranteed by Community law by executing an unlawful penalty of imprisonment must be held liable in damages by virtue of Community law".
[1134] *Ibid.,* AG La Pergola in *Kremzow,* para. 7, "…[t]hat argument cannot be accepted because it confuses the criminal sanction imposed by national law on persons committing the offence in question with the provision providing for the crime, which, as I have already observed, has no features connecting it with Community law. Moreover, were the appellant's reasoning to be followed, all sanctions consisting of terms of imprisonment or detention laid down by the legislation of a Member State would automatically fall within the field of application of Community law in so far as they deprived the accused or the sentenced person of his personal liberty, on the ground that they precluded, or at any event limited, enjoyment of the rights and

law. The ECJ came to the same conclusion, using a two-fold reasoning. [1135] This reasoning is reflected by paragraphs 16 and 17 of the judgment:

> "The appellant in the main proceedings is an Austrian national whose situation is not connected in any way with any of the situations contemplated by the Treaty provisions on freedom of movement for persons. Whilst any deprivation of liberty may impede the person concerned from exercising his right to free movement, the Court has held that a purely hypothetical prospect of exercising that right does not establish a sufficient connection with Community law to justify the application of Community provisions (see in particular to this effect Case 180/83 Moser [1984] ECR 2539, paragraph 18).
>
> Moreover, Mr Kremzow was sentenced for murder and for illegal possession of a firearm under provisions of national law which were not designed to secure compliance with rules of Community law (see, in particular, Case C-144/95 Maurin [1996] ECR I-2909, paragraph 12)".

First, the insufficient connection with Community law is due to the hypothetical exercise of EC rights. In fact, the plaintiff invoked freedom of movement, but did not try to exercise it effectively.[1136] Second, the provisions of national law (on murder and illegal possession of firearms) were not designed to ensure compliance with rules of Community law.[1137] Precisely like in *Maurin*, there was no link with any secondary legislation. In the cited case, concerning a criminal proceeding against Maurin for having sold food after the date of expiry, the defendant argued that there were certain procedural irregularities amounting to a breach of his rights of defence as protected by the European Convention on Human Rights. The French government alleged that the French legislation on the labelling of foodstuff fell outside the scope of Community law. AG La Pergola opined that the matter should fall under the scope of Community law if the Court were to undertake an assessment of the criteria of Labelling Directive 79/112. However, that was not the situation in this case. Indeed, there was no EC secondary legislation on the sale of product after the date of expiry. The matter was not regulated by Community law and consequently fell outside its scope. Hence, the ECJ did not have any jurisdiction to determine whether or not the irregularities were contrary to the EC rights of defence.

Finally, in *Kremzow* and *Maurin*, the competence of the Court is fixed negatively. If the national law falls outside the scope of Community law, the ECJ does not furnish the elements of interpretation to the national judge to appreciate the conformity of the legislation with the fundamental rights (resulting particularly from the ECHR) as defined and protected by the ECJ. Interestingly, one may remark the clear match between the scope of Community law and the jurisdiction of the ECJ in preliminary rulings.

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facilities which Community law confers on the person concerned. I cannot see what foundation that argument can have".

[1135] *Ibid.,* para. 18.

[1136] *Ibid.,* para. 16.

[1137] *Ibid.,* para. 17.

The final observation is that the Court always considers whether material competence in the area covered by the national legislation pertains to the Member States or the Community. A clear example of such an approach is afforded by the *Annibaldi* case,[1138] in which a regional law (Article 1 of Lazio Regional law No 22 of 20 June 1996), that establishes a nature and archaeological park in order to protect and enhance the value of the environment and the cultural heritage of the area concerned, was found to fall outside the scope of Community law.[1139] Mr Annibaldi claimed that the regional law was contrary, *inter alia*, to the general principles of law - more particularly to the right of property, the right to carry on an economic activity and to the principle of equal treatment leading in its effects to an expropriation without compensation.[1140] The applicant argued that the national measures affected the organisation of the common agricultural market and thus fell into the scope of Community law. Firstly, the ECJ noted that that the regional law was not intended to implement a provision of Community law.[1141] Secondly, it stressed that even if the Regional law may affect indirectly the common organisation of the market, the Italian law establishing a nature and archaeological park was aimed at the protection and enhancement of the value of the environment and the cultural heritage of the area concerned. The Regional Law pursued objectives other than those covered by the common agricultural policy.[1142] Finally, it stated that given the absence of specific Community rules on expropriation and the fact that the measures relating to the common organization of the agricultural markets have no effect on systems of agricultural property ownership, it follows that the Regional Law concerns an area which falls within the competence of the Member States.[1143] It is sometimes difficult to draw a clear dividing line between the Member States and Community competence. As rightly put by Craig and De Búrca,

> "questions nonetheless remain about the exact boundaries of the sphere of action within which Member States can be held to account by the ECJ for their observance of human rights and general principles of law. Indeed, this uncertainty over the scope of applicability of Community fundamental rights to the Member State action is probably no more than a mirror of the more general lack of clarity over the boundaries of Community jurisdiction and the scope of its competence in relation to Member State competence".[1144]

[1138] Case C-309/96 *Daniele Annibaldi* [1997] ECR I-7493.

[1139] *Ibid.,* paras 3 and 24, "[a]ccordingly, as Community law stands at present, national legislation such as the Regional Law, which establishes a nature and archaeological park in order to protect and enhance the value of the environment and the cultural heritage of the area concerned, applies to a situation which does not fall within the scope of Community law".

[1140] *Ibid.,* para. 8.

[1141] *Ibid.,* para. 21.

[1142] *Ibid.,* para. 22.

[1143] *Ibid.,* para. 23.

[1144] Craig and de Búrca, *EU Law*, Oxford, 1998, at p.331, *See also* Demetriou, "Using Human Rights Through European Community Law", EHHLR 1999, pp. 484-495.

6.2.2. Extending the Scope of Community law: From Homo Economicus to Civis Europeus Sum?

This part analyses the ever-increasing scope of Community law through Article 12 EC [ex Article 6 EC, ex Article 7 EEC]. Article 12 EC states that, *"[w]ithin the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality should be prohibited"*. This constitutes a clear example of EC fundamental rights arising at the national level. It seems to me that this area is of interest, since the related case-law has, in recent years, undertaken a drastic evolution. It is argued that this development goes in the sense of a substantial extension of the scope of Community law. In addition, this evolution is closely connected to the concept of European citizenship. In the words of AG Jacobs in Bickel, *"Freedom from discrimination on grounds of nationality is the most fundamental right conferred by the Treaty and must be seen as a basic ingredient of Union citizenship*".[1145] At the end of the day, one may speak here of the emerging rights of social citizenship. In so doing, we may underline the fundamental role of the principle of non-discrimination in the field of social policy.[1146] Conversely, it is worth noticing that until the mid-eighties, the Court always stressed that Article 12 EC should be invoked in conjunction with an explicit provision of the EC Treaty concerning free movement. In a similar vein, AG Léger emphasised *"that case law developed in the course of disputes involving the principle of non-discrimination on grounds of nationality set out in the first paragraph of Article 6 of the E.C. Treaty (now, after amendment, first paragraph of Article 12 E.C.), together with the articles guaranteeing its application in specific areas, such as free movement of persons or services"*.[1147] To borrow the words of Toth, it may be said that Article 12 EC protects the *"market citizen not the human being"*.[1148]

Article 39 EC offers an example of a special provision, which complements Article 12 EC. Article 39(2) provides that "the free movement of workers shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment". Interestingly, Article 39(4) provides an explicit derogation from the principle of non-discrimination in the area of public services.[1149] This Treaty exception has obviously been interpreted narrowly by the ECJ.[1150] However,

[1145] AG Jacobs in Case C-274/96 *Bickel and Franz* [1998] ECR I-7637, para. 24.
[1146] Bell, "Anti-Discrimination Law and the European Union", Oxford, 2002, at p.32.
[1147] AG Léger in *Kaur,supra n.1097,* para. 22.
[1148] Toth, "Human Rights as General Principles of Law, Past and Future", in Bernitz and Nergelius (eds.) "General Principles of European Community Law", Kluwer, 2000, pp.73-92, at p.85.
[1149] Article 39(4) states that, "the provisions of this Article shall not apply to employment in the public services."
[1150] Case C-283/99 *Commission* v. *Italy* [2001] ECR I-4363. A nationality requirement for primary school teachers was found to fall outside the ambit of the exception.

such a provision allows a Member State to justify (by exception) a situation of direct discrimination. Another situation, in which it is allowed to derogate from the principle of non-discrimination, is exemplified by the recourse to objective justifications in the event of indirect discrimination.[1151] Nevertheless, the domestic rules must respect the principle of proportionality. In this sense, AG Jacobs has stated that, "it is open to Member States to show that advantages reserved to nationals or to residents are objectively justified on grounds unrelated to nationality. It is however increasingly difficult to see why Community law should accept any type of difference in treatment which is based purely on nationality, except in so far as the essential characteristics of nationality are at stake, such as access to a limited range of posts in the public service, or the exercise of certain political rights".[1152]

a) From *Homo Economicus*…

The early *Cowan* jurisprudence illustrates perfectly the link between Article 12 EC [ex Article 7 EEC] and the free movement provisions.[1153] *In casu*, an English tourist was attacked in a French subway by hoodlums. The victim was severely injured, but could not get compensation, as the muggers were not caught (whereby their responsibility to pay compensation could not be engaged). The French *code de procédure pénale* established a fund of compensation for the victims of such situations. However, the fund was only accessible to French nationals. More precisely, according to Article 706/15 of the French Code of Criminal Procedure, one of the requirements (for non-nationals) to benefit from such a provision must be either to hold a resident permit or to be a national of a State, which had entered into a special agreement with France.[1154] Mr Cowan did not fulfill these requirements. He turned to the commission *d'indemnisation des victimes d'infractions* (a commission attached to the Tribunal de Grande Instance), who asked the ECJ through a 177 proceeding [new Article 234 EC], if the French legislation was compatible with Article 7 EEC [new Article 12 EC]. The ECJ considered that Cowan, as a tourist, was a recipient of services. The freedom of services includes both the freedoms to provide and receive services. Consequently, Cowan fell under the scope of application of Community law and was entitled to the protection against discrimination enshrined at this time in Article 7 EEC. According to AG Lenz,

> "[i]n its judgement in Case 63/86,[1155] the Court of Justice described the content of Articles 52 and 59 of the Treaty as a manifestation of the principle of equal

[1151] For instance, the promotion of the official language of the State.
[1152] AG Jacobs in *Bickel and Franz, supra n.1145*, para. 27.
[1153] Case 186/87 *Cowan* [1989] ECR 195.
[1154] *Ibid.,* para 10, "[b]y prohibiting "any discrimination on grounds of nationality" Article 7 of the Treaty requires that persons in a situation governed by Community law be placed on a completely equal footing with nationals of the Member State. In so far as this principle is applicable it therefore precludes a Member State from making the grant of a right to such a person subject to the condition that he reside on the territory of that State - that condition is not imposed on the State' s own nationals".
[1155] Case 63/86 *Commission* v. *Italy* [1988] ECR 29, paras. 12-13.

> treatment under Article 7; it thus comprises a requirement of equal treatment for Community citizens who carry on activities as self-employed persons and a prohibition of discrimination on the basis of nationality which constitutes an obstacle to access to or the exercise of such activities".[1156]

The ECJ followed the AG Opinion[1157] and responded that,

> "the prohibition of discrimination laid down in particular in Article 7 of the EEC Treaty must be interpreted as meaning that in respect of persons whose freedom to travel to a Member State, in particular as recipients of services, is guaranteed by Community law that State may not make the award of State compensation for harm caused in that State to the victim of an assault resulting in physical injury subject to the condition that he hold a residence permit or be a national of a country which has entered into a reciprocal agreement with that Member State".[1158]

The Articles concerning the exercise of the economic freedoms (such as the freedom of services) read in combination with Article 12 EC allow the application of the general principle of equal treatment in various ranges of specific situations, even in the field of criminal or procedural law. However, such a conclusion does not entail a transfer of Member States' competence in criminal or procedural matters to the Community. It solely asserts the fact that, as the Court noted in *Cowan*, Member States must exercise their powers in those areas in conformity with the fundamental principle of equal treatment.[1159]

The Court has always sought to establish a link, even indirect, with intra-Community trade. That appears to be the case in *Phil Collins*,[1160] which concerned copyright and related rights, and in *Data Delecta* and *Hayes*,[1161] in the context of rules on security for costs in civil proceedings. However, it cannot be concluded from this that the Court has rejected a broader view of the scope of Article 12.[1162] Conversely, it may be argued that the ECJ took a rather wide approach in defining the scope of Community law in the *Phil Collins* case.[1163] The artist sought action against the unauthorised recording of concerts and the distribution of such recordings. However, the German copyright act did not offer remedies for non-German nationals. In a preliminary ruling, the ECJ held that the national legislation

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[1156] AG Lenz in *Cowan, supra n.1153,* para. 42.
[1157] *Ibid., Cowan*, para. 14, "[u]nder Article 7 of the Treaty the prohibition of discrimination applies "within the scope of application of this Treaty" and "without prejudice to any special provisions contained therein". This latter expression refers particularly to other provisions of the Treaty in which the application of the general principle set out in that article is given concrete form in respect of specific situations. Examples of that are the provisions concerning free movement of workers, the right of establishment and the freedom to provide services".
[1158] *Ibid., Cowan*, para. 20.
[1159] AG Jacobs in Case C-274/96 *Bickel and Franz* [1998] ECR I-7637, para. 25.
[1160] Case C-92/92 and C-326/92 *Phil Collins* [1993] ECR I-5145.
[1161] Cases C-43/95 *Data Delecta and Forsberg* [1996] ECR I-4661 and C-323/95 *Hayes* v. *Kronenberger* [1997] ECR I-1711.
[1162] AG Jacobs in *Bickel* and *Franz*, *supra n.1159,* para. 26.
[1163] Case C-92/92 and C-326/92 *Phil Collins* [1993] ECR I-5145.

was in breach of Article 12 EC, according to which there shall be no discrimination on grounds of nationality within the scope of application of the Treaty. The ECJ held that the exploitation of copyrights affects potentially the trade in goods and services (Articles 28 and 49 EC), but also the competition rules (Articles 81 and 82 EC). Consequently, such rights fall within the scope of application of the Treaty and are subject to the application of Article 12 EC, without any need to bind them to a particular Treaty provision.[1164] A purely domestic measure might sway the functioning of the Common market and as a result be held to be within the scope of application of the Treaty. By falling into the purview of Community law, it is thus subject to the application of the general principle of non-discrimination on grounds of nationality.[1165]

Similarly, in *Data Delecta*, in a preliminary reference from the *Högsta Domstolen* in Sweden, the appellant (an UK company) claimed that the rules of domestic civil procedures were discriminatory. Indeed, according to the Swedish legislation, a foreign legal person had to provide a security for future costs in order to bring proceedings against a company or one of its nationals. The Swedish government argued that such a measure was required to prevent a foreign plaintiff from being able to bring legal proceedings without running any financial risk in the event that he lost the case.[1166] The Court of Justice did not accept the argument[1167] and ruled that a provision which compels legal persons established in another Member State to furnish security for costs falls within the scope of Community law.[1168] The reasoning of the Court of Justice was as followed:

> "It is settled case-law that, whilst, in the absence of Community legislation, it is for each Member State's legal system to lay down the detailed procedural rules governing legal proceedings for fully safeguarding the rights which individuals derive from Community law, that law nevertheless imposes limits on that competence (Joined Cases C-6/90 and C-9/90 Francovich and Others [1991] ECR I-5357, paragraph 42). Such legislative provisions may not discriminate against persons to whom Community law gives the right to equal treatment or restrict the fundamental freedoms guaranteed by Community law (Case 186/87 Cowan v Trésor Public [1989] ECR 195, paragraph 19). …It must therefore be held that a rule of domestic civil procedure, such as the one at issue in the main proceedings, falls within the scope of the Treaty within the meaning of the first paragraph of Article 6

[1164] *Ibid.*, para. 27, "[i]t follows that copyright and related rights, which by reason in particular of their effects on intra-Community trade in goods and services, fall within the scope of application of the Treaty, are necessarily subject to the general principle of non-discrimination laid down by the first paragraph of Article 7 of the Treaty, without there even being any need to connect them with the specific provisions of Articles 30, 36, 59 and 66 of the Treaty".
[1165] *Ibid.,* para. 28, "[a]ccordingly, it should be stated in reply to the question put to the Court that copyright and related rights fall within the scope of application of the Treaty within the meaning of the first paragraph of Article 7 the general principle of non-discrimination laid down by that article therefore applies to those rights".
[1166] *Data Delecta, supra n.1161*, para. 18.
[1167] *Ibid.,* para. 20.
[1168] *Ibid.,* para. 11.

> and is subject to the general principle of non-discrimination laid down by that article in so far as it has an effect, even though indirect, on trade in goods and services between Member States. Such an effect is liable to arise in particular where security for costs is required where proceedings are brought to recover payment for the supply of goods".[1169]

Finally, the reasoning, in *Phil Collins* and *Data Delecta*, is clearly more extensive than the one in the *Cowan* case. Indeed, the ECJ does not require linking the anti-discrimination provision with an explicit free movement provision.[1170] Article 12 may be invoked *per se*, if it can be demonstrated that the national measure has the potential to effect trade in goods and services. The scope of Community law has been further extended by the judgment in *Martínez Sala.*[1171] For the first time, the ECJ there expressly linked Article 12 EC with the provisions on EU citizenship. In that case, it may be said that the ECJ assessed the principle of non-discrimination on grounds of nationality as "*as a basic ingredient of Union citizenship*".[1172]

b)…To *Civis Europeus Sum*

Before analysing the *Martínez Sala* case, it seems necessary to examine the reasoning of AG Jacobs in *Konstantinidis*.[1173] Indeed, in the early nineties, the Opinion of AG Jacobs provides an enticing example of the potential scope of the European citizen status. This Opinion formed an attempt to extend the jurisdiction of the Court (and thus the scope of Community law) by establishing a connection between European citizenship and the fundamental rights. Konstantinidis was a Greek national established in Germany and working as a self-employed masseur and assistant hydrotherapist. He objected that the transcription of his name into Roman characters in the register of marriage by the German authorities was inappropriate. According to the AG:

> "a Community national who goes to another Member States as a worker or self-employed person under Articles 48,52 or 59 of the Treaty is entitled not just to pursue his trade or profession and to enjoy the same living and working conditions as nationals of the host state; he is in addition entitled to assume that, wherever he goes to earn his living in the European Community, he will be treated in accordance with a common code of fundamental values, in particular those laid down in the European Convention on Human Rights. In other words, he is entitled to say civis europeus sum and to invoke that status in order to oppose any violation of his fundamental rights".[1174]

[1169] *Ibid.,* paras. 12-15.
[1170] *See e.g.,* Case C-302/02 *Nils Laurin Effing* [2005] n.y.r., paras. 49-50.
[1171] Case C-85/96, *Martínez Sala* [1998] ECR I-2691. *See also*, for an extensive interpretation of the scope of application of the principle of non-discrimination, AG Madudro in Case C-160/03 *Spain* v. *Eurojust* [2005] n.y.r., para. 32.
[1172] AG Jacobs, in *Bickel and Franz, supra n.1159*, para. 24.
[1173] Case C-168/91 *Konstantinidis* [1993] ECR I-1191.
[1174] *Ibid.,* AG Jacobs in *Konstantinidis,* para. 46.

A Community citizen going to another Member State as a worker or self-employed person should thus be entitled to say *civis europeus sum*, i.e. any national measure infringing a fundamental right, even if not related specifically to his work, would constitute a violation of EC law. Consequently, the national measure would be incompatible with EC law. It has been argued that this Opinion implies that whenever a European citizen is lawfully present in the territory of another Member State and exercising Community rights, he will be entitled to protection of his fundamental rights as defined by Community law.[1175] The European Convention on Human Rights represents an essential element of the fundamental rights protection. The ECHR may go further than the protection afforded at the national level. Accordingly, the EC national can invoke such a potential higher standard so as to object to any human rights violation. The approach of AG Jacobs has been criticised notably by AG Gulmann in *Bostcok,* who qualified such a view as *"too far-reaching"*.[1176]

Admittedly, the reasoning of AG Jacobs may be compared to the type of federal review used in the United States. In this sense, it may be contemplated that there exists a possibility for the European citizen (exercising free movement rights) to challenge any national measure irrespective of the division of competence between the Member States and the Community (for example in criminal law). A similar situation exists in the United States, where State action can be reviewed under federal law, even in fields where the federal government has no competence. The difference remains that the EC system of review, in contrast to the US federal review, is subject to the exercise of one of the free movement provisions.[1177]

By contrast, the Court's reasoning was less sweeping, since it did not follow the AG's approach by not making any reference to fundamental rights. Instead, it relied on its case-law which permitted self-employed individuals to establish themselves in the Member States. In this sense, it ruled that the national rules on transcription from

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[1175] Craig and de Búrca, *EU law*, *supra n.1144,* at p.329, "implicit in the Advocate General's reasoning is the argument that such a failure might dissuade the national from exercising Community rights of movement, so that whenever an EC national is lawfully present in another Member State and exercising Community rights, he or she should be entitled under Community law to protection against any infringement of his or her human rights regardless of whether that protection is provided for nationals of the Member States".

[1176] AG Gulmann in *Bostock, supra n.1041*, fn. 11, "in his Opinion in Case C-168/91 *Konstantinidis,* Mr Advocate General Jacobs expresses the view that an employed person or a self-employed person who relies on Articles 48, 52 and 59 of the Treaty in connection with employment or an occupation in another Member State is entitled to assume that, wherever he goes to earn his living in the European Community, he will be treated in accordance with a common code of fundamental values, in particular those laid down in the European Convention on Human Rights (paragraph 46). In its judgment in that case on 30 March 1993 the Court did not adopt a view on that suggestion which, in my opinion, is too far reaching".

[1177] Binder, "The European Court of Justice and the Protection of Fundamental Rights in the European Community: New Developments and Future Possibilities in Expending Fundamental Rights Review to Member State Action", Harvard Jean Monnet Working Paper No 4/95, http://www.jeanmonnetprogram.org/papers/950430.html.

Hellenic to Roman characters were *"incompatible with Article 52 of the Treaty only in so far as their application causes a Greek national such a degree of inconvenience as in fact to interfere with his freedom to exercise the right of establishment enshrined in that Article"*.[1178] The limited scope of the judgment, restricted to the analysis of the economic freedoms, demonstrates the prudence of the ECJ in extending the scope of the national measures subject to EC fundamental rights review.

In the wake of *Konstantinidis,* the importance of the prohibition of discrimination on grounds of nationality has increased with the insertion of Article 8 EC (new Articles 17 and 18) into the Maastricht Treaty. According to Article 8(2) (new Article 17), "citizens of the Union shall enjoy the rights conferred by the Treaty and shall be subject to the duties imposed thereby". In addition, Article 8a (new Article 18) states that, "every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect". In the words of AG La Pergola*,*

> "[t]he creation of Union citizenship unquestionably affects the scope of the Treaty, and it does so in two ways. First of all, a new status has been conferred on the individual, a new individual legal standing in addition to that already provided for, so that nationality as a discriminatory factor ceases to be relevant or, more accurately, is prohibited. Secondly, Article 8a of the Treaty attaches to the legal status of Union citizen the right to move to and reside in any Member State".[1179]

Mrs Martínez Sala,[1180] is a Spanish national who has lived in Germany since 1968. She had various intermittent jobs there between 1976 and 1986 and was employed again from 12 September 1989 to 24 October 1989. Since then she received social assistance under the Federal Social Welfare Law. Until 19 May 1984, Mrs Martínez Sala obtained residence permits, which ran more or less without interruption, from the various competent authorities. Thereafter, she obtained only documents certifying that the extension of her residence permit had been applied for.[1181] She applied for a child-raising allowance during the period in which she did not have a residence permit. The national authority (*Freistaat Bayern*) rejected her application on the ground that she did not have German nationality, a residence entitlement or a residence permit. According to the *BErzGG,* the law provides that, unlike German nationals, a non-national, including a national of another Member States must be in possession of a certain type of residence permit in order to receive the benefit in question. Then, the Social Court dismissed an action brought by Mrs Martínez Sala against that decision on the ground that she was not in possession of a residence permit. On appeal, the referring court asked, *inter alia*, if it was compatible with the law of the European Union for the *BErzGG* to require possession of a formal

[1178] Case C-168/91 *Konstantinidis* [1993] ECR I-1191.
[1179] *Infra,* AG La Pergola, in *Martínez Sala,* para. 20.
[1180] Case C-85/96 *Martínez Sala* [1998] ECR I-2691.
[1181] *Ibid.,* paras. 13-14.

residence permit for the grant of child raising allowance to nationals of a Member State, even though they are permitted to reside in Germany. The German Government, while accepting that the condition imposed by the *BErzGG* constituted unequal treatment, argued that the facts of the case did not fall within either the scope *ratione materiae* or the scope *ratione personae* of the Treaty, so that the appellant could not invoke Article 6 EC.[1182] By contrast, the ECJ held that the matter fell within the Scope of the Treaty. It is worth quoting the operative part of the judgment:

> "As a national of a Member State lawfully residing in the territory of another Member State, the appellant in the main proceedings comes within the scope ratione personae of the provisions of the Treaty on European citizenship…Article 8(2) of the Treaty attaches to the status of citizen of the Union the rights and duties laid down by the Treaty, including the right, laid down in Article 6 of the Treaty, not to suffer discrimination on grounds of nationality within the scope of application ratione materiae of the Treaty…It follows that a citizen of the European Union, such as the appellant in the main proceedings, lawfully resident in the territory of the host Member State, can rely on Article 6 of the Treaty in all situations which fall within the scope ratione materiae of Community law, including the situation where that Member State delays or refuses to grant to that claimant a benefit that is provided to all persons lawfully resident in the territory of that State on the ground that the claimant is not in possession of a document which nationals of that same State are not required to have and the issue of which may be delayed or refused by the authorities of that State".[1183]

The nexus with Community law appears to be the European citizenship of the person alleging protection of his fundamental rights against a national measure. According to AG La Pergola,

> "what justifies application of the general prohibition of discrimination in this case… lies…in the legal status of a citizen of the Union, in the guarantee afforded by the status of the individual, as it is now governed by Article 8 of the Treaty, which is enjoyed by a national of any Member State and in any Member State. In other words, the Union, as conceived in the Maastricht Treaty, requires that the principle of prohibiting discrimination should embrace the domain of the new legal status of common citizenship".[1184]

Finally, the ECJ concluded that such national legislation constituted a clear case of direct discrimination based on the nationality of the applicant[1185] and was consequently incompatible with Community law.[1186] It is worth noting that the Court explicitly rejected, as submitted by the Commission,[1187] to consider whether Article

[1182] *Ibid.,* para. 56.
[1183] *Ibid.,* paras. 61-63.
[1184] *Ibid.,* AG La Pergola, in *Martínez Sala*, para. 23.
[1185] *Ibid., Martínez Sala*, para. 64.
[1186] *Ibid.,* para. 65.
[1187] *Ibid.,* para. 59, "the Commission submits that, the appellant has a right of residence under Article 8a of the EC Treaty, which provides that: .Every citizen of the Union shall have the

8a (new Article 18) confers a right to residence as the applicant had already been authorised to reside in Germany.[1188]

As rightly stated by O'Leary,

> "Martínez Sala confirms that Union citizenship explodes the linkages which EC law previously required for the principle of non-discrimination to apply, namely performance or involvement in an economic activity as workers, established persons or providers and recipient of services, preparation for a future economic activity as a student or stagiaire or some sort of relationship with an economic actor as a family member or dependant".[1189]

In *Bickel and Franz*,[1190] the ECJ applied a similar reasoning to European citizens travelling or staying in another Member State. The interest of the case lies in its implications concerning the scope of Community law. The ECJ here appears to go beyond *Martínez Sala* by advocating a wider definition of the scope *ratione materiae* of Article 12 EC. A national judicial proceeding was brought, in the Italian province of Bolzano, against an Austrian lorry driver (stopped by a *carabinieri* patrol and charged with driving while under the influence of alcohol) and a German tourist (he was found to be in possession of a type of knife that was prohibited). They both requested the proceedings to be conducted in German. Indeed, the national rules permitted the proceedings to be conducted in German for the Italian nationals of this large German-speaking region. The ECJ was asked to answer the following question:

> "Do the principle of non-discrimination as laid down in the first paragraph of Article 6, the right of movement and residence for citizens of the Union as laid down in Article 8a and the freedom to provide services as laid down in Article 59 of the Treaty require that a citizen of the Union who is a national of one Member State but is in another Member State be granted the right to have criminal proceedings against him conducted in another language where nationals of the host State enjoy that right in the same circumstances?"

The national court was essentially asking whether the right conferred by national rules to have criminal proceedings conducted in a language other than the principal language of the State concerned falls within the scope of the Treaty and must

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right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect'. According to Article 8(1) of the EC Treaty, every person holding the nationality of a Member State is to be a citizen of the Union."

[1188] *Ibid.* para. 60, "[i]t should, however, be pointed out that, in a case such as the present, it is not necessary to examine whether the person concerned can rely on Article 8a of the Treaty in order to obtain recognition of a new right to reside in the territory of the Member State concerned, since it is common ground that she has already been authorised to reside there, although she has been refused issue of a residence permit."

[1189] O'Leary, "Putting Flesh on the Bones of European Union Citizenship", ELR 1999, pp.68-79, at pp.77-78.

[1190] Case C-274/96 *Bickel and Franz* [1998] ECR I-7637.

accordingly comply with Article 6. The Court answered in the affirmative.[1191] In passing, the Court reiterated the reasoning used in *Martínez Sala* according to which a national of a Member State who is lawfully present in the territory of another Member State comes within the framework of the Treaty by virtue of Article 8(2) (new Article 17) and may consequently invoke Article 12 EC.[1192] Finally, the ECJ considered that Article 6 (new Article 12) of the Treaty precludes national rules which confer on citizens, whose language is that particular language and who are resident in a defined area, the right to require that criminal proceedings be conducted in that language, without conferring the same right on nationals of other Member States travelling or staying in that area, whose language is the same.[1193]

More recently, in the *Grzelczyk* case,[1194] the Court applied the previous reasoning to discriminatory Belgian legislation establishing the right to a minimum subsistence allowance (*minimex*) and clarified once again the relationship of the citizenship provisions with the other Treaty Articles. Mr Grzelczyk, a French national, began a course in physical education at the Catholic University of *Louvain-la-Neuve* and took up residence in Belgium. At the beginning of his fourth and final year of study, he applied to a Belgian national authority (CPAS) for payment of the *minimex.* The *minimex* was granted to Mr Grzelczyk. However, the CPAS withdrew the allocation for the reason that he was not fulfilling the nationality requirement. Indeed, Mr Grzelczyk was an EU national enrolled as a student.[1195] He challenged the decision before the Labour Tribunal, which asked whether the principles of European citizenship and non-discrimination preclude application of the national legislation at issue in the main proceedings.[1196] The Belgian government put two arguments before the ECJ. First, it argued that the principle of citizenship of the Union does not give new and more extensive rights than those deriving from the EC Treaty and secondary legislation, while this principle has no autonomous content, but is merely linked to the other provisions of the Treaty.[1197] Secondly, it asserted that the *minimex* constitutes an instrument of social policy with no particular link to

[1191] *Ibid.,* para. 19.
[1192] *Ibid.,* para. 15, "[s]ituations governed by Community law include those covered by the freedom to provide services, the right to which is laid down in Article 59 of the Treaty. The Court has consistently held that this right includes the freedom for the recipients of services to go to another Member State in order to receive a service there (Cowan, paragraph 15). Article 59 therefore covers all nationals of Member States who, independently of other freedoms guaranteed by the Treaty, visit another Member State where they intend or are likely to receive services. Such persons - and they include both Mr Bickel and Mr Franz - are free to visit and move around within the host State. Furthermore, pursuant to Article 8a of the Treaty, every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect".
[1193] *Ibid.,* para. 31.
[1194] Case C-184/99 *Rudy Grzelczyk* [2002] ECR I-6153.
[1195] *Ibid.,* para. 10-12.
[1196] *Ibid.,* para. 13.
[1197] *Ibid.,* para. 21.

vocational training. Consequently, it must fall outside the purview of Community law.[1198]

The ECJ stressed very explicitly that Article 6 (new Article 12 EC) must be read in conjunction with the citizenship provisions.[1199] According to the Court, *"Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality"*.[1200] It pinpointed that any citizen of the Union can rely on Article 6 (new Article 12) in all situations falling within the material scope of Community law. The ECJ had to determine whether the *minimex* fell within the ambit of Community law and thus had to answer to the latter argument. In doing so, it recalled its earlier case-law according to which assistance given to students for maintenance and training fell in principle outside the scope of Community law.[1201] However, the Court considered that the Maastricht Treaty introduced the principle of Union citizenship into the EC Treaty and that important secondary legislation had been adopted in the meantime. Thus, it may be said that the ECJ considered that the introduction of such provisions extends the scope of Community law. Subsequently, the matter does not fall within the internal matters of the Member States and a citizen of the Union that goes to study in a Member State other than the State of which he is a national is not deprived of relying on the principle of non-discrimination based on nationality.[1202] Finally, the Court held that the national requirement of the Belgian legislation was discriminatory towards other nationals of Member States legally resident in the territory.[1203]

Going further, in *D'Hoop*, the Court held that Community law precludes a Member State from refusing to grant the tide-over allowance to one of its nationals, a student seeking her first employment, on the sole ground that that student completed her secondary education in another Member State.[1204] Indeed, it may be said that the Court applies European citizenship and the rights laid down in Article 18 EC rather similarly to other free movement rights. [1205] Arguably, *D'Hoop* echoes the previous jurisprudence but takes it a step further, since nationality is not the exclusive ground of discrimination and a citizen who benefits from mobility opportunities must be guaranteed the same treatment in law.[1206]

[1198] *Ibid.*, para. 26.
[1199] *Ibid.,* para. 30.
[1200] *Ibid.,* para. 31.
[1201] *Ibid.,* para. 34, "it is true that, in paragraph 18 of its judgment in Case 197/86 *Brown* [1988] ECR 3205, the Court held that, at that stage in the development of Community law, assistance given to students for maintenance and training fell in principle outside the scope of the EEC Treaty for the purposes of Article 7 thereof (later Article 6 of the EC Treaty)".
[1202] *Ibid.*, para. 36.
[1203] *Ibid.*, para. 46.
[1204] C-224/98 *D'Hoop* [2002] ECR I-6191.
[1205] Iliopoulou and Toner, "A New Approach to Discrimination against Free Movers", ELR 2003, pp.389 *et seq*., at pp. 391-392.
[1206] *Ibid.,* at p. 395.

Some final remarks need to be made in light of the *post-Martínez Sala* jurisprudence. First, it may be argued that the incorporation of the citizenship provisions has substantially extended the material scope of application of Community law. Second, the provision on discrimination on grounds of nationality does not anymore need to be read in conjunction with the free movement provisions, but in connection with the Citizenship provisions. As put lucidly by one commentator, *"the principle of equal treatment shall not limit its meaning to instances where the free movement principle comes into play, but rather constitutes a goal in itself"*.[1207] Third, in light of the case-law, it appears that an extraneous element remains an essential requirement. In other words, the extraneous element exists in all the previous cases through the material exercise of the free movement principle. Finally, *Baumbast* and the recognition of direct effect constitute another essential step.

6.2.3. Baumbast: Direct Effect and "Citizenship Review"[1208]

a) The Baumbast Case

As noted previously, the Commission asked the Court in *Martínez Salas* whether Article 8a (new Article 18) confers a right to residence.[1209] The Court explicitly rejected to consider such a submission.[1210] Conversely, the Court in *Baumbast* was explicitly asked by the national court to determine the scope of the provision. In other words, the Court had to assess whether or not this provision may be directly effective. Mrs Baumbast, a Colombian national, married Mr Baumbast, a German national, in the United Kingdom. Their family consists of two daughters, the elder, Maria Fernanda Sarmiento (Colombian national) and the younger, Idanella Baumbast (dual German and Colombian nationality). In June 1990, the members of the Baumbast family were granted residence permits valid for five years. [1211] The Baumbast family owned a house in the United Kingdom and their daughters went to school there. Significantly, they did not receive any social benefits. Instead, they traveled to Germany for medical treatment since they had comprehensive medical

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[1207] Jacquesson, "Union Citizenship and the Court of Justice: Something new under the Sun? Towards Social Citizenship", ELR 2002, pp.260-281, at p.280.

[1208] In Case C-413/99 *Baumbast* [2003] 3 CMLR 23.

[1209] *Martínez Sala*, *supra n.1171,* para. 59, "the Commission submits that, the appellant has a right of residence under Article 8a of the EC Treaty, which provides that: Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect. According to Article 8(1) of the EC Treaty, every person holding the nationality of a Member State is to be a citizen of the Union".

[1210] *Ibid.,* para. 60, "[i]t should, however, be pointed out that, in a case such as the present, it is not necessary to examine whether the person concerned can rely on Article 8a of the Treaty in order to obtain recognition of a new right to reside in the territory of the Member State concerned, since it is common ground that she has already been authorised to reside there, although she has been refused issue of a residence permit".

[1211] *Baumbast, supra n.1208,* paras. 16-17.

insurance there.[1212] Between 1990 and 1993, Mr Baumbast pursued an economic activity in the United Kingdom, initially as an employed person and then as self-employed. However, since his own company failed and he was unable to obtain a sufficiently well-paid job in the United Kingdom, he was employed since 1993 by German companies in China and Lesotho. In 1995, Mrs Baumbast applied for indefinite leave to remain in the United Kingdom for herself and for the other members of her family. The Secretary of State refused to renew Mr Baumbast's residence permit and the residence documents of Mrs Baumbast and her children.[1213] In 1998, that refusal was brought before the Immigration Adjudicator who assessed that Mr Baumbast was neither a worker nor a person having a general right of residence under Directive 90/364.[1214] Mr Baumbast then appealed to the Immigration Appeal Tribunal against the Adjudicator's decision in his regard.[1215]

The Immigration Appeal Tribunal referred to the Court for a preliminary ruling under Article 234 EC four questions on the interpretation of Article 18 EC[1216] and Article 12 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community. Notably, the third question was related exclusively to the *Baumbast* case and sought, in essence, to ascertain whether a citizen of the European Union who no longer enjoys a right of residence as a migrant worker in the host Member State can, as a citizen of the European Union, enjoy there a right of residence by direct effect of Article 18(1) EC.[1217] The United Kingdom and German Governments argued that a right of residence cannot be derived directly from Article 18(1) EC. In that sense, they argued that the limitations and conditions referred to in that paragraph show that it is not intended to be a free-standing provision.[1218] In a similar vein, the Commission submitted that the very wording of that provision shows its limitations. And, as Community law stands at present, the rights to move and reside established by that article are still linked either to an economic activity or to sufficient resources.[1219]

The Court did not follow that reasoning and considered that Article 18(1) EC had direct effect. First, it rejected the argument put forward by the Commission. Second, the Court rebuffed the argument put forward by Germany and the UK. As to the former, it stressed that the Treaty on European Union has introduced the concept of Union citizenship.[1220] In that sense, Article 18(1) EC has conferred a right, for

[1212] *Ibid.,* para. 19.
[1213] *Ibid.,* para. 20.
[1214] *Ibid.,* para. 21.
[1215] *Ibid.,* para. 22.
[1216] Article 18(1) EC provides that every citizen of the Union is to have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the EC Treaty and by the measures adopted to give it effect.
[1217] *Baumbast*, *supra n.1208,* para. 76.
[1218] *Ibid.,* para. 78.
[1219] *Ibid.,* para. 79.
[1220] Under Article 17(1) EC, every person holding the nationality of a Member State is to be a citizen of the Union. Union citizenship is destined to be the fundamental status of nationals of the Member States (*see e.g.,* Case C-184/99 *Grzelczyk* [2001] ECR I-6193, para 31).

every citizen, to move and reside freely within the territory of the Member States. Consequently, the previous condition that a person must carry on an economic activity in order to benefit from the right of residence may be put into question.[1221] In addition, there is nothing in the TEU that indicates that citizenship is conditioned by the exercise of an economic activity.[1222] As to the latter, it emphasized that Article 18(1) constitutes a clear and precise provision of the EC Treaty and thus may be invoked directly by a citizen of the Union.[1223] In that regard, it considered that limitations and conditions imposed on that right do not prevent the provisions of Article 18(1) EC from conferring on individuals rights which are enforceable by them and which the national courts must protect.[1224]
Finally, it held that:

> "the exercise of that right is subject to the limitations and conditions referred to in that provision, but the competent authorities and, where necessary, the national courts must ensure that those limitations and conditions are applied in compliance with the general principles of Community law and, in particular, the principle of proportionality".[1225]

In other words, the national authorities must respect the general principles of Community law when they establish limitations to the right to residence, and the national courts will have to ensure its respect. In my view, this part of the judgment is of extreme importance. Indeed, one can deduce from it a clear third type of review concerning national measures in the light of the general principles of Community law. In the previous case-law, in the context of discrimination on grounds of nationality and citizenship, the relationship is merely implied. Arguably, the *Baumbast* type of review (or citizenship review) completes the system of judicial review of national measures, i.e. the *ERT* type of review and *Wachau*f type of review.

b) Post-Baumbast Case-Law

In the wake of *Baumbast,* many cases before the ECJ have clarified the scope and limits of the citizenship provisions.[1226] In *Garcia Avello,* a case concerning the scope of Articles 12 EC and 17 EC, the Court had to determine whether those articles must be interpreted as precluding a national administrative authority from refusing to grant an application for a change of surname (from Garcia Avello to Garcia Weber) made on behalf of minor children resident in Belgium and having dual nationality

[1221] *Baumbast, supra n.1208,* para. 81.
[1222] *Ibid.,* para. 83.
[1223] *Ibid.,* para. 84, "the right to reside within the territory of the Member States under Article 18(1) EC… is conferred directly on every citizen of the Union by a clear and precise provision of the EC Treaty. Purely as a national of a Member State, and consequently a citizen of the Union, Mr Baumbast therefore has the right to rely on Article 18(1) EC".
[1224] *Ibid.,* para. 86.
[1225] *Ibid.,* para. 94.
[1226] *See,* for an analysis of the case-law (1993-2003), Kostakopoulou, "Ideas, Norms and European Citizenship: Explaining Institutional Change", MLR 2005, pp.233-267.

(Belgian and Spanish).[1227] The reasoning of the Court was twofold. First, the ECJ considered whether the national measure falls within the scope of Community. In that regard, it stated that,

> "[t]he situations falling within the scope ratione materiae of Community law include those involving the exercise of the fundamental freedoms guaranteed by the Treaty, in particular those involving the freedom to move and reside within the territory of the Member States, as conferred by Article 18 EC (Case C-274/96 Bickel and Franz [1998] ECR I-7637, paragraphs 15 and 16, Grzelczyk, cited above, paragraph 33, and D'Hoop, paragraph 29)".[1228]

Then, the Court found that the link with Community law is established *in casu*, since the children of Mr Garcia Avello are nationals of one Member State lawfully resident in the territory of another Member State.[1229] Thus it appears that the dual nationality of the children is sufficient to allow the nexus with Community law, though the Court does not establish any connection with a free movement right (the children did not exercise any).[1230] Second, the Court examined whether Articles 12 and 17 EC precluded the national authority to refuse an application to change a surname. In that respect, the Court considered that, "such a discrepancy in surnames is liable to cause serious inconvenience for those concerned at both professional and private levels resulting from, *inter alia*, difficulties in benefiting, in one Member State of which they are nationals, from the legal effects of diplomas or documents drawn up in the surname recognised in another Member State of which they are also nationals".[1231] Consequently, the discriminatory treatment, which is not objectively justified,[1232] appears incompatible with the European citizenship status.[1233] At the end, it may be said that the ECJ through the recourse to the citizenship provision has extended the scope of application of Community law. Indeed, there is no need anymore to establish a particular breach of a free movement provision, since the citizenship provision affords *per se* protection. This extension is to be welcome and is particularly interesting for affording protection to persons lawfully residing in a Member State and who are less likely to exercise their free movement rights, e.g. children, third country nationals and unemployed persons.

[1227] Case C-148/02 *Garcia Avello* [2003] ECR I-11613.
[1228] *Ibid.,* para. 23.
[1229] *Ibid.,* para. 27.
[1230] *See* Iliopoulou, "Arrêt du 2 octobre 2003 (aff. C-148/02), Carlos Garcia Avello c/ Etat belge", RTDE 2004, pp.559-579 at p.578.
[1231] *Ibid.,* para 36.
[1232] *Ibid,* paras 42-45. Court considered hat the refusal of the Belgian authorities was disproportionate
[1233] *See* Spaventa, "From Gebhard to Carpenter: Towards a (Non-Economic) European Constitution", CMLRev. 2004, pp. 743-773, at p.771. The author rightly argues that the use of Articles 12 and 17 may provide protection to citizens who have not exercice free movement rights.

As to third country nationals, the *Chen* case provides a good illustration.[1234] Mrs Chen (a Chinese national) wished to have a second child, contrary to the "one child policy" adopted in China. Advised by her lawyer, she went to Northern Ireland, and gave birth to Catherine in order to make sure that her child would acquire the Irish nationality and that she would be able to establish herself in the United Kingdom. Kunquian Catherine Zhu was born on 16 September 2000 in Belfast. She is an Irish national and thus a European Citizen. The national authority rejected the application for permit to reside permanently in the United Kingdom. The UK immigration appellate authority made a reference for a preliminary ruling to the ECJ. The main questions at issue is to determine whether a citizen of the Union (Catherine) has a right of residence directly conferred by her status and whether, her mother (Ms Chen / a third country national) indirectly enjoyed such a right. Regarding the right to residence of Catherine, the Court remarked that this right is granted directly to every citizen of the European Union.[1235] Then, it stressed that this right is, however, subject to limitations and conditions, which must be applied in compliance with the principle of proportionality.[1236] Regarding the right of residence of Ms Chen, the Court, referring to *Baumbast* but surprisingly not to Article 8 ECHR,[1237] considered that the right of residence of a young child necessarily implies that the child is entitled to be accompanied by the person who is his or her primary carer.[1238]

As to inactive persons with no financial resources, the *Trojani* case is of interest.[1239]A French national (Mr Trojani), residing in Belgium since 2000, applied

[1234] C-200/02 *Man Lavette Chen* and *Kunquian Catherine Zhu* [2004] n.y.r.

[1235] *Ibid.*, para. 26, "[a]s regards the right to reside in the territory of the Member States provided for in Article 18(1) EC, it must be observed that that right is granted directly to every citizen of the Union by a clear and precise provision of the Treaty. Purely as a national of a Member State, and therefore as a citizen of the Union, Catherine is entitled to rely on Article 18(1) EC. That right of citizens of the Union to reside in another Member State is recognised subject to the limitations and conditions imposed by the Treaty and by the measures adopted to give it effect (see, in particular, *Baumbast and R*, paragraphs 84 and 85)".

[1236] *Ibid.,* para. 32, "[m]oreover, the limitations and conditions referred to in Article 18 EC and laid down by Directive 90/364 are based on the idea that the exercise of the right of residence of citizens of the Union can be subordinated to the legitimate interests of the Member States. Thus, although, according to the fourth recital in the preamble to Directive 90/364, beneficiaries of the right of residence must not become an 'unreasonable' burden on the public finances of the host Member State, the Court nevertheless observed that those limitations and conditions must be applied in compliance with the limits imposed by Community law and in accordance with the principle of proportionality (see, in particular, *Baumbast and R*, paragraphs 90 and 91)".

[1237] *See* the reasoning of AG Tizzano (paras 93-94), who based also his reasoning on the principle of respect for the unity of family life and Article 8 of the ECHR. The AG referred to the EctHR jurisprudence and the *Carpenter case* of the ECJ. The argument of the Court (*see* paras 45-46) is that the sole use of the right to reside as enshrined in the citizenship provision is sufficient.

[1238] *Ibid.,* para. 45.

[1239] Case C-456/02 *Michel Trojani* [2004] n.y.r.

to the centre public d'aide sociale de Bruxelles (CPAS) for obtaining the minimum subsistence allowance ("minimex"). The CPAS refused to grant the minimex on the grounds that he was not a Belgium national and was also the subject of proceedings in the Labour Court. The court granted provisional financial assistance and referred questions to the Court for a preliminary ruling. The main question at stake was to determine whether he can rely directly on Article 18 EC, which guaranteed the right to move and reside freely in the territory of another Member State of the Union, merely in his capacity as a European citizen. The Court gave a positive answer.[1240] However, the Court emphasised that the right was not unconditional. Indeed, the person lawfully resident in a Member State cannot constitute a burden on the social assistance system. In assessing those conditions, the Court must have recourse to the principle of proportionality.[1241] Thus it appears clear that some limits must be attached to citizenship provisions. Particularly, there is a need to avoid benefit tourism.[1242] This reasoning transpires from the *Collins* case, where the Court rightly refused to provide job seekers allowance to Mr Collins on the ground he was not habitually resident in the United Kingdom.[1243]

At the end, it resorts from this case-law analysis that the citizenship provisions have both extended the scope of application of Community law[1244] and also the scope of protection for vulnerable groups such as third country nationals (*Baumbast*/ *Chen*/ *Akrich*), inactive person with no financial resources (*Trojani*/*Collins*) and Children (*Garcia Avello*/*Chen*). In that sense, it may be argued that the recent jurisprudence tends towards social citizenship. What is more, it appears that the principle of proportionality is, once again, needed in order to examine the national legislation which conflict with the citizenship provisions. It remains, now, to determine whether the review of the ECJ is closer to *ERT* (limited) or *Wachauf* (extensive).

6.3. THE JUDICIAL REVIEW OF NATIONAL MEASURES

This section is divided into three parts. Firstly, it analyses the extent of review undertaken by the ECJ of national measures in a preliminary ruling proceeding (Article 234 EC). A distinction is drawn between the national measures implementing Community law, the national measures derogating from one of the economic freedoms, and the national measures limiting the exercise of European citizenship (6.3.1). Secondly, the problems relating to preliminary ruling

[1240] *Ibid.*, para. 46.
[1241] *Ibid.*, 31-34.
[1242] *See* AG Ruiz-Jarabo Colomer in *Collins,* para.75.
[1243] Case C-138/02 *Collins* [2004] n.y.r. Mr Collins, a dual American and Irish national, claimed jobseekers allowance in the United Kingdom eight days after he had returned to Europe, where he spent ten months in 1980 and 1981.
[1244] *See also* AG Geelhoed in Case C-209/03 *Bidar* [2005] n.y.r. The AG argued that, due to the introduction of EU citizenship, maintenance costs for students in the form of loans/grants for students fell within the scope of Community law.

proceedings are stressed. These problems arise particularly regarding the review of a national measure with the help of the general principles of Community law by a national court. In other words, the national court is not always inclined to use the preliminary ruling proceeding. It may, for instance, consider that the national measure does not fall within the scope of Community law. What is the consequence of such an appraisal? This part attempts to provide an answer (6.3.2). Thirdly, it studies the extent of the review undertaken by the national court. Significantly, this means that the national court considers that the national measure is falling within the purview of Community law. The fundamental question, which arises in this context, is to determine which standards the national court must use (6.3.3). Are the general principles of Community law applicable in all situations falling within the scope of Community law? Can one say that a national standard, providing a higher protection than the EC right, should be applied? What are the consequences linked to the application of the general principles of Community law? For instance, does it give new competence to the national courts? Does it amplify its grounds of review?

6.3.1. Limited Review of National Measures by the ECJ?

This section determines the scope of review of the ECJ regarding national measures in connection with the preliminary ruling procedure. Three situations are considered, i.e. "*Wachauf*" situation (Agency review), the "*ERT* situation" (Freedom review) and the "*Baumbast* situation" (Citizenship review). Indeed, it may be important to establish a distinction between, on the one hand, a situation where the Member State is acting as an agent in implementing a Community measure (*Wachauf* situation or Agency review) and, on the other hand, the situation where a national measure derogates from an economic freedom (*ERT* situation or Freedom Review). Furthermore, it appears important to assess the ECJ review in light of the *Baumbast* case that concerns the direct effect of a citizenship provision.

a) The "ERT situation": Preliminary Ruling on Interpretation and Interpretative Guidance

As stressed previously, a close link exists between the jurisdiction of the ECJ under Article 234 and the scope of Community law. In this sense, the national courts may ask the ECJ to determine whether or not a national measure falls within the scope of Community law. It is worth noting that the ECJ has no jurisdiction to give a preliminary ruling when the question is purely hypothetical. According to the Court in *Grado* and *Bashir*, it *"has no jurisdiction to give a preliminary ruling on a question submitted by a national court where it is quite obvious that the interpretation of Community law sought by that court bears no relation to the actual facts of the main action or to its purpose, or where the problem is hypothetical and the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it".*[1245] In this case, the question from the national court (the magistrate of the *Amtsgericht Reutlingen*) concerned the refusal

[1245] Case C-291/96 *Grado* and *Bashir* [1997] ECR I-5531, para. 12.

of the *Staatsanwalt* (Public Prosecutor) to use the courtesy title "*Herr*" for a national from another Member State in the course of a national proceeding. Such a practise was clearly discriminatory toward the nationals from other Member States. The defendant alleged an infringement of their rights to dignity and equality before the law, which are enshrined in Articles 1 and 3 of the German Basic Law. The Commission[1246] and AG Tesauro[1247] argued that the omission of courtesy was not susceptible to materially affect the outcome of the proceedings. The Court, referring to its settled case-law,[1248] followed the remarks of the Commission and the Opinion of the AG. The Court considered that the question was hypothetical. The ECJ was subsequently incompetent to assess the question of the preliminary ruling. According to the Court, *"even if the Staatsanwaltschaft Tübingen's manner of proceeding were shown to discriminate against nationals of Member States of the Community, it does not appear that this would have any bearing on the main proceedings"*.[1249]

By contrast, in the situation where the national legislation falls within the purview of Community law, the ECJ reviews the national measure. Nevertheless, the ECJ undertakes a limited judicial review. To quote Craig and de Búrca, *"[t]he ECJ's jurisdiction to review acts of the Member States under the Treaties is much more limited than its jurisdiction to review acts of the Community institutions"*.[1250] The new Article 46 TEU had extended the jurisdiction of the Court to Article 6(2)TEU. This last Article provides that *"[t]he Union shall respect fundamental rights, as guaranteed by the European Convention on Human Rights and*

[1246] *Ibid.,* para. 11, "[t]he Commission argues that the interpretation of Community law sought clearly bears no relation to the facts of the main action or to its purpose. Furthermore, issues of criminal law and procedure of the kind raised in the main proceedings fall outside the scope of Community law".

[1247] AG Tesauro in *Grado* and *Bashir*, para 6, "[h]aving regard to the subject-matter of the question referred, as compared with the apparent subject-matter (according to the grounds of the order for reference) of the main proceedings, the first point to be established is the relevance of the question itself and, accordingly, the Court's jurisdiction to reply. It is all too clear, however, that the Public Prosecutor's omission of the courtesy title `Herr' when referring to the defendant in the application for a punishment order is not a fact capable of materially affecting the outcome of the proceedings initiated against that person. This is not the first time this problem has arisen. On more than one occasion, the Court has been asked to give a preliminary ruling on questions of doubtful relevance to the merits of the case pending before the national court".

[1248] *Ibid., Grado* and *Bashir,* para. 12 , "[o]n that point it should be noted that, according to settled case-law, the Court has no jurisdiction to give a preliminary ruling on a question submitted by a national court where it is quite obvious that the interpretation of Community law sought by that court bears no relation to the actual facts of the main action or to its purpose, or where the problem is hypothetical and the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (Case C-415/93 Bosman [1995] ECR I-4921, paragraph 61, and Case C-134/95 USSL No 47 di Biella [1997] ECR I-195, paragraph 12)".

[1249] *Ibid.,* para. 15.

[1250] Craig and De Búrca, *EU law*, Oxford, 1998, at p.317.

Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general Principles of Community Law".

However, the jurisdiction of the Court is limited to the action of the institutions. Consequently, a review of the Member States action is founded on Article 220 (ex Article 164) EC.[1251] From the foregoing discussion, it may be said that the limited review is conditioned by the limited Treaty competence. Subsequently, the ECJ in a preliminary ruling merely offers to the domestic court all the guidance as to the interpretation in order to permit it to appraise the compatibility of the national legislation with the fundamental rights.[1252] To recall the formulation of the ECJ used for the first time in *ERT*:

> "According to the Court's case-law, where national legislation falls within the field of application of Community law the Court, in a reference for a preliminary ruling, must give the national court all the guidance as to interpretation necessary to enable it to assess the compatibility of that legislation with the fundamental rights - as laid down in particular in the Convention - whose observance the Court ensures. However, the Court has no such jurisdiction with regard to national legislation lying outside the scope of Community law".[1253]

In a reference for a preliminary ruling, the ECJ must provide the necessary criteria of interpretation in order to enable the national court to make that determination. The ECJ may be utterly cautious in providing the guidance. The judgment in *Familiapress* constitutes, in this sense, a perfect illustration. It is worth quoting the operative part concerning the relationship between the national court and the ECJ:

> "To that end, it should be determined, first, whether newspapers which offer the chance of winning a prize in games, puzzles or competitions are in competition with those small press publishers who are deemed to be unable to offer comparable prizes and whom the contested legislation is intended to protect and, second, whether such a prospect of winning constitutes an incentive to purchase capable of bringing about a shift in demand…It is for the national court to determine whether those conditions are satisfied on the basis of a study of the Austrian press market…In carrying out that study, it will have to define the market for the product in question and to have regard to the market shares of individual publishers or press groups and the trend thereof…Moreover, the national court will also have to assess the extent to which, from the consumer's standpoint, the product concerned can be replaced by papers which do not offer prizes, taking into account all the circumstances which may influence the decision to purchase, such as the presence of advertising on the title page referring to the chance of winning a prize, the likelihood of winning, the value of the prize or the extent to which winning depends on a test calling for a measure of ingenuity, skill or knowledge…The Belgian and

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[1251] Lenaerts, "Fundamental Rights in the European Union", ELR 2000, pp.575-600, at pp.588-589.
[1252] *Ibid.,* at p. 590
[1253] *Supra Chapter 6.2.1., ERT,* para 42, *Grogan,* para. 31, *Annibaldi,* para. 13, *Kremzow,* para. 15, *Perfili,* para. 20.

> Netherlands Governments consider that the Austrian legislature could have adopted measures less restrictive of free movement of goods than an outright prohibition on the distribution of newspapers which afford the chance of winning a prize, such as blacking out or removing the page on which the prize competition appears in copies intended for Austria or a statement that readers in Austria do not qualify for the chance to win a prize…The documents before the Court suggest that the prohibition in question would not constitute a barrier to the marketing of newspapers where one of the above measures had been taken. If the national court were nevertheless to find that this was the case, the prohibition would be disproportionate".[1254]

First, the ECJ emphasized that it is for the national court to determine the validity of the national legislation. Second, the Court provided the necessary guidance to interpret the measure at stake. In doing so, its stressed the importance for the national court to study carefully the domestic press market from the producer and consumer respective points of view. In addition, it submited the opinions of the Belgian and Netherlands governments, which considered that a less restrictive legislation could have been adopted. Third, the ECJ gave its own opinion on the proportionality of the measure. Hypothetically, the ECJ suggested that the legislation would not constitute a barrier to the free trade in the situation described by the intervening governments. It may be said that the Court suggested implicitly that the national measure was disproportionate. Interestingly, in paragraph 33, the Court highlighted very clearly the discretion of the national court in the determination of the proportionality of the Measure. The ECJ thus gives an extensive leeway to the domestic court. However, the guidance offered by the ECJ is articulated in such a way, that the national court seems to be under a "logical obligation" to declare the national measure disproportionate. Indeed, it seems conspicuous that the Austrian legislation did not pass the test of the less restrictive means. The final observation is that the national court is called to act like a constitutional adjudicator. The domestic judge, in such circumstances, can review and invalidate the national legislation. Such an extension of power is extremely significant in certain countries, e.g. UK.[1255]

b) The "Wachauf situation": Preliminary Ruling and Extensive Review

In contrast to the *ERT*-type of review, the review of the measure by the ECJ appears more extensive. Indeed, the Court signifies clearly to domestic jurisdiction whether the measure is valid in light of the general principles of Community law. An illustration is furnished by the *Karlsson* case.[1256] In the present litigation, three suits were brought by Karlsson and Gustafsson, milk producers, and Torarp, a former milk producer, challenging decisions whereby the Swedish Agricultural Office allocated reduced milk quotas or reduced the quotas already allocated to Karlsson and Gustafsson and refused to dispense a milk quota to Torarp. The *Regeringsrätten* (Supreme Administrative Court) deemed that as Community legislation stood, there

[1254] C-368/95 *Familiapress* [1997] ECR I-621, paras 28-33.
[1255] *Infra Part 3, Chapter 7.*
[1256] Case C-292/97 *Kjell Karlsson* [2000] ECR I-2737.

was a lack of implementing measures comparable to those contained in Regulation No 857/84, and it was therefore uncertain as to whether the Swedish legislation was compatible with Regulation No 3950/92, Articles 5 (new Article 10) and 40(3) (new Article 34(2)) of the Treaty and the principle of equal treatment. The national court decided to stay the proceedings and to refer the case to the ECJ for a preliminary ruling on the compatibility of the Swedish legislation with the general principles of Community law.[1257] The ECJ emphasized that the Member States possess a wide discretion in ensuring the implementation of Community rules within their territory.[1258] Nevertheless, the Court of Justice highlighted, in making reference to the previous jurisprudence[1259] that, *"the requirements flowing from the protection of fundamental rights in the Community legal order are also binding on Member States when they implement Community rules. Consequently, Member States must, as far as possible, apply those rules in accordance with those requirements".*[1260] The Court held once again that restrictions may be imposed on the exercise of those rights, on the condition that those constraints coincided with objectives of general interest pursued by the Community. Those restrictions must also constitute proportionate and reasonable obstructions, which do not impair the very substance of those rights.[1261] *In casu,* the Court assessed the proportionality of the restrictions and remarked, first, that "the restriction placed on the account to be taken of their production capacity was calculated precisely because of the risk that the total quantity would be exceeded".[1262] Second, the Member State could not be exceeding its discretionary powers where the quantities not allocated were of minimal importance.[1263] Subsequently, the ECJ concluded that,

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[1257] *Ibid.,* para. 25.
[1258] *Ibid.,* para. 35.
[1259] Case C-2/92 *Bostock* [1994] ECR I-955, para. 16.
[1260] *Karlsson, supra n.1256.*, para. 37.
[1261] *Ibid.,* para. 45, "[h]owever, it is well-established in the case-law of the Court that restrictions may be imposed on the exercise of those rights, in particular in the context of a common organisation of a market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, disproportionate and unreasonable interference undermining the very substance of those rights (Case 5/88 Wachauf [1989] ECR 2609, paragraph 18)".
[1262] *Ibid.,* para. 59, "[i]n the first place, there is nothing in the file indicating that fixing milk quotas for new producers and producers who have increased their production at a level lower than their production capacity is not appropriate and necessary in order to avoid exceeding the guaranteed total quantity. According to the observations of the Swedish Government, the restriction placed on the account to be taken of their production capacity was calculated precisely because of the risk that the total quantity would be exceeded".
[1263] *Ibid.,* para. 60, "[i]n the second place, the Swedish Government has shown, by figures produced at the hearing, that for the 1995/1996 milk year only 1% of the guaranteed total quantity was not distributed, a figure which fell to 0.2% for the 1997/1998 milk year. In view of the fact that Community legislation permits a national reserve to be constituted, and in the light of the very small quantity withheld by the Swedish authorities, a Member State cannot be exceeding its discretionary powers where the quantities not allocated are so small".

