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Articles

Case Law Analysis

Book Review

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Editorial

In this issue, REALaw is the proud host of a series of contributions on transplants in the European administrative space. Guest editors for this special issue are Yseult Marique and Emmanuel Slautsky.

For several years now, I have been teaching a class to master students at the University of Antwerp on the 'what, why and how' of comparative administrative law. Even though the students have already enjoyed a thorough compulsory course on comparative law at the time when this class is offered to them, I still find it useful to specifically highlight some of the particularities of comparative research in my own field of law. A text from which I often quote during that session is one by della Cananea entitled 'Administrative Law in Europe: a Historical and Comparative Perspective'. In this particularly rich contribution, the author puts forward – but also challenges – the idea of administrative law as 'a national *enclave*'.[1] Indeed, the time during which legal systems only borrowed private law-related solutions from each other and regarded administrative law as too entangled with the political and historical foundations of the state has long gone. It is a time so far behind us that much of our comparative efforts today aim to find inspiration in other legal systems to solve legal problems in our own.

However – much like a kidney or heart transplant – a legal transplant can lead to rejection. In medicine, rejection is caused by a patient's immune system. Genetic factors are key in this respect, which is why family members will often be suitable donors. The European Union – if we can at all compare it to a family – does not consist of siblings with a joint parent from which they would have inherited common features. In fact, the EU's genesis has been a process more comparable to that of centripetal federal states, with enough common ground between Member States to make integration possible as well as differences to expect resistance now and then.

Therefore, increasing our knowledge of successful and unsuccessful legal transplants can crucially teach us something about our own domestic legal systems. As della Cananea explains, comparative analysis can 'hone our understanding of our own laws and institutions':[2] it enables us to define the characteristics of our own system of administrative law in sharper terms, and to convey information on prevailing national administrative law to others. Örücü's striking way of emphasizing this particular role of comparative law comes to mind:

'We know that everyday process of thinking involves the making of a series of comparisons, that is, a process of contrasting and comparing, juxtaposing the unknown and known, and we comprehend the phenomena round us by observing differences and similarities.

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1 G della Cananea, 'Administrative Law in Europe: A Historical and Comparative Perspective' (2010) 2 Online Italian Journal of Public Law 162, 167ff.

2 ibid, 208.

Just as the qualities of a yellow, its hue, brilliance and tone are perceived and sharpened most truly by placing it first on or beside another yellow and secondly by placing it in contrast to purple, so we explore the world around us.[3]

This is precisely the thought process that can be found in many of the contributions for this special issue: when legal transplants are rejected, it makes one wonder why this has happened and what this tells us about the receiving system. In discussing the success or failure of certain transplants, the authors have each been invited to explain which features of their system have been decisive for the outcome. Undoubtedly, the authors themselves gained new knowledge of their domestic legal system in the process.

When reading the contributions for this special issue, another thing that came to mind is that much can get lost in the process of transplanting, too. Indeed, whilst a legal system may intend to adopt a solution found in another legal system, it may fail to adopt those features that are its constitutive elements. Dacian C. Dragos' contribution is especially illustrative in this respect. The author explains that the institution of the Ombudsman was not received all too warmly in Romania at first, amongst other things due to its perceived lack of resources (hard law powers). Today, the Romanian ombudsman can 'lodge a court action in a plaintiff's name, challenging the public administration over its illegal acts or activities or its silence (no action or response)'.[4] This seems quite remote from the original idea behind the Ombudsman as implemented in many other European states, where mediation and the power to issue recommendations are often what is valued in the institution.

Some contributions by the authors have also rightfully warned us against taking for granted the existence of a 'European common ground' on many issues of general administrative law all too easily. This is even the case for general principles that have filled numerous books written by scholars specialized in EU law. The contribution by Sophie Boyron and Yseult Marique, for instance, reminds us that even in Western legal systems like the UK, the idea of proportionality as a general principle of administrative law – often expected to replace more traditional reasonableness tests – is all but generally accepted or self-evident: constitutional context matters. In this respect, another eye-opener was Emilie Chevalier's article on the reception of the principle of legal certainty in France. In other cases, even the idea of codifying certain parts of administrative law by giving them a proper statutory basis – and the legal status that comes with that – may still be hard to fit into certain national administrative contexts.

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3 E Örücü, 'Developing comparative law' in D Nelken and E Örücü (eds), *Comparative Law. A handbook* (Hart Publishing 2007), 45.

4 See title 4 of the contribution.

In the case of Agnė Andrijauskaitė's contribution, it was revealed to be for historical reasons.

Ulrich Stelkens' contribution discusses judicial protection in the area of public procurement law. In Germany, this has been considered an aspect of administrative action governed by private – rather than public – law, making the introduction of judicial review all but evident. Indeed, the degree to which a legal system accepts that administrative decision-making should be governed by a set of independent rules labelled 'administrative law', and not by private law, may also influence a system's readiness to welcome legal solutions developed elsewhere. When it comes to regulating the relationship between the administration and citizens, the degree of exceptionalism – i.e. the belief in the need for a set of rules distinguished from civil law – may vary widely across legal systems.

It is not only public institutions (usually courts) that often cast the decisive vote on whether or not legal transplants are successful. Social or political conventions or traditions, and the actors that embody them, can play a considerable role as well. The contribution by Petra Lea Láncos, Írisz E. Horváth and Sándor Szemesi's on leniency in Hungarian competition law is an excellent illustration of this, emphasizing the role of business culture. Moreover, Emmanuel Slautsky's analysis of the adoption of independent regulators in Belgium reveals a reason for resistance against this mode of administrative organization – one which thus far has remained under the radar. Slautsky refers to the traditionally strong role of social partners in regulating the Belgian economy, and to how this influence has been weakened by (EU) requirements for 'independence' in the case of independent regulatory authorities in the network industries.

Just as the various country-specific contributions in this special issue are each a delight to read, the guest editors' introductory article is in itself also a masterpiece. Readers will especially appreciate the systematic way in which the phenomenon of resistance is fleshed out. Specifically, the editors present us with a clear conceptual theoretical framework to study the *loci*, expressions, main factors, and outcomes of resistance against transplants.

In the concluding paragraphs, Yseult Marique and Emmanuel Slautsky advise us to be patient in awaiting the development of a *ius commune* in administrative law in Europe, since mindsets and routines change slowly. Some of the contributions in this edited volume indeed reveal that time – or a lack thereof – may be essential in making administrative law reforms acceptable and accepted in a certain legal community. In many legal systems throughout Europe, such as my own Belgian system, administrative law is still one of the least codified areas of the law. Change is often incremental and theories of administrative law are built up in an inductive way, ripening slowly in the case law through an exchange of arguments between litigating parties and the courts. However, change can go in all directions, and that direction is hard to predict. Change does not

guarantee progress.[5] Moreover, local or national traditions are not per se phenomena to wish away. This is all the more so since Article 4(2) TEU[6] itself protects national (constitutional) identity. This provision has been much debated, and there is still no broad consensus on its significance. As Marique and Slautsky themselves emphasize, the formal or unwritten constitution can be a reason not to welcome legal transplants. Administrative bodies and courts may find it much harder to depart from their general principles or rules of administrative law than we may be able to envisage, especially when these have constitutional value. These rejections are often rooted in beliefs and conceptions about democracy, the rule of law, separation of powers, and other core values of modern constitutions whose concrete consequences may still differ across European public law systems.

Seen from that perspective, resistance may be something to embrace. When it stems from constitutional concerns, it can reveal that those resisting – especially when they are public institutions – still care enough about upholding the ideals of liberal democracy, which can be translated very differently across constitutions of different nation states. Moreover, rejection may teach us something about what it may take to make this marriage of nation states we call the EU a successful one. Like a quarrel every now and again in an actual marriage, resistance informs us of what our partners in the EU require in terms of self-determination to stay in. Therefore, one should hope for much more research on legal transplants and resistance in the future of the same high quality as that brought together in this special issue.

Our issue also contains a case note by Giulio Allevato and Fernando Pastor-Merchante on the Hungarian Advertisement Tax case. The authors dive into the particularities of the case and warn not to transplant its reasoning to other cases all too quickly.

Finally, Rónán R. Condon took time to write an extensive book review of Zsófia Varga's *The Effectiveness of Köbler Liability in National Courts*. Even though the reviewer would have liked to see more attention paid to the *sui generis* constitutional structure of the EU, Varga's ambition to develop a bottom-up approach and the efforts made to put *Köbler* liability in context were much appreciated.

Stéphanie De Somer[7]

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5 Again, I find inspiration in G della Cananea, 'Administrative Law in Europe: A Historical and Comparative Perspective' (2010) 2 Online Italian Journal of Public Law 162, 193.

6 Consolidated version of the Treaty on European Union [2016] OJ C202/15.

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Articles

REVIEW OF EUROPEAN ADMINISTRATIVE LAW; VOL. 14, NR. 1, 7-36, PARIS LEGAL PUBLISHERS © 2021

Resistance to Transplants in the European Administrative Space

An Open-Ended Reading of Legal Changes

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1. Introduction[1]

In 1992, a few years after the fall of the Berlin Wall and the beginning of the reunification of Europe, Fukuyama argued that the direction of history was towards the general advent of democracy and universal expansion of individual freedom.[2] At the time the European project was understood as integration through law. Academic enthusiasm rose to study the circulation of ideas and techniques – such as good administration, proportionality, legitimate expectations, and ombudsmen – which seemed to spread across the European continent. This trend seemed to hold the promise that a *jus commune*, a common core of administrative institutions and principles, could be identified in the European administrative space,[3] as had also been attempted in relation to private law.[4] Thirty years later the tide has turned, with Member States reclaiming the right to have different interpretations of shared values, such as the rule of law,

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1 This special issue is the outcome of discussions held on 7-8 November 2018 at the Centre de droit public, Université libre de Bruxelles (Belgium) by the Network *The Future of Administrative Law* (more information on this network is available on this website: <https://droit-public.ulb.ac.be/recherche/projets-specifiques/reseau-futur-du-droit-administratif/> accessed 17 March 2021) and of online discussions in July 2020. We thank our contributors for their stimulating engagement with this project, as well as the participants from the Comparative Law Section at the Society of Legal Scholars 2020 (online) for their comments and suggestions. We also acknowledge the generous funding provided by the Lehrstuhl Professor Stelkens (Universität Speyer) and the Université libre de Bruxelles.

2 F Fukuyama, *The End of History and the Last Man* (Free Press 1992).

3 G della Cananea, 'Beyond the State: the Europeanization and Globalization of Procedural Administrative Law' (2003) 9 European Public Law 563.

4 M Bussani and U Mattei, 'The Common Core Approach to European Private Law' (1997-1998) 3 Columbia Journal of European Law 339.

as well as legal principles, such as proportionality.[5] Even at EU level, the European Commission's white paper on the *Future of Europe* spells out five different models with varying degrees of differentiation.[6] What happened between the optimism of the nineties and the bleak picture of disintegration currently painted? If political science, economics, and sociology surely have part of the answer, lawyers – especially comparative public law ones – can also contribute to understanding the limits of the integration through law programme. Against this background, this special issue seeks to be more optimistic about the present diagnosis thanks to an analysis of the past. At no point in the last thirty years have transplants in administrative law been wholeheartedly and uniformly accepted. They have contributed positively to legal changes in the Member States thanks to on-going discussions, but there have always and everywhere been pockets of resistance against uniformity. Each administrative system seeks, to some extent, to make foreign ideas, techniques, and solutions its own in some way before fully embracing them. Time and patience are required to reap the benefit of the process of change triggered by transplants.

Thus, oscillations between convergence and divergence in European administrative law are no new phenomenon. The question arises on whether these oscillations are incrementally leading to the development of common principles of European administration, developments that would encapsulate a distinctive balance between rationality of administrative action, technical expertise, politics, and respect for individual entitlements. Identifying the contours of these principles is an ambitious project that goes beyond the scope of this special issue. Nevertheless, analysing some of their components, such as the legal changes brought about in national administrative institutions, techniques,[7] and procedures through transplants, can already contribute to the wider discussion. This special issue seeks to provide a distinctive perspective on this discussion thanks to a series of micro-case studies, thus illustrating the grey zone between convergence and divergence in administrative institutions, techniques, and procedures.

This special issue tests the hypothesis according to which the embeddedness of legal techniques and institutions in their social context may prevent them

5 J Ziller, 'L'insoutenable pesanteur du juge constitutionnel allemand – À propos de l'arrêt de la deuxième chambre de la Cour constitutionnelle fédérale allemande du 5 mai 2020 concernant le programme PSPP de la Banque Centrale Européenne' 2 Eurojus 151.

6 European Commission, 'White Paper on the Future of Europe' (White Paper) COM(2017)2025.

7 The expression 'technique' is used here as the legal equivalent for what is known in political and public management literature as 'tools': see e.g. C Hood and H Margetts, *The Tools of Government in the Digital Age* (Macmillan 2007) and L Salamon, *The Tools of Government: A Guide to the New Governance* (Oxford University Press 2002). In this literature, 'tools' are resources available to public authorities by virtue of being public authorities and upon which they can draw to carry out their policies (see Hood and Margetts, 5). For more detailed explanations of this notion, see Y Marique, *Public-private partnerships and the law – Regulation, institutions, and community* (Edward Elgar 2014) *passim*.

from being easily moved from one system to another.[8] This may be even more so as far as administrative law is concerned, given its intrinsic links with, in the words of Kahn-Freund, the prevalent power structure, 'whether that be expressed in the distribution of formal constitutional functions or in the influence of those social groups which in each democratic country play a decisive role in the law-making and the decision-making process and which are in fact part and parcel of its constitutional and administrative law'.[9] The aim of this special issue, however, is to go further than broad generalisations highlighting the difficulty of legal transplants succeeding when there is a 'lack of fit' between the transferred rule and local conditions.[10] Rather, all the case studies explore in detail the dynamics of legal change which result from an encounter between a transferred rule and the local context. Before administrative law transplants become embedded in their host system, a process of acclimatization happens with resistance along the way. In focusing on this resistance across our case studies (and not in comparing the transplanted technique in its original context and the host system), one gains new insights about the process itself, its possible variations, and the provisional result: one can identify these specific items that have proved 'transfer-resistant', the 'odd details' that 'are likely to encapsulate local traditions and experiences, social struggles, anxieties and visions'.[11] Identifying these 'odd details' contributes to understanding the current process of experimentation, disruption, and disengagement going on in Europe, as well as to exposing the political, social, and economic stakes underlying debates around the technicalities of the law. Furthermore, acknowledging events and facts that may have been hugely traumatising and challenging for some states and their administrations helps us understand their current position towards the political, social, and economic pressures they experience. In the editors' view, fostering such mutual understanding could also pave the way for developing normative and enforcement strategies at European level that are more tailor-made to the local contexts of the Member States. Finally, in not being limited to specific policy

8 M Siems, 'Malicious Legal Transplants' (2018) 38 Legal Studies 103; G Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 Modern Law Review 11 and P Legrand, 'The Impossibility of 'Legal Transplants'' (1997) 4 Maastricht Journal of European and Comparative Law 111.

9 O Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 Modern Law Review 13. Bell also highlights the links between administrative law, constitutional values, and national traditions and institutions: J Bell, 'Comparative Administrative Law' in M Reimann and R Zimmermann (eds), *Oxford Handbook of Comparative Law* (2nd edn, Oxford University Press 2019) 1252-1273, 1262-1264.

10 M Graziadei, 'Comparative Law, Transplants, and Receptions' in M Reimann and R Zimmermann (eds), *Oxford Handbook of Comparative Law* (2nd edn, Oxford University Press 2019) 441-473, 472.

11 G Frankenberg, 'Constitutions as Commodities: Notes on a Theory of Transfer' in G Frankenberg (ed), *Order from Transfer – Comparative Constitutional Design and Legal Culture* (Edward Elgar 2013) 1-26, 15.

areas, our case studies contribute to the wider debate on general administrative law within the European administrative space.

This introduction first provides a short contextual overview of the role of transplants in the European administrative space (section 2) and the channels facilitating – either mandating or enabling – the transplanting process (section 3). It then explains the selection process underpinning the cases presented in this special issue (section 4) and maps the resistance – i.e. the actors, factors, expressions, and outcomes – across the case studies gathered in this special issue (section 5). Based on this material, this introduction suggests one possible analytical lens for legal changes triggered by administrative transplants, following the stages that can be observed in these changes over time (section 6). This allows us to suggest that studying administrative transplants contributes to understanding the dynamics of the European administrative space, while also highlighting its limits and the ways in which they can be overcome over time (section 7).

2. Transplants in the European administrative space

Administrative law transplants are intrinsic to the development of the European administrative space. The notion of European administrative space is fluid: it can be formulated more or less narrowly. In its broader sense, the expression 'European administrative space' describes an increasing convergence of administrations and administrative practices at the EU level and various Member States' administrations towards a 'common European model',[12] as well as the Europeanisation of the Member States' administrative structures.[13] In a narrower sense, it refers to the coordinated implementation of EU law and to the Europeanisation of national administrative law.[14] Thus, in 2008 Hofmann could emphasize the integrated administration emerging from the joint exercise of powers in the EU and concretised in the 'intensive and often seamless cooperation between national and supranational administrative actors and activities'.[15] Nearly ten years later, the European administrative space seemed to have

12 JP Olsen, 'Towards a European Administrative Space?' (2003) 10 Journal of European Public Policy 506, 506.

13 E Page and L Wouters, 'The Europeanization of the National Bureaucracies?' in J Pierre (ed), *Bureaucracy in the Modern State* (Edward Elgar 1995) 185-204.

14 OECD-PUMA, 'Preparing Public Administration for the European Administrative Space' (1998) SIGMA Papers No. 23 <www.oecd-ilibrary.org/governance/preparing-public-administrations-for-the-european-administrative-space_5kml6143zd8p-en> accessed 17 March 2021; S Kadelbach, 'European Administrative Law and the Europeanised Administration' in C Joerges and R Dehousse (eds), *Good Governance in Europe's Integrated Market* (Oxford University Press 2002) 167-206 and E Chevalier, *Bonne administration et Union européenne* (Bruylant 2014) 34-39.

15 H Hofmann, 'Mapping the European Administrative Space' (2008) 31 West European Politics 662, 671; J Trondal and B Peters, 'The Rise of European Administrative Space: Lessons Learned' (2013) 20 Journal of European Public Policy 295 and A Von Bogdandy, 'European Law Beyond

become instead a superposition of overlapping circles with varying shared interests: there may be intensive cooperation indeed, but not quite as seamless as hoped.[16]

2.1. The Europeanisation of administrative law

The emergence of the European administrative space is linked to the broader project of European integration through law. [17] In the internal market context, for example, the crux of the matter has been to make sure that market operations could be carried out across the territory of all EU Member States.[18] This is achieved, first, through common standards adopted at EU level in the context of positive integration. Secondly, because of the legal principle of mutual recognition of goods and services legally brought to the market of one state, administrations of other states have to accept the effects of foreign acts on their own territory.[19] Administrative structures, processes, and techniques make the internal market a reality through the process of implementing EU law, controlling compliance with it, and enforcing it.[20] Some degree of coordination or convergence between administrative structures of the Member States is therefore necessary for creating and operating a functioning European internal market. However, this is not the only impact of the process of European integration on national administrative structures and processes. Market integration at the European level has gone along with increased competition in economic fields formerly dominated by state monopolies (e.g. gas, electricity, railways, and telecommunication). At the same time, EU Member States have strongly disengaged from directly providing public services or from their involvement in the economy at large (until the Covid-19 pandemic struck, at least). Once again, this change goes hand in hand with regulatory and administrative structures, processes, and institutions that ensure that the legal framework is implemented, complied with, and enforced – whether through hard law or soft law.

These changes in the administrative apparatus of EU Member States in the context of European integration have been labelled with umbrella concepts such

'Ever Closer Union' – Repositioning the Concept, its Thrust and the ECJ's Comparative Methodology' (2016) 22 European Law Journal 519.

16 European Commission, 'White Paper on the Future of Europe' (White Paper) COM(2017)2025, 7.

17 J Weiler, 'The Transformation of Europe' (1991) 100 Yale Law Journal 2403.

18 G Marcou, 'Introduction' in G Marcou (ed), *Les mutations du droit de l'administration en Europe – Pluralisme et convergences* (L'Harmattan 1995) 11-62, 21-25.

19 S Dorigo, M Eliantonio and R Lanceiro (eds), 'The Principle of Mutual Recognition in European Administrative Law' (2020) 13(2) Review of European Administrative Law 183.

20 cfr European Commission, 'Communication from the Commission. EU Law: Better Results through Better Application' [2017] OJ C18/10, 10-20.

as Europeanisation of administrative law,[21] Europeanisation of national legislation, or Europeanisation of administrative justice.[22] Indeed, institutions (e.g. regulatory authorities,[23] ombudsmen[24]), legal principles (e.g. legitimate expectations, proportionality, good administration)[25, 26] procedures (e.g. public participation, the right to be heard),[27] techniques (e.g. administrative sanctions, impact assessment or internal redress), and tools (e.g. codes of administrative procedure[28]) have spread across Europe in the last decades and, actually, across the world.[29] Administrative law transplants have played a constructive role in this diffusion. In Europe, administrative institutions, principles, procedures, techniques, and tools have been transplanted from one administrative system to another, regardless of whether a legal obligation to organize them existed under EU law or under the Council of Europe's instruments. Transplants have travelled horizontally, directly from one state to another,[30] or vertically (top-down) through EU law as states implement EU law requirements or voluntarily adopt EU law solutions, themselves often inspired by the laws of other Member States (vertical and bottom up).[31] As there have been situations of spillover when Member States have extended EU obligations outside their original remit,[32] the overall picture has become messy: it has become difficult to identify all the reciprocal

21 M Bobek, 'Europeanization of Public Law' in A Von Bogdandy, P Huber and S Cassese (eds), *The Administrative State* (vol 1, Oxford University Press 2017) 630-673.

22 M Eliantonio, *Europeanisation of Administrative Justice? – The Influence of the ECJ's Case Law in Italy, Germany and England* (Europa Law Publishing 2009).

23 e.g. A Psygkas, *From the "Democratic Deficit" to a "Democratic Surplus"— Constructing Administrative Democracy in Europe* (Oxford University Press 2017) and C Fraenkel-Haeberle, K-P Sommermann and J Socher (eds), *Die Umsetzung organisations- und verfahrensrechtlicher Vorgaben des europäischen Umweltrechts in ausgewählten Mitgliedstaaten* (Duncker & Humblot 2020).

24 e.g. R Kirkham and M Hertog (eds), *Research Handbook on the Ombudsman* (Edward Elgar 2018).

25 e.g. N Vogiatzis, *The European Ombudsman and Good Administration in the European Union* (Palgrave 2018) and M Bucura, *The Right to Good Administration at the Crossroads of the Various Sources of Fundamental Rights in the EU Integrated Administrative System* (Nomos 2015).

26 See the research carried out by the Coceal project: <www.coceal.it/> accessed 17 March 2021.

27 G della Cananea, 'Administrative Law in Europe: A Historical and Comparative Perspective' (2009) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2327934> accessed 17 March 2021 and C Fraenkel-Haeberle, K-P Sommermann and J Socher (eds), *Die Umsetzung organisations- und verfahrensrechtlicher Vorgaben des europäischen Umweltrechts in ausgewählten Mitgliedstaaten* (Duncker & Humblot 2020).

28 e.g. JB Auby (ed), *Codification of Administrative Procedure* (Bruylant 2014).

29 JB Auby, *La globalisation, le droit et l'État* (3rd edn, LGDJ 2020) 79-82.

30 J Bell, 'Mechanisms for Cross-fertilization of Administrative Law in Europe' in J Beatson and T Tridimas (eds), *New Directions European Public Law* (Hart 1998) 47-67.

31 J Schwarze, *European Administrative Law* (Office for official Publications & Sweet and Maxwell 1992).

32 P Birkinshaw, 'A Perspective on Cross-fertilization between European Legal Orders and UK Public Law' in B Bonnet (ed), *Traité des rapports entre ordres juridiques* (Lextenso 2016) 1287-1298, 1295.

influences on each other's legal systems.[33] There has been prior 'no rational conceptualisation'[34] of the process; there is neither a transplant strategy nor convergence by design.[35] On a positive note, this apparent 'Europeanisation of public law'[36] opens up the possibility that the administrative laws of EU Member States will become increasingly closer to each other, thus enabling smoother administrative cooperation across boundaries and removing administrative hurdles to freedom of movement.

2.2. Differences: moving beyond them or here to stay?

However, against this background of apparent administrative convergence, a contrasting picture can be depicted: multiple differences across Europe are emphasized in terms such as constitutional pluralism,[37] or differentiation in European policies.[38] Indeed, administrative law is often depicted as the product of the historical developments of each national administration.[39] In particular, the older Member States and the new Member States do not share the same historical experience and expectations when it comes to the role of administrative institutions and the law in the economy and in relation to civil society.[40] Procedural and organizational autonomy in Member States when EU law is implemented at national level has long been regarded as paramount, even though negative and positive integration have put pressure on this autonomy in order to facilitate the exercising of the four fundamental freedoms across the EU Member States and the fulfilment of European policy objectives.[41] Hierarchical relationships between national public organisations are replaced

33 See, for the same comment at constitutional level globally: G Frankenberg, 'Constitutions as Commodities: Notes on a Theory of Transfer' in G Frankenberg (ed), *Order from Transfer – Comparative Constitutional Design and Legal Culture* (Edward Elgar 2013) 1-26, 9.

34 P Birkinshaw, *European Public Law: The Achievement and the Brexit Challenge* (3rd edn, Kluwer 2020) 28.

35 ibid, 25.

36 To borrow the title of a book by J Hans, S Prechal and R Widdershoven (eds) (European Law Publishing 2007).

37 N Walker, 'Constitutional Pluralism Revisited' (2016) 22 European Law Journal 333.

38 e.g. M Markakis, 'Differentiated Integration and Disintegration in the EU: Brexit, the Eurozone Crisis, and Other Troubles' (2020) 23 Journal of International Economic Law 489.

39 G della Cananea, 'Administrative Law in Europe: A Historical and Comparative Perspective' (2009) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2327934> accessed 17 March 2021.

40 M Kryger, 'The Challenge of Institutionalisation: Post-Communist 'Transitions', Populism, and the Rule of Law' (2019) 15 European Constitutional Law Review 544.