> "[i]n the light of all those considerations relating to the existence of a breach of the principle of equal treatment, it is clear that national legislation governing the initial allocation of milk quotas and adopted by a Member State which acceded to the European Communities on 1 January 1995…is compatible with the principle of equal treatment".[1264]

Two conclusions may be drawn from the *Karlsson* case. First, as stated above, the ECJ does not provide guidelines to the national court to determine the validity of the national measure, but states clearly whether or not the legislation is compatible with the general principle of Community law. Second, the rights protected by the general principles of Community law can be subject to considerable restrictions in the name of the general interest. According to Usher, *"although the Community Institutions and the Member States implementing Community law are required to respect property rights, the exercise of those rights may be subjected to considerable restrictions if they are justified in the general interest".* [1265] In a similar vein, Jacobs, commenting on the *Bosphorus*[1266] and *Ebony*[1267] cases, considered that the alleged encroachment of human rights had to be assessed in the context of the objective pursued by the Community legislation (a sanction Regulation),[1268] i.e. to bring to an end the state of war in the former Yugoslavia. This objective was viewed as an objective of fundamental general interest for the Community.[1269]

What is more, in the *Caballero* case,[1270] the Court applied a far-reaching review of the domestic measure in the same line as in *the Karlsson* case. As seen previously, this case concerned the obligation to respect the general principle of equality in implementing Community legislation (i*n casu*, the case deals with the implementation of the "insolvency Directive"). As recalled by the Court, the principle of equal treatment precludes comparable situations from being treated in a different manner unless the difference in treatment is objectively justified. [1271] Interestingly, it here also emphasized that, *"where national rules fall within the scope of Community law, and reference is made to the Court for a preliminary ruling, the Court must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with the fundamental rights the observance of which the Court ensures (Case C-260/89 ERT*

[1264] *Ibid.,* para. 61.
[1265] Usher, *The General Principles of EC Law*, *supra*, at p.99.
[1266] Case C-84/95 *Bosphorus* [1996] ECR I-3953.
[1267] Case C-177/95 *Ebony [*1997] ECR I-1111.
[1268] The Regulation permitted certain properties such as aircraft and cargo to be impounded. This might conflict with the right to property.
[1269] Jacobs, "Human Rights in the European Union: the Role of the Court of Justice", ELR 2001, pp.331-341, at pp.334-335.
[1270] *See, Rodríguez Caballero*, *supra n.1053.*
[1271] *Ibid.,* para. 32. *See also*, Case C-189/01 *Jippes* [2001] ECR I-5689, para. 129, Case C-149/96 *Portugal* v. *Council* [1999] ECR I-8395, para. 91.

[1991] ECR I-2925, paragraph 42, and Case C-85/97 SFI [1998] ECR I-7447, paragraph 29)".[1272]

Then, the Court noted that it appeared clear that the Spanish legislation treated dismissed workers differently, since the right to payment by Fogasa of claims relating to post-dismissal remuneration was conditioned by judicial decision. However, such a difference in treatment could be accepted only if it was objectively justified.[1273] In that regard, the Spanish Government relied explicitly on Article 10 of the Directive and argued that the difference in treatment at issue was designed to avoid abuses. Conversely, the Court noted that Fogasa had sufficient safeguards in order to be able to avoid any type of fraud, e.g. the body can refuse, by reasoned decision, to make the payment requested in place of the employer if it considers that the conciliation agreement amounted to a circumvention of the law.[1274] Finally, it considered, using the language of proportionality that no convincing arguments had been submitted such as to justify the difference in treatment between claims for ordinary remuneration and claims for *salarios de tramitación* granted by judicial decision. The measure could therefore not be regarded as necessary in order to avoid abuses.[1275] The final observation may be that the ECJ is not ready to derogate from the previous line of reasoning. In other words, the Court of Justice, in a preliminary ruling concerning the implementation of Community law, gives tidy guidelines to the national court in order to interpret the validity of the domestic measure in the light of Community law. Notably, this is not the only area where the Court gives precise guidelines. In that regard, the context of union citizenship and the *Baumbast* case constitutes an interesting field of study.

c) "Baumbast situation": Citizenship and review of the national measure

The Court stressed that the right for citizens of the Union to reside within the territory of another Member State is conferred subject to the limitations and conditions laid down by the EC Treaty and by the measures adopted to give it effect, e.g. secondary legislation.[1276] In other words, the limitations and conditions can be subordinate to the legitimate interests of the Member States.[1277] Significantly, in light of the preamble and Article 1 of Directive 90/364, the beneficiaries of the right of residence must not become an unreasonable burden on the public finances of the host Member State, e.g. by becoming a burden on the social system of the host Member State.[1278] In this respect, the Court emphasized with strength that the Baumbast family did not constitute a burden on the social assistance system of the host Member State, since it used the social assistance system in the "origin" Member

[1272] *Ibid.*, para. 31,
[1273] *Ibid.,* paras. 33-34.
[1274] *Ibid.,* paras. 35-36.
[1275] *Ibid.*, paras. 38-39.
[1276] *Baumbast*, *supra n.1208,* para. 85.
[1277] *Ibid.,* para. 90.
[1278] *Ibid.,* para. 87.

State (Germany).[1279] However, at the national level, the Immigration Adjudicator assessed that the health insurance did not cover emergency treatment given in the United Kingdom.[1280] Arguably, this appreciation has led the UK authorities to adopt a negative measure/decision as to the renewal of the residence permit and documents.

According to the Court, "those limitations and conditions must be applied in compliance with the limits imposed by Community law and in accordance with the general principles of that law, in particular the principle of proportionality. That means that national measures adopted on that subject must be necessary and appropriate to attain the objective pursued (see, to that effect, Joined Cases C-259/91, C-331/91 and C-332/91 Alluè and Others [1993] ECR I-4309, paragraph 15)".[1281] Notably, the Court applied the principle of proportionality to the facts of the Baumbast case. Put bluntly, it remarked that Mr Baumbast had sufficient resources, worked and lawfully resided in the host Member State. Concerning the family, it noted that it had also resided in the host Member State, had not become a burden on the public finances and had comprehensive sickness insurance in another Member State of the Union.[1282] Finally, the Court concluded that the refusal to authorize Mr Baumbast to exercise the right of residence on the ground that his health insurance did not cover the emergency treatment would amount to a disproportionate interference.[1283]

This finding prompts a number of conclusions. Indeed, it is worth underlining that the Court stated, in casu, that "the national courts must ensure that those limitations and conditions are applied in compliance with the general principles of Community law and, in particular, the principle of proportionality".[1284] Apparently, the Court of Justice directly appreciates the proportionality of the national measure. In other words, the Court gives the answer to the national court as to the validity of the national measure. In light of the foregoing, the review must be seen as extensive from the Court. In that sense, this extensive review is similar to the "Wachauf type of review". It may be said that the far-reaching review is legitimate, since the domestic measure directly limited the exercise of a right guaranteed by the Treaty. Moreover, in the present case, the Court of Justice seems to have all the factual elements necessary to give a full answer to the national court. Other case-law, will

[1279] *Ibid.,* para. 88, "[a]s to the application of those conditions for the purposes of the Baumbast case, it is clear from the file that Mr Baumbast pursues an activity as an employed person in non-member countries for German companies and that neither he nor his family has used the social assistance system in the host Member State. In those circumstances, it has not been denied that Mr Baumbast satisfies the condition relating to sufficient resources imposed by Directive 90/364".
[1280] *Ibid.*, para. 89.
[1281] *Ibid.,* para. 91.
[1282] *Ibid.*, para. 92.
[1283] *Ibid.*, para. 93.
[1284] *Ibid.,* para. 94.

give us the answer as to whether the "Baumbast review" will be renewed or if the case is merely a test case to establish with strength the direct effect of Article 18 EC.

Interestingly, it may be argued that the review undertaken by the ECJ differs from one situation to another. More precisely, the national court is given much more leeway in the assessment of a national measure, which does not implement Community law, but falls within the scope of Community law. Presumably, such a distinction may appear quite obvious. In fact, in the *"Wachauf* situation*"*, the national court has to determine the validity of a national measure implementing Community law in the situation where the national authorities act like agents of the Community. This particular feature may explain the difference in the review. Furthermore, the *Wachauf* case may be appraised as closely related to preliminary rulings on the validity of the Community legislation. In those particular circumstances, it is well known that the national court is not competent to invalidate the Community measure. The national court makes the preliminary ruling in case of serious doubts concerning the validity of the Community measure. In the *"ERT* situation*"*, the national court generally refers a question to the ECJ in order to assert whether or not the national legislation falls within the scope of Community law, and, if that is the case, to obtain the necessary guidelines to interpret the national measure in light of the EC fundamental rights. But is that always the case?

In that regard, the *Carpenter* case should be recalled. In that case, a deportation decision was considered as detrimental to the effective exercise of the freedom to provide services. Thus, it seems safe to say that it constitutes an *"ERT* situation*"*, i.e. a national measure derogating from one of the freedoms. Significantly, it is worth remarking that, in contrast to the *ERT* or *Familiapress* cases, the ECJ does not limit itself to merely providing interpretative guidelines. The Court considered that the decision to deport Mrs Carpenter clearly infringed the right to respect family life as enshrined in Article 8 ECHR[1285] and ruled that the decision was disproportionate to the objective to protect the public order and safety.[1286] From the foregoing analysis, a brief concluding remark may be ventured. It appears from the recent jurisprudence, e.g. the *Caballero, Carpenter* and *Baumbast* cases, that the ECJ has increased its review of the national measures. Furthermore, it may be stated that it constitutes a uniformatization of the review in Article 234 proceedings. However, it remains to be seen whether the ECJ will confirm this tendency in a consistent manner.

6.3.2. Article 234 EC and Internal Difficulties

The plaintiff at the national level may encounter, sometimes, great difficulties in invoking the general principles of Community law and exhorting the domestic judge to refer the matter to the ECJ for a preliminary ruling. Beal considers that it is unclear whether a national measure will be reviewed by a national court to

[1285] Case C-60/00 *Carpenter* [2002] ECR I-6279, paras. 41-42.
[1286] *Ibid.*, paras. 44-45.

determine its compatibility with the general principles of Community law.[1287] The *First City Trading* case illustrates such difficulties.[1288] This case concerned an application seeking judicial review of a U.K. scheme, which provided aid for one sector of the domestic beef industry. The scheme had been introduced following the BSE crisis, which had caused a general drop in demand for British beef and led to the introduction by the Commission of a worldwide ban on exports of beef from the United Kingdom.[1289] The central issue is whether the general principle of equal treatment applies at all as regards the scheme. The applicants, who were beef exporters, sought judicial review of the legality of the Beef Stocks Transfer Scheme, primarily on the basis that the scheme infringed the fundamental principle of Community law of equality of treatment. They argued that where a national measure operates in a Community context, the measure's legality is subject to the fundamental principles of Community law. The respondents, by contrast, claimed that the fundamental principles are only applicable where the relevant act was done in the exercise of a power, or the fulfilment of a duty, imposed by Community law.

In this judgment, Judge Laws recognised, first, that the principle of equal treatment constitutes a general principle of Community law.[1290] However, Laws considered, very strangely, that the scope of application of this principle is narrower than the expressed provisions of the Treaty. This reasoning is based on the unwritten nature of the principles. In his words,

> "[t]hese fundamental principles, which also include proportionality and legitimate expectation, are not provided for on the face of the Treaty of Rome. They have been developed by the Court of Justice…out of the administrative law of the Member States. They are part of what may perhaps be called the common law of the Community. That being so, it is to my mind by no means self-evident that their contextual scope must be the same as that of Treaty provisions relating to discrimination or equal treatment, which are statute law taking effect according to their express terms".[1291]

[1287] Beal, "Sauce for the Goose, Sauce for the Cow, Pig and Fish", ICCLR 2002, pp.192-201, at p.194. *See also,* Boyron, "General Principles of Law and National Courts: Applying a Jus Commune", ELR 1998, pp. 171-178, Demetriou, "Using Human Rights through European Community Law", EHRLR 1999, pp.484-495, and Tridimas, *The General Principles of EC law,* Oxford, 1998, at pp.27-29.

[1288] *R* v. *Ministry of Agriculture, Fisheries and Food and Another*, *ex parte.* First City Trading . Before the High Court (Queen's Bench Division) QBD (Laws J.) 9 November 1996.

[1289] By Decision 96/239 of 27 March 1996 the European Commission adopted emergency measures to secure protection against disease in humans which it was suspected could arise from the consumption of beef or beef products from cattle affected by bovine spongiform encephalopathy ("BSE").

[1290] *First City Trading*, *supra n.1288,* para. 25, "The general or fundamental principles of Community law undoubtedly include the principle of equal treatment, or non-discrimination. Very crudely, but sufficiently for immediate purposes, it may be expressed as requiring decision-makers to treat like cases alike unless there exists an objective justification to discriminate. It seems plain that the rule is stricter than the Wednesbury ".

[1291] *Ibid.,* para. 39.

Then, the judge undertook an analysis of whether the national legislation fell within the scope of Community law. Indeed, the application of the general principle is conditioned to the possible nexus of the domestic legislation with Community law. Laws established a critical distinction to be drawn between two different types of situations. According to him, *"[o]n the one hand, a Member State may take measures solely by virtue of its domestic law. On the other a Community institution or Member State may take measures which it is authorised or obliged to take by force of the law of the Community."* [1292] Thus, in order to successfully resort to the general principle of equal treatment, it was necessary to ascertain that the scheme was a measure taken pursuant to Community law, either as implementing a Community provision *("Wachauf* situation*")* or because it was derogating from Community law *("ERT* situation*")*.[1293] By contrast, where a Member State took a measure exclusively by virtue of its domestic law, the general principles would not be applicable. Nevertheless, if such a measure affected the operation of the common market,[1294] it would be assessed to be within the ambit of the Treaty, and the Member State would be obliged to comply with the principles expressly stated in the Treaty.[1295]

Finally, the Judge concluded that the scheme did not fall within the scope of Community law.[1296] To this effect, he stressed that the scheme in question did not implement Community law nor constituted a permissible derogation from a free movement provision. Furthermore, he considered that the scheme was not state aid within the meaning of Article 92 EC (new Article 87) as it did not affect trade between Member States. In the present case, the judge did not make a preliminary reference to the ECJ concerning the application of the general principles of Community law. This attitude may be appraised as unfortunate since such a reference could have permitted the ECJ to determine more precisely the scope of

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[1292] *Ibid.*

[1293] *Ibid.,* "… [t]he second situation primarily includes (so far as Member States are concerned) measures which Community law requires, such as, for example, law which is made to give effect to a Directive. It includes also an act or decision done or taken by a Member State in reliance on a derogation or permission granted by Community law: as where for instance a restriction on imports or exports is sought to be justified by reference to Article 36 of the Treaty. In the first situation, the measure is in no sense a function of the law of Europe, although its legality may be constrained by it. In the second, the measure is necessarily a creature of the law of Europe. Community law alone either demands it, or permits it".

[1294] *See Phil Collins, supra n.1160.*

[1295] *First City Trading, supra n.1288,* para. 39, "…I contemplate a measure which is neither required of the Member State nor permitted to it by virtue of Community Treaty provisions. It is purely a domestic measure. Even so, it may affect the operation of the Common Market and accordingly be held to be "within the scope of application" of the Treaty. This was the Phil Collins case. It is of the first importance to notice that its falling within the Treaty's scope is by no means the same thing as being done under powers or duties conferred or imposed by Community law."

[1296] *Ibid.,* para. 47-51.

Community law or, to use Laws's words, "*the depth of Community law's bite*". [1297] Conversely, it is clear that the national courts have, sometimes, discretion to refer to the ECJ. Indeed, the ECJ is not competent to determine the validity of national measures, which fall outside the scope of the Treaty's application. If this matter were referred under Article 234 EC, the Court of Justice would have to decide upon the proper scope of that national law. As put by Laws, the interpretation of the term "law", in Article 164 (new Article 220 EC), is confined to Community law. The English judge observed that, *"[t]he power of the Court of Justice…to apply…principles of public law which it had itself evolved cannot be deployed in a case where the measure in question, taken by a Member State, is not a function of Community law at all. To do so would be to condition or moderate the internal law of the Member State without that being authorised by the Treaty"*.[1298] It can be stated that the judge refused to refer the matter to the ECJ because he considered that the domestic legislation was outside the scope of Community law. Although at first sight, it appears to be a convincing argument, such an assertion may be put into question, since it is arguable that the national measure affects the operation of the Common market. If this reasoning had been followed, the general principles of Community law would be applicable. By rejecting the Article 234 proceedings, the national judge assessed the scope of Community law in a very restrictive manner.[1299]

Similarly, an individual may encounter difficulties in challenging Community legislation before a national court. It is worth noting that an individual at the national level may indirectly challenge the Community legislation. In that respect, the national court may ask the ECJ for a preliminary ruling on the validity of the Community measure, since it cannot declare a Community measure invalid. However, it can refer the question of validity of such an act to the ECJ under Article 234 EC (ex Article 177 EC). Thus, it is possible to use the mechanism of preliminary ruling under Article 234(1)(b) in order to indirectly challenge a Community measure. In that situation, the applicant challenges the Community measure that implements the domestic measure and alleges a breach of a general principle of Community law, e.g. proportionality or equality. Since the national courts have no competence to declare the Community measures invalid,[1300] the applicant must persuade the domestic jurisdiction to start the preliminary ruling procedure in order to determine the validity of the measure. Significantly, the national court has broad discretion whether to refer the matter to the ECJ. Interestingly, the domestic court is precluded (theoretically) from referring the matter to the ECJ only in the circumstances in which it has serious doubts regarding the validity of the measure. In other words, the national judges are perfectly entitled

[1297] *Ibid.*, *First City Trading*, para. 24.
[1298] *Ibid.*
[1299] Interestingly, the national judge assessed the internal law both in the light of Wednesbury unreasonableness and the EC principle. He found no breach of the said principles (paras. 70-71). Such reasoning might be interpreted as demonstrating a doubt as to the applicability of Community law.
[1300] Case 213/85 *Foto Frost* [1987] ECR 4199.

to decide that the measure is legal if they consider that the grounds put forward before them by the plaintiffs are unfounded.[1301] Such a validity mechanism has been confirmed by the ECJ. The Court held in *Walter Rau*[1302] that:

> "It must be emphasised that there is nothing in Community law to prevent an action from being brought before a national court against a measure implementing a decision adopted by a Community institution where the conditions laid down by national law are satisfied. When such an action is brought, if the outcome of the dispute depends on the validity of that decision the national court may submit questions to the Court of Justice by way of reference for a preliminary ruling, without there being any need to ascertain whether the plaintiff in the main proceedings has the possibility of challenging the Decision directly before the Court".[1303]

The use of the preliminary ruling procedure in order to challenge the validity of a general measure may be seen as not providing strong and effective judicial protection. AG Jacobs in his Opinion in *UPA* highlighted these lacunae with strength. Firstly, referring to the *Foto-Frost* case, the domestic court cannot declare a Community act invalid.[1304] Secondly, the decision to make the reference depends entirely on the national court. Even if there is an obligation to refer for the national court of last instance, it may refuse to refer a question of validity to the Court of Justice.[1305] In addition, the national court has wide discretion in formulating the questions.[1306] Thirdly, it is extremely difficult to challenge Community measures when they are self-executing Regulations, i.e. a Regulation that does not require any implementing measure. Thus, the only solution that remains is to violate the Community regulation and wait for the sanction at the domestic level. As put rightly by Jacobs, "*individuals cannot be required to breach the law in order to gain access to justice"*.[1307]

6.3.3. Standard of Review by the National Courts

The fact that a domestic measure falls within the scope of Community law has a practical significance, i.e. it may allow an amplification of the grounds for review by the national courts.[1308] For example, it is arguable that the EC principle of proportionality offers a much more stringent test than the Wednesbury

[1301] Case C-27/95 *Woodspring District Council* [1997] ECR I-4517, para. 19.
[1302] Case 133-136/85 *Walter Rau* [1987] ECR 2289. German Margarine producers challenged the validity of Community Scheme.
[1303] *Ibid.*, para 11.
[1304] AG Jacobs in *UPA, supra n.838,* para. 41.
[1305] *See e.g.*, *First City Trading*.
[1306] AG Jacobs in *UPA*, *supra n.838,* para. 42.
[1307] *Ibid.,* para. 43.
[1308] Beal, "Sauce for the Goose, Sauce for the Cow, Pig and Fish", ICCLR 2002, pp.192-201, at p.194,

unreasonableness test in the UK.[1309] Accordingly, Judge Laws in *First City Trading* stressed that, "Wednesbury and European review are different models –one looser, one tighter of the same juridical concept, which is the imposition of compulsory standards on decision-makers so as to secure the repudiation of arbitrary power".[1310] Nevertheless, reasoning *a contrario* may be applied. Ward argued that *"some aspects of the Community system of judicial review would provide higher grades of protection than would otherwise be available in other Member States, while the same rules would compare unfavourably with analogous principles in other Member States"*.[1311] Indeed, it may be said that certain Member States provide a higher national standard of review than the EC standard. For instance, in Germany, it is well known that the domestic standards of review concerning questions such as legitimate expectations and proportionality allow a high level of scrutiny of the national governmental measure. This section attempts to give some clarifications on the application of the standards of protection by the national courts. In this sense, AG Jacobs considers that the standard of protection of fundamental rights that the national court has to apply constitutes a difficult concern.[1312] First, it analyses whether the national court can review a domestic measure falling within the scope of Community law in the light of a (higher) national standard of protection. Second, it determines whether the national courts are under an obligation to apply the (higher) standard imposed by the general principles of Community law

a) Application of a Higher National Standard

Is a national court entitled to apply a higher domestic standard to review a national measure falling within the scope of Community law? The answer to this question requires a delicate analysis. At first blush, it should be recalled that an applicant attempting an action to review the validity of a Community measure is not entitled to rely on a national principle, which is not recognized as a general principle of Community law by the ECJ. Such reasoning is exemplified by the early ruling of the ECJ in *Internationale Handelsgesellschaft*. [1313] In this case, the *Verwaltungsgericht* refused to accept the validity of a deposit based on a Community Regulation. According to the German national court, the system was contrary to certain

[1309] Demetriou, "Using Human Rights Through European Community Law", EHRLR 1999, pp-484-495, at p.493, "[a]nother advantage flows, from the grounds of judicial review permissible when challenging action within the scope of Community law. Notably, governmental action may be challenged on the ground that it is disproportionate. This allows far more careful scrutinity than the analogous domestic ground of Wednesbury unreasonableness and, arguably, is applied in a more rigorous manner than by the Strasbourg institutions which often give the decision-maker a wide margin of appreciation".

[1310] *First City Trading, supra n. 1288*, para. 69.

[1311] Ward, "Judicial Review of the Rights of Private Parties in EC Law", Oxford, 2000, at p.273.

[1312] AG Jacobs, "Human Rights in the European Union: The Role of the Court of Justice", ELR 2001, pp.331-341, at p.337. Jacobs considers that the ECJ is not really well placed to lay down that standard.

[1313] Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

structural principles of national constitutional law (the principles of freedom of action and of disposition, of economic liberty and of proportionality arising in particular from Articles 2 (1) and 14 of the basic law) which must be protected within the framework of Community law, with the result that the primacy of supranational law must yield before the principles of the German basic law.[1314] The ECJ held that:

> "Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. The validity of such measures can only be judged in the light of Community law. In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called in question. Therefore the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure".[1315]

However, an examination should be made as to whether or not any analogous guarantee inherent in Community law has been disregarded. In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community. It must therefore be ascertained, in light of the doubts expressed by the *Verwaltungsgericht,* whether the system of deposits has infringed rights of a fundamental nature, respect for which must be ensured in the Community legal system".[1316]

In this sense, AG Lenz in *Zuckerfabrick*[1317] considered that, "the fact that Community legislation is allegedly or effectively at variance with principles applicable in the Member States regarding the levying of taxes may result in the invalidity of such legislation only if the national constitutional principles in question also constitute general principles of law in the Community legal order".[1318] As put by a commentator, *"[t]here is however, an important aspect of the process of challenging the validity of the Community measure which seems to place the individual at a disadvantage, and which sits oddly with legitimacy problems inherent in EC law. If applicants fail to convince the Court that a standard of review recognized by national law should be adopted by the Community as a general principle of Community law or fundamental right, they will lose their entitlement to rely on that standard; despite its continuing availability before domestic courts in*

[1314] *Ibid.,* para. 2.
[1315] *Ibid.,* para. 3.
[1316] *Ibid.,* para. 4.
[1317] Joined Cases C-143/88 *Zuckerfabrick* [1991] ECR I-415.
[1318] *Ibid.,* AG Lenz in *Zuckerfabrik,* para. 85.

claims based purely on national law". [1319] This criticism is certainly acceptable. It seems clear that the non-acceptance of a high standard of protection by the ECJ poses inevitable problems as to the legitimacy of the EC law. However, as highlighted by the ECJ in *Internationale Handelsgesellschaft*, the acceptance of principles of national law may imperil dangerously the very foundation of the European legal order, damaging its uniformity and effectiveness.

Can one apply this reasoning to the national court reviewing a measure falling within the scope of Community law? In other words, are the national courts precluded from applying a lower Community standard? Indeed, under an Article 234 proceeding, it is for the domestic court to apply the general principles of Community law. In such a situation, the national court may find that the principle exists in both legal orders, but that the level of protection differs from one system to another.[1320] Weiler has argued that the national court should apply the higher national standard of protection and strike down the measure both when a Member State acts as an agent of the Community (implementing Community law) and in the "*ERT* situation", i.e. when the Treaty prohibits national measures which conflict with the free movement provisions.[1321]

In the former situation, Weiler considers that the discretion given by the Community in the implementation or execution of Community law does not necessitate that the national standard be violated. In the latter situation, the author argues that there is no Community interest in overriding a national human rights standard applied by a national court against Member States derogating from the Treaty. Then, in both situations the national court is entitled to strike down the domestic measure. Nevertheless, the application of the higher national standard is submitted to the condition that it does not prejudice the effective enforcement of Community law.[1322]

This view appears to be confirmed by the *Deutsche Milchkontor* case.[1323] This case concerned the reliance on a legal provision (paragraph 48 of the *Verwaltungsverfahrensgesetz*),[1324] that includes the principles of legitimate

[1319] Ward, *Judicial Review of the Rights of Private Parties in EC Law*, Oxford, 2000, at p.274.
[1320] AG Van Gerven in *ERT, supra n.1075*, para. 38.
[1321] Weiler, "The Jurisprudence of Human Rights in the European Union: Integration and Disintegration, Values and Processes", Harvard Jean Monnet Working Paper No 2/96, at pp.17-18.
[1322] *Ibid.,* at p.21.
[1323] Joined Cases 205/82 to 215/82 *Deutsche Milchkontor* v. *Germany* [1983] ECR 2633.
[1324] *Ibid.,* para. 28, "[i]t is clear from the orders for reference that the verwaltungsgericht frankfurt am main has asked this question in order to enable it to decide whether the application of paragraph 48 of the verwaltungsverfahrensgesetz to a case like this is consistent with the aforementioned principles of Community law. To take account of the principles of the protection of legitimate expectation and assurance of legal uncertainty that paragraph provides in particular that: An unlawful administrative Decision granting a pecuniary benefit may not be revoked in so far as the beneficiary has relied upon the Decision and his expectation, weighed against the public interest in revoking the Decision, merits protection; The recipient of such a benefit may plead loss of enrichment in accordance with the relevant

expectations and legal certainty. This provision may affect the scope and effectiveness of Community law, since it may make it impossible to recover Community aid unduly paid. After emphasising that the principles of legitimate expectations and legal certainty are part both of the Community legal order and of the legal systems of the Member States,[1325] the Court stressed, in addition, the importance of taking the interest of the Community into full consideration in the application of the provision.[1326] Finally, the Court ruled as follows:

> "Community law does not prevent national law from having regard, in excluding the recovery of unduly-paid aids, to such considerations as the protection of legitimate expectations..., provided however that the conditions laid down are the same as for the recovery of purely national financial benefits and the interests of the Community are taken fully into account".[1327]

This case, as stressed by AG Van Gerven in *ERT,* makes it possible for the national court to apply the national principle of legitimate expectations even if the legal protection goes further than Community law. In the words of AG Van Gerven:

> "As the Court has consistently held, in proceedings for a preliminary ruling under Article 177 of the EEC Treaty, it is for the national court, and not the Court of Justice, to apply Community law and the general principles forming an integral part of it to all the actual facts of the case before it. In so doing, it may happen that the national court finds that the same general principle is recognized both in the Community legal order and in its own legal system, but does not afford the same degree of legal protection in the two systems…[milchkontor]…makes it possible to apply the principle of legitimate expectations under national law even if the legal protection afforded thereby goes beyond the legal protection which Community law

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rules of civil law unless he knew, or was unaware of owing to gross negligence on his part, the circumstances which made the grant of the benefit unlawful; Unless obtained by fraud, duress or bribery, an unlawful administrative Decision must be revoked within one year from the time when the administration became aware of the facts in question; The amount unduly paid cannot be recovered where the authority knew, or was unaware owing to gross negligence on its part, that it was granting the benefit unlawfully."

[1325] *Ibid.,* para. 30, "[t]he first point to be made in this regard is that the principles of the protection of legitimate expectation and assurance of legal certainty are part of the legal order of the Community. The fact that national legislation provides for the same principles to be observed in a matter such as the recovery of unduly-paid Community aids cannot, therefore, be considered contrary to that same legal order. Moreover, it is clear from a study of the national laws of the Member States regarding the revocation of administrative Decisions and the recovery of financial benefits which have been unduly paid by public authorities that the concern to strike a balance, albeit in different ways, between the principle of legality on the one hand and the principles of legal certainty and the protection of legitimate expectation on the other is common to the laws of the Member States".

[1326] *Ibid.,* para. 32.

[1327] *Ibid.,* para. 33. *See also* AG Jacobs, paras. 20 *et seq.*

> would afford (and even if this detracts to some extent from the Community' s financial interests)".[1328]

The same view is taken by AG Cosmas in Case C-63/93 *Duff and others*.[1329] In this case, the national court raised the question of the protection of fundamental rights in relation to the failure to grant additional milk quota. The AG stated that:

> "It is, I think useful to add that, although the abovementioned general principles of Community law can provide no basis for a requirement on the part of Member States to provide for the special reference quantities to the producers referred to in the first indent of Article 3(1) of regulation No 857/84, there is nothing to prevent such a requirement from being founded on principles of national law which, in an appropriate case, may ensure greater protection in this respect than that afforded by the general principles applicable in the Community legal order".[1330]

However, the application of the higher national standard seems conditioned by the existence of certain requirements. In this sense, it is necessary that the national principle finds a corollary in the Community legal order. It is also worth remarking that AG Cosmas in the *Duff* case developed other conditions that are attached to the effectiveness of the Community legal order. The AG argued that:

> "That possibility in no way jeopardizes the uniform application of Community law since the first indent of Article 3(1) of regulation No 857/84 specifically gave the Member States the possibility of adopting different solutions as regards the grant or otherwise of special reference quantities. It should however be emphasized that the application of a principle of national law in order to found such an obligation on the part of the relevant Member States is subject to exactly the same restrictions as those to which national law is in any event subject when it gives effect to provisions of Community law. Thus that principle will have to be applied in areas unconnected with Community law, whilst, furthermore, the application thereof must not lead to any substantive alteration of the rules governing the additional levy scheme on milk, jeopardize the effectiveness of the scheme or compromise the successful attainment of its objectives. It goes without saying that it is not for the Court but for the national court to examine whether there any principles of national law capable of imposing on the relevant Member State an obligation to grant special reference quantities to the producers to whim the contested provision of regulation N0 857/84 refers".[1331]

The AG stressed that since the Member State has discretion given by the Community measure (Regulation), the national court is not prevented from applying a higher national standard. First, the application of the national principle must not be discriminatory (the conditions of application must be the same in purely internal areas). Second, the interest of the Community must be taken into full account. In

[1328] AG Van Gerven in *ERT*, *supra n.1075,* paras. 38-39.
[1329] Case C-63/93 *Duff* [1996] ECR I.569.
[1330] *Ibid.,* AG Cosmas in *Duff,* para. 60.
[1331] *Ibid.*, para. 61.

other words, the application of the national principle cannot impede the effectiveness of Community law.

b) Application of a Higher Community Standard of Protection

In contrast to the previous section, Weiler establishes a clear distinction between the "*ERT*" and "*Wachauf*" situation. The author considers that the domestic court should apply the lower national standard of protection in the "*ERT* situation". At first glance, this argument may appear tenable, since the Member States implementing a national policy do not act as agents of the Community. By consequence, the national measure, which does not pass the higher Community standard but does not conflict with the lower domestic standard of protection, does not need to be quashed by the national court. The main difference between those two types of situations is that, on the one hand, the national court should strike down a Member State measure in the agency situation if the higher Community standard of protection is infringed. On the other hand, in the *ERT* situation, under the same circumstances, the national court should not strike down the measure. In the words of Weiler:

> "in the ERT situation the Community should not impose its own standard on the Member State measure but allow a wide margin of appreciation, insisting only that the Member State does not violate the basic core encapsulated in the ECHR. This seems to be consistent with the Opinion of AG Van Gerven. Unlike the Wachauf situation where the Member State is in truth a Community measure, here we are dealing with a Member State measure in application of a Member State policy. The interest of the Court and the Community should be to prevent a violation of core human rights but to allow beyond that maximum leeway to national policy".[1332]

In the former situation, the Member State acts as agent of the Community. In the latter one, the Member State implements a national policy and, consequently, does not fulfil an agent's role. Such a differentiation might explain his reasoning.

Conversely, it may be argued that if the national legislation falls within the scope of Community law, then the national court should apply the higher standard provided by the general principles of Community law. Such reasoning appears to be tenable particularly in the light of Article 10 EC (ex Article 5). By interpreting Article 10 EC, one can deduce a duty for the national courts to apply the general principles of Community law to a national measure falling within its sphere. In this sense, Temple Lang's argumentation is of the utmost importance. The author lucidly argued that,

> "[a] national court, in proceedings for judicial review or the equivalent, must annul or decline to apply a national measure in the Community law sphere which is contrary to Community law, or which has been adopted by procedures which are contrary to Community law…it also means that a national court may have to decide whether a measure is contrary to one of the "general principles of law" which, the court has repeatedly said, are part of Community law…the case law of the court shows that the "general principles" of Community law include several principles

[1332] Weiler, *supra n.1321,* at p.21.

> like proportionality and legal certainty which are not clearly recognised as constitutional principles in all the Member States (though perhaps they should be). These principles have had important practical consequences for the validity of Community measures, on occasion, and they will certainly be--indeed, they already are--important in judicial review cases involving national measures also…In any case the point to grasp is that national courts must apply all of the Community fundamental rights principles throughout the sphere of Community law…The other point to remember is that both the "general principles of law" and fundamental rights rules are rules of Community law which are directly applicable in national courts (unlike the European Convention itself) and which override inconsistent rules of domestic law…It is important for a national court to know whether Community law applies in a particular situation (in which case all the safeguards under Community law apply) or whether the situation is governed only by national law. This is of course especially likely to be important in a Member State, which has no judicial review for compatibility with constitutional rights. A national court can, if it wishes, ask whether Community law does apply and ask, as further questions, whatever issues of Community law would then arise. So when does Community law apply to Member State action? What is "the sphere of Community law"? It seems that it is at least: when the Member State is implementing Community measures; when the Member State takes measures affecting rights given or protected by Community law, or in areas regulated specifically by Community law".[1333]

This analysis clearly points towards an application of the general principles of Community law whenever a national measure falls within the purview of Community law. Arguably, if a national measure implementing a national policy derogates from Community law, it falls within the scope of Community law. This national measure may derogate from Community law provided that the said measure is objectively justified on grounds of public policy. However, the domestic measure must be proportionate to the objectives. It is for the national court to apply the proportionality test, but what proportionality test? Is it the stringent EC proportionality test? Or is it the national proportionality test (like Wednesbury unreasonableness in the UK)? Arguably, the national courts are under a duty to apply the EC proportionality test. Such a view may be comforted by the *Sunday trading* saga. In that case, the UK national courts came to various conclusions. Such a situation is at odds with the principle of legal certainty and uniformity of legal remedies. Finally, the House of Lords made a preliminary ruling to the ECJ, which ruled that the domestic legislation was disproportionate in the light of the EC standard. Arguably, the EC standard is higher than the national one. According to Laws in *First City Trading*, *"Wednesbury and European Review are different models- one loser, one tighter, of the same judicial concept, which the imposition of compulsory standards on decision makers so as to secure the repudiation of arbitrary power."* [1334] If Weiler's reasoning is followed, the national court should apply the lower standard of proportionality. One may disagree with such an

[1333] *See,* Temple Lang, "The Duties of National Courts under Community Constitutional Law", ELR 1997, pp.3-18.
[1334] *First City Trading*, *supra n.1288,* para. 69.

assertion. Indeed, the higher Community Standard should be used by the national court not only in a *"Wachauf* situation*"*, but also when the Member State derogates from a Community freedom. In addition, this view is comforted by the case-law of the ECJ. Indeed, the Court has repeatedly ruled in the *ERT* situation that:

> "According to the Court's case-law (see, in particular, Case C-159/90 Society for the Protection of Unborn Children Ireland [1991] ECR I-4685, paragraph 31), where national legislation falls within the field of application of Community law the Court, in a reference for a preliminary ruling, must give the national court all the guidance as to interpretation necessary to enable it to assess the compatibility of that legislation with the fundamental rights - as laid down in particular in the Convention - whose observance the Court ensures. However, the Court has no such jurisdiction with regard to national legislation lying outside the scope of Community law".[1335]

It may be argued that there is an obligation for the national court to assess the compatibility of the national measure with EC fundamental rights standards. Needless to say, the fundamental rights in the EC law are influenced, in particular, but not only, by the ECHR. Obviously, this does not mean that the domestic measure must be merely appraised in the light of the ECHR. This could also take place in light of the fundamental rights developed in EC law. In other words, a higher Community standard can be used to determine the legality of the national measure. At the end of the day, the higher Community standard should be applied by the national courts whenever a domestic measure is falling within the scope of Community law. The major consequence is that the grounds of judicial review normally used by the national courts may be extended. This view has largely been developed by the doctrine.[1336] In this sense, according to Tridimas, *"Wachauf increases the onus on the national authorities and the national courts. National authorities must take care to ensure that the way they implement Community rules does not infringe fundamental rights. The role of national courts becomes critical. It falls upon them to review national measures on grounds of compatibility with fundamental rights, if necessary by making a reference to the Court of Justice. This way, they acquire a power which they may not possess under national law in relation to domestic measures unconnected with Community law".*[1337]

A further interdependent question to raise, but one not to be avoided, concerns the competence of the national courts. Increasingly, the national courts act like

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[1335] *Kremzow, supra n. 1118,* para. 15, *ERT supra n.1075,* para. 42, *Annibaldi, supra n.1138*, para. 13.

[1336] *See e.g.,* Beal, "Sauce for the Goose, Sauce for the Cow, Pig and Fish", ICCLR 2002, pp.192-201, at p.194, Demetriou, "Using Human Rights through European Community Law", EHRLR 1999, pp-484-495, at p.493, and Temple Lang, "The Duties of National Courts under Community Constitutional Law", ELR 1997, pp.3-18.

[1337] Tridimas, *The General Principles of EC Law,* Oxford, 1999, at pp.226-227.

constitutional adjudicators.[1338] Suffice it to recall here the observation made by Temple Lang, that:

> "this is particularly important in states such as the United Kingdom which have no judicial review of the compatibility of national measures with a national constitution. In such states Community law has given all national courts a wholly new responsibility, whenever necessary, of deciding whether even Acts of Parliament are contrary to the rules of Community law, with the help of the Court of Justice if the national court wishes. This means that a national court may have to decide whether a national measure in the sphere of Community law is contrary to a Treaty provision or to a Community regulation or directive".[1339]

My final observation is that the national courts must apply the standard offered by the general principles of Community law whenever a national measure falls within the scope of Community law. This is subject to the condition that the EC law standard offers a higher standard of protection than ECHR and national law. In my view, the national courts which apply a lower national standard are in breach of Community law (Article 10 EC [ex article 5]). Once again, the national courts should apply the highest standard of fundamental rights for the European citizens whenever a national measure falls within the purview of Community law.

[1338] De Witte, "The Past and Future Role of the European Court of Justice in the Protection of Human Rights", in Alston (eds.), *The EU and Human Rights*, Oxford, 1999, at p.873.
[1339] Temple Lang, *supra n.1333*, ELR 1997, pp.3-18.

PART 3 IMPACT OF THE GENERAL PRINCIPLES OF COMMUNITY LAW

After the study of the creation and development of the general principles, it now appears necessary to analyse their impact on the public law of UK, France and Sweden. This part therefore concerns the impact of general principles of Community law on the public law of those countries. More precisely, it focuses both on the reception of these principles in matters falling within the scope of Community law and internal matters. As to the former, there is an obligation for the national courts to apply the general principles in the EC law context. By contrast, such an obligation does not exist in matters falling within purely internal matters. This spill-over phenomenon is, indeed, voluntary and based on the need to ensure the integrity or coherence of domestic law.[1] Going further, it must be kept in mind that the impact of general principles of Community law, arguably, exemplifies the convergence of the national legal orders towards a European public law. In other words, these principles may be foreseen as vectors allowing the elaboration of a *jus commune* in the context of public law.[2]

Three arguments may be relied on to explain the impact of general principles of Community law in the national legal systems. First, the primacy argument concerns the obligation to apply the principles in the Community law context. This obligation can be deduced from Article 10 EC and the ECJ case-law. Second, the higher degree of scrutiny argument ("higher law") may help us to understand the necessity to

[1] Voluntary Europeanization (Hilson), spill-over (Craig, Anthony), cross-fertilisation (Bell, Allison), horizontal convergence (Harlow) are similar terms and express the same phenomenon, i.e. the impact of Community law in purely internal matters. *See* Allison, "Transplantation and Cross-Fertilisation", in Beatson and Tridimas (eds.), *New Directions in European Public Law*, Hart Publishing, 1998. *See also* Anthony, "Community Law and the Development of UK Administrative Law: Delimiting the Spill-Over Effect", EPL 1998, pp.253-276. Anthony, *UK Public Law and European Law: The Dynamics of Legal Integration,* Hart Publishing, 2002, Bell, "Mechanism for Cross-fertilisation of Administrative Law in Europe", in Beatson and Tridimas (eds.), *New Directions in European Public Law*, Hart Publishing, 1998, at p.147 *et seq*., Craig, "Once More Unto the Breach: The Community, the State and Damages Liability", LQR 1997, pp.67 *et seq,* Harlow, "Voices of Differences in a Plural Community", in Beaumont, Lyons and Walker, *Convergence and Divergence in European Public Law*, 2002, pp.199-224, and finally, Hilson, "The Europeanisation of English Administrative Law: Judicial Review and Convergence", EPL 2003, pp.125-145.

[2] *Ibid.,* Hilson. The author provides a contrary view. Europeanisation is narrowly defined as the influence of EC and ECHR norms on English, judge-made, administrative law. Going further, the author draws a distinction between compulsory (direct) and voluntary (indirect) Europeanisation. As to the former, it corresponds to matters falling within the scope of Community law. As to the latter, it corresponds to purely internal matters and represents a more indirect process, often described as spill-over or cross-fertilisation (at p.127). Hilson does not consider that the spill-over effect leads to convergence. One may disagree with this author.

properly apply the principles within Community law matters and the judicial interest of their reception within internal law. Third, the coherence argument ("two-speed law") provides another element supporting the spill-over of the principles. It considers that the existence of the two standards of law (Community and internal law) goes against the coherence of the legal system and that, consequently, only one standard (the higher one) should be applied.

What is the extent of this impact in the public law of these three Member States? How do administrative courts cope with the reception of general principles of Community law? Do general principles infiltrate purely internal law matters? This Part provides an answer in the light of the administrative jurisprudence. The thesis considers whether a strict dichotomy should be applied between the two paradigms of the law, i.e. matters falling within the purview of Community law and internal matters. [3]

[3] *See* Fernandez Esteban, "National Judges and EC Law: The Paradox of the Two Paradigms of Law", MJ 1997, pp.143 *et seq*. Using the words of the author, this dichotomy can be described as *"the paradox of the two paradigms of law"*.

CHAPTER 7. IMPACT OF THE GENERAL PRINCIPLES IN UK PUBLIC LAW

This Chapter concerns the influence of the general principles in UK public law and their application by the national courts.[4] More precisely, this Chapter focuses on the application of the principles of proportionality and legitimate expectations.[5] As explained above, there is an obligation for the UK courts to apply the general principles in the EC law context. By contrast, such an obligation does not exist in matters falling within purely internal matters.[6] According to Lord Hoffmann, *"the judicial power to review the acts of the executive and in some cases the legislature and to declare invalid any wrongful exercise of power is the most fundamental aspect of that complex notion which we call the rule of law. It is however also one of the most delicate tasks which a judge can have to perform"*.[7] This task becomes even more delicate with the modern approach to judicial review brought by the general principles of Community law. This principled approach requires, indeed, a new role for the national judge and, thus, clashes with the traditional attitude.

[4] Other principles will be discussed briefly, *e.g.* duty to give reasons and non-discrimination. It does not take into consideration the impact and diffraction of EC remedies. *M v. Home Office* [1993] 3 All ER 537 [HL], concerning the diffraction of EC remedies (interim relief) into purely domestic law. *See* Schwarze, "The Role of the European Court of Justice in Shaping Legal Standards for Administrative Action in the Member States", in O'Keeffe and Bavasso, *Judicial Review in European Union Law,* 2000, pp.447-464, at pp.460-461, for a more critical view, Legrand, "Public Law, Europeanisation, and Convergence: Can Comparatists Contribute?", in Beaumont, Lyons and Walker, *Convergence and Divergence in European Public Law*, 2002, pp.225-256, at pp.248-249.

[5] Anthony, *UK Public Law and European Law: The Dynamics of Legal Integration*, Hart, 2002, at pp.103-131. Chapter 5 of the book analyses the impact of the EC principles (proportionality and legitimate expectations) on UK public law. The book does not merely focus on the general principles of Community law but deals more generally with issues such as indirect effect, remedies and the Human Rights Act. Thomas, *Legitimate Expectations and Proportionality in Administrative Law,* Hart, 2000. The book deals specifically with the impact of the general principles of Community law (proportionality and legitimate expectations"). It does not deal with the Human Rights Act and the Coughlan and post-Coughlan jurisprudence.

[6] Lord Justice Schiemann, "The Application of General Principles of Community Law by English Courts", in Andenas and Jacobs, *European Community Law in the English Courts*, Oxford, 1998, pp.137-148, at p.147. *See Tesco Stores Ltd* v. *Secretary of State for the Environment* [1995] 2 All ER 636 [HL]. This case concerns a town planning decision approving the building of a supermarket. The House of Lords explicitly rejected the application of the principle of proportionality in purely internal matters. Conversely, *infra.*, Lord Slynn in *R v Alconbury,* "I consider that even without reference to the Human Rights Act 1998 the time has come to recognise that this principle [of proportionality] is part of English administrative law , not only when judges are dealing with Community acts but also when they are dealing with acts subject to domestic law".

[7] Lord Hoffmann, "A Sense of Proportion", in Andenas and Jacobs, *European Community Law in the English Courts,* Oxford, 1998, pp.149-161, at p.149.

Moreover, it will be stressed that the adoption of the Human Rights Act (HRA) facilitates the impact and diffraction of the general principles.[8]

The starting-point must be the analysis of the conception of parliamentary sovereignty and its strong linkage with judicial review (Wednesbury unreasonableness). Indeed, it may be said that the general principles affect strongly the traditional approach to judicial review. In this respect, the Wednesbury decision will be perceived as "retrogressive".[9] The important changes brought by the HRA will also be considered. Also, we will focus on the reception of the general principles in matters falling within the Community law context. The analysis will mainly concentrates on the principle of proportionality and the difficult reception of the principle in domestic law. Finally, the study will focus on the spill-over in purely internal matters. Substantive legitimate expectations will be taken as a case study and the analysis will mainly concentrate on the abuse of power test.

7.1. THE DOCTRINE OF PARLIAMENTARY SOVEREIGNTY, TRADITIONAL REVIEW AND THE HUMAN RIGHTS ACT: A CHANGING LEGAL LANDSCAPE

7.1.1. The Doctrine of Parliamentary Sovereignty

The concept of parliamentary sovereignty means that Parliament is the supreme legal authority in the UK. The traditional approach is that Parliament is not subject to any legal limitation and that the domestic courts have no power to declare laws duly (not irrational) passed by Parliament invalid. It also means that the Parliament can legislate and circumvent any judicial decisions that protect civil liberties if it considers them unaccommodating.[10] Following Dicey,[11] parliamentary sovereignty consists of four elements:

1. Parliament is competent to pass laws on any subject;
2. Parliament's laws can regulate the activities of anyone, anywhere;
3. Parliament cannot bind its successors as to the content, manner and form of subsequent legislation; and
4. Laws passed by Parliament cannot be challenged by the courts.

Thus, it seems plausible to consider that the limited role of the courts constitutes a crucial factor in the doctrine of parliamentary sovereignty. Further, it might be said that this doctrine deeply influenced the theory of judicial review in UK public law

[8] This is true because the application of ECHR rights by domestic judges shapes and fosters a more principled approach. The experience acquired in this context, then, may be transferred to the EC and internal domains. At the end, it might lead to a remarkable amalgam between national, EC and ECHR legal orders.

[9] Lord Cooke in *R (Daly)* v. *Home Secretary* [2001] 2 WLR 1622 [HL].

[10] *Burmah Oil* v. *Lord Advocate* [1965] AC 75.

[11] Dicey, *Law of the Constitution*, 1885, 10th ed, 1959.

and, subsequently, the role of the courts in adjudication.[12] In a similar context, Birkinshaw has argued that the rule of law and the courts in terms of government-citizen relationship was not the advancement of abstract rights but the protection of residual liberties.[13] Apparently, the doctrine of parliamentary sovereignty (traditional approach) conflicts with the theory of limited government (liberal approach) that is based on individual rights protected by a strong judiciary.[14]

Nevertheless, Parliament may limit its own sovereignty. In this respect, the adoption of the European Communities Act (1972) and the Human Rights Acts (1998) are two clear examples illustrating the limitation of parliamentary sovereignty. Importantly in a dualist system, their use by the UK courts was only possible after having been implemented by an Act of the Parliament.[15] It will be seen that the adoption of both Acts has had a substantial influence on judicial review. Paradoxically, the modification of the judicial review's texture appears as the direct consequence of two political decisions. At the end of the day, it will be argued that one witnesses here a shift from a majority rule (doctrine of parliamentary sovereignty) to a theory of limited government (more continental).[16]

Concerning Community law, the adoption of the European Community Act led, generally, to profound modifications in the UK domestic legal order, e.g. concerning interpretation and remedies.[17] To quote, once again, Lord Denning, *"when we come to matters with a European element, the Treaty is like an incoming tide. It flows into the estuaries and up our rivers. It cannot be held back. Parliament has decreed that the Treaty is henceforth to be part of our law. It is equal in force to any statute"*.[18] More precisely, as to the impact of the general principles of Community law, it is worth remarking that those principles are elaborated or developed through the case-law of the ECJ. Using the words of Jacobs, *"its main concern has been to protect*

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[12] In many countries, *e.g*., the USA, the competence of the legislator is limited by the Constitution. The U.S. Supreme Court can declare laws passed by the legislature to be unconstitutional and therefore invalid. *See* Ely, *Democracy and Distrust,* Cambridge, Harvard University Press, 1980, at p.43, ". . . [the Court] is an institution charged with the evolution and application of society's fundamental principles with its constitutional function to define values and proclaim principles".

[13] Birkinshaw, "European Integration and United Kingdom Constitutional Law", EPL 1997, pp.57-91, at p.73.

[14] *See*, Harlow and Rawling, *Law and Administration*, Butterworths, 1997 (2nd ed).

[15] Blackburn v. AG [1971] 2 All ER 1380. According to Lord Denning, "even though the treaty of Rome has been signed, it has not effect, so far as these courts are concerned, until it is made an Act of Parliament. One it is implemented by an Act of Parliament, these courts must go by Act of the Parliament, and then only to the extent that Parliament tells us".

[16] Jowell, "Beyond the Rule of Law: Towards Constitutional Judicial Review", PL 2000, pp.671-683, at p.671.

[17] *See,* concerning interpretation, Arnull, "Interpretation and Precedent in European Community law", in *European Community Law in the English Courts,* Oxford, 1998, pp.115-136, Usher, *General Principles of EC Law*, 1998, at pp.140-144, Concerning remedies, *see* Boch, *EC Law in the UK*, Longman, 2000, pp.127-149.

[18] *Bulmer* v. *Bollinger* [1974] 2 All ER 1226.

individual rights".[19] By protecting individual abstract rights, the principles create an environment favourable to, what can be called a "control theory", "red light theory" or "instrumentalist theory" (all describing the role of courts in order to protect rights). In other words, the principles have been connected with a liberal theory of limited governance sponsored by coherent and rational principles. Obviously, this theory conflicts, to a certain extent, with the Diceyan concept of parliamentary sovereignty described above.[20] The traditional approach has recently been reaffirmed by Lord Justice Laws in *Thoburn.*[21] Going further, it comes close to the theory advocated by Dworkin regarding the use of principled arguments in order to protect individual rights.[22] In this section, it will be seen how the general principles of Community law have modified the traditional approach followed by UK courts. The inquiry is not only limited to the field of Community law, but also considers the diffraction of the principles over purely internal matters.

Concerning human rights law, the adoption of the HRA also implied a radical change in the concept of rights and review.[23] In this respect, it will be seen that the traditional approach to judicial review has drastically changed in matters not falling automatically within the scope of Community law. The European Convention Rights are now used as self-sufficient (free standing) standards of legality for individuals. It will be demonstrated that the HRA, notably the application of the principle of proportionality, affects the reasoning of the courts and is leading to a more principled and, to a certain extent, a more moral assessment.[24] Put bluntly, the focus of the domestic jurisdictions is moving from the public body to the individual. Moreover, the adoption of the HRA is reinforcing, arguably, the impact of the

[19] Jacobs, "Public Law- The Impact of Europe", PL 2000, pp.232-245, at p.245.

[20] The rule of law as described by Dicey might also be seen as a form of invitation to limited governance.

[21] Lord Justice Laws in *Thoburn v. Sunderland City Council* [2002] 1 CMLR 1461, para. 59 (*Metric Martyrs* Case). Lord Justice Laws reaffirmed the traditional doctrine of Parliamentary sovereignty and emphasised that the foundation for all Community competence was English law, since the supremacy of EU law is conditioned by the Parliament which may explicitly repeal the ECA 1972 (constitutional statute which cannot be impliedly repealed). In other words, the relationship between the EU and UK legal orders rests within the domestic law/legislature/Parliament. For comments on the *Metric Martyrs* case. *See,* Anthony "Clustered Convergence? European Fundamental Rights Standards in Irish and UK Public Law", PL 2004, pp. 283-304. O'Neill, "Fundamental Rights and the Constitutional Supremacy of Community Law in the United Kingdom after Devolution and the Human Rights Acts", PL 2002 pp.724 *et seq.*

[22] Dworkin, *Taking Rights Seriously*, Duckworth, 8th edition, 1996. Dworkin considers that the court must protect the rights of the individuals against the state. Arguments of principles permit to justify a decision in order to secure individual rights.

[23] Before the adoption of the HRA, the ECHR was used as aid to interpretation (*See*, Usher*,* General Principles of EC Law, Longman, 1998). This situation explained the important number of cases before the EctHR.

[24] Nergelius, "Parliamentary Supremacy under Attack: The British Constitution Revisited", in Bergrenn, Karlson, Nergelius (eds.), *Why Constitutions Matters,* City University Press, 2000, pp.107-135, at p.127.

general principles of Community law in non-community matters. The application of the ECHR principle of proportionality permits the judges to familiarize themselves with a "continental style of review", and then facilitate the diffusion of the principle. What is more, there is often an entanglement between Human Rights and Community law issues.[25] Though theoretically both types of claims should be dealt with separately by the national judge, in practice, a good knowledge of the ECHR rights certainly permit a better solution in Community law.

7.1.2. Wednesbury Review (Irrationality test): Deference and Flexibility

The Wednesbury review (irrationality test) constitutes the traditional (orthodox) approach of review in UK public law. Put bluntly, it means that judges have no power to interfere with the facts or merits of a public authority decision unless the decision/measure is manifestly disproportionate or unreasonable (irrational).As a consequence, it allows a wide margin of appreciation to the decision-maker. Importantly, this wide margin of appreciation goes hand in hand with a low intensity of review and a high degree of deference to the decision-maker. In other words, the threshold the applicant must overcome is incredibly high. The judge must ask himself questions like:

> "is the decision so absurd that no sensible person could ever dream it lay within the powers of the decision-maker"[26]
>
> "is the decision so wrong that no reasonable person could sensibly take this view"[27]
>
> " is the decision so outrageous in its defiance of logic or of accepted moral that no sensible person who applied his mind to the question to be decided could have arrived to it"[28]
>
> or even if the decision-maker "has taken leave of his senses"[29]

Next, it ought to be remarked that the Wednesbury test is a variable standard of review.[30] It means that there is some latitude in the intensity of review or a "sliding

[25] *See e.g. International Ferry* [1998], *International Transport Roth* [2002], *Gough and Smith* [2002], *R* v. *A*, and *Smith and Glazier* [2003].
[26] Lord Greene in *Associated Provincial Picture Houses* v. *Wednesbury Corporation* [1948] 1 KB 223, at p.229.
[27] Lord Denning MR in *Secretary of State for Education* v. *Thameside MBC* [1977] AC 1014, at p. 1026.
[28] Lord Diplock in *Council of Civil Service Union* v. *Minister for Civil Service* [1985] AC 374, at p. 410.
[29] Lord Scarman in *R* v. *Secretary of State for the Environment, ex parte Nottinghamshire County Council* [1986] AC 240, at pp.247–248.
[30] However, the principle of proportionality in EC and ECHR applies with a greater degree of variation. *See infra*, Supperstone and Coppel for the flexibility in the ECHR and De Búrca for the EC principle of proportionality.

scale in the degree of deference".[31] Already before the entry into force of the Human Rights Act, the need for "*anxious scrutiny"* by the Court, where human life or liberty is at risk, was notably stated by Lord Bridge of Harwich in *ex parte Bugdaycay*.[32] This formula clearly anchors the future importance of the distinction between human rights and non-human rights issues. Then, this distinction has been known under the academic *sobriquets* of Super-Wednesbury[33] and Mini-Wednesbury (Jowell)/Sub-Wednesbury (Hilson).[34] As to the former, it corresponds to a highly deferential test/low intensity of review used for instance in the field of economic policy. [35] As to the latter, it corresponds to the application of heightened scrutiny in the field of human rights. This last example is clearly illustrated by the *ex parte Smith* case.[36]

The *Smith* case concerned the decision to dismiss servicemen in the armed forces on the grounds of their homosexuality. The applicant argued that the decision was contrary to the 76/207 Equal Treatment Directive. The Court considered that the Equal Treatment Directive was inapplicable in the present case. Thorpe Lord Justice (L.J). stated that the Directive was merely directed to gender discrimination and not to discrimination against sexual orientation.[37] The same view was taken by Thomas Bingham, Master of the Rolls (MR). The Minister claimed that the case was non-justiciable on grounds of national security. It also contended that morale in the army would be seriously affected if homosexuals were to be admitted. The Court of Appeal (CA) considered that this argument constituted a sufficient justification. And the decision was considered to be "Wednesbury reasonable".[38]

The Court of Appeal upheld, quite strongly, the application of the Wednesbury test. However, it also recognised that the intensity of review will be higher in the human rights context than in another (non-human rights) situation. In that regard, it seems worth quoting the CA,

> "[t]he Court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision maker. In judging whether the decision maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of

[31] Jowell, "Is Proportionality an Alien Concept", EPL 1996, pp. 401-411, at p.406.
[32] Lord Bridge of Harwich in *R* v. *Secretary of State for the Home Department, ex parte Bugdaycay* [1987] AC 514, at p. 531.
[33] Ibid.
[34] Hilson, *supra n.1*, at pp.132-133.
[35] *R* v. Secretary *of State for the Environment, ex parte Hammersmith and Fulham* [1991] 1 AC 521.
[36] *R* v. *Ministry of defence, ex parte Smith* [1996] QB 517, 1 All ER 257.
[37] *Ibid*., at p.565.
[38] The HL refused leave to appeal (after delivery of the *P* v. *S* ECJ's Opinion).

> justification before it is satisfied that the decision is [wednesbury] reasonable in the sense outlined above".[39]

In short, the Wednesbury standard of review in human rights cases appears to be a higher standard in comparison to other factual (non-human rights case) situations. However, it should be stressed that this standard is still lower than the one used by the EctHR. Such an assertion is particularly true in the light of the subsequent ruling of the EctHR in *Smith and Grady*.[40] The EctHR considered that the "Mini-Wednesbury test", used by the Court of Appeal, was not appropriate to the protection of fundamental rights. It also assessed that the "morale" argument had been too easily accepted and that less restrictive means, e.g. disciplinary measures could have been used. More precisely, it ruled that:

> "the threshold at which the High Court and the Court of Appeal could find the Ministry of Defence policy irrational was placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order aims pursued, principles which lie at the heart of the Court's analysis of complaint under Article 8 of the Convention".

More recently, in *Saville*, the CA stated that, "the courts will anxiously scrutinize the strength of the countervailing circumstances and the degree of the interference with the human right involved and then apply the test accepted by the Lord Chief Justice in *Smith*".[41] Interestingly, the decision, unlike the *Smith* case, was found to be unreasonable.[42] The test applied is still the so-called Mini-Wednesbury. The Court did not apply the principle of proportionality in this purely internal matter and, once again, declared its allegiance to the orthodox review. However, one may remark that the Wednesbury review is plied with even more intensity than in *Smith*. Is that using proportionality without mentioning it? Be that as it may, the decision, as discussed above, of the EctHR is certainly not without merit. In other words, the Strasbourg court plays the role of a Damocles sword in purely domestic matters.

At the end of the day, the EctHR appears as the final arbitrator and may assess the "quality" of review provided by the national courts. This situation is clearly illustrated by the *Peck* case (2003).[43] In this case, the applicant was filmed by a local television network, while attempting to commit suicide. He started an action in order to impede the disclosure of footage and photographs. However, the sole issue before the national court was whether the policy might be said to be irrational. Importantly at this time, the Convention did not form part of UK domestic law, but the case occurred after the entry into force of the HRA. Peck argued that his right to privacy

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[39] *Smith*, *supra n.36*, at p.554.
[40] *Smith and Grady* v. *United Kingdom* (1999) 29 EHRR 493. Similarly, *see*, *Peck* v. *UK* (2003), *infra*.
[41] *R* v. *Lord Saville of Newdigate, ex parte A* [2000] 1 WLR 1855, para. 37.
[42] The decision concerned the refusal to grant anonymity to soldiers in an inquiry regarding the events of Bloody Sunday in Ireland.
[43] *Peck* v. *United Kingdom*, Application No 44647/98, 28 January 2003 [2003] 36 EHRR 41.

under Article 8, both in isolation and taken together with Article 13 ECHR, had been infringed. The applicant contested the assertion that the High Court had assessed the proportionality of the interference. Accordingly, the irrationality test could not be equated with the proportionality test under Article 8 ECHR (which includes the right to family life) and, thus, constituted a breach of his right to effective remedy. The EctHR referred to the Wednesbury test and considered that the English courts do not recognise proportionality as a separate ground for judicial review.

However, the Court emphasised the *obiter dictum* of Lord Slynn in *Alconbury*. This *obiter* considers that the principle of proportionality should be recognised as part of English administrative law even outside the scope of application of Community law.[44] Also, the EctHR recalled the *Smith and Grady* case, where it concluded that the applicants had no effective remedy in relation to the violation of their right to respect for their private life.[45] *In casu*, the Court remarked that the High Court did not consider that the local council acted irrationally. In this respect, the EctHR stated that, "the threshold at which the High Court could find the impugned disclosure irrational was placed so high that it effectively excluded any consideration by it of the question of whether the interference with the applicant's right answered a pressing social need or was proportionate to the aims pursued, principles which as noted above lie at the heart of the Court's analysis of complaints under Art.8 of the Convention".[46] The Court concluded that judicial review did not provide the applicant with an effective remedy in relation to the violation of his right to respect for his private life.[47]

Finally, as seen previously, the "Wednesbury review" appears rather flexible.[48] In that sense, the Court stated in Smith that:

> "the greater the policy content of a decision, and the more remote the subject matter of a decision from ordinary judicial experience, the more hesitant the court must necessarily be in holding a decision to be irrational. That is good law, and like most good law, common sense. Where decisions of a policy-laden, esoteric or security-based nature are in issue even greater caution than normal must be shown in applying the test, but the test itself is sufficiently flexible to cover all situations".[49]

However, as will be demonstrated later, the irrationality test is clearly less flexible than the principles of proportionality in ECHR and Community law. At the end of the day, it might be said, using the words of De Búrca, that the Wednesbury test is

[44] *Ibid.*, paras. 39 and 106.
[45] *Ibid.,* paras. 100 and 105.
[46] *Ibid.*, para. 106.
[47] *Ibid.,* para. 107.
[48] *See,* Lord Cooke in *R* v. *Chief Constable of Sussex, ex parte International Trader's Ferry* [1997] 2 All ER 65 [1999] 2 AC 418 [HL]. Lord Cooke proposed a more intensive Wednesbury test.
[49] *Smith*, *supra n.36,* at p.556.

unstructured and circular.[50] The circularity constitutes the very nature of the irrationality test as described above. The lack of structure is, indeed, the result of this circularity. By contrast, the principle of proportionality constitutes, without doubt, a more intelligible standard. It appears interesting, now, to analyse the position of the ECHR principle of proportionality in UK public law and then to determine the similarities and distinctions between the two standards of review.

7.1.3. Human Rights Act and Review

The ECHR was adopted in 1950[51] and the HRA incorporated it in the UK legal order in 1998. Due to a need of adaptation for the UK judiciary, the HRA entered into force on 2 October 2000. Drawing a parallel with the Canadian Charter of Fundamental Rights, the entry into force of the HRA might have led to a deluge of cases, the so-called floodgates argument.[52] However, this dark prediction has never been materialized. Instead, a vigilant approach prevailed. This approach was certainly helped by the rather strict requirement concerning *locus standi* ("victim test").[53] Thus, few claims succeeded during the first six months of the entry into force and the use of the HRA was temperate and, generally, justified.[54] Between October 2000 and April 2002, arguments based on sections 3, 4 and 6 were invoked in 431 cases and accepted in 94 cases.[55]

It appears important to discuss briefly the main points of the Human Rights Act. One of the main points of the HRA concerns the interpretative obligation (Section 2 and 3). The Act requires, indeed, that the courts take account of the Strasbourg

[50] De Búrca, "Proportionality and Wednesbury Unreasonableness: The Influence of European Legal Concepts on UK Law", EPL 1997, pp.561-586.

[51] The adoption of the ECHR led to criticisms in the UK. In that sense, Lord Jowett argued that the ECHR was vaguely drafted and condemned the administration by an "unknown court".

[52] Wade, "Human Rights and the Judiciary", EHRLR 1998, pp.520-533, at p.533, Clayton, "Developing Principles for Human Rights", EHRLR 2002, pp.175-195, at p.175.

[53] Section 7, limits the right to bring an action to the victim of the unlawful act. Section 7(7), states that, "a person is a victim of an unlawful act only if he would be a victim for the purposes of Article 34 of the Convention if proceedings where brought in the European Court of Human rights in respect of that act". Article 34 of the ECHR states that the Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be a victim of a violation by one of the High contracting parties of the rights set forth in the convention and the protocols thereto. This is stricter than the domestic test of sufficient interest. However it is not only limited to cases brought against public authorities. The HRA appears applicable to all proceedings, e.g. press freedoms, newspapers are not public authorities It ought to be noted that the HRA has a limited horizontal effect in relation to freedom of expression cases, *see* Clayton, EHRLR 2002, at pp.182-184 and *Douglas* v *Hello*! Ltd [2001] 2 WLR 1038.

[54] Starmer, "Two Years of the Human Rights Act", EHRLR 2003, pp.14-23, at p.16.

[55] *Ibid.*, at p.15. In comparison, between 1975 and 1996, 316 cases were referred to the ECHR (16 cases).

jurisprudence.[56] Lord Slynn considered that national jurisdictions should follow the ECHR case-law in a consistent manner. However, if they do not, a complaint would probably be filed to the EctHR which, consequently, would follow its own jurisprudence.[57] Both primary and subordinate legislation must be *"read and given effect"* in a way which is compatible with the Convention rights *"so far as it is possible to do so"*.[58] What is more, Section 6 requires the public authority, e.g. local authorities, government department, courts, and persons possessing functions of a public nature, to act in compatibility with the ECHR rights.[59] In the situation where it is impossible to achieve compatibility with primary legislation and the ECHR, the court can have recourse to Section 4 of the HRA.[60] This dialogue model (section 4 and 10) permits a declaration of incompatibility and remedial order. A declaration of incompatibility (Section 4) may be made by the court if it is satisfied that there is a manifest conflict between the ECHR and primary legislation. It allows a national court (only a higher court) to indicate to the government that legislation is incompatible with the ECHR. Then, this situation may lead to a remedial order (Section 10) amending the offending legislation. This order is made by a minister of the Crown and must be approved in draft by positive resolutions in each house of Parliament.[61] In doing so, the Government allows the higher court concerned to set aside the incompatible provision. A part of the doctrine assessed such a system as a sign of respect towards the sovereignty of Parliament;[62] others have seen it as a device to protect the remains of absolute parliamentary sovereignty.[63]

Before the adoption of the Human Rights Act (HRA) on 9 November 1998, it is worth noticing that the ECHR made its entrance into UK public law through the back door, i.e. through the human rights case-law of the ECJ.[64] Consequently, it is important to stress the close link between the ECHR and the general principles of Community law. In that respect, the *A v Chief Constable of the West Yorkshire*

[56] Section 2.
[57] *R* v. *Environmental Secretary* [2001] 2 WLR 840.
[58] Section 3 of the HRA. Together with the European Communities Act of 1972 (interprets the law with another set of norms), 3(2) can strike down secondary or subordinate legislation
[59] Section 6, "it is unlawful for a public authority to act in a way which is incompatible with one or more of the convention rights". This has been described as key provision (Supperstone and Coppel, *infra n.63,* at p.301).
[60] *See, R* v. *A.* (No2) [2001] 2 WLR 1546. Lord Steyn considered (para. 44) that the declaration of incompatibility must be avoided unless it is impossible.
[61] Wade, "Human Rights and the Judiciary", EHRLR 1998, pp.520-533, at pp.529-530.
[62] *Ibid.*, at p.530. "[r]everence for the sovereignty of the Parliament was the motive behind this remarkable amalgam of judicial and executive powers".
[63] Supperstone and Coppel, "Judicial Review After the Human Rights Act", EHRLR 1999, pp.301-329, at p.305, "[t]he HRA treads a careful line between creating for domestic law human rights standards which are truly normative, and protecting the remaining vestiges of the sovereignty of Parliament".
[64] *See Lord Bridge in R* v. *Home Secretary ex parte Brind* [1991] 1 AC 696 at p. 748, Lord Ackner in *Brind*, at p.763, and Lord Brown *Wilkinson*, PL 1992, at pp. 397 *et seq.*

Police case (2002) illustrates perfectly this correlation.[65] A (a male to female transsexual) applied to become a police constable in the West Yorkshire. The application was rejected in March 1998 on the grounds that A was a male and would be unable to conduct searches for persons in custody. The appellant argued that she had been discriminated on the grounds of sex. More precisely, it was submitted that although the ECHR was not incorporated into English law at the material time it was indirectly effective because the sex discrimination act gave effect to the Equal Treatment Directive.[66] This was clearly accepted by the Court of Appeal. Buxton L.J. stated that the Convention jurisprudence entered domestic law because of its status in Community law.[67]

Moreover, in *Booker Aquaculture*,[68] the Court of Session (Scotland), in Edinburgh, using the procedure for reference for a preliminary ruling, under Article 234 EC, referred various questions to the Court of Justice on the interpretation of the general principles of Community law, in particular the right to property, and on the validity of Council Directive 93/53/EEC. The domestic court asked whether the right to property, as recognised by Community law, requires that compensation be paid to farmers whose fish have had to be destroyed under measures imposed by a Council Directive for the control of diseases. In other words, are the principles of Community law relating to the protection of fundamental rights, in particular the right to property, to be interpreted as having placed on a Member State the obligation to adopt measures providing for the payment of compensation? [69] This leads to a double assessment of compatibility of both Directive 93/53 and the implementing measures adopted by a Member State with the fundamental right to property. At the end, this case-law demonstrates how a ECHR fundamental right, forming part of the general principles of Community law, can be interpreted by the

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[65] *A* v. *Chief Constable of the West Yorkshire Police* [2003] 1 CMLR. 25.
[66] *Ibid.,* para. 25.
[67] *Ibid.,* para. 33. The CA put emphasis on the fact that the HRA (incorporating the ECHR) did not come into effect until October 2000. This is long after the rejection.
[68] *Booker Aquaculture* Ltd v. *The Secretary of State for Scotland* [1999] 1 CMLR 35.
[69] *Ibid.* 1. Where, in implementation of an obligation under Directive 93/53/EEC to provide control measures for an outbreak of a List II disease on an approved farm or in an approved zone, a Member State adopts a domestic measure the application of which results in the destruction and slaughter of fish, *are the principles of Community law relating to the protection of fundamental rights, in particular the right of property,* to be interpreted as having placed on a Member State the obligation *to adopt measures providing for the payment of compensation*
(a) to an owner of fish which are destroyed; and (b) to an owner of fish which are required to be slaughtered immediately, thereby necessitating the immediate sale of those fish by that owner?
2. If the Member State is required to adopt *such measures*, what are the criteria of interpretation needed by a national court to determine whether the measures that are adopted *are compatible with the fundamental rights, in particular the right of property,* which the Court ensures and which derive in particular from the European Convention on Human Rights?" (emphasis added).

ECJ and thus how a national court may influence the development of case-law concerning fundamental rights and the interpretation of the ECHR. The general principles constitute vectors for the ECHR. Indeed, the ECHR constitutes a source of Community law that may be interpreted by the ECJ. This, generally, happens, through the recourse to the preliminary ruling procedure by a national court.

This section will focus on the effect of the incorporation of the HRA on domestic review. The test of proportionality in the ECHR case-law has been described as a three-pronged test[70] or four-pronged test. [71] By contrast, Clayton has argued:

> "whilst the multi-stage format of the proportionality test has been elaborated in other jurisdictions, the Court of Human Rights has, unfortunately, failed to explain itself in any coherent way. The three stage test is nowhere to be found in the case-law of the Court, although the vast majority of the Court's decisions on proportionality can be rationalised under at least one of the three stages".[72]

In light of this assertion, it might be said that the EctHR does not use explicitly the 3-step test. Be that as it may, the ECHR proportionality is more rational than the Wednesbury review.

It has been rightly advocated that the "HRA is likely to have a radical impact on judicial review".[73] It appears, at first glance, more intrusive and less deferential. This new approach is clearly illustrated by Lord Clyde in *De Freitas* v. *Permanent Secretary of Agriculture* (1999).[74] He considered that the court should use a three-step test in order to determine whether a limitation (by an Act, rule or decision) is arbitrary or excessive. In that sense, the court should ask itself whether:

> "(i) the legislative objective is sufficiently important to justify limiting a fundamental right;
>
> (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective".[75]

However, *Mahmood*, [76] one of the first cases decided after the entry into force of the HRA, did not constitute a promising start. The Court of Appeal followed a highly

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[70] Clayton, *supra n.52,* at p.511. The author illustrated the test in the light of the *Sunday Times* v. *United Kingdom*. It led to a painstaking analysis in the context of freedom of expression.
[71] Jowell, "Beyond the Rule of Law: Towards Constitutional Judicial Review", PL 2000, pp.671-683, at p.679. 1 did the action pursue a legitimate aim? 2 Where the means employed suitable to achieve that aim? 3 Could the aim been achieved by a less restrictive alternative? 4 Is the derogation justified overall in the interests of a democratic society?
[72] Supperstone and Coppel, *supra n.63,* at p.314.
[73] *Ibid.*, at p.328.
[74] *De Freitas* v. *Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69.
[75] *Ibid.,* at p.80.
[76] *R* v. *Secretary of State for the Home department* [2001] 1 WLR 840 (CA).

deferential approach and did not apply the principle of proportionality.[77] Laws L.J. considered that the same test applied in *ex p. Smith* should be used, i.e. an improved version of the Wednesbury test. As seen earlier, this enhanced version of the Wednesbury test is clearly less protective than the ECHR standard. Following this fictitious start, the House of Lords followed a more coherent and rigorous approach in *Daly* (2001) by applying the three-pronged test.[78] In *Daly,* the House of Lords was concerned with an official policy of searching jail cells, and the effect of the policy on the rights of prisoners regarding confidential communication with their lawyers. Lord Steyn stated that the contours of proportionality are familiar and referred to the quote above (three-step test) of Lord Clyde in *De Freitas*.[79] Then, he established a strong distinction between Wednesbury review and the proportionality that has to be used in Convention cases. It seems worth quoting him:

> "The starting point is that there is an overlap between the traditional grounds of review and the approach of proportionality. Most cases would be decided in the same way whichever approach is adopted. But the intensity of review is somewhat greater under the proportionality approach. Making due allowance for important structural differences between various Convention rights, which I do not propose to discuss, a few generalisations are perhaps permissible. I would mention three concrete differences without suggesting that my statement is exhaustive. First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in ex p. Smith [1996] is not necessarily appropriate to the protection of human rights".[80]

In a nutshell, the intensity of review may be more important within the proportionality test. This difference in the intensity of review is clearly demonstrated by the sub-Wednesbury test (or de Smith test). This case demonstrates the difference of approach between the circular Wednesbury test and the principled proportionality test. It also helps us to understand the strong impact of the HRA on the principles of

[77] This case concerned the review of a Decision which refused leave to remain in the United Kingdom after marrying a British citizen.

[78] *R (Daly)* v. *Home Secretary* [2001] 2 WLR 1622 (HL). *See also* some weeks after *Daly, R (Samaroo)* v. *Secretary of Sate for the Home Department* [2001] UKHR 1150 which concerned a Guyanese national, married to a women (resident UK), having together a young son of 11 years and two step children. He was convicted for a serious drug trafficking offence and was the object of an order of deportation. The Appeal was, however, dismissed. See for example HL, *R* v. *A.* (No2) [2001] 2 WLR 1546. "rape shield case". National legislation (Section 41(3) of the Youth Justice and Criminal Evidence Act 1999) found in violation of Article 6 ECHR (right to a fair trial).

[79] *Ibid., Daly,* at pp.1634-1636, paras. 25-28.

[80] *Ibid.,* para. 27. *See also*, Lord Hope in *R* v. *Shayler* [2003] 1 AC 247, paras. 72-79.

public law. The impact of the HRA is also clearly illustrated by the *Prolife Alliance* case (2003).[81]

The Prolife Alliance is a registered political party and also an organisation which campaigns against, *inter alia,* abortion, euthanasia and destructive embryo research. Prolife submitted a tape, supposed to describe the truth about abortion, to the broadcasting authorities (decision makers). The BBC (one of the broadcasters) rejected the tape on the ground that it infringed the standards of taste and decency. Prolife argued that the decision was in breach of its rights under Article 10 ECHR. The Court of Appeal considered that the BBC's refusal to broadcast Prolife Alliance's party election broadcast was unlawful.[82] In that respect, Laws L.J. rejected the suggestion that the court should show deference to the broadcasters. He stated that the court's constitutional duty was to protect political speech and had to decide for itself whether this censorship was justified.[83] The BBC appealed the judgment to the House of Lords. Lord Hoffmann considered that:

> "although the word "deference is now very popular in describing the relationship between the judicial and the other branches of government . . . in a society based on the rule of law and the separation of powers, it is necessary to decide which branch of government has in any particular instance the decision-making power and what the limits of that power are, that is a question of law and must therefore be decided by the court. This means that the courts themselves often have to decide the limits of their decision-making power. That is inevitable".[84]

Interestingly, Lord Hoffmann, as well as three other Lords (Lord Nicholls, Lord Millet and Lord Scott) did not analyse the principle of proportionality in detail.

Conversely, it is worth noting that Lord Walker of Gestingthorpe made a very detailed assessment of the principle of proportionality.[85] First, he summarized the debate around the principle of proportionality[86] and then stressed that the correct principle is that the court should in appropriate cases show some deference to the national legislature or to official decision-makers.[87] Also, Lord Walker confirmed

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[81] *R (Prolife Alliance)* v. *British Broadcasting Corp* [2003] EMLR 23, 457 (HL). *See also Fisher* v. *English nature* [2004] WL 1074611 (CA). In the context of environmental protection (protection of Wildlife/ a private land was classified as a site of Special Scientific Interest) and Article 1 of the First Protocol of the ECHR, the CA applied the principle of proportionality and the balancing of interest between the interests of the state and the rights of the individual. The Court considered the decision to be unnecessary (too large area of arable land) and disproportionate.

[82] *R (Prolife Alliance)* v. *British Broadcasting Corp* [2002] 3 WLR 1080 (CA).

[83] *Ibid.*, at pp. 1097-1099.

[84] *Prolife* (HL), *supra n.81,* paras. 75-76.

[85] *Ibid.,* paras. 131-138.

[86] *Ibid.,* para. 131.

[87] *Ibid.,* para. 132. *See also* (cited in para.132), Lord Hope of Craighead in *R* v. *DPP ex p.Kebilene* [2000] 2 AC 326, 380-1 and Lord Steyn in Brown v. Stott [2001] 2 WLR 817,842. Lord Hope favoured the expression "discretionary area of judgment". It was followed by the Court of Appeal in *R (Mahmood)* v. *Secretary of State for the Home Department* [2001] 1

the recognition of the three-pronged test by referring extensively to the previous jurisprudence and emphasised that the principle of proportionality allows a more important intensity of review than the traditional review.[88] Regarding the intensity of review, he said that the jurisprudence was still developing and referred to the doctrine which considers that the principle of proportionality constitutes a "flexi-principle", i.e. the intensity of review can modulate according to the context and circumstances.[89] In his words, "the latitude [intensity or margin in ECHR case-law] connotes the appropriate degree of deference by court to public body . . . This means that Human Rights Act review needs its own distinct concept of latitude (the 'discretionary area of judgment'). The need for deference should not be overstated. It remains the role and responsibility of the Court to decide whether, in its judgment, the requirement of proportionality is satisfied".[90] To summarize, the intensity of review and thus the degree of deference (a high degree of intensity implies a low degree of deference, and vice versa) will vary from case to case according to the circumstances and/or context of the case. Notably, Lord Walker emphasised that there is no alternative to the substitution of the Wednesbury test by a more complex and context-sensitive approach (proportionality principle).[91] Finally, he did not consider that the broadcasters' decision, though reviewed with some intensity, was wrong and, consequently, allowed the appeal.

In that sense, Stone and Coppel stated that:

> "proportionality is not, in and of itself, a more intensive standard of review than the Wednesbury test. It entails a different analytical approach, but, so far as the

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WLR 840. Laws LJ referred to the need for a "principled distance" between the decision-maker's decision on the merits and the court's adjudication.

[88] *Ibid.,* paras. 133-135.

[89] *Ibid.,* para. 138, "[m]y Lords, this is an area in which our jurisprudence is still developing, and we have the advantage of a great deal of published work to assist us in finding the right way forward. I have obtained particular assistance from *Understanding Human Rights Principles*, edited by Mr Jeffrey Jowell Q.C. and Mr Jonathan Cooper (2001) and from the very full citations in the third (2001) edition of Judicial Review Handbook by Mr Michael Fordham. Fordham's survey in para.58.2 appears to me to give a useful summary of where we seem to be going. Under the heading 'Latitude and Intensity of Review' he writes: 'Hand in hand with proportionality principles is a concept of ''latitude' which recognises that the Court does not become the primary decision-maker on matters of policy, judgment and discretion, so that public authorities should be left with room to make legitimate choices. The width of the latitude (and the intensity of review which it dictates) can change, depending on the context and circumstances. In other words, proportionality is a 'flexi- principle' . . .".

[90] *Ibid.*

[91] *Ibid.,* para. 144, "[t]he Wednesbury test, for all its defects, had the advantage of simplicity, and it might be thought unsatisfactory that it must now be replaced (when human rights are in play) by a much more complex and contextually sensitive approach. But the scope and reach of the Human Rights Act is so extensive that there is no alternative. It might be a mistake, at this stage in the bedding-down of the Human Rights Act, for your Lordships' House to go too far in attempting any comprehensive statement of principle. But it is clear that any simple 'one size fits all' formulation of the test would be impossible".

> intensity or intrusiveness of review is concerned, it is an empty vessel. Proportionality may be a highly intensive standard of review, or it may be as deferential as the traditional Wednesbury test, depending upon the extent to which the courts defer to the decision maker's view of proportionality in any particular case".[92]

One can only agree with such a statement. It may be concluded that the ECHR principle of proportionality constitutes a highly variable standard. It varies according to the circumstances, subject matter and the background.[93] Similarly, Laws LJ rightly emphasised in that *"the intensity of review in a public law case will depend on the subject matter in hand"*.[94]

This case-law analysis prompts a number of conclusions. Generally, as put by Starmer, "there have been teething problems (as was to be expected), some of which may still have to be played out in Strasbourg. But so far, the new era in the quest to develop and protect human rights in the United Kingdom has got off to a very positive start".[95] More specifically, as to judicial review, it may be argued that the traditional approach of judicial review (ultra vires doctrine, materialised by the Wednesbury review) has drastically changed. Indeed, the focus of the domestic jurisdictions has now moved from the public body to the individual and the principled approach affects the reasoning of the court (maybe more moral assessment).[96] In the words of Lord Steyn, "there has been a decisive shift towards a rights based system".[97]

The *Smith* and *Peck* cases of the EctHR establish clearly that the standard of protection offered by the ECHR may be superior to the irrational test. The national judges have become more familiar with the ECHR standard since the entry into force of the HRA. In return, it fosters the application of the principles of proportionality in cases falling within the purview of Community law. As mentioned above, the general principles constitute vectors for the ECHR. What is more, the unstoppable extension of the HRA and the scope of Community law may encourage the application of the principle of proportionality in purely internal matters. In that regard, it may be stated that proportionality has become the rule and Wednesbury the exception. In other words, the doctrine of purely internal matters, i.e. not affected either by the HRA or EC law, resembles a *"peau de chagrin"*.

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[92] Supperstone and Coppel, "Judicial Review after the Human Rights Act", EHRLR 1999, pp.301-329, at pp.314-315.
[93] *Ibid.,* at pp.301-329. *See also*, Singh, "Is there a Role for the Margin of Appreciation in National Law After the Human Rights Act", EHRLR 1999, pp.15-22.
[94] Mahmood, *supra n.*87*,* at p 847, para.18.
[95] Starmer, "Two Years of the Human Rights Act", EHRLR 2003, pp.14-23, at p.23.
[96] Nergelius, "Parliamentary Supremacy under Attack: The British Constitution Revisited", *supra n.24,* at p.127.
[97] Lord Steyn, "Democracy through Law", EHRLR 2002, pp.723-736, at p.732.

7.2. PROPORTIONALITY IN UK PUBLIC LAW

7. 2.1. A Free Standing or a Coterminous Principle of Review?

The main question at stake here is to determine whether the principle of proportionality constitutes a free standing principle or an aspect of irrationality in the Wednesbury sense (coterminous principle). This section describes the slow but inescapable influence of the principle of proportionality into UK public law. This issue is also closely linked to the determination of the scope of Community law by the national courts. Indeed, it may be said that there exists an obligation for the domestic jurisdictions to apply a free standing principle of proportionality in matters falling within the purview of Community law.

The principle of proportionality was famously described by Lord Diplock in *R.* v. *Goldstein*, in the following terms: *"you must not use a steam hammer to crack a nut"*.[98] Already in 1976, Lord Denning attempted to put forward the principle of proportionality as a standard of good public administration in the UK.[99] Sometimes the concept of proportionality has been associated with the Wednesbury unreasonableness standard of review.[100] Furthermore, it is worth noting that Lord Diplock, in *GCHQ*,[101] considered the possibility to assess proportionality as an independent fourth ground of judicial review alongside legality, procedural impropriety and irrationality. In his words, *"[t]hat is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of proportionality which is recognised in the administrative law of several of our fellow members of the European Economic Community"*. Some years afterwards, the application of the principle of proportionality was pleaded before the House of Lords in the *Brind* case.[102]

In casu, the Home Secretary forbade a representative of a recognised Irish organisation from speaking on television or radio. The decision was imposed because he believed that the live appearance of supporters or members of a terrorist organisation gave a false impression of the strength and legitimacy of terrorism. This decision was challenged by journalists from the BBC and the IBA who argued that the decision had gone beyond the lawful use of powers under section 29(3) of the Broadcasting Act 1981 and was thus disproportionate to its aim. Moreover, they contended that the decision was contrary to Article 10 ECHR. The House of Lords

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[98] *R* v. *Goldstein* [1983] 1 WLR 151, at p. 155.

[99] *R* v. *Barnsley MBC, ex parte Hook* [1976] 1 WLR 1052. A street trader's license had been revoked since he had urinated in the street.

[100] *R* v. *Brent London Borough Council, ex parte* Assagai (unreported), 11 June 1987. The Council action was "wholly out of proportion to what Dr. Assegai had done. Where the response is out of proportion with the cause to this extent. This provides a very clear indication of unreasonableness in a Wednesbury sense".

[101] Council of Civil Service Unions v. Minister for the Civil service [1985] AC 374, at p. 410.

[102] In *R* v. *Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696.

considered that proportionality did not form part of English law and, thus, did not form a distinct principle of public law. In that sense, it might be said that the House of Lords heralded its extensive use as an emerging principle of public law. Ultimately, the House of Lords decided that the decision was not Wednesbury unreasonable. It upheld the ban on the direct spoken words of members of certain Northern Ireland groups/political organisations and also declined to apply Article 10 ECHR, since it, arguably, did not form part of UK law. However, its future application was, notably, not totally ruled out.[103]

Significantly, Lord Lowry and Lord Akner argued with strength against the reception of proportionality as a ground of review. This radical rejection was based on rather analogous reasoning. Lord Ackner compared the principle of proportionality and the Wednesbury review. He considered that both standards were dissimilar and found the principle of proportionality more exacting.[104] The main difference and the subsequent main objection concerned the fact that the principle of proportionality leads, arguably, to a review of the merits of a decision.[105] Accordingly, this merits-review was assessed to be contrary to the doctrine of parliamentary sovereignty.[106] In a similar vein, Lord Lowry assessed the application of proportionality as an *"abuse of the court's supervisory jurisdiction"*.[107] In other words, its application might fetter the discretion entrusted to Parliament to make decisions (doctrine of parliamentary sovereignty). Also, it was argued that judges are not trained to decide the answer to an administrative problem. Furthermore, it was put forth that the application of the new doctrine would lead to uncertainty.[108] In my view, as will be demonstrated later, those arguments do not appear particularly convincing. The main problem at stake appears to be the difficult assimilation for the UK judges of their new and constitutional role and the ineluctable shift from orthodox review to proportionality review.

Conversely, one may wonder about the "real" differences between both tests, since it might be contended that the control of proportionality is redundant and is leading to the same result as the irrationality test.[109] In this respect, Lord Steyn has stressed that, *"most cases would be decided in the same way whichever approach is*

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[103] *See* Lords Bridge, Roskill and Templeman in *Brind*.

[104] Lord Akner in *Brind,* at p.762.

[105] *Ibid.,* at p.763. For a contrary review, *infra* Lord Steyn in *Daly,* at p.548.

[106] *Ibid.,* "[t]he European test of whether the interference complained of corresponds to a pressing social need . . . must ultimately result in the question is the particular decision acceptable? And this must involve a review of the merits of the decision. Unless and until Parliament incorporates the Convention into domestic law . . . there appears to me to be at present no basis upon which the proportionality doctrine applied by the European Court can be followed by the courts of this country".

[107] *Ibid.,* Lord Lowry in *Brind,* at pp.766-767.

[108] In the words of Lord Lowry, "there is always something to be said about an administrative decision". It will lead to an increase in review litigation, and it will be time and money consuming for individuals.

[109] *See* Boyron, "Proportionality in English Administrative Law: a Faulty Translation?", OJLS 1992, pp.237 *et seq.* For a contrary view, *see* Hilson, EPL 2003, *supra n.1*.

adopted".[110] Also, it might be said that if a decision is disproportionate, it would bear the label of Wednesbury unreasonableness.[111] At the end, it appears possible to conclude that the principle of proportionality is coterminous to the irrationality test. However, this argument, in my view, lacks full convincing force. Notably, Lord Steyn in *Daly,* referring to the outcome of the *Smith* case in the European Court of Human Rights, rightly emphasised that the differences in method between the orthodox grounds of review and the proportionality approach may occasionally produce different results.[112] To summarize, it might be said that Lords Lowry and Ackner criticized starkly the continental style of review. Arguably, the recognition of proportionality as a free standing principle of review requires that the domestic court has a fact-finding or appellate jurisdiction. Nevertheless, as lucidly put by De Búrca, *"the resistance of many judges to proportionality is based on the perception that the introduction and use of this concept demands a change in their constitutional role which is at odds with the traditional confines of that role within the UK legal and political system"*.[113]

The House of Lords explicitly rejected the application of the principle of proportionality regarding purely internal matters.[114] There is, thus, a clear distinction between the two paradigms of law, i.e. Community law and internal matters. By contrast, Lord Slynn argued that, *"I consider that even without reference to the Human Rights Act 1998 the time has come to recognise that this principle [of proportionality] is part of English administrative law, not only when judges are dealing with Community acts but also when they are dealing with acts subject to domestic law"*.[115] The obligation, however, to apply this standard of review

[110] Lord Steyn in *Daly,* para. 27. Lord Cooke in *Daly*, para. 32, Lord Cooke in *ITF* at p.452, Lord Slynn in *ITF* at p.439.

[111] Lord Akner in *Brind*, *supra n.102,* at p. 762 and Lord Lowry in *Brind,* at p. 766.

[112] Lord Steyn in *Daly*, at pp. 547-548, "in other words, the intensity of the review, in similar cases, is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued. The differences in approach between the traditional grounds of review and the proportionality approach may therefore sometimes yield different results. It is therefore important that cases involving Convention rights must be analysed in the correct way. This does not mean that there has been a shift to merits review".

[113] *De Búrca,* EPL 1997*, supra n.50,* at p.585.

[114] *Tesco Stores Ltd* v. *Secretary of State for the Environment* [1995] 2 All ER 636. *See also*, *R (Association of British Civilian Internees Far Eastern Region)* v. *Secretary of State for Defence* [2003] 3 WLR 80 (CA). Though it constitutes a strong case (additional criterion relating to birth into a scheme to compensate British civilian internees held by Japanese during World War II) for recognising the application of the principle of proportionality within purely internal matters (ECHR and EC law were not applicable), the Court of Appeal applied the Wednesbury test. The CA found that the introduction of the birth criterion was not irrational.

[115] Lord Slynn in *R (Alconbury)* v *Secretary of State for the Environment* [2001] 2 W.L.R. 1389. stated *obiter dictum* that. It will be analysed more analysed into detail with the principle of legitimate expectation.

concerns solely the field of Community law.[116] Hence, proportionality must be explicitly used by the UK courts in the context of Community law.[117]

7.2.2. Proportionality in the Community Law Context

It is worth remarking that the application of the principle of proportionality in the Community law field has not been an easy task. In *ex parte Adams*,[118] an order of the Home Secretary refused entry to Gerry Adams (leader of the Sin Fein) to the UK on ground of national security. He argued that the decision infringed one of his rights to free movement within the European Community. The national court stated that:

> "although the proportionality principle is part of our law through Community law it seems to us that the explanation of the principle is not in harmony . . . as English judges it seems to us that explanation of the principle span a spectrum of views from a narrow doctrine not essentially different from Wednesbury unreasonableness to a de novo review of the administrative decision. On the other hand, there may be better explanations placing the principle between these extremes. Even in respect of proportionality there may be a margin of appreciation".[119]

This quote shows the tendency of the UK judges to link the principle of proportionality to an existing standard of review, i.e. the Wednesbury test. The same thing happened in *ex parte McQuillan,*[120] a case concerning a decision taken by the Home Secretary to exclude Mr McQuillan from the UK on the basis of the Prevention of Terrorism Act 1989, which had the effect of forcing him to live in Northern Ireland though his life was threatened by terrorist organisations. The applicant contended that the exclusion order was disproportionate, constituted a restriction of his right to free movement and citizen rights under EC law, as well as a breach of Article 3 ECHR (right to life). Sedley J used a balancing test in applying the irrationality test.[121] By using a balancing approach, the intensity of the review appears more important. However, the Court did not use the principle of proportionality in an explicit manner although the case fell within the scope of

[116] There is also an obligation to apply the ECHR principle of proportionality.
[117] *R* v. *Minister of Agriculture, Fisheries and Food, ex parte Roberts and others* [1991] 1 CMLR 555, *Stoke-on-Trent City Council v B&Q plc* [1991] 4 All ER 221.
[118] R *v*. Secretary of state for the Home department, ex parte Adams *[1995] All ER 177. LJ Steyn referred to the ECJ for a preliminary ruling on the interpretation application of the principle of proportionality and the question of citizenship. However, the question was withdrawn when the exclusion order was cancelled.*
[119] *Ibid.,* at p.191.
[120] *R* v. *Secretary of state for the Home department ex parte McQuillan* [1995] 4 All ER 400.
[121] *Ibid.,* at p.423, "to measure rationality by, among other things, asking whether in the light of its impact the exclusion order could reasonably be considered an expedient response by a Home Secretary who has given proper weight to the fundamental rights thereby put at risk".

Community law. The national court attempted to assimilate it with the national standard of review.[122]

The *ITF* case[123] concerns a claim against a decision to withdraw full scale police protection provided to animal exporters from animal rights demonstrators protesting against the transport of live animals. Consequently, the undertaking could not carry on its cross border activity and the export of livestock from the UK to other Member Sates was disrupted. This case is extremely interesting as it confronts a fundamental value (the right to free trade) with fundamental rights (the right of association and the right to freedom of speech). This case appears to be rather similar to the recent *Schmidberger* case of the ECJ, which was the object of a preliminary ruling in 2003.[124] However, in the present case, despite the recommendation of Lord Slynn, the UK court did not make a preliminary ruling. The Court of Appeal found that the decision was justified under Article 36 [new 30] EC on the ground of public policy. It considered that although the irrationality test and the principle of proportionally reached the same result on the merits of the case, the principles could not be regarded as simply coterminous.[125] The House of Lords upheld the judgment of the Court of Appeal.[126] Lord Slynn agreed with Kennedy L.J and considered that the two tests are different. However, he remarked that the outcome was quite similar.[127] This conclusion might be perceived as a sign that the two systems are converging.[128] Conversely, this reasoning might lead one to consider the penetration of the principle of proportionality as nugatory.[129] Finally, as put rightly by one commentator, *"we are left with the impression that the House of Lords is attempting to absorb Community law principles in a way which is compatible with national*

[122] *See also R* v. *Secretary of State for Health, ex parte RP Scherer Ltd* [1996], Decision of the Secretary of Sate for Health Ban on Temazepan capsules. The company fabricating it brought a proceeding arguing that the absolute ban was disproportionate. The reasoning was based on irrationality and not proportionality.

[123] *R* v. *Chief Constable of Sussex, ex parte International Trader's Ferry* [1997] 2 All ER 65, [1999] 2 AC 418 (HL).

[124] *See* Case C-112/00 *Schmidberger* [2003] ECR I-5659.

[125] *R v. Chief Constable of Sussex, ex parte International Trader's Ferry* [1998] QB 477, 494-495 (CA).

[126] Lord Cooke advocated for a more intensive test to be applied. The test should be whether the decision in question was one of which a reasonable authority could reach.

[127] According to Lord Slynn (referring to the *Brind* case), "the House had treated Wednesbury and proportionality as being different . . . The cautious was in which the European Court usually applied that test, recognising the importance of respecting the national authority's margin of appreciation, might mean that whichever test was adopted, and even following for a difference in onus, the result would be the same". *See also, infra,* the *First City Trading* case. Judge Laws applied both standards and found no violation in both instances.

[128] Schwarze, "The Role of the European Court of Justice in Shaping Legal Standards for Administrative Action in the Member States", in O'Keeffe and Bavasso (eds.), *Judicial Review in European Union Law*, 2000, pp.447-464 at p.457.

[129] In this respect, it constitutes an argument for what has been called, by Legrand, the "local resistance". *See,* Legrand, in Beaumont, Lyons, Walker, *Convergence and Divergence in European Public Law*, 2002, at p.247.

standards of judicial review in order to create a unitary system at the national level".[130] The absorption thesis (tendency to assimilate proportionality with the domestic standard of unreasonableness) may partially explain some problems linked to the uniform application of the principle of proportionality in the national courts. This lack of uniformity can also be explained, more bluntly, by the recourse to the Wednesbury test instead of the EC principle of proportionality.[131] In that regard, the *Sunday Trading* saga gives a clear example of the divergent solutions given by national courts on the same legal issue.[132] In a similar vein, the domestic courts may give a different interpretation of the scope of Community law in a similar case.[133] It is worth noting that the restrictive interpretation of the scope of Community law by the UK courts is often linked to a certain reluctance to use unwritten norms elaborated by the ECJ.[134] In other words, it is a reluctance to accept the interpretation of Community law given by the ECJ and to consider proportionality as a free standing principle.

The *First City Trading* case, discussed previoulsy,[135] illustrates such difficulties.[136] The pivotal issue was whether the general principle of Community

[130] Szyszczak, "Fundamental Values in the House of Lords", ELR 2000, pp 443-451, at p.450. *See also* at p.451, "in ITF, the House of Lords blends the claims made under national law with those raised under Community law without addressing fully the balancing of the fundamental freedoms at issue. Future decisions of the English courts will be required to blend both the Community and the national law issue into the hierarchy of norms which is emerging in the protection of fundamental rights in Europe".

[131] Hoffmann J in *Stoke-on-Trent City Council* and *Norwich City Council* v. *B&Q* plc. [1991] AC 49. Hoffmann considered that a strict application of the principle of proportionality would lead the national courts arrogate a legislative function (usurping the function of the legislative). Accordingly, "it is not my function to carry out the balancing exercise or to form my own view on whether the legislative objective could be achieved by other means. The questions involve compromises between competing interests which in a democratic society must be resolved by the legislature. The duty of the court . . . is to review the acts of the legislature but not to substitute its own policies or values" [1991] Ch 48. Lord Hoffmann in *Stoke-on-Trent* used a deferential approach. This approach was criticized in the Opinion of AG Van Gerven.

[132] According to some judges and commentators, the application of the principle of proportionality leads to the same result than the Wednesbury test. As seen before, this is not always the situation.

[133] *R* v. *The Human Fertilisation and Embryology Authority ex parte DB* [1997] 2 CMLR 1997 591.IVF treatment in Belgium. Gametes were taken from her husband before he died. However, he did not give his consent. Consequently, the gametes could not be exported (cannot be lawfully used in the UK) The High Court dismissed the application for judicial review on the ground that Community law was not applicable. Conversely, the Court of Appeal assessed the UK act (Article 28(3) Human Fertilisation and Embryology Act 1990) in the light of, *inter alia*, Article 59 (new 49 EC) and found no infringement.

[134] Boyron, "Proportionality in English Administrative Law: a Faulty Translation?", OJLS 1992, pp.237 *et seq.* The author considers that the application of the general principles by the UK judge constitutes a "pocket of resistance".

[135] *Supra, Part 2 Chapter 6.3.2.*

law of equal treatment applied at all as regards the scheme. Arguably, the judge refused to refer the matter to the ECJ because he considered that the domestic legislation was outside the scope of Community law. Although, at first sight, that may be regarded as a convincing argument, such an assertion should be put into question. Indeed, it could always be argued that a national measure affects the operation of the Common market. If this reasoning had been followed, the general principles of Community law would be applicable. By refusing the application of the general principles of Community law, the national judge assessed the scope of Community law in a very restrictive manner and blatantly ignored the interpretation of Community law given by the ECJ.

This case is unfortunately not isolated. Similarly, the Divisional Court in *Lunn Poly,*[137] rejected the application of the principles of non-discrimination and proportionality to differential rates of insurance premium tax. The national court observed that the principles, elaborated by the jurisprudence of the ECJ, were not wholly apparent from a perusal of the Treaty. Consequently, the general principles were declared inapplicable to a domestic situation falling within the purview of the Treaty. According to the national court, in this type of situation, only Treaty rights appear applicable.

The UK courts then started to explicitely apply the general principle of proportionality. In *Wilander,* the rules of the International Tennis Federation regulating drug abuse and disciplinary proceedings were found to be contrary to the freedom of services [new Article 49 EC] by the High Court. The Courts (HC and CA) expressly used the principle of proportionality in order to analyse and balance the competing interests.[138] In *Gough and Smith*,[139] a case concerning a ban which prevented identified hooligans from leaving the country without permission when certain football games were taking place outside England and Wales, the applicants challenged the order on the basis of free movement provisions. Notably, it was argued that the proportionality test identified by Lord Clyde in *De Freitas* should be applied.[140] One of the main questions at issue was to determine whether the

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[136] *R* v. *Ministry of Agriculture, Fisheries and Food and Another, ex parte. First City Trading Limited and Others* [1997] 1 CMLR 250. Before the High Court (Queen's Bench Division) QBD (Laws J.) 9 November 1996.

[137] *R* v. Customs *and Excise Commissioners, ex parte Lunn Poly Ltd* [1998] STC 649.

[138] *Wilander* v. *Tobin* [1997] 2 CMLR 346, at p.359. Lord Woolf did not refer to community case-law. The Court of Appeal found the rules proportionate. Lord Woolf MR in the *Wilander* case (CA) considered that "[t]he requirement of proportionality may not be identical . . . with reasonableness or natural justice but it is certainly close to those concepts. It is for the national courts to determine whether or not this is the situation and I do not regard it as capable of being successfully argued that Rule 53 is disproportionate in its effect or goes further than is necessary".

[139] *Gough and Smith* v. *The Chief Constable of Derbyshire* [2002] 2 CMLR 11.

[140] *Ibid.*, para. 64. The test is as follows, (i) the legislative objective is sufficiently connected to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.

restrictions were justified on grounds of public policy. The public policy which justifies the restraint must be considered as having regard to the established principles of Community law.[141] The Court applied the test of proportionality in the context of the right of free movement. It verified whether the restrictions imposed were to be justified. According to the Court:

(i) they must have been imposed after giving individual consideration to each individual.
(ii) they must not have been based simply upon the criminal record of each individual
(iii) they had to be rationally connected to the objective of preventing English football hooliganism abroad.
(iv) they had to be no more severe than what was necessary in order to achieve that objective.[142]

Point (iii) above concerns the suitability of the measures, i.e. the first part of the proportionality test, while (iv) concerns the necessity of the measures, i.e., the second part of the proportionality test. The Court held that the scheme, if properly operated, satisfied the requirement of proportionality. In other words, it was proportionate that the individual who had been shown to constitute a real risk of participation in football hooliganism should be required to have permission to travel abroad. The Court considered that no less restrictive alternative method of preventing hooliganism could be envisaged.[143] Notably, the method of "less restrictive means" constitutes the core element of the "necessity test". Interestingly, the Court of Appeal applied clearly the test of proportionality to the Community law plea.[144]

Going further, the House of Lords applied the proportionality principle to a legislative policy in the recent *Smith Glaziers*[145] case concerning domestic legislation denying benefit of exemption for insurance related services. In this case, an exemption for insurance-related services from VAT was provided under Article 13(B)(a) of the Sixth VAT Directive. However, according to the same Article, Member States were entitled to deprive such services of exemption where necessary to prevent any possible evasion, avoidance or abuse. Consequently, such conditions enshrined in the domestic statute had to be construed, as far as possible, in conformity with European law and, more precisely, in conformity with the general principle of proportionality. Interestingly, Lord Hoffmann referred to the EC principle of proportionality in connection with German law. In that sense, he stated that,

[141] *Ibid.,* para. 56.
[142] *Ibid.,* para. 69.
[143] *Ibid.,* para. 87.
[144] *Ibid.,* paras. 64-66.
[145] *CR Smith Glaziers (Dunfermline) Limited* v. *Commissioners of Customs and Excise* [2003] 1 CMLR 37 (HL).

> "in general European law would require them to satisfy the principle of proportionality in its broad sense, which following German law, is divided into three sub-principles: first a measure must be suitable for the purpose for which the power has been conferred; secondly, it must be necessary in the sense that the purpose could not have been achieved by other means less burdensome to the person affected and thirdly, it must be proportionate in the narrower sense, that is, the burdens imposed by the exercise of the power must not be proportionate to the object to be achieved".[146]

Lord Hoffmann made explicit reference to the three-pronged test (suitability, necessity and proportionality *stricto* sensu), generally used in the ECJ. The House of Lords found that the provisions of the statute were disproportionate and, thus, did not conform to the terms of the Sixth VAT Directive. In the end, the tax payer was entitled to exemption.

To conclude, it may be stated that the UK courts apply the principle of proportionality with more and more appropriateness. In that sense, it appears, in certain instances, as a free standing principle of review and, thus, as non-coterminous to the irrationality test. The application of the principle appears limited to the Community law context, though Lord Slynn has advocated a more progressive approach based on the "coherence argument".

The scope of Community law is extending. So is the general principle of proportionality. The impact of the principle into the UK legal order is facilitated by the increasing knowledge and familiarity of lawyers and judges with Community law. In this regard, the HRA has influenced the modification of the legal landscape. Indeed, it may be said that the HRA fostered the application of the principle of proportionality as a free standing and rational test. Though a claim may be declared inadmissible under Community law, the HRA and ECHR may provide effective alternatives. In this regard,[147] the *International Transport Roth* case provides an example where two pleas based on respectively ECHR and EC law were lodged. This case dealt with the imposition of penalty to lorry drivers due to the clandestine entry into the UK by way of concealment in freight vehicles. The plaintiff alleged violations of Article 6 ECHR and Article 1 of the First Protocol to the Convention and also contended that the restrictions on the free movement of goods and the freedom to provide services were in breach of Articles 28 and 49 EC. The Court of Appeal, by a majority, upheld the ruling concerning the ECHR infringements, but, unanimously, did not consider that the penalty regime violated Community law.[148] It remains to conclude on the impact of the HRA and EC jurisprudence regarding the application of proportionality by the domestic courts.

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[146] *Ibid.,* para. 25.

[147] *International Transport Roth Gmbh* v. *Secretary of State for the Home Department* [2002] 1 CMLR 52.

[148] *Ibid.,* para. 81, Simon Brown LJ in *Roth* stated that "the Court's role under the Human Rights Act is as the guardian of Human Rights. It cannot abdicate this responsibility".

7.2.3. A Higher Degree of Intelligibility, Rationality and Scrutiny

It may be argued that the principle of proportionality brings a higher degree of intelligibility, rationality and scrutiny in comparison to the Wednesbury test. Intelligibility, rationality and scrutiny may be perceived as closely interconnected. In other words, the intelligibility and rationality of the proportionality test may explain its higher degree of intrusiveness. In comparison, one may say that the *Wednesbury* case constitutes a *"retrogressive decision"*.[149]

As to intelligibility and rationality, the principle of proportionality, as developed by the ECtHR and ECJ jurisprudence, ensures a structured and principled review.[150] Conversely, as seen above, Wednesbury is a vague and circular test. The ECHR principle of proportionality is described as a three or four-pronged test. Similarly, the EC law test of proportionality is often assimilated to a tripartite reasoning. This tripartite reasoning may be summarized as follows: suitability, necessity and proportionality *stricto sensu*. It seems clear that these criteria are more precise and sophisticated than the orthodox grounds of review, i.e. Wednesbury. In this respect, the test involves a wide review of the facts behind the decision. Mainly, this is the result of the balancing of interests undertaken by the court in the third part of the test, i.e. proportionality *stricto sensu*. Thus, the Court, by balancing the individual interest versus the public interest, gives the reasons for intervention and provides reasons for its decision. The proportionality test implies more rationality by giving reasons.[151] Furthermore, it is worth remarking that the burden of proof in the proportionality test is dissimilar from the Common law test.[152] Indeed, in the Wednesbury test, it is for the applicant to demonstrate that the decision is unreasonable. By contrast, the principle of proportionality puts the burden of proof on the decision-maker.[153] The defendant (the decision-maker) must give reasons for the particular policy choice. By putting the burden of proof on the decision-makers, it improves the rationality of the decision and, consequently, fetters arbitrary power. In that sense, this restriction of power fosters the degree of "scrutiny".

As to scrutiny, it has been stressed earlier that proportionality review may be more intrusive, more intensive and less deferential than the irrationality test. First, it may lead the reviewing court to assess the balance which the decision-maker has struck. In that regard, the analysis is not only limited to a determination of whether the measure/decision is reasonable. Secondly, it may go further than the orthodox grounds of review inasmuch as it may require a certain consideration to be given to the weight of the various interests. In other words, it provides a higher standard of

[149] Lord Cooke in *Daly*, s*upra n.9*, para. 34.
[150] *See* Jowell and Lester, "Beyond Wednesbury: Substantive Principles of Administrative Law", PL 1987, pp. 368 *et seq*., at p.372*,* and Steyn, *supra n.97*, EHRLR 2002.
[151] Moral Soriano, "A Theoretical Approach to the Tension between Form and Substance in English Judicial Reasoning", in Ladeur, *The Europeanisation of Administrative Law*, Dartmouth, 2002, pp.122-144, at p.122.
[152] De Búrca, EPL 1997, *supra n.50,* at p.576.
[153] In the ECHR, it is for the state to justify a derogation from a Convention right.

review than the Wednesbury test. Notably, this assertion is verified by the rulings of the EctHR in *Smith and Peck*.[154] Similarly, Lord Ackner in *Brind*, when comparing the proportionality and Wednesbury tests, found that the proportionality test was "*a different and severer test"*.[155] However, it is worth noticing that proportionality constitutes a flexi-principle, i.e. it constitutes a variable standard of review. The standard of review varies according to the context, the interests and rights at stake. As to the EctHR, it allows a wide margin of appreciation in the context of tax, economy and social policy. The court also allows a wide margin of appreciation when interests such as public security or morality[156] are invoked to justify a derogation from a fundamental right[157] and when two fundamental rights are conflicting, e.g. freedom of expression versus right to privacy. The same holds true concerning the application of proportionality by the ECJ. First, the ECJ is influenced by the jurisprudence of the EctHR in the adjudication of EC fundamental rights. Second, the application of the proportionality in the administrative context is also marked by judicial self-restraint (wide margin of appreciation) in certain fields, e.g. CAP policy.

Finally, proportionality appears much more flexible than the Wednesbury test.[158] This super-flexibility also renders its use rather complicated. However, this inherent complexity should not represent an argument against its development in UK public law. As seen before, the principle brings more intelligibility, rationality and, in certain circumstances, more scrutiny. In that sense, it may be stated that it constitutes a better standard to protect subjective rights.

7.3. LEGITIMATE EXPECTATIONS AND INTERNAL MATTERS

Substantive legitimate expectations, like proportionality, constitute a general principle of Community law. Both principles may be linked in the sense that the determination of whether an expectation is legitimate leads to a balancing of interests (individual interest versus public interest). Similarly, the said principles were unknown to UK law before the reception of the general principles of Community law, though the domestic law recognized the existence of procedural legitimate expectations. However, substantive legitimate expectations may be differentiated from proportionality, since it has been applied by the national courts within purely internal matters. This section proposes to focus on the spill-over of

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[154] *Supra n.36 and 43.*

[155] *Brind, supra n.102*, at p.762.

[156] *See R* v. *A, Prolife*, *supra n.81.*

[157] In the Strasbourg Convention, Articles 8 to 11 of the ECHR form a particular cluster since their respective paragraph 2 permit restrictions to fundamental rights in so far as they appear "necessary in a democratic society" to achieve one of specified aims for the protection of public order, health or morals and, then, reflects the doctrine of margin of appreciation.

[158] The standard of review of the Wednesbury test in human rights cases is a higher standard that in other factual (non-human rights case) situation. However, it has been stressed before that this standard is still lower than the one used by the EctHR.

legitimate expectations into UK law. Nevertheless, it will also analyse the case-law relating to the Community context and the hesitation from the courts regarding the reception of the general principle in internal matters. It will demonstrate the connection between procedural and substantive legitimate expectations as well. Before entering into detail, the scope of substantive expectations must be described. According to Craig and Schønberg, there are three categories of cases regarding substantive legitimate expectations.[159] This distinction appears to be accepted by the doctrine.[160]

Category 1: a public body makes a representation or pursues a course of action, e.g. Preston, *Matrix* and *Unilever* cases.[161]

Category 2: a public authority departs from general policy or practise in the circumstances of the case, e.g. *Kahn* and *Ruddock* cases.[162]

Category 3: a public authority replaces the general policy or practice by a new and different policy choice, e.g. *Hamble Fisheries* and *Hargreave* cases.[163]

Before assessing the scope of the principle of substantive expectation, it appears important to analyse the development of legitimate expectations in UK public law and to emphasize the close relationship between the paradigms of procedural and substantive legitimate expectations.

7.3.1. Procedural and Substantive Legitimate Expectations

Lord Denning in 1969, for the first time, referred to the term legitimate expectation in the *Shmidt* case.[164] It was only in the 1980s, in *CCSU (GCHQ)*,[165] that the House of Lords accepted that the right to be heard may be based on a legitimate expectation and, thus, clearly confirmed that a procedural legitimate expectation was part of

[159] Craig and Schønberg, "Substantive Legitimate Expectations after Coughlan", PL 2000, pp.684-701, at pp.685-687.
[160] Clayton, "Legitimate Expectations, Policy, and the Principle of Consistency", CLJ 2003, pp.93-105, at pp.95.97.
[161] *Infra.*
[162] *Infra.*
[163] *Infra.*
[164] *Shmidt* v. *Secretary of State for Home Affairs* [1969] 1 All ER 909B (CA). Schmidt (a scientologist) applied to remain in the UK after the expiry of his residence permit The Home secretary rejected the request and failed to give him an opportunity to be heard. The CA considered that the Home secretary did not act unfairly.
[165] *Council for the Civil Service Unions* v *Minister for the Civil Service Unions* [1985] AC 374.

English law.[166] Significantly, Lord Diplock attempted to determine the scope of review in the context of legitimate expectations and considered that in order to qualify for judicial review, the decision must have consequences which affect some persons other than the decision-maker. More precisely, "It must affect such other person either:

(a) by altering rights or obligations of that person which are enforceable by or against him in private law; or
(b) by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn".[167]

In a nutshell, the present definition includes both private and public law. As to the latter, the decision-maker creates an expectation by following a certain course of action (practise) or by giving an explicit promise (assurance). The decision must deprive the individual of some benefit or advantage. This definition of legitimate expectations appears more procedural than substantive. The decision-maker may depart from the practise or promise by stating reasons and affording a hearing. It does not seem that the departure or change of policy creates substantive expectations *per se*. Indeed, it does not focus on the competing interests (individual versus public) at stake, but rather on the decision-makers way of behaving, i.e. the formal attitude of the decision-maker.[168] Notably, this case led to an important increase of litigations based on the principle of legitimate expectations.[169]

It appears interesting to determine whether the case-law can be extended to protect substantive legitimate expectations.[170] In that sense, the recognition of substantive expectation may be deduced from *ex parte Khan*.[171] This case concerned

[166] The case concerned a decision (without hearing or consulting) to forbid civil servants working for a governmental intelligence organization to join trade unions. The House of Lords upheld the national security argument.
[167] *Ibid., CCSU,* at p.408.
[168] *See Attorney General of Honk Kong* v. *Ng Yuen Shiu* [1983] 2 AC 629. Lord Fraser remarked that, "the principle that a public authority is bound by its undertaking as to the procedure it will follow . . . is applicable to the undertaking given by the Government of Hong Kong to the applicant".
[169] Cripps, "Some effects of European Law on English Administrative Law", wwwlaw.indiania.edu/glsj.
[170] *See also R* v. *IRC*, *ex parte Preston* [1985] AC 835, *Matrix Securities* v. *IRC* [1994] 1 WLR 334, *R* v. *IRC, ex parte Unilever* [1996] STC 681. The principle of substantive legitimate expectations may be deduced implicitly from this jurisprudence concerning taxation.
[171] *R* v. *Home Secretary, ex parte Khan* [1984] 1 WLR 1337.

an alleged departure from a published policy laying down criteria as to the approval of the adoption of family members from abroad. More precisely, Mr Khan adopted a child of a relative not living in the UK and wished to bring the child back. Consequently, he applied on a standard form letter issued by the Ministry. His application was rejected though it met the criteria. The Court of Appeal held that the Home Secretary could not resile from conditions on which he had stated that entry to the United Kingdom would be permitted *"without affording interested persons a hearing and then only if the overriding public interest demands it"*.[172] Hence, the individual must be given the procedural opportunity to claim why the policy for departure should not be applied to him. Furthermore, the administration was subject to the substantive requirement that there must be an overriding public interest if the departure were to override the individual's prior expectation. The Court of Appeal linked together procedural and substantive requirements. Thus, it recognized the existence, though not so clearly, of substantive legitimate expectations.