41 E Slautsky, *L'organisation administrative nationale face au droit européen du marché intérieur* (Larcier 2018).

by (judicial) dialogue and (agency) networks spanning national and European levels.[42]

Tensions between unity and differences as well as between coordination and competition can, therefore, be observed in the European administrative space.[43] The complex administrative landscape resulting from these conflicting trends triggers practical questions – for instance, in terms of concrete implementation and enforcement of EU law[44] at national and sub-national levels, in terms of transnational administrative cooperation,[45] as well as in terms of accountability[46] – and theoretical questions – for instance, regarding the interpretation to give to administrative changes. At least two political theories, functionalism and historical institutionalism, provide a starting point for understanding changes in administrative institutions, processes, and techniques. On the one hand, functionalism considers that institutions are there to fulfil a social need and fundamentally have no way of doing things differently from how they have always been done: they remain trapped in their cognitive templates, unable to adapt them and change them as long as there is no major crisis (also called 'critical juncture'[47]) affecting the administrative system. In order for institutions to address new problems, they look for inspiration in solutions already developed successfully elsewhere. Competition leads to the adoption or survival of the fittest solution. This leads to isomorphism across administrative institutions over time.[48] On the other hand, historical institutionalism believes that institutions are the product of a delicate balance between power holders (e.g. interest groups or public bodies). This balance is constantly renegotiated and tweaked as new situations arise, with power shifting from the one to the other. Change is incremental over time, with no winner or loser.[49]

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42 A Arnull, 'Judicial Dialogue in the European Union' in J Dickson and E Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press 2012) 109-133; M de Visser, *Network-Based Governance in EC Law. The Example of EC Competition and EC Communications Law* (Hart Publishing 2009) and H Hofmann, 'Seven Challenges for EU Administrative Law' (2009) 2 Review of European Administrative Law 37.

43 R Caranta, 'Pleading for European Comparative Administrative Law – What is the Place for Comparative Law in Europe?' (2009) 2 Review of European Administrative Law 155, 156-57.

44 M Smith and S Drake (eds), *New Directions in the Effective Enforcement of EU Law and Policy* (Edward Elgar 2016).

45 M Eliantonio, E Chevalier and R Lanceiro (eds), *Administrative Cooperation in Europe – A Sectoral Analysis* (forthcoming, Bruylant 2021).

46 S Röttger-Wirtz and M Eliantonio, 'From Integration to Exclusion: EU Composite Administration and Gaps in Judicial Accountability in the Authorisation of Pharmaceuticals' (2019) 10 European Journal of Risk Regulation 393.

47 G Cappoccia, 'Critical Junctures' in O Fioretos, T Falleti and A Sheingate (eds), *Oxford Handbook of Historical Institutionalism* (Oxford University Press 2016) 90-106.

48 P DiMaggio and W Powell, 'The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields' (1983) 48 American Sociological Review 147.

49 K Thelen and J Conran, 'Institutional Change' in O Fioretos, T Falleti and A Sheingate (eds) *Oxford Handbook of Historical Institutionalism* (Oxford University Press 2016) 51-70.

Combining these two theories, one hypothesis emerges: as administrative institutions in the EU have one major function – that of developing and implementing common policies, which include enabling the exercising of the four freedoms across Europe – they will have a tendency to opt for similar technical solutions (and, thus, for transplants), so the most successful solution is adopted everywhere. However, because administrative institutions are also rooted in the past and are the product of age-old socio-political bargains, any administrative change upsets these bargains and a process of re-balancing power between powerholders is set in motion.

2.3. Transplants and legal cultures

At the crossroads between these contrasting approaches to institutional changes, there arises resistance to change through the borrowing of foreign structures, processes, and techniques.[50] More precisely, this special issue seeks to distinguish between three different levels at which these pressures can happen: at the level of general ideas and the broad politico-legal agenda (e.g. good administration, administrative democracy); at the level of identifying technical solutions to practical problems; and at the level of the administrative machinery needed to deliver these ideas and solutions. In theory, transplants – looking for inspiration elsewhere to address domestic issues – can happen at each of these levels. However, in order to provide a detailed legal analysis of transplants, this special issue adopts a definition of transplants that is both narrower and broader in its remit. Borrowing from Saunders, it considers that transplants can be conceived of as 'deliberate movement of relatively structured legal phenomena across jurisdictional boundaries'.[51] This is narrow in the sense that it focuses the attention on relatively well-delineated technical phenomena. It excludes more diffuse cases, such as the circulation of mere ideas. However, this definition of transplants is also broad: it includes techniques that are not borrowed from one foreign national legal system, so as to include techniques channelled through European instruments. Furthermore, this special issue does not analyse the movement of ideas from one legal system to another, comparing *stricto sensu* the original model with the transplanted solution. It instead focuses on how and to what extent a foreign legal technique (by way of legal principle, test, institution, etc.) is processed inside an administrative system to become an integral part of it. This focus on the internal process is distinctive: in our case studies, there is not always a clear legal system of origin, since the

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50 For earlier discussions of these tensions, see C Himsworth, 'Convergence and Divergence in Administrative Law' in P Beaumont, C Lyons and N Walker (eds), *Convergence and Divergence in European Public Law* (Hart 2002) 99-110.

51 C Saunders, 'Transplants in Public Law' in M Elliott, J Varuhas and S Wilson Stark (eds), *The Unity of Public Law?* (Hart 2018) 257-278, 258.

transplants exist widely and different processes (such as globalisation, and EU law transposition[52]) come together to foster circulation. This consequently blurs the possibility of comparing transplants in their system of origin and in the host system.

This link between ideas and legal techniques and between law and its wider context is a well-known question when it comes to transplants in general. Indeed, key proponents of transplants – such as Watson – suggest that transplants are ubiquitous.[53] Adopting the same approach as Watson, Birkinshaw suggests that '[i]t is simply that different systems have to work in ever-increasing proximity and borrowing or influencing are standard and universal characteristics'.[54] This would suggest that, over time, natural convergence happens as the most successful solutions should, rationally and 'self-evidently', be copied by other legal systems.[55] However, this position is far from being unanimously followed. From the beginning of the development of the transplant scholarship in the 1970s, discussions have arisen about this process. Kahn-Freund drew attention to the importance of the political context to make sense of a transplant, highlighting particular sensitivity when transplants are attempted in the constitutional and administrative law field.[56] Even more drastic in his opposition to the idea of transplants[57] and the convergence between systems,[58] Legrand contends that any transplant distorts the original technique. According to him, each rule is embedded in a specific legal culture and its context gives it its meaning. In Legrand's words: '[legal culture] is about collective mental programmes, [...] that have formed [...] as a function of the community to which we belong'.[59]

An alternative reading of legal culture is provided by Bell when he draws attention to the role of routines, and thus to the actual way in which the law is

52 See below section 3 on channels.

53 A Watson, *Legal Transplants. An Approach to Comparative Law* (2nd edn, University of Georgia Press 1993).

54 P Birkinshaw, *European Public Law: The Achievement and the Brexit Challenge* (3rd edn, Kluwer 2020) 25.

55 This self-evidence is prominent in the scholarship dedicated to proportionality: see e.g. B Schlink, 'Proportionality (1)' in M Rosenfeld and A Sajó (eds), *Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 719-736, 729 and B Schlink, 'Proportionality in Constitutional Law: Why Everywhere but Here' (2012) (22) Duke Journal of Comparative & International Law 291, 296.

56 O Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 Modern Law Review 13, 18.

57 P Legrand, 'The Impossibility of 'Legal Transplants'' (1997) 4 Maastricht Journal of European and Comparative Law 111.

58 P Legrand, 'European Legal Systems Are Not Converging' (1996) 45 International & Comparative Law Quarterly 52.

59 ibid, 56.

implemented and enforced day by day.[60] As the cognitive/legal mindsets[61] that constitute a legal culture are located at the level of training and intellectual understanding of administrative issues, they can be difficult to apprehend and identify directly: they depend on subjective interpretations by the observer. Routines, in contrast, are more easily objectively and empirically observable. One good example of the importance of these routines, encapsulating both meaning and power relationships, is provided by the role of the 'file' in the French administrative justice process, as Latour has documented in his ethnological research.[62]

Cognitive mindsets and administrative routines are rarely the object of transplants. Still, they shape how a foreign technique is transplanted into the host legal system and how it will be interpreted, understood, and implemented. This means that they act as a screen. They may be shaped by the transplant over time, but only in the long term. Recent systematic analyses of how administrative systems change illustrate this process. Stelkens and Andrijauskaitė have demonstrated the importance of administrative legal mindsets in the ways in which national administrative systems adopt principles of good administration under the impetus of the Council of Europe. Building on the work done by Bell[63] and Kischel,[64] they found that some systems were more prone to integrating these principles because there were pre-existing processes for receiving these principles in these systems; national systems without these paths of reception, on the other hand, struggled to see the mindsets of their actors being transformed by the principles of good administration. Stelkens and Andrijauskaitė closely connect these mindsets to the daily routines in administrative systems, i.e. those routines developed over generations in each administrative law community – namely, judges, lawyers, officials, and scholars working with national law on a daily basis, all of them together forming epistemic communities providing meaning to these routines – on how statutes, courts decisions, and scholarly work on administrative law should be written, read, and understood. Law drafters, civil servants, judges, lawyers, etc. often interact through these routines in their daily work on the basis of implicit knowledge. According to Stelkens and Andrijauskaitė, differences in these routines result from differ-

60 J Bell, 'Mechanisms for Cross-fertilization of Administrative Law in Europe' in J Beatson and T Tridimas (eds), *New Directions European Public Law* (Hart 1998) 47-67.

61 This introduction uses 'cognitive mindsets' and 'legal mindsets' interchangeably throughout the following lines.

62 B Latour, *La fabrique du droit: une ethnographie du Conseil d'État* (La Découverte 2002) 83-118 and G Tanguy, 'Les préfets et l'application de la loi. Des interprètes exigeants? L'exemple de la législation du 13 juillet 1906 sur le repos hebdomadaire' (2014) 1 Droit et Société 77, 84 (for administrative processes).

63 J Bell, *Judiciaries within Europe – A Comparative Review* (Cambridge University Press 2006).

64 U Kischel *Comparative Law* (Oxford University Press 2019) ch 5 para 41ff (common law), ch 6 para 104ff (civil law), and ch 7 para 106ff (Nordic).

ent objectives in national systems of legal education, the different national training – most notably in the civil service – recruitment and career systems for the civil service, and the varying degrees of legal training for both civil servants in management positions and in street-level bureaucracy. They distinguish West and Nordic mindsets from post-socialist mindsets, where formalism is more strongly embedded, especially when it comes to judicial control over administrative action.[65] Such an analysis may be a possible approach to help explain the tension between path dependency and legal development, namely that 'the paths on which legal systems have been travelling will help to explain why they do not approach similar, new problems in the same way".[66] Yet, "the law does develop by breaking out of the mould cast by the past'.[67] There are changes (transplants are one factor in these changes), but change is slow and aligned in some way with the past.

3. The case studies selected for this special issue

To analyse this phenomenon of resistance to administrative law transplants outside the framework of the Council of Europe, and to switch the focus from analysing the transplanting process from the foreign to the domestic by analysing more deeply the internal process of resistance itself, we selected seven countries. We sought to achieve a balance between Western countries (Belgium, England, France, and Germany) and former Eastern countries (Hungary, Lithuania, and Romania), testing further the idea Stelkens and Andrijauskaitė developed that a post-socialist legal administrative mindset remains distinctive in the latter. We also sought a balance between Southern (France) and Northern countries (Lithuania), and between the usual suspects (England, France, and Germany)[68] and smaller jurisdictions, usually more open to learning lessons from comparative law (Belgium,[69] Hungary, and Lithuania). We also aimed to balance importers of legal concepts (Belgium, Hungary, Lithuania, and Romania) and exporters of legal concepts (England, France, and

65 U Stelkens, A Andrijauskaitė and Y Marique, 'Mapping, Explaining, and Constructing the Effectiveness of the Pan-European Principles of Good Administration – Overall Assessment' in U Stelkens and A Andrijauskaitė (eds), *Good Administration and the Council of Europe – Law, Principles and Effectiveness* (Oxford University Press 2020) 755-820, para 31.32ff (West and Nordic) and para 31.59ff (post-socialist).

66 J Bell, 'Path Dependence and Legal Development' (2013) 87 Tulane Law Review 787, 788.

67 ibid.

68 For one illustration of the focus dedicated to comparing these three systems: see M Ruffert (ed), *The Transformation of Administrative Law in Europe – La mutation du droit administratif en Europe* (Sellier 2007).

69 D Heirbaut and M Storme, 'The Belgian Legal Tradition: From a Long Quest for Legal Independence to a Longing for Dependence?' (2006) 5-6 European Review of Private Law 645.

Germany) in order to test whether resistance would differ depending on the traditional 'prestigious' status of an administrative system. Additionally, we aimed to get examples of transplants from different parts of administrative law, hence using illustrations drawn from the field of good administration (the right to be heard and ombudsmen), administrative justice (protection of legal certainty and proportionality), and the interface between the state and the market (independent economic regulators, the leniency programme, and competitive procedures). Put together at their best, these administrative institutions, techniques, procedures and principles may suggest a model for European administrations where rational decision-making and behaviour apply for both the administration and the administration's addressees.

Therefore, this special issue revisits some old friends in the debates on legal transplants in the European administrative space – in particular legitimate expectations, proportionality, and the ombudsman – providing the latest state of art in the studied legal systems, a point especially relevant in the case of proportionality at a time when the UK has just left the EU. The issue adds to this up-to-date information an original analysis of the situation in countries rarely included in previous studies of legal transplants, such as Belgium, Hungary, Lithuania, and Romania. In addition, we seek to give an overview of legal transplants in different dimensions of administrative law, including the relationships between state and market, contributing to identifying specificities of this legal field.

This special issue does not build primarily on empirical investigations, although the contributions on Romania (**Dragos**) and Hungary (**Láncos**, **Horváth** and **Szemesi**) rely on empirical research undertaken over fifteen years on the Romanian ombudsman and on interviews with key actors in the Hungarian leniency programme, respectively. Thus, due to the transplanting of administrative techniques across the administrative systems covered, this special issue cannot provide systematic new information on changes in administrative practices. However, the contributions included in this special issue give us a privileged insight into the legal reasoning and cognitive mindsets of the most relevant actors in the different administrative systems. In particular, they reveal in fascinating ways how the law (its normativity), its linkages to politics (meaning that the law is not conceived of as a mere neutral and logical tool, but is collectively accepted as a tool encapsulating power), and the reasoning and type of arguments convincing the various actors have some bearing on how an administrative system changes and how changes are – or are not – made efficient and effective.

4. Channels for transplants

According to Miller's typology, four types of legal transplant can be identified from looking at an importer's perspective: (i) cost-saving

transplants (i.e. the transplant saves time and costly experimentation when a new problem arises);[70] (ii) externally-dictated transplants (i.e. the transplant is made a condition for doing business with a country or for allowing the dominated country a measure of political autonomy);[71] (iii) entrepreneurial transplants (i.e. the transplant is the outcome of groups that reap benefits from promoting its adoption);[72] and (iv) legitimacy-generating transplants (i.e. transplants linked to the prestige of the foreign model).[73] Specific legal transplants often belong to several categories at the same time. This typology can be applied to legal transplants between countries, but also to top-down/bottom-up circulation of techniques or instruments between states and international organisations.[74] As Graziadei observes, 'some of the problems that are discussed with respect to the enactment and implementation of EU law, or more generally of uniform or harmonized norms, reflect the same concerns that often emerge with respect to legal transplants'.[75]

Administrative transplants in Europe are fuelled by a variety of factors and actors. Overall, all four rationales for transplants identified by Miller are illustrated in our case studies. For instance, EC law was perceived – if only by one academic writer – to be 'occupation law' in Germany in the 1990s.[76] Our Hungarian and Belgian cases illustrate that sometimes economic performance does not seem to be the most prevalent factor in underlying changes. This is even though leniency programmes and independent regulators should contribute to improving economic performance in theory. Belgium, for example, created independent regulators mainly as the result of the need to implement the (far-reaching) requirements of EU law. Legitimacy-generating transplants can be identified, for instance, with examples of the ombudsman in Romania and the law on administrative procedure in Lithuania. These are intrinsically linked to the aspiration of these countries to join the 'club' of liberal democracies after the fall of the Soviet Union rather than to a specific European requirement. In the UK and France, discussions regarding the need to extend the scope of the principles of proportionality, legal certainty, or legitimate expectations beyond

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70 J Miller, 'A Typology of Legal Transplants – Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process' (2003) 51 American Journal of Comparative Law 839, 845.

71 ibid, 847.

72 ibid, 849.

73 ibid, 854.

74 ibid, 848.

75 M Graziadei, 'Comparative Law, Transplants, and Receptions' in M Reimann and R Zimmermann (eds), *Oxford Handbook of Comparative Law* (2nd edn, Oxford University Press 2019) 442 - 473, 458 (footnotes omitted). See also M Mota Prado, 'Diffusion, Reception, and Transplantation' in P Cane and others (eds), *Oxford Handbook of Comparative Administrative Law* (Oxford University Press 2021) 255-273, 256.

76 Stelkens below 145.

what is required under EU law or under the European Convention on Human Rights have mostly revolved around arguments related to the advantages of such extensions. Economic efficiency was, for instance, a key concern behind thinking more creatively about legal certainty in France. However, there was also a concern that France should keep its edge in the globalized economy by providing a welcoming legal environment to investors, pointing more to a case of an externally-dictated transplant. Proportionality and legal certainty are, furthermore, also entrepreneurial transplants to the extent that they were strongly lobbied for by certain segments of the legal profession, such as academics and judges. For example, when discussing the transplantation of legal certainty in France, **Chevalier** lists all the efforts by legal scholarship and various practitioners in France to create a 'favourable context for its future recognition'[77] as a first preparatory step for the transplant. A similar type of outpouring of writings[78] can be found in relation to proportionality and global constitutionalism,[79] in relation to the right to be heard and codification of administrative procedure,[80] or in relation to the ombudsman.[81]

Our case studies further highlight the role played by the EU, the Council of Europe, and other organisations – such as the Organisation for Economic Co-operation and Development (OECD) or the World Bank – in the circulation of administrative techniques and institutions within Europe. Even when techniques and institutions have their (distant) origins outside of Europe (independent regulators and the leniency programme in the United States) or in a specific European country (legitimate expectations and proportionality in Germany; ombudsmen in Sweden), these organisations have been instrumental in spreading them on the continent. Often, they have also combined forces to support similar legal developments. This is perhaps not entirely surprising: the role played by the EU[82] and the Council of Europe[83] in the 'Europeanisation' of the administrative laws of Europe is well documented. The OECD,[84] for its part, spread, for instance, good practices and administrative techniques to Eastern Europe as a way of helping these countries join the EU. Finally, the

77 Chevalier below 104-105.

78 For an early awareness of the role of scholarship in the imitation of administrative solutions, see J Rivero, 'Les phénomènes d'imitation des modèles étrangers en droit administratif' *Miscellanea WJ Ganshof van der Meersch* (Bruylant 1972) 619-639, 620-630.

79 Boyron and Marique below 65.

80 Andrijauskaitė below 167.

81 Dragos below 185.

82 J Schwarze, *European Administrative Law* (Sweet & Maxwell 2006).

83 U Stelkens and A Andrijauskaitė (eds), *Good Administration and the Council of Europe – Law, Principles and Effectiveness* (Oxford University Press 2020).

84 J Bell, 'The Importance of Institutions' in M Adams and D Heirbaut (eds), *The Method and Culture of Comparative Law – Essays in Honour of Mark Van Hoecke* (Hart 2014) 207-219, 218-19.

Doing Business Reports adopted by the World Bank in 2004 were key drivers in the French debates regarding the scope of the principle of legal certainty.[85]

5. Mapping resistance across our case studies

The case studies gathered in this special issue illustrate the diversity that resistance towards foreign techniques can take. Resistance can be overcome, as in the case of legal certainty in France, or it can be on-going, as in the case of legitimate expectations, again in France. It can further have won whilst leaving imprints elsewhere, as in the case of proportionality in England, or it can be more formalistic than substantive, as in the case of the right to be heard in Lithuania. The transplant can have creative effects in either generating new administrative processes, as in the case of independent economic regulators in Belgium, or in spilling over to other fields, as in competitive procedures in Germany. The transplant can be met with practical indifference, as in the case of leniency in Hungary, or the institution can become subverted by its own success, as in the case of the ombudsman in Romania. This diversity of resistance can be further analysed by looking at its loci (5.1), expressions (5.2), main factors (5.3), and concrete outcomes (5.4).

5.1. Locus of resistance: who is resisting? And what?

Legal reforms can result from the actions of various social, legal, economic, or political groups and entrepreneurs. Some of them may advocate for reform, while others may resist the changes, as when their interests, powers, or positions would be directly or indirectly harmed by the transplant. If the administration is often reproached for inertia,[86] our case studies cover a broad range of possible loci of resistance, well beyond the administration itself.

In some cases, one actor can be identified clearly as resisting a change. For instance, **Andrijauskaitė** identifies the locus of the resistance towards the right to be heard within the Lithuanian legislature, whereas the judges are more

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85 A Nicita and S Benedettini, 'Towards the Economics of Comparative Law: The Doing Business debate' in P Monateri (ed), *Methods of Comparative Law* (Edward Elgar 2012) 291-305.

86 At least in political discourses. In the years when this project has been carried out (2019-2020), French president Macron has invoked the 'deep state' (*état profond*) to explain slow reforms: M Endeweld, 'Emmanuel Macron et l'" État profound"' (*LeMondeDiplomatique*, September 2020) <www.monde-diplomatique.fr/2020/09/ENDEWELD/62194> accessed 17 March 2021. Dominic Cummings, former special advisor to the British prime minister Boris Johnson, equally blamed the civil service for inertia: A Hill, 'The Dominic Cummings Guide to Management' (*FinancialTimes*, 30 December 2019) <www.ft.com/content/02179112-2311-11ea-92da-f0c92e957a96> accessed 17 March 2021.

welcoming.[87] Equally, **Láncos, Horváth** and **Szemesi** do not identify the administration or the competition authorities as the actors resisting the leniency programme, but the economic actors.[88] Resistance from mainstream political actors can be traced in **Stelkens**' contribution on competitive procedures in Germany.[89] In the case of Belgian economic regulators, **Slautsky** identifies the political actors as being the most reluctant concerning the independence of these agencies, although legal actors such as the Council of State have showed reluctance as well.[90] Noteworthy in this case, where we are in the presence of a multi-government state, is that this resistance cannot be ascribed to one specific executive but to all of the executives competent for the matter. This moves us to confidently say that, in this case, resistance is really of a political nature across the board and not linked to, for instance, a Dutch-speaking or French-speaking preference.

However, in other cases, resistance is more diffused across different actors. In the case of the Romanian ombudsman, **Dragos** highlights that resistance was of a more systemic nature because there was uncertainty as to how the ombudsman would play between the administration and civil society and disturb political factors embedded in 'patron-client relationships'.[91]

In yet other cases, resistance can cross the neat dividing line between legislature, government, judges, administration, and scholarship. For instance, **Boyron** and **Marique** explain that, although some English judges were more inclined to accept proportionality as a ground for review in domestic judicial review cases (those involving neither EU law nor the ECHR) – either in their judgements or extra-judicially – the UK Supreme Court (UKSC) as a whole remained hesitant to take the ultimate step of merging proportionality and reasonableness. It consequently delayed as much as possible the time when it would decide either way. Scholarship was equally divided. The executive did not explicitly resist proportionality as such, but it did express profound resistance to any expansion of judicial power, and thus indirectly to proportionality, which would just contribute to such an expansion.

5.2. Expressions of resistance

Each transplant of a foreign technique needs to be assessed according to the parameters of its host administrative system; for instance, to

87 Andrijauskaitė below 167.
88 Láncos, Horváth and Szemesi below 121.
89 Stelkens below 141.
90 Slautsky below 37.
91 Dragos below 193.

see whether it will have a '*malicious*'[92] or an '*irritant*'[93] effect. However, success is only partial as long as a foreign technique remains identified as being a transplant and foreign, yet it may be exhibited in practical and formal expressions (e.g. the law has been changed, administrative routines are being changed). In the face of the otherness of transplants, our case studies illustrate different forms of resistance.

First, silence and non-responsiveness to the transplant can be noted. This is most frequent in the early days of the discussions and/or formal implementation of the transplant. Examples of this can be found in Romania, after the ombudsman was introduced in the Constitution of 1991. The institution only became operational six year later when, in 1997 the Parliament adopted the law organising its function.[94] In Hungary, non-responsiveness has lasted for a longer period of time, as the leniency programme is still barely relied upon nearly twenty years on since its formal implementation.[95] The resistance can be less dramatic, yet some form of absence of buying-in from the main actors can also be detected when the practical implementation of a principle, technique, or institution remains confined to a 'bare minimum', in either practical or legal terms. **Andrijauskaitė**, for instance, writes that procedural rights in administrative procedures do not 'permeate the whole system of public administration',[96] remaining limited to procedures leading to administrative decisions (e.g. sanctions). In a different way, a form of legal bare minimum appears in France: while the French administrative judge recognized legal certainty in 2006, the French Constitutional Council did not recognise it as a constitutional principle.[97] As legal certainty is usually linked to the '*État de droit*' or 'rule of law', this stance of the French Constitutional Council strikingly betrays that French administrative categories should not be too upset by a foreign principle.