The conclusion was similar in the *Ruddock* case.[173] Mr Cox had his telephone tapped by the security services. He argued that this was contrary to the criteria generally followed (individuals not falling within the government's publicised criteria for telephone surveillance would not have their telephones tapped by the security services) by the Home Office. He claimed that the new policy was in breach of the principle of legitimate expectations. By contrast, the Home Secretary, relying on the national security argument, considered that there was no breach of this principle, since he could not expect to be consulted or heard before a decision to tap his telephone was made. Judge Taylor considered that individuals not falling within the government's publicised criteria for telephone surveillance should not have their telephones tapped by the security services. Furthermore, he held that the doctrine of legitimate expectations in essence imposes a duty to act fairly. In his words, "whilst most of the cases are concerned . . . with a right to be heard, I do not think the doctrine is so confined . . . of course, such a promise or undertaking must not conflict with his statutory duty . . . the Secretary of State cannot fetter his discretion. By declaring a policy he does not preclude any possible need to change it".[174] In so deciding, Judge Taylor relied upon the speech of Lord Scarman in *Re Findley,* in which the possibility of a substantive legitimate expectation was recognised.[175]

At the end of the day, one may wonder whether the distinction is of any utility. As put by Judge Laws, "the putative distinction between procedural and substantive rights in this context has little (if any) utility; the question is always whether the discipline of fairness, imposed by the common laws, ought to prevent the public authority respondent from acting as it proposes".[176] The principle of legitimate expectations appears firmly rooted in fairness. There is a duty to act fairly on the

[172] *Ibid.,* at p.1344.
[173] *R* v. *Home Secretary, ex parte Ruddock* [1987] 1 WLR 1482.
[174] *Ibid.,* at p.1497.
[175] [1985] AC 318.
[176] *R* v. *Secretary of State for Transport, ex parte Richmond upon Thame LBC* [1994] 1 All ER 577, at p.595. *See also Hamble Fisheries*, at p.723.

part of the public authority responsible for the decision. It might be said that this precludes a public authority from acting inconsistently with the expectations it has created, but can it preclude a policy change?

Hamble Fisheries[177] constitutes a strong case as to the acknowledgement of the doctrine of substantive legitimate expectations and also points out the obligation for national authorities to respect the general principles of Community law when they implement a Community policy. More precisely, the case concerned the UK government's change of policy as to fishing licences in relation to the Community Fisheries Policy and Community quotas.[178] Accordingly, before the adoption of the new policy, it was permitted to aggregate and transfer the fishing licenses. Hamble Fisheries had bought two fishing vessels with the intention of transfering the fishing licences to another vessel purchased before (the Nellie). However, a new policy clearly forbade such a transfer. The applicant argued a breach of substantive legitimate expectations.

The application of the administrative law principle of legitimate expectations to the conduct of domestic authorities in situations which fall under Community regulation cannot be considered as purely domestic.[179] According to the court, the purpose of national legislation and policy alike, in such circumstances, is to consent, under the principle of subsidiarity, the exercise of decision-making powers for the purpose of implementing Community law. Therefore, in assessing under domestic administrative law the propriety of governmental choice of action, national courts should have full recourse to the jurisprudence of the ECJ, including the rules it has developed on legitimate expectations as a concept of Community administrative law.[180] The judgment made an extensive analysis of the jurisprudence of the ECJ[181] and the EC law doctrine (in particular Schwarze) [182] regarding legitimate expectations.

As stressed in the case, there is no material difference between legitimate expectations as developed by the European Court of Justice and legitimate expectations as a principle of English law.[183] Judge Sedley applied the principle of proportionality, and not merely the irrationality test, as the standard of review (doctrine of substantive legitimate expectations).[184] Interestingly, he stated that,

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[177] *R* v *Ministry of Agriculture Fisheries and Food, ex parte Hamble Fisheries Ltd* [1995] 2 All ER 714.

[178] Member States had been allotted a quota for pressure stocks of fish and had to establish the precise rules for their application.

[179] *See*, by contrast, *First City Trading*.

[180] *Hamble Fisheries*, *supra n.177*, para. 29.

[181] *Ibid.*, paras. 34-39.

[182] *Ibid.*, paras. 30, 33, 37 and 39.

[183] *Ibid.,* para. 26.

[184] *Ibid.,* para. 47, "the balance must in the *firs*t instance *be for the policy-maker to strike*; but if the outcome is challenged by way of judicial review, *I do not consider that the court's criterion is the bare rationality of the policy-maker's conclusion.* While policy is for the policy-maker alone, the fairness of his or her decision not to accommodate reasonable expectations which the policy will thwart remains the court's concern (as of course does the

"legitimacy in this sense is not an absolute. It is a function of expectations induced by government and of policy considerations which militate against their fulfilment . . . it is the court's task to recognise the constitutional importance of ministerial freedom to formulate and to reformulate policy; but it is equally the court's duty to protect the interests of those individuals whose expectation of different treatment has a legitimacy which in fairness outtops the policy choice which threatens to frustrate it".[185] To summarize, Sedley J proposed to determine the legitimacy of an expectation by balancing policy considerations with individuals interests. This approach comes close to the so-called proportionality *stricto sensu*.[186] Arguably, it implies an assessment of the merits of a public policy and conflicts with the traditional limited review and the wider doctrine of parliamentary sovereignty. However, Judge Sedley seemed to consider the protection of individual rights as the most fundamental task for a Court. The decision in *Hamble Fisheries* is clearly progressive, imbued with a continental approach and contrasts with the orthodox view followed in *Hargreaves.*

The Hargreaves case[187] concerned a policy change as to prisoner's home leave. The new policy had a traumatising effect on some of the prisoners. The Court of Appeal denied the application of substantive legitimate expectations to purely internal matters like this. To justify this reasoning, Hirst LJ qualified the approach taken in *Hamble Fisheries* as "heretical"[188]while emphasising that on matters of substance, Wednesbury reasonableness constituted the applicable test. In other words, the Court of Appeal refused to interfere with an administrative decision which is not irrational.[189] It might be said that *Hargreaves* reflects an orthodox reasoning. This approach has been put into question by certain commentators.[190] The criticisms directed to the *Hamble Fisheries* case appear clearly unjust and based on a judicial fallacy (in the sense that they do not take into consideration the Community law obligation attached to the principle). However, it should be kept in mind that, *in casu*, there is no question of EC law and thus no obligation to apply the general principles of Community law in internal matters. Nevertheless, the Court of Appeal could have voluntary accepted the EC principle. This voluntary acceptance might be urged by the necessity to ensure a better coherence of the judicial review system, i.e. similar review both in Community and internal matters. Arguably, the UK courts

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lawfulness of the policy). To postulate this is not to place the judge in the seat of the minister. As the foregoing citations explain . . ." (italics added).

[185] *Ibid.,* para. 47.

[186] The balancing of interests constitutes the third part of the proportionality test.

[187] *R* v. *Secretary of State for the Home Department, ex parte Hargreaves* [1997] 1 WLR 906.

[188] *Ibid.,* at p.921. "Mr Beloff characterised Sedley J's approach as heresy, and in my judgment he was right to do so. On matters of substance (as contrasted with procedure) Wednesbury provides the correct test." Gibson LJ qualified it as "wrong in principle".

[189] *Ibid.*, at p.924.

[190] *See* Craig, "Substantive Legitimate Expectations and the Principles of Judicial Review" in *English Public Law and the Common Law of Europe*, Andenas (eds.), 1998, Thomas, *Legitimate Expectations and Proportionality in Administrative Law,* Hart, 2000, at pp.71-72.

may appear reluctant to the introduction of new and foreign concepts which conflict with the doctrine of parliamentary sovereignty. In the words of Thomas, commenting on the concept of legitimate expectations, *"English courts have largely refused to recognise its continental origin. Instead, they have preferred to keep its meaning vague and obscure. The reasons for this are clear. English judges feel that they cannot allow themselves to be seen to be openly making new law for fear of offending the democratic arm of the government"*.[191] The "democratic arm of the government" argument is generally affiliated to the question of review and as already seen, predominantly, in connection with the principle of proportionality and the Wedenesbury test. The same type of argument was resorted to with virulence against the decision of the Court of Appeal in *Coughlan*.[192]

7.3.2. Substantive Legitimate Expectations and Internal Matters

In *Coughlan,* the Court of Appeal rejected the *Hargreaves* approach which considered that the court would only enforce expectations as to procedure as opposed to expectations of a substantive benefit in matters falling within the internal domain. The *Coughlan* case is of importance for two reasons. First, the *Coughlan* case lays down the abuse of power test, which must be studied thoroughly, since it enshrines a more principled approach. Second, the post-*Couglan* case-law appears to confirm the application of the abuse of power test.

a) Coughlan and the Abuse of Power Test[193]

A local authority made a promise to four chronically ill patients, *inter alia,* to Ms Coughlan who had been injured in a traffic accident. In 1993, they were moved from Newcourt Hospital to a modern institution (Mardon House). They also received an express assurance or promise that this nursing home constituted a permanent place for living ("home for life"). However, in 1998, the local authority decided to close Mardon House and to place the patients in another hospital. The decision of the local authority constituted a change in policy which had the effect of breaking the promise. *Coughlan* falls within the above described third categories, i.e. the factual situation constitutes a change of policy. The pivotal issue concerns the role of the court in determining whether such a situation constituted a legitimate expectation. In the words of the CA, *"what is still the subject of some controversy is the court's role when a member of the public, as a result of a promise or other conduct, has a legitimate expectation that he will be treated in one way and the public body wishes to treat him or her in a different way. Here the starting point has to be to ask what in the circumstances the member of the public could legitimately expect. In the words of Lord Scarman in In re Findlay [1985] AC 318, 338, 'But what was their*

[191] *Ibid.,* Thomas, at p.51.
[192] Elliot, "Coughlan: Substantive Protection of Legitimate Expectations Revisited", JR 2000, pp.27 *et seq*. The author criticized the decision in *Coughlan* for not respecting the constitutional boundaries between the executive and the judiciary.
[193] *R* v. *North and East Devon Health Authority, ex parte Coughlan* [2000] 2 WLR 262.

legitimate expectation?' Where there is a dispute as to this, the dispute has to be determined by the court".[194] The Court underlined that there are at least three possible outcomes:

(a) The court may decide that the public authority is only required to bear in mind its previous policy or other representation, giving it the weight it thinks right, but no more, before deciding whether to change course. Here the court is confined to reviewing the decision on Wednesbury grounds (Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223). This has been held to be the effect of changes of policy in cases involving the early release of prisoners: see In re Findlay [1985] AC 318; R v Secretary of State for the Home Department, Ex p Hargreaves [1997] 1 WLR 906.

(b) On the other hand the court may decide that the promise or practice induces a legitimate expectation of, for example, being consulted before a particular decision is taken. Here it is uncontentious that the court itself will require *the opportunity for consultation* to be given unless there is an overriding reason to resile from it (see Attorney General of Hong Kong v Ng Yuen Shiu [1983] 2 AC 629) in which case the court will itself judge the adequacy of the reason advanced for the change of policy, taking into account what fairness requires.

(c) Where the court considers that a lawful promise or practice has induced a legitimate expectation of a *benefit which is substantive*, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of *weighing the requirements of fairness against any overriding interest relied upon for the change of policy*. [195]

To put it in a nutshell, there exists three possibilities for the court to deal with the issue. First, the Court may apply the Wednesbury test. Second, it may apply the opportunity for consultation test, i.e. procedural legitimate expectation. Third, it may apply the abuse of power test. It is worth noticing that the first and the third tests concern substantive benefits, whereas the second test applies to procedural benefits. As put by the Court, the difficult task is to decide which test should be applied to review the decision.[196] Accordingly, two difficult choices may arise. On the one hand, the choice between the procedural or substantive test. On the other hand, when its comes to the substantive test, the choice between the first (Wednesbury) or the

[194] *Ibid.,* para. 56.
[195] *Ibid.,* para. 57 (italics added).
[196] *Ibid.,* para. 59.

third (abuse of power) test. To quote Laws LJ in Begbie, categories 1 and 3 are not *"heretically sealed"*.[197]

As to the former, the Court emphasised that, the difficulty of segregating the procedural from the substantive was illustrated by the line of cases arising out of decisions of justices not to commit a defendant to the Crown Court for sentencing, or assurances given to a defendant by the court. However, the second test applies whenever there is an obligation to consult. The Court considered that the application of the second test leads to a full review. By consequence, the court *"has . . . to examine the relevant circumstances and to decide for itself whether what happened was fair"*.[198]

As to the latter, the Court considered that a promise of a home for life constituted a substantive benefit. Also, it stressed that the standard of review to apply in relation to a substantive benefit was unclear. In that sense, it was advocated that the irrationality or Wednesbury test should be applied instead of the third test.[199] Nevertheless, the Court of Appeal regarded the Wednesbury categories as the major instances, and not necessarily the sole ones, of how public power may be misused.[200] It held that the applicable test, in the circumstances of the case, was the third test, i.e. abuse of power test.[201]

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[197] Laws LJ in *R* v. *Secretary for Education and Employment, ex parte Begbie* [2000] 1 WLR 1115, at p.1130

[198] *Coughlan, supra n.193,* para 62.

[199] *Ibid.,* para. 62, "doubt has been cast upon whether the same standard of review applies. Instead it is suggested that the proper standard is the so-called Wednesbury standard which is applied to the generality of executive decisions. This touches the intrinsic quality of the decision, as opposed to the means by which it has been reached, only where the decision is irrational or (per Lord Diplock in Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, 410) immoral".

[200] *Ibid.,* para. 81, "for our part, in relation to this category of legitimate expectation, we do not consider it necessary to explain the modern doctrine in Wednesbury terms, helpful though this is in terms of received jurisprudence (cf Dunn LJ in *R* v. *Secretary of State for the Home Department, Ex parte Asif Mahmood Khan* [1984] 1 WLR 1337, 1352: 'an unfair action can seldom be a reasonable one'). We would prefer to regard the Wednesbury categories themselves as the major instances (not necessarily the sole ones: see Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, 410, per Lord Diplock) of how public power may be misused. Once it is recognised that conduct which is an abuse of power is contrary to law its existence must be for the court to determine".

[201] *Ibid.,* para. 89, "we have no hesitation in concluding that the decision to move Miss Coughlan against her will and in breach of the health authority's own promise was in the circumstances unfair. It was unfair because it frustrated her legitimate expectation of having a home for life in Mardon House. There was no overriding public interest which justified it. In drawing the balance of conflicting interests the court will not only accept the policy change without demur but will pay the closest attention to the assessment made by the public body itself. Here, however, as we have already indicated, the health authority failed to weigh the conflicting interests correctly. Furthermore, we do not know (for reasons we will explain later) the quality of the alternative accommodation and services which will be offered to Miss Coughlan. We cannot prejudge what would be the result if there was on offer accommodation

It remains to define, if possible, which are the elements triggering the applicability of the respective tests. According to the Court, it is the facts of the case assessed in their *"statutory context"* which trigger the application of the first or third test and, thus, the standard of review.[202] As seen before, in *Hargreaves*, the Court of Appeal relied on the Wednesbury test. The statutory context in *Coughlan* is, however, different and steers the application of the abuse of power test.[203] The Court seems to take into consideration the number of persons affected by the decision[204] of

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which could be said to be reasonably equivalent to Mardon House and the health authority made a properly considered decision in favour of closure in the light of that offer. However, absent such an offer, here there was unfairness amounting to an abuse of power by the health authority".

[202] *Ibid.*, para. 82, "the fact that the court will only give effect to a legitimate expectation within the statutory context in which it has arisen should avoid jeopardising the important principle that the executive's policy-making powers should not be trammelled by the courts: see Hughes v Department of Health and Social Security [1985] AC 766, 788, per Lord Diplock. Policy being (within the law) for the public authority alone, both it and the reasons for adopting or changing it will be accepted by the courts as part of the factual data--in other words, as not ordinarily open to judicial review. The court''s task--and this is not always understood--is then limited to asking whether the application of the policy to an individual who has been led to expect something different is a just exercise of power. In many cases the authority will already have considered this and made appropriate exceptions (as was envisaged in British Oxygen Co Ltd v Board of Trade [1971] AC 610 and as had happened in Ex p Hamble (Offshore) Fisheries Ltd [1995] 2 All ER 714), or resolved to pay compensation where money alone will suffice. But where no such accommodation is made, it is for the court to say whether the consequent frustration of the individual's expectation is so unfair as to be a misuse of the authority's power".

[203] *Ibid.*, para. 76, "Ex p Hargreaves [1997] 1 WLR 906 can, in any event, be distinguished from the present case. Mr Gordon has sought to distinguish it on the ground that the present case involves an abuse of power. On one view all cases where proper effect is not given to a legitimate expectation involve an abuse of power. Abuse of power can be said to be but another name for acting contrary to law . . . But the real distinction between Ex p Hargreaves and this case is that in this case it is contended that fairness in the statutory context required more of the decision-maker than in Ex p Hargreaves where the sole legitimate expectation possessed by the prisoners had been met. It required the health authority, as a matter of fairness, not to resile from their promise unless there was an overriding justification for doing so. Another way of expressing the same thing is to talk of the unwarranted frustration of a legitimate expectation and thus an abuse of power or a failure of substantive fairness. Again the labels are not important except that they all distinguish the issue here from that in Ex p Hargreaves. They identify a different task for the court from that where what is in issue is a conventional application of policy or exercise of discretion. Here the decision can only be justified if there is an overriding public interest. Whether there is an overriding public interest is a question for the court".

[204] *Ibid.,* para. 86. Few persons are indeed affected. In that sense, it resembles a contractual obligation and can be linked to the private law concept of estoppel by representation. This concept is, however, not applicable to public law.

the public authority as well as the (public interest) reasons given by the decision-maker to justify the change of policy.[205] In this respect, the Court held that,

> "there was no overriding public interest which justified it. In drawing the balance of conflicting interests the court will not only accept the policy change without demur but will pay the closest attention to the assessment made by the public body itself. Here, however, as we have already indicated, the health authority failed to weigh the conflicting interests correctly. Furthermore, we do not know (for reasons we will explain later) the quality of the alternative accommodation and services which will be offered to Miss Coughlan".[206]

The Court determines whether there is an overriding public interest which may justify the decision. Clearly, it used a balancing interest test, i.e. private versus public interests. The CA came to the conclusion that the public authority did not assess correctly the conflicting interests. Interestingly, the court referred to a kind of *"less restrictive means test"*. This test may be linked to the second element of the tripartite test of proportionality, i.e. necessity. Consequently, it might be argued that the abuse of power test comes very close to the proportionality test. Indeed, it appears to include, *in casu*, two elements of the proportionality test, i.e. necessity and proportionality *stricto sensu*. Also, according to Laws LJ, "the facts of the case, viewed always in their statutory context will steer the court to a more or less intrusive quality of review".[207] It may be stated that substantive legitimate expectations are subject to a variable standard of review. As stressed previously, this varies according to the context, circumstances and interests of the reviewed case at issue. In this respect, one can draw, once again, a parallel between the application of the abuse of power test and the flexible application of the principle of proportionality.

Flexibility brings, to a certain extent, uncertainty and a lack of clarity. This variable standard of review leads to criticisms. Notably, Clayton has argued that the principle of consistency should be taken into consideration.[208] More precisely, the author contended that the lack of rigour concerning the doctrine of legitimate expectations in UK law could be done away by using the irrationality test in all the situations dealing with policy. In his words:

> "the approach in Coughlan may have extended the idea of legitimate expectations beyond its proper bounds, that expectation based on policy should be differentiated from those based on assurances or representations; and that policy based expectations are more satisfactorily analysed as illustrations of the principle of consistency rather than the principle of substantive legitimate expectations".[209]

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[205] *Ibid.,* paras. 87 and 89.
[206] *Ibid.,* para. 89.
[207] *R* v. *Secretary for Education and Employment, ex parte Begbie* [2000] 1 WLR 1115, at p.1130.
[208] Clayton, "Legitimate Expectations, Policy, and the Principle of Consistency", CLJ 2003, pp.93-103.
[209] *Ibid.,* at p.95.

One may disagree with this assertion for three reasons. First, the application of consistency and, thus, irrationality,[210] will lead to the establishment of a less intensive standard of review. Consequently, it will be detrimental to the protection of subjective rights. Second, the flexibility which appears inherent in the application of the principle of substantive legitimate expectations, though leading to a variable standard of review, is not condemnable *per se*. In other words, a flexible standard of review, e.g. proportionality, may bring a lack of clarity. However, the lack of clarity does not constitute a denial of justice. A certain degree of variation is inherent to a principled review. Third, if one desires to achieve greater rigour one should aim, in my view, for the higher standard of review. It has been seen previously that the abuse of power test is closely linked to proportionality. Consequently, it may be contended that clarity could be achieved by a general application of the proportionality test. It is worth noting, again, that proportionality review may encompass both the irrationality and abuse of power tests.

In a similar vein, according to Craig and Schønberg, certain pivotal matters are not resolved by the abuse of power test.[211] In that sense, the authors propose other types of tests in order to refine the *Coughlan* case.[212] One of the tests concerns the replacement of the abuse of power test with the principle of proportionality.[213] Quoting them, *"proportionality helps to structure the decision-making process and facilitates the giving of reasons"*.[214] This principled approach favours the protection of subjective rights since it provides an intensive standard of review. By contrast, Schønberg appears to prefer the application of the *"significant imbalance test"*.[215] The test is inspired from the ECJ jurisprudence, where the Court will merely intercede if there is a significant imbalance in support of the individual's

[210] Clayton defines the principle of consistency as follows: the principle of consistency ensures that real weight is given to the policy promulgated whilst acknowledging that a public body has a right to alter policy provided it does not act irrationally.

[211] Craig and Schønberg, "Substantive Legitimate Expectations after Coughlan", PL 2000, pp.684-701. *See also* Sales and Steyn, "Legitimate Expectations in English Public Law: An Analysis", PL 2004, pp-564-593. The authors consider that the area of legitimate expectations is mainly connected with striking a fair balance between the public and private interests. Also they stress the need of a systematic classification and a more structured conceptual framework. In that regard, they argue, in the same line than Craig and Schønberg that the concept of abuse of power does not constitute a clear guide as to the standard of review. However, they consider that the application of ECHR proportionality would not lead to promote conceptual clarity since there is no instrument which defines rights or which specifies legitimate objectives.

[212] It is, *inter alia*, the potential application of heightened scrutiny applied in the Smith case or the test proposed by Lord Cooke in *ITF*.

[213] *See* Craig, "Substantive Legitimate Expectations and the Principles of Judicial Review", in Andenas, *English Public Law and the Common Law of Europe,* 1998, Craig in this article proposed to replace Wednesbury by the principle of proportionality. By contrast, Schønberg, appears to prefer the "significance imbalance" test.

[214] Craig and Schønberg, *supra*, at p.699.

[215] Schønberg, *Legitimate Expectations in Administrative Law*, Oxford, 2000, at p.154.

expectations. First, the author criticized the application of the proportionality test as being confusing in relation other areas of review and considered that the tripartite proportionality test is too complex to be applied to legitimate expectations. The author also pointed out that the linkage between the two principles cannot be found in any legal systems. Second, he proposed the "significant imbalance test" as an alternative. In his words, this test, *"(a) prescribes a more appropriate threshold for judicial interference than Wednesbury unreasonableness, (b) is specifically tailored to legitimate expectations cases, and (c) is conceptually less complex than the principle of proportionality"*.[216]

At the end of the day, even if the proportionality or the significance imbalance tests are not adopted, it seems clear that the standard of review, afforded by *Coughlan*, constitutes an evolution towards more intensity. Arguably, this evolution in internal matters results from the impact of the Community case-law. The HRA might also have an impact on the principle of substantive legitimate expectation.[217] Jowell has considered that, "*even in advance of the implementation of the Human Rights Act, the Court was, in Coughlan, willing not only to lower the Wednesbury reserve . . . but indeed to collapse the decision-maker's discretionary area of judgement and arrogate to the court the question whether the violation of the right was justified"*.[218] This principled and right approach appears to be confirmed by the post-*Coughlan* case-law.

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[216] *Ibid.*

[217] In that respect, the *Stretch* [*Stretch* v. *UK* (2004) 38 EHRR 12] case of the EctHR is of of particular interest in connection with unlawful representation. *See,* Elliot, "Legitimate Expectations and Unlawful Representations", CLJ 2004, pp.261-264. Stretch purchased a 22 year lease from a local authority. He had also an option regarding the renewal of the lease. The public (local) authority argued that its predecessor did no have legal capacity to grant such an option. The Court of Appeal accepted this argument. By contrast, the EctHR considered that Stretch has acquired a legitimate expectation of exercising the option and that the local had breached this legitimate expectation. According to Elliot, "[t]he significance of this analysis lies in its treatment of legal incapacity merely as a factor to be placed in the balance when deciding whether the legitimate expectation may lawfully be frustrated. This is in stark contrast to the English authorities' mechanical presupposition that the public interest in legality is necessarily of overriding force" (at p.262). The UK national courts might be reluctant to follow the *Stretch* approach. *See e.g., Rowland* v. *Environmental Agency* [2003] EWCA Civ 1885 (CA). This case concerns the enforcement of an unlawful promise regarding public navigation rights. The CA found no breach of legitimate expectations (*see* LJ May who considers that authority leads to an unjust outcome). However, it is argued that the traditional approach as to unlawful promise and legal capacity cannot automatically prevail in situations which are not purely internal.

[218] Jowell. "Beyond the Rule of Law: Towards Constitutional Judicial Review", PL 2000, pp.671-683, at p.677.

b) Post-Coughlan Case-Law

It appears clear from the post-Coughlan jurisprudence that legitimate expectations constitute the central principle in the context of public law[219] and that promises can be given which have the effect of creating substantive legitimate expectations.[220] For instance, in the *R (Bibi)* v. *Newham London Borough Council* (2001) case[221] the applicants successfully brought applications for judicial review of the authority's decisions that the duty to secure accommodation that became available to them had been discharged.[222] The Court held that the authority is under a duty to consider the applicants' applications for suitable housing, on the basis that they have a legitimate expectation that they will be provided by the authority with suitable accommodation on a secure tenancy. It is worth remarking that in the case of *Coughlan* and the more recent *Bibi* case, there was no dispute that a promise had been made. By contrast, in the *Home for Life II* case (2002), a promise of a home for life was keenly disputed.[223]

In the *Home for Life II* case the claimants suffered from severe and chronic mental disorders. Each of the claimants presently lives at Harefield Lodge. C, P and HM moved to Harefield Lodge from Shenley Hospital in l998. The move to Harefield Lodge was prompted by the closure of Shenley, which was a long stay psychiatric hospital. There was a staged closure programme, with groups of patients being moved over a period of time. The main question to determine was whether the trust promised that three of the claimants (C, P and HM) could remain at Harefield Lodge for the rest of their lives? The issue has generated an important controversy. Indeed, because of the legal consequences, the content must be established with sufficient certainty and clarity. In other words, "assurance must be clear and unequivocal".[224] The High Court highlighted the fragility of the evidence on this issue and concluded that anything was said to the effect that Harefield Lodge would be a "home for life" would be to find facts wholly inconsistent with the clearly expressed intention and purpose which the placement was designed to serve.[225]

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[219] *R* v. *East Sussex County Council, ex parte Reprotech (Pebsham)* [2002] UKHL 8 (HL), para. 34. The House of Lords clearly stated that legitimate expectations constitute the central principle in the context of public law. Thus, public authorities have to take into account the interests of the general public (which may vary according to the rights at stake).

[220] *See Begbie* [2000], the court applied the abuse of power test. it concerned a change of policy by the Labour party. Before the change of policy, a state funded scheme offered a place in an independent school to a child until eighteen years old. Laws LJ focused on the number of persons affected and the nature of the policy.

[221] *R (Bibi)* v. *Newham London Borough Council* [2002] 1 WLR 237.

[222] The applicants have been provided by the authority with housing for the last ten years or so but they have never had security of tenure.

[223] The *Queen on the Application of 'C', 'M', 'P', 'HM'* v. *Brent, Kensington and Chelsea and Westminster Mental Health NHS Trust CO*. Wednesday 13th February, 2002.

[224] *Ibid.*, Harefield Lodge.

[225] *Ibid*., paras. 13-15.

In *Bloggs* (2003),[226] a case factually rather similar to *Hargreaves,* the CA once again recognized, without applying it, the abuse of power test. This case concerns the Secretary of State's decision to remove a prisoner from a special protection regime to a mainstream prison conditions. The appellant was arrested on a charge of conspiracy to supply nine tons of cannabis resin. He made full admissions to the arresting officers of his guilt and he also gave them a lengthy and detailed account of his involvement with a number of persons who were importing cannabis from Spain. Consequently, he was placed under a witness protection system that provides for a very high level of personal security in prison. The protected witnesses are all given the name of Bloggs followed by a number unit in order to preserve their anonymity. This system has been termed the so-called "Bloggs system". In the appeal, the claimant argued that although the police gave the appellant assurances to that effect, the prison service was in some way responsible (through the assurances made by the police) for giving the appellant a legitimate expectation that he could remain in the unit throughout his sentence. It was submitted that the appellant had a reasonable basis for a legitimate expectation [227] grounded on the ostensible authority of the police to commit the Prison Service.[228] Thus, one of the main issues at stake in this appeal was whether representations allegedly made by police officers to the appellant could and did give him a legitimate expectation, as against the prison service, that he would serve the length of his sentence in a protected witness unit.

The Court of Appeal remarked that, *"there is . . . an analogy between a private law estoppel and the public law concept of a legitimate expectation created by a public authority, the denial of which may amount to an abuse of power, (ex p. Coughlan). But it is no more than an analogy because remedies against public authorities also have to take into account the interests of the general public which the authority exists to promote. Public law can also take into account the hierarchy of individual rights which exist under the Human Rights Act 1998".*[229] Then, it pointed out that the police could not bind the prison service to treat the appellant as a protected witness unless it had actual or ostensible authority to do so.[230] The CA concluded that the decision could not be regarded as procedurally flawed or otherwise unreasonable in the sense of breaching any legitimate expectation that the appellant may have had as to how the Prison Service should have considered his reluctance to return to mainstream prison conditions.[231] This limited review was confirmed, in 2004, by the Vary case, where the High Court had to assess the Prison Service Policy in the light of legitimate expectations.[232]

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[226] *The Queen on the Application of Bloggs 61* v. *Secretary of State for the Home Department* [2003] CA Wednesday 18th June 2003.
[227] *Ibid.,* para. 35. relying on the words of Lord Fraser in A-G of Hong Kong v. Ny Yuen Shiu [1983] AC 629, at p. 636, and of Lord Woolf in ex parte *Coughlan*, para. 56.
[228] *Ibid.,* para. 29.
[229] *Ibid.,* para. 34.
[230] *Ibid.,* para. 38.
[231] *Ibid.,* para. 46.
[232] *Vary and Others* v. *Secretary of State for the Home Department* [2004] WL 2458646

It seems clear that the post-*Coughlan* jurisprudence has recognized and applied, in certain circumstances, the abuse of power test.[233] More precisely, the case-law affords protection to substantive interests through either the application of the irrationality test or the abuse of power test. Notably, the two tests (test 1 and test 3) afford a different degree of scrutiny, i.e. from low (test 1) to heightened scrutiny (test 3). Accordingly, the variable application depends on the statutory context.

Be that as it may, it seems that the principles of EC law have made their way into purely internal matters. It remains to be answered whether the courts use the principle of proportionality under the guise of abuse of power, or if it is a different concept? As mentioned above, it is not a direct translation of the EC law principle of substantive legitimate expectations, but rather a *sui generis* application through the abuse of power test. It may be said that the *"abuse of power"* test uses a balancing test, which is generally affiliated to proportionality *stricto sensu* (third part of the test). In that sense, this test is clearly more principled than Wednesbury unreasonableness and, consequently, implies a new approach and constitutional role for the UK judge. Nevertheless, the test is still lacking clarity. Arguably, this situation could be remedied by the application of the principle of proportionality or the significance imbalance test inspired from the ECJ case-law on substantive legitimate expectations. What is more, the HRA might be useful in this respect.[234]

Finally, it might be contended that the influence of the EC law principle of substantive legitimate expectations has led to the establishment of a doctrine which comes closer to the EC principle and undeniably provides citizens with better protection than the Wednesbury test. In that regard, it constitutes a diffraction of a general principle of Community law over purely internal matters through the use of fairness. Also, the reception has been favoured by the pre-existence of national concepts such as procedural legitimate expectations and estoppel by representation.[235] According to Sedley J in *Hamble fisheries*, *"in a brief comparison of the development of the doctrine of legitimate expectation in the Member States of the Community, Professor Schwarze locates Britain as a relative latecomer to the doctrine. This, I would think, may be an advantage, at least to the extent that our*

[233] One witnesses a clear increase in complaints based on a breach of legitimate expectations, though often not founded. *See e.g.* for the High Court, *Bakhtear Rachid* v. *Secretary of State for the Home Department* [2004] WL 2577116, para. 16. *Gopal Rana Sunsurri* v. *Secretary of State for the Home Department* [2004] WL 2700856, *Kedar Thapa* v. *Secretrary of State for the Home Department* [2004] WL 3130731 (Concerning asylum claims/removal decisions). For the Court of Appeal, *Fisher* v. *English nature* [2004] WL 1074611, paras. 85-87. For the House of Lords: *Regina (Mullen)* v. *Secretary of State for the Home Departments* [2005] 1 AC 1 (concerning miscarriage of justice).

[234] Craig and Schønberg, s*upra n.159,* at pp. 699-700. Notably, legitimate expectation can be pleaded before the EctHR. The ECHR case-law on legitimate expectations may have an impact on the application of the principle in domestic law. *See, Benjamin and Wilson* v *United Kingdom*, Application No 28212/95 [2003] 36 EHRR 1.

[235] Interestingly, the same can be said of French administrative law with the concept of acquired rights.

case law on the topic has not had a chance to ossify and because it enables us to learn from our neighbours".[236]

7.3.3. The Good, the Bad and the Ugly

The application of the general principles in internal and Community matters by the UK courts may be epitomised by a tripartite formula: the Good, the Bad and the Ugly. The first characteristic (The Good) refers to the proper and increasing application by the national courts of the general principles (proportionality and legitimate expectations) in matters falling within the scope of Community law. The Community principles constitute more exacting standards and bring more rationality and intelligibility to the system of review. The second element (the Bad) concerns the continued and resistant application by the domestic courts of the Wednesbury test in matters linked to proportionality and legitimate expectations and falling within the purview of Community law. This application is contrary to Community law and brings uncertainty. The third facet (the Ugly) represents the diffraction of the general principles in purely internal matters. More precisely, the national courts influenced by the principles of Community law may apply them on a voluntary basis. For instance, this has led to the creation of the so-called abuse of power test which protects, to a certain extent, legitimate substantive interests and which appears to be a "hybrid concept". The two first elements are linked to matters falling within the scope of Community law, whereas the third element is proper to internal law.

a) As to matters falling within the scope of Community law (The Good, the Bad . . .)

There exists an obligation for the national courts to apply the general principles of Community law. This obligation may be deduced from Article 10 EC.[237] This Chapter focuses, more precisely, on the reception of the principles of proportionality and legitimate expectations.[238] Moreover, it is worth noting that other principles have made their way into UK law, e.g. duty to give reasons and non-discrimination.[239] However, the application of the general principles by the national

[236] *Hamble Fisheries*, *supra n.177.,* para 31.

[237] *See* Temple Lang, *supra. Chapter 6.3.3 (b).*

[238] The study of the principle of proportionality is of the utmost importance since it can be found in fundamental rights cases, e.g. non discrimination and freedom of expression, and can be linked to substantive legitimate expectations. In other words, it covers more or less the entire scope of general principles.

[239] *MacDonald* v. *Advocate General for Scotland Pearce* [2003] UKHL 34. Macdonald was dismissed from the Royal air force because he was homosexual. The case enshrines an extensive analysis of the Community case law regarding homosexuals, *e.g. Grant, D* v. *Sweden* (paras. 56-57, paras. 160-161) It follows the restrictive approach of Community law jurisprudence and underlines the mighty problem of the lack of a comparator (male homosexual with a female homosexual). The Court considered also that, "the position under Community law has moved on. Article 13 EC deals with discrimination on the ground of

courts in matters falling within the purview of Community law has not been an easy task. It may be argued that such difficulties result, basically, from two elements. First, the national courts confused the application of the EC principle of proportionality with the Wednesbury test. Second, there were some difficulties for the national courts to determine the scope of application of Community law.

As to the former, the UK judges, in many instances, tended to wrongly assimilate the EC law principles with the national standard, *e.g. ex parte* Adams, *ex parte McQuillan or ITF*.[240] The judges appeared sometimes reluctant to qualify a decision or a measure disproportionate such as with irrationality.[241] As mentioned above, the traditional approach of review, materialized by the Wednesbury test, gives no power for judges to interfere with the facts or merits of a public authority decision unless it is manifestly disproportionate or unreasonable. The control of proportionality, contrary to what has sometimes been argued,[242] is not redundant to the application of the irrationality test. It requires the domestic jurisdictions to balance the aim of a measure against its effect on the individual. It does not lead to the same result in every situation.[243] Consequently, the general principles, analysed above, clearly provide a higher standard of review than the Wednesbury test. The principles afford a higher degree of scrutiny, since the review is more articulated, rigorous and brings more rationality.[244] In this respect, it could be said that those principles exemplify the "higher law" argument.

The consequences of the application of the "higher law" may be problematic. Arguably, it is incompatible with the constitutional role of the domestic courts. In that regard, one may contend that the application of this intensive review involves

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sexual orientation". There is a new directive that must be transposed by December 2003 (paras. 52 and 163). The Court found no discrimination. *Bellinger* v. *Bellinger* [2003] UKHL 21, Ms Bellinger had undergone a gender reassignment. According to the legislation, a marriage is void unless the parties are respectively male or female. Ms Bellinger sought a declaration that the marriage was valid and a declaration and that section 11(c) of the matrimonial Causes Act 1973 is incompatible with the right to respect for her private life under Article 8 ECHR and with her right to marry under Article 12 ECHR. In December 2002, UK legislation evolved when the government announced primary legislation which will allow transsexuals to marry in that gender (paras. 25-27). The HL made reference to the EctHR case-law in *Goodwin* (2002). Interestingly, the ECJ(2003) in *KB* referred to *Bellinger* v. *Bellinger*.

[240] Szyszczak, "Judicial Review of Public Acts", ELR 1998, pp.89-98.

[241] Lord Hoffmann, "A Sense of Proportion", in Andenas and Jacobs, *European Community Law in the English Courts, Oxford*, 1998, pp.149-161, at pp.160-161.

[242] Boyron "Proportionality in English Administrative Law: a Faulty Translation?", OJLS 1992, pp.237 *et seq*.

[243] *See ex parte Smith*, *Peck , Saville* and *Sunday Trading* cases.

[244] Jacobs, "Public Law- The Impact of Europe", PL 2000, pp.232-245, at p.245, at p.239. Jacobs considered that proportionality is a more exacting and articulated standard. *See also* Jowell and Lester, "Beyond Wednesbury: Substantive Principles of Administrative Law", PL 1987, pp. 368 *et seq*., at p.372., De Búrca, EPL 1997, *supra n.50*, at p.576. The principles justify the decision by giving the reasons for intervention. This is the result of the balancing test. In a similar vein, there also exists a heavier evidential burden on the administration.

balancing opposite interests which, in a democratic society, must be resolved by the legislature. Consequently, the role of the judiciary is not to usurp the role of the decision-maker by reviewing the merits of the decision or to substitute it with its own policies.[245] The modern review (EC law principles but also HRA) affects the constitutional role of the UK judges.[246] It constitutes, in that sense, a fundamental shift from the doctrine of parliamentary sovereignty. It is not an easy task for the domestic judge to modify the conception of his/her own role. Subsequently, one may understand the resistance of certain judges to the application of the principles of Community law.[247] This does not, however, legitimise behaviour that is clearly contrary to Community law. By contrast, one may venture to say that a proper application of the principle of proportionality would not irremediably intrude into the merits of the decision. Furthermore, the entry into force of the HRA demonstrates the acceptance of the principled model by the Parliament. Finally, a proper application of the EC law principles requires the acceptance of the possibility to adapt democracy to new conditions in order to make it function better, what Rawls would call the public reason. More than any legal and political arguments, it necessitates "*une certaine ouverture d'esprit"*.

As to the latter, one has seen that the national courts tend sometimes to interpret the scope of Community law in a very restrictive manner, e.g. *First City Trading* and *Lunn Poly*. This restrictive interpretation is often based on the reluctance to use unwritten norms of Community law. Accordingly, the general principles of Community law are not provided for on the face of the Treaty. One must starkly criticize such an interpretation, which makes it impossible for preliminary rulings to be brought before the ECJ and thus impedes the determination of whether the matter is falling within the scope of Community law or not. However, the scope of Community law is extending. So are the general principles of Community law. In this respect, the UK judge recognised in *Hamble Fisheries* the application of legitimate expectations. Lawyers and judges are becoming more familiar with Community law.[248] Still, two types of judges exist. On the one hand, judges attached to the traditional review and, consequently, less responsive to Community law, e.g.

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[245] Wong, "Towards the Nutcracker Principle: Reconsidering the Objections to Proportionality", PL 2000, pp. 92 *et seq.,* at p.98.

[246] Jowell, "Beyond the Rule of Law: Towards Constitutional Judicial Review", PL 2000, pp.671-683, at p.683, "[t]he new constitutional review will profoundly affect the tasks of both our administration and our judiciary. It should not, however, permit judges to usurp the making of policy or to meddle with the merits of official decisions".

[247] De Búrca, EPL 1997, *supra n.50*, at p.585, "the resistance of many judges to proportionality is based on the perception that the introduction and use of this concept demands a change in their constitutional role which is at odds with the traditional confines of that role within the UK legal and political system".

[248] Lord Justice Schiemann, "The Application of General Principles of Community Law by English Courts", in Andenas and Jacobs, *European Community Law in the English Courts,* Oxford, 1998, pp. 137-148.

Laws in *First City Trading*. On the other hand, progressive judges more akin to properly applying Community law, e.g. Sedley in *Hamble Fisheries*.[249]

b) As to purely internal matters (. . . and the Ugly)

At first blush, proportionality and legitimate expectations must be distinguished. First, it stems from the case-law that the EC principle of proportionality is not applicable to purely internal matters. Second, the EC principle of legitimate expectation applies to purely internal matters in the form of the abuse of power test, e.g. *Coughlan.* One may wonder whether such a clear-cut distinction will remain. Strong elements seem to support a negative answer and thus a uniformization.

Regarding proportionality, though the House of Lords has refused its application in matters falling outside the scope of Community law, Lord Slynn in *Alconbury* considered it unnecessary and confusing to keep the two tests together. In other words, it is time to apply the principle of proportionality in the domestic field.[250] This view, based on the coherence argument, is also followed by Jacobs and Hilson.[251] According to former, *"with the developing impact of European community law in English courts, and with the imminent impact of the Convention under the Human Rights Ascot, it may come to seem increasingly anomalous for the English courts to apply proportionality under Community and Convention law but not under English law"*.[252] As demonstrated before, the HRA plays an important role in the rational application of the principle of proportionality. Notably, the HRA applies in purely internal matters though its impact has been deemed very patchy. [253] Thus, it may be contended that the principle of proportionality applies in domestic matters connected to fundamental rights. The ECHR and EC principles of proportionality are very similar. Arguably, the HRA will foster the application of EC proportionality. In light of the foregoing, its application into internal matters appears inescapable. In this respect, we seem to be well on the way to *"far-reaching changes"*.[254] Finally, the explicit acceptance of the principle of proportionality would ameliorate the intelligibility (the test is more exacting), the coherence of the review (convergence of the two standards of review) and scrutiny of the review as well as the quality of decision-making (increasing the sensitivity of the decision-

[249] More porous, *Sedley in McQuillan* [1995], but not explicit, integrate to the domestic standard.
[250] *Alconbury*, *supra n.115*, para. 51.
[251] Hilson, EPL 2003, *supra n.1*, at p.143. Hilson strongly argued for the removal of Wednesbury test from the domestic cases. He considered that few would mourn the Wednesbury test. The author used both the coherency and the higher law arguments. The author stated that "the courts should on grounds of simplicity and economy disallow its use within rights cases. It makes little sense to allow a less sophisticated principle for controlling discretionary power to be used in a case where a more sophisticated principle – proportionality – is already being employed. Norm reduction within cases should be the aim where an existing norm is essentially redundant" (at p.135).
[252] Jacobs, PL 2000, *supra n.244,* at p.239.
[253] Clayton, "Developing Principles for Human Rights", EHRLR 2002, pp.175-195, at p.194.
[254] Anthony, *supra n.5*, at p.17.

makers in taking their actions and also impelling officials to contemplate alternative courses of action).[255]

Regarding substantive legitimate expectations, one clearly witnesses a spill-over of the EC law principles into purely internal matters. The acceptance was not, however, realised without resistance, e.g. *Hargreaves* case (where the application of legitimate expectations in purely internal matters was qualified as being heretical). The diffraction takes the form of the abuse of power test. As seen previously, this may be explained by the recourse to the coherency and higher law arguments. In addition, three other arguments may be used. First, the traditional reasoning by analogy used by the UK judges to solve problems, i.e. to look around in order to find a solution, might explain the diffusion of the general principles of Community law into purely domestic matters. Second, the existence of national concepts such as procedural legitimate expectations and estoppel (private law) may have helped to provide a foundation for the principle. Third, once again, the HRA and the jurisprudence of the EctHR have fostered the application of substantive legitimate expectations.[256]

As to the abuse of power test, its elaboration and application have been welcomed differently by the doctrine. On the one hand, some authors warmly welcome the spill-over of the EC law principle into purely internal law.[257] On the other hand, its complexity has given rise to criticisms and to proposals in order to permit a user-friendly application. In that regard, Clayton argued for a general application of the principle of consistency (in the end this approach results in the application of the Wednesbury test). This view appears to me retrogressive and thus should not be followed. Other authors have proposed to replace the test either by the principle of proportionality (Craig) or the significance imbalance test (Schønberg). These views are clearly progressive. Though one knows that the national courts are totally capable of elaborating *sui generis* principles, the standard applied in internal matters should be the same as the Community test for the sake of clarity, coherence and certainty.

Finally, the foregoing discussion prompts in my view two conclusive remarks on proportionality and legitimate expectations. First, it seems to me that the phenomenon of spill-over in UK public law tends towards convergence. In that sense, one may disagree with Hilson, who contended that voluntary Europeanization in the shape of spill-over or cross-fertilization is unlikely ever to produce a common,

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[255] Jowell, "Is Proportionality an Alien Concept", EPL 1996, pp. 401-411. Conversely, *see* Legrand, "Public Law, Europeanisation, and Convergence: Can Comparatists Contribute?", in Beaumont, Lyons and Walker , *Convergence and Divergence in European Public Law*, 2002, pp.225-256, at p.247 and at p.255, Legrand argued for the respect of diversity in the European Community and against, the uniformatization of the EC. This author concluded that diversity is good and common-lawyers should resist the continental invasion in the name of European construction.

[256] *Benjamin and Wilson* v. *United Kingdom*, Application No 28212/95 [2003] 36 EHRR 1.

[257] *See e.g.,* Jowell, *supra n.255*, Hilson, *supra n.1,* and Anthony, *supra n. 5.*

general administrative law in Europe.[258] Arguably, it simply takes more time to modify traditional concepts on a voluntary basis than to impose an EC obligation. The EC concepts are making their way into internal public law, slowly, silently but inescapably. Second, the HRA and EctHR jurisprudence appear to play an important role in the application of the principles in both paradigms of law. The influence is dual (direct and indirect). It appears direct through the case-law of the EctHR (*Smith*, *Peck* [proportionality], *Benjamin and Wilson, Stretch* [legitimate expectations]). It is also indirect in the sense that the rational application of the HRA by domestic judges foster the proper use of the EC law principles.

[258] Hilson*, ibid.,* at p.129.

CHAPTER 8. IMPACT OF THE GENERAL PRINCIPLES IN FRENCH PUBLIC LAW

This Chapter concerns the study of the impact and spill-over of the general principles into French public law and their application by the national administrative courts.[259] More precisely, this Chapter focuses on the reception of the general principles both in matters falling within the scope of Community law and internal matters. As seen before, there is an obligation on the national courts to apply the general principles in the EC law context. By contrast, such an obligation does not exist in matters falling within purely internal matters.

First, it appears necessary to analyse the hierarchy of Community law and its general principles vis-à-vis Constitutional law (Article 55 of the French Constitution) and the place of the general principles of Community law within the jurisprudence of the Constitutional Council (CC). Second, the analysis focuses on the recognition and application of the general principles of Community law by the administrative courts in matters falling within the scope of Community law. Third, it will be determined whether the general principles of Community law affect French internal law. This last section mainly deals with the principle of legitimate expectations.

8.1. CONSTITUTIONAL LAW, HIERARCHY OF NORMS AND GENERAL PRINCIPLES OF COMMUNITY LAW

8.1.1. Article 55 of the French Constitution and the Hierarchy of Norms

It may be said that Article 55 of the Constitution establishes a hierarchy of norms between international law and the French national legal order. Article 55 states that, *"[t]reaties and international agreements which have been lawfully ratified or approved shall, as from the date on which they are published, take precedence over Laws, subject to the requirement that the other contracting parties apply the treaties*

[259] Importantly, it does not focus on the impact of the general principles in the case-law of the judiciary courts, *e.g.* Cour de Cassation. In this respect, *see* Huglo and Soulard report. Furthermore, it does not analyze the indirect impact of the general principles, i.e. influence of a general principle via a Directive. In France, the Directive 89/655/EEC, concerning proceedings for violation of competition rules in the public procurement context, was inspired by the general principle of effective judicial protection. The Directive led to important legislative reforms in the internal domain as the power of injunction against the Administration. The same holds true in connection with other countries. For instance, in the UK, it can be compared with the injunctions against the Crown in the UK (*see supra*, *Factortame, M* v. *Home Office*). Furthermore, the directive on sexual orientation has obviously had an important effect on the legislation (*see supra Bellinger* v. *Bellinger* (HL)). The Directive, however, was fostered by the case-law of the ECJ (*see supra*, *P* v. *Cornwall and Grant*). In this respect, it might also be said that the case-law of the ECJ impacts on secondary legislation, and then, indirectly, impacts the domestic law (*see supra, UPA* and *Jégo Quéré*).

or agreements in question". In a nutshell, the international agreement must be ratified, published and subjected to the principle of reciprocity. According to Vedel, the direct content of Article 55 concerns the resolution of conflicting norms. In other words, it means that a judge confronted with such a conflict must remove the internal statute contrary to the international treaty.[260] In 1975, the Court of Cassation recognized the primacy of Community law over a posterior French statute.[261] The reasoning was based on Article 55 of the French Constitution. Touffait, in his conclusions, advised not to base the reasoning on Article 55 in order to assert the primacy of Community law over national law, since it would imply that the position of Community law into the national legal order depends solely on the Constitution.[262] In that sense, it might be contended that the general prosecutor had already determined the potential normative conflict between Community law and the wording of Article 55 of the Constitution. Very late, in 1989, the *Conseil d'Etat* (CE) in *Nicolo*, following the *Commissaire du Gouvernement* (CG) Frydman,[263] affirmed the primacy of the international convention over a prior domestic statute (*loi postérieure*),[264] thus abolishing the so-called theory of the *"loi-écran"* (veil-statute). It is worth noticing here that the theory of "veil-statute" leads to affording supremacy to the domestic statute over international conventions by impeding the ordinary judge from discarding the domestic law. The said theory was established, in the late sixties, by the *"Semoules* case*"*.[265] Next, the CE considered in *Boisdet* that a Community Regulation prevailed over the French Law. [266] In *Rothmans* (1992), the administrative judge considered that the refusal by the French ministry, based on a decree[267] and a statute,[268] to allow cigarette manufacturers to increase the price of

[260] Vedel cited in Potvin-Solis, *l'effet des jurisprudences européennes sur la jurisprudence du conseil d'Etat Français,* LGDJ, 1999, at p.422.
[261] Cass. Ch.mixte, 24 May 1975, *Sté des Cafés Jacques Vabre* [1975] 2 CMLR 336.
[262] The *Procureur Général* Touffait stressed that the Court should base its decision on the very nature of the Community legal order. In that regard, he considered that the transfer made by the Member States in those areas regulated by the Treaty must constitute a definitive limitation of their sovereign rights. Also, he referred to the decisions of the Belgium (*Le Ski decision*, 1971), German (*Lütticke,* 1971) and Italian (*Frontini*, 1973) Courts, which have recognized the supremacy of Community law over national law.
[263] CG Frydman assessed that the CE should reconsider its approach regarding Article 55 of the Constitution and thus review the compatibility of statues with treaties. In this respect, the CE would bring into line its case-law with not only the Court of Cassation but also with the German and Italian Constitutional Councils.
[264] CE Ass, 20 October 1989, *Nicolo,* RFDA 1989, pp.813 *et seq. See* Dutheil De La Rochère, "The Attitude of French Courts Towards ECJ Case Law", in O'Keeffe and Bavasso (eds.), *Judicial Review in European Union Law*, 2000, pp.417-431, at pp.420-422.
[265] CE, 1 March 1968, *Syndicat General des Fabricants de Semoules de France* [1970] CMLR 395.
[266] CE, 24 September 1990, *Boisdet,* AJDA 1990, pp.906 *et seq*.
[267] Decree of the 10th of December 1976.
[268] Statute of the 24th of May 1976.

their products was contrary to the "tobacco Directive" of 19 December 1992.[269] Consequently, it annulled the decision of the French Minister.[270] In light of the administrative jurisprudence, the hierarchy between the Constitution and the international treaties remains to be determined. However, this difficult issue appears to be tackled by the CE in the *Sarran* case.[271]

8.1.2. The Sarran Case: Superiority of the Constitution and Community law

Firstly, Article 55 of the French Constitution asserts the superiority of international treaties over domestic statutes. It does not, however, refer explicitly to the Constitution. Arguably, the wording of this provision seems to indicate a hierarchy favourable to the French Constitution. Secondly, the administrative jurisprudence has confirmed such a view. In *Koné,* a principle of constitutional law prevailed over international law. [272] Further, in *Aquarone*, the *Conseil d'Etat* refused to make internal custom prevail over domestic constitutional law.[273] Notably, in the *Sarran* case, the CE made clear that the domestic Constitution takes precedence over the International Treaty. It appears, thus, important to analyze such a case in more detail and, particularly, in the light of Community law. *In casu*, the applicant brought an action before the Council of State invoking the illegality of a decree that had been adopted on the basis of Article 76 of the French Constitution providing for consultation of the population of New Caledonia. Sarran and Levacher argued that Article 3 and 8 of the decree were contrary to the Article 2, 25 and 26 of the ICCPR and Article 14 of the ECHR. The Council of State held that:

> "Considérant que si l'article 55 de la constitution dispose que les traités ou accords régulièrement ratifiés ou approuvés ont, dès leur publication, une autorité supérieure à celle des lois sous réserve, pour chaque accord ou traité, de son application par l'autre partie, la suprématie ainsi conférée aux engagements internationaux ne s'applique pas, dans l'ordre interne, aux dispositions de nature constitutionnelle, qu'ainsi, le moyen tiré de ce que, le décret attaqué, en ce qu'il méconnaîtrait les stipulations d'engagements internationaux régulièrement introduits dans l'ordre interne, serait par le même contraire à l'article 55 de la constitution, ne peut lui aussi qu être écarté".

[269] CE, 28 February 1992*, SA Rothmans International France and SA Phillip Morris France,* AJDA 1992, pp.210 *et seq*, CMLRev. 1993, pp.187-198.
[270] *Infra.*, *Meyet* and *SNIP* cases. In the second case, the CE explicitly considered the position of the general principles of Community in the national legal order. The general principle of Community is superior, in the hierarchy of norms, to the Law (statute). The Constitution appears, still, to prevail.
[271] CE Ass., 30 October 1998, *Sarran et Levacher et autres*, AJDA 1998, pp.1039 *et seq. See also* CE, 30 July 2003, *Association Avenir de la langue française*, Recueil Lebon 2003, pp.347 *et seq.*
[272] CE Ass, 3 July 1996, *Koné,* Recueil Lebon, pp. 255 *et seq*.
[273] CE Ass, 6 June 1997, *Aquarone,* RGDIP 1997, pp. 1053 *et seq*.

On the one hand this paragraph (*"considérant"*) has been appraised as an *obiter dictum* since the CE could have invoked its incompetence to disregard the application of the French Constitution.[274] On the other hand, it has been assessed that such a very clear statement constituted the *ratio decidendi* of the judgment.[275] Regardless, it is clear from the case that the *Conseil d'Etat* emphasized the superiority of the constitutional dispositions over the international treaties. These dispositions of a constitutional nature include the written Constitution but also the constitutional principles developed by the Constitutional Council. Further, it might be argued that all the international conventions are concerned since, *in casu*, the CE found that the Constitution prevailed over the ICCPR and the ECHR.[276] The CE asserted the superiority of the Constitution over international norms. The supremacy conferred by Article 55 of the Constitution to international conventions does not apply, in internal law, to dispositions of a constitutional nature. In practice, this means that it is impossible to plead before an administrative court that a constitutional disposition is contrary to an international convention.

This case clearly illustrates the conflict between the legal orders.[277] The supreme administrative court clearly established a theory of "Constitution écran" ("veil-constitution"). In other words, being hierarchically superior, the Constitution appears immune from judicial review by an international norm (more particularly a Community norm). Rephrasing Flauss, to give an absolute character to the supremacy of the constitutional norm over the conventional norm constitutes, without doubt, an eminent dogmatic option which is apparently excessive.[278] By contrast, the other solution would have allowed the ordinary judge to review the Constitution in light of an international norm ("*contrôle de conventionnalité de la Constitution*").

The *Sarran* case might lead to serious problems, especially, in relation to Community law. In other words, there is a risk of conflict between Constitutional and Community norms. Indeed, according to the Community jurisprudence,[279] Community law prevails over national law even constitutional law. Yet, the *Conseil d'Etat* has never been directly confronted with such a conflict. In practise, such a conflict is highly hypothetical. Moreover, the CE might abandon such an approach. In that regard, it is worth underlining that the *Conseil d'Etat* discarded its theory of "loi-écran" in the *Nicolo* case (French legislation superior to the international norm).[280] Importantly, the CE always has this possibility in relation to the theory of "Constitution-écran". The CE might also recognize the specificity of the Community

[274] Chaltiel, "Droit constitutionnel et droit communautaire", RTDE 1999, pp. 395-408, at p. 404.
[275] Flauss,"Contrôle de conventionnalité et contrôle de constitutionnalité devant le juge administratif", RDP 1999, pp. 919-945.
[276] *Ibid.,* at p. 931.
[277] Chaltiel, *supra n.274*, at p. 404.
[278] Flauss, *supra n.275*, at p. 927.
[279] Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.
[280] Chaltiel, *supra n. 274,* at p. 403.

legal order. In that sense, the CE established a distinction, regarding their hierarchy, between general principles of international law and general principles of European law. Arguably, the inexistence, at this stage, of a formal European Constitution might constitute a strong element impeding the recognition of the predominance of the European judicial order over the constitutional domestic order. At the end of the day, how can we assess the reaction of the *Conseil d'Etat*? Is it a positive or negative reaction towards Community law? This decision appears to me *prima facie* negative since it goes against Community (case) law. Drawing a parallel, the same reasoning might have been applied to the *Solange I* of the German Federal Constitutional Court. However, as demonstrated previously, the consequences of Solange I have been extremely positive for the Community legal order, though the reaction of the national jurisdiction was deemed *prima facie* negative.[281] As to the reaction of the Council of State, it may be too early to give a precise answer. Furthermore, it is worth emphasising that the *Sarran* case does not explicitly apply to the Community legal order. Extrapolating on a positive consequence, one might say that this type of ruling enhances the necessity to adopt a European Constitution. Finally, it seems to me that the Council of State in the *Sarran* case reasserts its utmost interest and role in protecting the French Constitution and, thus, appears as its guardian.[282] In that regard, the decision might conflict, to a certain extent, with the position of the *Conseil Constitutionnel*.[283] It appears, now, important to analyze the position of the *Conseil Constitutionnel* towards Community law and, more precisely, its general principles.

8.1.3. The Position of the Conseil Constitutionnel towards General Principles of Community Law

In the *Maastricht I* decision,[284] the *Conseil Constitutionnel* (CC), using the formulation of the ECJ recognized the *sui generis* nature of the Community legal order *("ordre juridique propre"*). Thus, the constitutional judge acknowledged the impact of the Community legal order into the domestic system. Notably, the CC remarked that Article F(2) TEU (new 6(2)) explicitly refers to the general principles of Community law and stresses the important role of national courts in the application of the said Article.[285] In that regard, it could be argued that the CC

[281] *Supra., Chapter 1.3.3.*

[282] Richards, "Sarran et Levacher: Ranking Legal Norms in the French Republic", ELR 2000, pp192–199, at p.192.

[283] Interestingly, the "conflict thesis" is very strong in the context of internal general principles.

[284] CC, No 92-308 DC, 9 April 1992.

[285] *Ibid.,* "*Maastricht I* case", para 18, "[t]he provisions of Article F(2), taken in conjunction with the intervention of national courts rendering decisions in the exercise of their jurisdiction, enable the rights and freedoms of citizens to be guaranteed. In this respect, the international agreement submitted to the Constitutional Council does not infringe constitutional rules and principles", translated in Oppenheimer (eds.), *The Relationship between European Community Law and National Law: The Cases*, Cambridge, 1994, at

recognized the obligation for the domestic jurisdiction to respect the general principles of Community law. Also, one might state that the general principles of Community law, as part of the Community legal order, appears hierarchically equal to the EC Treaty and, as such, influence the national legal order.

However, the explicit reference to the general principles of Community law by a constitutional court remains a marginal phenomenon. Only in a few countries, i.e. Austria,[286] Spain[287] and Germany,[288] have the Constitutional Courts made express references. The same holds true in relation to the Charter of Fundamental Rights, e.g. Spain and Belgium.[289] As explained by Flauss, the refusal to take explicitly into consideration the general principles of Community law constitutes a political choice.[290] Indeed, the acceptance of the general principles of Community law by the CC may reflect a certain "communitarization" of the constitutional norms.[291] At the end of the day, it would make the ECJ appear as the supreme and final constitutional adjudicator. This choice might also be explained by resorting to three judicial arguments (lack of fundamental rights protection in EC law, lack of similar scope and definition between the general principles of Community law and the general principles of constitutional law and lack of preliminary references by the *Conseil Constitutionnel*).

First, it has been argued that the EU is marked by an incomplete system concerning the protection of fundamental rights.[292] In other words, the fundamental rights protected by the general principles of Community law are few and scattered.[293] One may disagree with such an assertion. Such argumentation resembles the one given by the Federal Constitutional Court in *Solange I.* As seen previously, the situation has drastically changed since 1974. Consequently, this assertion, in my view, lacks full convincing force, since fundamental rights

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p.390. *See also* CC, No 04-496 DC, 10 June 2004, *Loi pour la confiance dans l'economie numerique*. The CC mentioned Article 6 TEU in relation to its refusal to review the constitutionality of an implementing legislation and the reaffirmation of the *Foto-Frost* doctrine (control of validity of a Directive by the ECJ through preliminary ruling).

[286] *See* Belgian and Spanish reports of the London FIDE Conference (2002).

[287] Constitutional Tribunal, 28 February 1994 (58/1994). The Tribunal declared sexual discrimination unconstitutional by applying the ECJ case-law. Interestingly, Article 20(2) of the Spanish Constitution, to a certain extent, obliges the Tribunal to take Community jurisprudence into consideration. More recently, the Constitutional Tribunal made explicit reference to the Charter of Fundamental Rights.

[288] BVerfGE, 28 November 1992, 85/191. The FCC referred to the case-law of the ECJ concerning discrimination.

[289] *See* the reports of Belgium and Spain during the London FIDE Conference 2002.

[290] Flauss, "Principes généraux du Droit communautaire dans la jurisprudence des juridictions constitutionnelles des États membres", in *droits nationaux, droit communautaire: influences croisées*, CERIC, 2000, pp.49-60, at p.54.

[291] *Ibid.,* at p.51.

[292] *Ibid.,* at p.57.

[293] Favoreu, "La constitution française et le droit communautaire", in *droits nationaux, droit communautaire : influences croisées*, CERIC, 2000, pp.77-80, at p.77.

protection, nowadays, can be deemed rather strong and fully-fledge. The Charter of Fundamental Rights also constitutes a strong element against the "lack of protection" thesis. Second, the basic problem is that certain general principles of Community law do not constitute constitutional principles for the Constitutional Council in the internal legal order. This is the situation with the principles of legal certainty,[294] legitimate expectations[295] and transparency.[296] Hence, the Constitutional Council might consider that the general principles of Community law are not constitutional *per se*. The Constitutional Council might explain its reluctance to use the communitarian terminology. What is more, the recognition of the general principles as norms truncating the Constitution would permit the ordinary courts to review the Constitution through the prism of Community law and lead to an unprecedented reform of constitutional law.[297] Third, there is not a preliminary ruling from the Constitutional Council. Thus, it does not exist in any dialogue between the Constitutional Council and the ECJ. This position is similar to the Spanish[298] and Italian Constitutional Council[299] and dissimilar from Germany[300] and Belgium.[301] This view can certainly be criticized. In that sense, Tridimas rightly noted that the notion of court or tribunal constitutes a Community concept which should be appraised by the ECJ.[302]

8.2. THE RECOGNITION AND APPLICATION OF THE GENERAL PRINCIPLES IN COMMUNITY LAW MATTERS

8.2.1. The Recognition of General Principles of Community Law in the Administrative Jurisprudence

According to the administrative jurisprudence, unwritten international law constitutes a source of law.[303] In 1993, an applicant argued before a *cour administrative d'appel* (CAA) that the French fiscal Law was incompatible with the international custom law.[304] However, the *Conseil d'Etat* (CE) in *Aquarone* (1997)

[294] CC, No 95.339 DC, 28 December 1995.
[295] CC, No 96.385 DC, 30 December 1996.
[296] CC, No 93.335 DC, 21 January 1994.
[297] Galmot, "L'apport des principes généraux du droit communautaire à la garantie des droits dans l'ordre juridique français", CDE 1997, pp.70-79, at pp.76-78.
[298] Case No 28/1991, 14 February 1991.
[299] Case No 536/95, 29 December 1995.
[300] Cour d'arbitrage Belge, case no 6/97, 19 February 1997.
[301] FCC, 5 August 1998, BVR 264/98.
[302] Tridimas, "Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure", CMLRev.2003, pp 9-50, at p.46.
[303] CE, 23 October 1987, *Société Nachfolger Navigation Compagnie*, Recueil Lebon, pp..319 *et seq.*
[304] CAA Lyon, 5 April 1993, *Aquarone*, Recueil Lebon, pp. 439 *et seq.*

[305] confirmed the judgment of the CAA and clearly stated that international custom does not prevail over a national law (statute). This solution has been extended to the general principles of international law in the *Paulin* case (2000).[306] Going further, one may wonder about the position of the general principles of Community law vis-à-vis domestic law. Is the above case law directly transposable to the general principles of Community law? Or, conversely, is the "specificity-argument" applying to general principles of Community law? Before I explain the place of the general principles in light of the jurisprudence, it is important to underline the reticence of the CE to mention expressly the general principles of Community law.

The reluctance of the *Conseil d'Etat* to explicitly refer to general principles is, for instance, reflected by the *Residence Dauphine* case (1994) where it rejected the application of the general principles of Community law by considering that the domestic French legislation falls outside the scope of Community law.[307] In doing so, it followed the Opinion (*conclusions*) of *Commissaire du Gouvernement* (CG) Bachelier who advised the CE not to answer whether the general principles of Community law are hierarchically superior to the national law (statute), since the case at issue constituted an internal situation. Interestingly, the CG remarked that Article F(2) TEU (new 6(2) TEU) made direct reference to the general principles of Community law. In that sense, it could be argued that the general principles of Community law are inherent to the Treaty. This conclusion represents the beginning of the so-called thesis of consubstantiality. Such a thesis was followed, one year later, by CG Toutée in *Meyet.* However, Toutée did not lucidly base such consubstantiality on the mentioned provision of the TEU.

In *Meyet* (1995),[308] the applicants contested the election of French representatives to the European Parliament and argued, *inter alia*, that a French statute (*loi* n° 77-729 7 July 1977) was contrary to Article F(2) of the TEU. According to Article F(2) (new Article 6(2) TEU), *"[t]he Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law*". The CE recognized the general principles

[305] CE Ass, 6 June 1997, *Aquarone,* Recueil Lebon, pp.207 *et seq.* Accordingly, "ni l'article 55 de la constitution, ni aucune autre disposition de valeur constitutionnelle ne prescrit ni n'implique que le juge administratif fasse prévaloir la coutume internationale sur la loi en cas de conflit entre ces deux normes".

[306] CE, 28 July 2000, *Paulin*, Dr. Fisc. 2001, pp. 358 *et seq.* The CE considered that, "ni l'article 55 de la constitution, ni aucune autre disposition de valeur constitutionnelle ne prescrit ni n'implique que le juge administratif fasse prévaloir la coutume internationale ou même un principe général du droit international sur la loi en cas de conflit entre, d'une part, ces normes internationales, et d'autre part la norme législative interne".

[307] CE, 30 November 1994, *SCI Résidence Dauphine*, Recueil Lebon, pp.515 *et seq.*

[308] CE Ass, *Meyet et autres,* 17 February 1995, Recueil Lebon, pp.79 *et seq.* Opinion (c*onclusions*) by Toutée (Government Commissioner) AJDA 20 March 1995, pp.223-228. The CG was favourable to the recognition of the general principles of Community law as a source of law.

of law as a source of Community law. However, the reference to the general principles of law as a source is implied in the judgment, since it considered that Article F.2 does not edict any rules contrary to the national law which was deemed incompatible with the principle of equality by the defendant.[309] This paragraph does not say much and appears elliptical (this is indeed the style generally adopted by the CE). Consequently, it is important to look at the Opinion of the *Commissaire du Gouvernement* in greater detail. In his *conclusions*, Toutée argued that the principle of equal treatment should be recognized by the CE as a general principle of Community law.[310] He stressed that the applicant had chosen the wrong legal basis, since Article F(2) is exclusively applicable to the Institutions and not to the acts of the Member States.[311] However, the CG also noted that it may be difficult to refuse answering on the ground that France is not concerned by Article F(2). Furthermore, he emphasized that the principle of equality remains applicable through the European Convention on Fundamental Rights.

Importantly, the CG considered that the unwritten nature of the general principles does not constitute a problem since the case law of the ECJ must be entirely accepted. In his words, "*il s'agit ici de l'application d'un traité et dès lors que le traite confie son interprétation à la Cour de justice, il nous paraît difficile de refuser cette interprétation. Et cette interprétation est que l'adhésion au traite comprend l'adhésion a un certain nombre de principes généraux dégagés par la Cour*".[312] The Government Commissioner followed the so-called "consubstantiality" thesis of the general principles of Community law.[313] Nevertheless, such an approach is not founded on Article F(2) [new Article 6(2)], but on the basis of Articles 164 [new Article 220 EC] and 177 [new Article 234 EC]. In doing so, Toutée recognized the specificity of the Community legal order and, consequently, the specificity of the general principles of Community law vis-à-vis the general principles of international law.

What is more, he lucidly commented on the difficult task a national judge faces when applying general principles that have not been discovered by him.[314] Such a finding has been acknowledged by the French doctrine. In the words of Moderne, "*[l]a tendance du juge administratif a accueillir avec circonspection les principes généraux du droit communautaire, avec lesquels il n'est pas complètement*

[309] *Ibid., Meyet,* (emphasis added).
[310] CG Toutée in *Meyet,* AJDA 1995, pp.223-228.
[311] *Ibid.,* "[n]ous pensons que le requérant, intimidé. A voulu prudemment prendre un détour inutile pour vous faire juger que vous contrôliez la compatibilité d'une loi avec un principe général du droit européen, sans même oser d'ailleurs citer la Cour de justice des Communautés".
[312] *Ibid.,* at p.225.
[313] CG Bachelier in *Résidence Dauphine, supra n.307*.
[314] CG Toutée in *Meyet, supra n.308*, "[i]l est évidemment très désagréable pour un juge de devoir appliquer des principes généraux qu'il n'a pas découvert lui même". The CG considers that it is annoying for the national judge to apply principles that have been discovered by a foreign court.

familiarisé, peut se concevoir".[315] This observation is also exemplified by the refusal of the *Conseil d'Etat* to apply unwritten principles of international law. However, Community law is not international law and the general principles of Community law must be recognized as a source of law by the national court.

Going further, the CG drew a distinction between two types of general principles of Community law. On the one hand, principles which are already widely applied or, to a certain extent, have been influenced by French law, e.g. equality and effective judicial protection. To paraphrase the CG, the principle of equality does not create any particular problem. Most likely, it is more strictly respected or more broadly interpreted in France than in many other States.[316] On the other hand, the situation is much more complicated concerning principles which may appear foreign to the French legal system, e.g. legal certainty and legitimate expectations.

Using *a contrario* interpretation, it might be said that the CE recognises that a general principle of Community law can be a source for administrative law.[317] However, the CE avoided making direct reference to the general principles of Community law.[318] Arguably, one might regret anyhow the absence of such a positive recognition.[319] The reticence of the *Conseil d'Etat* to take into consideration the principle of equality as a general principle of Community law may be appraised as a sort of conflict with the ECJ, due to the increasing influence of Community law within the domestic legal order.[320] Also, it is worth noting that the domestic use of the general principles of Community law, inspired by the national constitutions of the Member States, would permit a control of constitutionality via the control of conventionality by the ordinary judge.[321] This control might go against the very structure of the domestic legal order and lead to an important *de facto* constitutional reform.[322]

In the wake of *Meyet*, the administrative courts clarified the relationship between the general principles of Community law and national law.[323] At first blush, it appears important to remark that the lower administrative courts have been much

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[315] Moderne, "Actualité des principe généraux du droit'', RFDA 1998, pp.495-518, at p.515.
[316] CG Toutée in *Meyet, supra n.308*, "le principe d'égalité ne nous pose pas de problème particulier – il est probablement plus strictement respecté, ou largement interprété, en droit Français que dans beaucoup de droits frères". The CG considers that the principle of equality is very-well protected in the national legal order. The level of protection afforded by domestic law is deemed higher than in other States.
[317] Christophe-Tchakaloff, "Les principes généraux du droit Communautaire" *in Droits nationaux, droit communautaire,* CERIC, 2000, pp. 83-96, at p.92.
[318] Boyron, "General Principles and National Courts: Applying a *Jus Commune*", ELR 1998, pp.171-178, at p.171.
[319] Moderne, RFDA 1998, *supra n.315*, at p.515.
[320] *Ibid.,* at p.502.
[321] CG Toutée, *supra n.308*. The possibility to control the constitution via an international norm is used as argument to reject the application of the general principles in national law.
[322] Galmot, "L'apport des principes généraux du droit communautaire à la garantie des droits dans l'ordre juridique français", CDE, 1997, pp.69-79, at pp.76-78.
[323] The culmination is materialized by the *SNIP* case (2001) of the CE.

more devoted to the reception of the general principles of Community law.[324] For instance, the *tribunal administratif* (TA) of Caen in 1997[325] used the general principle of proportionality to review the legality of a fine.[326] More precisely, Article 467(4) of the Custom Code obliges undertakings to submit periodical reports concerning the exchange of goods and failure to comply with this obligation is subject to a fine. In the present case, a French undertaking (SA Perimédical) did not submit the compulsory reports between November 1993 and July 1994 and was required to pay a lump sum of 45 000 francs. SA Perimédical argued before the TA that the legality of the Custom Code provision imposing the fine should be verified in light of the principle of proportionality as established by the ECJ. The Tribunal accepted the argument of the undertaking and assessed whether the fine was excessive with respect to the aim of the measure. Finally, it concluded that the fine was not disproportionate. Notably, the TA assessed the legality of a legislative text through a general principle of Community law. Such a stance has been welcomed by the French doctrine.[327] In doing so, the TA has followed the path of *Nicolo* and its related jurisprudence, since it recognizes the supremacy of the general principle of proportionality over the national Statute.[328] On 9 May 1997, Périmédical appealed the judgment.[329] In this appeal the CAA of Nantes was asked to analyse two pleas regarding, firstly, the incompatibility of the domestic legislation with the principle of proportionality, and secondly, its compatibility with Article 6(1) ECHR.[330]

The Court resorted to the formulation "*en tout état de cause*" (in any case). Accordingly, this formulation had already been used extensively in the context of general principles in order to provide a solution without entering into a detailed assessment of the plea, i.e. the use of a general principle of Community law against national legislation.[331] However, the Court of Appeal did consider, in transposing implicitly the case-law of the Court of Justice, that the fine was proportionate to its aim. The finding is, thus, the same as in the TA. Apparently, the Court of Appeal, in contrast to the TA, seemed reluctant to use a positive application of the general principle of proportionality. Indeed, it merely concluded that the applicant cannot invoke an infringement of the principle of proportionality in the circumstances of the case.

Furthermore, the *Conseil d'Etat* in *Meyet II*,[332] had to determine whether the French legislation was compatible with Articles 10 and 14 of the ECHR.

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[324] *Infra*, Freymuth.
[325] TA Caen, 8 April 1997, *SA Périmédical*, RFDA 389, note Favret.
[326] Boyron, *supra n.318*, at pp. 171-174. *See also*, Fernandez Esteban, *The Rule of Law in the European Constitution, Kluwer,* 1999, at p.209.
[327] Favret, "La primauté du principe communautaire de proportionnalité sur la loi nationale", RFDA, 1997, pp.389 *et seq*.
[328] CAA Nantes, 29 December 2000, *SA Périmédical*, AJDA 2001, Note Millet, pp.270 *et seq.*
[329] *Ibid.*
[330] *Ibid.*
[331] *Ibid.*, Millet, at pp.270 *et seq.*
[332] CE, 2 June 1999, *Meyet II,* Req. No 207752.

Interestingly, the CE referred explicitly to the general principles of Community law by mentioning, in the decision, Article 6(2) TEU. This argument was indeed raised by the plaintiff. However, the *Conseil d'Etat* considered that the plea based on the general principles of Community law had to be merged with the main plea based on the Articles of the ECHR. The CE found that Article 11 of statute n° 77-808 of 19 July 1977 was not incompatible with Article 10 ECHR.[333]

In *FNUJA and Poirrez* (2001),[334] the CE had to assess the validity of national legislation, which created a system that permitted information to be stored concerning persons involved in a preliminary penal inquiry. Apparently, this system could conflict with Article 8(1) ECHR which guarantees the right to privacy. The plaintiff alleged infringement of Article 6(2) TEU[335] and asked the administrative court to refer the case to the ECJ for a preliminary ruling.[336] It is worth noting that the plaintiff used Article 6(2) TEU as a vector for the application of Article 8(1) ECHR and asked the *Conseil d'Etat* to make a preliminary ruling to the ECJ. However, the CE considered it inappropriate to use the Article 234 proceeding. The rejection was based on the wording of Article 46 TEU, according to which the fundamental rights protection is clearly and solely applicable to the institutions of the European Union.

At first glance, the reasoning of the *Conseil d'Etat* appears coherent. Nevertheless, it appears less coherent in light of the *Meyet* case, where the CE upheld a plea as to the alleged infringement of domestic legislation with Article F(2) [new 6(2) TEU]. Does this mean that the *Conseil d'Etat* has become more familiar with European Community law? Be that as it may, the reasoning used in *Meyet* and the extensive application of Community law seems to be restricted in the present situation. Finally, the CE analysed the national legislation in light of Article 8 ECHR and found that the restrictions were justified on the basis of Article 8(2) ECHR. This type of reasoning is rather similar to the one used in the *Meyet II* case in which the CE merged the Community law plea with the ECHR plea. In contrast to the *Meyet II* case, the plaintiff asserted the violation of Article 6(2) TEU as the principal plea, Article 8 ECHR being included in the main argument.

The *Conseil d'Etat* follows the thesis of consubstantiality as expressed by CG Bachelier in *Résidence Dauphine,* i.e. a thesis based on Article 6(2) TEU.[337] Though this approach constitutes in my view a fallacy, it demonstrates the utmost importance given by the administrative judge to the text of the Community Treaties.

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[333] *Ibid.*, *Meyet II.*

[334] CE, 24 January 2001, *Federation Nationale de l'Union des Jeunes Avocats (FNUJA and Poirrez)*, Req. No 212484, 212487,212629.

[335] *Ibid., FNUJA and Poirrez*, "[c]onsidérant qu'en vertu du paragraphe 2 de l'article 6 du traité sur l'Union européenne, l'Union respecte les droits fondamentaux tels qu'ils sont garantis par la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales,.... et tels qu'ils résultent des traditions constitutionnelles communes aux Etats membres, en tant que principes généraux du droit communautaire".

[336] *Ibid.*

[337] Accordingly, Article 6(2) TEU is directed to the institutions and not to the Member States.

Regrettably, it has the effect of minimizing and, more dangerously, disregarding the ECJ jurisprudence. First, certain principles, e.g. the principle of non-discrimination, are expressly included in the EC Treaty. However, other principles, e.g. the principle of legal certainty and legitimate expectations, have been clearly elaborated by the case-law of the ECJ. Second, this thesis has wrongly led the administrative judge to discard the application of the principles of non-discrimination, legal certainty and legitimate expectations on the basis that the TEU was not yet in force.[338] In my view, such an approach is at odds with the proper interpretation and application of Community law.[339] Moreover, as seen previously, this surrealistic interpretation of Community law is, unfortunately, not isolated solely to French jurisdictions.[340]

However, the *Conseil d'Etat* in *SNIP*[341] (December 2001) gave a decision more, but not fully, in line with the proper interpretation and application of Community law.[342] Significantly, this case concerned the first positive application of the general principles of Community law by the CE. *In casu,* a French statute in the social security context was reviewed in the light of the general principles of Community law and the Community principles were given a superior status vis-à-vis the national legislation.[343] The CE held that the general principles of the Community legal order are deduced from the EC Treaty. These principles have a similar judicial value as the Community Treaty. It is, for instance, the principles of legal certainty and legitimate expectations which are applicable to the situations falling within the scope of Community law. The CE linked the traditional general principles of Community law, e.g. legitimate expectations with other constitutional principles, i.e. the principle of loyalty and the principle of supremacy. Consequently, it could be said that there follows, from Article 10 EC, an obligation for the national courts to apply the general principles of law in matters falling within the purview of Community law. The *Conseil d'Etat* considered that the general principles have an equal status in the legal hierarchy as the EC Treaty. This assertion effectively concludes that the

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[338] CAA, 2001 *Broissia*, Req. No 96LY21348, "[c]onsidérant enfin que M. de Broissia ne peut utilement invoquer, pour contester une décision en date du 31 août 1992, les principes généraux du droit communautaire de non-discrimination, de sécurité juridique et de confiance légitime, dès lors que le Traité de l'Union Européenne n'est entré en vigueur que le 1er novembre 1993". CAA 13 March 2002, *Lamblin,* Req. No 99DA00757, the CAA referred to the "principes généraux du droit international européen". This incorrect application and terminology reflects, to a certain extent, the difficulty for the national courts, to cope with the European concept of general principles.

[339] The approach followed by CG Toutée in *Meyet* appears to me to be the right approach. This approach is based on Articles 220 and 234 EC.

[340] *See e.g.* Laws in *First City Trading*. The English Judge considered that the general principles of Community law did not have the same ranking as the Treaty provisions.

[341] CE, 3 December 2001, *Syndicat national de l'industrie pharmaceutique et autres (SNIP)*, RFDA 2002, pp.166 *et seq.*

[342] However, the decision is not fully in line with Community law since it applies the *"Sarran"* doctrine.

[343] *SNIP, supra n.341*. It concerned the review, *par voie d'exception*, of Article 30 of the loi n° 99-1140 of 29 December 1999.

general principles of Community law are norms which prevail over national statutes. In this sense, it confirms that the general principles constitute a "*super-légalité communautaire*".[344]

By recognizing the supremacy of the general principles of Community law, the CE follows the path opened in 1989 by the *Nicolo* case and, in addition, brings more coherence to the review system in the context of European remedies. More precisely in regards to the latter, it allows national courts to review the national statute, not only in light of the ECHR, but also in connection with the general principles of Community law.[345] Thus, it reinforces the "*judicial arsenal*"[346] of the *Conseil d'Etat*. This reinforcement of judicial review through the use of principles inspired by the constitutions of the Member States might be perceived as reopening the conflict between the constitutional and administrative judges. Indeed, the general principles allow the administrative judge to use European constitutional norms to review the legality of the domestic statutes. Consequently, it could be perceived as a kind of control of constitutionality via the general principles.[347] In addition, in *obiter dictum*, the CE has stressed that the principle of supremacy would not put into question the supremacy of the Constitution. In other words, the French Constitution appears, still, to prevail over Community law and, hence, its general principles. This reasoning is in line with the Sarran and Levacher decision of 1998.[348] This approach, arguably, goes against an established interpretation of Community law jurisprudence.[349]

Finally, the *Conseil d'Etat* considered it unnecessary to make a preliminary ruling to the ECJ and did not annul the national decree taken on the basis of the statute.[350] The CE held, indeed, that the French legislation was not incompatible with the principle of non-discrimination stemming from Article 12 EC.[351] At the end of the day, despite some flaws, this case constitutes a clear step towards the integration of Community law into the domestic legal order. It remains to be seen

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[344] Isaak, *Droit communautaire général*, Armand Colin, 7th edition, 1999, at p.160, Simon, *Le système juridique communautaire,* PUF, 1997, at p.254.

[345] Valembois, "La prévalence des principes généraux du droit communautaire sur la loi nationale, à propos de l'arrêt du Conseil d'Etat du 3 décembre 2001, Syndicat national de l'industrie pharmaceutique et autres, AJDA 2002 Chroniques, pp.1219 *et seq.*

[346] *Ibid.*

[347] *Ibid.*

[348] CE Ass, 30 October 1998*, Sarran et Levacher et autres*.

[349] The CE considered however, that, "...du principe de primauté, lequel au demeurant ne saurait conduire, dans l'ordre interne, à remettre en cause la suprématie de la Constitution". The reference to the "internal order" might be appraised as establishing a distinction between internal matters and matters falling within the scope of Community law. If so, does it mean that the general principles prevail over the Constitution whenever the matter is falling within the scope of Community law? To give a positive answer, though in line with Community jurisprudence, would seem to constitute a very extensive and possibly too far reaching interpretation".

[350] *SNIP, supra n.341*.

[351] The same holds true in relation to Article 14 ECHR.

what is the scope of application of general principles in Community law matters (implementation and derogation from Community law).

8.2.2. The Application of the General Principles: Validity and Interpretation of Community Law

a) The Validity of Community Law in the light of the General Principles

Although the national courts, according to the so-called *Foto-Frost* doctrine, have no jurisdiction to declare that acts of Community institutions are invalid, they may nonetheless dismiss grounds advanced for invalidity if they regard them as unfounded. If there is a doubt as to the validity of the Community measure, the national court is under a duty to make a preliminary ruling to the ECJ. As put by Cassia, the basic question is to assess whether the national measure implementing community law can be subject to review or, by contrast, if those acts are immune to judicial review due to their object.[352] Importantly, the administrative courts do not have exclusive jurisdiction regarding determinations as to the validity of Community acts.[353] In this respect, the civil courts also play an important role in verifying the validity of Community acts implemented by national law. As to the administrative courts, the CE assumed its role to control the validity of a Community act in *Union des Minotiers de Champagne* (1974).[354] In this case, it assessed whether a Council Regulation of 1970 violated previous EC Regulations. According to CG Théry, the conformity of the national decree with the Community Regulation did not mean that the Community act could not be challenged. Conversely, the alleged encroachments put into question the validity of the Regulation itself.[355]

The TA of Rennes (1989), however, had recourse to the so-called theory of *"décret écran"* ("veil-decree"), i.e. it considered that an internal transposing measure constituted a screen or veil between the said act and the Community legal norm. Consequently, the illegality of the Community norm could not be alleged before the national court. This jurisprudence was, obviously, rejected by the CE.[356] To summarize, it is only the Court of Justice that can declare a Community regulation to be invalid. However, it is for the administrative courts to assume their role as judges of the validity of the Community acts so as to avoid a denial of justice. In this regard, Cassia lucidly noted that due to the restrictive access generally assigned to a direct action (new Article 230.2 EC), the only possibility of review for the individual is to turn to the national judge and plead the illegality of

[352] Cassia, "Le juge administratif français et la validité des actes communautaires", RTDE 1999, pp.409-441, at p.419.
[353] *Ibid.,* at p.410.
[354] CE, 18 Janvier 1974, *Union des Minotiers de Champagne*, RTDE 1975, pp.86-93.
[355] *Ibid.,* CG Théry, at p.92.
[356] *FDSEA Côtes-du nord* (1992) and by the CAA of Paris in *ONIC* (1996).

the Community measure.[357] Additionally, it appears that the *Conseil d'Etat* has never been reticent to make a preliminary ruling in order to determine the validity of the Community act. Accordingly, between 1974 and 1999, more than 20 cases have been dealt with by the CE.[358] The *Conseil d'Etat* will make the preliminary ruling whenever the pleas submitted as to the validity of the Community act present a serious character.[359] Logically, whenever there is no doubt the CE will be considered to be competent and will recognize the validity of the Community act.

The general principles of Community law may be enshrined in primary law and then may be used as such by the CE, e.g. Articles 12[360] and 34[361] EC. It is worth remarking that the *Conseil d'Etat* in *Fédération départementale des syndicats d'exploitants agricoles des côtes du nord* (1992) applied the unwritten general principles of proportionality and legitimate expectations.[362] Notably, the CE wrongly linked the principle of legitimate expectations to the wording of the Treaty *("*". . . *Le principe de confiance légitime résultant des stipulations du traité* . . ."). More recently, the lower administrative courts (TA and CAA) made use of the general principles of Community law to determine the validity of Community acts. In this respect, the Administrative Court of Appeal (Paris) in 1997,[363] assessed a plea of illegality, based on the breach of the general principle of proportionality, as to the invalidity of an EC Regulation. The CAA held that there was no infringement of the general principle and consequently found it unnecessary to make a preliminary ruling to the ECJ regarding the validity of the impugned Regulation. Similarly, the TA of Dijon gave a judgment on 5 January 1999 considering that although the national courts have no jurisdiction to declare that acts of Community institutions are invalid, they may nonetheless dismiss grounds advanced for invalidity if they regard them as unfounded. *In casu*, the claimant sought reimbursement of a VAT credit.[364] The administrative court held that, since the claimant merely asserted that the principle of proportionality had been breached without specifying how, it had not advanced a sufficiently precise argument to cast serious doubt on the validity of the Decision and that it was therefore not necessary to ask the Court of Justice for a preliminary ruling.

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[357] Théry, *supra n.355,* at p.91. *See also* conclusions Goulard in CE 18 September 1998, *Société Demesa,* and conclusions Delarue in CE 10 July 1995, *Syndicat des embouteilleurs de France*.

[358] Cassia*, supra n.352*, at p.412.

[359] CE, 22 April 1988, *Association générale des producteurs de blé et autres.*

[360] *Union des minotiers de champagne*, *supra n.354*

[361] CE, 22 April 1988, *Association générale des producteurs de blé*.

[362] CE, 19 June 1992, *Fédération départementale des syndicats d'exploitants agricoles des côtes du nord*, CE 2 October 1992, *Fédération départementale des syndicats d'exploitants agricoles des côtes du nord*. (proportionality and legitimate expectations).

[363] CAA Paris, 21 January 1997, *Sté coopérative agricole de la plaine de Genlis et de la région d'auxonne*.

[364] TA Dijon, 5 January 1999, *Société BSAD*, nº 97-1250, Revue de droit fiscal 1999, Comm. 669, p.1129-1130, Revue de jurisprudence fiscale, 1999, pp. 333-334.

At the end of the day, it may be stated that the use of general principles of Community law before the national courts to indirectly challenge the validity of Community legislation appears to be a real success story. One may conclude that the French courts assume effectively and fully their role as guardian of the validity and, by consequence, allow individuals to circumvent the restrictive *locus standi* requirements before the ECJ. It ought to be remarked, however, that the "validity review" constitutes merely one facet of their role. In that regard, the national courts are also responsible to ensure the compatibility of national law derogating from Community law.

b) Compatibility of National Law with (General Principles) Community law.
Indeed, it is the role of the ordinary and the administrative courts to control the compatibility of national law with Community law. The domestic courts assess both the compatibility of the legislation implementing Community law and the legislation derogating from Community law (derogating from the free movement provisions or the citizenship provisions). The ordinary courts play a crucial role in this context.[365] In light of the *Simmenthal* jurisprudence, the ordinary courts are empowered to discard administrative acts which are incompatible with Community law.[366] In that sense, it constitutes a new competence for the ordinary court in comparison to their competences in purely internal matters.[367] Concerning the administrative courts, as

[365] *See,* in relation to the free movement context, C.cass, crim, 5 sept 2000, *Paul Gabard*, Bulletin des arrêts de la Court of Cassation - Chambre criminelle, 2000, nº 26. The Court of Cassation considered that the rules establishing a pharmaceutical monopoly, which applied equally to products imported from the Member States and from the European Community and to domestic products, were justified in the light of Articles 30 and 36 of the EC Treaty (now Articles 28 and 30 EC). This is a positive application (the national measure is justified) of the principle of proportionality. Court of Appeal Paris, 14 June 2000, *Parodi*, the Court of Appeal assessed the conditions in which a credit institution based in another Member State could grant a mortgage loan in France. It stated that the national law predating Council Directive 89/646/EEC96 had not merely created an obstacle to freedom to provide banking services but had made it impossible to exercise that Community freedom. The Court of Appeal then considered the question whether such legislation was necessary in the light of the interests to be protected. The Court held that the French law went beyond what was objectively necessary to protect the interests it sought to protect and accordingly declared it incompatible with the Treaty. This is a clear application of the proportionality test, following the ECJ jurisprudence, in relation to free movement. Conversely, it may happen that the judiciary courts reject the community jurisprudence, *e.g.* C.Cass, soc, 30 April 1994, *Duchemin.* The Court of Cassation did not follow the jurisprudence of the ECJ concerning indirect discrimination.

[366] Normally, in internal law the judiciary judge must refer a preliminary question to the administrative judge in order to declare that an administrative act violates a higher ranking legislation.

[367] Huglo and Soulard, "L'application des principes généraux du droit communautaire par les juridictions judiciaires francaises", in *les principes communs d'une justice des Etats de l'union européenne*, colloque of the Court of Cassation, 4-5 December 2000. Normally, in internal matters, the judiciary courts are required to make a preliminary ruling to an administrative court.

noted above, the *Conseil d'Etat* made an implicit use of the general principles of Community law until the *SNIP* case, that consecrates the positive recognition and application of the general principles of Community law by the highest administrative court. Also, it is worth noting that the applicant in the nineties made extensive use of the general principles of Community law before the administrative courts. However, the domestic courts often discarded the arguments by invoking the lack of sufficient precisions to review the impugned acts.[368] This section will focus mainly on providing an overview of the role of the administrative courts in determining whether the national legislation is compatible with Community law.

As to the compatibility of implementing legislation, in its judgment of 24 February 1999,[369] the CE found that Article L 601-4 of the Public Health Code was incompatible with the Directive in that it extended the scope of the simplified registration procedure beyond the objectives of the Directive.[370] The same year, in two cases given the same day, the *Conseil d'Etat* found that the national provisions setting the initial and final dates of the hunting season were contrary to the species preservation aims of Article 7(4) of Directive 79/409.[371] The CE found that the decision by which the Prime Minister had refused to initiate the procedure to amend a legislative text by decree is not an act of government but is an aspect of the exercise of regulatory powers and may thus be regarded as an administrative decision which can be challenged.[372]

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[368] CAA, 3 July 1996 *Levy,* Req. No 94NT00554 ; CAA, 16 December 1997 *Douillard,* Req. No 95NT00451, CAA, 13 March 2002 *Lamblin,* Req. No 99DA00757; CE, 17 December *SCP Vuitton*, Req. No 258253, CE 19 January 2004, *T-Online France*, Req. No 251016.

[369] CE, 24 February 1999, *Association des patients de la médecine d'orientation anthroposophique et autres*, nº 195354; RFDA 1999, p.437-439; AJDA 1999, p.823-824. The associations bringing the action claimed that the Decree was contrary to the aims of Directive 92/7371 and also cited the failure to enact regulatory measures to render applicable Article L.601-4 of the Public Health Code, derived from Law No 94-43 of 18 January 1994, which transposes the Directive into French law.

[370] *See also* CE 28 July 2000, The applicants argued that the Article L.162-38 of the Public Health Code, was incompatible with Article 2 of Directive 89/105/EEC. The Government Commissioner suggested making a reference to the Court of Justice on the issue of compatibility. However, the CE decided that the argument based on the incompatibility of Article L.162-38 of the Code of Public Health with the clear objectives of Article 2 of the Community directive could be dismissed without the need for a preliminary ruling to the Court of Justice.

[371] CE, 3 December 1999, *Association ornithologique et mammalogique de Saône-et-Loire* (AOMSL) v. *Rassemblement des Opposants à la Chasse* (ROC), Req No 164789 and 165122, and *Association ornithologique et mammalogique de Saône-et-Loire* (AOMSL) v. Association France Nature Environnement, Req No 199622.

[372] *See also*, CE 19 May 1999 *Région du Limousin* v. *Ministre de l'Intérieur et de l'Aménagement*, Req. No 157675, RFDA, 1999, pp.896-897. The CE, while rejecting the substance of the claimant's case, recognised the admissibility of an application to have a decision of the French government annulled as *ultra vires.*

Additionally, the administrative court may implicitly apply the general principle of Community law, e.g. *Thalineau.*[373] This case dealt with a decree transposing the Directive concerning the procedures for awarding public work contracts. The decree laid down transitional provisions (for contractors selected before July 1990) that had the effect of postponing the Directive's date of entry into force. The CE impliedly considered reviewing a directive in light of the principle of legitimate expectations. By contrast, the CG explicitly mentioned the principles of legal certainty and legitimate expectations. The Commissioner Government considered that the transitional provisions were necessary in order not to reverse the selection and thus to respect the principle of legitimate expectations. Finally, the CE held that the transposing measures were not contrary to the objectives of the Directive.

In regards to the compatibility of national legislation derogating from Community law the CAA of Nancy in *Lilia Malaja*[374] quashed a judgment of the administrative tribunal of Strasbourg dismissing an application by a professional basketball player of Polish nationality seeking the annulment of the decision of the French Basketball Federation refusing to treat her as a national of a country of the European Economic Area. The Court of Appeal, using the *acte clair* doctrine, refused a request to refer a preliminary question to the Court of Justice. It began by upholding the Strasbourg court's judgment concerning the direct effect of Article 37 of the Europe Agreement between the European Communities and Poland. However, in contrast to the TA, the appeal court found a breach of the principle of non-discrimination laid down by Article 37 of the Agreement.

In determining whether national legislation is compatible with the general principles of Community law, the national courts may either have recourse to the so-called doctrine of *acte clair* or make a preliminary ruling to the ECJ. As to the former, it is suffice to remark here that the said doctrine is not a bad thing *per se*. It becomes negative if and only if the national courts erroneously interpret Community law.[375] As to the latter, the judgments of the CE in *Griesmar* (1999) and the TA/CE in *Mouflin* (2000)[376] illustrate the mechanism of preliminary ruling in connection with general principles of Community law.[377] In these cases, the applicants challenged the compatibility of the French Civil and Military Retirement Pensions Code in light of the principle of equal pay. According to the legislation, only women

[373] CE, 20 February 1998, *Thalineau et ville de Vaucresson*.
[374] CAA Nancy, 3 February 2000, *Lilia Malaja*, Droit administratif 2000, No 208.
[375] *See*, Rideau, "Droit communautaire et droit administratif, la hiérarchie des norms", AJDA 1996 Chroniques, pp.6 *et seq.*
[376] Interestingly, the TA sought the opinion of the Council of State (on the interpretation of Article 141 EC Treaty) and the provisions of Directive 79/7 (equal treatment for men and women in matters of social security)/ The *CE* took the view that it was up to the TA to determine whether, having regard to those factors, it considered that its judgment depended on an additional request to the Court of Justice for a ruling as to whether Community law precluded a difference in treatment such as that established by the relevant provisions of the Code on civil and military retirement pensions.
[377] CE, 4 February 2000, *Mouflin,* RDFA 2000, p.468. *See* TA of Châlons-des-Champagne by order of 25 April 2000.

enjoyed a direct claim to retirement rights if their spouse suffers from an incurable disability or disease preventing them from performing any kind of work. In both cases, the ECJ found that provisions of the national legislation concerning the retirement scheme for civil servants fell within the scope of Article 141 EC and infringed the principle of equal treatment.[378]

More recently, the CE, in *Olazabal*, made a preliminary ruling as to the scope of citizenship provisions and the *Rutili* jurisprudence.[379] Mr Olazabal, a Spanish national of Basque origin and an ETA member, left Spain in July 1986 to enter France, where he applied for refugee status, which was refused. In 1996, an order of the Ministry for the interior prohibited him from residing in 31 *départements* in order to keep him away from the Spanish frontier, and the prefect of *Hauts-de-Seine* prohibited him from leaving the department of *Hauts-de-Seine* (*Ile de France* region), without authorisation. Mr Olazabal brought an action before the Administrative Court (TA Paris) for annulment of those two orders. This judgment was confirmed by the Administrative Court of Appeal of Paris by a judgment of 18 February 1999. These courts took the view that the provisions of Articles 6, 8a and 48 of the Treaty, and those of Directive 64/221, as interpreted by the Court of Justice in its judgment in Case 36/75 *Rutili* [1975] ECR 1219, prevented such measures being taken against Mr Olazabal.

By a decision of 29 December 2000, the CE referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Articles 6, 8a and 48 of the EC Treaty (now, after amendment, Articles 12 EC, 18 EC and 39 EC) and of Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health. Being uncertain, in the light of those considerations, as to the compatibility with Community law of a measure limiting the right of residence of a national of another Member State to part of the national territory, the *Conseil d'Etat* decided to stay proceedings and refer the following question to the Court of Justice for a preliminary ruling:

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[378] Case C-366/99 *Griesmar* [2001] ECR I-9383, "[n]otwithstanding what is provided in Article 6(3) of the Agreement on Social Policy, a provision such as Article L. 12(b) of the French Civil and Military Retirement Pensions Code infringes the principle of equal pay inasmuch as it excludes male civil servants who are able to prove that they assumed the task of bringing up their children from entitlement to the credit which it introduces for the calculation of retirement pensions", C-206/00 *Mouflin* [2001] ECR I-10201, "[t]he principle of equal pay for men and women enshrined in Article 119 of the Treaty is infringed by a provision of national law such as Article L.24-I-3.(b) of the Civil and Military Retirement Pensions Code which, in providing that only female civil servants whose husbands suffer from a disability or incurable illness making it impossible for them to undertake any form of employment are entitled to a retirement pension with immediate effect, deprives male civil servants in the same situation of that right".

[379] CE, 29 December 2000, *Olazabal,* Case C-100/01 *Olazabal* [2002] ECR I-10981.

> "Do Articles 6, 8a and 48 of the Treaty of Rome, now Articles 12 EC, 18 EC and 39 EC, the principle of proportionality applicable in Community law and the provisions of secondary law adopted to implement the Treaty, in particular Directive 62/221/EEC of 25 February 1964, preclude a Member State from adopting, as against a national of another Member State to which the provisions of the Treaty apply, a measure for the maintenance of public order which, subject to judicial review, restricts that national's residence to a part of the national territory when interests of public order preclude him from residing in the remainder of the territory, or in such circumstances is the only measure restricting residence that can lawfully be taken as against that national a measure excluding him from the whole territory and adopted in accordance with national law?".

The ECJ answered by giving clear guidelines to the *Conseil d'Etat*.[380] Interestingly, the ECJ did not give an explicit solution regarding the proportionality of the measure. This case constitutes also a clear limitation to the *Rutili* doctrine. It deals with the first preliminary ruling of a French court as to the scope of the citizenship provisions. Notably, other preliminary rulings have been made to the ECJ by the French CE, e.g. *Société Caixa Bank*,[381] and also the Belgium *Conseil d'Etat*, e.g. *Carlos Garcia Avello*,[382] as to the scope of citizenship. At the end of the day, it might be said that the administrative courts promote and stimulate the general principles of Community law through recourse to preliminary rulings on their interpretation.[383] It is worth noting that the same reasoning applies to ordinary courts, *e.g. Roquette* case.[384]

These findings prompt two conclusions. First, in the light of *Simmentahl* and *Foto-Frost*, it is for the national judge (this role has also been assumed by the ordinary jurisdictions) to dismiss the application of national law contrary to EC law and to assess the validity of Community law. In case of doubts as to the validity of Community law, the national judge must refer a preliminary ruling on validity to the ECJ. This role has been fully assumed by the French judiciary, which may be

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[380] The ECJ considered that, "[n]either Article 48 of the EC Treaty (now, after amendment, Article 39 EC) nor the provisions of secondary legislation which implement the freedom of movement for workers preclude a Member State from imposing, in relation to a migrant worker who is a national of another Member State, administrative police measures limiting that worker's right of residence to a part of the national territory, provided - that such action is justified by reasons of public order or public security based on his individual conduct; - that, by reason of their seriousness, those reasons could otherwise give rise only to a measure prohibiting him from residing in, or banishing him from, the whole of the national territory; and - that the conduct which the Member State concerned wishes to prevent gives rise, in the case of its own nationals, to punitive measures or other genuine and effective measures designed to combat it".

[381] CE, 6 November 2002, *Société Caixa Bank France* Req. No 247209.

[382] Case C-148/02 *Carlos Garcia Avello* [2004]1 CMLR 1.

[383] *See Mouflin*, *Caixa Bank*, *Olazabal.*

[384] Case C-94/00 *Roquette frères* [2002] ECR I-9011. The *Cour de Cassation* asked the ECJ to clarify the scope of the *Hoechst* case and Article 8 ECHR. The Court of justice, referring to the *Cola Est* Jurisprudence of the EctHR (2002), stressed the importance for the national courts to ensure the respect of the general principles of Community law.

confronted by the application of the general principles of Community law. Second, the national judge may have to assess the compatibility of national law falling within the scope of Community law in light of the general principles. Notably, it is only in the *SNIP* case (2001) that the *Conseil d'Etat* recognized explicitly the superiority of the general principles over the French statute. This type of assessment may happen when a national measure implements, [385] derogates from Community law[386] or is contrary to a citizenship provision. [387] In all these situations, the national judge may have to deal with the general principles of Community law and also refer a preliminary ruling on interpretation to the ECJ, e.g. *Mouflin*, *Olazabal*, *Caixa Bank*, *Roquette* (*Cour de Cassation*). Arguably, these references ensure a smoother and better reception of the general principles within national matters falling within the purview of Community law. One may wonder, however, whether the general principles infiltrate purely internal matters.

8.3.TOWARDS APPLICATION IN PURELY INTERNAL MATTERS?

This section determines whether the general principles of Community law influence French internal law. This analysis mainly concentrates on the principle of legitimate expectations. In that respect, the attitude of the administrative courts towards reception of Community law must be carefully studied. Finally, it concludes with an assessment of the impact of Community law on French public law in light of the two "banks" of the law (*Rive droite, rive gauche…*).

As noted above, the administrative courts generally refuse to apply the general principles in purely internal matters.[388] In this respect, it might be said that the general principles of Community law are merely applicable in a situation which falls within the scope of Community law ("*la mise en oeuvre du droit communautaire*" or "*régie par le droit communautaire*").[389] By contrast, the *Cour de Cassation* has applied, in certain situations, the general principles of Community law to obligations resulting from the internal law.[390] For instance, this is true in relation to the principle

[385] Case 5/88 *Wachauf* [1989] ECR 2609.
[386] Case C-260/89 *ERT* [1991] ECR I-2925.
[387] Case C-413/99 *Baumbast* [2003] 3 CMLR 23.
[388] *See,* CE, 12 May 2003, *Société Télévision Française* 1 (*TF1*), Req. No 247353.
[389] *See,* CAA Bordeaux, 6 May 2003, *SARL Pardo-trans*, Req. No 99BX01635.
[390] It seems that, although the obligation results from internal law, the domestic legislation can be linked to Community law. In this respect, the Court of cassation refused to apply the principle of proportionality to fiscal sanctions because, arguably, they did not fall within the scope of Community law. C.Cass 17 February 1992, *Sune*. The applicant argued that the provisions concerning the plurality of sanctions of the *Code Général des Impôts* violated the principles of proportionality and equality. The Court of Cassation held that the "*cumulation*" of fiscal sanctions is not contrary to the principle of non-discrimination and also considered that fiscal sanctions are not falling within the scope of application of Community law. *See also*, C.Cass 5 October 1992, *Lecocq*. Similarly, the Court of Cassation (C.Cass, 5 June 1997, *Boulet*) refused to make a preliminary ruling to the ECJ concerning the compatibility of fiscal inquiries with fundamental rights. According to the Court, the ECJ, through the existence of

of proportionality and domestic sanctions,[391] or the principle of non-discrimination and provisions of the tax code.[392] Also, it ought to be remarked that the applicants have extensively used the principle of legitimate expectations in the context of social law.[393]

Furthermore, it is worth remarking that the EC principle of legitimate expectations has led to an interesting debate as to whether this principle should apply within purely internal matters. As opposed to the principle of proportionality, legitimate expectations is an unknown concept to the French legal order.[394] In that sense, CG Toutée in *Meyet,* stated that the application of the principle of legal certainty and legitimate expectation appears more complex than the application of the principle of equality, since the former principles are less familiar to the French judge.[395] Before undertaking an analysis of the spill-over of legitimate expectations

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article F(2), was not competent (this reasoning is arguably a fallacy if one bases the competence on the ERT case). The Court also stressed that such inquiries are compatible with Article 8 ECHR.

[391] *See*, Huglo and Soulard. According to the authors, the principle of proportionality can be applied regarding civil or penal sanctions imposed by the national legislation (the Community legislation rarely imposes a particular type of sanction). *See,* C.Cass 13 October 1999, *Bitterwolf*. Application of the principle of proportionality to sanctions imposed by the custom code (Articles 412 and 414). The sanctions were more important concerning infractions committed during an importation than in relation to infractions realized on the French territory. The Court of Cassation found that the provisions were disproportionate and squashed the decision of the Court of Appeal. Conversely, the Court of Cassation, as seen above, refused to apply the principle of proportionality to fiscal sanctions.

[392] *See,* C.Cass, 23 February 1999, *Coopération des vignerons de l'île de France* (*Pineau des Charentes*). The case was confirmed some months later in C.Cass, 30 November 1999, *Floc de Gascogne*. The plaintiff (Mr Lalanne) argued that a provision of the tax code (Article 402 bis du *code general des impôts*) breached the principle of non discrimination. More precisely, the applicant argued that the provision was discriminatory and contrary to the fundamental rights of the Community legal order. *In casu,* the tax on "*Floc de Gascogne"* was four times higher than other similar types of sweet wines. The Court of Cassation held the principles applicable by considering that Article 402 bis was enacted by the excise duty directive on alcoholic beverage. The same reasoning applied in relation to the *Pineau des Charentes* (first case cited). A commentator (*Christophe-Tchakaloff, supra* at p.92) argued that the former case law confirmed the application of the general principles of Community law within internal law. However, in the light of the reasoning of the court, one might wonder about the classification of such situations as internal matters. The Court of Cassation established a clear linked with Community law to declare the applicability of the general principles.

[393] *See* C.Cass soc, 27 January 2000, *Société Entreprise Malet*, C. Cass soc, 11 May 2001, *Société Klinos*, C. Cass soc, 17 May 2001, *Neuville*, C. Cass soc, 29 Mai 2001, *Société De Bruyn-Ozoir*.

[394] Dutheil De La Rochère, "The Attitude of French Courts Towards ECJ Case Law", in O'Keeffe and Bavasso, *Judicial Review in European Union Law*, 2000, pp.417-431, *see also,* Galmot*, supra n.297*.

[395] CG Toutée in *Meyet*, *supra n.308,* "[l]a question pouvant apparaître moins simple pour des principes moins familiers au juge, comme ceux de la sécurité juridique ou de la confiance légitime. Un Allemand prévoyant, Keyserling, disait d'ailleurs que l'incompréhension

into internal law, it appears important to determine the scope of the principles of legal certainty and legality. This analysis is necessary if one desires to properly understand the reaction of the national judge towards the influence of legitimate expectations.

8.3.1. Legal Certainty/Legitimate Expectations and Internal Matters

At the outset, one must define the scope of the principle of legal certainty. In few words, it reflects the ultimate necessity of clarity, stability and intelligibility of the law. This principle constitutes, notably, an integral part of unwritten Community law. By contrast, in the French legal order, the principle appears much vaguer and its precise contours still remain to be defined. It ought to be remarked that the doctrine demonstrates a certain curiosity[396] and pinpoints its increasing influence.[397] Yet, it seems safe to say that the jurisprudence of the *Conseil Constitutionnel* protects this principle, though its recognition has never been expressly mentioned.[398] Moreover, the Court of Cassation has recently used the expression *verbatim*.[399] According to Huglo, the principle of legal certainty is a tautology and finds its expression in a multiplicity of more specific principles, e.g. non-retroactivity, legitimate expectations and time limits for judicial review.[400] Going further, the author considers that this observation may explain the reason why the principle has been used very rarely.[401] Generally, it may be said that the principle of legal certainty constitutes an umbrella concept.[402] In that sense, it includes subjective rights that are materialized by the principles of legitimate expectations, acquired rights and non-retroactivity. These principles appear as corollaries of legal certainty. However, the principle of legitimate expectations, in contrast to acquired rights and non-retroactivity, is ignored in French administrative law both in its expression and

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mutuelle, si fréquente, provient probablement d'une incompatibilité grammaticale des deux langues".

[396] *See,* Cahiers du Conseil Constitutionnel no 11, 2001. The journal offers a compilation of Articles as to the scope of the principle of legal certainty into constitutional, administrative, civil, ECHR and Community law.

[397] Pacteau, "La sécurité juridique, un principe qui nous manque?", AJDA 1995 Chroniques, pp.151 *et seq.*

[398] *See* Fromont, "Le principe de sécurité juridique", AJDA 1996, Chroniques, pp.178 *et seq.,* Luchaire, "La sécurité juridique en droit constitutionnel français", Cahiers du Conseil Constitutionnel no 11, 2001, Etudes et doctrine.

[399] C.Cass 21 March 2000, Civ. 1er, Bull,civ.I, no 97, pp.65 *et seq.,* "la sécurité juridique...ne saurait consacrer un droit acquis à une jurisprudence figée, l'évolution de la jurisprudence relevant de l'office du juge dans l'application du droit".

[400] Huglo, "La Cour de cassation et le principe de sécurité juridique", in Cahiers du Conseil Constitutionnel no 11, 2001, Etudes et doctrine.

[401] *Ibid.,* The same view is taken by Boissard in the context of public law. She refers to the "target principles" (*principes ciblés*) of acquired rights and non-retroactivity.

[402] Fromont, *supra n.398.*

content.[403] The French judge is not accustomed, indeed, to apply this principle originating in from German law.[404]

Before analyzing the pivotal issue, i.e. the impact and spill-over of the principle of legal certainty into public law, one must fill in some background regarding French administrative law. Thus, administrative law in France is based on the sacrosanct principle of legality. This principle of legality (principle of lawful administration) requires administrative authorities to act *intra vires*, i.e. the authorities must respect the law and conform their action to it. Importantly, the administrative judge is the guardian of the principle of legality.[405] In other words, the administrative courts must ensure its respect and, thus, sanction any *ultra vires* administrative act. In this respect, it might be argued that the principle of legality does not conflict with the principle of legal certainty but appears, conversely, to be complementary. Nevertheless, the administrative judge may decide that the administration acted *ultra vires*. This decision has the effect of obliging the administration to *a posteriori* rectify the illegal act. In this regard, it may conflict with the principle of legal certainty.[406] This potential conflict may be seen as problematic for understanding the reception into domestic law of the principle of legitimate expectations as a corollary to legal certainty.

Also, it is worth noting again that the administrative judge does not explicitly recognize the existence of a general principle of legal certainty in purely internal matters. However, the existence of principles that fall clearly, in my view, under the umbrella of the concept of legal certainty have been recognized. Hence, the CE elaborated the principles of acquired rights[407] and non-retroactivity.[408] As to the latter, it means that the administrative authorities cannot take acts that produce effects before their notification or publication. As to the former, the *Conseil d'Etat* decided that an administrative authority cannot withdraw or abrogate a "definitive act"[409] that creates rights *("intangibilité des situations créatrices de droit")* until the

[403] Galmot, *supra n.322,* at p.72, Dutheil De La Rochère, *supra n.394,* at p.430.
[404] Puissochet, "Vous avez dit confiance légitime?" in mélanges, Dalloz, 1996, pp.581 *et seq*.
[405] The main role of the CE is to protect the individual against illegal State action. This mainstream view has been challenged by Mestre in 1974. The author argued that the CE has, indeed, two facets. In other words, the CE is also the guardian of the prerogatives of the administration.
[406] Boissard, "Comment garantir la stabilité des situations juridiques individuelles sans priver l'autorité administrative de tous moyens d'action et sans transiger sur le respect du principe de légalité? Le difficile dilemme du juge administratif", Cahiers du Conseil constitutionnel no 11 (online), pp.1-14, at p.5.
[407] CE, 3 November 1922, *Dame Cachet*, Recueil Lebon, pp.770 *et seq.*
[408] CE, 25 January 1948, *Société du journal l'Aurore*, Recueil Lebon, pp.289 *et seq.*
[409] An act is considered definitive after the expiration of the time limits for *ultra vires*, i.e. 2 months.

end of its period of validity,[410] and this applies even if the impugned act is *per se* illegal.[411]

Furthermore, there is no protection of procedural legitimate expectations in French law.[412] The administrative authorities do have the possibility to depart from (statement) a representation which is adopted without procedural formality. As to substantive legitimate expectations, the distinction, established by Schønberg, between formal decisions and informal representation appears of utmost interest. Indeed, French administrative law provides an extensive protection as to formal decisions through the use of the principles of vested (acquired) rights and non-retroactivity. However, the protection of informal representation is limited merely to some fiscal provisions, e.g. Article L 80 of the Fiscal Code.[413] By contrast, it ought to be emphasized that the domestic system of damages appears rather complete and effective.[414] The effectiveness of the system of compensation may, in this sense, appear as a palliative to the lack of substantive protection concerning informal representation. However, one may venture to say that some gaps remain to be filled in this domain. The *Freymuth* jurisprudence provides an interesting illustration.

In relation to the principle of legitimate expectations, the case-law of the Administrative Court of Strasbourg in *Freymuth* 8 December 1994[415] gives a clear example of the spill-over of the general principles into internal matters. Indeed, after a national decree[416] prohibiting the importation of domestic waste (even from another Member State), a company recycling wastes, having many contracts with German firms, went bankrupt and sued the Government for damages. Interestingly, the applicant argued a breach of "legitimate expectations". The Government Commissioner, referring to the Community case-law, proposed to integrate the principle of legitimate expectations into the French judicial system.[417] As noted previously, this principle was unknown at the domestic level. The Tribunal ruled

[410] CE, 26 March 2001, *Association pour la gratuité de l'autoroute A 8.* Decree approving a highway concession.
[411] This is after the expiration of the time limit for judicial review.
[412] Schønberg, *Legitimate Expectations in Administrative Law,* Oxford, 2000, at pp.115-117.
[413] *Ibid.,* at pp.115-117*, infra*., the Administrative court in the *Freymuth* cases.
[414] *See* CE, 24 April 1964, *Société des huileries de Chauny* (promise given by the administration concerning as to a certain quantity for exportation), CE, 26 October 1973, *SCI Résidence Arcole* (promise given by the administration as to a building permit), CE, 20 January 1988, *Aubin* (the administration gave wrong information which led to a prejudice). All these examples imply fault by the administration. It may also happen in very limited circumstances that damages can be sought without any fault. This may be the situation when the administration modifies the applicable legislation and creates, subsequently, a prejudice (CE, 14 January 1938, société anonyme *La Fleurette*, CE, 27 January 1961, *Vannie*r).
[415] TA of Strasbourg, 8 December 1994, *Entreprise Freymuth c/ Ministère de l'environnement*, AJDA, 20 July-20 August 1995, pp.555 *et seq*.
[416] Decree of 18 August 1992.
[417] CG Pommier in *Freymuth*, *supra n.415*, at pp. 558-559.

that the State was responsible, since the decree was not combined with transition measures and, consequently, led to a breach of legitimate expectations.[418]

The reception of the principle of legitimate expectations at the national level confers to the individual applicant the compensation of the suffered prejudice. Notably, it is worth remarking that the classical system of state responsibility did not afford such protection. Finally, it might be said that the principle of legitimate expectations offers a higher standard of protection for the individuals than national law and leads, without doubt, to a levelling-up of the internal legal system of protection ("higher law argument"). Conversely, the CAA of Nancy, which incidentally did not follow the Government Commissioner, ruled that the principle of legitimate expectations was not applicable outside the scope of EC law. However, it did consider, interestingly, that the principle was applicable *in casu,* due to the fact that the litigation was indirectly linked to Community law.

Finally, the *Conseil d'Etat*, on 9 May 2001, held that the principle of legitimate expectations constitutes an integral part of the general principles of Community law.[419] However, they only apply in the national legal order when the situation falls within the scope of Community law.[420] Thus, it may be stated that the highest

[418] *Ibid.*, TA *Freymuth,* "[d]ans la mise en œuvre de son activité, l'administration doit veiller à ne pas porter aux tiers un préjudice anormal en raison d'une modification inattendue des règles qu'elle édicte ou du comportement qu'elle adoptes le caractère soudain de ce changement n'est pas rendu nécessaire par l'objet de la mesure ou par les finalités poursuivies ;en particulier, si les autorités administratives peuvent modifier la réglementation qu'elles ont édictée en fonction de l'évolution de leurs objectifs ou des situations de fait et de droit qui conditionnent leur intervention, elles doivent prendre les dispositions appropriées pour que les personnes concernées disposent d'une information préalable ou que des mesures transitoires soient aménagées, des lors que la modification envisagée ne doit pas, par nature ou en raison de l'urgence, prendre effet de manière immédiate et qu'elle est susceptible d'avoir de manière substantielle des effets négatifs sur l' exercice d'une activité professionnelle ou d'une liberté publique; à défaut de respecter ce principe de confiance légitime dans la clarté et la prévisibilité des règles juridiques et de l'action administrative, l'administration engage sa responsabilité à raison du préjudice anormal résultant d'une modification inutilement soudaine de ces règles ou comportement".

[419] CE, 9 May 2001, *Freymuth,* Req. No 210944.