Secondly, resistance can take less drastic expressions in more differentiated ways, with some degree of non-responsiveness among relevant actors yet more positive welcome among other actors. In Germany, for instance, resistance against offering judicial protection to unsuccessful bidders for contracts falling within the EU remit lasted a few years – up to the prospect of an infringement procedure becoming more pressing. Now this technical resistance has been overcome, and a range of competitive procedures have been adapted to include a similar form of judicial protection for disappointed candidates as the one organised in the Remedies Directive 89/665/EEC. However, disappointed bidders

92 M Siems, 'Malicious Legal Transplants' (2018) 38 Legal Studies 103.
93 G Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 Modern Law Review 11.
94 Dragos below 185.
95 Láncos, Horváth and Szemesi below 121.
96 Andrijauskaitė below 167.
97 Chevalier below 95.

who participate in procurement procedures falling below the thresholds of the EU directives still do not unambiguously enjoy judicial protection. According to the Constitutional Court this does not breach their constitutional rights. Hence, indifference to the trend towards increasing judicial protection for unsuccessful bidders for public contracts persists at the highest level – if only in a '*niche*' area.[98]

Thirdly, explicit legislative measures contradicting the supposed transplant can be taken, expressing direct opposition to the transplant. The best illustration of this blunt attitude is provided by the various pieces of legislation adopted in Belgium that were in breach of Belgian commitments under EU law to respect the independence of its economic regulators.[99]

Fourthly, mental frameworks and cognitive mindsets may not have been adapted to assimilate the foreign and make it national. For instance, **Andrijauskaitė** partly attributes the Lithuanian resistance to extending procedural rights more widely to a '*mental leftover*' from the times when it was part of the Soviet legal and administrative system.[100] Similarly, **Chevalier** notes that the principles of legal certainty and legitimate expectations did not fit French administrative culture, and especially the objective perspective taken by the French Administrative Supreme Court in the protection of administrative legality.[101] Changing these cognitive mindsets represents a momentous turning point. We consequently find, in our case studies, that judges seek to signal the significance of these changes in certain ways. For instance, the French administrative judge accepted legal certainty in the most solemn formation – that of the General Assembly.[102] The UKSC has never come to adopt proportionality outside EU law and human rights cases, yet UK judges repeat that such a change could only be made by a full panel of the UKSC.[103]

Finally, resistance can be ambiguous – a suspension of any definitive confirmation or rejection of the transplant, awaiting a time when the answer becomes ripe. This is best illustrated with the proportionality principle in England. The UKSC has never clearly rejected proportionality in matters where the principle does not have to be relied on (i.e. in cases without EU law or human rights dimensions). Moreover, in a first step, the Court re-moulded the domestic ground of review, i.e. *Wednesbury* unreasonableness, to make it a more structured test for controlling administrative action and for making it closer to proportionality. In a second step, some of the UKSC judges repeated that the outcomes of the proportionality test and the reasonableness test were similar.

98 Stelkens below 141.
99 Slautsky below 37.
100 Andrijauskaitė below 182.
101 Chevalier below 95.
102 Chevalier below 95.
103 Boyron and Marique below 65.

Therefore, hesitations were expressed, with the door towards the merger of the two criteria being kept half-open and never really formally shut.[104]

5.3. Factors of resistance

Our case studies highlight three main noteworthy phenomena when it comes to factors of resistance: the first one pertains to the constitution, the second one to time, and the last one to the interactions between legal and extra-legal factors.

When it comes to the constitution and constitutional values, comparative law scholarship such as Kahn-Freund[105] and Bell[106] has highlighted their relevance in providing the context and making meaningful comparative law analysis. This makes full sense: the administration functions within the parameters of the domestic constitution, which frames its key functions and powers either explicitly or implicitly. However, the constitutions in the countries considered in our case studies do not provide detailed regulations or provisions about how the administration should work, apart maybe from general principles enshrined in the constitutional text or derived from it, such as the rule of law (*État de droit* or *Rechtsstaat*) or power separation. This is not surprising in a comparative perspective.[107] In none of our case studies was the formal constitution mentioned as being a factor of resistance against the foreign transplanted technique. Moreover, the Romanian Constitution was the first part of the legal system to welcome the ombudsman in 1991,[108] and the Lithuanian Constitution includes a very broad provision relating to the administration, namely article 5(3) specifying that 'State institutions shall serve the people', on which judges relied to broaden the remit of the right to be heard. In other cases, resistance can be linked to constitutional aspects outside the formal constitution, thus more to its operations and interpretation. The best examples of this are drawn from Belgium[109] and England.[110] In addition, the silence of the French Constitution about legal certainty led to arguments against this principle.[111]

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104 Boyron and Marique below 65.

105 O Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 Modern Law Review 13, 13.

106 J Bell, 'Comparative Administrative Law' in M Reimann and R Zimmermann (eds), *Oxford Handbook of Comparative Law* (2nd edn, Oxford University Press 2019) 1252-1273, 1262-64.

107 M Ruffert, 'National executives and bureaucracies' in P Cane and others (eds), *Oxford Handbook of Comparative Administrative Law* (Oxford University Press 2021) 505-525, 506.

108 By contrast, the French Constitution devotes one provision to the ombudsman, which was introduced in 2008, well after the ombudsman had been transplanted into the French administrative system in 1973.

109 Slautsky below 37.

110 Boyron and Marique below 65.

111 Chevalier below 95.

When it comes to the time factor,[112] an area where, according to Cohn awareness is needed when analysing transplants,[113] our case studies illustrate the many facets it can take. Indeed, we can see time as a *succession of stages*, as **Chevalier** does (e.g. preparation, reception, adaptation).[114] In this vein, **Dragos** especially highlights resistance at the preparation stage of transplanting the ombudsman into Romania.[115] However, more generally, resistance may happen at any stage. Time can also be conceived of as *speed*. Indeed, one strategy in relation to transplanting foreign legal techniques is to seek to shape the timing and speed of transplantation. Our contributors mention delay (**Chevalier**),[116] 'postponement' (**Boyron** and **Marique**),[117] 'a long time' (**Stelkens**),[118] or 'instability and hesitations' (**Slautsky**).[119] Time can also be linked to *specific events* (or so-called critical junctures) and their consequences for the transplanted technique. One can think here about Brexit in relation to proportionality in English administrative law. **Dragos** identifies two such '*defining moments*' or '*turning points*' with regard to the Romanian ombudsman, namely the rule of law crisis in 2018-2019 and the Covid-19 pandemic in 2020,[120] and how the latter affected the ways in which national administrations dealt with massive risks for the population and emergency regulations.[121] Finally, time can be seen as a *duration*, as in 'this takes time'. **Dragos** minutely details this dimension. He writes that the Romanian ombudsman went from initial 'acculturation' to 'many challenges over time', including a 'slow change in perception' – the overall process 'took a great amount of time'.[122] This progressive acceptance not only applies to the institution of the ombudsman as a whole, but also to some of its powers; in particular, the power of the ombudsman to lodge a court action in the plaintiff's name. This power was left unused for many years, but it all changed in 2015 when a first judicial challenge was brought, followed by a number of other similar procedures.

When it comes to the interactions between legal and non-legal factors, examples abound, as the literature would suggest it does.[123] **Stelkens** insists on the

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112 Section 6 below analyses the time dimension of legal changes in more details.

113 M Cohn, 'Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom' (2010) 58 American Journal of Comparative Law 583, 596-97.

114 Chevalier below 95.

115 Dragos below 185.

116 Chevalier below 95.

117 Boyron and Marique below 80.

118 Stelkens below 164.

119 Slautsky below 49.

120 Dragos below 195.

121 See contributions on this topic forthcoming in (2021) 2 Review of European Administrative Law.

122 Dragos below 191 and 193.

123 T Goldbach, 'Why Legal Transplants' (2019) 15 Annual Review of Law and Social Science 583.

(sometimes only alleged) economic pressures to speed up investments to the detriment of judicial protection of disappointed bidders in Germany in the 1990s. **Chevalier**'s paper on legal certainty in France provides a good example of this interaction between different factors – namely the historical structure of administrative law, the Europeanisation process, the weight of the Council of State in the development of French administrative law, and the ambivalent role of the action of the judicial authorities) – [124] as does **Slautsky**'s paper on economic regulation in Belgium. There, the creation of independent regulators challenged assumptions about the respective roles of the State, the market, and social partners in the regulation of the economy. These assumptions are widespread in Belgian political and economic circles, and they have been translated into legal arguments raised against independent regulators. Protecting the constitutional powers of the executive against encroachment from independent regulators made it possible to protect the range of interests associated with the decision-making process within the executive and, in particular, the role of social partners and of other public bodies – such as municipalities – in this decision-making process.[125] **Boyron** and **Marique** flag the specific political context connected to Brexit and the increasing wish of the UK government to limit judicial review as contextual factors contributing to explaining the resistance to proportionality in England.[126]

Thanks to their various empirical studies and in-person-interviews, **Láncos, Horváth** and **Szemesi** demonstrate that the failure of the leniency programme is primarily due to extra-legal factors – especially the socialist history of the country, as well as the business structure and culture because Hungary is a small market where business owners and managers know each other well – and not the legal design of the programme itself.[127] At the same time, this lack of take-up of the option offered by the leniency programme is not due to ignorance of the legal obligations of economic actors, but much more to the underlying logic of snitching. There is, thus, a differentiated level of legal awareness between illegal practices and possibilities of opting out from these illegal practices across the economic actors. Beyond this, **Láncos, Horváth** and **Szemesi** suggest that the specific mindsets forged under a planned economy cannot be wiped out easily, and even a new generation of economic actors reproduces the same mindsets because routines and the general economic environment have not undergone any major change.[128] This confirms what Stelkens and Andrijauskaitė found in relation to administrative legal mindsets in the context of

124 Chevalier below 95.
125 Slautsky below 37.
126 Boyron and Marique below 65.
127 Láncos, Horváth and Szemesi below 121.
128 Láncos, Horváth and Szemesi below 121.

the Council of Europe.[129] Culture is not only the product of one – even if major – feature in a given legal system: it is much more a combination of interlocking factors feeding into each other, making it highly challenging to break a social pattern even when legal tools seem to call for such a break or when some form of training or different education is provided.[130] **Andrijauskaitė** makes a similar point in relation to the 'socialist mentality' still prevailing in the Lithuanian administration, which does not seem to be moved to table any bill modernizing administrative procedures any time soon. This leads to the consequence that Lithuanian judges seem to be the ones moved to adapt their legal categories, becoming more flexible in terms of the legal authoritative sources which allow them to expand the scope of the right to be heard:[131] an observation that would seem barely noticeable for Belgian, English or French administrative lawyers – but one that does not sit well with the interactions between the legislature, the executive and the judge in Lithuania. Hence, if convergence there is, it is not only in terms of contents of rights, but also in terms of constitutional relationships. As noted in **Boyron** and **Marique**, focusing on changes through foreign transplants in administrative systems highlights the relational dynamics within which the key actors are embedded.[132] Here, legal cultures are not only about cognitive mindsets for applying legal techniques to solve legal problems, but also about cognitive mindsets concerning each other's expected constitutional roles in general. These are in flux and never fully settled.

5.4. Outcomes of the resistance

In Cohn's typology of outcomes for transplants, seven types are suggested – from full convergence to minimal fine-tuning, pro-transplant transposition, contra-transplant transposition, distortion, mutation, and rejection.[133] Cohn focuses on rule transposition in general, while our case studies rely on a wider range of transplants and start from a narrower focus, namely that of resistance, meaning that the first two and the last options Cohn identifies are not relevant here. This allows our case studies to be fleshed out with more details and nuances of what happens in the zone between the extremes. One

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129 See U Stelkens, A Andrijauskaitė and Y Marique, 'Mapping, Explaining, and Constructing the Effectiveness of the Pan-European Principles of Good Administration – Overall Assessment' in U Stelkens and A Andrijauskaitė (eds), *Good Administration and the Council of Europe – Law, Principles and Effectiveness* (Oxford University Press 2020) 755-820, para 31.32ff (West and Nordic) and para 31.59ff (post-socialist).

130 Láncos, Horváth and Szemesi below 121.

131 Andrijauskaitė below 167.

132 Boyron and Marique below 65.

133 M Cohn, 'Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom' (2010) 58 American Journal of Comparative Law 583, 593, figure 2.

striking feature, however, across our case studies, is that the host system seeks to develop control over the transplanted foreign technique in some way (the major outlier being the Hungarian leniency programme, but its voluntary nature may explain the special outcome of this technique, namely its lack of effective implementation). This means that the host system is creative in its approach to the transplanted technique.

First, we find a minimalist approach where the host system contains the transplanted technique and re-interprets it in some way to align it with its own categories. For instance, the French administrative judge remains in control of legal certainty. It limits its scope to its objective components (i.e. accessibility, simplification and quality of legislation), thus excluding its subjective components (i.e. protection of legitimate expectations).[134]

Secondly, the host system may undergo legal changes down the line as a consequence of the transplanted foreign technique. This leads to second-order differentiation. Formal law and/or case law are adapted to include the transplant, but the consistency of the overall administrative system requires other adaptations elsewhere. This overspill can take the form of logical legal consequences resulting from the transplant itself – like the development of parliamentary accountability procedures for independent economic regulators being a substitute for the previous governmental control over these regulators in Belgium.[135] This overspill can go a little outside the transplanted technique to reach a contiguous technique. So, in England, proportionality was unambiguously introduced in the field of human rights with the formal enactment of the Human Rights Act 1998. The UKSC was then influenced by this principle when redefining its otherwise classic *Wednesbury* test.[136] This overspill may even stretch outside the natural scope of the transplanted technique, as in the case of German competitive award procedures and the judicial protection used not only in public procurement, but also in the recruitment of civil servants and decisions to allocate scarce goods.[137]

Finally, the transplant can be subverted, as **Dragos** explains in the case of the Romanian ombudsman and his increasing powers, with some of these powers being seldom recognised to other ombudsmen elsewhere. The two best illustrations of these extensive powers are the ombudsman's power to initiate judicial proceedings *pro bono* for plaintiffs and to raise exceptions of unconstitutionality in the Constitutional Court. These more extensive powers can bring the ombudsman into political debates and weaken their independence, regardless of whether the ombudsman actually decides to act or not. The ombudsman's

134 Chevalier below 95.
135 Slautsky below 37.
136 Boyron and Marique below 65.
137 Stelkens below 141.

concrete inaction whilst enjoying legal powers to act signals where their preferences lie. This shift towards an arbiter between political actors – illustrated by a crisis over decriminalizing corruption in Romania where the executive and civil society were opposed – disturbs the 'standard' role of the ombudsman, conceived primarily as focusing on good administration carried out by public bodies in the general interest.[138]

6. Resistance and legal changes – an open-ended reading

From the foregoing description of forms of resistance towards foreign techniques and their many factors and expressions, a picture of complexity emerges. To make sense of this complexity,[139] one may focus on the process of legal change over time thanks to such resistance. Change did not happen in our case studies overnight. In all cases, change occurred over a relatively long period,[140] often more than ten years (e.g. the Hungarian leniency programme), sometimes twenty years (e.g. Belgian independent economic regulators; legal certainty in France), sometimes thirty years (e.g. Romanian ombudsman) and even longer (e.g. proportionality in England). It is thus possible to divide this process of legal changes into stages that recur across our case studies and suggest possible options that emerge over time. An overview of these stages is provided in *Figure 1: An open-ended model of legal change for administrative transplants – getting to grips with the foreign* on page 34.

At the outset (i.e. stage zero) new problems or challenges arise, and some types of reaction to deal with them gain prominence, suggesting they are successful or important. They can be techniques (e.g. the independence required by economic regulators or a leniency programme); a judicial technique (e.g. proportionality); a legal principle (e.g. legal certainty); a type of right (e.g. the right to be heard); an institution (e.g. the ombudsman); or a fully-fledged judicial review technique (e.g. judicial protection in competitive procedures). Legal ob-

138 Dragos below at 185.

139 i.e. providing an interpretation and analytical tool for legal entrepreneurs interested in understanding which options lie ahead when faced with apparent resistance. This does not mean that we adopt a determinist approach to legal changes or that we seek to suggest a grand theory for transplants, providing predictions as to how a foreign technique will be received in the transplanting country: cfr U Kischel, 'Theorising Legal Transplants?' (BACL Seminar, Preston, 3 September 2019) <https://british-association-comparative-law.org/2020/01/27/account-u-kischel-theorising-legal-transplants-bacl-seminar-preston-3rd-september-2019/> accessed 17 March 2021. For one thing, our sample is far too Euro-centric for us to have that ambition.

140 At least if we consider the lifetime of the European Union. Of course, taking a longer perspective would already greatly mitigate the idea of 'resistance' when compared to the actual results. It may be that over longer periods of time one could observe branching out and recursive loops between different phases.

ligations or other incentives to include them in the national system may or may not exist.

Stage one starts the process of transplantation. Foreign techniques are transplanted into the host country and come into contact with the domestic institutions encapsulating compromises. For instance, economic regulation in Belgium was very much the product of corporatism, whereby key socio-economic actors had been institutionally included in administrative decision-making since the early 20th century. Requiring economic regulation to be decided independently – i.e. outside this historic structure – challenged this socio-economic compromise and disrupted vested economic and political interests.[141] The Romanian ombudsman did not challenge economic interests so much as the 'patron-client' relationships between politicians and civil society.[142] The principle of legal certainty and its sister principle of legitimate expectations challenged the way in which the French administrative judge had, over time, balanced the interests of the administration against those of users.[143]

This leads to stage two, i.e. the short-term reactions to these disruptions. In particular, two reactions can be identified. In one scenario, significant actors (those who are relevant to ensuring the implementation of the foreign technique in the host system) whose interests are disrupted or threatened with disruption by the foreign technique flee: they do not engage with the transplant, resulting in the absence of practical implementation. A good example in our project is the fact that economic actors have not heeded the leniency programme in Hungary.[144] In the second scenario, significant actors put up a fight against the foreign technique and rely on legal tools and concepts – for instance, constitutional principles such as political accountability in the case of the Belgian economic regulators.[145] Of course, significant actors may first adopt one attitude only to shift it later on. The Romanian ombudsman was not used at first, whereas later it gained visibility yet lost credibility.[146]

Over time stage three is kicked off, with more sophisticated strategies being deployed. Again, two types of scenarios can be distinguished. On the one hand, some strategies are soft and diffuse, consisting of incremental changes. For instance, English judges have slowly – one case after another – adopted proportionality in some areas and then put in some framing for the subsequent development of proportionality. There may be some testing of the ground. For instance, English judges have called for comparative studies of proportionality in the common law world, maybe in an attempt to elicit arguments drawn from

141 Slautsky below 37.
142 Dragos below 193.
143 Chevalier below 95.
144 Láncos, Horváth and Szemesi below 121.
145 Slautsky below 37.
146 Dragos below 185.

outside too European-centric case law.[147] The French Supreme Administrative Court tested the water, slowly preparing its audience (e.g. 2006 annual report, a case where the claim was rejected) before jumping into legal certainty.[148] On the other hand, strategies of resistance can be bluntly upfront, formal and focused: they involve looking for judicial solutions where there is a loser and a winner at the end of the journey. This was clearly the choice made by the Belgian economic regulator, which took the Belgian government to court to force the adoption of its preferred solution.[149]

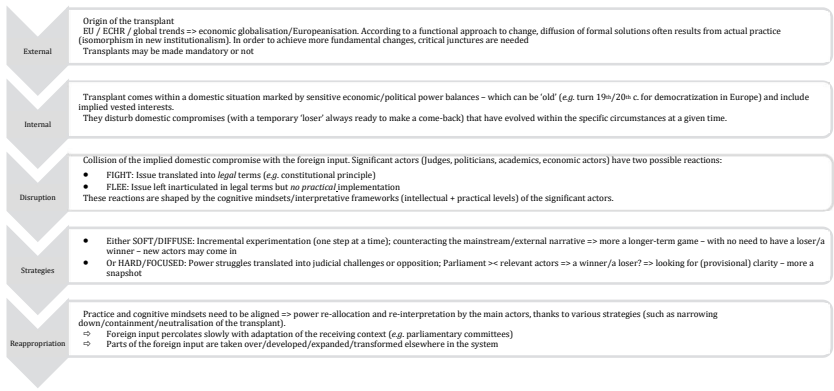
Finally, one can take a step back and assess the longer-term effects of foreign techniques on the host administrative system. Here, our case studies show how national actors have started acclimating to the transplants to some extent, leading to administrative changes. Creativity emerges. One such acclimatation is the narrowing down of the transplant and its scope, maybe even reinterpreting it in a way consistent with the domestic cognitive mindset. For instance, legal certainty is understood in France only in its objective aspect; the subjective dimension – that of legitimate expectations – is neutralised.[150] This leads to maintaining internal consistency within the legal system. Another type of creativity is that observed in Belgium, where new administrative procedures (parliaments are now involved in monitoring regulators' activities) have been developed in order to flesh out the principle of political accountability.[151] Once again, this contributes to maintaining the internal consistency of the system. Furthermore, there is no loser or winner: the opponents of independent economic regulators can claim that (some form of) control is maintained; its proponents can claim that the executive has nothing to say any longer about economic regulation carried out by regulators. Yet another form of creativity appears when other dimensions of the administrative system are transformed. This happened in Germany with the alignment of judicial protection in competitive procedures in procurement and civil service matters,[152] and in England with proportionality leading to the redefining of the *Wednesbury* ground of review into a new standard of review.[153] In short, creativity can emanate from the judge (as in England, France, and Lithuania), from the legislature (as in Belgium, and Romania) or from economic actors (as in Germany).

This time-oriented approach to the internal process of acclimating to the foreign to make it more domestic leads to a questioning of the assumption that

147 Boyron and Marique below 65.
148 Chevalier below 95.
149 Slautsky below 37.
150 Chevalier below 95.
151 Slautsky below 37.
152 Stelkens below 141.
153 Boyron and Marique below 65.

decentralisation increases the effectiveness of EU law.[154] Indeed, a range of internal processes are set in motion with transplants. It may become possible over time to develop some form of typologies for these developments, reactions, and courses of acclimation. The overall picture, however, is likely to be anything but homogenous, not to mention the real risk that some significant actors may just leave the law aside. This risk seems to be especially present if the logic behind the transplanted technique goes too far against culturally ingrained ideas (such as a distaste for snitching). If we expand this to the European administrative space, this means that differentiation will keep flourishing for the foreseeable future, and that the same legal rules at EU level may need different supportive techniques at national level in order to be concretely implemented. In more general terms, more attention needs to be devoted in comparative terms to these 'odd details' in the legal design of rules, institutions, principles, and other techniques. They are the ones making a difference in the day-to-day functioning of the administration. Indeed, the devil is in the detail.

Figure 1: An open-ended model of legal change for administrative transplants – getting to grips with the foreign



Source: Yseult Marique

7. Looking into the future of a pluralistic European administrative space?

Administrative law transplants are ubiquitous in the European administrative space. Yet, the case studies collected for this special issue illustrate that transplants have encountered resistance from various actors – the administration but also the legislature, judges, and economic stakeholders. Cognitive

154 See also F Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques' (1993) 56 Modern Law Review 19.

mindsets and daily routines cannot be changed overnight. Patience and time are needed. Nonetheless, transplants have contributed to legal changes and innovation in administrative practices and thinking. This introduction has suggested a way to analyse how the transplanting system – and its most significant actors – seeks to accommodate transplants over time. Although this process is open-ended, the very awareness that transplants are processes can contribute to understanding the dynamics of the European administrative space, its limits, and the ways in which they can be overcome. This requires acknowledging the proper extent of top-down Europeanisation of administrative law across Member States and the distinctive role of administrative law.

On the one hand, the limits to Europeanisation of administrative law are threefold. First, EU law is often only one of the conduits for spurring a country to start the process of transplanting a foreign technique into its system. Secondly, the modalities of the transplanted technique can vary widely from the archetype technique(s) and over time. Thirdly, even when the transplanted technique corresponds to the archetype technique it does not guarantee uniformity, because the scope of the transplant may either remain narrow (France, England, Lithuania – to the point even of being non-existent in practice, as with leniency in Hungary) or trigger deeper structural changes (Belgium with respect to controls over economic regulators or the specific powers recognised to the Romanian ombudsman) or in collateral fields (e.g. judicial protection for disappointed candidates in the civil service in Germany or revisiting *Wednesbury* in England).

On the other hand, isomorphism in administrative law needs to be strongly qualified – even when administrative law serves as a conduit for facilitating the four European freedoms and the realisation of the internal market. Indeed, even when economic factors have been pressing in a country, the domestic legal preferences associated with economic growth have differed from the European ones. The best example is the wish and need to speed up investments in Germany in the 1990s, while the EU wanted to develop the internal market thanks to increased judicial protection for economic actors. In addition, administrations may often have priorities other than only supporting (European or national) economic objectives, priorities shaped by their distinctive historic choices and compromises. Finally, European law and policies can also seek to balance economic and non-economic objectives. Administrative law is not only a legal field for limiting administrative powers: it is also a legal field facilitating the development and implementation of public policies – with all their diversity.

Put together, the balance between these factors (i.e. cognitive mindsets shaping preferences about administrative action and techniques, tools, and/or processes to implement these preferences through daily routines) specific to each legal system points to the administrative cultures within each of these legal systems. Changing these cultures is more complex than what can be accomplished with a one-day event like the one that happened on 9th November 1989. Before changing them, one needs to first understand them in

depth. Time and patience are key to identifying the 'odd details' that provide unique keys to administrative cultures and that unlock their creativity to answer new issues as they arise. The coronavirus has, sadly, brought immense coordination and financial challenges for our domestic administrations. This may be one of those critical junctures when leaps of innovation and experimentation are attempted to expand and reshape our cognitive mindsets and daily routines, trusting that this will contribute to better days to come, and building on the specific strengths of each administrative component.

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Independent Economic Regulators in Belgium: Contextualising Local Resistance to a Global Trend in the Light of the Belgian Economic Constitution

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Abstract

Inspired by the American experience, the European Union has made it compulsory for Member States since the 1990s to entrust certain regulatory powers to national authorities independent from the government in several sectors of the economy. Such a development is part of a larger trend that has taken place at the global level since the 1980s. The choice for independent regulators with wide powers must ensure credible and effective regulation of the economy, away from the short-term thinking that plagues politicians. Yet, the creation of independent regulators of the economy does not fit well with the constitutional, political and economic traditions of several European states, such as Belgium. In Belgium, the creation of independent economic regulators has faced resistance. Using Belgium as a case-study, this paper seeks to contextualise this resistance and argues that it should be understood in the light of the mismatch between the (neo-liberal) view regarding the respective roles of 'experts', politicians and economic actors in the regulation of the economy that is behind the creation of independent economic regulators and the Belgian economic constitution.

1. Introduction

Originating from the United States, independent regulators of the economy are an integral part of the current arrangements of economic governance worldwide. This is also the case in the European Union, where independent regulators of the economy have been created under EU impulse in all Member States to improve the functioning of the internal market and increase the effective implementation and enforcement of EU policies. Yet, independent economic regulators challenge preexisting arrangements in many states and face resistance in some of them. This is notably the case in Belgium. Using Belgium as a case-study, this paper seeks to contextualise this resistance. It argues that independent economic regulators cannot be disentangled from the

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(neo-liberal) view regarding the respective roles of 'experts', politicians, and economic actors in the regulation of the economy that is behind their creation, and that this view is not always in line with historic compromises underlying distinct institutional and administrative arrangements for the regulation of the economy at the national level. This paper further argues that these differences in approaches may help to understand the resistance to the independence of economic regulators that can be observed in countries such as Belgium.