[420] *Ibid., Freymuth,* "[c]onsidérant que ce principe qui fait partie des principes généraux du droit communautaire, ne trouve à s'appliquer dans l'ordre juridique national que dans le cas où la situation juridique dont a à connaître le juge administratif français est régie par le droit communautaire ; que tel n'est pas le cas en l'espèce dès lors, d'une part, que le décret du 18 août 1992 n'a pas été pris pour la mise en oeuvre du droit communautaire et, d'autre part, qu'il a été pris antérieurement à l'intervention du règlement n° 259/93 (CE) du Conseil du 1er février 1993 ; que, par suite, en rejetant la demande de l'entreprise personnelle de transports Freymuth au motif que les conditions d'application du principe de confiance légitime n'étaient pas réunies, alors qu'il était en réalité inapplicable, la cour administrative d'appel a entaché son arrêt d'une erreur de droit ; que le motif tiré du caractère inopérant du moyen tiré de la méconnaissance du principe de confiance légitime qui a été soulevé devant la cour administrative d'appel par le ministre de l'environnement, qui n'implique l'appréciation par le

administrative court insists on the establishment of a clear dichotomy between the two paradigms of law, i.e. internal law and matters falling within the scope of Community law. Notably, its appreciation of the scope of Community law is restrictive. The conservative stance of the highest administrative court may be explained in the light of two interconnected arguments. First, it conflicts with the traditional conception of French Administrative law.[421] Second, the French administrative law offers a palliative to the non-application of the principle of legitimate expectations.[422]

As to the former, it is worth remarking that French administrative law is structured around cardinal and interlinked concepts such as the principle of legality, the notion of prerogatives of the administration and public interest. As seen previously, the application of the principle of legal certainty may conflict with the cardinal principle of legality.[423] To recap, this principle implies, *inter alia*, that the administrative courts must determine whether the administrative authorities have acted *ultra vires*. The review function of the administrative courts appears fettered by the prerogatives of the administration. Thus, the administration is allowed to take measures restricting civil liberties in order to ensure the respect of this public interest.[424] The administrative decisions must have the sole objective of promoting the general interest. Consequently, the review of administrative decisions by the administrative courts is limited to determinations of their legal regularity.[425] The review may appear *per se* restricted when it comes to assessing the prerogatives given to the administration.[426] Arguably, the litigation brought before the administrative jurisdiction reinforced, to a certain extent, the role and place of the administration.[427] Finally, it may be argued that the orthodox view taken by the *Conseil d'Etat* constitutes a natural defensive reaction to protect its own legal

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juge de cassation d'aucune circonstance de fait et justifie légalement la solution adoptée par la cour, doit être substitué à celui que celle-ci a retenu".

[421] This argument has been used extensively in relation to the penetration of the general principles of Community law in UK administrative law. The principles conflict with the so-called theory of parliamentary sovereignty.

[422] Calmes, *Du principe de protection de la confiance légitime en droit allemands, communautaire et français*, 2000, Thèses en lignes de Paris 2, pp.1-626, Schønberg, "Legitimate Expectations in Administrative Law", *supra n.412*, at pp.116-117.

[423] *Ibid.*

[424] Bell, *French Administrative Law*, Oxford University Press, Oxford, 1993, at p.210.

[425] Hostiou, "Administrative Review of Complex Decisions: Litigations on the Declaration of Public Utility in French Law", in Ladeur, *The Europeanisation of Administrative Law*, Dartmouth, 2002, pp.112-121, at p.118. Also, one can draw a parallel here with the assessment of the traditional doctrine of parliamentary sovereignty by the UK courts and the subsequent limitation of review.

[426] *See,* Mestre, *Le Conseil d'Etat protecteur des prérogatives de l'administration*, LGDJ, 1974.

[427] *Ibid.,* the author considered that the CE should be perceived as Janus face, i.e. having two faces. The first face is as the protector of the citizen (liberal approach), the second face is as the protector of the administration.

system against the intrusion of foreign concepts and principles which may conflict with certain exiting domestic principles and, to a certain extent, alter the traditional legal concepts.

As to the latter, the national judge, as a direct consequence of the first argument, may view the principle of legitimate expectations as far too indefinite (as entering into the concept of fairness and thus lacking clarity and certainty) and far too innovative (as entering into the concept of subjective rights and thus diverging from the traditional concept of objective legality). Subsequently, it may tend to favour other solutions already existing or merely deemed more appropriate. In this respect, an author argued that the administrative judge is able to effectively protect the expectations by recourse to concepts and rules more compatible with the traditional structure of administrative law, e.g. good faith and good administration.[428] In a similar vein, another commentator contended that the CE may have recourse to specific principles that fall under the implicit concept of legal certainty.[429] This situation is clearly exemplified by the *SNCF* cases (2000 and 2001) concerning a preliminary ruling from the *Cour de Cassation*[430] to the *Conseil d'Etat*.[431] In other words, the CE is able to fill the gaps on a case-by-case analysis and, thus, ensures the respect of the imperious, though implicit, concept of legal certainty. Also, one may stress that some statutory provisions[432] allow the application of the principle of legitimate expectations in limited fields.[433] Hence, Article L 80 A of the Fiscal Code[434] and the Decree no 83-1025 of 28 November 1983[435], arguably, take into

[428] Calmes, *supra n.422*, *Title II, Chapter 1*. The author is largely inspired by the German doctrine, *see* fn 2456-fn 2459. CE 1929, *compagnie des mines de Siguiri* (responsabilité pour faute de l'administration pour cause de brusquerie non justifiée du comportement de l'administration).

[429] *Boissard, supra n.406*.

[430] Cass, Soc, 2 May 2000, Bull. civ. V, no 162, pp.127 *et seq*., the Court of Cassation raised *ex officio* the possible invalidity of an administrative act (SNCF regulation concerning its employees) in light of the principle of legal certainty. The Court of Cassation mentioned expressly the principle of legal certainty. One may wonder whether the Council of State will follow the same path.

[431] CE, Ass, 29 June 2001, *Berton c/ SNCF*, AJDA 2001. On the basis of Articles 1134 of the Civil Code and Article 121-1 of the *Code du travail*, the CE recognized the existence of a principle of stability of the working contract. This principle applies both to private and public sectors and prohibits a modification of the working contract without the consent of the two parties. *In casu*, the CE considered that an employer could not demote employees on the basis of failing a professional examination. Notably, the CE, in contrast to the Court of Cassation, did not refer expressly to the principle of legal certainty.

[432] It concerns the fields of taxation and planning.

[433] Schønberg, *supra n.412,* at p.117, Huglo, "La Cour de cassation et le principe de sécurité juridique", in Cahiers du Conseil Constitutionnel no 11, 2001, Etudes et doctrine.

[434] According to Article L 80 A, "lorsque le redevable a appliqué un texte fiscal selon l'interprétation que l'administration avait fait connaître par ses instructions ou circulaires publiées et qu'elle n'avait pas rapporté a la date des opérations en cause, elle ne peut poursuivre aucun rehaussement en soutenant une interprétation différente". This provision concerns the interpretation of the fiscal law. It protects the taxpayer against a potential

consideration the principle of legitimate expectations. Moreover, Schønberg has noted that the domestic principles of administrative liability are very effective and, thus, provide an easier way to be compensated than in other legal systems.[436] All these arguments may help us to understand the general and restrictive attitude of the French highest administrative court confronted with the spill-over of the EC principle of legitimate expectations into purely internal matters. The CE appears to fill the gaps of the legal system by having recourse to domestic concepts and, thus, avoids (deliberately?) the possible use of foreign principles.

8.3.2. Towards a More Progressive Attitude of the Administrative Courts?

As seen previously in *Freymuth*, the lower administrative courts (the Administrative Tribunal and the Administrative Court of Appeal) had a more progressive approach as to the scope of application of the principle of legitimate expectations. By contrast, the *Conseil d'Etat* adopted a restrictive attitude by considering that the general principles of Community law only apply in situations falling within the scope of Community law.[437] Already, in 1999, the CE in *Rouquette* relied on this theory of the scope of Community law to justify the non-application of the principle of legitimate expectations to the social security code. However, the *Conseil d'Etat* did not use the clear formulation in relation to the non-applicability of the general principles of Community law (legitimate expectation *in casu*).[438] Similarly, the CE confirmed the same day, in *Société Mosellane de Tractions*, the non-application of the general principles of Community law in purely internal matters.[439] In the wake of *Freymuth*, the CE[440] and the CAA,[441] have extensively used this formulation

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modification of interpretation by the administration. It is a case of informal representation. This provision has been applied both by the Court of Cassation and the CE. For the CE, *see* cases, CE 23 March 1994, *Beaufour,* Req. No 142974 and 142975, CE 30 December 1996, *Brockly,* Req. No 145174. *See* more recently, CE 17 December 2003, *SCP le Bret-Desache*, Req. No 239677. The argument (legitimate expectations) was rejected, since it was not raised on appeal.

[435] This decree concerns the relationship between the administration and its users. When against the administration an individual can use any instruction, directives and circulars which have been published. This decree has been used extensively in the fiscal domain.

[436] Schønberg, *supra n.412,* at p.117.

[437] *Ibid.*

[438] CE, 5 March 1999, *Rouquette,* Req. No 194658, 196116.

[439] CE, 9 mai 2001, *Société Mosellane de Tractions,* Req. No 211162, "[c]onsidérant que ce principe, qui fait partie des principes généraux du droit communautaire, ne trouve à s'appliquer, dans l'ordre juridique national, que dans le cas où la situation juridique dont a à connaître le juge administratif français est régie par le droit communautaire". *See also*, CE, 9 May 2001, *Freymuth, supra n.419.*

[440] *CE,* 6 March 2002, *Triboulet,* Req. No 217646, CE, 6 March 2002 *Depalle,* Req. No 217647, CE, 18 February 2004, Commune de Savigny-le-Temple, Req. No 251016.

[441] CAA, 27 February 2002 *Finet*, Req. No 98DA02097, "[c]onsidérant, en second lieu, que les principes généraux du droit communautaire ne trouvent à s'appliquer dans l'ordre

regarding the principle of legitimate expectations. The Courts have done so, not only in connection with the principle of legitimate expectations, but also in relation to the principle of proportionality[442] and the principle of non-discrimination.[443]

Though the situation, nowadays, appears rather Cartesian, it is worth remarking that the *Conseil d'Etat* in some cases during the mid-nineties adopted an ambiguous position as to the recognition and application of the principle of legitimate expectation in internal matters. First, in *Beaufour* (two fiscal cases of the same day of the Acceptance's Commission regarding *pourvoi en cassation*),[444] the applicant argued a breach of the principle of legitimate expectation on the basis of Article L 80 A (". . . *Que la Cour ne pouvait écarter, comme elle l'a fait, la lettre invoquée sur le fondement des dispositions de l'article L. 80-A du livre des procédures fiscales, par laquelle le centre des impôts l'informait qu'il n'y avait pas a souscrire de déclaration de taxe sur la valeur ajoutée sans violer le principe général de confiance légitime du contribuable.*"). The Acceptance Commission rejected the argument by considering that this argument was not serious in the circumstances of the case. Thus, it considered the utility of the argument and did not rule out the possibility to accept the principle in another case. Notably, the *Conseil d'Etat* did not establish whether the case fell within the purview of Community law.

Second, outside the context of fiscal law, in *Brockly*,[445] the CE used once again a very ambiguous formulation. This case concerns the decision by the administration (*préfet*) to allow the creation of a pharmacy. Another pharmacist (Duverdy) contested the decision on the basis that she had made an application before Mme Brockly. Brockly argued a breach of the principle of legitimate expectations. The *Conseil d'Etat*, ambiguously stated that, "the plaintiff, *in casu*, cannot seriously invoke the breach of a principle of legitimate expectations". The CE rejected the application of the principles in the present case. However, by using the adjective "seriously", the judge appears to consider the utility of the principle. Further, does the formulation mean that, in the light of other circumstances, the principle of

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juridique national que dans le cas où la situation juridique dont a à connaître le juge administratif français est régie par le droit communautaire ".

[442] *Ibid.,* CAA 2002 *Finet,* CE, 29 December 2000, *Olazabal*, Req. No 206913, "le principe de proportionnalité, applicable selon la Cour de Justice aux situations régies par le droit communautaire, exige que les mesures prises soient aptes à réaliser l'objectif visé et ne dépassent pas les limites de ce qui est nécessaire à cet effet ; qu'à ce titre, une mesure restreignant la validité territoriale d'une carte de séjour est moins rigoureuse qu'une décision d'expulsion".

[443] CE, 8 December 2000, *Parti Nationaliste Basque ERI-PNB,* Req. No 212044, "[c]onsidérant enfin que ne saurait davantage être accueilli le moyen tiré de l'incompatibilité de la loi avec les dispositions de l'article 12 du traité interdisant "toute discrimination exercée en raison de la nationalité" dès lors que cet article ne produit effet que "dans le domaine d'application... du traité" et "sans préjudice des dispositions particulières qu'il prévoit" et qu'ainsi qu'il a été dit ci-dessus les différents moyens tirés de la violation du droit communautaire ne sont pas eux-mêmes pertinents".

[444] CE, 23 March 1994, *Beaufour,* Req. No 142974 and 142975.

[445] CE, 30 December 1996, *Brockly,* Req. No 145174.

legitimate expectation might apply? Quid circumstances? Arguably, the main problem here is that the judge does not establish clearly that the situation concerns purely internal matters. In other words, the CE leaves the door open to an extensive interpretation in which other circumstances might be seen as also including internal situations.[446]

A similar, but clearer, attitude has been taken by the lower courts in the area of fiscal law, but also in some specific cases. As to the latter, the TA of Paris in *Sté Eiffage et Spie Batignolles*, followed the path opened by the Strasbourg Tribunal in *Freymuth*. In this case, the applicant challenged, on the basis of legitimate expectations, a state policy decision as to the choice of location of the "*Stade de France*". The TA recognized the existence of such a principle of legitimate expectations in purely internal matters.[447] However, it did not allow the allocation of damages to the applicant based on a breach of a general principle.[448] It considered that, in the present situation, the applicants could not invoke the infringement of the principle of legitimate expectations.[449]

As to the former, in *Caisse Régionale de Crédit Agricole Mutuel de Savoie* (1993), the applicant (a bank) invoked the principles of legal certainty and legitimate expectations against Parliamentary legislation permitting the calculation of the VAT.[450] The Administrative Court, without deciding whether the measure fell within the scope of Community law, recognized the existence of the principles in the domestic legal order. Nevertheless, it rejected categorically the application of the principle in the circumstances of the case. Furthermore, the CAA of Bordeaux in 1994[451] recognized the existence of these principles in fiscal national law. It stressed very clearly, however, that the breach of the principles of legal certainty and legitimate expectations cannot in any case lead to the annulment of legislation created by the Parliament.[452] In that sense, the principles are appraised as "infra-legislative". This jurisprudence was confirmed some days later by the same court in another case concerning fiscal issues.[453] It seems worth remarking that the case could be interpreted as falling within the scope of Community law. Indeed, fiscal matters, and especially VAT, can often be linked to the 6th Community Directive

[446] *Ibid., Brockly*, "[c]onsidérant que…dès lors, Mme Brockly qui, en tout état de cause, ne peut pas sérieusement invoquer en l'espèce la méconnaissance d'un "principe de confiance légitime, n'est pas fondée à soutenir que c'est à tort que, par le jugement attaqué, le tribunal administratif de Lyon a rejeté sa demande dirigée contre la décision du ministre de la santé et de l'action humanitaire du 12 juin 1992".

[447] In contrast to the *Freymuth* case, where the domestic decision had a possible Community dimension, this case deals with a pure internal matter.

[448] TA Paris, 14 October 1997, *Sté Eiffage et Spie Batignolles*, Req. No 9405985/6.

[449] *Ibid.*

[450] TA Grenoble 30 June 1993, Req. No 8834940, *Caisse Régionale de Crédit Agricole Mutuel de Savoie*.

[451] CAA Bordeaux, 22 February 1994, Req. No 92BX00939 Ministère *du budget c/ Banque populaire Centre Atlantique*.

[452] Is there in France a doctrine of Parliamentary sovereignty like in the UK?

[453] CAA Bordeaux, 8 March 1994, Req. No 92BX 00716.

(1977). And by consequence, those situations could be the object of preliminary rulings to the ECJ. Interestingly, one may say that these cases conflict, to a certain extent, with the *SNIP* case where the *Conseil d'Etat* recognized that the general principles were superior to the national statute in a situation falling within the scope of Community law.

What is more, the CAA of Nantes 4 May 1994, stated that, ". . . caisse requérante n'est en tout état de cause pas fondée à se prévaloir, contre les impositions contestées, des principes de la sécurité juridique et de la protection de la confiance légitime, à propos de l'application desquels il n'y a pas lieu de saisir la Cour de justice des communautés européennes d'une question préjudicielle".[454] Once again, the Administrative Court used the same formulation, and links the principles of legal certainty and legitimate expectations together. It may be said that the existence of the principle of legal certainty, though not explicitly used by the constitutional and administrative jurisprudence, has been admitted by the doctrine.[455] Thus, arguably, the linkage between the two principles allows the principle of legitimate expectation to be anchored to another principle more familiar to the French lawyers. Notably, this linkage has also been realised by the CAA and CE in relation to another well-known domestic principle, i.e. acquired rights.[456] In this respect, the CE in the Nestlé decision (2003) linked once again the principle of acquired right with legal certainty and legitimate expectations.[457] Interestingly, it seems that the CE automatically discards the application of the principle of legitimate expectations after observing the non-violation of the principle of droit acquis. Furthermore, the Conseil d'Etat appears to recognize, for the very first time, the existence of the principle of legitimate expectations in purely internal fiscal matters. It remains to be seen whether this precedent will be followed.

Though the administrative Courts (mostly lower courts) now seem to recognize the existence of a principle of legitimate expectations in fiscal matters, the attitude of the TA and CAA and now the CE as to its existence may be described as confusing.[458] Firstly, the Courts often do not specify whether they are confronted by a purely internal situation or a situation falling within the EC law context. Secondly, the Courts often discard its application (*l'argument n'étant pas sérieux*) in the circumstances of the case *(en l'espèce)*. Thirdly, certain decisions have excluded the applicant from usefully ("*utilement*") invoking the principle in any case ("*en tout état de cause*"). It seems worth noting here that the principle is not considered as having a higher ranking than the French statute *("infra-législatif*"). In that sense, the principle has been adapted to the French legal order, but goes against the *SNIP*

[454] CAA Nantes, 4 May 1994, *Caisse Régionale de Crédite Agricole Mutuel du Cher,* Req. No 92NT00380, and *Caisse Régionale de Crédit Agricole Mutuel d'Indre et Loire*, Req No 92NT00381, (emphasis added).
[455] Fromont and Luchaire, *supra n.398*.
[456] CAA Nantes, 6 December 1995*, SCI Résidence Dauphine*, Req. No 93NT00395.
[457] CE, 25 June 2003 *Société Nestlé France*, Req. No 239189.
[458] Calmes, *Title III, Chapter I*, *supra n.422.*

case.[459] Fourthly, the *Conseil d'Etat* doctrine of exclusion has been applied to fiscal matters by lower courts.[460] Fifthly, the principle is often associated with the principle of legal certainty (*principe de sécurité juridique*) or acquired rights *(droits acquis ou intangibilité des situations créatrices de droit)*. The "umbrella concept' of legal certainty and the well-known principle of acquired rights allow a better or easier incorporation of this foreign principle into the domestic law. Consequently, it seems plausible to argue that one may perceive the principle of legal certainty and acquired rights as vectors of legitimate expectations within internal matters.

8.3.3. Rive Droite, Rive Gauche...

By way of conclusion, I shall touch upon the scope of the general principles' penetration into domestic law. One may recall that, in 2001, the general principles of Community law have been explicitly recognized by the *Conseil d'Etat* in *SNIP* as a direct source of Community law. Following the *Nicolo* reasoning, the principles prevail over a national statute ("*loi*"). As to their scope of application, it appears that the CE recently (since 2001) attempted to draw a very clear distinction between matters falling within the scope of Community law and internal matters.[461] This strict dichotomy seems now to be followed generally by the lower administrative courts.[462]

As to domestic matters falling within the scope of Community law, there is an obligation to apply the general principles. This obligation can be deduced from Article 10 EC. The impact increases due to the extension of the scope of Community law and leads to the building of a *jus commune*. This inexorable extension is fostered, *inter alia*, by the growing familiarity of lawyers and judges with Community law. Notably, the civil judge used to be more inclined to consider and accept the "Community law" arguments in comparison to the administrative judge. In this respect, the applicants in the nineties made extensive use of the general principles of Community law before the administrative courts. However, the domestic courts often discarded the arguments by invoking the lack of sufficient precisions to review the national measures.

However, the situation appears to have changed and the administrative case-law can be seen as generally more in tune with Community law. In this connection, mention should, however, be made of the problems resulting from the divergent

[459] CE, *SNIP* (2001), *supra n.341.*
[460] CAA Nantes, *SCI Résidence Dauphine*, *supra n.456.*
[461] *See e.g.,* CE, 18 February 2004, *Commune de Savigny-le-Temple,* Req. No 251016, CE, 12 May 2003 *Société Télévision Francaise 1 (TF1)* Req. No 247353, "[c]onsidérant que la Société Television Française 1 (TF1) ne saurait utilement se prévaloir du moyen tiré de la méconnaissance des principes de confiance légitime et de sécurité juridique dès lors que la décision attaquée n'a pas été prise pour la mise en oeuvre du droit communautaire", CE, 6 March 2002, *Triboulet*, Req. No 217646, CE, 6 March 2002 *Depalle*, Req. No 217647, CE, 9 mai 2001, *Société Mosellane de Tractions*, Req. No 211162, CE, 9 May 2001, *Freymuth.*
[462] See *e.g.,* CAA Bordeaux, 6 May 2003 *SARL Pardo Trans,* Req. No 99BX01635.

interpretation of the scope of Community law. The *Freymuth* saga offers a clear illustration of divergent interpretations between the administrative courts. Suffice it to say here that the *Conseil d'Etat* followed a restrictive interpretation of the scope of Community law. Arguably, the restrictive interpretation constitutes one of the main elements hindering the development of general principles of Community law.[463] Also, it is worth remarking that the courts may have fewer problems using general principles already existing in their national law, e.g. principles of equality and proportionality.[464] By contrast, the principle of legitimate expectations (inspired from German law) may pose difficulties for the national courts.

As to purely internal matters, there is no obligation to apply the general principles of Community law. As explained above, the jurisprudence of the CE draws a clear distinction between the two paradigms of law and, thus, excludes, the application of the general principles from the internal domain. The spill-over of the general principles is based on a voluntary acceptance of the general principles by the national courts. In this respect, the Cour de Cassation applied the principle of proportionality to domestic sanctions and the principle of non-discrimination to certain provisions of the tax code. Regarding administrative courts (generally the lower administrative courts), one may venture to say that the principle of legitimate expectations made its way within diverse domains of internal law, i.e. urbanism (pharmacy concession) (CE in *Brockly*), damages (TA in Freymuth, TA *Sté Eiffage et Spie Batignolles*) and fiscal matters (Article L 80 A of the procedural fiscal code). However, the recent case-law of the CE may be appraised as rejecting the application of the principle of legitimate expectations in the *first two* matters. This is regrettable, since the application of the principle afforded better protection to the individual. Is the *Conseil d'Etat* then still the guardian of individual rights?

By contrast, in fiscal matters, the application of the principle of legitimate expectations clearly persists. It is worth describing in detail the spill-over of the principle of legitimate expectations in fiscal law. Three conclusive remarks may be made in this respect. First, the principle is strictly limited to the application of Article 80 A of the fiscal code. Second, when applied, it is attached to well-known principles of French law, i.e. legal certainty (implicit in the jurisprudence) and/or acquired rights (explicit in the jurisprudence). Third, the national courts did not fully transplant the EC principle of legitimate expectations and created a kind of "hybrid principle". The distinction lies in the hierarchical structure of the legal order. More precisely, the internal principle does not prevail over the French Law (statute). In other words, the principle of legitimate expectations in fiscal matters is "*infra-législatif*" but "*supra-décrétal*".

The final point must concern the doctrinal debate surrounding the spill-over of the general principles into internal law. The main question at issue is to determine

[463] One can draw interesting parallels with the *First City Trading* case (UK) and the *Barsebäck* case (Sweden).

[464] CG Toutée in *Meyet, supra n.308*, *see also,* Moderne, RFDA 1998, *supra n.315,* at p.515, "[l]a tendance du juge administratif a accueillir avec circonspection les principes généraux du droit communautaire, avec lesquels il n'est pas complètement familiarisé, peut se concevoir".

whether the general principles are *anathemas* to the internal legal order (a positive answer would corroborate the assumption that there exists a strict distinction between the two [banks] paradigms of law). As noted above, two main elements may explain the phenomenon of spill-over: the higher law and the coherence (two-speed law) arguments. First, it seems clear to me that the general principles provide a higher degree of protection for the individual.[465] In that sense, it is worth quoting CG Toutée in *Meyet*, "*la tentation est alors grande pour des juristes français toujours a l'affût des qualités supposées supérieures des autres droits et certes légitimement attentifs a tout ce qui pourrait en leur provenance parfaire notre droit public, d'observer que justement a cet égard la sécurité juridique y paraît mieux reconnue, et en tout cas plus expressément incorporée a la théorie juridique*". Arguably, the general principles allow a "*nivellement par le haut*" of the various administrative laws.[466] In relation to the French legal order, such an assertion is verified by the impact and spill-over of the general principle of legitimate expectations.[467] This principle used to be unknown to the domestic legal order. It is not anymore.

Second, it may be argued that the influence of the general principles in purely internal matters is unstoppable.[468] Particularly, Auby has argued that the position of the *Conseil d'Etat* regarding legitimate expectations will soon be untenable.[469] Indeed, the use of two standards (community law and internal) of protection leads to incoherency and legal uncertainty. The spill-over, though quite limited, is confirmed by the above mentioned case-law of the administrative and ordinary courts. At the end, legal systems no longer appear isolated or self-contained. There are some solid bridges between the two banks (paradigms) of law. Furthermore, the recent jurisprudence of the *Conseil d'Etat* in the context of acquired rights has been described as very active. Thus, it may be argued that the general principles foster, indirectly, what has been called by Boissard the "*aggionarmento*" of CE jurisprudence.[470]

On the other hand, it could be argued that the general principles of Community law are anathemas to the internal legal order. This argument is taken by Calmes in

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[465] Galmot, *supra n.297,* at p.71. According to the author, "[l]e recours au principe général reconnu par le droit communautaire est susceptible de renforcer le contrôle exercé par le juge administratif français sur les actes de l'administration, notamment sur ceux qui sont pris dans l'exercice d'un pouvoir discrétionnaire".

[466] *Ibid.*, at p.78.

[467] The same may hold true concerning the EC principle of proportionality (three-pronged test).

[468] Auby, "La bataille de San Romano", AJDA, 2001, pp. 912 *et seq. See also* Galmot, *supra n. 297.* the author used the two speed-law argument in relation to internal legislation taken following an EC Directive incorporating the principle of effective judicial protection

[469] *Ibid.*

[470] Boissard, *supra n.406*, *see also* Delamarre, "La sécurité juridique et le juge administratif Français", AJDA 2004, pp.186-193. For recent developments of legal certainty in the CE jurisprudence, see CE Ass 26 October 2001, Ternon, AJDA 2001, pp.1037 *et seq.*, CE Sect 6 November 2002, *Soulier,* AJDA 2002, pp.1434 *et seq.*

her analysis of legitimate expectations in France. The author concludes that the general principles constitute monsters and virus.[471] Two main lines of argumentation are generally resorted to against the reception of the general principles within internal law. Firstly, one may argue that the domestic courts can have recourse to and extend existing domestic concepts so as to afford a higher protection.[472] Secondly, to counter the coherence arguments, theories such as "legal pluralism"[473] and "cultural diversity"[474], have been advocated. Under the clothes of an appealing terminology, both theories give birth to very conservative standpoints.

To conclude, it may be stated that the general principles are not anathemas to the internal legal order. Accordingly, the general principles are valuable in the sense that they complete and enrich the national legal system. In my view, the very problem may lie in the suspicion of the French judge towards foreign concepts. Also, the traditionalist stance of the *Conseil d'Etat* may be appraised as a kind of confrontation with the ECJ. Thus, "*general principles might be forming a new pocket of resistance for national courts*".[475] By contrast, it is worth remarking that the *Cour de Cassation* and the lower administrative courts, by not applying a strict dichotomy between the two banks of the law, have been much more flexible. As seen previously, this approach ensures stronger protection for individual rights (higher law argument) and stricter respect for legal certainty (coherence argument).

[471] Calmes, *supra n.422, see also* of the same author, "Du principe de la confiance légitime en droits allemand, communautaire et Français", REDP-ERPL, 2002, pp.1249-1265. at p.1261. The terminology is similar to Legrand's terminology qualifying the spill-over of EC remedies in UK of epidemiological process.

[472] Delamarre and Calmes, *supra n.470 and 422.*

[473] Harlow, "Voices of Differences in a Plural Community," in Beaumont, Lyons and Walker, *Convergence and Divergence in European Public Law*, 2002, pp.199-224. The author distinguishes between horizontal and vertical convergence. Vertical convergence "draws on the doctrine of precedent to impose common principles", *e.g.* member state liability. Horizontal convergence is related to EC principles creating distortion within the existing standard in domestic law.

[474] Legrand, "Public Law, Europeanisation, and Convergence: Can Comparatists Contribute?", in Beaumont, Lyons and Walker, *Convergence and Divergence in European Public Law,*2002, pp.225-256, *see also* Legrand, "The Impossibility of Legal Transplants", MJ 1997, at pp. 111 *et seq.*

[475] Boyron, *supra n.318,* at p.178. This statement was used to describe the situation within the UK courts.

CHAPTER 9. IMPACT OF THE GENERAL PRINCIPLES IN SWEDISH PUBLIC LAW

This Chapter demonstrates the impact of the general principles of Community law on Swedish public law.[476] Already in 1995, Vogel had foreseen the impact of the general principles within the Swedish administrative legal order.[477] More recently, a monograph stressed the importance of the general principles of Community law when applying administrative law.[478] Here, it will be seen that three general principles have substantially influenced domestic public law, i.e. effective judicial protection, proportionality and legal certainty (non-retroactivity and legitimate expectations). The influence is not only limited to Community law matters, but also spills over into purely internal matters.

Though some principles referred to by the Court of Justice may be said to be explicitly enshrined in the Swedish Constitution - the Swedish Constitution contains an explicit provision forbidding retroactive criminal law and tax law – and some principles have played an important role in Swedish jurisprudence even before 1995, one will stress, however, that their importance has recently increased since the accession of Sweden to the European Union. Notably, the domestic jurisdictions have explicitly based their judgments on principles elaborated by the European Court of Justice. The Chapter attempts to analyze the rational behind the impact. In other words, can it be said that the general principles offer a higher standard of protection for individuals than Swedish law?[479]

In this respect, the Swedish system is of particular interest, since it may be argued that it reflects a certain continuity and never has allowed the complete reception of another legal system.[480] To put it differently, the domestic legal order appears, to a certain extent, like a "virgin system" and offers noteworthy particularities, e.g. the principles are not used abundantly as a source of law, the extensive role of central administrative agencies, the importance of transparency and the existence of a non-conflicting system that leads to a general avoidance of

[476] *See e.g.,* Schäder, "General Principles of Law in Swedish Law", in Bernitz and Nergelius, 2000, pp. 213-216, Holmgren, Paju and Person, "The Duties under Article 10-Experiences from Swedish Courts and Authorities", FIDE XIX Congress Helsinki, pp. 323-343.

[477] Vogel, "Förvaltningslagen, EG:s Förvaltningsrätt och EG:s Allmänna Rättsprinciper", FT 1995, pp. 249-258.

[478] Nergelius, "Förvaltningsprocess, normprövning och Europarätt", Norstedts Juridik, 2000.

[479] Ragnemalm, "Är den europeiska förvaltningsrätten bättre en vår?, FT 2000, pp. 135-144, at p. 135.

[480] Bernitz, "Swedish Legal Development in a Comparative Perspective", in *European Law in Sweden – Its Implementation and Role in Market Consumer Law*, Juridiska Fakulteten, Stockholm, 2002, pp. 15-20, at p. 15. The author (at p. 19) stressed that Swedish law has been influenced, to a certain extent, by of Roman-German law (17th), French Law (19th), German law (end 19th beginning 20th). The Swedish legal order enters within the Nordic legal systems that may be attached to European continental law.

judicial review.[481] At first glance, this national system contrasts with the protection of individual rights in EC law that is based on judicial review and the extensive use of general principles of Community law. Moreover, it is well known that the general principles and EC administrative law, in general, have strongly been influenced by German and French administrative law.[482] Consequently, the analysis of the reception of general principles of Community law (and its general principles) in the Swedish legal order offers a fascinating field of study. One may presume that the general principles will profoundly affect the domestic system of judicial review that is traditionally perceived as a weak system. It will be highlighted that the last ten years have been the seed of drastic changes.

This Chapter 9 is divided into three sections. First, it will assess the scope of the so-called traditional review, i.e. review before 1995. Then, it will demonstrate that the accession to the ECHR and EU has had a strong effect on judicial review and that preliminary rulings have permitted the general principles to have impact on the national legal order in Community law matters. Second, it will focus on the influence of the principle of proportionality in the practice of the domestic courts. This section will define the scope and significance of this principle. Also, it will analyze the dissemination of the principle of proportionality within the jurisprudence with the help of both EC and ECHR law, concentrating on a particular case study: the *Barsebäck* case that had serious implications in the context of Community law. Third, it will determine the impact of other general principles on Swedish public law, i.e. effective judicial protection and legal certainty (non-retroactivity and legitimate expectations). It will be seen that the impact is not only limited to Community law matters but also extends to purely internal situations.

9.1. TRADITIONAL REVIEW AND EVOLUTION

This section will assess the scope of the so-called traditional review. Then, it will demonstrate that the accession to the ECHR and EU has had a strong effect on judicial review and that the preliminary ruling procedure has permitted the general principles to influence the national legal order in Community law matters.

9.1.1. Constitution and Limited Review

In Sweden, the Constitution is formed by four fundamental laws (*grundlagar*),[483] i.e the Instrument of Governments (1974), the Act of Succession (1810), the Freedom

[481] *See* Schäder and Melin, "European Union Law and National Constitutions", FIDE XX London, pp. 387-404, at p. 391.
[482] *Supra., Part 1 Chapter 1.1.1.*
[483] These fundamental laws are of a superior nature. This is explicitly stated in the introductory chapter of the Instrument of Government "the fundamental laws of the Realm". Also, their adoption and amendments procedure requires similar rules. As to the amendment, the Parliament must pass two identical resolutions in different sessions separated by an election. Furthermore, a constitutional referendum may be held, the effect of which is binding if it goes against the amendment.

of the Press Act (1949) and the Fundamental Law on Freedom of Expression (1991). The Instrument of Government contains provisions regarding the enumeration of basic rights (Chapter 1 contains a part on economic, social and cultural rights, Chapter 2 enumerates the basic rights and makes reference to the freedom of the Press Act and the Fundamental Law on Freedom of Expression) and provisions for the exercise of public power and for the separation of power between the Parliament (the *Riksdag*), the Cabinet, the courts, public authorities and local government. The Act of Succession regulates the line of inheritance of the throne. The Freedom of the Press Act protects the right to publication and the right to access to official documents for citizens. Finally, the Fundamental Law on Freedom of Expression applies to mass media.

As to the Instrument of Governments or *Regeringsformen* (RF), Chapter 1 Article 1 states that "[a]ll public power in Sweden emanates from the people. Swedish democracy is founded on the freedom of opinion and on universal and equal suffrage. It shall be realized through a representative parliamentary polity and through local self-government. Public power shall be exercised under the laws". This provision points out the importance of parliamentary sovereignty. It may be said, however, that the principle of sovereignty of the people is counterbalanced by the principle of legality / rule of law (in that public power shall be exercised under the laws). This delicate balance between the sovereignty of parliament, on the one hand, and the rule of law, on the other, has traditionally been struck in favour of the former.[484]

Interestingly, it appears that the institutional system is based on a certain avoidance or reluctance to resort to judicial review. Two types of elements point toward this conclusion. First, this assertion is confirmed by elements linked to the institutional systems, e.g. agency systems (limiting the appeal), ombudsman (limiting the direct conflicts before a court) and the *Lagrådet* (a priori constitutional control). As to the latter, it is worth mentioning that a significant constitutional control is accomplished by this specific authority, the *Lagrådet* (Law Council). This Council is comprised of Judges from the Supreme Court and the Supreme Administrative Court. The task of the Law Council is to examine the draft legislation submitted by the government to the parliament. The main task of the Law Council is to determine whether a draft is compatible with fundamental laws. Notably, the views are of an advisory nature, and are not binding on the government or Parliament. Nevertheless, it ought to be mentioned that its advisory opinions are generally followed.[485]

Second, the judicial review system *per se* appears to be constrained. Several traits verify this allegation. Thus, it was only in 1974 that the Instrument of

[484] Schäder and Melin, "European Union Law and National Constitutions", The Swedish National Report, FIDE XX Congress.

[485] If the government takes a different position, it will often meet problems in the parliament. By tradition, the work of the Law Council has been very much focused on the relation between draft legislation and the Swedish constitution. However, examining whether a proposal is in line with Community law has become increasingly important.

Governments contained a Bill of Rights (Chapter 2).[486] This unwillingness to impose an explicit constitutional control on the powers of the *Riksdag* (Parliament) demonstrates, in my view, the reluctance towards judicial review of political decisions. Furthermore, it is of interest to note that the Swedish judicial system has no special constitutional court. Consequently, judicial review is the task of the ordinary and administrative courts, who may set aside any provision which is in conflict with constitutional law or another superior statute.[487] Notably, if the provision has been approved by the Parliament or the government, it may be set aside only if the conflict is manifest. However, the prerequisite that the conflict shall be manifest does not apply to cases where Community law is at issue. In other words, Community law will always take precedence over Swedish domestic law.[488]

The Swedish traditional stance, of limited judicial review, is reflected in the Constitution (11: 14 RF) by a provision worded as follows: "If a court, or any other public organ, considers that a provision is in conflict with a provision of a fundamental law or with a provision of any other superior statute, or that the procedure prescribed has been set aside in any important respect when the provision was inaugurated, then such a provision may not be applied. However, if the provision has been approved by the Riksdag or by the Cabinet, the provision may be set aside only if the inaccuracy (error) is manifest".[489] As said previously, the limitations regarding the power of the court to set aside legislation as unconstitutional do not, however, apply in relation to the Community law.

Finally, it may be said that the traditional view as to parliamentary sovereignty and limited judicial review has subsequently been under attack by the process of Europeanization or Europeafication. In recent years, there has been a marked shift in the traditional views favouring parliamentary sovereignty and judicial restraint. This tendency may be attributed to the Swedish membership of the EU and to the incorporation into national law of the European Convention on Human Rights. It is worth analyzing, now, in more detail the impact of the ECHR and EU accession on the Swedish system of review. One of the main questions at stake is whether or not the process of Europeanization has had an influence on the domestic system of judicial review and favours an extension of the court's review powers.

9.1.2. The Evolution: ECHR and EU Accession

As to the ECHR, it is worth noticing that this Convention was incorporated on 1 January 1995 in the domestic legal order, i.e. the same day that Sweden became a Member of the European Union. A statute was passed by the Parliament and a new provision was added to the constitution (RF). According to 2:23 RF, "*no act of law or other prescription may be promulgated which contravenes Sweden's*

[486] with successive amendments in 1976 and 1979.
[487] *Infra*, 11:14 RF.
[488] Schäder and Melin*, supra n.484*.
[489] In Sweden, the official way to refer to the Constitution would be 11 kap. 14§ RF. For the sake of simplicity this research will refer to 11:14 RF.

undertakings under the European Convention for the protection of Human Rights and Fundamental freedoms". This provision is intended to point out the special status of the convention and provides a basis for the exercise of the courts power to review legislation under 11:14 RF. However, as seen previously, the review is limited, since national law must be found to conflict obviously with the ECHR.[490] Indeed, the provision decided by the Parliament or by the government may be set aside only if the inaccuracy is obvious and apparent (manifest). Arguably, the idea behind this provision is to avoid a conflict and promote the use of the principle of interpretation in conformity.[491] According to Bernitz, the chosen legislative technique has resulted in a half measure.[492] The author has stressed that it demonstrates a clear lack of interest for an effective monitoring of the ECHR by the domestic courts and criticized the fact that human rights review offers a stronger protection under EC law and the general principles of Community law.[493]

As to the EU accession, a statute was necessary to incorporate Community law into national law. Consequently, the Swedish Parliament passed the EU Act on conditions of accession, annexed to the Treaty on Accession. According to section 2 of the Act, "[t]hose Treaties and other instruments enumerated in section 4 as well as those acts, treaties and other decisions that, before the Swedish accession to the European Union, have been taken or entered into by the European communities are applicable in this country with the effects following from these Treaties and other instruments".[494] To summarize, this provision pinpoints the validity of the *acquis communautaire* in the national legal order.

At the time of the accession, one of the main questions at issue was to consider whether the accession should modify the form of government. In other words, should the Swedish Constitution be amended? According to the Government Bill on Swedish accession, "[t]he co-operation within the EC is in some respects supra-national, e.g. by decisions binding on the Member States and private subjects being taken by majority vote and by Community law taking precedence over national law. But still it is basically a question of co-operation between sovereign States. It is the Member States – not the EC institutions – that decide in the union how far the cooperation shall extend and what competence the EC institutions shall be given".[495] Following this line of reasoning, no amendment to the Constitution concerning the

[490] Government Bill 1993/94:117, at pp. 53 *et seq.*

[491] Bernitz, "Sweden and the European Union –On Sweden's Implementation and Application of European Law", in Stockholm, 2002, pp.21-53, at p.49.

[492] Bernitz, "The Incorporation of the European Human Rights Convention into Swedish Law – a Half Measure", in Stockholm, 2002, pp.81-94, at p.93.

[493] *Ibid.,* at p.94. EU Act section 3. "The European Communities will after the Swedish accession to the European Union be able to take decisions that will be applicable, to the extent, and with the effects following from the Treaties and other instruments enumerated in Section 4". Section 4 enumerates the treaties concluded by the EC.

[494] *See* Bernitz, "Sweden and the European Union: On Sweden's Implementation and Application of European Law", CMLRev.2001, pp. 903-904.

[495] Government Bill, 1994/1995:19 part 1, at p.524 (proposing the constitutional amendment).

fundamental characteristics of the Swedish form of government was deemed to be necessary before the accession.[496] This reasoning appears to consider that there is no need of amending the basic features of the Swedish form of government, since some areas of competence are still intergovernmental (second and third pillars).

Also, it is worth remarking that the national constitutional provision until 2002 did not mention the European Union, but merely the European Communities. This drafting illustrates, once again, the view that the second and third pillars are foreseen as intergovernmental and not supranational. During the negotiations of the Amsterdam Treaty, the development regarding the third pillars, e.g. qualified majority vote, consultation of the European parliament competence of the ECJ as to third pillar cases, and led to the reopening of the debate.[497] The main question was to consider whether the decision-making powers should be transferred only to the Communities. The Swedish government took the same line of reasoning and did not consider that a referendum was compulsory.[498] It is stated in the Government Bill that, "[t]he Treaty does not entail any dramatic changes, but it contains important step forward for the European co-operation in a direction that essentially corresponds to the Swedish interests. The Treaty does not change the character of the cooperation in a major way. The EU remains the same kind of organization as it was when Sweden acceded on 1 January 1995".[499] In 2002, however, 10:5 of the Instrument of Government was changed to allow such transfer to "cooperation within the European Union".

However, the protection of fundamental rights appears to be more problematic, since several provisions in secondary Community law were considered to limit certain of the fundamental rights enshrined in the Chapter 2 of the Instrument of

[496] Schäder and Melin, *supra n.481*, "[t]he fact that, according to the first article of the Constitution, cited above, 'all public power emanates from the people' does not – it was stated in the preparatory works on constitutional amendments to make a Swedish accession to the EU possible – hinder the people from instructing its representatives, the Riksdag, to cooperate with other peoples and to let decisions taken within such a cooperation bind the participating states and their peoples. In other words, when the Riksdag decides to transfer decision-making powers to the Communities and the Swedish Cabinet – accountable to the Riksdag – participates in the use of those powers, the execution of public power may still be said to emanate from the Swedish people. On the other hand, it follows from that very same principle that there is a limit to the possible development of the European cooperation. Thus, it would not be in conformity with the initial provision of the Constitution to let the cooperation develop into the creation of a federal state, the powers of which derive their legitimacy from a mandate given by a European people in common elections. It could safely be assumed that such a development would require extensive changes in the constitutions of all the Member States".

[497] The transfer from the supranational elements of the third pillar to the first pillar was deemed to be a satisfactory solution.

[498] The position was the same for the Nice Treaty.

[499] Government Bill 1997/98:58, at p.32.

Government (Bill of Rights).[500] By consequence, it was necessary to ensure that the accession to the European Community will continue to uphold a protection of human rights equivalent to the level of Swedish constitutional law and the ECHR. These considerations resulted in an amendment to the provision of the Constitution making a transfer of competence to the Communities possible (10:5 RF). This Constitutional amendment entered into force 1 January 1995 and stated that,

> "[t]he Parliament may transfer a right of decision-making to the European Communities *so long as the Communities have protection for rights and freedoms* corresponding to the protection provided under this Instrument of Government and the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Parliament shall authorize such transfer in a decision which has the support of at least three quarters of those voting. The Parliament may also take such a decision according to the procedure prescribed for the enactment of fundamental law".[501]

This provision concerned the transfer of decision-making powers to the European Communities.[502] There is only one condition for such a transfer, i.e. the upholding of a sufficient protection of fundamental rights and freedoms in Community law. Arguably, the provision made a reference to the German "*Solange*" doctrine ("as long as").[503] In that sense it may even be said that the *Solange* doctrine constituted a part of the written Swedish constitution. Moreover, one may stress that it is the unique provision regarding the conditions and limits to further steps of integration. It is noteworthy that this provision does not contain any limits as to the type or scope of powers that may be transferred.[504] As put by Bernitz, *"the Swedish membership is based on the constitutional prerequisite that the EC will continue to offer a protection of human rights corresponding to the level of Swedish constitutional law and European Convention protection"*.[505] Then, it must be assumed, that the *Riksdag*, at the time of Swedish accession and later Treaty revisions, considered Community law to fulfill that requirement.

It is worth remarking again that this provision has been modified. The new 10:5 RF states that,

> "[t]he Riksdag may transfer a right of decision-making which does not affect the principles of the form of government within the framework of European Union cooperation. Such transfer presupposes that protection for rights and freedoms in the field of cooperation to which the transfer relates corresponds to that afforded under

[500] Government Bill 1993/94: 114, at pp.17 *et seq. See also* Constitutional Committee report 1994/94 KU21, at p.27. A conflict may arise in relation to the freedom of expression and public access to official documents.
[501] Italics added.
[502] It is not explicitly stated that this EC law takes precedence over the constitution.
[503] *Supra Chapter 1.3.3.*
[504] Bernitz, "Sweden and the European Union – On Sweden's Implementation and Application of European law", in Stockholm 2002, pp.21-53, at p.30.
[505] *Ibid.*

> this Instrument of Government and the European Convention for the Protection of Human Rights and Fundamental Freedoms".[506]

Notably, the new version is more precise, mentions explicitly the European Union, and though the equivalence of the standard of human right protection is still stressed, it does not contain anymore a reference to the *Solange* doctrine. This provision prompts two comments. First, the non-reference to the *Solange* doctrine may mark a certain recognition of the fundamental rights protection in the EU. Second, it may be said that the Swedish memberhip is still based on the constitutional prerequisite that the EU will continue to offer a protection of human rights corresponding to the level of Swedish constitutional law and ECHR.

Finally, one may wonder about a risk of conflict between European law and Swedish constitutional law. In that respect, freedom of the press and public access to official documents may constitute an area of conflict. In effect, it is well known that Sweden attaches a high significance to this area which has acquired a constitutional status through its codification in special fundamental laws. These fundamental laws do not fall explicitly under the scope of RF 10:5. However, the principles of the freedom of expression and access to documents are to be found in 2:1 RF.[507] In the end, the risk for a conflict is indeed very low in practice, since the ordinary and administrative courts must interpret the national legislation in conformity with Community law.[508] The domestic courts are under a duty to interpret and apply Swedish law in compliance with Community law. This duty of loyalty stems from Article 10 EC.[509] Besides, the development within EC law has clearly gone towards increased transparency since 1995, as seen above in Chapter 5.3. It is, now, time to look into detail at the extent of the national courts powers in relation to Community law.

9.1.3. The Influence of the General Principles through Preliminary Rulings

As seen above, constitutional review is limited, since the national courts can only refuse to apply government ordinances and acts passed by parliament, if they manifestly conflict with the Constitution. However, the scope of judicial review is more extended for the national courts in the context of Community law. In that respect, the government bill on accession stated that "Swedish courts and authorities, according to the prevalent Community law, are obliged to, in a case of conflict of norms, disregard the Swedish provision being in contradiction with Community law, since the Swedish provision is decided by an instance that no longer has competence to decide the norm".[510] Hence, it appears that the domestic jurisdictions are not only under a duty to interpret Community law, but also to give

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[506] "The Constitution of Sweden: The Fundamental Laws and the Riksdag Act", 2003, Sveriges Riksdag, at pp.83-84.
[507] Bernitz, CMLRev.2001*, supra n.491*, at pp.916-917.
[508] *Ibid.,* at p.913.
[509] Paju *et al*, *supra n.476.*
[510] Government Bill 1994/1995:114, at p. 27.

priority to Community law over a national provision. It may be stated that the accession of the Community increased the importance of the judiciary and the level of judicial protection in the Swedish legal order.

In addition, it may be noted that judicial review, in recent years, to a larger extent has been carried out, mostly by the administrative courts, with regard to general principles of law, e.g. the principle of proportionality, effective judicial protection and non-retroactivity. The impact of these principles must be studied carefully, since they may directly influence the legal order through the *prism* of Community law. Indeed, there is an obligation to respect the general principles in matters falling within the scope of Community law. Before analyzing the impact of the principles on the Swedish public law, it appears of interest to scrutinize the preliminary rulings made by the national courts to the ECJ. These preliminary rulings often contain interesting questions as to the application of the general principles of Community law.

From 1995 until February 2005, 39 preliminary rulings have been made to the ECJ.[511] It is worth remarking that it is mostly administrative courts and more particularly, the Supreme Administrative Court (*Regeringsrätten*) that have referred questions to the European Court of Justice. By contrast, the Supreme Court (*Högsta Domstolen*) referred only twice (1995-2001) to the Luxembourg court in, *Data Delecta* and *Gharehveran*. Interestingly, the lower ordinary courts (*Tingsrätten* [*Franzen/Ulf Hammarsten* and/ *Krister Hanner*], *Hovrätten* [*Björnekulla/Lindqvist*] have been more active than the higher instances. The doctrine has criticized the Supreme Court and the Supreme Administrative Court for their restraint in making preliminary rulings and the extensive use of the doctrine of *acte clair*. As to the latter, the ECJ stated in *CILFIT* that a national court against whose decisions there is no judicial remedy under national law is required, where a question of Community law is raised before it, to bring the matter before the Court of Justice, unless the question raised is irrelevant or has already been interpreted by the Court or is so obvious as to leave no scope for reasonable doubts.[512]

As stated before, it may be said that the general principles of Community law make their way into national law through preliminary rulings. In Sweden, the preliminary rulings have dealt mainly with free movement,[513] social provisions,[514]

[511] Between 1995 and 1998, Swedish courts have requested preliminary rulings by the European Court of Justice in six cases in 1995, four cases in 1996, seven cases in 1997 and six cases in 1998. The corresponding figures with respect to Denmark are eight, four, seven, seven and, as far as Finland is concerned, zero, three, six, two. The figures concerning France for the years 1995-1998 are 43, 24, 10 and 16.

[512] Case 283/81 *CILFIT* [1982] ECR 3415. *See, Volvo* case, NJA 1998 p. 474. This case concerns a car repair shop which was forbidden to use the trademark Volvo when advertising. It was argued that, since the domestic legislation on trademark is based upon a Community directive, the Supreme Court ought to have requested a preliminary ruling by the European Court of Justice before deciding the case. *See also*, RÅ 1999, ref. 96.

[513] C-329/95 *VAG Sverige* [1997] ECR I-2675, Case C-34/95 and 36/95 *De Agostini* [1997] ECR I- 3843, Case C-189/95 *Henry Franzén* [1997] ECR I-5909, Case C-162/97 *Gunnar Nilsson* [1998] ECR I-7477, Case C-241/97 *Försäkringsaktiebolaget Skandia* [1999] ECR I-

tax law, [515] agriculture[516] and non-discrimination.[517] The case-law may contain precious guidelines as to the application of the general principles. Previously, it has been demonstrated that non-discrimination and proportionality are clearly interrelated.[518] What is more, the jurisprudence regarding free movement may be said to be strongly related to the principle of proportionality. Indeed, it is well-known that the national derogations from the free movement provisions must respect the principle of proportionality. In that regard, the ECJ ruled in *Paranova Läkemedel* that,

> "it is for the national authorities responsible for the operation of the legislation governing the production and marketing of medicinal products - legislation which, as is made clear in the first recital of Directive 65/65, has as its primary objective the safeguarding of public health - to ensure that it is fully complied with. Nevertheless, the principle of proportionality, which is the basis of the last sentence of Article 30 EC, requires that the power of the Member States to prohibit imports of products from other Member States be restricted to what is necessary in order to achieve the aims concerning the protection of health that are legitimately pursued. Thus, national legislation or practice cannot benefit from the derogation laid down in Article 30 EC when the health and life of humans can be protected equally effectively by measures less restrictive of intra-Community trade (*Ferring*, paragraph 34)".[519]

It appears from the case-law that the national authorities and courts must ensure the respect of the general principles of Community law. It is of interest to look closely at three preliminary rulings made by Swedish courts (*Data Delecta, Abrahamsson* and *Lindqvist*) in order to assess the extent of the obligation. This jurisprudence illustrates the use of the general principle of proportionality in various areas, i.e. non-discrimination, positive discrimination (written general principle) and fundamental rights (unwritten general principle).

First, in *Data Delecta*, in a preliminary reference from the *Högsta Domstolen* in Sweden, a company registered in the UK challenged the rules of domestic civil

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1879, C-223/98 *Adidas AG* [1999] ECR I-7081*,* C-200/98 *X AB and Y* AB [1999] ECR I-8261, C-473/98 *Toolex Alpha AB* [2000] ECR I-5681, C-15/01 *Paranova Läkemedel* [2003] ECR I-4175 (RR), C-422/01 *Försäkringsaktiebolaget Skandia* [2003] ECR I-6817 (RR), C-462/01 *Hammarsten* [2003] ECR I-781 (TR).

[514] C-387/96 *Anders Sjöberg* [1998] ECR I-1225, C-275/96 *Anne Kuusijärvi* [1998] ECR I-3419, C-321/97 *Andersson and Andersson* [1999] ECR I-3551, C-407/98 *Abrahamsson and Anderson* [2000] ECR I-5539, C-441/99 *Soghra Gharehveran* [2001] ECR 7687.

[515] C-134/97 *Viktoria Film* [1998] ECR I-7023, C-346/97 *Braathens Sverige AB* [1999] ECR I-3419, C-150/99 *Lindöpark AB* [2001] ECR I-493, C-240/99 *Försäkringsaktiebolaget Skandia* [2001] ECR I-1951 (RR), C-436/00 X and Y [2002] ECR I-10829 (RR).

[516] C-27/96 *Danisco sugar AB* [1997] ECR I-6653, C-292/97 *Kjell Karlsson* [2000] ECR I-2737, C-131/00 *Ingemar Nilsson* [2001] ECR I-10165.

[517] Case C-43/95 *Data Delecta* [1996] ECR I-4661, C-292/97 *Kjell Karlsson* [2000] ECR I-2737, C-407/98 *Abrahamsson and Anderson* [2000] ECR I-5539.

[518] *Ibid.*

[519] *Paranova Läkemedel*, *supra n.513,* para. 24.

procedure as discriminatory. Indeed, according to the Swedish legislation, a non-national legal person had to provide security for costs so as to bring proceedings against a company or one of its nationals. The Swedish government argued that such a disposition had the aim of preventing a foreign plaintiff from being able to bring legal proceedings without running any financial risk in the event that he should lose the case.[520] The Court of Justice did not accept the argument[521] and ruled that a provision which compels legal persons established in another Member State to furnish security for costs falls within the scope of Community law. [522] Consequently, the national rules relating to civil procedure must respect the general principle of non-discrimination.[523] The ECJ found that the discriminatory national legislation was not justified by proportionate measures. It is worth noticing that the *Högsta Domstolen* did not follow the reasoning of the ECJ.[524]

Second, in the *Abrahamsson* case,[525] the national court attempted to determine whether Article 2(1) and (4) of the Directive preclude the Swedish legislation from positive discrimination in recruitment in favour of candidates of the under-represented sex.[526]

The ECJ remarked that the aim of the Swedish legislation was to promote substantive equality pursuant to Article 141(4) EC.[527] Accordingly, the domestic law, used as a basis during the selection procedure, was not based on clear and unambiguous criteria in order to prevent or compensate for disadvantages in the professional career of members of the under-represented sex.[528] Indeed, the Court

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[520] *Ibid., Data Delecta*, para. 18.
[521] *Ibid.* para. 20.
[522] *Ibid.* paras. 11-12, "it is settled case-law that, whilst, in the absence of Community legislation, it is for each Member State's legal system to lay down the detailed procedural rules governing legal proceedings for fully safeguarding the rights which individuals derive from Community law, that law nevertheless imposes limits on that competence (Joined Cases C-6/90 and C-9/90 Francovich and Others [1991] ECR I-5357, paragraph 42). Such legislative provisions may not discriminate against persons to whom Community law gives the right to equal treatment or restrict the fundamental freedoms guaranteed by Community law (Case 186/87 Cowan v Trésor Public [1989] ECR 195, paragraph 19)".
[523] *Ibid., Data Delecta*, para 15, "it must therefore be held that a rule of domestic civil procedure, such as the one at issue in the main proceedings, falls within the scope of the Treaty within the meaning of the first paragraph of Article 6 and is subject to the general principle of non-discrimination laid down by that article in so far as it has an effect, even though indirect, on trade in goods and services between Member States. Such an effect is liable to arise in particular where security for costs is required where proceedings are brought to recover payment for the supply of goods".
[524] NJA 1996. It might be interesting to analyse such a decision in the light of the recent *Köbler* case.
[525] C-407/98 *Katarina Abrahamsson, Leif Anderson and Elisabet Fogelqvist* [2000] ECR I-5539.
[526] This case has been previously discussed in detail. For a full account of the facts, *see* Part 2 *Chapter 4.2.3.*
[527] *Abrahamsson*, *supra n.525*, para. 48.
[528] *Ibid.,* para. 50.

emphasized that *"the legislation at issue in the main proceedings automatically grants preference to candidates belonging to the under-represented sex, provided that they are sufficiently qualified, subject only to the proviso that the difference between the merits of the candidates of each sex is not so great as to result in a breach of the requirement of objectivity in making appointments*".[529] Hence, this lack of objectivity regarding the examination of the candidates' specific situations makes it difficult to consider the selection permitted under the wording of Article 2(4) of the Directive. Consequently, the Court considered it necessary to assess whether the legislation could be justified by Article 141(4). It highlighted that the method of selection was disproportionate to the aim pursued. Finally, the ECJ concluded that Article 141(4) and the Directive precluded national legislation of the kind at issue.[530]

Third, in *Lindqvist*,[531] a case concerning the implementation of a Directive by Swedish national legislation (PUL)[532] and the subsequent conflict between two fundamental rights, i.e. the right to freedom of expression versus the right to privacy,[533] the Göta Court of Appeal referred to the Court for a preliminary ruling under Article 234 EC several questions concerning the interpretation of Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data.[534] Mrs Lindqvist was charged with breaching the Swedish legislation on the protection of personal data for publishing, without notification to the national administrative authority, on her internet site personal data on a number of people working with her on a voluntary basis in a parish of the Protestant Church. In the sixth question, the national courts asked whether the provisions of the Directive may be regarded as bringing about a restriction which conflicts with the general principles of freedom of expression or other freedoms and rights, which are applicable within the EU and are enshrined *inter alia* in Article 10 of the European Convention on the Protection of Human Rights and Fundamental Freedoms.

Mrs Lindqvist argued that there was no breach of the right to respect of private life and that the requirements of prior consent and prior notification of a supervisory authority and a principle of prohibiting processing of personal data of a sensitive nature laid down in the Directive and the PUL were disproportionate and contrary to

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[529] *Ibid.,* para. 52.
[530] *Ibid*., paras. 53-56.
[531] C-101/01 *Bodil Lindqvist* [2004] 1 CMLR 20.
[532] SFS 1998:204, Swedish law on personal data (PUL/*personuppgiftslagen*).
[533] *See* the argument of the Netherlands government, para. 76. Accordingly, "the Netherlands Government points out that both freedom of expression and the right to respect for private life are among the general principles of law for which the Court ensures respect and that the ECHR does not establish any hierarchy between the various fundamental rights. It therefore considers that the national court must endeavour to balance the various fundamental rights at issue by taking account of the circumstances of the individual case".
[534] The Directive 95/46 is intended, according to the terms of Article 1(1), to protect the right to privacy regarding the processing of personal data. Directive 95/46 was implemented in Swedish law by the Personuppgiftslag.

the general principle of freedom of expression. The Courts stressed the flexibility given to the Member States in implementing the Directive.[535] The national legislation implementing the Directive must respect the fundamental rights.[536] Subsequently, it is for the authorities and courts to interpret their national law in a manner consistent with secondary Community law and also to make sure that they do not rely on an interpretation of it which would be in conflict with the fundamental rights protected by the Community legal order or with the other general principles of Community law, e.g. the principle of proportionality.[537] In that sense, sanctions must also respect the principle of proportionality.[538]

The Court concluded that the Directive did not conflict with the general principles of freedom of expression or other freedoms and rights,[539] and stressed, once again, that it is for the national authorities and courts to ensure a fair balance between the rights and interests at issue. More precisely, in the present case, the domestic court must consider all the circumstances of the case before it, in particular the duration of the breach of the rules and the importance, for the persons concerned, of the protection of the data disclosed.[540] In other words, the national authorities must ensure the respect of the EC fundamental rights.[541] *In casu,* they must balance

[535] *Lindqvist, supra n.531*, para. 83, "as regards Directive 95/46 itself, its provisions are necessarily relatively general since it has to be applied to a large number of very different situations. Contrary to Mrs Lindqvist's contentions, the directive quite properly includes rules with a degree of flexibility and, in many instances, leaves to the Member States the task of deciding the details or choosing between options".