Belgium is one of the founding Member States of the EU and has an economy that relies heavily on international trade and foreign investments. At the same time, however, globalization has put pressure on some of Belgium's historic compromises between labor and capital, and the neocorporatist arrangements that resulted from them after the Second World War. In light of this socio-economic context, Belgium is a particularly interesting case study for discussing the tensions that arise at the interface between global legal and administrative trends and local experiences, and the ways and extent to which they can be overcome. This paper first sets the scene for independent economic regulators (2); secondly, it highlights that these independent economic regulators have met with resistance in Belgium on several occasions (3); thirdly, it contextualises this resistance in the light of the principles and compromises that form the Belgian economic constitution (4). The notion of economic constitution is here understood both descriptively as the set of key state institutions that are active in the management of the economy, their interrelations and their relations with civil society and, normatively, as the set of principles underlying the status and operation of these key institutions.[1]

2. Independent economic regulators: setting the scene

In 2010 Bruce Ackerman challenged the traditional distinction between legislative, executive and judicial powers as the main tool for classifying the different branches of government.[2] New institutional forms such as independent election commissions and independent central banks escape Montesquieu's categorisation. Independent regulators of the economy do as well. Independent economic regulators are market regulators in charge of overseeing and regulating a limited number of specific economic sectors (usually former monopolistic markets), typically in order to encourage and promote competition.[3]

1 T Prosser, *The Economic Constitution* (Oxford University Press 2014) 7-11.
2 B Ackerman, 'Good-bye, Montesquieu' in S Rose-Ackerman and P Lindseth (eds), *Comparative Administrative Law* (Edward Elgar 2010) 128-133.
3 A Ottow, *Market and Competition Authorities* (Oxford University Press 2015) 27-28.

They are independent because they enjoy autonomy both in relation to private actors and to the representative institutions of the state (the government in the first place). Independent economic regulators have spread worldwide over recent decennia.[4] Their origin is commonly attributed to the United States,[5] although the US model of independent regulatory agencies is often misunderstood.[6] Europe is no exception to this trend. Firstly, as D. Ritleng writes, '[o]ne of the peculiarities of the European integration process from the outset has been the granting of important powers to autonomous institutions'.[7] Secondly, since the 1990s, and in the wake of the liberalisation of the utilities sectors that occurred in the United Kingdom in the 1980s and 1990s, European internal market law has made it compulsory for Member States to entrust certain powers to national regulators. These regulators must also exercise their powers without being subjected to the control of politically responsible institutions.[8] This independence from the government comes on top of the independence which regulators must keep in relation to private actors. Independent regulators have had to be established under EU law for the regulation of the network industries (telecommunications, electricity, gas, railway)[9] but also in areas such as data protection and the regulation of audiovisual services.[10] Besides the EU, other international organisations, such as the Organisation for Economic Co-operation and Development (OECD), also promote regulation of the economy at arms' length from

4 J Jordana, D Levi-Faur and X Fernandez i Marin, 'The Global Diffusion of Regulatory Agencies' (2011) 44(10) Comparative Political Studies 1343, 1344.

5 F Gilardi and M Maggetti, 'The independence of regulatory authorities' in D Levi-Faur (ed), *Handbook on the Politics of Regulation* (Edward Elgar 2011) 201.

6 M Ruffert, 'National executives and bureaucracies' in P Cane, H Hofmann, E Ip and P Lindseth (eds), *Oxford Handbook of Comparative Administrative Law* (Oxford University Press 2021) 523-524.

7 D Ritleng, 'Introduction' in D Ritleng (ed), *Independence and Legitimacy in the Institutional System of the European Union* (Oxford University Press 2016) 3.

8 S De Somer, 'The Europeanisation of the Law on National Independent Regulatory Authorities from a Vertical and Horizontal Perspective' (2012) 5 REALaw 93, 93-96.

9 Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast) [2018] L321/36, arts 5 and 8; Directive (EC) 2009/73 of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC [2009] OJ L211/94, art 39; Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU [2019] OJ L158/125, art 57; Directive (EU) 2012/34 of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area [2012] OJ L343/32, art 55.

10 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1, art 52; Directive (EU) 2010/13 of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (as revised in 2018) [2010] L95/1, art 30.

the government to improve the quality of regulation (i.e., its fairness and impartiality).[11]

Although the trend towards creating independent economic regulators is a global one, the design of regulators is influenced by the local context in which the regulators operate.[12] There is notably a great diversity in the degree of autonomy and in the scope of powers and responsibilities that economic regulators possess worldwide. As colourfully put by A.G. Bobek,

Independence can hardly be understood as a unitary notion, a sort of 'off-the-rack' single blueprint, that would provide for a set of guarantees universally applicable to all the independent bodies in exactly the same way. Independence is more like a ladder which one can climb up or down and stop at a specific rung, depending on the distance needed from given actor(s) in order to complete one's tasks independently.

Analytically, the independence of regulators can be assessed according to four dimensions: institutional, personnel, financial, and functional independence.[13] Different institutions 'score' differently on these four dimensions. Furthermore, even 'independent' entities do not operate in a *vacuum*: they interact with public and private bodies, they rely on information from other actors for their operations, etc. Independence is therefore always relative.[14] In the EU, however, EU law has been increasingly demanding and precise regarding the degree and scope of independence from private actors and from the government required for national regulatory authorities in sectors such as energy or electronic communications.[15] In general terms, the European Court of Justice has ruled that in "relation to a public body, the term 'independence' normally means a status which ensures that the body concerned can act completely freely, without taking any instructions or being put under any pressure".[16] The details of the independence requirement applicable to national regulators are further provided

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11 OECD, *Recommendation of the Council on Regulatory Policy and Governance* (22 March 2012) 14; A Vauchez and B François, 'Pour une sociologie politique de l'indépendance' in B François and A Vauchez (eds), *Politique de l'indépendance. Formes et usages contemporains d'une technologie de gouvernement* (Presses universitaires du Septentrion 2020) 34.

12 J Chevallier, 'Les autorités administratives indépendantes: un produit d'importation?' in F Bottini (ed), *Néolibéralisme et américanisation du droit* (Mare & Martin 2019) 149 (on France).

13 M Scholten, 'Independent, Hence Unaccountable? – The Need for a Broader Debate on Accountability of the Executive' (2011) 4 REALaw 5, 6.

14 F Gilardi and M Maggetti, 'The independence of regulatory authorities' in D Levi-Faur (ed), *Handbook on the Politics of Regulation* (Edward Elgar 2011) 202.

15 E Slautsky, *L'organisation administrative nationale face au droit européen du marché intérieur* (Larcier 2018) pt 3; N Athanasiadou, 'Independent regulatory authorities at the EU and Member State level: towards different standards of "independence"?' in J-B Auby (ed), *The Future of Administrative Law* (LexisNexis 2019) 201-220.

16 Case C-518/07 *Commission v Germany* EU:C:2010:125, para 18. See also Case C-530/16 *European Commission v Republic of Poland* EU:C:2018:430, para 67; Case C-378/19 *Prezident Slovenskej republiky* EU:C:2020:462, para 32.

for in sectoral instruments. In the electricity sector, for example, the European legislature has provided that regulators must not seek or take direct instructions from any government or other public or private entity when carrying out their regulatory tasks, and should be able to take autonomous decisions, independently from any political body.[17] Thus, while the EU first protected the discretion of the Member States in the design of their regulators in line with national institutional autonomy, EU requirements for independent regulators at the national level became more stringent at the end of the 2000s.[18] This is because the leeway previously enjoyed by Member States proved unsatisfactory for the achievements of the objectives pursued by the EU, in particular the liberalisation of several sectors of the European economy (e.g. in the energy, railway or electronic communications sectors). Its experience of problems with some Member States led the Commission to further harmonize the design of national regulators and increase their independence. In 2007 the Commission gave as an example of shortcomings the then applicable regulatory framework in the electricity sector. They stated:

Regulators have, on occasion, been put in a position where their decisions clearly go against the objective of creating a single internal market for electricity and gas, usually due to direct or indirect influence from national governments. The clearest, although not the only, example of this is inappropriate regulated supply tariffs.[19]

This is because politicians may be tempted to use their influence over the regulator to keep supply prices for energy artificially low, even though this may harm competition and interfere with the good functioning of the internal market in the longer run.

This pressure from EU law to create independent regulators at national level goes hand-in-hand with a tendency to require Member States to grant these same regulators significant powers to achieve their aims of making markets more competitive, while also taking into account other non-economic interests.[20] By nature, the search for an equilibrium between these different interests requires the exercise of discretion from the regulators. This is not a mere 'techni-

17 Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU [2019] OJ L158/125, art 57.

18 T Perroud, *La fonction contentieuse des autorités de régulation en France et au Royaume-Uni* (Dalloz 2013) 76-79.

19 Communication from the Commission to the Council and the European Parliament: Prospects for the internal gas and electricity market, COM(2006) 841 final, 10 January 2007, 8.

20 See eg Directive (EC) 2009/73 of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC [2009] OJ L211/94, art 40.

cal' exercise.[21] As is already apparent from the example from the previous paragraph, there can e.g., be trade-offs between affordable access to basic human needs such as energy and the need to give incentives to undertakings to invest in e.g., energy production plants or networks in the longer term. More precisely, it is common for EU law to list the powers and competences that national regulators must minimally possess in sectors regulated at EU level. In the network industries, the powers that regulators must enjoy have increased over time and currently range from the making of rules applicable to the sectors that regulators oversee to the settling of disputes between regulated undertakings. They also encompass the enforcement of legislation and the enactment of sanctions.[22] As a result, there is a legal core of powers and duties that national economic regulators in the EU must possess in sectors such as energy and electronic communications. This leads to the overall picture that, as a matter of EU law, national regulation of significant parts of the economy must be left to actors enjoying independence both from market actors and from the political sphere, and which exercise discretion in using these powers. However, the choice promoted at EU level for independent regulation of the economy may interfere with approaches and compromises underlying the economic constitution of some Member States, where regulation of the economy is usually mediated through ordinary political processes.

Thus, independent regulators restrict the scope of governmental intervention in the economy and allow regulatory decisions to be insulated from political influence. In the EU context the choice of independent regulators with wide powers to regulate the economy must ensure credible and effective sectoral regulation, away from the short-term electoral thinking that often plagues politicians.[23] Independent economic regulators are supposed to enhance investor confidence in the regulation of the market.[24] They must ensure 'market confidence in impartiality',[25] and 'that regulatory decisions are not affected by political and specific economic interests, thereby creating a stable and predictable

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21 'Yet it is empirically evident that the divide between political and non-political is flawed in an important way; we could go so far as to say it is evidently wrong', Ruffert (n7) 507.

22 See eg Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU [2019] OJ L158/125, art 59 and 60.

23 G Majone, 'Temporal Consistency and Policy Credibility: Why Democracies Need Non-Majoritarian Institutions' (1996) 57 *European University Institute – Robert Schuman Centre of Advanced Studies Working Paper.*

24 S Lavrijssen and A Ottow, 'Independent Supervisory Authorities: A Fragile Concept' (2012) 39 Legal Issues of Economic Integration 419, 424.

25 European Commission, 'Impact Assessment accompanying the legislative package on the internal market for electricity and gas' (COM(2007) 528 final, COM(2007) 529 final, COM(2007) 530 final, COM(2007) 531 final, COM(2007) 532 final) para 5.2.

investment climate'[26] which reduces investors' risks and costs, especially in capital-intensive sectors. This is particularly important for interstate economic operators, which do not form part of the electorate and lack proper political representation in the country in which they invest.[27]

In the EU the enhanced role played by independent regulators can further be explained by the need to improve the effectiveness of EU law in the Member States.[28] Regulators insulated from other national public bodies and from national interests are expected to be more focused and more committed to the goals, principles and provisions of the relevant European legislation which they need to implement and enforce, which in turn must provide for more effective implementation and enforcement of EU law. It comes, therefore, as no surprise that independent authorities are part of the European Commission strategy for better implementation and enforcement of EU law.[29] Overall, from an EU law perspective, 'independent bodies, owing to their insulation from politics and electoral concerns and their technical expertise, are better able to fulfil certain tasks and will gain democratic legitimacy thanks to the effectiveness of their actions'.[30] In addition to the 'output legitimacy' that is expected to result from the expertise of independent bodies and their ability to make decisions free from electoral concerns,[31] the EU also seeks to increase the democratic legitimacy of these independent bodies which it requires in its Member States by promoting consultation practices with citizens and stakeholders when regulators make decisions. In doing so, the EU seeks to promote a form of 'participatory democracy' at the national level,[32] thereby contributing to the 'throughput legitimacy' of the regulators and their decisions.[33] As the Belgian example will show, how-

26 Commission Staff Working Paper, 'Interpretative Note on Directive 2009/72/EC concerning common rules for the internal market in electricity and Directive 2009/73/EC concerning common rules for the internal market in natural gas. The Regulatory Authorities' (2010) 6.

27 K Lenaerts, 'The principle of democracy in the case law of the European Court of Justice' (2013) 62 International and Comparative Law Quarterly 271, 297.

28 M Egeberg, 'EU Administration: Centre Formation and Multilevelness' (2010) 133 Revue française d'administration publique 17, 26; G Dellis, 'Servant of two masters or Trojan horse? Independent regulators in EU Member States, the principal-agent problem and the attempt for an undercover federalization of the European Union' in J-B Auby (ed), *The future of administrative law* (LexisNexis 2019) 183-200.

29 European Commission, 'Communication – EU law: Better results through better application' (2017/C 18/02, 19 January 2017).

30 D Ritleng, 'Does the European Court of Justice Take Democracy Seriously? Some Thoughts about the Macro-Financial Assistance Case' (2016) 53 Common Market Law Review 11, 32 (Ritleng refers to the ECJ in particular); Vauchez and François (111) 33.

31 F Scharpf, *Governing in Europe: effective and democratic?* (Oxford University Press 1999).

32 A Psygkas, *From the 'Democratic Deficit' to a 'Democratic Surplus': Constructing Administrative Democracy in Europe* (Oxford University Press 2017).

33 V Schmidt, 'Democracy and Legitimacy in the European Union Revisited: Input, Output and "Throughput"' (2013) 61 Political studies 2, 2–22.

ever, this view of the legitimacy of the regulators has not met with universal approval.

It must therefore be clear from the outset that the EU preference for independent economic regulators is far from being a mere "technical" question: it is a preference driven by assumptions regarding the respective roles of politicians, "experts" and economic actors in the functioning of the market economy, the conditions under which the exercise of public power is legitimate, as well as the respective weights of European (economic) objectives and national conflicting preferences. As such, independent economic regulators represent the 'institutionalization of a new global order of regulatory capitalism',[34] and they are part and parcel of the European administrative space. Yet, as already alluded to, the creation of independent economic regulators does not fit well with the constitutional, political and economic traditions of several Member States of the EU,[35] such as Belgium. As a matter of fact, independent European agencies also raise constitutional concerns at EU level.[36] At the national level, independent regulators challenge the constitutional role of the government, raise concerns about political accountability, challenge pre-existing national political economy choices and threaten vested interests. It is therefore not surprising that independent regulators of the economy have met with resistance in the Belgian context. The legislature, the executive and even the legislative section of the Council of State have all opposed or weakened the independence of the Belgian regulators at some point in recent years.[37] The independence requirements applicable to regulators in Belgium as a matter of EU law have, e.g., been breached on numerous occasions. From an EU perspective, such resistance is problematic as it threatens the well-functioning of the internal market and the effective implementation of EU law at the national level. In line with the overall theme of the special issue in which this paper appears, it is therefore crucial to understand the roots of this 'Belgian difficulty' with independent economic

34 Jordana, Levi-Faur and Fernandez i Marin (n4) 1361.

35 T Zgajewski and M Van Bellinghen, 'Quelle réforme pour le régulateur des télécommunications en Belgique?' (2000) 53 Studia Diplomatica 51, 60; L Hancher and P Larouche, 'The Coming of Age of EU Regulation of Network Industries and Services of General Economic Interest' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (2nd edn Oxford University Press 2011) 773; S Rose-Ackerman, 'The Regulatory State' in M Rosenfeld and A Sajó (eds), *Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2013) 676-677. Regarding the French situation, see Chevallier (n12) 143.

36 J Saurer 'EU Agencies 2.0: the new constitution of supranational administration beyond the EU Commission' in S Rose-Ackerman, P Lindseth and B Emerson (eds), *Comparative administrative law* (2nd edn Edward Elgar 2017) 619-631.

37 Besides being the highest administrative court in Belgium, the Belgian Council of State is also an advisory body in legislative and statutory matters. This advisory role is taken up by the legislative section of the Council of State. The opinions of the legislative section of the Council of State are available here: <www.raadvst-consetat.be/?page=adv_search&lang=fr> accessed 13 March 2021.

regulators and to discuss its distinctive character, in order to better appreciate the extent to which it can be overcome.

Drawing mostly on examples from the electricity sector and the electronic communications sector, this paper will first show that Belgian authorities have struggled to accept the independence of Belgian economic regulators. Secondly, it will contextualise these difficulties and highlight the role that courts and EU institutions have played in protecting the independence of the Belgian regulators. In summary, this paper argues that the observed resistance can best be understood in light of the Belgian constitutional and political context, and the threat that independent regulators pose to the vested interests of powerful (public) actors in the sectors concerned, or, in other words, in the context of the Belgian economic constitution. Nonetheless, despite this resistance, independent economic regulators now seem to have made their way into Belgium and appear to be an established part of the current Belgian institutional landscape. Belgian courts and European institutions have been instrumental in this process of acceptance. This instrumental role of Belgian courts can be linked to their general attitude of 'European-friendliness', which leads them to protect the integrity of EU law even against domestic constitutional principles. The constitutional position of Belgian economic regulators remains, however, partly unsettled, which leads to the observation that the acclimation of this new (by Belgian standards) institutional form is not yet fully achieved in Belgium and may require sustained attention in the future.

3. The contested independence of economic regulators in Belgium

Although Belgium's first autonomous regulators – the *Commission Bancaire* – were created as long ago as 1935,[38] economic regulators independent from the government have mushroomed in the Belgian institutional landscape only since the 1990s.[39] The Belgian regulator for telecommunications (BIPT/IBPT) was, e.g., created in 1991 and, at the federal level, the Belgian regulator for the energy sector (CREG) was created in 1999.[40] The increasing role played by independent economic regulators in Belgium is intrinsically linked to the EU-driven process of liberalisation of the network industries, the

38 Royal decree no 185 of 9 July 1935 'sur le contrôle des banques et le régime des émissions de titres et valeurs'.

39 E Slautsky, 'Principe de légalité et attributions de pouvoirs à des autorités indépendantes: une relation équivoque' in L Detroux, M El Berhoumi and B Lombaert (eds), *La légalité: un principe de la démocratie belge en péril* (Larcier 2019) 593.

40 V De Schepper and E Slautsky, 'Decentralisering en privatisering van regelgevende bevoegdheid: naar een grondwettelijke verankering?' in C Behrendt, W Pas, S Sottiaux and J Van Nieuwenhove (eds), *Leuvense Staatsrechtelijke Standpunten IV* (die Keure 2019) 150-170.

need to implement European secondary legislation and to foster competition in the newly liberalised markets.[41] An institution commonly thought to be of American origin, independent economic regulators are therefore a relatively new phenomenon in Belgium. They correspond to Saunders' definition of a legal transplant, namely a 'deliberate movement of relatively structured legal phenomena across jurisdictional boundaries'.[42] As such, they are a perfect example of the diffusion of administrative institutions across national borders,[43] which is at the core of this special issue. Given the major role played by EU law in bringing independent economic regulators to Belgium, this legal transplant is not entirely voluntary as far as Belgium is concerned. Several signs show that the political independence of economic regulators from the government has been difficult to accept in the Belgian context. As previously explained, the independence of regulators from political actors – as required under EU law – must allow them to 'act completely freely, without taking any instructions or being put under any pressure'.[44] However, Belgian economic regulators are comparatively less independent than their European counterparts,[45] and their independence has been regularly put under pressure by Belgian governments and legislatures, and even by the Belgian Council of State, as the four following examples from the electricity and the electronic communications sectors will show.[46] The first examples, from the electricity sector, highlight attempts by the Belgian legislatures to restrict the scope of the powers and discretion of the regulators or, in other words, to restrict their substantive independence. The example from the electronic communications sector illustrates attempts to restrict functional independence from the regulator through the organisation of governmental control over its decisions. In all the examples courts or EU institutions have had to step in to protect the independence of the Belgian regulators.

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41 P Nihoul, 'Les autorités administratives indépendantes en Belgique' (2013) Revue française de droit administratif 897, 898.

42 C Saunders, 'Transplants in Public Law' in M Elliott, J Varuhas and S Wilson Stark (eds), *The Unity of Public Law?* (Hart 2018) 258.

43 M Mota Prado, 'Diffusion, Reception, and Transplantation' in P Cane, H Hofmann, E Ip and P Lindseth (eds), *Oxford Handbook of Comparative Administrative Law* (Oxford University Press 2021) 258-259. See also N K Dubash and B Morgan (eds) *The Rise of the Regulatory State of the South: Infrastructure and Development in Emerging Economies* (Oxford University Press 2013).

44 *Commission v. Germany* (n16) para 18.

45 C Henretti, P Larouche and A Reindl, 'Independence, accountability and perceived quality of regulators' (2012) CERRE Study 1-96, 34.

46 The lack of independence of the Belgian regulators in other sectors, such as data protection, has also been highlighted. See eg É Degrave, *L'e-gouvernement et la protection de la vie privée. Légalité, transparence et contrôle* (Larcier 2014) 579-583. At the time of writing, debates still rage in Belgium regarding the independence of the Belgian Data Protection Agency, its role in the Covid-19 crisis and the compatibility of Belgian law with European requirements. See P Laloux, 'Grand format – Le casse du siècle sur la vie privée des Belges' (Le Soir, 11 February 2021) available at <https://plus.lesoir.be/354333/article/2021-02-11/grand-format-le-casse-du-siecle-sur-la-vie-privee-des-belges> accessed 13 March 2021.

In the electricity sector, Belgian governments and legislatures have attempted to curtail the powers and discretion of the Belgian energy regulators in several ways, to maintain control over the Belgian electricity market and make sure that their own political choices pertaining to the electricity sector are correctly implemented.[47] In Belgium, energy policy is the responsibility of both the national government and the regional entities. Accordingly, there are four energy regulators in Belgium, one at the national level and three at the regional level. For example, Belgian authorities initially tried to restrict the tariff powers of the federal regulator. Both the ECJ and the Belgian Constitutional Court found these attempts to be a breach of the independence requirements of the then applicable Directive 2003/54.[48] In a similar attempt at control, Belgian legislative bodies at federal and regional levels have adopted various guidelines regarding electricity transport and distribution tariffs when implementing the Third Electricity Package from 2009.[49] The guidelines must be respected by the Belgian regulators when they control and approve the tariffs charged by the operators of the transport and distribution networks of electricity. Some guidelines are rather detailed and thus substantially restrict the regulators' discretion in exercising their powers.[50] The federal legislature further restricted the powers of the national energy regulator on other accounts as well. In 2012, these attempts led the Belgian national energy regulator to take the unusual step of filing a complaint with the European Commission,[51] which led the Commission to start an infringement procedure against Belgium in 2014 and, eventually, to the finding of an infringement against Belgium by the ECJ in 2020.[52] In the

47 European electricity law preserves the possibility of Member States developing their own electricity policy on several issues, such as the structure of energy supply or the security of supply. See Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU [2019] OJ L158/125, art. 57(4)(b)(ii), and the Consolidated Version of the Treaty on European Union [2012] OJ C 326, art. 192(2)(c), and 194(2).

48 Directive (EC) 2003/54 of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC [2003] OJ L176/37. See Case C-474/08 *Commission v. Belgium* EU:C:2009:681; Belgian Constitutional Court, 31 May 2011, no 97/2011, B.7.1-B.10. The decisions of the Belgian Constitutional Court are available at <www.const-court.be/fr/> accessed 13 March 2021.

49 Directive (EC) No 2009/72 of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (2009) OJ L211/55.

50 D Verhoeven, 'Régulation des tarifs de transport et de distribution d'électricité et de gaz naturel: éléments juridiques d'un jeu de quilles politico-économique' in D Renders and R Born (eds), *Actualités du droit de l'énergie. La transposition du "troisième paquet énergie" européen dans les lois "électricité" et "gaz"* (Bruylant 2013) 322-328.

51 CREG, 'Plainte à l'encontre de l'État belge pour manquement à l'obligation de transposition du troisième paquet énergie' mentioned here <www.creg.be/sites/default/files/assets/Publications/Press/2012/compress20062012fr.pdf> accessed 23 March 2021.

52 More precisely, on 16 October 2014, the European Commission initiated an infringement procedure against Belgium for incorrect transposition of Directive 2009/72 (2014/2189 C(2014) 7337 final). The Commission decided in 2019 to refer Belgium to the Court, notably pointing out that Belgium had not correctly transposed certain rules on the powers of the national regulator (European Commission, 'Energy: Commission refers Belgium to the Court for failing

same vein, in 2016 and, again, in 2021, the Belgian Constitutional Court annulled regional statutes restricting the discretion of the energy regulators regarding distribution tariffs, as the former violated European law requirements regarding the independence of the regulator.[53] In recent months, the Walloon energy regulator and the Walloon government have again disagreed on whether citizens who produce electricity through photo-voltaic modules (solar panels) should pay more for their use of the electricity network.[54] Here again, courts and the legislative section of the Belgian Council of State reasserted the exclusive competence of the regulator to take these decisions and the need to protect its independence: it was only then that the government somehow held back on its attempts to make its view prevail over the regulator.[55]

An example where the functional independence of the regulator has been threatened can be drawn from the electronic communications sector. In this sector, the legislative section of the Belgian Council of State notably held positions that were detrimental to the independence of the regulator. For example, in 2002 and 2012, the legislative section of the Belgian Council of State insisted on the need to maintain some degree of governmental control over the decisions taken by the Belgian regulator for electronic communications.[56] This is because, in the Council of State's view, such control was deemed necessary to protect ministerial accountability to Parliament for the decisions adopted by the regulator. On 16 October 2014, however, the European Commission announced that it had started an infringement procedure against Belgium for lack of independence of its national electronic communications regulator.[57] The start of this in-

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to comply with EU rules on electricity and gas markets' (25 July 2019)). The ECJ found Belgium to be in breach of European energy legislation in Case C-767/19 *Commission v. Belgium* EU:C:2020:984. For an earlier account of this infringement procedure, see D Verhoeven, 'Recente ontwikkelingen in het federaal energierecht: "Europe Strikes Back"' in K Deketelaere and B Delvaux (eds), *Jaarboek Energierecht 2014* (Intersentia 2015) 56-66.