[536] *Ibid.,* paras. 85-86, "thus, it is, rather, at the stage of the application at national level of the legislation implementing Directive 95/46 in individual cases that a balance must be found between the rights and interests involved . . . In that context, fundamental rights have a particular importance, as demonstrated by the case in the main proceedings, in which, in essence, Mrs Lindqvist's freedom of expression in her work preparing people for Communion and her freedom to carry out activities contributing to religious life have to be weighed against the protection of the private life of the individuals about whom Mrs Lindqvist has placed data on her internet site".

[537] *Ibid.,* para. 87.

[538] *Ibid.,* para. 88, "[w]hilst it is true that the protection of private life requires the application of effective sanctions against people processing personal data in ways inconsistent with Directive 95/46, such sanctions must always respect the principle of proportionality".

[539] *Ibid.,* para 90, "[t]he answer to the sixth question must therefore be that the provisions of Directive 95/46 do not, in themselves, bring about a restriction which conflicts with the general principles of freedom of expression or other freedoms and rights, which are applicable within the European Union and are enshrined inter alia in Article 10 of the ECHR . . ."

[540] *Ibid.,* para. 89, "[i]t is for the referring court to take account, in accordance with the principle of proportionality, of all the circumstances of the case before it, in particular the duration of the breach of the rules and the importance, for the persons concerned, of the protection of the data disclosed".

[541] *Ibid.,* "[i]t is for *the national authorities and courts* responsible *for applying the national legislation implementing Directive 95/46* to ensure a fair balance between the rights and interests in question, including the fundamental rights protected by the Community legal order".

the right to freedom of expression with the right to privacy and take account of the guidelines given by the ECJ.

To conclude, it results from these three cases an obligation to respect the general principles in matters falling within the scope of Community law. Apparently, these general principles are both written (*Data Delecta/Abrahamsson*) and unwritten (*Lindqvist*). As seen above, they may take the form of non-discrimination or fundamental rights (freedom of expression, right to property). It is worth noticing that the proportionality analysis appears as being the common denominator. This analysis must be undertaken by the national authorities and courts.[542] The ECJ may offer guidelines to the domestic courts in the wake of a preliminary ruling. It may be said that it appears necessary to give guidelines to the national courts for a proper/uniform application of the general principles. Ultimately, the ECJ may give an answer. *In fine*, the national courts must apply and respect the general principles in matters falling within the scope of Community law (implementation of community law [*Wachauf*] and presence of the Community law element [*ERT*]). This leads to the application of the test of proportionality in order to ascertain whether the principle at issue has been infringed. Both the obligation to respect the general principle and the subsequent application of the test of proportionality lead to an influence of the general principles within the national law. It is now necessary to study the impact of the principle of proportionality on national law in more detail.

9.2. PROPORTIONALITY

First, this section will analyze the significance of the EC principle of proportionality for the Swedish legal order. Second, it will describe the evolution of the principle of proportionality within the case law but also the legislation. Third, it will focus on the famous *Barsebäck* case and its implications as to judicial review.

9.2.1 Significance of the Principle of Proportionality

It may be said that the principle of proportionality constitutes the keystone of the general principles of Community law. As seen previously, the use of the principle of proportionality extends to the principle of non-discrimination and all derogatory fundamental rights. Therefore, the study of its impact on the domestic public law of a Member State appears of utmost importance. Several articles and one monograph have analyzed the development of the principles of proportionality in Swedish

[542] *Ibid.,* para. 75. The Swedish Government considers that Directive 95/46 allows the interests at stake to be weighed against each other and freedom of expression and protection of private life to be thereby safeguarded. It adds that only the national court can assess, in the light of the facts of each individual case, whether the restriction on the exercise of the right to freedom of expression entailed by the application of the rules on the protection of the rights of others is proportionate.

public law.[543] This section will focus on the impact of the principle of proportionality within the case-law, but will also take into consideration its codification in various areas. The research is not limited to Community law matters and will demonstrate that the principle spills over to purely internal matters (internal law argument). In this respect, the role of the ECHR will be considered and its interplay with the EC law principle of proportionality will be stressed. The basic aim is to display that the principle increases the judicial protection of the individual (higher law argument).

One of the most complex questions as regards the proportionality is its own definition and relation with a pre-existing national concept. In other words, what can one benefit from the principle of proportionality if it already exists in the domestic legal order? A clear definition of the principle of proportionality may permit one to understand its final purpose and impact on the national legal order. In that sense, a proposition concerning the incorporation of the ECHR in Swedish law stated that the principle of proportionality has been recognized for a long time in Swedish law.[544] However, it may be said that the situation before the accession of Sweden to the EU and the incorporation of the ECHR (January 1995) was quite uncertain.

Indeed, it is difficult to find in practice the application of the principle of proportionality.[545] Nergelius stressed that very few cases before 1995 make references, even indirectly, to the principle of proportionality.[546] One may argue, thus, that the principle of proportionality did not exist or was not recognized in Swedish law before the first of January 1995. Conversely, one may say that the idea or concept of proportionality was already enshrined in the Swedish legal order. In that regard, the Law on Judicial Review *(Rättsprövningslagen)*, which entered into force in 1988, may be said to have led to an intensification of interest concerning the principle of proportionality.[547] Also, proportionality may be found in the Police Law (*Polislagen*) [548] and in the context of interim measures.[549] Moreover, it is worth

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[543] Moëll, *Proportionalitetsprincipen i skatterätten,* Juristförlaget i Lund, 2003, at pp.169-186. The author describes the development of the principle of proportionality in the Swedish legal order. The book focuses on the impact of the principle in tax law.

[544] Prop. 1993/94: 117 p. 39 f.

[545] Nergelius, *supra n.478*, at p. 90. *See,* for the prior existence of the principle of proportionality, Bohlin and Warnling-Nerep, *Förvaltningsrättens grunder*, Norstedts, 2004, at pp. 373-374, Bull, *Mötes och demonstrationsfriheten*, Iustus, 1997, at pp. 486-487.

[546] Nergelius, *Konstitutionellt rättighetsskydd – Svensk rätt i ett komparativt perspektiv*, *Norstedts,* 1996, 19.6, fn 72. Concerning proportionality, referring to a case RÅ 1983 2:5, concerning *reklaminslagen, "Skånepartiets närradiosändningar"*. The prohibition of advertisement did not go beyond what was necessary to preserve the character of the proxy radio programme. The reasoning of the Regeringsrätten might be appraised as a balancing of interests.

[547] Warnling-Nerep, *Rättsprövning and rätten till domstolprövning*, Stockholm 2000, s 174 ff: (*See* also Moëll , *supra*, at p.179). The aim of this legislation was to guarantee that Sweden complies with Article 6 ECHR regarding judicial review of civil rights.

[548] *Polislagen* (1984:387). (PolL 8§).

[549] Bernitz , *supra n.504*, at p. 45.

noticing that Chapter 2 of the Instrument of Government enshrines the concept of proportionality. This is the case notably, in 2:12 RF paragraph 2 and 2:18 RF relating respectively to freedom of expression and expropriation. The former provision states that,

> "[t]he restrictions referred to in paragraph (1) may be imposed only to achieve a purpose acceptable in democratic society. The restrictions may never exceed what is necessary having regard to the purpose which occasioned it, nor may it be carried so far as to constitute a threat to the free formation of opinion as one of the foundations of democracy. No restriction may be imposed solely on grounds of political, religious, cultural or other such opinions".[550]

Though these provisions embody a certain notion of proportionality, they do not enshrine a specific reference to a balancing of interest between the public and private interests at stake. As demonstrated by the Swedish doctrine, the EC principle of proportionality may entail a tripartite test, i.e. suitability, necessity and proportionality *stricto sensu*.[551] This three-pronged test appears to be inspired from German law.[552] The balancing of interests corresponds to the third part of the test of proportionality and may be assessed as offering a higher level of protection.[553] According to Strömberg, the principle of proportionality, under the influence of the ECHR and EC law, has been explicitly recognized in Swedish public law. The author, in the context of administrative law, described the importance of the principle of necessity (principle of least restrictive means) and the balancing between the general and individual interest (principle of proportionality).[554] The three-pronged test may be foreseen in Swedish law as the application of different principles. Notably, a committee in the 1980's proposed to codify the three principles in relation to 2:12 RF (Constitution).[555]

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[550] The rights and freedoms referred to in Chapter 2, Articles 1, 6, 8 and 11 may be restricted by law, they may be restricted by statutory orders in the cases referred to in Chapter 8, Article 7 and in Chapter 8, Article 10. Freedom of assembly and the freedom to demonstrate may similarly be restricted also in the cases referred to in Article 14, second sentence.

[551] Gydal, "Proportionalitetsprincipen, en Europeisk rättsprincip och dess betydelse för svensk rätt", FT 1997, pp.219-230. *See also* Nergelius, *supra n.478*, at pp. 90-91.

[552] Lundblad and Wärnsby, "Proportionalitetsprincipen inom förvaltningsrätten efter Barsebäckdomen", ERT 2000, pp. 209-232.

[553] Gydal, *supra n.551,* at pp. 229-230.

[554] Strömberg, *Allmän Förvaltningsrätt*, Liber, 2003, at p.68, "[o]m ett förvaltningsbeslut eller en annan myndighetsåtgärd är betungande för den enskilde, är det av vikt at nackdelarna för denne står i ett rimligt förhållande till den nytta för det allmänna som åtgärden syftar till och att åtgärden sålunda inte medför uppoffringar för den enskilde än som motiveras av ett starkt allmänt interesse (proportionalitetsprincipen). Vidare är det av vikt att hårdare metoder inte används än som verkligen behövs för uppnående av det avsedda resultatet (behovsprincipen eller det lindrigaste ingreppets princip). Under senare tid har proportionalitetsprincipen *vunnit uttryckligt erkännande* i svensk rättspraxis, troligen under inflyttande av Europadomstolens och EG-domstolens rättstillämpning". (italics added).

[555] Moëll, *supra n.543,* at p. 173*, "[d]en europeiska proportionalitesprincipen kan nog sägas innefatta vad som i svenskt rätt i vissa sammanhang har behandlats som olika principer.*

At the end, it must be strongly emphasized that the concept of proportionality is not synonymous with the EC/ECHR test of proportionality. It is now of interest to look more precisely at the significance of the test in EC law. At first glance, as seen previously, the test of proportionality in German law is composed of three elements, i.e. suitability, necessity and proportionality *sensu stricto*.[556] In the European legal order, the ECJ sometimes examines the legality of an institutional or national measure in the light of this three-pronged test. Arguably, the use of this three-step process entails a higher standard of review than an examination merely based on one or two elements.

9.2.2. Development of the Principle

During the last ten years, the principle of proportionality has been widely recognized in the case-law of the Swedish national courts. Arguably, this is the result of the influence of the ECJ and ECHR jurisprudence. Also, it may be said that the effect of the principle of proportionality on the case law has been the most important in comparison with other general principles of Community law. This is not a surprise, since, as seen previously, the principle of proportionality is a kind of over embracing principle. One must study in detail the impact of proportionality on the jurisprudence. In that sense, the decisions of the Supreme Administrative Court dealing with the principle of proportionality should be deeply analyzed in order to assess the extent of the penetration of the principle into the domestic law.[557]

The first apparition of the EC/ECHR principle of proportionality occurred, already in 1996, in three cases from the Supreme Administrative Court (RÅ 1996, ref, 40, 44, 56) [558] concerning the use of the land *(Miljöbeslut rörande markanvändning)* and its compatibility with the Law on the Protection of the Nature and the Law.[559] In the first case (RÅ 1996, ref 40), a decision was taken as to the extension of a nature reserve from 480 to 488 hectares. This extension encompassed some private buildings. One of the owners claimed that the decision was illegal. The Supreme Administrative Court balanced the individual and the general public interests. One of the main questions was to consider the necessity of the extension in order to create adequate nature reserves. The national court made explicit reference to the principle of proportionality in the ECHR. Finally, the decision was found to be incompatible with the Law on the Protection of the Nature (*naturvårdslagen*). It is worth remarking that the court did not mention the EC principle of

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Detta gäller t.ex. de allmänna rättsgrundsatserna ändamåls-, behovs- och proportionalitetsprinciperna. 1978 års tvångsmedelskommitté framhöll i sitt betänkande att det är dessa tre rättsgrundsatser som man värnar om i 2 kap.12 RF. I kommitténs förslag till en tvångsmedelslag ingick en kodifiering av de tre principerna (SOU 1984:54 s. 77-80)".

[556] *See Part 2 Chapter 4.1.3.* for a comprehensive analysis of the principle of proportionality.

[557] Nergelius, "The Impact of EC law in Swedish National Law- A Cultural Revolution", in Cameron and Simoni (eds.) 1998, pp. 165-182, at p. 179.

[558] *See* Case RÅ 1996 ref 22 (*avsåg försöksodling av främmande växter*).

[559] *Naturvårdslage*n (1964:822).

proportionality. This shortcoming was remedied in the second and third cases dealing also with the use of the land.

Thus, in the second case (RÅ 1996, ref 44), the planning and building act of 1987 prohibited the building of new houses in a zone boarding the sea. A decision was taken by a municipal authority to forbid the construction. The administrative decision was challenged on the ground of the breach of the right to property (RF 2:18). The Supreme Administrative Court recognized that, since the accession of Sweden to the ECHR, the principle of proportionality had to be taken into account. Therefore, any situations involving such a principle should be considered in the circumstances of the case. In this situation, the restrictions imposed were considered not to be proportionate. Similarly, in the third case **(**RÅ 1996, ref 56) the Law on the Protection of the Nature prohibited growing trees in protected areas, and the local authority refused to grant an exception to the general ban.[560] The applicant argued a breach of the right to property enshrined in RF 2:18. The court balanced the various interests at stake and found that the decision was disproportionate. Interestingly, the national jurisdiction made explicit reference to the principle of proportionality. This principle of proportionality is indeed applied in the ECHR case-law relating to the right to property (Article 1 of the First Protocol of the ECHR). RegR also stressed that the principle had gained recognition, since the incorporation of the ECHR in the domestic legal order and the precision added to the right to property in 1995 (RF 2:18).[561]

At the end, it may be noted that the Supreme Administrative Court, in these three cases relating to the right to property, ruled that the decisions of the local authorities encroached the principle of proportionality and that the decisions should thus be invalidated. In that regard, it should be pinpointed that the subsequent jurisprudence did not invalidate the alleged infringements of the principle of proportionality. Ultimately, it is without doubt that these seminal rulings clarified the scope of the principle of proportionality in the Swedish legal order. The Court gave clear guidelines to the administrative authorities and courts as to the application of the principle. One may say that, after the 1996 jurisprudence, the

[560] *See,* Cameron, "Swedish Case Law on the ECHR since Incorporation and the Question of Remedies", in Cameron and Simoni (eds.), at p. 9.

[561] *Supra n.558,* "[v]id den avvägning mellan allmänna och enskilda intressen som avses i 3 § första stycket naturvårdslagen bör naturligtvis beakta vilken vikt lagstiftaren I olika sammanhang har lagt vid miljö- och naturvårdshänsynen i jämförelse med bl.a. den enskilde markägarens intresse…En grundläggande princip är emellertid att en inskränkning från det allmännas sida av den enskildes rätt att använda sin egendom förutsätter att det föreligger en rimlig balans eller proportionalitet mellan vad det allmänna vinner och den enskilde förlorar på grund av inskränkningen. Att en proportionalitetsprincip har vunnit hävd i svensk rätt underströks också i den proposition som låg till grund för bl.a. inkorporeringen av Europakonventionen av Europakonventionen och den samtidigt beslutade preciseringen av egendomsskyddet i 2 kap: 18 § regeringsformen (prop:1993/94:117 s. 39-40). Vid tillämpningen av art 1 i det första tilläggsprotokollet till konventionen har Europadomstolen konsekvent hävdat en sådan proportionalitetsprincip".

principle of proportionality is firmly established in Swedish law.[562] Importantly, the penetration of the principle of proportionality in the domestic law did not occur through the general principles of Community law but through internal law and the use of the ECHR.

It is of interest to have a look to the subsequent case-law and the development of the use of the principle of proportionality. In 1997, these cases were mostly linked to the Environmental and Building Acts and touched upon expropriation, planning or construction permissions.[563] More recently (1998-2002), it also seems that the jurisprudence concerning proportionality has been strongly concentrated in the same area and, more particularly, in the context of derogation from the Environmental Act (zone boarding the sea).[564] The courts, in a balancing of interest and using generally the same formulation, verified whether the decision did not affect the individual in a disproportionate manner.[565] Notably, the courts refer to the 1996 jurisprudence. For instance, in a case (RÅ 2001 ref 72) concerning the judicial review of a decision of the government (*miljödepartementet*) refusing a dispensation to build a house, the Supreme administrative court stressed the importance of the principle of proportionality by referring to the previous jurisprudence and the importance of taking into consideration the particular circumstances of the case.[566]

Importantly, it is not only in the context of the Environmental and Building Acts that the principle of proportionality is useful. In that respect, other areas appear of interest such as administrative licenses and tax law. As to the latter, it is worth noting that the case-law is rich regarding taxi licenses.[567] In RÅ 2000 ref 52, the applicant lodged an application in order to have the possibility of putting video surveillance in the taxi. The administrative authority rejected the application since there was a tangible risk of infringing the personal integrity of individuals (right to privacy of the customers). Interestingly, both the *Kammarräten* and the *Regeringsrätten* made explicit references to the principle of proportionality. In regards to the latter, the principle of proportionality also made its way into domestic

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[562] Bernitz, "Retroactive Legislation in a European Perspective – On the Importance of General Principles of Law", in Stockholm, 2002, pp. 113-131, at p.130.

[563] RÅ 1997 ref 59 (*naturvård, dispens från förbud mot arbetsföretag som kan skada naturmiljön*), RÅ 1997 not 18,. RÅ 1997 ref 57. (*Bygglagen*), RÅ 1997 not 96. (*Bygglagen*) obligation of a detailed plan compatible with the European convention, RÅ 1997 not 107, RÅ 1997 not 231. RÅ 1996 ref 97. (Article 6 and 8 ECHR/proportionality).

[564] RÅ 2000 not *25 dispens från sd. Avslag*, RÅ 2001 ref 72, RÅ 2000 not 118 (idem), RÅ 2002 not 47 (idem), RÅ 2002 not 69 (idem). RegR 5857-1999, 2002-05-10, "Regeringsrätten har i en rad avgöranden i bl.a. naturvårdsärenden behandlat denna proportionalitetsprincip (t.ex. RÅ 1996, ref 22, 40, 44 och 56, RÅ 1997 ref.59 och RÅ 2001 ref.72) och därvid framhållit att stor vikt måste fästas vid den speciella situation som föreligger i varje särskilt ärende". *See also*, RÅ 2001 not 115, RÅ 1997 not 96 (*plan och bygglagen*).

[565] Usual sentence to define proportionality, "detta innebär att de olägenheter som åtgärderna medför för den enskilde måste stå i rimlig proportion till de intressen som skall skyddas".

[566] RÅ 2001 ref 72. *dispens from SK (avslag), see also* RÅ 1996, ref 22, 40, 44 och 56, RÅ 1997 ref.59.

[567] RÅ 2003 ref 37, RÅ 2000 ref 52.

law.[568] It is not surprising to find the tax authority making reference to the principle of proportionality,[569] because tax law does not merely involve issues related to the right to property (Article 1 of the first Protocol), but also issues regarding the right to a fair hearing (article 6 ECHR) and the right to privacy (Article 8 ECHR).[570]

In *RÅ 2000 ref 66,* the Supreme Administrative Court examined the applicability of Article 6 ECHR to the tax surcharges imposed under the Swedish tax system. The Supreme Administrative Court considered that the Swedish tax surcharge complied with the general requirement under the Convention for measures to be proportionate. It held that a system of sanctions against breaches of the obligation to submit tax returns and information to the tax authorities served an important public interest. Furthermore, it remarked that the requirement of proportionality was reflected in the rules on surcharges as, under Chapter 5, section 6, of the Taxation Act, surcharges were to be remitted in cases where they would be "manifestly unreasonable".[571] The Court mentioned expressly the importance of the principle of proportionality in the ECHR system and the need to realize a balancing of interest. [572] The decision of the Supreme administrative court seems to be confirmed by two judgments of the EctHR (*Janosevic* and *Västberga taxi AB*).[573]

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[568] Moëll, *Proportionalitetsprincipen i skatterätten,* Juristförlaget i Lund, 2003.

[569] *Ibid.,* at pp. 195-197. Mål nr 809-02 *länsrätten i Kronobergs län den* 9 juli 2002, 13§ taxeringslagen*. Begäran om undantagande av handling från revision enligt 3 kap. 13 § taxeringslagen.* The tax authority made reference to proportionality. By contrast, the administrative court of first instance did not expressly refer to the principle of proportionality. *See* Kammarrätten mål nr 2707-02.

[570] *Ibid.,* at p.293. The author stressed that there is a wide margin of appreciation as to material tax rules and Article 1 of the first protocol right to property. Consequently, only very few cases establish a violation of the right to property.

[571] In the other judgment delivered on 15 December 2000 (Case no. 2922-1999) the Supreme Administrative Court was called upon to examine whether the enforcement of a tax surcharge prior to a court examination of a taxpayer's liability to pay the surcharge in question conflicted with the presumption of innocence under Article 6 (2) of the Convention.

[572] RÅ 2000 ref. 66, "[e]n viktig princip som enligt Europadomstolens rättspraxis skall beaktas vid tillämpningen av konventionen är den s.k. proportionalitetsprincipen. Många åtgärder som till sin karaktär är konventionsenliga kan sålunda godtas endast om de också är proportionerliga. Är de oproportionerliga, dvs. mer långtgående än som framstår som rimligt till ändamålet (jfr Danielius, Mänskliga rättigheter i europeisk praxis, s 61). Konventionen griper emellertid inte in på alla område. Straffmätningsprinciper vid utdömande av ekonomiska påföljder får anses tillhöra de områden som principiellt sett har lämnats åt de enskilda staternas reglering när straffet inte avser något speciellt av konventionen skyddat intresse såsom t.ex. yttrandefriheten.

[573] Case *Janosevic* v. *Sweden* (34619/97) [2002] ECHR 613 (23 July 2002), para. 104, "[i]n view of what has been stated above, in particular the fact that the relevant rules on tax surcharges provide certain means of defence based on subjective elements and that an efficient system of taxation is important to the State''s financial interests, the Court considers that the presumptions applied in Swedish law with regard to surcharges are confined within reasonable limits. Nevertheless, as the Supreme Administrative Court stated in a judgment delivered on 15 December 2000 (see paragraph 53 above), this conclusion in general

Notably, on 1 July 2003, important modifications entered into force regarding administrative fiscal sanctions (Sanktionslagstiftningen).[574] The new legislation includes expressly the principle of proportionality by replacing the old formulation *("oskäligt"*) by a new one *("rimlig proportion"*).[575] Finally, it must be said that the ECHR has played a very important role in the dissemination of the principle of proportionality within the domestic legal order.

Also, it is worth remarking that the principle of proportionality has been codified in legislation. Thus, the spill-over is not limited to the case-law. At the end of the 1980s, a committee proposed to develop the principle of proportionality in various areas.[576] In that sense, the principle of proportionality was taken into consideration in the Law on Bankruptcy[577] and the Law on Video Surveillance.[578] A more restrictive approach was taken in the context of social law (*arbetsrätt)*.[579] By contrast, the tax law area is marked by a wide codification of the principle.[580] This codification was realized in the context of procedural taxation, e.g. the Law on Coercive Measure,[581] which then spilled over into material tax law, e.g. the Law on Excise Duty[582] and the Custom law.[583] Even more recently, since 1 July 2003, the

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"requires that the courts . . . make a nuanced and not too restrictive assessment in each individual case as to whether there are grounds for setting aside or remitting the tax surcharge". As has been mentioned above, however, except for the reference to the length of the proceedings, the applicant did not rely on the grounds for remission in the relevant tax assessment proceedings". *See also Taxi Aktiebolgag and Vulic* v. *Sweden* (36985/97) [2002] ECHR 616 (23 July 2002).

[574] *Lagen* (2003:211) *om ändring i taxeringslagen* (1990:324), prop. 2002/2003: 106. p.138 .

[575] Moëll, *supra n.543,* at pp. 223, 246, 271.

[576] *Tvångsmedelslagen,* the committee, prop 1988/89: 124 s 27.

[577] *Konkurslagen* (7 Kap 14 §) och prop 1994/95:189 s 56 f.

[578] SFS 1998:150. TP of LAK *lagen om allmän kameraovervakning* 6 § LAK authorization regarding camera surveillance. Bedömning av övervakningsinteresse compared with the integrity interest. TP made reference to "överviktprincipen" is applicable by a balance of interest. It means that the necessity to survey must be balanced with the integrity interest. (Prop. 1997/98: 64 s 27 ff).

[579] Moëll, *supra n.543,* at pp.180-181. *Medbestämmandelagens* (Lag 1976:580 *om medbestämmande i arbetslivet*). *Införa begränsningar med hänsyn till ett rimligt fackligt ändamål*, The government deemed unnecessary to legislate on "stridsåtgärder" proportionality (prop. 1999/2000: 32 , pp.90-91).

[580] *Ibid.,* at pp.218-220.

[581] The Law on Coercive Measures (*Tvångsåtgärderslagen*) 4§ *lagen* (1994: 466) *om särskilda tvångsåtgärder i beskattning. Beslut om åtgärd enligt denna lag får fattas endast om skällen för åtgärder uppväger det intrång eller men i övrigt som åtgärden innebär för den enskilde*. *See also*, the Law on the security of payments *Betalningssäkringslagen,* 4 § *lagen* (1978: 880) *om betalningssäkring för skatter, tullar och avgifter. Beslut om betalningssäkring får fattas endast om skälen för åtgärden uppväger det intrång eller men i övrigt som åtgärden innebär för gäldenären eller för något annat motstående intresse*.

[582] *Punktskattekontrollagen*, 5 § *lagen* (1998: 506) *om Punktskattekontroll av transporter, Beslut om åtgärd enligt denna lag får fattas endast om skällen för åtgärder uppväger det intrång eller men i övrigt som åtgärden innebär för den enskilde*.

principle of proportionality has been incorporated into the Taxation Law[584] and the Law on the Payment of Taxes.[585] In the end, it appears that the principle of proportionality has had a powerful influence on internal Swedish legislation. However, one may wonder whether the codification of the principle has had a significant effect in practice.[586]Accordingly, it may be difficult to determine the impact.

To conclude, three points may be made. First, it is without doubt that the principle of proportionality, from 1996 to 2004, has had an important effect on the national jurisprudence. The study focuses on the impact on public law. In that respect, the Supreme Administrative Court has been astonishingly active as to the application of the principle of proportionality in internal law, e.g. concerning environmental law, tax law, administrative licenses. Moreover, the principle has influenced the national legislation in many fields. Notably, the area of tax law has been particularly influenced. It may be said that the activism of the national court has led to important modifications in the legislative context. The case *RÅ 2000 ref 66* constitutes, in that sense, a perfect illustration. Thus, in the light of the foregoing, it may be said that the ECHR principle of proportionality has played an important role in the evolution of Swedish public law in the recent years. As seen above, the principle of proportionality brings a higher level of protection for individuals. Arguably, this is due to the balancing of interests that the court or authorities should undertake.[587] This balancing of interests may also lead to an increase of the powers of the Courts and authorities.

Second, one may wonder, however, whether the use of the principle of proportionality has been overestimated, since it does not often lead to the invalidation of the administrative decision being reviewed. As stressed previously, it stems from an analysis of the provisions of the ECHR that the state or authorities may benefit from a wide margin of appreciation. This margin of appreciation depends on not only the provision that is used but also the context in which it is used. For instance, there is a wide margin of appreciation as to material tax rules and Article 1 of the first Protocol of the ECHR (right to property).[588] Consequently, the violation of the right to property has been established only in a very few cases.[589] It must be said that the primary role of the principle of proportionality is to review decisions and, thus, to allow the judge to balance the various interests and give

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[583] *Tullagen* 6 kap. 1§ *tullagen* (2000:1281).*Beslut om kontrollåtgärd enligt tullagstiftningen får fattas endast om skälen för åtgärder uppväger det intrång eller men i övrigt som åtgärden innebär för enskilda*.
[584] *Taxeringslagen 5 kap 14§ taxeringslagen* (1990:324).
[585] 15 kap. 10 § skattebetalningslagen (1997:483).
[586] Moëll, *supra n. 543,* at p. 219.
[587] Gydal, *supra n.551,* at p. 230.
[588] Moëll, *supra n.543*, at pp. 293-295.
[589] *Ibid.*, at p. 295. There is a stronger protection through the use of Article 8 ECHR, since the wide margin of appreciation is not so wide in comparison with the right to property.

reasons to the findings. This improves the rationality of the judgment. In that respect, the principle of proportionality enhances the quality of review.

Third, the principle of proportionality constitutes an extremely complex principle that could be seen as the keystone of the general principles of Community law. And one may wonder whether the application of the principle of proportionality, at the national level, will be improved? The Supreme Administrative Court has given some indications as to the application of the principle of proportionality, notably, as to the importance of the balancing of interests. The application of the principle has been assessed as rather satisfactory in the public law area.[590] Critics have argued that the court should provide even more precise guidelines.[591] It may be said that the application of the principle in the Swedish legal order is not so precise or systematic in comparison with the European principle of proportionality.[592] Hence, one might perceive the frenetic codification of the principle, not only as a sign of interest towards proportionality, but also as demonstrating the need to give more precision regarding its application. However, does the codification constitute a step forward? On the one hand, it appears as a good thing since it makes clear that the principle of proportionality is of importance in the Swedish legal order. On the other hand, the responsibility to properly apply the principles lies on the administrative and judicial authoritaties based on the circumstances of the case. In other words, it depends on their willingness to undertake a serious and deep balancing of interests.

It must be stressed that this section focused on the influence of the principle of proportionality with the ECHR as a vector. Though the ECHR and EC principles of proportionality are often assimilated, it is of interest to analyze also the impact through European Community law. In that regard, a proposition, in the late nineties, stressed the utmost importance of the general principle of proportionality within European Community law.[593] It added that the ECHR must be taken into consideration and, finally, it referred to RF 2:12 that includes proportionality. The impact of the EC general principles is perfectly illustrated by the famous *Barsebäck* case.[594]

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[590] *Ibid.,* at p.184, "[det är]…främst inom den offentliga rätten som proportionalitetsprincipen anses gälla som en allmän rättsgrundsats. Proportionalitetsbedömningar kan visserligen även aktualiseras inom ett antal andra rättsområden där det kan bli fråga om att göra avvägningar mellan olika intressen, men då inte nödvändigtvis mellan ett allmänt och ett enskilt intresse. Som exempel kan nämnas arbetsrätten, immaterialrätten, processrätten och konkursrätten. De rättsfallsstudier som gjorts beträffande principens förankring inom dessa områden visar att principen där antar ännu suddigare konturer än inom den offentliga rätten".

[591] Lundblad and Wärnsby, "Proportionalitetsprincipen inom förvaltningsrätten efter Barsebäckdomen", ERT 2000, pp.209-232, at p.232.

[592] *Infra, Barsebäck* case. Critics argued that the Court did not apply the principle of proportionality in a proper way.

[593] Prop. 1999/2000: 126.

[594] RÅ 1999, ref 76.

9.2.3. The Barsebäck Case and EC Law[595]

There are a number of reasons verifying the assertion that the *Barsebäck* case is a very important case in the domain of Swedish public law. First, it involves a very political issue (closure of a nuclear plant) imbued with a Community law element and dealt with by the Supreme Administrative Court. Second, the doctrine has been particularly active and many criticisms have been made of the reasoning of the case. Third, the ruling is lengthy (85 pages) and reflects the complexity of the issues which gave rise to many general principles of Community law, i.e. non-retroactivity, legitimate expectations and proportionality. This section will merely focus on the application and analysis of the principle of proportionality. Also, it is worth noting again that the concept of proportionality was recognized, to a limited extent, under Swedish law even before Sweden became a member of the EU and incorporated the ECHR in its legal order. However, since 1 January 1995, the scope of its application has been widened and, frequently, referred to in the legislation or by the administrative courts, as seen above. What is more, one should always keep in mind that the *Barsebäck* case was decided 1999, that is to say three years after the seminal rulings of the Supreme Administrative Court (In *RÅ 1996, ref 40, 44, 56*).[596]

At the outset, two governmental decisions of 1970 and 1972 authorised Barsebäck Kraft Aktiebolag (BKAB) according to the law on atomic energy to own and make use of two nuclear reactors (Barsebäck 1 and 2). Commercial use of the reactors started in 1975 and 1977 respectively. The two decisions authorizing use were replaced by a new governmental decision.[597] After a referendum in 1980 concerning nuclear energy, the parliament made the decision to close all nuclear plants before 2010. In 1997, the socialist, communist and center parties reached an agreement to start this policy in 1998 and as to the closure of the first Barsebäck nuclear plant. After consultation with the Law Council (*Lagrådet)*, the law on the liquidation of nuclear energy was passed and entered into force in January 1998. The applicants in the *Barsebäck* case contended*, inter alia*, that the governmental decision to close the Barsebäck plant infringed the general principle of proportionality.[598] According to the applicants, there was no public interest justifying such a severe measure as the closure of one of the Swedish nuclear plants, at least not with such brief notice. Furthermore, they argued that the government should have chosen one of the state-owned reactors instead of the reactor owned by private undertakings even if there existed such public interest.

In its judgment, the Supreme Administrative Court considered that there was no disproportion between the public advantages resulting from the closing-down of the nuclear plant and the disadvantages on the part of the owners. Thus, the government decision could not be reversed, since the principle of proportionality was not violated. The reasoning of the Court must be thoroughly analyzed.

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[595] RÅ 1999, ref 76.
[596] *Supra Chapter 9.2.1.*
[597] 5 § *kärntekniklagen* (1984:3)
[598] The first reactor was required to close on 1 July 1998 and the second on 1 July 2001.

The Court remarked that one of the applicants made reference to the principle of proportionality and stressed the need to balance the aim and the means as well as the various interests.[599] It mentioned explicitly the three step process, i.e. suitability, necessity and proportionally *stricto sensu* and defined precisely the content of each step. [600] The Court stated that the principle of proportionality has a fundamental significance in ECHR and Community law and noted that the principle has been recognized in the Swedish national law.[601] Then, the Supreme Administrative Court analyzed in greater detail the scope of the principle of proportionality in the ECHR and the EC and emphasized the close link between both systems. Also, it gave a rather precise assessment of the scope of the principle in internal law. First, as to the ECHR, the Supreme Administrative Court stated that the right to property is of utmost interest in the present situation and that the three-pronged test of proportionality is of importance in relation to Article 1 of the First Protocol concerning the right to property.[602] Second, as to EC law, the national court considered that the principle of proportionality and its tripartite test is often used to test the legality of the acts of the institutions and acts of the Member States implementing Community law or falling within its scope. Thus, the Swedish court

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[599] There was, indeed, three applicants, Barsebäck AB, Sydkraft AB and Preussen Elektra (the German company possessing 28% of the Sydkraft shareholders). By allowing *locus standi* for Preussen Elektra, it may be said that the national court recognised the existence of the Community law element.

[600] *Barsebäck, supra, 5.5.1,* "[d]en av sökandena åberopade proportionalitetsprincipen innefattar flera olika krav som rättsordningen ställer på balans mellan mål och medel och mellan motstående intressen. När det gäller att pröva villkoren för och resultatet av ingrepp från det allmännas sida mot enskilda intressen är det vanligt att anlägga tre olika aspekter.
Ändamålsenlighet (lämplighet)
Är det aktuella ingreppet ägnat att tillgodose det avsedda ändamålet?
Nödvändighet
Är ingreppet nödvändigt för att uppnå det avsedda ändamålet eller finns det mindre långtgående alternativ?
Proportionalitet i strikt mening
Står den fördel som det allmänna vinner genom ingreppet i rimlig proportion till den skada som ingreppet förorsakar den enskilde?".

[601] *Ibid.*, "[p]roportionalitetsprincipen har en grundläggande betydelse vid tillämpningen av Europakonventionen och inom EG-rätten. Den har också vunnit erkännande inom svensk nationell rätt".

[602] *Ibid.,* "[v]ad först beträffar Europakonventionen är det tillämpningen av artikel 1 i det första tilläggsprotokollet som tilldrar sig störst intresse i målet. I flera avgöranden har Europadomstolen med skilda formuleringar beskrivit de krav på proportionalitet som ställs när de allmänna gör ingrepp som innebär att någon berövas äganderätten till egendom eller får sin rätt att använda en tillgång begränsad. Samtliga de tre nyss berörda aspekterna har framhållits som relevanta, dvs. kraven på ändamålsenlighet, nödvändighet och proportionalitet i strikt mening. När det gäller kravet på proportionalitet i strikt mening gör domstolen en helhetsbedömning av de förhållanden under vilka ingreppet företas. En viktig faktor är vilka ersättningsvillkor som gäller. Även andra omständigheter, t.ex. förekomsten av varseltid och tillgången till effektiva rättsmedel, vägs in".

recalled implicitly the jurisprudence of the ECJ, i.e. *Wachauf* and *ERT*.[603] Also, it stressed that the ECJ links the application of proportionality *stricto sensu* to the common constitutional traditions of the Member States and the ECHR, e.g. Article 1 of the First Protocol.

Third, as to Swedish national law,[604] the court stated, once again, that the principle is recognized within the domestic legal order. This recognition appears true if one looks at the national legislation that refers expressly to the suitability and necessity of a measure, e.g. RF 2:18 (as to the right to property). Also, there are general provisions laying down a balancing test between general and individual interests. Furthermore, in recent years the principle of proportionality and the balancing test (third part of the test) have been explicitly mentioned in the case-law. Finally, the Court remarked that the administrative authorities have a wide margin of appreciation when it comes to balancing the various interests at issue. In other words, there must be a clear disproportion between the protection of the general interest and the harm suffered by the individual. Arguably, the court referred to a kind of manifest error test. In that respect, it is worth underlining that the test of manifest error is only applicable in a few situations depending on the fundamental right(s) and interests at issue in the circumstances of the case. Thus, one may criticize the position of the Court that seems to refer to the wide margin of appreciation as a general test.

The Court applied the principle of proportionality to the circumstances of the case.[605] As to suitability, the Supreme Administrative Court held that the suppression of the exploitation licenses constitute measures pursuing the aims of the new legislation *(avvecklingslagen)*. As to necessity, the Court stressed that the suppression of the license constitutes not only a suitable but also a necessary measure in the closure of nuclear plants and must also apply to private reactors. As

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[603] *Ibid.,* "[n]är det gäller EG-rätten aktualiseras proportionalitetsprincipen när EG-domstolen prövar lagligheten av EG:s egna rättakter och i viss utsträckning också vid domstolens prövning medlemsstaternas implementeringsåtgärder och deras åtgärder inom områden som inte är harmoniserade men faller inom gemenskapens kompetens. Även vid denna prövning har alla de tre berörda aspekterna stor betydelse".

[604] *Ibid.,* "[s]om redan nämnts har proportionalitetsprincipen också vunnit erkännande i svensk rätt. Det finns lagregler som tydligt uttrycker krav på ändamålsenlighet och nödvändighet –däribland den i målet aktuella bestämmelsen i 2 kap. 18 § första stycket RF – och det finns allmänt hållna bestämmelser som föreskriver att avvägning skall göras mellan de allmänna och enskilda intressen som berörs av åtgärd. I rättspraxis, särskilt i några avgöranden från de senaste åren, har de olika proportionalitetskraven, inte mints kravet på proportionalitet i strikt mening, kommit till klart uttryckt (RÅ 1996 ref 22, 40, 44 och 56 samt RÅ 1997 ref 59 och RÅ 1997 not 107). När det gäller att bedöma om kravet på proportionalitet i strikt mening är uppfyllt måste naturligtvis beaktas att myndigheterna i många avvägningsfrågor har ett betydande handlingsutrymme och att ett underkännande av ett myndighetsingripande i sådana fall knappast kan komma i fråga i andra fall än sådana där det råder ett klart missförhållande mellan det allmänna intresset av ingripandet och den belastning som ingripandet innebär för den enskilde (jfr bl.a. nyssnämnda RÅ 1997 ref 59)".

[605] *Ibid*., *Barsebäck,* 5.5.3.

to the choice of a private reactor, as the first reactor to be closed, the court remarked that such a decision results from the consequence of the objective and the correct application of conditions to achieve the aim of the legislation. By contrast, Sydkraft argued that, if there is a general interest to close a nuclear plant, it is without doubt that the state owned reactor must be chosen.[606] However, the Supreme Administrative Court held that the refusal to renew the authorization of exploitation was necessary.

As to proportionality *stricto sensu*, the Court obviously balanced the general and individual (BKAB/Sydkraft) interests.[607] The parties argued that advance notice plays a significant role in limiting the negative consequences of the closure. Going further, the parties contended that an advance notice of five months was too short and that a longer notice would have limited the negative economic effects of the closure. The examination gives support to the fact that an extension of the time might have increased the possibilities to limit the negative economic effects. However, the Court held that the alleged short notice does not constitute a sufficient ground to invalidate the decision of the government. Finally, the court assessed whether the closure of the nuclear plant should be considered as an essential general interest in the sense of RF 2:18. In other words, the court had to determine whether the general interest justified the economic losses caused to the enterprises.[608] The Court considered that in order to invalidate a decision on the grounds of its incompatibility with the principle of proportionality a clear disproportion must be established between the general advantages of the measure and the disadvantages caused to the undertakings. The Court ruled that the objections submitted by the parties did not constitute sufficient grounds to invalidate the governmental decision and, consequently, did not find a violation of the principle of proportionality. It may be said that the government did not commit a manifest error of appreciation in taking the decision to cancel the permit to operate the nuclear plant. A commentator argued that the decision was well-reasoned and impervious (*"vattentät"*).[609] This point of view was widely criticized by the doctrine.[610]

Subsequently, this discussion prompts a number of conclusions as to the scope of judicial review in Sweden. Indeed, it could be said that the *Barsebäck* ruling constitutes an important and unwelcome step back as to the application of the

[606] Nergelius, *Förvaltningsprocess, Normprövning och Europarätt*, Norstedts Juridik, 2000, pp.102-123, at p.113. The author considered this argument as simple and strong. Conversely, one may argue that such an argument leads to the non-existence of the decision and thus does not constitute the least restrictive means.

[607] Åhman, "Barsebäck ur ett egendomrättsligt perspektiv", ERT 1999, pp.661-677. Case-law concerning Article 1 of the First Protocol.

[608] The closure causes significant economic losses and gives rise to compensation (not clear for sydkraft).

[609] Sterzel, "Barsebäcksmålet", JT 1999-2000, pp. 658-675, at p.673.

[610] Debatt (Bernitz, Nergelius, Quitzow, Wiwen-Nilsson), Barsebäcksmålet, JT 1999-2000, pp.963-983.

general principles of Community law in Sweden.[611] As seen previously, the general principles reinforce the protection of individuals and, thus, may affect the traditional structure of judicial review. Consequently, the general principles may have a tendency to increase the powers of the national courts, a fact which then raises the controversial question whether the powers of the national courts should be extented. As usual, on the one hand, a part of the doctrine, more traditional, appears to dislike this evolution.[612] On the other hand, another part, more progressive, seems to favor the extension of judicial review and disapproves of judicial pusillanimity in political matters [613] At the end, the heart of the debate concerns the delimitation of the thin line between judicial and political questions as well as the extent of the Court's intervention in this context.[614] As stressed above, the *Barsebäck* case clearly involves important political issues and the judgment is clearly imbued with judicial restraint. Arguably, the limited review is the result of the very political character of the case.[615]

Thus, one may say the national court has given a rather narrow application to the principle of proportionality. An author compared the application of the principle of proportionality in the 1996 jurisprudence (the administrative measures were invalidated) with the *Barsebäck* case (no invalidation of the governmental measure) and questioned whether the principle had been overestimated.[616] In that regard, it is worth underlying that proportionality constitutes a flexible principle. In other words, its scope of review varies according to the situation. More precisely, it depends on the fundamental right(s) and the interests at stake. In the *Barsebäck* case, it is clear that a wide margin of appreciation *("betyndande handlingsutrymme")* was accorded to the authorities. The court stated that there must be a clear disproportion *("klart missförhållande")* between the drawbacks caused to companies and the advantages to the general interest. The Swedish court applied a kind of manifestly inappropriate test. This test may appear legitimate, since the case concerns the right to property and involves the closure of a nuclear plant. Notably, the ECHR and EC jurisprudence concerning the right to property is known to give a wide margin of appreciation. Further, the same holds true as to the closure of a private nuclear plant that constitutes a highly political issue involving complex economic interests. It might be extrapolated that if the case had been the object of a preliminary ruling to

[611] Nergelius, *supra n.478,* at p.108.
[612] Sterzel, *supra n.609, See also* Vängby, "Förhandsavgörande från EG-domstolen", JT 1999-2000, pp. 248 *et seq*.
[613] Nergelius, "Barsebäcksmålet –kommentar till en rättsfallskommentar", JT 1999-2000, pp.970-972, Quitzow, Sterzel och Regeringsrätten", JT 1999-2000, pp. 973-978.
[614] Wiwen-Nilsson, "Barsebäcksmålet- politik eller juridik?", JT 1999-2000, pp.978-983. The author stressed the extreme political nature of constitutional review. The court did not carefully analyse the necessity of the decision as to the closure of the nuclear plants, since it did not take into consideration the method of the least restrictive means, i.e. the closure of a State owned reactor.
[615] Nergelius, *Förvaltningsprocess, Normprövning och Europarätt*, *supra,* at p. 109.
[616] Warnling-Nerep, "Barsebäck och proportionalitetsprincipens egentliga innebörd", in Festskrift till Ulf Bernitz, Stockholm 2001, pp. 169-177.

the ECJ, the Luxembourg judges would have probably applied the same kind of test, though one can never be too sure.[617] Unfortunately, the Supreme Administrative Court applied the doctrine of *acte clair* and did not refer the case to the ECJ though the case raised fundamental and complex questions as to, *inter alia*, *the interpretation of the ECHR and the general principles of Community law.* The *Barsebäck* case has led to many comments.[618] The Court did not make any preliminary ruling to the ECJ though it was stated that there were many alternatives regarding the interpretation.[619] By consequence, the decision not to make a preliminary ruling constitutes an extensive interpretation of the *acte clair* doctrine. Furthermore, it might be contended that the national court of last resort had an obligation under 234(3) EC to make a preliminary ruling to the ECJ. [620] Arguably, the non-referral may be seen as a violation of the Treaty, i.e. a breach of Article 234 EC read in conjunction with Article 10 EC.[621]

To conclude, the *Barsebäck* case constitutes a landmark decision as to the application of the principle of proportionality in the EC law context. Also, it offers a

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[617] The ECJ often applies the manifest error test in relation to acts of the institutions. However, it is also of common knowledge that the review of the Court is more stringent regarding acts of the Member States derogating from one of the free movement provisions.

[618] Bernitz, "Barsebäcksdomen i Regeringsrätten – borde förhandsavgörande av EG-domstolens ha begärts?", JT 1999-2000, pp.964-970. The author stressed the limited use of preliminary rulings by the Swedish courts (only 20 cases had been referred until 2000). In comparison, Austria had twice as many cases in the same period of time). He considered that such a restraint might be temporary and is due to the fact that Sweden is a new Member States (at p.970). Bull, "Nationella domstolar och europeisk konstitutionalism", ERT 1999, pp.678-701, pp.689-692. The author stressed the need to ensure the uniform application of Community law and the necessity of preliminary rulings where there is a real need for clarification (at p.700), and argued for a pluralist viewpoint that accentuates the dialogue between the Union and its Member States). Bökwall, "Gemenskapsrättens uniforma tillämpning i fara? – Om Regeringsrättens ovilja att hänskjuta EG-rättsliga frågor i Barsebäcksmålet, ERT 1999, pp.711-720. The author argued for a correct application of Article 234 in order for national courts to influence the development of EC law. Accordingly, the national or institutional prestige may constitute a danger to the correct application of EC law. Sweden is a new Member State and still trying to find its place within the Union. Nergelius, "Barsebäcksmålet – kommentar till en rättsfallskommentar", JT 1999-2000, pp.970-972. The author considered that the Supreme Administrative Court did not take into consideration the EC law reality and was under an obligation to make a preliminary ruling (at p.971). Quitzow, "Sterzel och Regeringsrätten", JT 1999-2000, pp.973-978. The author emphasized that the court does not name or discuss the CILFIT criteria (at p.975).

[619] Nergelius, *supra n.478,* at pp. 118-119. *In casu*, the solution was not evident. It constitutes an extensive interpretation of the *CILFIT* jurisprudence. According to *CILFIT*, it is possible to derogate from the Treaty obligation (234.3) whenever the solution to the legal problem appears evident. Moreover, the author emphasized that the national court lacked sufficient experience in the competition field and its reasoning as to proportionality was not particularly impressive.

[620] Melin, "När skall man fråga EG-domstolen?", JT 1999-2000, pp. 859-866.

[621] *See* recent developments in the light of *Köbler* case (ECJ).

good illustration of the judicialization of politics.[622] It demonstrates not only the increasing power of the courts to decide more and more highly political questions, but also and foremost the limits inherent to constitutional review.[623] Arguably, the principle of proportionality (as defined in the EC law and ECHR), reflecting the continental style of review, appears as a precious tool to enhance the power of the national courts or administrative authorities. Thus, it affects the traditional stance as to judicial review and the role of the judiciary in society. [624] Though the reasoning of the court may always be criticized, it seems to me that the Supreme Administrative Court provided a full-fledged analysis of the principle of proportionality (tripartite test) and offered interesting guidelines as to the application of the principle for the national courts. In that sense, the attitude of the Swedish court contrasts with the procrastinations of other national instances of last resort.[625] However, one may always have some resentment towards the non-referral to the ECJ. [626] Going further than *Barsebäck,* the attitude of the administrative courts as to the application of the principle of proportionality in purely internal matters is notable.[627] In that respect, it must be pointed out that the incorporation of the ECHR in 1995 in the Swedish legal order has influenced the direction that the national courts have taken in such situations.[628] The impact of the principle is clearly visible in both EC and internal law matters. To conclude, one may describe the influence of the principle of proportionality on Swedish public law (case-law and legislation) as remarkable.[629] One should not forget, however, that other general principles of Community law have had a significant impact on the domestic legal order, e.g. effective judicial protection and non-retroactivity.

9.3. FUNDAMENTAL RIGHTS, EFFECTIVE JUDICIAL PROTECTION AND NON-RETROACTIVITY

This Section will determine the impact of other general principles on Swedish public law, i.e. effective judicial protection and legal certainty (non-retroactivity and legitimate expectations). Then, it will be seen that the impact is not only limited to Community law matters, but also extends to purely internal situations.

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[622] Nergelius, *supra n.478,* at pp. 55-56, Nergelius, Law and Politics- on Democracy and Judicial Review in Justice, Morality and Society, a tribute to Aleksander Peczenik, Lund 1997 at p.305 and 312 as well as, "Maktdelning och Politikens Judikalisering. Löser Juridiken demokratins problem?, Demokratiutredningen, SOU 1999:58, pp.55-84.

[623] Nergelius, "Förvaltningsprocess, Normprövning och Europarätt", *supra n.478,* at p.102.

[624] *Ibid.,* at pp.65-66.

[625] *See* the attitude of the French *Conseil d'Etat* and House of Lords.

[626] The ECJ might have been embarrassed. On the one hand, it might have fallen with the manifest error of appreciation matter, since it concerns economical interest. On the other hand, a member state measure clearly infringes the free movement of establishment.

[627] *See,* Lavin, *Lagrådet och den offentliga rätten 1999-2001*, Lund 2001, at p.24.

[628] *See, Chapter 7.1.3.* Compare the situation with the UK (another dualist state).

[629] Schäder, *supra n.476,* at p. 216. The author described the influence of the general principle of proportionality as the most important.

9.3.1. Effective Judicial Protection

The influence of the principle of effective protection into Swedish law occurred in the mid-nineties, particularly in the context of judicial review of administrative decisions. Indeed, the Swedish system was marked by a set of very unclear rules as to the competence of the courts (administrative or ordinary) regarding the review of administrative decisions.[630] In that sense, it is worth remarking that the Swedish Constitution (RF 11:1) merely refers to the Supreme Court and the Supreme Administrative Court, without establishing their respective competences. Concerning ordinary courts, the Code of Judicial Procedure (*Rättegångsbalken*) states that *"any legal dispute or litigation that is to be dealt with by another authority than a court or by a particular court cannot be handled by an ordinary court"*.[631] As to administrative courts, the procedure and competence are laid down by different administrative statutes.[632] In particular, the competence of the administrative courts is determined by paragraph 14 of the Administrative Court Act.[633] Accordingly, the legal action shall be initiated before an administrative court of first instance (*lansrätten*) if it follows from a statute or subordinate legislation. In other words, the competence must be deduced from an explicit statement in a written legal rule.[634] Thus, it appears that the competence rule has been given a restrictive interpretation and is strengthened by the traditional practice, to refer to a superior administrative agency rather than a court, when it comes to appeal.[635] This interpretation might enter into conflict with Article 6 ECHR. In that respect, the EctHR has, in many cases, considered that Sweden infringed Article 6 ECHR. These consistent findings led to the reform of the system and the enactment of a new law in 1988 (Act on Judicial Review of certain administrative decisions).[636] This provision was deemed to be "half-hearted".[637] As said by Nergelius, "administrative decisions may be tried by competent administrative authorities or by the government, on appeal from lower authorities, or by administrative courts when the possibility of judicial review is provided by special laws".[638] The interpretation of the new law by the national courts was assessed in the light of the ECHR and the EC law. In that sense, the *Stallknecht* (1995)[639] and the *Lassagård* (1997)[640]decisions of the

[630] Nergelius, "The Impact of EC Law in Swedish National Law – A Cultural Revolution", in Cameron and Simoni (eds.), pp.165 *et seq*, at p. 167.
[631] Chapter 10 Article 17 of the Code of Judicial Procedure.
[632] The Act on Administrative Procedure (*Förvaltnings Processlagen*) from 1971 is the most important.
[633] *Lagen om allmänna förvaltningsdomstolar*, 1971:289
[634] Lavin, "Domstols kompetens enligt artikel 6 i Europakonventionen", JT 1995/96 731.
[635] Nergelius, *supra n.639,* at pp. 167-168.
[636] *Rättsprövningslagen,* 1988:205.
[637] Nergelius, "The Impact of EC law in Swedish National Law a Cultural Revolution", *supra n.630*, at p. 168.
[638] *Ibid.*
[639] RÅ 1995 ref 58.
[640] RÅ 1997 ref 65.

Supreme Administrative Court must be analyzed carefully.[641] The main difference between those cases is that the facts of the *Stallknecht* case occured prior to the entry of Sweden into the EU, whereas in the latter, an EC Regulation was at issue (the Community element was present). An interesting decision of the Supreme Court in *Vellinge* (1998) in the tax field will also be scrutinized.

a) Stallknecht and Vellinge: the Time of Confusion

In *Stallknecht* (1994-1995), a conflict of interpretation, regarding Article 6 ECHR and the 1988 Act on Review of certain administrative decisions, between the Supreme Administrative Court and the Supreme Court led to a denial (absence) of competence or negative conflict of jurisdiction. The case concerned the entitlement to an agricultural susbsidy. More precisely, the agricultural agency (*Jordbruks-verket)* decided not to allow an agricultural support to Stallknecht. The decision of the administrative agency could not be reviewed since there was no right of appeal available against the negative decision.[642] Subsequently, the farmer claimed before the ordinary court the amount of the subsidy.[643] Two main questions were at stake. First, the court had to assess whether the issue may be qualified as concerning "civil rights" and, thus, fell within the scope of Article 6 ECHR. Second, it had to determine the competent court (ordinary or administrative court). The Supreme Court considered that the dispute constituted a civil right. Consequently, the plaintiff should be able to base the claim for judicial review on Article 6 ECHR. However, the Court decided that the issue should be decided by the Administrative Court since the matter concerned generally administrative law, due to the nature of claim in the circumstances of the case. Interestingly, it noted that, it appears difficult to establish a competent administrative court. Subsequently, in 1995, the Supreme Administrative Court found that though certain elements indicated that it fell under the concept of civil rights according to Article 6 ECHR, there was no reason to provide a remedy. Indeed, though a right to judicial review might be deduced from Article 6 ECHR, the administrative court could not be competent, since the competence, according to Swedish law, must be specified by a statute or ordinance (secondary legislation). Finally, Stallknecht brought the case before the European Commission of Human Rights.[644] A settlement was reached with the State of

[641] Andersson, "Effective judicial protection of Community Rights in Sweden-Judicial Review of Administrative decisions applying the Common Agricultural Policy" in Cameron and Simoni (eds.), *Dealing with integration-Perspectives from seminars on European Law 1995-96*, Uppsala, 1996, pp. 141-84. *See also* Cameron, "The Protection of Constitutional Rights in Sweden", PL 1997, pp.488 et *seq*.

[642] No right to appeal decisions regarding agricultural subsidy was available since it constituted a benefit which does not fall under the Act on Review of Certain Administrative Decisions (1988:205) (RPL).

[643] NJA 1994 s.657.

[644] *See also* Case 3510-96 E, Jönköping County Administrative Court (Lansrätten). As other lower administrative courts, the District Administrative Court in Svensson had a similar finding. This case concerned the rejection by the Agricultural agency of an application for agricultural support based on an EC regulation. Similarly, there was no right to appeal the

Sweden. In the end, the two Supreme Courts came to two different findings, which resulted in a negative conflict of jurisdiction. This case illustrates the difficulty of finding an appropriate solution in the fuzziness of the national legislation concerning the judicial review of administrative decisions.

Once again, the lack of clarity of the Swedish legislation was highlighted in the *Vellinge* case (1997) of the Court of Appeal of Southern Sweden (*Hovrätten over Skåne and Blekinge*).[645] This case dealt with a dispute concerning the partial entitlement of the local municipality to the tax paid by its inhabitants. It is worth remarking that municipal tax is paid to the State and, then, returned to the municipality. According to a law of 1995, the State may keep a part of the money in order to redistribute it to poorer municipalities. The municipality of Vellinge claimed back a sum of 42 million SEK before an ordinary court. The main question was to determine whether ordinary courts are competent to judge a dispute between a local municipality and the State concerning entitlement claimed by the municipality to a part of the tax paid by its inhabitants. The Court of Appeal considered that the issue should not be solely handled by an administrative authority and that the ordinary court was competent to try the case.[646] The judgment of the Court of Appeal was overruled by the Supreme Court (1998),[647] who found that neither Community law nor Article 6 ECHR were applicable in this case. Also, the Supreme Court noted the option to call for a new trial before an administrative court. The Supreme Court, following the argument of the state, ruled that it was for the tax authorities and the government (after appeal) to consider these issues.[648]

b) Lassagård and EC law

In *Lassagård* (1997), the plaintiff applied for an agricultural subsidy to a regional administrative authority (*Länsstyrelsen*) in May 1995.[649] The application, based on an EC Regulation, was rejected because the time limit was not respected.[650] Lassagård AB exercised its right to appeal to the superior administrative agency. The agency, however, upheld the previous decision in January 1996. Then, the

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decision as to the agricultural subsidy. The County Administrative Court found a violation of the article 6 ECHR. However, there was no legislation to determine the competent court (lack of jurisdiction), which made it impossible to set aside the rule. The case also demonstrates a clear judicial self-restraint from the lower administrative courts.

[645] Case nr Ö 881-96, Hovrätten over Skåne and Blekinge, Court of Appeal of Southern Sweden , 3rd November 1997.

[646] RÅ 1997 ref 65. *See also* NJA 1996 s. 202. The case concerned the repayment of an agricultural subsidy (support) due to non-compliance with its conditions (for obtaining the subsidy). The decision was taken by the agricultural administrative agency with no possibility of appeal. The Supreme Court considered such a matter as falling under the competence of the ordinary court.

[647] NJA 1998 p. 656 II.

[648] The government argued that decisions by tax authorities could be appealed only to the government and, consequently, ordinary courts had no competence.

[649] For comments on *Lassagård*, *see* Nergelius, Paju *et al* and Cameron.

[650] The claim was, thus, based on Community law.

marathon of *Lassagård* started.[651] Finally, after numerous appeals to different courts, the case reached the Supreme Administrative Court. [652] The main question at issue was to consider whether the lack of judicial review was contrary to Community law. Interestingly, the issue of Community law was not elucidated by the lower administrative courts, who preferred to rely on Article 6 ECHR.