53 Belgian Constitutional Court, 25 May 2016, no 71/2016, B.10.3-B.12; Belgian Constitutional Court, 14 January 2021, no 5/2021, B.12.4; L De Deyne, 'Onafhankelijkheid energieregulator vereist terughoudendheid bij opstellen richtsnoeren' (2016) Milieu- en Energierecht 339, 339-343.

54 CWaPE, 'Tarif prosumer: avis remis le 02/12/2019 sur un projet de décret impliquant la révision de la méthodologie tarifaire et l'adaptation des tarifs pour les utilisateurs du réseau', <www.cwape.be/?dir=7&news=1044> accessed 13 March 2021.

55 Cass 13 December 2018, C.15.0405.F/1; Council of State, opinion no 66.747/4 of 18 December 2019 (not published); X Counasse and B Padoan, 'Photovoltaïque: le ministre Philippe Henry renonce au report de cinq ans du tarif prosumer' *Le Soir* (Brussels 27 April 2020). Decisions from the Belgian 'Cour de cassation' can be accessed at <https://juportal.be/home/accueil> accessed 13 March 2021.

56 Opinion no L. 33.255/4 of 5 June 2002 on a Bill 'relatif au statut du régulateur des postes et télécommunications belges', 14-15; Opinion no 50.003/4 of 4 September 2011 on a Bill 'portant des dispositions diverses en matière de communications électroniques', 17-22. For details, see Slautsky (n15) 286-299.

57 European Commission, 'Telecoms: Commission refers Belgium to Court over independence of national regulator' (IP/14/1145 16 October 2014).

fringement procedure led to a change in Belgian law to remove the remaining governmental control over the electronic communications regulator, in line with EU law requirements.[58] This change in the law was eventually accepted by the legislative section of the Belgian Council of State, given the infringement procedure.[59] This illustrates the general tendency of Belgian courts to accept the primacy of EU law even against their own interpretation of Belgian constitutional law requirements.

These examples highlight recurring difficulties in Belgium about accepting independence from the government of its economic regulators, the existence of which is mostly due to EU law requirements. It is not uncommon for Belgian courts and EU institutions to have to step in to protect the independence of Belgian regulators and the implementation of EU law, as is their role and responsibility under EU law. Since 2000, in the electricity and electronic communications sectors alone, EU institutions (the ECJ or the Commission) have found Belgium to have breached EU law requirements regarding the status of the regulators at least four times, and the Belgian highest courts have also had to step in on at least five occasions.[60] This is without considering the discussions between the Commission and the Belgian authorities which, on other occasions, have also led to changes in the law. The status of the Belgian independent economic regulators has been marked by instability and hesitations: reforms have followed one another, governmental controls on the regulators have been removed only as a last resort, often under pressure from European bodies, and certain incompatibilities with EU law requirements remain.[61]

Now, the distinctive character of the Belgian difficulty with independent economic regulators could, perhaps, be doubted. Firstly, Belgium has a poor record in general when it comes to the implementation of EU law.[62] Thus, its difficulties seem to be with the implementation of EU law in general, not only with its requirements to set up independent economic regulators. The complexity of its federal structures and the inefficiencies of its bureaucracies contribute to this poor record. Secondly, other Member States have also been found in breach of EU law by the ECJ for violating the independence of their regulators in the

58 'Loi du 16 mars 2015 portant modification de la loi du 17 janvier 2003 relative au statut du régulateur des secteurs des postes et des télécommunications belges', 2015.

59 Opinion no 56.903/4 of 17 December 2014 on a Bill 'portant modification de la loi du 17 janvier 2003 relative au statut du régulateur des secteurs des postes et des télécommunications belges', 4-9.

60 Besides the decisions quoted in the examples above, see Belgian Constitutional Court, 18 November 2010, no 130/2010.

61 For examples, see Slautsky (n15) 297-299 and 306.

62 TA Börzel and M Knoll, 'Quantifying Non-Compliance in the EU. A Database on EU Infringement Proceedings' (2012) *Berlin Working Paper on European Integration No. 15*, 14.

energy and electronic communications sectors,[63] which may point to a difficulty with the independent regulation of the economy beyond Belgium. For example, a comparative study has shown that the need to maintain some form of political control over non-governmental public bodies is widely recognised in Europe,[64] and, in Germany, legal scholars have claimed that the requirement to create independent regulators in the electricity sector is in breach of German constitutional identity.[65] De Somer also identifies, in general terms, conflicting approaches between EU requirements that oblige Member States to create autonomous public bodies and a counter-trend at national level to restrain the use of such public bodies because of democratic and rule of law concerns.[66]

Yet, this paper argues that there is something distinctively interesting in the difficulty that Belgium experiences with independent economic regulators. First of all, Belgian hesitations over independent economic regulators are not the sole result of technical difficulties with the transposition of EU law: the roots of this resistance can be traced back to a widely held view that the regulation of the economy should remain within the realm of politics, a view that transpires in both political and constitutional discourse. As De Roy wrote in 2006, 'the attachment to the political essence of the administration seems unwavering and no doubt explains the resistance encountered in Belgium to the spread of a genuine model of independent administrative authority'.[67] This remains true, at least partly, 15 years later. In other words, the Belgian difficulty with independent economic regulators is principled, at least in part, and the alternative view promoted at EU level according to which independent regulators of the economy can rely on output and throughput legitimacy does not seem to make good for the Belgian understanding of the requirements of representative democracy. This tension raises the broader issue of the democratic character of the EU and the possibility to accommodate diverging views of what democracy requires in the European administrative space. Secondly, even if the Belgian difficulty with independent economic regulators is not unique, it also provides an illuminating example of the tensions that result from the encounter between neo-corporatist and parliamentary arrangements, on the one hand, and one of

63 Case C-274/08 *Commission v Sweden* EU:C:2009:673; Case C-424/07 *Commission vGermany* EU:C:2009:749; Case C-424/15 *Ormaetxea Garai et Lorenzo Almendros* EU:C:2016:780; Case C-560/15 *Europa Way et Persidera* EU:C:2017:593.

64 C Jenart, 'Uitbesteding van regelgevende bevoegdheid aan autonome agentschappen, private en hybride actoren' (2020) Tijdschrift voor Bestuurswetenschappen en Publiekrecht 63, 69-70.

65 See the references in M Ruffert, 'Public Law and the Economy: A Comparative View from the German Perspective' (2013) 11(4) International Journal of Constitutional Law 925, 935. See also Ruffert (n6) 522.

66 S De Somer, *Autonomous Public Bodies and the Law* (Edward Elgar 2017).

67 D De Roy, 'Le pouvoir réglementaire des autorités administratives indépendantes en droit belge' in *Rapports belges au Congrès de l'Académie internationale de droit comparé à Utrecht* (Bruylant 2006) 711 (our translation).

the main institutions of global regulatory capitalism on the other hand, as well as of the tensions that result from a strong involvement of the public sector in the economy, on the one hand, and the creation of an internal market in the EU, on the other hand. This tension between conflicting choices in political economy and their legal and institutional concretization is overlooked by much of the (Belgian) legal scholarship that discusses the tension between independent economic regulators and constitutional and democratic values. This paper also illustrates how these tensions between the EU push for independent regulators and the Belgian difficulty with them trigger a process of change at the national level, and discusses the scope and depth of the induced change so far. The next section unpacks these ideas further to highlight why independent economic regulators are at odds with Belgian political and economic traditions, and how this has transpired in constitutional discourse.

4. Contextualising resistance to independent economic regulators in Belgium

This paper identifies two major types of difficulties with independent regulators in Belgium: one of a legal nature, which is widely recognized by Belgian legal commentators,[68] and one of a political/economic nature, which has received much less attention in legal scholarship. This paper argues that the two aspects need to be analysed together, to demystify the traditional legal approach adopted by Belgian scholarship in this field – their approach is one guided by their own context and the values embedded therein. As such, the Constitution is far more open to interpretations than is usually accepted. Nonetheless, Belgian constitutional law has traditionally required that the regulation of the economy remain within the realm of politics. Although the text of the Constitution says little on this issue, the Constitution has been interpreted by the Council of State and by legal scholarship as allocating the responsibility for regulating the economy to the legislature or the executive (the representative institutions), and as preventing them from delegating this responsibility to third parties. However, under the pressure of EU law, Belgian constitutional law has evolved to allow wider possibilities of creating independent economic regulators. This evolution in the interpretation of constitutional principles is discussed first (4.1.). Furthermore, separating the regulation of the economy from the realm of representative institutions also challenges neo-corporatist and consociational arrangements in Belgian governance, as the second section will explain (4.2.). This is because independent economic regulators weaken the position of social partners in the regulation of the economy, and their par-

68 Eg J Velaers, *De Grondwet. Een artikelsgewijze commentaarI* (die Keure 2019) 49-50.

ticipation has characterised Belgian political economy since the first half of the XXth century. Independent regulators also threaten powerful (public) interests resulting from a strong involvement of the Belgian state in the economy, and this leads to attempts to restrict their independence, as the third section will show (4.3.).

4.1. Independent regulators and the Belgian constitution

Belgium is a federal, parliamentary, constitutional monarchy, with a codified constitution first adopted in 1831 and amended regularly since the 1970s. Politically, the Belgian Constitution of 1831 is of liberal inspiration. Economically, the Constitution recognises a broad margin of manoeuvre for the representative institutions: the scope of economic policies and of State intervention in the economy permitted under the Constitution are quite broad.[69] At the federal level, the main representative institutions are the bicameral Parliament and the government responsible before Parliament. According to article 37 of the Constitution, the executive power belongs to the King, but the King must always exercise his powers on ministerial advice (article 106). Therefore, for all practical purposes, any reference to the King in the Belgian Constitution is a reference to the federal government. Article 108 of the Constitution gives the King the responsibility for implementing statutes, while article 105 allows the legislature to grant powers to the King that go further than the implementation of principles previously established by the legislature. These provisions give an impression that all administrative matters must be handled by the King or the administration that he presides; there is, e.g., no mention of the possibility of the King or the legislature delegating responsibilities in the regulation of the economy to other entities.

As mentioned, Belgium experiences constitutional difficulties with independent economic regulators as promoted under EU law. Legal scholarship and the Council of State, acting in an advisory capacity, have long treated with suspicion the conferral of public powers to independent authorities, particularly when the exercise of these powers entails rule-making powers and the exercise of discretion.[70] This is because, firstly, there is little recognition in the Belgian Constitution of regulation at arm's length from the government, as has just been explained.[71] As powers must be exercised in the manner provided for by

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69 D Yernault, *L'État et la propriété* (Bruylant 2013) 1220.

70 See the position of the Belgian Council of State as summarised by R Andersen, 'Les autorités administratives indépendantes en droit belge' (2008) Annuaire européen d'administration publique 25, 28; K Muylle, 'Het Grondwettelijk delegatieverbod en het Unierecht: welke democratisch verkozen beraadslagende vergadering?' in A Alen and J Theunis (eds), *Leuvense Staatsrechtelijke Standpunten 3. De Europose dimensie in het Belgische publiekrecht* (die Keure 2012) 324-326.

71 De Roy (n67) 712-713; De Schepper and Slautsky (n40) 147.

the Constitution (article 33 of the Constitution), the absence of constitutional recognition of independent economic regulators raises doubts regarding the possibility of delegating the regulation of the economy to independent regulators. Secondly, conferring powers to independent regulators would breach articles 37 and 108 of the Constitution by encroaching on the powers that belong to the federal government (formally, the King) or, for that matter, to regional governments. It would also run counter to basic constitutional notions of political accountability, as it empowers an authority to take binding (discretionary) decisions without being directly accountable before Parliament. This would breach the legitimacy chain that originates in the people and runs through Parliament, the government, which in Belgium is responsible before Parliament, and public bodies, which are under the control and the responsibility of the government.[72] As Michel Pâques, a judge in the Belgian Constitutional Court and public law professor, wrote:

the power to direct or supervise [administrative bodies] is [...] a Belgian constitutional requirement which allows that there is always a minister able to explain and defend before Parliament what happened in the darkest of the offices of power. In contrast, the problem in Belgian law is with independent administrative authorities.[73]

In sum, in this interpretation of Belgian constitutional law, the regulation of the economy should remain in the hands of the representative institutions and not be delegated to independent regulators.

However, it should also be noted that other Belgian public law scholars have nuanced this interpretation, highlighting legitimate functional reasons to delegate powers to non-governmental public bodies and to protect certain decisions from political interference.[74] The legislative section of the Council of State itself has also accepted the possibility of such delegation even in the absence of a constitutional basis to do so. However, such delegations have been accepted only in so far as the scope of the delegation would remain limited, and that some degree of governmental control would be maintained with respect to the discretionary decisions of the authorities to which powers were granted. In terms of quality, the control had to be of such a nature that the responsible

72 Legislative section of the Council of State, opinion no L. 19.181/8 of 13 February 1990 on a Bill 'portant des mesures tendant à promouvoir l'exercice du droit d'enquête parlementaire'; Opinion no L. 33.255/4 of 5 June 2002 on a Bill 'relatif au statut du régulateur des postes et télécommunications belges', 9.

73 M Pâques, 'Entre géométrie et finesse: le droit administratif réducteur et créateur d'incertitude' (2019) 80 Annales de Droit de Louvain 251, 261 (our translation).

74 P Popelier and J Van Nieuwenhove, 'Decentralisering en privatisering van wetgeving' in *Liber amicorum Boudewijn Bouckaert* (die Keure 2012) 261-286; P Goffaux, *Dictionnaire de droit administratif* (2d edn Bruylant 2016) 103.

minister could be held accountable before Parliament for the decisions made by the public authority.[75]

Even so nuanced, it remains fair to say that Belgian constitutional law has traditionally been quite restrictive regarding the possibility of granting powers to regulate the economy to entities autonomous from the government. This creates a tension with EU law requirements. As previously explained, EU law requirements regarding the independence of the regulators in, e.g., the network industries, go further than is traditionally admissible as a matter of Belgian constitutional law: they require that regulators be able to act completely freely, without taking any instructions or being put under any pressure. In the sectors concerned, EU law therefore excludes any governmental control over the decisions of the regulator. Yet, this is precisely what is traditionally required under Belgian constitutional law when powers are delegated outside the sphere of the representative institutions. In 2012, Van Bellinghen and Zgajewski highlighted this tension between EU law and Belgian constitutional law requirements, and argued that the main obstacles in Belgium to implementing the 2009 reform of the EU electronic communications legal framework were the division of competences at the national level and 'the tensions between the reinforcement of the autonomy of national regulatory authorities required by the European texts and the controls required by Belgian texts'.[76] In her work, De Somer has also repeatedly highlighted the tension between Belgian constitutional law and the requirements of EU law.[77] This tension, however, has not led to unsurmountable difficulties, for two main reasons.

Firstly, Belgian courts have widely recognised the primacy of EU law since 1971,[78] even when it comes to constitutional law principles. As a result, they accept that powers can be granted to public bodies that are independent from the government when it is required by EU law, even when this would otherwise be in breach of Belgian constitutional law principles.[79] It is striking that Belgian

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75 R Andersen, P Nihoul and M Joassart, 'Le Conseil d'État – Chronique de jurisprudence 2002' (2004) Revue belge de droit constitutionnel 25, 85-88; eg legislative section of the Council of State, opinion no L. 30.527/4 of 25 Octobre 2000 on an 'avant-projet de décret 'relatif à l'organisation du marché régional de l'électricité', 7.

76 M Van Bellinghen and T Zgajewski, *Les enjeux de la transposition en Belgique des nouvelles directives européennes sur les communications électroniques* (Academia Press 2012) 4 (our translation).

77 S De Somer, *Autonomous Public Bodies and the Law* (Edward Elgar 2017).

78 Cass., 27 May 1971.

79 Belgian Constitutional Court, 18 November 2010, no 130/2010, B.8.1; legislative section of the Council of State, opinion no 49.336/3 of 22 March 2011 on a Flemish Bill 'houdende de wijziging van de wet van 10 maart 1925 op de electriciteitsvoorziening, het decreet van 20 december 1996 tot regeling van het recht op minimumlevering van elektriciteit, gas en water en het Energiedecreet van 8 mei 2009, wat betreft de omzetting van de richtlijn 2009/72/EG en de richtlijn 2009/73/EG', 4-6 ; opinion no 49.491/3 of 27 April 2011 on a Brussels Bill 'modifiant l'ordonnance du 19 juillet 2001 relative à l'organisation du marché de l'électricité en Région de Bruxelles-Capitale', 7; opinion no 56.903 of 17 December 2014 on a Bill 'portant modification de la loi du 17 janvier 2003 relative au statut du régulateur des secteurs des postes et des télécommunications belges', 8-9.

courts have done so despite a 2016 decision from the Belgian Constitutional Court which held that Belgian national identity could set a limit to the primacy of EU law.[80] This attitude of 'Euro-friendliness' explains why Belgian courts have stepped in against the government or the legislature when the independence of the Belgian regulators – as required under EU law – was under pressure. The absence of direct "retaliation" against the courts on the part of executive or the legislature in this context shows a degree of acceptance among the representative institutions of the need to implement EU law requirements and to respect the primacy of EU law.

Secondly, since 2010, the Belgian Constitutional Court – probably in the light of the identified tension between EU law and the Belgian Constitution and of EU law's increasing reliance on independent regulators – has relaxed the conditions under which powers can be conferred to non-governmental bodies as a matter of Belgian constitutional law. The main limits that the Court now puts on the conferral of powers to independent authorities seem in line with EU primary law as interpreted by the ECJ;[81] namely, the limited scope of the conferred powers, the technicity of the field in which the delegation takes place and the existence of parliamentary and judicial controls over the decisions of the concerned authority. The Constitutional Court no longer requires ministerial control over the decisions of an authority.[82] Although the Constitutional Court did not initially make clear whether independent regulators were admissible only in cases where this was required under EU law,[83] it later clarified that independent regulators are also admissible in cases where EU law is not concerned.[84] Several legal scholars, including members of the Belgian Council of State, have strongly criticized this shift by the Belgian Constitutional Court in relaxing the aspect of ministerial and parliamentary control as a condition for delegating regulatory powers outside the realm of representative institutions.[85] Furthermore, the legislative section of the Council of State has so far only ac-

80 Belgian Constitutional Court, 28 April 2016, no 62/2016, B.8.7. See P Gérard and W Verrijdt, 'Belgian Constitutional Court Adopts National Identity Discourse' (2017) 13 European Constitutional Law Review 182–205.

81 *Commission v. Germany* (n16). The Belgian Constitutional Court explicitly makes a reference to this case in Belgian Constitutional Court, 21 November 2013, no 158/2013, B.14.4 (reference to the ECJ view of the democracy principle).

82 Belgian Constitutional Court, 18 November 2010, no 130/2010, B.5; Belgian Constitutional Court, 21 November 2013, no 158/2013, B.14.4; Belgian Constitutional Court, 9 June 2016, no 89/2016, B.9.6.4. See also a previous decision of the Belgian Constitutional Court, no 24/98 of 10 March 1998, B.5-B.6.

83 Belgian Constitutional Court, 18 November 2010, no 130/2010.

84 Belgian Constitutional Court, 9 June 2016, no 89/2016, B.9.6.4.

85 M Pâques, 'Décentralisation, régulation et contrôle démocratique. L'arrêt 130/2010 en question' in *Liber Amicorum Marc Boes* (die Keure 2011) 411-424; Muylle (n70) 319-352.

cepted the creation of independent regulators when required under EU law.[86] This testifies to its willingness to contain the effects of EU law on this issue to what is strictly required under EU law, in contrast with the strategy adopted by the Constitutional Court.

These two constitutional developments have made constitutionally possible the increasing role, independence and powers of economic regulators observed in Belgium since the 1990s. Overall, however, the multiplication of independent economic regulators has happened against a Belgian constitutional background inimical to such a development, and, even now, the constitutional position of Belgian regulators remains partly unsettled. This may lead to accountability flaws. As previously mentioned, there remains no constitutional basis for economic regulation at arm's length from the government in Belgium. There is no general legal framework applicable to independent economic regulators either. Each regulator has been created on an *ad hoc* basis, and there is no uniformity in their legal status or in their constitutional position. Some of them, such as the Flemish and Walloon energy regulators, have been directly linked to one of the Belgian parliaments, in an attempt to increase their accountability. Others, such as the national energy and electronic communications regulators, remain formally within the ambit of the executive branch.[87] This *ad hoc* approach can lead to accountability gaps. The following example of another independent Belgian regulator can illustrate this risk. Before a 2018 reform, the Belgian legislature had not provided for the possibility of judicial review for every decision of the Belgian Data Protection Authority (then called the Privacy Commission). This gap was problematic from a rule of law perspective: the Belgian Constitutional Court ruled that it was unconstitutional in May 2020.[88] This example arguably illustrates the risks of the Belgian choice to approach regulation of the economy at arm's length from the government without undertaking a comprehensive assessment of what the appropriate constitutional place of such regulation should be. Such a pragmatic approach is quite typical of Belgian administrative reforms,[89] but Belgian legal scholarship has nonetheless insisted on the need for a more comprehensive approach to regulation of the economy at arm's length from the government, and even advocated for constitutional amendment to put it on a firmer constitutional basis.[90]

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86 Legislative section of the Council of State, opinion no 63.202/2 of 26 April 2018 on an 'avant-projet de loi instituant le comité de sécurité de l'information et modifiant diverses lois concernant la mise en oeuvre du Règlement (UE) 2016/679 du Parlement européen et du Conseil du 27 avril 2016 relatif à la protection des personnes physiques à l'égard du traitement des données à caractère personnel et à la libre circulation de ces données, et abrogeant la directive 95/46/CE', 11.

87 Slautsky (n39) 595.

88 Belgian Constitutional Court, 28 May 2020, no 74/2020.

89 Zgajewski and Van Bellinghen (n35) 81.

90 Jenart (n64) 75.

4.2. Belgian consociationalism and neo-corporatism displaced: the case of the electricity sector

In addition to being at odds with traditional Belgian constitutional law principles, independent economic regulators also challenge existing decision-making models on a political and economic level. The Belgian political system is a traditional example of a consociational system. Belgian political decision-making is characterised by the making of compromises at an elite level between representatives of the main groups that compose Belgian society.[91] The involvement of social partners alongside the government has also characterized the regulation of the economy in Belgium since the first half of the XXth century. Social partners have been active both in the regulation of the economy at the central level and in specific sectors.[92] Of course, within this tradition, specific institutional arrangements that exist in different economic sectors vary, as does the degree and form of involvement of the social partners or the different groups that form the fabric of Belgian society in the decision-making processes. As the case of the electricity market shows, however, the liberalisation of this sector in the 1990s, and the creation of independent regulators, have in many instances displaced traditional modes of economic decision-making in Belgium.[93] The EU process of e.g., liberalising the electricity sector, has required specific institutional arrangements at the national level that differ from the institutional arrangements associated with previous organisation of the sector in Belgium. This has also been the case in other sectors of the economy. In line with the view that legal institutions are intertwined with a country's general political economy, [94] this paper argues that the Belgian difficulties with independent economic regulators must also be understood in light of the Belgian neo-corporatist tradition in political economy, and not solely from a legal perspective.

The Belgian energy sector was historically organised by a statute of March 10th, 1925.[95] Production and transport of electricity were not restricted, while a dominant role was granted to municipalities as far as the distribution

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91 According to Lijphart, 'consociational democracy means government by elite cartel designed to turn a democracy with a fragmented political culture into a stable democracy'; A Lijphart, 'Consociational Democracy' (1969) 21/2 World Politics 216.

92 E Arc (ed), *Dynamiques de la concertation sociale* (CRISP 2010) 609.

93 The following developments build on Y Marique and E Slautsky, 'Die Unabhängigkeit der belgischen Energieregulierungsbehörden zwischen korporativem Erbe und deliberativem Konzept' in C Fraenkel-Haeberle, K-P Sommermann and J Socher (eds), *Die Umsetzung organisations- und verfahrensrechtlicher Vorgaben des europäischen Umweltrechts in ausgewählten Mitgliedstaaten* (Duncker & Humblot 2020) 201-238.

94 J Reitz, 'Legal Origins, Comparative Law, and Political Economy' (2009) 57 American Journal of Comparative Law 847, 857.

95 'Loi sur les distributions d'énergie électrique', 10 March 1925 <www.ejustice.just.fgov.be/eli/loi/1925/03/10/1925031050/justel> accessed 23 March 2021.

and supply of electricity were concerned.[96] The application of this 1925 statute led to a relatively anarchic and structurally incoherent system of energy production and distribution in Belgium.[97] The rationalisation of energy production and distribution in Belgium became urgent in the 1950s. This led, in 1955, to the conclusion of agreements between public authorities and private energy production and distribution undertakings for a period of ten years. The aim of these agreements was to avoid legislative intervention by the State in the electricity sector and to curb trade union demands for nationalisation of the energy sector.[98] These agreements established a "management committee" common to the thirty or so private undertakings that agreed to submit to the decisions of this "management committee" and to supervision of the sector by a "control committee". This control committee, known as the "Electricity and Gas Control Committee" (*Comité de Contrôle de l'Électricité et du Gaz*), included representatives of social partners and of the industry, and was set up by an agreement between the association of private production and distribution undertakings, the Federation of Belgian Industries and the three 'blue-collar' trade unions active at the time.[99] The agreements stated that their objective was to rationalise the electricity sector in order to achieve lower energy prices. These contracts were extended in time in 1965 and expanded to the gas sector. Under the terms of these agreements, the participating companies gave up a large part of their autonomy, preferring to abide by the terms of an agreement whose binding force in private law was arguably questionable, rather than face the risks of legislative intervention.[100] Under this system, the management committee had the power to set, modify or propose tariffs to the public authorities in a series of cases. The control committee reviewed these tariffs annually. The signatory companies to these agreements also undertook to transmit all relevant information to the management committee. The latter could make recommendations to the parties, as well as study any technical problems and formulate improvements for both private undertakings and public authorities.[101]

These agreements setting up advisory bodies, which bring together social partners, the industry, and government representatives, is representative of the

96 M Louveaux, 'Énergie électrique et gaz' in *Répertoire Pratique de Droit Belge. Complément IV* (Bruylant 1972) 214, 134; C Declercq and A Vincent, 'L'ouverture du marché de l'électricité' (2000) 19 Courrier hebdomadaire du CRISP 1, 11-12.