The Supreme Administrative Court stressed that no right to judicial review was explicitly provided by Community law, i.e. the EC Regulation.[653] Thus, it was necessary to consider the general principles of Community law enshrined in the jurisprudence of the ECJ.[654] It is worth noting that the general principle that enshrines the right to effective judicial protection results from the *Johnston* case. This case states that the national constitutions and the ECHR (Articles 6 and 13) constitute sources of inspiration regarding the elaboration of the right to effective judicial protection. The national court did not refer to *Johnston*, but to the *Borelli*

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[651] *See* Vogel and Warnling-Nerep, "Allmän domstol eller förvaltningsdomstol – och vilken fötrvaltningsdomstol", FT 1996, pp. 213 *et seq*.

[652] The company appealed to the District Administrative court in Jönköping in May 1996 (the regional agency was located in Jönköping), and the Court considered that the right to a subsidy constituted a civil right in the sense of Article 6 ECHR. By consequence, Lassagård was entitled to judicial review. However, the competence was not fixed. The Administrative Court of Appeal of Jönköping (August 1996) considered that the absence of judicial review was contrary to Article 6 ECHR and declared the administrative court to be competent. As to the substance, the Court of Appeal handed the case to the District Administrative Court of Halmstad. (Lassagård was located in Halmstad). The Court declared itself competent but rejected the application since the application was lodged too late. Then, Lassagård appealed to the Administrative Court of Gothenburg that declared its incompetence. After that, the case reached RegR.

[653] *Lassagård*, *supra n.646*, "Regeringsrätten övergår härefter till frågan om förbudet i 33§ jordbruksförordningen att föra talan mot Jordbruksverkets beslut står i strid med EG-rätten. Någon uttrycklig bestämmelse om att den som vägrats arealersättning eller liknande stöd har rätt att få sin sak prövad av domstol *finns inte i de nu aktuella EG-förordningarna*. Detta innebär dock inte med nödvändighet att sådan rätt saknas. *Hänsyn måste också tas till EG–rättens allmänna rättsprinciper såsom dessa uttolkats och utvecklats av EG-domstolen"*. (italics added).

[654] *Ibid.,* "EG-domstolen har i det s.k Borelli-målet uttalat att den som påstår sig ha anspråk av detta slag har rätt att få sin sak prövad av domstol. EG-domstolen *anförde att kravet på rättslig kontroll av varje beslut av nationell myndighet reflekterade en allmän princip inom gemenskapsrätten som härrörde från medlemsstaternas gemensamma konstitutionella traditioner och som blivit inskrivna i artiklarna 6 och 13 i Europakonventionen*. Denna koppling mellan EG-rätten och andra rättskällor anknyter nära till de ändringar i Romfördraget den 7 februari 1992 om Europeiska unionen (Maastichtfördragen). I artikel F 2 av gemensamma bestämmelser i Maastrichfördragets sägs nämligen att unionen skall som allmänna principer för gemenskapsrätten respektera de grundläggande rättigheterna, såsom de garanteras i Europakonventionen och såsom de följer av medlemsstaternas gemensamma konstitutionella traditioner. Av artikel 6 i Europakonventionen framgår bl.a. att envar skall, när det gäller att pröva hans civila rättigheter och skyldigheter, vara berättigad till opartisk och offentlig rättegång inom skälig tid och inför en oavhängig och opartisk domstol som upprättats enligt lag".

case of the ECJ.[655] This case constituted an application of the *stare decisis* principle, and emphasizes that all types of decisions from national authorities regarding individuals' rights stemming from Community law must be subject to judicial review. *In casu,* the community law element was clearly present and there was no availability to review the administrative decisions of the public authority. A Community law right was, thus, encroached.[656] Consequently, the Court considered that a court should have jurisdiction to try the case. The court decided that the administrative courts should have competence and the substance of the claim was assessed by the Administrative Court of Appeal.[657]

Thus, the Supreme Administrative Court put aside the domestic rule, under which there existed no possibility of judicial review, incorporated in the agricultural regulation/ordinance (paragraph 33 of the *Jordbruksförordningen*).[658] As stated previously, there was no general recourse to judicial review of decisions taken by administrative authorities and the review was conditioned by the existence of an explicit statutory provision. Following the judgement in the *Lassagård* case, the Administrative Procedure Act (1986:223) was amended in 1998 (1998:386) and Article 22 (a) was incorporated, so as to give a general competence to the administrative courts to consider appeals against decisions taken by administrative authorities. It may be said that the legislative reform would not have occurred without the strong influence of the general principles of Community law.[659]

To conclude, it appears that the *Lassagård* case is of fundamental importance as to the extension of the scope of judicial review in Sweden and its interaction with European Community law. First, it stems clearly from the case that Community law prevails over domestic law. Second, it may be stated that EC law permits the development of the scope of judicial review in the Swedish legal order. As seen above, the application of the general principle of effective protection by the Supreme Administrative Court has resulted in the invalidation of the national regulation limiting review and the incorporation of a new provision ensuring the general competence of the administrative courts to review administrative decisions. Thus, the general principles of Community law may trump the application of traditional review and the extensive involvement of administrative agencies (by giving an extended role to the national courts). Going further, it must be remarked once again that EC law offers a better protection than the ECHR.[660] In that regard, it is interesting to note that the Supreme Court did not refer to RF 11:14 in *Lassagård*. Indeed, this constitutional provision reflects the Swedish traditional stance as to

[655] Case C-97/91 *Borelli* [1992] ECR I-6113.
[656] Also, the court found the Swedish ordinance incompatible with Article 6.1 of the ECHR.
[657] The *Lassagård* case of the Supreme Administrative Court merely dealt with a procedural issue.
[658] Paragraph 14 of the Administrative Court Act (As to the competence of administrate courts) was also put aside.
[659] Bernitz, *supra n.504,* at p. 45. *See also* the French exemple as to the legislative reform.
[660] It may also be said the general principle of effective judicial protection offers a better scope of protection than Articles 6 and 13 ECHR and their corresponding jurisprudence.

limited judicial review. Thus, the *Lassagård* case confirms, as stated previously, that the limitations regarding the power of the court to set aside legislation as unconstitutional do not, however, apply as to Community law. Arguably, it seems more favorable to attempt a claim based on Community law and its general principles rather than on the ECHR.

What is more, one may notice that the *Lassagård* case has had a serious impact on the jurisprudence regarding negative administrative decisions unsusceptible to judicial review and falling outside the scope of Community law. In this respect, in *Metafysen* (public aid to build a home for ederly)[661] and *Rönnquist* (access to a training course provided as a government employment measure),[662]the Stockholm Administrative Court of Appeal and the Stockholm District Court respectively assessed whether the *Lassagård* reasoning (as to EC law) was applicable to purely internal situations.[663] In both cases, the courts rejected such reasoning since there was no Community law element and reviewed the decisions in the light of the ECHR.[664] However, the general principles of Community law may also influence internal matters. The *Klippan* case, concerning non-retroactivity of national legislation, offers a perfect illustration.

9.3.2. Klippan, Internal Matters and Non-Retroactivity

It is worth noting that the Swedish Constitution contains explicit provisions forbidding retroactive legislation in the context of criminal law (RF 2:10(1)) and tax law (RF2:10(2)).[665]

Though there is no general prohibition regarding retroactive legislation, it may be said that the Swedish legislators have been careful in avoiding retroactivity.[666] In recent years, the principle of non-retroactivity and legitimate expectation made its way into national law with the help of the general principles of Community law. An important illustration is the *Klippan* case of the Supreme Administrative Court (RÅ 1996 ref. 57). Interestingly, this case demonstrates the spill-over of general

[661] Case 3784-1997, Stockholm Administrative Court of Appeal, Judgment of 11 March 1998. See also Case Ö 20352-96 E, Stockholm District Court, Judgment of 15 May 1997.
[662] Case Ö 1018-97, Stockholm District Administrative Court, judgment of 15 may 1997.
[663] In *Rönnquist*, the district court referred expressly to *Stallchnecht* and *Lassagård*.
[664] The new Article 22 (a) of the Administrative Procedural Act (1998) enshrines the principles of effective judicial protection and the subsequent obligation to provide an appeal to review administrative decisions. Thus, it may be said that Community law, through codification, has also indirectly influenced purely internal law.
[665] The ban on retroactive tax legislation has been applied recently by the Supreme Court (NJA 2000 p. 132). In its judgment, the Supreme Court found that a legal provision making representatives of legal persons responsible for the taxes of the juridical person itself, even with respect to taxes which should have been paid before the provision entered into force, could not be upheld..
[666] Parliamentary constitutional committee Report 1974: 60).

principles into purely internal matters and the extension of the scope of the non-retroactivity rule under the influence of Community law.[667]

The case concerned an undertaking (Klippan) that produced paper and wood pulp during the years 1965-1975 at the lake of Järnsjön in southern Sweden. In 1975, the property was transferred to another company (Modo AB). In 1989, the environmental legislation (Section 5 of the Environmental Act) was modified. The new provision permitted the authorities to engage the responsibility of an undertaking to pay damages even after the transfer of property. The environmental protection agency maintained that Klippan should pay a sum of around SEK six million to clean the water of the lake since PCP fibers had polluted the water of the lake. The decision was appealed to the responsible government ministry. Though the 1989 legislation entered into force after the transfer of property from Klippan to Modo, the Swedish government considered that Klippan was liable under the 1989 legislation to remedy certain environmental damages (pay the costs of environmental sanitation work). Finally, the governmental decision was quashed by the Supreme Administrative Court. It appears of interest to analyze, in detail, the reasoning of the national court. The main question at stake was to determine whether the legislation may be applied retroactively.

First, the Supreme Administrative Court made reference to its previous case law, i.e. RÅ 1988 ref 132.[668] This case dealt with an administrative decision authorizing a pool saloon to own and make use of automatic game machines. The favorable decision was, thus, creating rights for the interested individuals (*gynnande förvaltningsbeslut*), which comes very close to the concept of acquired rights. However, the authorization was withdrawn, since new legislation imposed stricter rules. The Court held that the local authority did not have the right to revoke the decision on the sole basis that the conditions for authorization became stricter in the latter legislation. Also, the Court in *Klippan* stated, in the light of RÅ 1988 ref 132, that, according to a general principle of administrative law, one must determine the administrative regulation in force at the time of the review. The Court emphasized that there are only limited possibilities to modify or revoke an administrative decision creating rights due to the entry into force of new legislation.[669] Three types of exceptions to the principle may be identified:

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[667] Darpö, "Retroaktiv Rättsprövning-Regeringsrättens dom i Klippanmålet", FT 1997, pp. 283-316, Warnling-Nerep, Regeringsrättens rättsprövning i Klippanmålet – Ett fall som engagerar på många sätt", FT 1998, pp.149-158.

[668] *See* Bull, "Färdtjänst för evigt? Om Rättskraft och Retroaktivitet i Förvaltingsrätten", FT 1999, pp.121-130.

[669] Klippan, RÅ 1996 ref 57, "[a]v allmänna förvaltningsrättsliga grundsatser har ansetts följa att bestämmande för vilka förvaltningsrättsliga föreskrifter . . . som skall tillämpas i ett mål eller ärende som regel är vilka föreskrifter som är i kraft när prövningen sker. Det anförda har ansetts gälla även vid prövning av besvär över beslut som fattats före ikraftträdandet av de föreskrifter som gällde vid besvärprövningen".

The exception is expressly mentioned in the transitional rules
The exception is suggested or justified by the preparatory works
The exception may also be implicit in the transitional rules.[670]

The application of the principle would lead to the question whether the Klippan's company responsibility as to the sanitation work of the lake must be read in the light of the 1989 legislation.[671]

The Supreme Administrative Court considered once again that the principle as to choice of the applicable legislation is not without exceptions. It remarked that in certain circumstances the retroactive application of legislation is constitutionally prohibited (RF 2:10).[672] Moreover, it referred to EC law and its general principles inspired from the common constitutional traditions of the Member States that generally do not take into consideration situations preceding the entry into force of the legislation. More precisely the Court stated that, "it has been the opinion within Community law – in reference to the proportionality principle and to the principle of legal certainty (or security) and the protection of legitimate expectations that, as opposed to changes in procedural rules, changes in rules related to substantive rights normally do not include circumstances dating back to the time prior to the adoption of such rules, other than in cases where it is clear in different ways – such as the wording of the rule – that a retroactive application has been intended. Also, in such a case it is required that the legitimate expectations of the concerned parties have been rightfully respected".[673]

Thus, it appears from EC law that the exception to the rule on non-retroactivity is very narrow. Indeed, the retroactive application must be clearly intended and the legitimate expectations must be adequately regarded. The EC law exception contrasts with the previous national jurisprudence (RÅ 1988 ref 132) that, arguably, allowed floating exceptions.[674] In other words, if the reasoning of RÅ 1988:132 would have been applied, it might have opened the path to all sorts of retroactive

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[670] *Ibid.,* "[u]ndantag från dessa grundsatser kan dock vara uttryckligen föreskrivna i övergångsbestämmelser eller följa av uttalanden i motiven till lagstiftningen. Fall kan också tänkas där av omständigheterna framgår att lagstiftaren inte avsett att de nya bestämmelserna ska tillämpas helt enligt de angivna grundsatserna i ett övergångsskede".

[671] *Ibid.,* "[e]n tillämpning av den ovan angivna huvudprincipen, nämligen att till grund för prövningen av ett mål eller ärende skall ligga de föreskrifter som är i kraft vid tidpunkten för prövningen, skulle leda till att frågan om Klippanbolagets skyldighet att medverka vid saneringen av Järnsjön skall bedömas med ledning av bl.a. 5 och 24 §§ ML i deras lydelse fr.o.m. den 1 juli 1989". According to the circumstances of the case, happen that the legislator did not intend that the new provision be applicable in the period of transition.

[672] *Ibid.,* "[d]en beskrivna principen angående valet av tillämplig lagstiftning är emellertid inte undantagslös. Härvid är först att märka att en retroaktiv tillämpning är emellertid inte undantagslös. Härvid är först att märka att en retroaktiv tillämpning i vissa fall är direkt förbjuden i grundlag (se 2 kap. 10 § regeringsformen)".

[673] Bernitz, "Retroactive Legislation in a European Perspective – On the Importance of General Principles of Law", pp. 113-131, at p.129 (translated by Bernitz).

[674] *See* in particular the third exception.

legislation. According to Bernitz, *"the decision establishes a legal rule that previously has not been clearly articulated in Swedish law"*.[675] Going further, it may be said that this welcome development in internal law is clearly influenced by European Community law and its general principles.

Indeed, the Court mentioned a Community principle stating that rules of substance do not have any retroactive effect, unless it is clearly demonstrated, by the wording of the provision or in another way that retroactivity is intended. Then, the Court considered that the legislation before 1989 did not require the undertaking, after a transfer of property, to contribute to sanitation works. And the decision of the government was reversed. It is also worth noting that the governmental decision had important economic consequences on the individual undertaking.[676] Hence, one may state that the retroactive application is not allowed if it disadvantages the individual in a disproportionate manner.[677] The close relationship with individual rights echoed the ECJ case-law and the significant imbalance test. In the end, one may venture to suggest that the reliance on EC law and its general principles, in a purely internal situation, extended the scope of the constitutional prohibition against retroactive legislation.

In the wake of the *Klippan* case, applicants in national proceedings, concerning both internal and Community law matters, relied quite extensively on the principles of non-retroactivity and legitimate expectations.[678] In the above studied *Barsebäck* case, the parties argued that the legislation on the closure of the nuclear plant was contrary to the principle of non-retroactivity and legitimate expectations.[679] The

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[675] Bernitz, *supra n.673.*

[676] Bull, *supra n.668,* at p. 128, "[e]n retroaktiv tillämpning av nya regler till nackdel för den enskilde kan ha orimliga konsekvenser. Regeringsrätten har i RÅ 1996 ref.57 funnit ha det, i avsaknad av särskilda övergångsbestämmelser eller klara tecken på att en retroaktiv verkan varit avsedd, inte alltid är rimligt att retroaktivts tillämpa en lagstiftning till nackdel för den enskilde. Dock påpekades att denna bedömning gjordes mot backgrund av viss typ av lagstiftning. Fallet gällde ersättningsskyldighet av avsevärd storlek och drabbade det enskilda företaget tämligen hårt. *Lagstiftning som får stora ekonomiska konsekvenser för den enskilde kan alltså vara av den karaktären att en tillbakaverkande kraft av nya regler är utesluten*". (emphasis added).

[677] *Ibid.*, at p. 130, "[n]är det gäller retroaktiviteten är denna fråga kanske slutgiltigt avgjord genom RÅ 1988 ref 132 och RÅ 1995 ref 10 lästa tillsammans med RÅ 1996 ref 57. Den regel som ska utläsas av fallen innebär att retroaktivt verkande regler inte är tillåtna om de drabbar den enskilde på ett orimligt hårt sätt. Om det klart framgår att denna effekt varit åsyftas synes regeringsrätten dock vara benägen att tillåtna en retroaktiv verkan".

[678] *See,* RegR 4544-1998, 2000-03-17. The applicant argues the protection of legitimate expectations but it is not taken into considerations by the Court. RegR 2906-1996, 2000-11-21. The applicant argues a breach of the principle of legitimate expectations and asked for a preliminary ruling (kammarätten).

[679] *Barsebäck, supra n.595*, 4.7, "[s]ökandena gör gällande att regeringens beslut strider mot principen om att gynnande förvaltningsbeslut inte får återkallas. De hävdar också att avvecklingslagen är oförenlig med ett numera etablerat generellt förbud mot retroaktiv lagstiftning. Samtidigt hävdar de att beslutet innebär en retroaktiv tillämpning som inte har något klart stöd i avvecklingslagen. Slutligen gör de gällande att beslutet strider mot en

Court assessed the scope of the principle of non-retroactivity in the light of national constitutional law (RF 2:12) and also made reference to Article 7 ECHR (non-retroactivity of penal provisions) and the jurisprudence regarding Article 1 of the First Protocol. It considered that EC law enshrines the same type of protection through the general principles.[680] However, the Court stated that the protection established by national, ECHR and EC law is not so extended to establish that the domestic legislation (*avvecklingslagen*) conflicts with it.[681] Subsequently, the Supreme Administrative court found no breach of the alleged principles.[682]

In light of the foregoing, one may conclude that the general principle of legal certainty (legitimate expectations and non-retroactivity) has led to an extension of the scope of judicial review in Swedish public law. The extension of the scope of review, based on individual rights stemming from the general principles of Community law, also leads to the modification of the structure of the judicial system by giving an increased and leading role to the national courts.

9.3.3. Lagom or not Lagom?

This Chapter prompts a number of conclusions as to the impact of the general principles on Swedish public law. The first section emphasizes that the traditional view as to parliamentary sovereignty and limited judicial review was under attack by the process of Europeanization. In recent years, there has been a manifest shift in the traditional views favouring parliamentary sovereignty and judicial restraint. This leaning may be attributed to the accession to the EU and to the integration into

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allmän rättsgrundsats om skydd för berättigade eller legitima förväntningar…Angående frågan om förbud mot retroaktivitet och skydd för berättigade eller legitima förväntningar åberopar sökandena förutom intern rätt även artikel 1 i det första tilläggsprotokollet till Europakonventionen. De hänvisar också till EG-rätten och anför bl.a. att EG-rätten anlägger en strikt syn på tillåtligheten av retroaktiv lagstiftning och att EG-rättens principer på detta område skall beaktas även utanför tillämpningen av gemenskapsrätten.

[680] *Ibid.,* "[i] artikel 7 i Europakonventionen finns en föreskrift som innebär förbud mot retroaktiv strafflagstiftning. I övrigt saknar konventionen regler som uttryckligen rör retroaktiv normgivning även om artikel 1 i det första tilläggsprotokollet i praxis ansetts ge visst generellt skydd mot sådana regler och ett motsvarande skydd för berättigade eller legitima förväntningar. I EG-domstolens praxis har likartade skyddsprinciper etablerats".

[681] *Ibid.*, "[v]ad beträffar avvecklingslagen är det tydligt att den möjliggör en förändring till den enskildes nackdel i vissa bestående rättsförhållanden. Regleringen innefattar emellertid inte någon retroaktivitet i den mening som förbudsreglerna i 2 kap. 10 § RF avser. Något skydd mot en förändring av det i målet aktuella slaget finns inte föreskrivet vare sig i den rent interna svenska rätten eller i Europakonventionen eller EG-rättens regelverk. Ett visst allmänt skydd för den enskilde mot förvaltningsrättslig lagstiftning med retroaktiva eller liknande effekter har visserligen etablerats i svensk- och europarättslig praxis. Skyddet har emellertid inte en sådan räckvidd att avvecklingslagen i det hänseende som nu har berörts kan anses strida mot någon rättsregel".

[682] *Ibid., Barsebäck* 4.7, "Regeringsrättens slutsats är att vad sökandena anfört om förbud mot att återkalla gynnande beslut, retroaktivitet och berättigade eller legitima förväntningar inte föranleder att regeringens beslut skall upphävas".

domestic law of the European Convention on Human Rights. Importantly, human rights review offers a stronger protection under EC law and the general principles of Community law than under the ECHR provisions.

As seen previously, the ECHR review is limited since national law must be found to conflict manifestly with the ECHR.[683] Moreover, it is worth stressing that the influence of the general principles within the national legal order appears to be stimulated by the recourse to preliminary rulings. Since 1995 until February 2005, 39 preliminary rulings have been given by the ECJ. Referrals to the European Court of Justice have been made mainly by administrative courts and more particularly, by the Supreme Administrative Court (*Regeringsrätten*). By contrast, the Supreme Court (*Högsta Domstolen*) referred until 2001 only twice to the Luxembourg court in *Data Delecta* and *Gharehveran*. Interestingly, the lower ordinary courts (*Tingsrätten*, e.g. *Franzen, Ulf Hammarsten, Krister Hanner*, *Hovrätten* e.g. *Björnekulla, Lindqvist*] have been more active than the higher courts. It is worth noting that the Supreme Court referred thrice to the ECJ between 2002-2004, in *Lyckeskog, Fixtures Marketing and Lindberg*.[684] Scholars have criticized the Supreme Court and the Supreme Administrative Court for their restraint in making preliminary rulings and the extensive use of the doctrine of *acte clair*. Notably, the Commission has recently issued a reasoned opinion pointing out a breach of Article 234(3), due to the judicial practise of the Supreme Court regarding leave to appeal and its absence of motivation.[685]

As mentioned above, general principles result from the jurisprudence of the ECJ, which imposes an obligation on States to respect the general principles in matters falling within the scope of Community law. Apparently, these general principles are both written (*Data Delecta/Abrahamsson*) and unwritten (*Lindqvist*). As seen above, they may take the form of non-discrimination or fundamental rights (freedom of expression, right to property). It is worth noting that the proportionality analysis appears as being the common denominator. This analysis must be undertaken by the national authorities and courts. The ECJ may offer guidelines to the domestic courts in the wake of a preliminary ruling. It may be said that it appears necessary to give guidelines to the national courts for a proper/uniform application of the general principles. Ultimately, the ECJ may give an answer. *In fine*, the national courts must apply and respect the general principles in matters falling within the scope of Community law (implementation of community law (*Wachauf*) and presence of the Community law element (*ERT*)). This leads to the application of

[683] Indeed, according to RF 11:14 the provision decided by the Parliament or by the government may be set aside only if the inaccuracy is obvious and apparent (manifest).

[684] Case C-338/02 *Fixture Marketing* [2004] n.y.r, and Case C-267/03 *Lindberg* [2005] n.y.g., Opinion of AG Jabobs (16 December 2004).

[685] 2003/2161, C (2004) 3899. *See* Bernitz, "No Need for Commission to be Heavy-Handed over Courts", European Voice, 25 November-1 December 2004, at p.8 and "Kommissionen ingriper mot svenska sistainstansers obenägenhet att begära förhandsavgöranden", ERT 2005, pp.109-116. The Supreme Court must provide reasons as to the decision not to provide leave so it will be possible for the Commission to examine the decision to protect the EU interests.

the test of proportionality in order to ascertain whether the principle at issue has been infringed. Both the obligation to respect the general principle and the subsequent application of the test of proportionality lead to an influence of the general principles within the national law.

The second section examined the impact of the principle of proportionality in Swedish public law. It must be strongly highlighted that the concept of proportionality in Swedish law is not synonymous with the EC/ECHR test of proportionality. Though certain provisions embody a certain notion of proportionality, they do not enshrine a specific reference to a balancing between the public and private interests at stake. As demonstrated by the Swedish and European doctrine, the EC principle of proportionality may entail a tripartite test, i.e. suitability, necessity and proportionality *stricto sensu*. This three-pronged test appears to be inspired from German law. The balancing of interests corresponds to the third part of the test of proportionality and may be assessed as offering a higher level of protection.

Between 1996 and 2004, the principle of proportionality has had an important effect on the national jurisprudence. The study focused on the impact on public law. In that respect, the Supreme Administrative Court has been astonishingly active as to the application of the principle of proportionality in internal law, e.g. environmental law, tax law, administrative licenses. Moreover, the principle has influenced the national legislation in many fields. Notably, the area of tax law has been particularly influenced. It may also be said that the activism of the national court has led to important modifications in the legislative context. Thus, in the light of the foregoing, it may be said that the ECHR principle of proportionality has played an important role in the evolution of Swedish public law in the recent years. As seen above, the principle of proportionality provides a higher level of protection to individuals. Arguably, this is due to the balancing of interests that the court or authorities should undertake. This balancing of interests may also lead to an increase of the powers of the Courts and authorities.

One may wonder, however, whether the use of the principle of proportionality has been overestimated since it does not often lead to the invalidation of the administrative decision being reviewed. As stressed previously, it stems from an analysis of the provisions of the ECHR that the state or authorities may benefit from of a wide margin of appreciation. This margin of appreciation depends not only on the provision that is used but also the context in which it is used. For instance, there is a wide margin of appreciation as to material tax rules and in matters falling under Article 1 of the First Protocol of the ECHR (right to property). It may be said that the primary role of the principle of proportionality is to review a decision and, thus, to allow the judge to balance the various interests and give reasons for the findings, which improves the rationality of the judgement. In that respect, the principle of proportionality enhances the quality of review.

Nevertheless, the principle of proportionality constitutes an extremely complex principle that may be seen as the keystone of the general principles of Community law. One may wonder whether the application of the principle of proportionality, at

the national level, should be improved? The Supreme Administrative Court has given some indications as to the application of the principle of proportionality, notably, as to the importance of the balancing of interests. The application of the principle has been assessed as rather satisfactory in the public law area. Critics have argued that the court should give even more precise guidelines. It may be said that the application of the principle in the Swedish legal order is not so precise or systematic in comparison with the European principle of proportionality.[686] Hence, one might perceive the codification of the principle, not only as a sign of interest towards proportionality, but also as demonstrating the need to give greater precision regarding its application. However, does the codification constitute a step forward? On the one hand, it appears as a good thing, since it makes clear that the principle of proportionality is of importance in the Swedish legal order. On the other hand, the responsability for the proper application of the principles lies on the administrative and judicial authorities and depends on the circumstances of the case. In other words, it depends on their willingness to undertake a serious and deep balancing of interests. Finally, during the last ten years, the principle of proportionality has been widely recognized in the case-law of the Swedish national courts. Arguably, this is the result of the influence of the ECJ and ECHR jurisprudence. Also, it may be said that the effect of the principle of proportionality on the case-law has been the most important in comparison with other general principles of Community law. This is not a surprise, since, as seen previously, the principle of proportionality is a kind of over-embracing principle.

The third section demonstrates that other general principles of Community law have had an influence on the Swedish legal order, i.e. effective judicial protection and legal certainty (non-retoactivity and legitimate expectations). Regarding the former, it appears from the case-law (*Lassagård* case) that the general principle of effective judicial protection is of fundamental importance as to the extension of the scope of judicial review in Sweden and its interaction with European Community law. First, it stems clearly from the *Lassagård* case that Community law prevails over domestic law. Second, it may be stated that EC law permits the development of the scope of judicial review in the Swedish legal order. As seen above, the application of the general principle of effective protection by the Supreme Administrative Court has resulted in the invalidation of the national regulation limiting review and the incorporation of a new provision ensuring the general competence of the administrative courts to review administrative decisions.

Thus, the general principles of Community law may trump the application of traditional review and the extensive involvement of administrative agencies (by giving an extended role to the national courts). Going further, it must be remarked once again that EC law offers better protection than the ECHR.[687] In that regard, it is interesting to note that the Supreme Court did not refer to RF 11:14 in *Lassagård*.

[686] E.g. in the *Barsebäck* case, critics have argued that the Court did not apply the principle of proportionality in a proper way.

[687] It may also be said that the general principle of effective judicial protection offers a better scope of protection than Articles 6 and 13 ECHR and their corresponding jurisprudence.

Thus, the *Lassagård* case confirms, as mentioned above, that the limitations regarding the power of the court to set aside legislation as unconstitutional do not, however, apply to the Community law.

What is more, one may notice that the *Lassagård* case has had a serious impact on the jurisprudence regarding negative administrative decisions not subject to judicial review and falling outside the scope of Community law, as shown by the cases *Metafysen* (public aid to build a home for ederly) and *Rönnquist* (access to a training course provided as a government employment measure. In both cases, the courts rejected such reasoning, since there was no Community law element and reviewed the decisions in the light of the ECHR. It may be said, however, that Community law influenced the codification in 1998 of Article 22 (a) of the Administrative Procedure Act. Notably, this provision applies also to internal matters.

Finally, the *Klippan* case, concerning non-retroactivity of national legislation, offers a perfect illustration of the spill over of the general principle within purely internal matters. Indeed, the Supreme Administrative Court referred to EC law and its general principles inspired from the common constitutional traditions of the Member States, that generally do not take into consideration situations preceding the entry into force of legislation. It is also worth noting that the governmental decision had important economic consequences on the individual (undertaking). Hence, one may state that the retroactive application is not allowed if it disadvantages the individual in a disproportionate manner.

In light of the foregoing, one may conclude that the general principles of Community law, which offer high standards of judicial protection, have led to the extension of the scope of judicial review in Swedish public law. The extension of the scope of review, based on individual rights stemming from the general principles of Community law, leads also to the modification of the structure of the judicial system by giving an increased and leading role to the national courts. This approach contrasts with the so-called traditional judicial review (before the accession to the EU). It is also worth remarking that the administrative courts, and more particularly the Supreme Administrative Court, have played an important role in the dissemination of the general principles. Additionally, one must emphasize that the principles of proportionality and effective judicial protection have been codified in various pieces of legislation. Interestingly, the influence of the general principles of Community law, both visible in the jurisprudence and the legislation, is not only limited to Community law matters, but also spills over to purely internal situations.[688]

[688] In that respect, the ECHR has also played an important role. However, it always worth keeping in mind that the review with the help of the general principles in Community law matters appears stronger.

GENERAL CONCLUSION

TOWARDS A *JUS COMMUNE EUROPAEUM*

The elaboration of a *jus commune* has always been the subject of a passionate interest for lawyers,[689] since it is often associated with a high standard of judicial protection.[690] It may be argued that a *jus commune* takes shape both at the Community and national levels through the use of general principles of Community law. As to the Community level, this *jus commune* is reflected by the corpus of fundamental rights and the codification of the general principles within the Charter of Fundamental Rights (see Part 1 and Part 2). As to the national level, the general principles of Community law made their way back to the laws of the Member States via the national case-law and legislation (see Part 3).

This two-level *jus commune* is the result of the cross-fertilisation of legal systems, i.e. the interaction between national, EC and ECHR legal orders establishing a two-way traffic between EC law and the two other legal orders. Cross-fertilisation does not have a fixed meaning in the context of European public law.[691]

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[689] Edouard Lambert and Raymond Saleilles in a congress held in Paris (1900), had the idea to create a "*jus commune*" for mankind funded on a comparative law approach. Van Gerven in 1995 argued that, *"[t]he creation of a Common Law for Europe with the help of general principles underlying the national and supranational systems in the Member Sates may stand a better chance, now almost one century later than the schemes of Lambert and Saleilles. Although it remains an enterprise with dubious chances of success, it must be tried over and over again, at least once in the lifetime of every new generation of lawyers, let us try it again".* (Van Gerven, "Bridging the Gap between Community Law and National Law: Towards a Principle of Homogeneity in the Field of Legal Remedies", CMLRev. 1995, pp. 679 *et seq*., at. p.702). Also, an International Conference at the European University Institute of Florence (1978) made reference to the building of a common law in different spheres of Community law. Among the matters figured the creation of a common constitutional and administrative law (Schwarze, "Tendencies towards a Common Administrative Law", ELR 1991).

[690] The *jus commune* indicates the *corpus juris civilis* and its interpretation, which gave birth to a high quality group of norms, applied subsidiary to local custom. In the XI century, the law of Justinian was *jus commune*, applicable everywhere in the absence of special sources of law (Wieacker, "The Incorporation of Western Civilization and Western Legal Thought" in Rogowski, *Civil Law*, Dartmouth, 1996, at p.xiii and at p.5). The origin of the *corpus juris canonici* can be traced back to the XII Century, it corresponds to the private work of Gratien, in Bologna who created a compilation of an extremely complete character applied in Europe. The term *corpus juris canonici* appeared in 1500, constituting the title of a book written by Jean Dupuis, a Parisian Jurist (Valdrini , *Droit Canonique*, Dalloz, 1989).

[691] Indeed, in the context of European public law, it has often been associated with convergence and spill-over (voluntary europeanisation). Bell, "Mechanisms for Cross-fertilisation of Administrative Law in Europe", Beatson and Tridimas (eds.), in *New Directions in European Public Law*, Hart 1998, pp. 147-167, at p.147. The author considers

In this thesis, however, it is presented as a dynamic concept capable of bringing changes into legal orders.[692]

Firstly, this conclusion looks at the influence of national and international (ECHR) law as to the elaboration and development of the general principles of Community law and thus encapsulates the effect of cross-fertilisation at the Community level. Secondly, it focuses on summarizing the impact and spill-over in the three Member States, and then accounting for the similarities and differences between them. Thirdly, it examines whether the legal systems tend to converge and, thus, may sketch a *jus commune europaeum*.

A) THE EFFECT OF CROSS-FERTILISATION AT THE COMMUNITY LEVEL

At the Community level, the effect of cross-fertilisation is represented by the ECJ's use of national and international law in the creative process of the general principles of Community law. As to national law, it appears that the ECJ has recourse to national administrative, procedural and constitutional law in the elaboration of the general principles of Community law. The use of national law as an indirect source of inspiration leads to the creation of administrative and procedural general principles as well as fundamental rights. It is worth remarking that the Court of Justice has made express references to the laws of the Member States in only a few cases. Notably, the Court does not enter into a comprehensive comparative analysis and mentions in broad terms the comparative methodology relied on. However, it is possible to establish the influence of a particular system on the development of general principles and fundamental rights from a perusal of the case-law. In that respect, it may be said that continental law, particularly German law, influenced the elaboration or application of administrative principles, e.g. legitimate expectations and proportionality. The same holds true in connection with the common law and the shaping of the rights of the defense. In a benign vein, the principle of transparency has been influenced by North Western European law. Consequently, it is argued that the extension of the European Community from six to fifteen Member

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that, "[c]ross-fertilisation…implies that an external stimulus promotes an evolution within the receiving legal system. The evolution invoves an internal adaptation by the receiving legal system in its own way…This process often gives rise to greater convergence between the receiving legal system and the external stimulus, but this need not be the case. According to Harlow, cross-fertilisation is the same as convergence (coming together of legal systems), and a better way to express it (Harlow, "Voices of Differences in a Plural Community", in Beaumont, Lyons and Walker *Convergence and Divergence in European Public Law*, 2002, pp.199-224, at p.202.

[692] Smith, "Cross-Fertilisation of Concepts in Constitutional Law", in Beatson and Tridimas (eds.), in *New Directions in European Public Law,* Hart, 1998, pp-101-124, at p.103, "the concept of fertilisation is inevitably dynamic…if A fertilises B, it means that B is submitted to change and that B…will give birth to new phenomena. In the cultural field…, however, such a perception should not at all be taken for granted. After all, successful fertilisation in this field means opening up for new attitudes, concepts or institutions".

States has effectively increased the sources of law for the ECJ in the search of general principles. In 1973, the accession of common law countries (United Kingdom and Ireland) permitted the Court and the AG to rely on the general concept of natural justice exemplified by the *audi alteram partem* principle. Similarly, the accession of Sweden and Finland in 1995, gave additional constitutional sources as to the elaboration of the principle of access to documents ("transparency"). Going further, it may be contended that the accession in 2004 of ten new Member States will also extend the sources of inspiration. It is worth noting that a comparative analysis might be a perilous exercise in a legal order composed of 25 Member States. Consequently, the direct use of the ECHR or the CFR might constitute interesting alternatives.

In the context of fundamental rights, the ECJ refers, in a general manner, to the constitutional traditions common to the Member States. However, in the early case-law the ECJ seemed reluctant to use national constitutional law. It is only in the seminal *Internationale Handelsgesellschaft* case that the Court ruled that respect for fundamental rights forms an integral part of the general principles of law protected by the Court, such rights being inspired by the constitutional traditions common to the Member States. This statement gave the fundamental rights the status of general principles. However, not all general principles are fundamental rights in the strict sense. In other words, the general principles constitute a wider category, e.g. administrative and procedural principles. Importantly, it should always be kept in mind that it is through the use of general principles as vectors that the EU nowadays boasts a solid and rather wide range of fundamental rights. As seen above, the Court does not systematically embark into a detailed comparative study of the constitutional laws of the Member States in order to discover a general principle. This stance has been severely criticized by parts of the doctrine that consider that a detailed comparative constitutional analysis would have enhanced the legitimacy of the Court's jurisprudence. Even if one may agree with this assertion, one may equally wonder about the very need of a profound comparative analysis when the ECHR is also available as a source of inspiration. To put it differently, the mere reliance on the ECHR enables the ECJ to establish a commonality of traditions, since all the Member States are parties to it. At the end of the day, the references by the Court to the common traditions of the Member States give substance (by providing reasons) to the formulation of fundamental rights and permits the Court to build on their legitimacy.

As to international law, it has been stressed that when the Court moulds a principle, inspiration will also be taken from international treaties concerning human rights. In the light of the subsequent jurisprudence of the Court, different international instruments have been used, e.g., ICCPR, ESC, ILO and ECHR. It was only in 1986 with the *Johnston* case that the ECJ affirmed that the ECHR had *"special significance"*. The importance of the ECHR is confirmed by Article 6(2) TEU, that refers uniquely to the ECHR and places it before the common constitutional traditions. In the early years, the Court made either explicit or implicit references to Articles of the ECHR. Sometimes, it was not possible to rely on the

ECHR provisions since the text may be silent on a specific matter. Notably, the ECHR case-law was rarely explicitly used by the Court and can be found essentially in the Opinions of the AG.

It is argued that Opinion 2/94 and Article 6(2) TEU have acted as the triggering stimuli of the increasing use by the ECJ of ECHR jurisprudence. Opinion 2/94 makes clear that the European Union cannot accede to the European Convention on Human Rights. Article 6(2) TEU ackowledges the importance of the ECHR. In the wake of Opinion 2/94, the doctrine suggests that the ECJ and the Advocates General increasingly made references to the Strasbourg jurisprudence and, thus, demonstrated an astonishing capacity of adaptation and great loyalty towards the interpretation of the ECHR. This phenomenon has been lucidly described by Sudre as *"un transfert du droit de la CEDH vers le système juridique communautaire"*. This transfer is divided into three phases: First, an *"instrumentalisation"* of the Convention by the ECJ through the general principles of Community law, then, a *"communautarisation"* of the ECHR law and, finally, a *"hybridation"* of Community law. Furthermore, in the recent case-law (2002–2004), it appears that the Court increasingly referred to the ECHR jurisprudence. This is particularly true in relation to Articles 6, 8, 10 and 12 ECHR. In some instances, the ECHR arguably appears as a direct source of Community law.

In addition, it is worth noting that the ECJ resorted to a maximalist interpretation in several decisions. This trend is particularly discernable regarding the application of the principle of non-discrimination and the interconnected concept of citizenship. The same holds true in relation to the interpretation of Article 8 ECHR. Interestingly, the EctHR in *Goodwin* (2002) made a thorough reference to the ECJ case-law in order to elaborate a similar protection within the Strasbourg system. Notably, it seems that the ECJ makes use of the principle of non-discrimination and the concept of citizenship as tools in order to develop a maximalist interpretation. It appears clear from this thesis that the ECJ has increased its maximalist interpretation of the ECHR in recent years. Such a stance should be most warmly welcomed. Also, it may be argued that such a development enters within a more global frame and is, thus, closely linked to the incorporation of the citizenship provision within the Treaty, the adoption of the Charter of Fundamental Rights and the suggestion included in the Constitutional Treaty to accede to the ECHR.

At the end of the day, this thesis has demonstrated that the use of national and international law by the ECJ brings legitimacy to the elaborative process and thus constitutes an essential element of the paradigm of legitimate judicial activism.

B) IMPACT AND SPILL-OVER AT THE NATIONAL LEVEL (UK, FRANCE AND SWEDEN)

The impact and spill-over of the general principles of Community law exemplify the convergence of European public law. The impact refers to the collision of the general principles of Community law with national law and the subsequent

obligation for the national courts to apply the general principles in the field of application of Community law.[693] This impact proportionally increases with the extension of the scope of Community law and leads to "vertical convergence".[694] The spill-over concerns the diffusion (resulting from the impact) of the general principles within purely internal law.[695] In contrast to the impact, this phenomenon is voluntary and based on the desire to ensure the integrity or coherence of domestic law. This spill-over leads to "horizontal convergence".[696]

For instance, the analysis of the UK public law has revealed that the influence of the general principles of EC law is particularly salient in relation to the principles of proportionality and legitimate expectations. However, the application of the general principles by the UK courts in matters falling within the scope of Community law has not been an easy task. Difficulties result, basically, from two elements. First, the national courts confused the application of the EC law principle of proportionality with the Wednesbury test. Second, the national courts encountered some difficulties when determining the scope of application of Community law. In purely internal matters, it results from the UK case-law that the EC principle of proportionality is not applicable to purely internal matters. By contrast, the EC

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[693] *See,* Hilson, "The Europeanisation of English Administrative Law: Judicial Review and Convergence", EPL 2003, pp.125-145. Europeanisation is narrowly defined as the influence of EC and ECHR norms on English, judge-made, administrative law. Going further, the author draws a distinction between compulsory (direct) and voluntary (indirect) Europeanisation. As to the former, it corresponds to matters falling within the scope of Community law. As to the latter, it corresponds to purely internal matters and represents a more indirect process, often described as spill over or cross-fertilization (at p.127). The impact is rather similar to concepts such as mandatory or compulsory Europeanisation.

[694] Harlow, "Voices of Differences in a Plural Community", in Beaumont, Lyons and Walker, *Convergence and Divergence in European Public Law*, 2002, pp.199-224. Harlow distinguishes between horizontal and vertical convergence. Vertical convergence "draws on the doctrine of precedent to impose common principles", *e.g.* member state liability. Horizontal convergence is related to EC principles creating distortion within the existing standard in domestic law. "This gap creates a quandary for a national judiciary charged with maintaining so far as possible the integrity of the domestic legal system".

[695] Spill-over (Craig, Anthony) is similar to concepts such as voluntary Europeanisation (Hilson), cross-fertilisation (Bell, Allison). *See,* Craig, "Once More unto the Breach: The Community, the State and Damages Liability", LQR 1997, pp.67 *et seq*, Anthony, "Community Law and the Development of UK Administrative Law: Delimiting the Spill-Over Effect", EPL 1998, pp.253-276. Anthony, *UK Public Law and European Law: The Dynamics of Legal Integration*, Hart Publishing, 2002. Spill-over: Superior standard of EC administrative law is developed in domestic law (internal practice). The external stimulus provokes an evolution within the receiving system (Bell at p.147). This internal evolution may be realized in its own way, e.g. substantive legitimate expectations and the abuse of power test in UK, Bell, "Mechanisms for Cross-fertilisation of Administrative Law in Europe", in Beatson and Tridimas (eds.), *New Directions in European Public Law*, Hart, 1998, at p.147-167, and Allison, "Transplantation and Cross-Fertilisation", in Beatson and Tridimas (eds.), *New Directions in European Public Law*, Hart, 1998, pp.169-182.

[696] Harlow, *supra n.694*,

principle of legitimate expectations does apply to purely internal matters in the form of the abuse of power test. One may wonder whether such a clear-cut distinction will remain in the future. Strong elements seem to support, indeed, a negative answer and thus a uniformalization.

Regarding the principle of proportionality, even though the House of Lords refused its application in matters falling outside the scope of Community law, Lord Slynn in *Alconbury* considered it unnecessary and confusing to maintain two separate tests (Wednesbury and EC proportionality). In other words, it is time to apply the EC principle of proportionality in the domestic field.[697] Regarding substantive legitimate expectations, one clearly witnesses the spill-over of the EC principles into purely internal matters, which takes the form of an abuse of power test. This test protects, to a certain extent, legitimate substantive interests and appears to be a "hybrid concept". The traditional reasoning by analogy used in the UK may explain the diffusion of the general principles of Community law into purely domestic matters. Also, the existence of national concepts such as procedural legitimate expectations and estoppel (private law) may have helped the principle take root.

In addition, the HRA plays an important role in the rational application of the principle of proportionality. The entry into force of the HRA demonstrates the acceptance of the principled model by the Parliament. Notably, the HRA applies in purely internal matters. Thus, it is contended that the principle of proportionality applies in domestic matters in connection with fundamental rights. Arguably, the HRA will not only foster the application of the EC principle of proportionality, but also substantive legitimate expectations. In light of the foregoing, its application into internal matters appears inescapable. At the end, the general principles of Community law constitute more exact standards and bring more rationality and intelligibility to the system of review. They require the domestic jurisdictions to balance the aim of a measure against the effect on the individual and constitute, in that sense, a fundamental shift from the doctrine of parliamentary sovereignty.

As to French public law, the EC principle of legitimate expectations, unknown before, has been influential. It appears that the *Conseil d'Etat* recently (since 2001) draws a very clear distinction between matters falling within the scope of Community law and internal matters. By contrast, the *Cour de Cassation* and the lower administrative courts, by not applying a strict dichotomy between the two paradigms of the law, have been much more flexible. The applicants in the 1990s made extensive use of the general principles of Community law before the administrative courts. Nevertheless, the domestic courts often disregarded these arguments by invoking the lack of sufficient precision thereof in order to review the national measures. The situation appears to have changed and the administrative case-law can be seen as generally acting more in tune with Community law. Mention should, however, be made of the problems resulting from the restrictive interpretation of the scope of Community law. Such a restrictive interpretation

[697] *Alconbury, supra n.115,* para 51.

constitutes one of the main elements hindering the development of general principles of Community law, though the courts may have fewer problems using general principles already existing in their national law, e.g. principles of equality and proportionality. Consequently, the principle of legitimate expectation (inspired from German law) may pose difficulties for the French courts.

Concerning purely internal matters, the reception of the general principles is based on their voluntary acceptance by the national courts. In that regard, the *Cour de Cassation* applied the principle of proportionality to domestic sanctions and the principle of non-discrimination to certain provisions of the tax code. Similarly, the principle of legitimate expectations made its way into diverse domains of internal law (case-law and legislation), i.e. town planning (pharmacy concession), damages, and fiscal matters (Article L 80 A of the procedural fiscal code). When applied, it is attached to well-known principles of French law, i.e. legal certainty (implicit in the jurisprudence) and/or acquired rights (explicit in the jurisprudence). Also, it is worth remarking that the *Conseil d'Etat*, during the past few years, has substantially developed its jurisprudence regarding acquired rights. This evolution may be appraised as an indirect influence of the general principle of legitimate expectations.

Regarding Swedish public law, the EC principles of proportionality, effective judicial protection and non-retroactivity have had a significant influence on the national jurisprudence. During the last ten years, the principle of proportionality has been widely recognized in the case-law of the Swedish national courts. Particularly, the Supreme Administrative Court has been active as to the application of the principle of proportionality in different areas of internal law, e.g. environmental law, tax law and administrative licenses. Importantly, the ECHR principle of proportionality has also played a substantial role in the evolution of Swedish public law.

Other general principles of Community law have had repercussions on the Swedish legal order, i.e. the principles of effective judicial protection and legal certainty (non-retroactivity and legitimate expectations). The application of the general principle of effective protection by the Supreme Administrative Court has resulted in the invalidation of the national regulation limiting review and the incorporation of a new provision ensuring the general competence of the administrative courts to review administrative decisions. Thus, the general principles of Community law have trumped the application of traditional review and the extensive involvement of administrative agencies (by giving an extended role to the national courts).

As to the issue of non-retroactivity, EC law and its general principles have been relied on in purely internal situations. By consequence, the scope of the constitutional prohibition against retroactive legislation was extended. In the wake, applicants in national proceedings concerning both internal and Community law matters, relied quite extensively on the principles of non-retroactivity and legitimate expectations.

One may perceive the codification of the principles, not only as a sign of interest towards the general principles, but also as demonstrating the need to define

the scope of their application more precisely. Finally, there has been a manifest shift from the traditional views favouring parliamentary sovereignty and judicial self-restraint. This leaning may be attributed to the accession to the EU and to the integration into domestic law of the European Convention on Human Rights.

From this short summary, one may deduce three conclusions about the impact and spill-over of the general principles of Community law in the UK, France and Sweden:

1) They complement and extend the possibilities of judicial review afforded by the national legal norms.

2) They provoke legislative reforms in internal matters.[698]

3) They vitalize the national legal orders and *de facto* trigger constitutional reforms by affecting the place and role of the judge in the respective Member States.

Naturally, the impact and spill-over lead to a certain resistance of the national judges and to conflicts within the judiciary branch and between the national courts of the Member States. It is not an easy task for the domestic judge to modify the concept of his/her own role. Subsequently, one may understand the resistance of certain judges in the application of the general principles of Community law. This does not, however, legitimise a behaviour that may be contrary to Community law. In the UK, this is exemplified by the existence of two types of national judges. On the one hand, judges attached to the traditional approach to review and, consequently, less responsive to Community law, e.g. Laws in *First City Trading*. On the other hand, progressive judges are more likely to properly apply Community law, e.g. Sedley in *Hamble Fisheries,* or even to apply the Community standard in internal matters, e.g. Slynn in *Alconbury*. In France, the attitude of the *Conseil d'Etat* marks a restrictive approach. By contrast, the civil judge and the lower administrative courts appear more flexible. In Sweden, the Supreme Administrative Court (*Regeringsrätten)* seems more inclined to consider and accept Community law in comparison with the Supreme Court (*Högsta Domstolen).* In that regard, mostly administrative courts and more particularly, the Supreme Administrative Court have referred questions to the European Court of Justice. By contrast, the Supreme Court hs referred only twice to the Luxembourg court between 1995 and 2001.

[698] These reforms may be directly influenced by the general principles, e.g. codification of legitimate expectations in French tax law, codification of proportionality and effective judicial protection in Sweden, or, indirectly, by a Treaty provision incorporating a general principle, e.g. transparency (Belgium, Ireland and UK). UK or a Directive incorporating a general principle, e.g. effective judicial protection in France. Also, it must be noted that the Directive 2004/38 EC (29 April 2004) recently incorporated the jurisprudence regarding citizenship (*see* preamble, paragraph 27). In addition , a particular ECJ case may also lead to a legislative reform, e.g. *Kreil* case (ECJ) in Germany and *Chen* case in Ireland (referendum 2004 on the status of citizenship).

It is now important to determine which are the most influential principles and the most receptive countries. As to the former, the principles which have had the most important influence in the laws of the three Member States are clearly the principles of proportionality and legitimate expectations, i.e. proportionality and legitimate expectations in the UK, proportionality in Sweden and legitimate expectations in France. Two elements may explain such an influence. First, these two principles are the most often invoked before the ECJ. Second, as previously stated, they constitute high standards of protection elaborated through the influence of German law.

As to the latter, it appears that the most receptive country, regarding the spill-over, is Sweden. Indeed, one witnesses a spill-over of the principle of proportionality, effective judicial protection and non-retroactivity. This spill-over is sometimes marked by the codification of the principles of proportionality and effective judicial protection in certain areas. The UK, in turn, is particularly influenced by the principles of proportionality and legitimate expectations. As to proportionality, the HRA plays an important role in the development of the principle in internal matters. As to legitimate expectations, the national courts have recourse to a home-made principle, i.e. the "abuse of power test". Finally, France seems the least receptive country of the three, though it may be said that the principle of legitimate expectations indirectly made its way through the help of a pre-existing French concept, i.e. the concept of acquired rights.

Thus, it may be concluded that the spill-over, in contrast to the impact, is specific to each Member State. Notably, this spill-over is more developed in a relatively "new" Member State such as Sweden rather than in a founding Member State such as France. It may be said that the influence of the general principles is less important in a continental law country such as France. This is not so surprising, since the general principles of Community law are mainly inspired by the continental law experience.

C) ARGUMENTS OF CONVERGENCE

The assessment of the impact and spill-over in the laws of the three Member States constitutes a pivotal issue so as to determine whether the legal systems are converging and, thus, may sketch a *jus commune europaeum*. As previously stated, three arguments may be resorted to in order to prove the existence of the phenomenon of convergence. First, the primacy argument ("Community law argument") concerns the obligation to apply the principles in the Community law context. Second, the higher degree of scrutiny argument ("higher law argument") may help us to understand the necessity to apply properly the principles within Community law matters and the judicial interest of their spill-over within internal law.[699] Third, the consistency argument ("two-speed law argument") provides

[699] In few instances, the national standard appears higher than the EC standard, *e.g.* the use of the principle of legitimate expectations in Germany in the context of state aids. (*See*, Schwarze, "The Role of the European Court of Justice in Shaping Legal Standards for

another element supporting the spill-over of the principles. It considers that the existence of the two standards of law (Community and internal law) goes against the coherence of the legal system and that, consequently, only one standard (the higher one) should be applied.

As to the Community law argument, this thesis has stressed that the impact of the general principles is intricately connected to the principles of supremacy, direct effect and Article 10 EC. Thus, there is a duty for the national courts to respect the general principles in matters falling within the scope of Community law. Additionally, one has seen that the recourse to the preliminary ruling procedure constitutes an important tool of ensuring a judicial dialogue between the ECJ and the national courts and to stimulate the reception of the general principles of Community law.[700] However, national courts sometimes interpret the scope of Community law in a very restrictive manner, e.g. *First City Trading* in the UK, *Freymuth* in France or *Data Delecta* in Sweden. This restrictive interpretation is sometimes based on the reluctance to use unwritten norms of Community law. One must strongly criticize such an interpretation, which renders preliminary rulings to the ECJ impossible and, thus, impedes the determination of whether the matter falls within the scope of Community law. Moreover, the national courts use the doctrine of *acte clair* in order to avoid making a preliminary reference to the ECJ, e.g. *Barsebäck* in Sweden. In that regard, it is worth noting that a restrictive interpretation and the abuse of *acte clair* can be effectively tackled by the recent jurisprudence of the ECJ in *Köbler* and *Kühne.*[701] As to the former, the Court established the possibility of engaging Member State liability in the case where a national court, using the *acte clair* doctrine, commits a manifest breach of Community law.[702] As to the latter, the Court concluded that an administrative body is, in accordance with the principle of cooperation arising from Article 10 EC, under an obligation to review a decision in order to take into account the interpretation of the relevant Community law provision given in the meantime by the Court.[703] Also, lawyers and judges are becoming, indeed, more familiar with Community law. The scope of Community law is extending. So are the general principles of Community law. One thus witnesses the elaboration of a new kind of *jus commune* in

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Administrative Action in the Member States", in O'Keeffe and Bavasso, *Judicial Review in European Union Law*, 2000, pp.447-464, at p.455).

[700] *See,* Jacobs, "Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice", TILJ 2003, pp.547-558.

[701] Case 224/01 *Köbler* [2003] ECR I-10139, Case C-453/00 *Kühne & Heitz* [2003] ECR I-10239.

[702] *Ibid., Köbler,* paras. 118-120.

[703] *Kühne & Heitz* , *supra n.701*, para. 27. It concerned a decision regarding customs nomenclature given by a national administrative body (Board for poultry and eggs). The decision was confirmed by the administrative for Trade and Industry, using the *acte clair* doctrine. Nevertheless, the decision appeared inconsistent with a subsequent ruling from the ECJ.

Community law matters. This *jus commune* is incited by the compulsory nature of Community law and is unstoppable.

As to the higher law argument (levelling-up, *nivellement par le haut* of the various administrative law)[704], this thesis has demonstrated that the general principles normally provide a higher standard of protection than the national law of the Member States, e.g. proportionality and legitimate expectations in UK, legitimate expectations in France, proportionality and effective judicial protection in Sweden, and that this standard of protection may also go further than the ECHR, e.g. *Johnston, Orkem, P* v. *S and Baumbast*. By contrast, Rasmussen has qualified the higher law argument as suspect due to the lack of an agreed standard that cannot be elaborated due to the important societal differences between the Member States.[705] In a similar vein, Harlow has questioned the emergence and necessity of a *jus commune* and, instead, argued for diversity and legal pluralism. Her criticism is based mainly on procedural grounds (procedure cannot be inferior but simply different) and the *Grogan* case. Harlow considers that the principle of subsidiarity gives us contrary signals and that the higher law argument constitutes a dangerous simplification.[706] In my view, these criticisms also constitute dangerous simplifications of the "higher law" argument. This study has shown that the higher law argument should be taken seriously, that it does not constitute a fallacy and provides, in turn, legitimacy to the general principles of Community law. Importantly, the higher law argument is valid both in relation to Community law and purely internal matters.

As to the two-speed law argument (coherence/integrity), this thesis has argued for the application of the general principles of Community law in purely internal matters. This voluntary choice to adapt the judicial system, should be made in order to ensure the coherence of the legal system. As lucidly stated by Hilson, "[t]he courts should on grounds of simplicity and economy disallow its use within rights cases. It makes little sense to allow a less sophisticated principle for controlling discretionary power to be used in a case where a more sophisticated principle – proportionality – is already being employed. Norm reduction within cases should be the aim where an existing norm is essentially redundant".[707] To counter the coherence argument, theories such as "legal pluralism" and "cultural diversity", have been advocated. In that regard, Legrand argues for the respect of diversity in the European Community and against the uniformalisation of the national legal

[704] Galmot, "L'apport des principes généraux du droit communautaire à la garantie des droits dans l'ordre juridique français", CDE 1997, pp. 69-79, at p. 78.
[705] Rasmussen, "On Legal Normative Dynamics and Jurisdictional Dialogue in the Field of Community General Principles of Law", in Bernitz and Nergelius (eds.), pp. 35-46, at p. 44.
[706] Harlow, *supra n.694,* at pp. 218-221.
[707] Hilson, *supra n.693,* at p.135. *See* Jacobs, *supra n.700,* at p. 549. Taking the example of the principle of proportionality, he considers that, "[i]t would indeed be unsatisfactory to have different tests applied in different areas of judicial review". *See also*, *Galmot, supra n.322* and *Auby, supra n.468*.

orders.[708] He concludes that diversity is good and that common-lawyers should resist the continental invasion in the name of European construction.[709] Clothed in appealing terminology, this theory gives birth to very conservative standpoints, since it totally disregards the higher law argument, which is intricately linked to the acceptance of the coherence argument. In the light of this thesis, it may be said that the reception of the general principles in purely internal matters is unstoppable. Indeed, the use of two standards (community law and internal) of protection leads to incoherence, legal uncertainty and lower protection for individuals.

The final point must concern the doctrinal debate surrounding the impact and spill-over of the general principles. There is no disagreement as to the convergence of the national laws in Community law matters. By contrast, the situation is different in purely internal matters. In this regard, Hilson contended that voluntary Europeanisation in the shape of spill-over or cross-fertilisation is unlikely ever to produce a common, general administrative law in Europe.[710] Similar pessimistic views are echoed also by Anthony, who stresses that an orthodox perception of public law has served to limit the scope of integration and thus, the process of spill-over appears more restrictive than expected. [711] One may disagree with those views. Arguably, it simply takes more time to modify traditional concepts on a voluntary basis than to impose an EC law obligation. The EC law concepts are making their way within internal public law slowly, silently but inescapably. Using the words of Anthony, European public law might be headed towards far-reaching changes.[712]

In this context, one may further query whether or not the general principles are anathemas to the internal legal orders. A positive answer would corroborate the assumption that there exists a strict distinction between the two paradigms of law. As Member States' legal orders appear no longer isolated or self-contained, there is no need to resist the deflection in purely internal matters when solid bridges exist between the Community and national legal systems. Therefore, in my view, the general principles are not anathemas to the internal legal orders, but are valuable in the sense that they complete and enrich the national legal systems. More than any legal arguments, the reception of the general principles of Community law necessitates *"une certaine ouverture d'esprit"*. One of the pivotal aims of this thesis

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[708] Legrand, "Public Law, Europeanisation, and Convergence: Can Comparatists Contribute?", in Beaumont, Lyons and Walker , *Convergence and Divergence in European Public Law*,2002, pp.225-256, at p. 226. He takes as examples the *Brind* and *M* v. *Home* Office cases. Brind constitutes an example of the local resistance and the rejection of the continental principle of proportionality. According to him, citing Hoffmann, considering the acceptance of proportionality would change little (*Ibid.*, at p. 247). M is seen as unexceptional and the result of an epidemiological process (*Ibid*., at p. 250).

[709] *Ibid.,* at p.255.

[710] Hilson, *supra n.1,* at p. 129.

[711] Anthony, *supra n.1* at pp. 130-131, "the orthodox reception of EU law has created a dualist divide that has frustrated the deeper interaction of domestic and EU legal standards. Although the divide has not precluded integration, it has given rise to a perception that domestic and EU Law should be seen as essentially distinct from each other".

[712] *Ibid.*, at p.17.

was to question the existence of a *concordentia* between the Member States and to analyse whether the Member States head towards the same meeting point. This research has demonstrated that the Member States' legal orders are converging and, thus, tend towards a *jus commune europaeum*, thanks not least to the general principles of Community law.

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