97 A Jacquemin, P Maystadt and B Michaux, 'Politiques d'intervention de l'État et administration économique' in *Aspects juridiques de l'intervention des pouvoirs publics dans la vie économique* (Bruylant 1976) 150.

98 R Maes, 'Het controlecomité voor de elektriciteit en het gas en het toezicht op de inrichting van de elektriciteits- en gasvoorziening in België' (1970) Tijdschrift voor Bestuurswetenschappen en Publiekrecht 229, 229-243; Jacquemin, Maystadt and Michaux (n97) 132.

99 P Horion, *Notions de droit industriel belge* (Martinus Nijhoff 1967) 131-132.

100 ibid 133.

101 ibid 135-137; Louveaux (n96) 214-230.

Belgian neo-corporatist model resulting from the predominant post-war economic configuration.[102] They also find favourable breeding ground in the consociational tradition that characterises Belgian democracy, and the search for consensus between the various social groups which is a dominant feature of that tradition. Following the system set up by these conventions, supervision of the energy sector was, in fact, ensured by the Electricity and Gas Control Committee: the formally competent minister would, in practice, normally follow the recommendations and opinions of this committee. In this context, the electricity sector in Belgium gradually came to be dominated by one private company – Electrabel – which owned most of the production units and the electricity transport infrastructure, and by the municipalities, where appropriate in collaboration with Electrabel in electricity distribution and supply activities.[103]

The regulatory model described above was in force before the liberalisation of the Belgian energy sector started in 1999. The process of liberalising the sector initiated at European level made it progressively impossible to continue to organise the sector on a contractual basis with regulated prices for the supply of electricity. However, even after 1999, there have been attempts to protect the role of the stakeholders and organisations represented in the previous Electricity and Gas Control Committee in the regulation of the electricity market. When the national Belgian energy regulator was created in 1999, its board was placed under the supervision of a "general council" composed of representatives of the Belgian government, the trade unions and the employers' associations, as well as of representatives from consumers and the electricity industry.[104] The composition of the "general council" was explicitly modelled after the composition of the former Electricity and Gas Control Committee.[105] The legislative section of the Council of State furthermore highlighted that the representation of the Belgian government within the "general council" was in line with constitutional law requirements.[106] However, over time, the powers of the "general council" were reduced,[107] and, in 2013, the Belgian Constitutional Court ruled that the "general council" could not be set up within the regulator itself: this

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102 X Delgrange, L Detroux and H Dumont, 'La régulation en droit public' in B Jadot and F Ost (eds), *Élaborer la loi aujourd'hui, mission impossible ?* (Publications des Facultés universitaires Saint-Louis 1999) 47-48.

103 P Boucquey, 'L'énergie: du service public aux obligations de service public' in H Dumont et al (eds), *Le service public: passé, présent et avenir – vol. 1* (La Charte 2009) 330-331; L De Deyne, *Markttoezicht in de energiesector* (Intersentia 2017) 1-2.

104 'Loi du 29 avril 1999 relative à l'organisation du marché de l'électricité' <www.ejustice.just.fgov.be/mopdf/1999/05/11_2.pdf#Page1> accessed 13 March 2021, art 24.

105 Exposé des motifs, *Doc. parl.*, Chambre (1998-1999) no 1933/1, 26.

106 Opinion no L. 33.255/4 of 5 June 2002 on a Bill 'relatif au statut du régulateur des postes et télécommunications belges', 12.

107 See eg 'Loi du 20 juillet 2006 portant des dispositions diverses (1)' <www.ejustice.just.fgov.be/cgi_loi/change_lg_2.pl?language=fr&nm=2006202314&la=F> accessed 13 March 2021, art 134.

was in violation of the independence of the regulator.[108] The council was replaced in 2014 by another committee with an advisory role and with the purpose of being a forum for discussion.[109] As a result of this evolution, the model that was applicable to the regulation of the Belgian energy market before 1999 – with a central role played by the Electricity and Gas Control Committee, a role which also reflected a broader commitment in Belgium to giving an important role to social partners in the regulation of the economy – has been for the most part displaced by the liberalisation process initiated at EU level in the 1990s and the need to create independent regulators. This change in the way the Belgian energy market is regulated can arguably shed some light on the resistance encountered by independent regulators in Belgium in the energy sector: over time, their creation has led to a weakening of the position of actors (notably, social partners) that previously played a central role in the supervision of the sector, and it seems reasonable to think that these actors have sought to retain their influence to the greatest extent possible.

4.3. Independent regulators as a threat to public financial interests

In addition to being at odds with pre-existing constitutional and political conditions, the independence of Belgian regulators may also threaten powerful (public) interests. Belgian public bodies remain active in several sectors of the Belgian economy, either directly or as shareholders. This strong involvement in the economy of the Belgian state increases the need for independent regulators in the relevant sectors to avoid conflicts of interests. However, it can also explain some of the resistance that has surfaced against the independence of regulators. Two examples can be given, drawn from the electricity and the electronic communications sectors.

In the electricity sector, the crucial role played by Belgian municipalities since 1925, as far as the distribution and supply of electricity are concerned, has already been mentioned in the previous section. Currently, Belgian municipalities still (indirectly) control most of the transport and distribution networks of electricity in Belgium through their shareholdings in the corporations that operate the networks.[110] This means that the tariffs that network operators charge to users of the networks have a direct impact on the financial resources of many local authorities in Belgium. The national or regional regulators – depending on whether the transport or distribution networks are involved – must approve the tariffs set by the network operators, and they must do so with a view to in-

[108] Belgian Constitutional Court, 7 August 2013, no 117/2013.

[109] 'Loi du 8 mai 2014 portant des dispositions diverses en matière d'énergie' <https://eur-lex.europa.eu/legal-content/FR/ALL/?uri=NIM:217820> accessed 13 March 2021, art 14.

[110] F Collard, 'La transition énergétique' (2016) 36 Courrier hebdomadaire du CRISP 5, 18-21.

creasing network operational efficiency, while also allowing for their development. Transport and distribution activities are so regulated because they are monopolies. However, if the regulator decides, for example, that the network operator may not include in its tariffs some of the costs which it has incurred, or not to the requested extent, this will impact the profitability of the network operator's activities. This lower profitability may imply lower dividends for its (public) shareholders and, therefore, fewer resources for municipalities. This situation creates a strong incentive for Belgian politicians – many Belgian politicians are active at both local and regional or national levels – to maintain their grip on the tariff decisions of the regulators to the greatest extent possible. It therefore comes as no surprise that the regulators' competence in tariff matters is the area where the independence of the regulators has been most often put under pressure in Belgium by the legislatures and the executives. These challenges to the independence of the regulators in the Belgian electricity sector result, at least in part, from the fear among Belgian politicians of losing control over a source of income for municipalities, which can be significant.[111]

In the electronic communications sector, as well, Belgian public bodies have significant financial interests, which may be threatened when regulation is undertaken at arm's length from the government. This is because the decisions of electronic communications regulators must be guided by the good functioning of the market, rather than by, e.g., the financial interests of the state. As a matter of fact, preventing this kind of conflict of interests is one of the main EU objectives in having independent regulators and a condition for creating a competitive and well-functioning European internal market. Three of the main operators on the Belgian electronic communications market – Proximus, Voo and Telenet – are either directly or indirectly (partially) owned by the Belgian state (Proximus) or by other Belgian public authorities (Voo and Telenet). The decisions of the Belgian electronic communications regulator may affect the position and business interests of these operators and, indirectly, the financial interests of Belgian public authorities. Such a situation is an incentive for public bodies to resist granting "too much" independence to the regulator: by keeping a grip on the regulator and its decisions, Belgian politicians remain in a position to protect the profitability of the public undertakings operating on the market and, therefore, to protect public finances. For example, it was only when the European Commission started an infringement procedure in 2001 that direct control of the Belgian electronic communications regulator by the competent minister was removed.[112] Before this reform, the competent minister was both a regulator of the communications sector and the main shareholder

111 Verhoeven (n50) 366-367.

112 'Loi du 17 janvier 2003 relative au statut du régulateur des secteurs des postes et des télécommunications belges' <www.ejustice.just.fgov.be/mopdf/2003/01/24_3.pdf#Page5> accessed 13 March 2021.

of the dominant undertaking on the market (Belgacom – now Proximus). Suspicions of conflicts of interests were widespread as a result.[113]

The electricity and the electronic communications sectors are not the only sectors where the involvement of Belgian public bodies in the economy has put pressure on the independence of the regulators. In the airway sector, for example, the head of the regulator was fired by the competent minister in 2011, as a follow up of a disagreement between them regarding the tariffs that Brussels Airport could charge to airline companies, and regarding the scope of the independence of the regulator.[114] The Belgian state is a shareholder of Brussels Airport and, as a result, the decisions from the regulator impact its financial interests. In the postal sector, there are also examples of legislative reforms adopted to reverse decisions from the regulator that were damaging to the financial interests of the main public undertaking from the sector and, therefore, to the Belgian state.[115]

5. Conclusion

Inspired by the American experience, the EU has made it compulsory since the 1990s for Member States to entrust regulatory powers to national regulators independent from the government, e.g., in the energy or telecommunications sectors. Such a development is part of a larger trend that has taken place globally since the 1980s in favour of independent regulators entrusted with significant powers to regulate the economy. The choice of independent regulators with wide powers must ensure credible and effective regulation, away from the short-term thinking that often plagues politicians.
Independent regulators also contribute to the effective implementation and enforcement of EU law at the national level. Yet, the creation of independent economic regulators with wide powers does not fit well with the constitutional, political, and economic traditions of several European states, such as Belgium. In Belgium, independent economic regulators have mushroomed since the 1990s. Their independence from the government has, however, been regularly put under pressure by, e.g., the legislature, the executive and the Council of State. EU law requirements for independent regulators have been regularly breached.

Drawing mainly on examples from the energy and the electronic communications sectors, this paper has highlighted how this resistance has materialised formally, before contextualising it in light of the principles and compromises

113 See Zgajewski and Van Bellinghen (n35) 68-69.
114 Belgian Labor Court of Appeal, 22 June 2016, no 2014/AB/560.
115 See 'loi du 26 janvier 2018 relative aux services postaux', arts 18 and 19 and the opinion from the regulator of 19 October 2017 'concernant le projet de loi relative aux services postaux', 5-7.

underlying the Belgian economic constitution. Regulation of the economy at arm's length from the government has challenged pre-existing Belgian constitutional and political traditions, and the relationships between economic, social and political actors that these traditions encompass. Independent economic regulators restrict the role of representative institutions in the regulation of the economy, and this is in tension with Belgian constitutional law principles that protect this role. Furthermore, independent economic regulators have led to a weakening over time of the role played by social partners in the regulation of the Belgian economy, replacing neo-corporatist arrangements with a new (neoliberal) institutional model of regulation in sectors such as energy. Finally, in Belgium, independent economic regulators threaten vested interests of powerful (public) actors in the sectors that they regulate. This threat to public interests is a natural result of the strong involvement of the Belgian state and Belgian municipalities in several sectors of the Belgian economy.

Overall, however, this bumpy road has not prevented Belgian independent economic regulators from operating and gaining in independence over time, notably thanks to interventions from Belgian courts and EU institutions. Faithful to their reputation and history of 'Euro-friendliness', Belgian courts have stepped in whenever required to protect the integrity of EU law. As a result, the highlighted difficulties and the persisting ambiguity regarding their constitutional position have not prevented independent economic regulators from becoming an established part of the current Belgian institutional landscape. This could perhaps lead to the conclusion that resistance to independent economic regulators, while still present, may well be slowly fading away in Belgium, exemplifying how Europe shapes state structures to adapt them to the needs of European integration, effective enforcement of EU policies, and the needs of a global economy. Yet, the Belgian neo-corporatist tradition and the strong involvement of Belgian public actors in the economy may also well remain stumbling blocks for a deeper entrenchment of independent economic regulators in Belgium. Only time will tell how far the Belgian legal system will be able to accommodate independent regulators of the economy satisfactorily and, perhaps, more generally, how far European integration will lead to an alignment of national approaches in political economy, and of the legal and administrative institutions intertwined with them.

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Proportionality in English Administrative Law

Resistance and Strategy in Relational Dynamics

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Abstract

Proportionality is at the centre of heated debates in English administrative law. It has been adopted for matters pertaining to European law and the European Convention on Human Rights, but its use in other areas parts of English administrative law is highly contentious. While some arguments in favour or against applying proportionality in England are similar to those exchanged in relation to other legal systems (such as tensions between increased objectivity in judicial control over administrative action vs. the desirability of more limited control), other arguments are more specific to English administrative law. To understand the challenges encountered by proportionality in English administrative law, this paper adopts a contextual analysis, putting the emphasis on the relational dynamics framing the interactions between the main actors involved in the proportionality test. Paradoxically, this perspective rehabilitates the analysis of the legal techniques behind transplants such as proportionality: indeed, transplants are vehicles for legal changes in ways that go beyond the circulation of ideas across the world. Instead of being merely superficial and rhetorical, transplants engage deeply with the whole gamut of institutions and actors in a legal system, calling on them to rearticulate their implied and explicit relationships.

1. Introduction

When a range of legislative and administrative measures were taken to fight the Covid-19 pandemic in the UK in early 2020, a spat broke out

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on social media between Yossi Nehushtan[1] and Jeff King.[2] This controversy brought the different conceptions of proportionality to light: should it be assessed at a largely conceptual level or in the concrete circumstances of the case? Should we look at the whole country or at individual decisions? Where does the legitimacy of the measures fit in, if at all? The UK government assured the House of Lords that it would act with proportionality to fight the pandemic.[3] This statement leads us to wonder whether proportionality has finally successfully 'infiltrated' English administrative law, to borrow Nason's expression.[4] This paper answers this question in distinguishing two aspects of the debates pertaining to proportionality: on the one hand, its very technique is now well-established and has contributed to expanding judicial review of administrative action; on the other hand, it is embedded in relational dynamics between key players such as judges, the executive and academics which, taken as a whole, tend to shape the proportionality test and its scope of application to make it of minimal technical relevance to English administrative law. Yet, the ways in which these relational dynamics must take proportionality into account in a range of debates and practices mean that proportionality is a significant driver for legal changes in English administrative law.

This paper suggests using the concept of "relational dynamics" as a heuristic device to provide a framework for making sense of the complex interactions between significant actors (such as administration and judges) in English administrative law. Linking together context, techniques[5] and narratives, the concept of "relational dynamics" helps to interpret the unique evolution of proportionality as a transplant in English administrative law. The paper also shows that while these multi-faceted interactions can be formal or informal, explicit or implied, constructive or defensive, they are never static. In analysing both the technique and the relational dynamics of proportionality, this paper shows that English courts rely on proportionality when dealing with a point of EU law or one made under the European Convention of Human Rights,[6] but that its use outside these disputes remains open to debate. On the face of it, proportionality has not been fully transplanted into English law. This would

1 Y Nehushtan, 'The British Lockdown is Disproportionate' IACL-IADC blog, 9 April 2020 <https://blog-iacl-aidc.org/2020-posts/2020/4/9/the-british-lockdown-is-disproportionate> accessed 07 April 2021.

2 J King, 'The Lockdown is Lawful: Part II - 'Quarantine' or Mere 'Restriction'?' UK Constitutional law blog, 2 April 2020 <https://ukconstitutionallaw.org/2020/04/02/jeff-king-the-lockdown-is-lawful-part-ii/> accessed 07 April 2021.

3 Contribution by Lord Bethell to the House of Lords Debate, Vol 802, Col 1778 (25 March 2020) <https://hansard.parliament.uk/Lords/2020-03-25/debates/3C266E78-4BB7-4330-9199-D361CDBAE2AD/CoronavirusBill#main-content> accessed 07 April 2021.

4 S Nason, *Reconstructing Judicial Review* (Hart 2016) 208.

5 For the definition of 'technique', see Y Marique and E Slautsky, 'Resistance to Transplants in the European Administrative Space – An Open-Ended Reading of Legal Changes' in this issue.

6 This paper technically focuses on England, leaving aside the other devolved entities in the UK.

probably come as a surprise, as proportionality is a well-travelled idea more recently connected to the rise of global constitutionalism.

Thus, this paper takes the view that one does not have to choose between the scholars who conceive of borrowing as a means of legal change[7] and those who reject the very reality of transplants.[8] Both approaches reflect reality in part. This paper argues that English judges exercise strategic choices to navigate between these two options: they were strategic in invoking the proportionality test at first and in implementing it in practice; they are also strategic in how they navigate the contextual constraints weighing on their choice. In short, strategically choosing to use a legal transplant has two faces: developing the transplant for one's own purpose of generating new solutions, and recognizing that other purposes may subordinate the transplant to internal limits, especially those set by relational dynamics within the English constitution.

Comparative law scholarship recognises the role of specific actors in facilitating the circulation of transplants, including international organisations, civil society actors, academics, lawyers, etc. Judges also relay legal ideas and solutions while looking for inspiration in other jurisdictions.[9] This use of foreign law is disputed: in using comparative law, especially when human rights are litigated, it is argued that judges become activists pursuing a political agenda. As proportionality provides courts with a reasoning and argumentative process rather than substantive answers, judges may indeed exhibit these trends. Although the proportionality test is embedded in a specific narrative of global constitutionalism and protection of human rights, it is also about the relationships between constitutional and administrative actors (especially the administration, the judge, and citizens) within a particular context. In this sense, judges need to consider a wide array of constraints in their strategic use of the proportionality test. Judges' roles are only partly defined by judges themselves; they are also informed by procedural rules, the constitutional framework, the relationships to the executive and the specific audiences they are addressing. Faced with each of these parameters, judges can position themselves strategically in various ways if they want to gain more power or merely maintain the position they enjoy. However, the specificity of English judges – by comparison to their continental counterparts – is to be recognised as creator of law as well as a check on executive power. They balance these two roles strategically by being responsive to the consequences at home and in the wider world, with a view to long-term effects.

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7 T Goldbach, 'Why Legal Transplants?' (2019) 15 Annual Review of Law and Social Science 583–601.

8 P Legrand, 'The impossibility of transplants' (1997) 4 Maastricht Journal of Comparative Law 111, who argues that transplants can never happen as the rule/institution/solution is transformed by the transplantation process.

9 E Mak, *Judicial Decision-Making in a Globalised World: A Comparative Analysis of the Changing Practices of Western Highest Courts* (Hart 2015).

This paper argues that the English judiciary has been using proportionality in a sophisticated and multi-layered strategy, not only in using the proportionality test but also in *not* using it, thus being strategic in recognising their place in relational dynamics and preserving it as much as they can over time. In this respect, the concept of "relational dynamics" unlocks original insights often overlooked by comparative law: such as the willingness of key actors to keep doors ajar for evolving interpretation or to opt for the 'legal' community they aspire to belong to.

In order to develop this multi-layered approach, and the interactions framing its impact on the receiving legal system, this paper starts with an overview of proportionality in general (Section 2). It then goes on to look at how proportionality has been inserted in English administrative law. Section 3 analyses how English judges have used their strategic choices in shaping their techniques for judicial control over administrative action. Section 4 turns to the constraints resulting from relational dynamics that English judges must accommodate in their strategies. This leads to a conclusion that attempts to draw lessons beyond proportionality in English administrative law for further comparative analysis when it comes to judicial control of administrative action.

2. Proportionality: a technique embedded in a complex narrative

Proportionality is multifaceted. This makes it difficult to capture the reality of this concept, as it can refer to either a legal principle, a method of reasoning, or a kind of logic of action.[10] Despite these challenges, one senses that proportionality refers to the way in which judges operate within their constitutional and administrative context – judges invoke proportionality in their decisions to link their control over administrative action to the legal framework within which the executive exercises its power. From its Prussian origin and its rediscovery in German constitutional law in the 1950s, techniques and narratives of proportionality have migrated across legal orders and are relied upon in a range of national and regional systems. Furthermore, the move from administrative to constitutional law has enabled proportionality to circulate widely across constitutional orders, so much so that it has become identified with the debate on global constitutionalism. This leads to methodological considerations concerning the mapping of the two sides of proportionality, namely its technical aspects and its normative content, not to mention the relational dynamics between the main actors in proportionality.

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[10] Nason (n4) 205.

2.1. The rise of a technique

As a technique of judicial control over administrative action, proportionality is often ascribed a 19th century Prussian origin. Proportionality became a tool for assessing whether the police had acted in a way that protected public order. The proportionality test limited the police's and administration's discretion when maintaining public order in the event of demonstrations or when issuing building permits. Proportionality became increasingly linked to the *Rechtsstaat*: police and decision-makers could only act within the confines of the law. Indeed, individual rights were increasingly recognised against the administration, rights that courts could be asked to protect and enforce.[11] Decision-makers could no longer encroach on these individual rights without judicial control. Thus, proportionality became the way to adjudicate when individual rights and administrative discretion collided. Individual rights could only be set aside when: (i) no less intrusive means would be equally effective for decision-makers, (ii) the means resorted to by the decision-makers were appropriate to meet their objective, and (iii) the end justified the intrusion. Consequently, individual freedoms and rights were protected, as well as public order and safety. All in all, arbitrariness was no longer possible – a major milestone in the evolution of the "rule of law".[12]

Proportionality took a back seat after WWII. However, the German Constitutional Court resorted to proportionality from the 1950s to arbitrate similar conflicts between individual rights and the power of Parliament to limit them. Some commentators presented this evolution as natural and logical, "*a response to a universal legal problem*"[13]. Open-textured, proportionality can be used in flexible ways, which allows for easy adaptation to a wide range of constitutional and administrative contexts. Schwarze[14] was one of the first to document this circulation within Europe in the late 1980s, with a specific role given to the reliance on proportionality in the case law of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU).[15] For instance, the CJEU recognised the proportionality principle as derived from the

11 O Mayer, *Deutsches Verwaltungsrecht* – Vol I (1924 Dunker & Humblot repr 1961) 218-225.

12 B Schlink, 'Proportionality (1)' in M Rosenfeld and A Sajó (eds), *Oxford Handbook of Comparative Constitutional Law*(OUP 2012) 719-736, 728-29.

13 ibid 729. See also B Schlink, 'Proportionality in Constitutional Law: Why Everywhere but Here' (2012) 22 Duke Journal of Comparative and International Law 291, 296.

14 J Schwarze, *Europäisches Verwaltungsrecht* (2nd edn Nomos 2005) 661-842.

15 For proportionality in Scandinavian countries, H Wenander, 'Europeanisation of the Proportionality Principle in Denmark, Finland and Sweden' (2020) 13 REALaw 133-153; for Italy, P Borriello, 'Principle of Proportionality and the Principle of Reasonableness' (2020) 13 REALaw 154-174.

rule of law in early case law,[16] at a time when proportionality was only used in one Member State – Germany.[17] Since Schwarze's writings, a wide literature has confirmed and nuanced this migration of proportionality.[18]

2.2. Diffusion of proportionality within the narrative of global constitutionalism[19]

According to Kumm, proportionality is one of "the most successful legal transplants in the second half of the twentieth century".[20] Yet, the comparative literature on transplant cautions us: ideas, principles, tools, techniques, institutions or processes may ostensibly be borrowed or copied from elsewhere, but there are always processes of differentiation and transformation at work.[21] Also, Cohn tells us to look beyond a binary evaluation of transplants in terms of success versus failure, and at the wider impacts of transplants on the target legal system.[22] In the case of proportionality, this paper contends that this principle, because of its flexibility, has circulated primarily as an idea, partly as a judicial test, partly as a standard for administrative action, and partly as a value to be pursued to allow for peaceful coordination of rights in a democratic society. Proportionality has circulated widely as part of the global constitutionalism movement, even though it was originally developed for reviewing administrative action.

Global constitutionalism has different meanings depending on the author: it can refer to the development of constitutions across the world, the identification of principles for framing the activities of regional or international organisations, and even the search for constitutional principles and institutions structuring global governance, etc.[23] For Stone Sweet and Mathews, global constitutionalism expresses the idea that a new form of constitutionalism has spread around the world with the following requirements: the constitution en-

16 Case C-4/73 *Nold v. Commission* EU:C:1974:51; T Tridimas, 'The Principle of Proportionality' in R Schütze and T Tridimas (eds), *Oxford Principles of European Union Law – The European Union Legal Order* vol 1 (OUP 2018) 243.

17 A Stone Sweet and J Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 Columbia Journal of Transnational Law 72, 144.

18 eg S Ranchordas and B de Waard (eds), *The Judge and the Proportionate Use of Discretion – A Comparative Study* (Routledge 2016).

19 Stone Sweet and Mathews (n17).

20 M Kumm, 'Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice. A Review Essay on *A Theory of Constitutional Rights*' (2004) 2 International Journal of Constitutional Law 574, 595.

21 See introduction to the present special issue for the relevant literature on this point.

22 M Cohn, 'Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom' (2010) 58 American Journal of Comparative Law 583-629.

23 C Mac Amhlaigh, 'Harmonising Global Constitutionalism' (2016) 5 Global constitutionalism 173.

shrines all institutions of government and its own process of amendment, ultimate power is recognised to the people, all uses of power must conform with the constitution and, finally, the constitution protects rights and freedoms and entrusts judges with enforcing this protection. Thus, in this global constitutionalism, judges are tasked with adjudicating between competing human rights or between human rights and public interests. For Stone Sweet and Mathews, this judicial role leads to judicial law-making. This recognition has implications for sovereignty:[24] it becomes binary – with political sovereignty vested in Parliament, and legal sovereignty in the judiciary. Stone Sweet and Mathews make important additional points regarding the implications of this development. As judges are tasked with enforcing (difficult) constitutional bargains, they develop strategic tools to frame, legitimise, or even disguise their political power. Proportionality is such a tool: it was adopted by courts involved in the adjudication of rights to help them deliver on constitutional adjudication. It provided judges with a doctrinal underpinning for the expansion of their power.[25] Furthermore, the flexibility of proportionality was attractive for courts that wanted to be part of the same constitutional 'family': in using the vocabulary shared by 'other family members', courts signalled their belonging, despite differences in the use of this concept.

Against this background Stone Sweet and Mathews explain the mechanisms of this 'viral spread' of proportionality around the world. First, they point out that proportionality soon emerged as best practice globally and benefitted from a consensus among the relevant national elite groups that led to them normatively committing to proportionality.[26] Indeed, Stone Sweet and Mathews argue that identifiable agents – namely judges and law professors-turned-judges – are directly responsible for the development of proportionality at international level[27] and that it would be possible: "(...) *in principle [to] map the network of individuals, and the connections between institutions, that facilitated the spread of [proportionality]*"[28]. Called 'normative isomorphism', this mechanism is in direct contrast with 'coercive isomorphism', the other mechanism Stone Sweet and Mathews identify as being at play behind the circulation of proportionality, i.e. the diffusion of institutional forms and practices that are backed by monitoring and enforcement mechanisms such as the CJEU and the ECtHR.[29]

Since this seminal account, proportionality has been the subject matter of countless discussions. Four comments are relevant here. First, proportionality is not neutral in itself. At the conceptual level it has been claimed that propor-

24 A Young, *Democratic Dialogue and the Constitution* (OUP 2017) 85.
25 Stone Sweet and Mathews (n17).
26 ibid 162 (footnote omitted).
27 ibid 161.
28 ibid 161.
29 ibid 161-162.

tionality, although widespread, is also attached to a specific understanding of the constitution where economic efficiency is attached to the law, with little space for social justice.[30] Consequently, it is connected to systems where legal positivism is prevalent. Suggesting that proportionality is universal occults the fact that it may not fit well with specific institutions, doctrines, social and cultural choices, as these may not attach the same importance to economic efficiency and give life differently to social justice. Such contextual factors shape how proportionality is implemented in a given legal system.

Secondly, empirical investigations have shown that proportionality differs from jurisdiction to jurisdiction. It is not to be reduced to specific deliberate choices made by judges to decide in a more or less political manner for the sake of amassing power. A range of contextual variables needs to be taken into account to map the different uses of proportionality in view of the diversity of legal systems. Indeed, *"[l]egal methods are entrenched in the attitudes and background knowledge of officials and lawyers in each constitutional culture"*.[31] The local context within which judges adjudicate shapes the ways in which they make use of proportionality. The superficial similarity of proportionality across many jurisdictions operates as a rhetorical device, concealing the many local political and contingent factors that cannot be replicated in other contexts.[32]

Thirdly, this narrative of proportionality papers over major political and constitutional controversies about the roles of judges and their control of both Parliament and the executive. As a result, key questions remain unanswered: should proportionality act as a rational and structured conduit for judges to control administrative action, or as an open-ended tool? Is the open-endedness of proportionality a beneficial feature or a dangerous one? In leaving these questions unanswered, proportionality supports the rise of (global) constitutionalism. To move beyond these questions, scholars have argued that a key benefit and justification for the spread of proportionality is that it supports a "culture of justification":[33] as it requires public bodies to give reasons for their decisions, proportionality contributes to (political) decisions of better quality.

Fourthly, while proportionality is recognized as a key principle both in global administrative law[34] and in global constitutionalism, it has travelled around thanks to its embeddedness in global constitutionalism. In weaving together the umbrella concepts of constitutionalism and proportionality, a su-

30 Nason (n4) 208.

31 C Bernal Pulido, 'The Migration of Proportionality across Europe' (2013) 11 New Zealand Journal of Public and International Law 483, 487.

32 D Kenny, 'Proportionality and the Inevitability of the Local: A Comparative Localist Analysis of Canada and Ireland' (2018) 66 American Journal of Comparative Law 537.

33 M Cohen-Eliya and I Porat, 'Proportionality and the Culture of Justification' (2011) 59 *American Journal of Comparative Law* 463-490.

34 B Kingsbury, N Krisch and R Stewart, 'The Emergence of Global Administrative Law' (2005) 68 Law and Contemporary Problems 15-61.

perficial consensus is found: a close inspection of the individual rights recognised in national constitutional law reveals how the principle is implemented very differently in practice – thus highlighting the relativity and pluralism of the whole global constitutionalism endeavour.[35] The temptation of some scholars is then to arc back to something more or less clearly recognizable across systems. Indeed, while judges grow aware of belonging to the same professional community, they learn to develop strategic choices that help them dialogue across legal systems.[36] However, there is a lack of a common framework for these discussions and a recognition that *"[m]eaningful communication among judges within judicial networks presupposes more than just strategic interaction"*,[37] and that there may be a plurality of communities intersecting at any one point in time. By analysing the English reception of proportionality through the prism of "relational dynamics", this article highlights the impact that these strategic interactions can have on the transplanting process.

2.3. Methodological considerations

As mentioned above, proportionality is a successful transplant at the global level: it has been circulating widely. Yet, the comparative literature on transplants cautions us to be careful when analysing legal transplants. Transplants need to adapt to local circumstances, political/cultural mindsets, and practical needs. Proportionality is no different. If we are to examine the reception of proportionality in England, and the contribution of proportionality to legal change there, we need to take heed of these warnings and distinguish two levels of analysis.

The first level of analysis pertains to mapping how and to what extent the legal transplant has been received as a technique, as a strategic tool in the hands of judges for pushing direct and indirect legal changes. In this respect, this paper revisits two ideas put forward by Cohn when she analysed proportionality as a transplant in England; namely, (i) the need to examine the transplant on a long temporal continuum rather than simply at the reception point,[38] and (ii) the need to analyse the overall outcome and wider impact of the transplant in the legal system, beyond a mere binary evaluation of the transplant in terms of success/failure.[39] Section 3 below enriches these insights with the benefit of

35 K Lachmayer, 'Counter-developments to Global Constitutionalism' in M Belov (ed), *Global Constitutionalism and its Challenges to Westphalian Constitutional Law* (Hart 2018) 81-102; J Klabbers, 'International Constitutionalism' in R Masterman and R Schütze (eds), *Cambridge Companion to Comparative Constitutional Law* (CUP 2019) 498-520.

36 AM Slaughter, *A New World Order* (Princeton University Press 2004) 100-103.

37 V Perju, 'Comparative Constitutionalism and the Making of a New World Order' (2005) 12 Constellations 464, 471.

38 Cohn (n22) 600, figure 4.

39 ibid 593.

ten more years of case law, including the symbolic times around Brexit: this section demonstrates that the reception of a transplant is not necessarily linear, that reception may not be permanently settled and that the wider impact can also be in flux.

The second level of analysis reflects on this overall process of legal change: taking a step back, it moves to a contextual analysis unpacking the stakes of proportionality, especially in terms of how relational dynamics between the main actors in English administrative law have framed the choices available to these actors. Here, the paper identifies the specificities of English administrative law using the parameters identified by Stone Sweet and Matthews;[40] namely, (i) the content of the constitution (i.e. formal protection of constitutional rights), (ii) the constitutional position of judges (and their relationship to the executive), (iii) the need for tools to justify/support the development of judicial control, and (iv) the (cosmopolitan outlook of the) judicial community. This last parameter is also related to Cohn's idea that one needs to go beyond the exporter-importer relationship so as to take in the complex influences of multiple players.[41] Revisiting these aspects in light of developments in English law over the last decade will add a degree of sophistication to their overall analyses, highlighting that these parameters are not monolithic. Still, these parameters frame our analysis of the reception of proportionality in English administrative law. Also, they help us increase our understanding of the way transplants behave over a longer period of time, including at key turning points.

3. Proportionality: a strategic choice for controlling administrative action

We turn here to our first level of analysis, where this paper maps the legal changes in English administrative law that proportionality has triggered. Two different aspects of these legal changes need to be discussed. At first, proportionality was suggested as a way to strategically expand judicial control over administrative action, especially in the fields of human rights and EU law. The strategies varied before (3.1) and after the adoption of the Human Rights Act 1998 (3.2). This gradual acceptance of proportionality in English administrative law triggered a second-order question as to whether proportionality should replace older techniques that judges had been using to exercise this control. In short, boundary issues emerged around "reasonableness". If judges had been strategic in seeking ways to use proportionality in the human rights and EU law fields, they were even more so when deciding how far proportion-

40 Stone Sweet and Mathews (n17).
41 Cohn (n22) 601.

ality should permeate into other aspects of judicial review: while they blurred the distinction between proportionality and reasonableness (3.3), they postponed merging the two concepts, a very strategic decision in light of the Brexit referendum (3.4).

3.1. Before 1998: shaping a strategic tool

Lord Diplock was the first to suggest adopting proportionality in English administrative law, in 1985 in *GCHQ*.[42] After famously restating the grounds of judicial review as illegality, irrationality and procedural impropriety, he also stated that the principle of proportionality might be added to this list in the future. Thus, a well-respected member of the judicial committee of the House of Lords began this transplant's long history. Taking inspiration from Lord Diplock's statement, Lester and Jowell argued from 1987 for replacing '*Wednesbury*[43] unreasonableness'[44] with proportionality.[45]

At the time of Diplock's statement, English administrative law was experiencing a procedural and conceptual transformation. Despite administrative law's long history in England,[46] it is often portrayed as having awakened in the 1960s with a series of famous cases such as *Ridge* v. *Baldwin,*[47] *Anisminic*[48] and *Padfield,*[49] and as being transformed by the procedural reform launched in 1977.[50] The latter triggered a rapid conceptual evolution of English administrative law that continues to this day. Against this background, proportionality was soon presented as a necessary part of this re-formulation of the grounds of review. With proportionality, judges would also have a better tool for reviewing discretionary powers: it certainly provided a more structured reasoning than

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42 *CCSU v. Minister for the Civil Service* [1985] AC 374.

43 *Associated Provincial Picture Houses Ltdv Wednesbury Corporation* [1948] 1 KB 223.

44 A cinema was granted a licence by the Wednesbury Corporation on the condition that no children under 15 were admitted on Sundays. The owners of the cinema challenged the legality of the restrictions on the grounds that they were outside the power of the Corporation. While deciding the case, Lord Greene specified the grounds for review of a public body's exercise of discretion: not only will the court review the relevance of considerations taken into account in the decision, but it will also look to see whether the public body "ha[s] nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it". This became the '*Wednesbury* unreasonableness' test.

45 A Lester and J Jowell, 'Beyond Wednesbury: Substantive Principles of Administrative Law' (1988) 14 Public Law 368 and 'Proportionality: Neither Novel nor Dangerous' in J Jowell and D Oliver (eds), *New Directions in Judicial Review –Current Legal Problems* (Rothman 1988) 61.

46 P Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (CUP 2015) 26-29.

47 *Ridge v Baldwin* [1964] AC 40.

48 *Anisminic Ltdv.Foreign Compensation Commission* [1969] 2 AC 147.

49 *Padfieldv.Minister of Agriculture, Fisheries and Food* [1968] AC 997.

50 Order 53 united all remedies available against public bodies in one single procedure called Claim for Judicial Review. This helped claimants considerably, and led to a marked increase of Judicial Review cases (albeit from a rather low base number).

Wednesbury[51] unreasonableness when assessing the rationality of administrative action. Thus, the importing of proportionality was part of a wider transformation of English administrative law.

When advising, in the late 1980s, that *Wednesbury* 'unreasonableness' gives way to proportionality, Jowell and Lester aimed to kill two birds with one stone: first, they planned to add directly to the substantive arsenal of English administrative law, and second, they hoped that the balancing exercise that proportionality facilitates would be responsible for the recognition of other substantive principles and rights. Thus, the operation of the principle of proportionality would act as a Trojan horse and would help bring the protection of fundamental rights into the UK constitution at a time when it did not clearly organise this protection. Indeed, this is exemplified by the challenge mounted in *ex p. Brind*[52] in 1991. In this case the Home Secretary had issued directives to both the BBC (British Broadcasting Corporation) and the IBA (Independent Broadcasting Authority) to restrict the broadcasting of speech by representatives of proscribed terrorist organisations: in future, the voices of terrorists appearing on television would be dubbed. Anthony Lester,[53] the barrister representing the journalists challenging the directives, argued they violated article 10 of the ECHR and that a presumption rested on the Home Secretary to respect the ECHR when exercising discretionary powers.[54] In addition, he contended that the court ought to review the proportionality of the directives, rather than their unreasonableness. The House of Lords rejected both arguments. The bid to increase the substantive arsenal of English administrative law and to address the limitations of the UK constitution had failed. This failure was largely due to a lack of support for proportionality among judges: they were weary of the narrative that proportionality brought with it.

With regard to EEC/EU law, the transplanting of proportionality was gradual: the courts slowly abandoned their early references to the unreasonableness test and started applying proportionality.[55] Thus proportionality had started to make its way into English public law. It would soon be involved in key debates.

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51 *Wednesbury* (n43).

52 *R. v. Secretary of State for the Home Department, ex p. Brind* [1991] 1 AC 696.

53 At the time, Lester was involved with Charter 88, that advocated among other things the adoption of a codified Bill of Rights, see A Lester (ed), *A British Bill of Rights* (IPPR 1996).

54 At the time, the ECHR had not been incorporated by an Act of Parliament and had no legal effect in the UK legal order.

55 eg *RvInternational Stock Exchange of the UK and the Republic of Ireland, ex p Else* [1993] BCC 11; *RvChief Constable of Sussex, ex p. ITF Ltd* [1995] 3 CMLR 485.

3.2. 1998: a turning point for strategic calibration

If the strategies to integrate proportionality through case law failed in the 1990s, the discussions relating to the protection of fundamental rights were becoming even more pressing. They led to the incorporation of the ECHR into English law. This incorporation happened at a very specific political time – Tony Blair had just broken eighteen years of Conservative rule, which had been plagued by dissensions about the link between the UK and the EU. A barrister by training, Tony Blair came to power with manifesto promises of constitutional reforms and a positive inclination towards all things European and law-based. The incorporation of the ECHR through the Human Rights Act 1998 (HRA) fulfilled the pledge of better protecting human rights.[56] Also, judges were extensively trained in how to use this new legislation in their judgements.[57] With the HRA, judges would need to use proportionality to adjudicate between competing rights and fundamental freedoms. However, three points need to be made regarding this apparent compliance with the interpretation of fundamental rights. Overall, UK judges sought to keep control over proportionality as much as possible.

The first point pertains to the channel used for receiving proportionality in England. The leading case was decided in the Privy Council, *De Freitas*[58] where the court relied on case law from South Africa, Zimbabwe and Canada. The Privy Council was then truly a global court, as it acted as the appeal court for several Commonwealth jurisdictions and set precedents for these jurisdictions. In all likelihood, the court wanted to give some traction to proportionality as part of the evolution of English administrative law. By relying on cases from South Africa, Zimbabwe and Canada, the court created a precedent that could not only apply to this specific litigation, but was also more likely to be used in any number of common law jurisdictions. This would also enable England's top courts to participate in the judicial 'conversations' that take place in and between any number of common law jurisdictions on various topics concerning human rights[59] and, in particular, proportionality. This shows that the influences and obligations resting on English courts are not limited to the two European treaties. The courts respond to influences or obligations of their own through their judicial position in the Commonwealth: they are certainly responsible for participating in forms of coercive isomorphism themselves. UK judges did not

56 'New Labour – because Britain deserves better' [Labour Party Manifesto for the general election May 1997] <www.fes.de/fulltext/ialhi/90057/90057001.htm accessed> 07 April 2021.

57 D Feldman, 'The Human Rights Act 1998 and constitutional principles' (1999) 19 Legal Studies 165-206, 170.

58 *De Freitas v Permanent Secretary of Ministry of agriculture, fisheries, lands and housing* [1999] 1 AC 69 (PC).

59 H Tyrell, *Human Rights in the UK and the Influence of Foreign Jurisprudence* (Hart 2018).

want proportionality to be seen as a merely European technique; thus, they sought to strategically 'acclimate' it and create a channel for further expansion outside the UK.

The second point turns around the interpretation to be given to reasonableness in the field of human rights. Indeed, the debate opposing unreasonableness to proportionality was reignited shortly before the incorporation of the ECHR. Famously, the government's policy of banning homosexuals from the military was the subject of a judicial review challenge: the Court of Appeal did not find the policy to be *Wednesbury* unreasonable.[60] However, when argued before the ECtHR, it was found that the unreasonableness test did not provide a sufficiently in-depth review of the minister's exercise of discretionary power.[61] The timing of this decision was far from accidental: the HRA had just been passed by Parliament and was due to come into force on 2 October 2000. Clearly, the Strasbourg court was identifying the unreasonableness test as unfit for purpose. While the UK courts had sought to retain control over the test to be applied in human rights, the ECtHR imposed its own interpretation. This points towards relational dynamics where collaboration, dialogue and mutual respect were lacking. One wonders whether the ECtHR would have gained greater cooperation by giving UK courts more time to find their bearings.

The third point pertains to the English specificities in the formulation of the proportionality test. In the leading case on this point, *Bank Mellat*,[62] the UK Supreme Court (UKSC) highlighted that the proportionality test at domestic level cannot purely mirror the proportionality test used by the ECtHR.[63] Lord Sumption formulates the proportionality test as requiring assessment of (i) whether the objective of a measure is sufficiently important to justify the limitation of a fundamental right, (ii) whether a measure is rationally connected to its objective, (iii) whether a less intrusive measure could have been used, and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.[64] This means that the British test of proportionality has four steps and not three, as is usual in the European case law.

While the UKSC has sought to keep control over proportionality, the UK courts have had to rely on proportionality for grounds that involve EU or ECHR law. It will be interesting to see whether the UK courts will continue their use of proportionality on former EU law, now that the UK has left the European Union.

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60 *RvMinistry of Defence, ex p Smith* [1996] QB 517.
61 *SmithvGrady* (1999) 29 EHRR 493.
62 *Bank Mellat v Her Majesty's Treasury* [2013] UKSC 39.
63 ibid [71]-[72] (Lord Reed).
64 ibid [20].

3.3. Strategic blurring of reasonableness

Since Lord Diplock mentioned proportionality in 1985, there have been doubts as to how to distinguish proportionality from reasonableness. Indeed, the distinction between the two tests is anything but clear. This is the outcome of an evolution in the definition of the reasonableness test.

In its original formulation, the *Wednesbury* test is a test of "unreasonableness". In the words of Lord Diplock in the mid-1980s,[65] an irrational decision is "a *decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it…*".[66] Such a formulation meant that hardly any administrative action would be unreasonable and thus illegal. This led to a slow transformation of the test, first in 1996 with Pannick's expression of unreasonableness as a decision "*beyond the range of responses open to a reasonable decision-maker*",[67] then in 2000 with Laws LJ's formulation that the test was "*a sliding scale of review more or less intrusive according to the nature and gravity of what is at stake*".[68] In short, there has been a process of redefining the content and analytical structure of the reasonableness test to move it closer to proportionality. This identifies a clear process of legal change showing an indigenous concept being shaped by an external factor, the transplanted technique. This process has been summed up in the following way:

> *So, it seems, almost 30 years after CCSU, proportionality has crept into the English common law by the back door, not by the explicit addition of a fourth ground to Lord Diplock's trilogy, as he anticipated, but by the transmutation of the Lord Greene's strict reasonableness test into […] a flexible but structured test which is much better adapted to the task of effective and practical judicial supervision of executive action.*[69] [our underlining].

Overall, this scrutiny of the legality of administrative action seems to reflect the concerns raised first in the 1960s when judicial review started to develop in its modern form. The changes in articulating the test have little to do with global constitutionalism: they are a practical response to the new ways in which the administration started to take decisions around that time. The nub of the question was to identify the procedural role of the administration in England: the decision-maker not just asking himself the right question, but taking "*rea-*

65 *CCSU v Minister for Civil Service* [1985] AC 374.
66 ibid.
67 *R v Ministry of Defence ex p Smith* [1996] QB 517.
68 *R v Secretary of State for Education and Employment ex p Begbie* [2000] 1 WLR 1115, 1130 (Laws L).
69 Lord Carnwath, 'From Rationality to Proportionality in the Modern Law' (2014) 44 Hong Kong Law Journal 447-458, 457-58.

sonable steps to acquaint himself with the relevant information to enable him to answer it correctly" (*Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014, 1065B)".[70] Similar matters were discussed in the Council of Europe around the same time,[71] leading to recommendations at the end of the 1970s.[72] The dates may be partly coincidental: it is difficult to trace back direct connexions between the works of the Council of Europe and the choices made in the UK to develop a certain type of judicial control over administrative action. However, this shows that in the 1970s, the main concrete questions in European circles were at least as much related to the administration as to the constitution. In this sense, English administrative law responded to the need to be creative in scrutinizing administrative action more than it did to global constitutionalism.

3.4. Bifurcation: strategic postponement in unifying proportionality and reasonableness

For a while it appeared that proportionality would finally be accepted fully into English public law. The transformation of reasonableness into a more structured test made this desirable from a conceptual point of view, to avoid confusion between two tests that were close if not identical. However, the definitive step of replacing reasonableness with proportionality in matters falling outside European and human rights did not happen. It seems as if the UKSC had arrived at a point where it was ready to take this decision, but then postponed it[73] – it may have been waiting strategically for the dust to settle with regard to 'Brexit' and to the UK bill of rights. Now, it seems unlikely that the UKSC will take this decision any time soon, if ever.

Unsurprisingly, the English courts chose to resort to proportionality when a violation of an ECHR right was argued. The matter is a little more complex when the litigation could be resolved by reliance upon either the ECHR or common law, as in *Daly*. There, the court wanted to make sure that the rights of prisoners (in this case those rights protecting their privileged correspondence) were enforced under common law rather than just the Convention. In *Daly,*[74] the court decided that a policy directing prison staff to check the legally privileged

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70 ibid 453.

71 X, *Pouvoir discrétionnaire et opportunité des décisions administratives: étendue et limites du contrôle juridictionnel*: Cinquième Colloque des Conseils d'Etat et des Jurisdictions Suprêmes en Matière Administrative des Pays Membres des Communautés Européennes (The Hague, 1977).

72 CM adopted Resolution (77)31 on the protection of the individual in relation to acts of administrative authorities; Recommendation No R (80) 2 concerning the exercising of discretionary powers by administrative authorities. On this process: U Stelkens and A Andrijauskaitė, 'Sources and Content of the Pan-European General Principles of Good Administration' in U Stelkens and A Andrijauskaitė (eds), *Good administration and the Council of Europe – Law, Principles, and Effectivity* (OUP 2020) 19-54.

73 *R (Youssef)vSecretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3.

74 *RvSecretary of State for the Home Department, ex p Daly* [2001] 2 AC 532 (HL).

correspondence of prisoners during a cell search without the prisoner present constituted an unjustifiable infringement of prisoners' rights under common law. Both Lord Steyn and Lord Cooke compared and contrasted the *Wednesbury* unreasonableness test and the principle of proportionality – Lord Bingham specified that, in the circumstances, both tests would have had the same outcome. However, this should not necessarily be interpreted as a rejection of the ECtHR, but as a policy decision to enable this case law to be used by other common law jurisdictions.

Commentators have labelled this situation as 'bifurcation' and debated its advantages and drawbacks. The concept of bifurcation recognises that rationality review is undertaken using two co-existing tests: for grounds arguing an infringement of EU law or a violation of the ECHR the courts apply the proportionality test, while for grounds based on English law the courts will resort to the *Wednesbury* test. For proponents of bifurcation,[75] proportionality should be limited to the protection of human rights.[76] The proportionality test would bring courts too close to merits review. In addition, routine use of proportionality may compromise the courts' ability to defer to the technical, constitutional, or scientific expertise of the decision-maker. Also, some commentators express concerns that proportionality would compromise the conceptual integrity of judicial review.[77] Finally, the long existence of the *Wednesbury* test has engendered a feeling of familiarity (not to say certainty) that would be lost were it to be replaced by a new test. Having said that, commentators have shown that *Wednesbury* is no more monolithic than the proportionality test and can be applied with differing intensities of review depending on the context.[78]

On the other hand, the proponents[79] of the unification of rationality review argue that the proportionality test would be more transparent in terms of intensity and structure of review:[80] it would highlight the reasoning of judges when undertaking a review of the rationality of an administrative decision and help courts to structure their control. This is particularly true, in view of the assessment by Paul Craig that both tests involve a degree of weighing and balancing.[81]

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75 Among others, Jeff King, Lord Sales, Tom Hickman, and Jason Varuhas, are all supporters of bifurcation.

76 Some would widen this scope further, see eg J King, 'Proportionality: A Halfway House' [2010] New Zealand Law Review 327.

77 Some have even argued that proportionality may lead to the complete annihilation of other grounds of review.

78 A Le Sueur, 'The Rise and Ruin of Unreasonableness' (2005) 10 Judicial Review 32-51.

79 Paul Craig is one of the main proponents of this unification.

80 A Davies and J Williams, 'Proportionality in English Law' in S Ranchordas and B de Waard (eds), *The Judge and the Proportionate Use of Discretion* (Routledge 2016) 73-108.

81 P Craig, 'The Nature of Reasonableness Review' (2013) 66 Current Legal Problems 131-167.

Also, reliance on one single test for rationality review would be a welcome simplification for claimants.[82]

Despite some early pronouncements by Lord Cooke that *Wednesbury* is "*an unfortunately regressive decision*"[83] or by Lord Slynn that "*trying to keep the Wednesbury principle and proportionality in separate compartments seems to me to be unnecessary and confusing*"[84], the early demise of the *Wednesbury* test has failed to materialise. The Court of Appeal indicated in *ex p. Association of British Civilian Internees*[85] that it wished to move to a unified proportionality test, but it also stated that it was not "*to the (Court of Appeal) to perform its burial rites*".[86]

Still, the more recent case law casts doubt on the unification of proportionality review. Several potential cases have failed to engineer this transformation. In *Kennedy,*[87] Lord Mance stated that the proportionality test has a slight edge over *Wednesbury* as it "*introduces an element of structure into the exercise*".[88] If one reads this statement in conjunction with the speech made by Lord Carnwath in 2014,[89] one would be forgiven for believing that unification is quite near. Indeed, a year later, the cases of *Pham*[90] and *Youssef*[91] gave the impression that proportionality would finally be used across the board in England. In the former case, the UKSC reviewed the decision to strip *Pham* of his British citizenship – a decision that had implications in both domestic and EU law. Lord Mance specified that the outcome would be similar under both EU law and common law. Despite this, unification was not achieved. Again, the UKSC seemed on the verge of unifying the grounds of review in *Youssef*.[92] While Lord Carnwath notes that unification would be possible, he states that this decision needs a wider judicial panel of the Supreme Court. This repeats a statement made in

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82 Especially, as pointed by Paul Craig, because many claims combine different legal arguments: some are based on the ECHR, others on EU law and some rely simply on English administrative law. A lack of unification of the test makes this exercise rather complex for the claimant.

83 Lord Cooke of Thorndon in *Daly* at [32].

84 Lord Slynn of Hadley in *R (Alconbury) vSecretary of State for Transport* [2001] UKHL 23.

85 *R (Association of British Civilian Internees – Far East Region) vSecretary of State for Defence* [2003] 1 WLR 1813.

86 Dyson LJ at [35].

87 *Kennedyv.Charity Commission* [2014] UKSC 20 at [54].

88 Lord Mance endorsed Craig's argument that the *Wednesbury* unreasonableness and proportionality tests require a degree of balancing and that both can be applied with varying intensities.

89 Lord Carnwath, 'From Rationality to Proportionality in the Modern Law', at the joint UCL-HKU conference 'Judicial review in a changing society' (Hong Kong University, 14 April 2014).

90 *Pham v Secretary of State for the Home Department* [2015] UKSC 19.

91 *R (Youssef)vSecretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3.

92 Youssef challenged a decision of the Secretary of State for Foreign Affairs to agree with the UN Sanctions Committee that Youssef be added to the list of persons associated with Al Qaeda who should have their assets frozen.

Keyu.[93] According to Lord Neuberger, moving to proportionality review needed a panel of nine judges to assess its serious constitutional implications.[94] Yet, Lord Neuberger specified that both the reasonableness and proportionality tests would have had the same outcome.[95] However, Lady Hale dissented on the very topic of proportionality and described how the *Wednesbury* test could be applied to a rational decision-maker, leading her to suggest that in this case the decision-maker had not been rational, a result different from the one achieved by the judgment.[96] This shows that this mantra about 'no practical difference between proportionality and reasonableness' may be expressed as a strategy to assuage fears of expanding judicial power. Finally, *Browne*,[97] which has been decided since, seems to imply that unification will not happen any time soon.

Overall, the court managed to show a seemingly outward agreement with proportionality while being responsible for repeated refusals to switch the test. A rather ambiguous response, but a very strategic stance. One can only speculate on the reasons behind this strategic postponement. Some of this strategic resistance may be connected to the general climate, with discussion of a UK Bill of Rights[98] and the upcoming 2016 referendum. The UKSC may have felt it unwise to address the question in this rather uncertain political context.

Another aspect of this strategic resistance may lie in the debate over the foundations of judicial review in English administrative law. Whether one believes, like Forsyth[99] and Elliott, that the constitutional basis for judicial review rests with the principle of parliamentary sovereignty, or, on the contrary, that the source of the review of administrative action is common law, as suggested by Craig,[100] this provides different answers to the reliance upon proportionality.

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93 *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69. Keyu wanted the British government to hold an inquiry into the massacre of Batang Kali in Malaysia when this country was under colonial control.

94 ibid [132].

95 ibid [273]. To be more nuanced, he writes: 'It should also be understood that the difference between a rationality challenge and one based on proportionality is not, at least at a hypothetical level, as stark as it is sometimes portrayed.'

96 ibid, Lady Hale dissenting [308]-[313]. She constructed the notion of a rational decision-maker as undertaking a cost-benefit analysis before deciding.

97 *Browne v Parole Board for England and Wales* [2018] EWCA Civ 2024.

98 P Munce, 'The Conservative Party and Constitutional Reform: Revisiting the Conservative Dilemma through Cameron's Bill of Rights' (2014) 67 Parliamentary Affairs 80–101; M Amos, 'Problems with the Human Rights Act 1998 and How to Remedy Them: Is a Bill of Rights the Answer?' (2009) 72 Modern Law Review 883-908; S Lambrecht, 'Bringing Rights *More* Home: Can a Home-grown UK Bill of Rights Lessen the Influence of the European Court of Human Rights?' (2014) 15 German Law Journal 407-436.

99 C Forsyth, 'Of Figs Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review' (1996) 55 Cambridge Law Journal 122.

100 P Craig, 'The Common Law, Shared Power and Judicial Review' (2004) 24 Oxford Journal Legal Studies 237.

Elliott,[101] in particular, argues that *Wednesbury* and proportionality reflect different understandings by the courts of the separation of powers and contrasting perceptions of their roles. With the European Community Act 1972 and the HRA 1998, proportionality has been given a constitutional basis that legitimizes (and in fact imposes) its reception. This question of constitutional foundations is key to the extension of proportionality to cases/grounds that do not involve EU law or the ECHR. It seems that for the UK courts, unification has 'troubling' constitutional implications. While the use of proportionality derives from the incorporation of the two treaties, the reliance upon proportionality at common law would not. It would be a creation of the court at common law. This certainly explains the reluctance of the courts: in a word, proportionality has been caught up in the wider debates of the courts' constitutional role and of the foundations of judicial review. Still, there are undoubtedly other – contextual – reasons for the strategic choices made by the UKSC in using and *not* using proportionality. Section 4 turns to analysing these.

4. Relational dynamics: constraints on strategic choices

If proportionality was first mooted as a technique to expand judicial control over administrative action, the extent to which it was able to make inroads in non-EU law matters and in non-human rights matters was shaped by the specific context provided by the relational dynamics between the judiciary and the administration in England. All in all, this context is nearly at the antipodes of the key features of the continental model on which the global constitutionalism narrative surfs in broad terms. While proportionality as a technique has been relatively successful, an alternative narrative – that of UK common law constitutionalism – has emerged rooted in the specific relational dynamics involving English judges. When it comes to identifying what may be the reasons behind the development of UK constitutional principles detached from a more global narrative of constitutionalism, Lady Hale writes:

[W]hether this trend (that the UK's constitutional principles should be at the forefront of the court's analysis) is developing as a response to the rising tide of anti-European sentiment among parliamentarians, the press and the public, whether it is putting down a marker for what might happen if the 1998 Act were repealed, whether it is a reflection of distinctive judicial philosophies of the judges who are at the forefront of this development, or whether it is simple irritation that our proud

[101] M Elliott, 'The Human Rights Act 1998 and the Standard of Substantive Review' (2001) 60 Cambridge Law Journal 310.

traditions of UK constitutionalism seemed to have been forgotten, I leave it to you [...] to decide.[102]

However, what emerges is that English judges respond to their context. In this respect, the relational dynamics within UK common law constitutionalism can be broken down into four levels: the general framework for these relationships being the English political constitutionalism (4.1), the concrete political stance taken by successive UK governments in relation to the judiciary (4.2), the institutional mechanisms shaping judicial review (4.3), and the specific international audience whom UK judges are addressing (4.4). Overall, judges take a strategic stance of preserving, maintaining and, where needed, using their power in relation to the executive. However, they do not seek to revolutionize their practice and cognitive mindsets: they move incrementally as a rule and take drastic steps only in extreme cases.

4.1. Old and new constraints of political constitutionalism

In 1979 Griffith suggested the idea that the UK was regulated by a political constitution[103] – a notion in clear opposition to the legal/judicial constitutionalism conveyed by the narrative of global constitutionalism. Political constitutionalism carries a specific vision of the relationships between the main constitutional actors – namely the legislative, the executive and the judiciary. In particular, it has implications for the protection of human rights under the constitution and for the process of accountability of administrative/political action, favouring political processes rather than judicial review.[104] Proportionality can only be marginal under political constitutionalism.

The UK constitution does not foster an environment supportive of the type of judicial control over administrative action that proportionality represents. In fact, the uncodified UK constitution creates a number of difficulties with regard to this principle. For one thing, the regulation of the political system relies heavily on political practices, constitutional conventions, and memorandums of understanding. While political institutions continue to eschew formal and legal regulations, this absence of legal recognition makes it difficult, if not impossible, for the courts to enforce any of these conventions or practices.[105] While legal constitutionalism has made some inroads with the adoption of the HRA,

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[102] Lady Hale, 'UK Constitutionalism on the March?' (2014) 19 Judicial Review 201, 208.

[103] J Griffith, 'The Political Constitution' (1979) 42 Modern Law Review 1. See also G Gee and G Webber, 'What is a Political Constitution?' (2010) 30 Oxford Journal Legal Studies 237.

[104] Young (n24).

[105] *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5 [136]-[151]: even a codified constitutional convention was not recognized as enforceable.

the successive devolution legislations and the Constitutional Reform Act 2005,[106] political constitutionalism still characterises the regulation of the political system. According to political constitutionalism, the executive is controlled largely through the work of Parliament, which reviews the activities and policies of government departments, public corporations, independent agencies, and similar organisations. This reliance upon political accountability does not sit well with the tenets of global constitutionalism. In this context, proportionality cannot fulfil the same objective of providing the key tool for controlling administrative action.[107] While global constitutionalism has facilitated the migration of proportionality around the world, the discourse of human rights protection through constitutional review can only have a limited influence in the UK in view of its constitutional arrangements. In turn, this has impacted the transplanting of proportionality.

As a result of its attachment to political constitutionalism, the UK constitution is characterised by the principle of parliamentary sovereignty, which creates a formidable obstacle to both constitutional review and the protection of rights. With sovereignty placed in Parliament, it is difficult to grant the judiciary power to review acts of Parliament. Since the UK constitution does not contain a formal declaration of rights, the courts lack a textual basis for a substantive review of parliamentary legislation. Review of the parliamentary process itself would be regarded as a clear infringement of separation of powers. Unsurprisingly, the courts have repeatedly refused to undertake such a review in the past.[108]

Importantly, the lack of rights protection has been partly remedied by the adoption of the HRA 1998. With this act, Parliament has given legal effect to the ECHR in UK law. However, to protect the integrity of parliamentary sovereignty, courts finding a violation of a Convention right by an act of Parliament can only issue a declaration of incompatibility. This warning to Parliament has no legal effect for the parties or the legislation in question. Parliament can choose to amend the legislation subsequently but is under no legal obligation to do so; thus, the sovereignty of Parliament is safeguarded. In addition, the debates surrounding the legitimacy of the ECHR and the suggestion that the HRA could be replaced by a UK Bill of Rights, have created a degree of uncertainty regarding rights protection in the UK. A form of mutual support exists

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106 A Tomkins, 'What's Left of the Political Constitution?' (2013) 14 German Law Journal 2275-2292.

107 The use of proportionality in political procedures deserves a more systematic investigation than has been done so far, even though it has been argued that the joint committee uses the same type of approach as courts (M Tolley, 'Parliamentary Scrutiny of Rights in the United Kingdom: Assessing the Work of the Joint Committee on Human Rights' (2009) 44 Australian Journal of Political Science 41-55, 45-46) as the practice may have fluctuated since then.

108 *Pickin v British Railways Board* [1974] UKHL 1.

between the HRA and common law constitutional rights.[109] However, this may change, were the Parliament to repeal the HRA. In any event, this illustrates the challenging environment in which proportionality has had to evolve/is evolving. Two key features of global constitutionalism linked to proportionality, namely, constitutional review and judicial protection of human rights, have a different reach under the UK constitution.

Overall, these are strong reasons explaining why proportionality has found it difficult to make its way into English administrative law. When deciding to use proportionality, judges have had to take into account the strong inclination towards political constitutionalism in England – a major difference from the premises on which global constitutionalism is built.

4.2. Political constraints: recurring threat of reform by an increasingly dissatisfied executive

A second key contextual constraint on the development of proportionality outside the realm of EU law and human rights matters can be found in the tense relationships between the judiciary and political actors, especially the UK government. The continuing government hostility to judicial review and the recent high-profile court challenges have certainly encouraged the judiciary to take a careful approach to their review. The conceptual discussions relating to political constitutionalism are not theoretical: they have concrete implications for the interactions between the executive and judiciary.[110]

First, political dissatisfaction with judicial review of administrative action goes back a long way. As early as 2004 the government threatened the imposition of 'ouster clauses' to prevent judges from reviewing immigration decisions.[111] In 2013, threats to restrict standing rules were made, and changes to the costs regime were introduced in 2015.[112] This led to a range of reactions: for instance, the senior judiciary contested the government's proposal that judicial review should be in effect limited to claimants with a direct interest in the matter;[113] later, the UKSC restated the constitutional right of access to courts and quashed

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109 C O'Cinneide, 'Human Rights and the UK Constitution' in J Jowell and C O'Cinneide (eds), *The Changing Constitution* (9th edn OUP 2019) 58-94, 73-76. See also M Elliott and K Hughes (eds), *Common Law Constitutional Rights* (Hart 2020).

110 For an historical perspective on the various changes that made the executive and the judiciary increasingly distant, see A Paterson, *Final Judgment. The Law Lords and the Supreme Court* (Hart 2013) 286-87.

111 Lord Mance, 'The Frontiers of Executive and Judicial Power: Differences in Common Law Constitutional Traditions' (2018) 26 *Asia Pacific Law Review* 109, 120.

112 Criminal Justice and Courts Act 2015 c. 2.

113 Judiciary of England and Wales, Response of the senior Judiciary to the Ministry of Justice's consultation entitled: 'Judicial Review: Proposals for Further Reform', 01 November 2013.

a fee Order for preventing such access.[114] Following on from the UKSC decision that the 2019 prorogation of Parliament had been unconstitutional,[115] the government triggered a new review of judicial review,[116] with a view to limiting it.[117] This has contributed to making the UKSC careful not to expand judicial review, while seeking to maintain the rule of law.

Secondly, this scepticism towards judicial power is not the preserve of the executive. Some academics see the expansion of judicial power as a threat to the UK constitution. Initiatives such as the judicial power project illustrate this academic scepticism.[118]

Thirdly, this scepticism is linked to the question of the institutional competence of judges: are they equipped and trained to really scrutinize administrative decisions? In particular, proportionality is often portrayed as allowing a more intense review of an administrative decision.[119] However, discussions arise about the deference that judges ought to show to the original decision-maker. This mirrors discussions about individual and/or institutional expertise and is the result of political or bureaucratic legitimacy.[120] Proportionality requires expertise in administrative decision-making by the judge.[121] English judges are not acquainted with the working of administrations in the way the French or German judges are. Thus, English judges are, in the main, generalists and not experts in specific administrative law fields, by contrast to many of their continental counterparts. Even though this may be changing, the number of judicial reviews and the complexity of many administrative fields make it difficult for anybody to gain comprehensive expertise in any sub-field of administrative law.[122] Although judges can have prior professional experience in the administration,[123]

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114 *R (on the application of UNISON) (Appellant) v Lord Chancellor* [2017] UKSC 51, [66]-[85].

115 *R (on the application of Miller) v The Prime Minister* [2019] UKSC 41 (*Miller 2*).

116 Ministry of Justice Press Release, 'Government launches independent panel to look at judicial review', 31 July 2020 <https://www.gov.uk/government/news/government-launches-independent-panel-to-look-at-judicial-review> accessed 07 April 2021.

117 M Elliott, 'The Judicial Review I: The Reform Agenda and its Potential Scope', 03 August 2020 <https://publiclawforeveryone.com/2020/08/03/the-judicial-review-review-i-the-reform-agenda-and-its-potential-scope/> accessed 07 April 2021.

118 For discussions about this project, see ia P Craig, 'Judicial Power, the Judicial Power Project and the UK' (2017) 36 University of Queensland Law Journal 355; R Ekins and G Gee, 'Putting Judicial Power in Its Place' (2017) 36 University of Queensland Law Journal 375.

119 See Lord Steyn in *Daly*: 'But the intensity of review is somewhat greater under the proportionality review'.

120 J Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65 Cambridge Law Journal 174-207.

121 J Rivers, 'The Presumption of Proportionality' (2014) 77 Modern Law Review 409–433.

122 This paper does not say anything about proportionality at the level of tribunals, where the situation may differ.

123 Judicial Appointments Commission, 'Eligibility for legally qualified candidates' <https://judicialappointments.gov.uk/eligibility-for-llegally-qualified-candidates/> accessed 07 April 2021.

this is not the most common pathway to becoming a judge in England.[124] As a result, the question of institutional deference is hotly debated, and judges may feel less equipped (and thus more reluctant) to scrutinize administrative decision-making too closely.

Debates have thus raged on the deference that judges owe to the original decision-maker: they have tried to analyse the exercise, type, and degree of deference that judges ought to have in judicial review. Unsurprisingly, this debate has encompassed the reliance upon proportionality. On the face of it, proportionality review appears to be at the opposite end of the spectrum from deference: it may mean a more intensive review and therefore a less deferential treatment of administrative action. While Daly[125] and Craig are at pains to demonstrate that proportionality can vary the intensity of review depending on the context and, according to Craig, the weight given by the court to the decision-maker will be determined by the court and not by reliance upon proportionality,[126] this message is not heard by a large section of the legal community. The topic of deference has grown in parallel with the one on proportionality: it is now central to any analysis of judicial review.[127]

4.3. Pragmatic constraints

A third key contextual constraint on the development of proportionality outside the realm of EU law and human rights can be found in the institutional consequences of such an adoption. Here, views are divided.

Lady Arden[128] and Lord Carnwarth[129] have expressed their preference for proportionality in extra-judicial writings, highlighting its conceptual advantages. However, the UKSC (like the House of Lords before it) takes a consequentialist approach to legal issues:[130] it seeks to understand the consequences of its decisions before taking them. With proportionality being broadly born in continental legal orders, issues arise regarding judicial review's procedural and evidential system that mirrors the common law-civil law dichotomy. As common

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124 Most judges have professional experience as barristers or solicitors: Judicial Appointments Commission, 'Judicial Selection and Recommendations for Appointment', 1 April 2018 to 31 March 2019, 2019, section 3.1.

125 P Daly, *Theory of Deference in Administrative Law* (CUP 2012) chap 5; M Elliott, 'Proportionality and Deference: The Importance of a Structured Approach' in C Forsyth, M Elliott, S Jhaveri, M Ramsden and A Scully Hill (eds), *Effective Judicial Review: A Cornerstone of Good Governance* (OUP 2010) 264, 279.

126 P Craig, 'Proportionality, Rationality and Review' [2010] New Zealand Law Review 265, 288.

127 A Davies and J Williams, 'Proportionality in English Law' in S Ranchordas and B de Waard (eds), *The Judge and the Proportionate Use of Discretion* (Routledge 2016) 73-108, 97-105.

128 Lady Arden, 'Proportionality: The Way Ahead?' [2013] Public Law 498-518.

129 Carnwarth (n69).

130 Paterson (n110) 275-276.

law judicial procedure is adversarial and the civil law one inquisitorial,[131] judicial proceedings in England tend to ask parties to bring evidence to support their claim in court.[132] Accordingly, questions about burden of proof – who must prove what and at which stage – become crucial.[133] This might even lead to asking about who should bring what evidence for which part of the proportionality formula. Moreover, the determination of questions of facts are discouraged in judicial review. This unveils considerable procedural issues that the UKSC is not necessarily in a position to address in one landmark decision: incremental adaptations over time are likely to be needed, so that the practices and cognitive mindsets of litigants and judges become slowly attuned to the new processes.

However, this pragmatic stance needs to be contextualised: UKSC's annual activity shows the number of judicial reviews to be between ten and twenty per year, with a marked decrease over the last five years.[134] Even if proportionality were more widely used in English courts, it would not be used nearly as often as in the administrative courts of continental Europe. Thus, reliance upon proportionality would have a limited impact, even though judicial review cases have some effects beyond the cases themselves.[135] It is therefore doubtful whether proportionality would transform the relationship between the government and the judiciary, as feared.

4.4. Discursive constraints: a privileged relationship with a common law centred audience

The last key contextual constraint on the development of proportionality outside the realm of EU law and human rights is the question of the audience that English judges wish to reach when controlling administrative action. Stone and Mathews suggest that judges belong to a large cosmopolitan community that shares objectives and values alongside global constitutionalism. However, UKSC judges address a specific audience, that of Commonwealth

131 M Siems, *Comparative Law* (1st edn CUP 2014) 48-58.

132 For examples of issues with secondary evidence, see Lord Mance (n111) 114.

133 Rivers (n120).

134 From 25 less than five years ago, to ten in the last year, for which statistics are available. UKSC, Annual Report and Accounts 2018-19 (HC 2194) 41: 10 cases in judicial review (3 granted / 6 refused permissions to appeal; one other); UKSC, Annual Report and Accounts 2017-18 (HC 1031) 28: 18 cases (9 granted / 9 refused permissions to appeal); UKSC, Annual Report and Accounts 2016-17 (HC 31) 25: 22 cases (9 granted / 13 refused permissions to appeal); UKSC, Annual Report and Accounts 2015-16 (HC 32) 23: 25 cases (14 granted / 11 refused permissions to appeal).

135 M Sunkin, 'The Impact of Public Law Litigation' in M Elliott and D Feldman (eds), *The Cambridge Companion to Public Law* (CUP 2015) 236-255; L Platt, M Sunkin and K Calvo, 'Judicial Review Litigation as an Incentive to Change in Local Authority Public Services in England and Wales' (2010) (20 suppl 2) *Journal of Public Administration Research and Theory*, i243–i260.

and common law judges.[136] This is partly due to their role as the judicial committee of the Privy Council for several jurisdictions, but it extends to common law judges and audiences as well.[137]

As mentioned in Section 3.2, UK judges first recognised proportionality in a Privy Council case building on South African, Zimbabwean and Canadian case law. As late as 2016, Lord Carnwath asked for "*an authoritative review in this court of the judicial and academic learning on the issue, including relevant comparative material from other common law jurisdictions ... aim[ing] for rather more structured guidance for the lower courts than such imprecise concepts as 'anxious scrutiny' and 'sliding scales'*".[138] This is in line with research into reliance upon foreign case law by the Supreme Court suggesting that most references to foreign cases are from common law countries.[139] Similar factors probably play a role when borrowing techniques such as proportionality. With regard to proportionality, the UKSC refers to cases from the common law world as well as from Europe.[140] Finally, as the UKSC wishes its case law to be relevant for other common law jurisdictions,[141] it may fear that adopting a too strongly European stance may weaken its position among common law jurisdictions.

Individual judges are also intensively interacting with a common law audience. If annual reports from the UKSC reveal that judges visit Luxembourg, Strasbourg and other European courts on a regular basis, they also report extensive interactions with common law, beyond institutional interactions, such as the fact that two UK judges sit on the Hong Kong Court of Final Appeal. English judges regularly give lectures in common law jurisdictions and write papers published there. Among the topics discussed, judicial control over administrative action comes up regularly.[142]

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136 M Elliott, 'The United Kingdom Constitution' in R Mastermann and R Schütze (eds), *Cambridge Companion to Constitutional Comparative law* (CUP 2019) 69-91, 85-89, especially footnote 26 referring to C Harlow, 'Export, Import. The Ebb and Flow of English Public law' [2000] Public Law 240; R French, 'The Globalisation of Public Law: A Quilting of Legalities' in M Elliott, J Varuhas and S Wilson Stark (eds), *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (Hart 2018).

137 R Pennington-Benton and H Massod, 'The Judicial Committee of the Privy Council – Contribution to Judicial Review and Public Law' (2008) 23 Judicial Review 65-82.

138 *Youssef* (n91) [55] [our underlining].

139 C Lienen, 'Judicial Constitutional Comparativism at the UK Supreme Court' (2019) 39 Legal Studies 166, 176. She highlights transferability when courts share history, language values and legal traditions.

140 S Nason, 'The Impact of Pan-European General Principles of Good Administration on United Kingdom Administrative Law: Shared Principles in a Strained Relationship' in U Stelkens and A Andrijauskaitė (eds), *Good administration and the Council of Europe – Law, Principles, and Effectivity* (OUP 2020) 3/94-3/99.

141 C Saunders, 'Transplants in Public Law' in M Elliott, J Varuhas and S Wilson Stark (eds), *The Unity of Public Law?* (Hart 2018) 257-278.

142 eg Lord Mance (n111); Lord Carnwarth (n69).

This audience matters, as judges in other common law jurisdictions are establishing their own approaches to proportionality in ways that differ from jurisdiction to jurisdiction. Proportionality is not necessarily well-accepted in these jurisdictions or as widely accepted as in continental Europe. To give a few examples, India understands proportionality and reasonableness to be two different matters;[143] in Australia, similar constitutional issues have arisen in relation to fundamental freedoms as in the UK, leading to sophisticated scholarly debates;[144] in the Cayman Islands, proportionality is explicitly provided as a ground of review in the constitution, and yet questions of bifurcation still arise.[145]

5. Conclusions

To answer the question of the possible infiltration of proportionality into English administrative law, this paper first located proportionality in its wider narrative of global constitutionalism, then analysed how UK judges have been strategic in using technical aspects of proportionality in English administrative law beyond EU law and human rights. Finally, it turned to the contextual constraints that relational dynamics put on these judicial strategies. From this systematic analysis of proportionality in English administrative law, three lessons can be drawn.

The first lesson pertains to proportionality as a vehicle of judicial control over administrative action. Against the oft-repeated claim that proportionality is self-evident, this paper has demonstrated that this is not the case. For proportionality to carry a degree of self-evidence, it requires a specific constitutional context that is by no means universal. It is even less universal when one considers proportionality in terms of administrative law, a field where historical and political specificities have often led to distinctive relationships between its major actors; namely, the executive, the judges, and the citizens. This interaction between the constitutional and the administrative planes is usually overlooked in scholarship. Accounting for the specificities of English administrative law in an analysis of proportionality would contribute significantly to the foreseeable developments in this field owing to Brexit and the possible repealing of the HRA.

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143 L Marsons, 'Bifurcation, Unification, and Calibration: A Comparison of Indian and English Approaches to Proportionality' (2018) 2 Indian Law Review 26-50.

144 R Dixon, 'Calibrated Proportionality' (2020) 48 Federal Law Review 92–122; A Stone, 'Proportionality and its Alternatives' (2019) 48 Federal Law Review 123–153; C Bernal, 'The Migration of Proportionality to Australia' (2020) 48 Federal Law Review 288–291; E Douek, 'All Out of Proportion: The Ongoing Disagreement about Structured Proportionality in Australia' (2019) 47 Federal Law Review 551–582.

145 B Simamba, 'Proportionality as a Constitutional Ground of Judicial Review with Special Reference to Human Rights' (2016) 16 Oxford University Commonwealth Law Journal 125-159.

The second lesson pertains to rehabilitating the legal concept of transplants at a time when it has been widely overshadowed by scholarship preferring cross-fertilisation, migration, diffusion, and circulation of ideas. Analysing the legal techniques embedded in a transplant contributes to a better understanding of the underlying processes, making an alien technique more familiar and acknowledging its limits: factors such as time, context, procedures, and audience come prominently to the fore.

The third lesson pertains to the contribution of transplants to legal changes in administrative law. There is no single theory available to frame legal changes and administrative reforms. The suggestion made by Sweet Stone and Mathew that proportionality would lead to some isomorphism must be strongly challenged, now that we have the benefit of hindsight and knowledge of the process of change and adaptation in English administrative law. They rightly suggest that judges exercise strategic choices when selecting their tools and performing their control over administrative action. However, judges need to address a large range of audiences (e.g., key actors): the parties to the case, past, present, and future litigants, judiciaries in Europe and across common law systems. Consequently, the UKSC has strategically increased its control over administrative action, but kept a close eye on its most significant interlocutor, the government.

Overall, the rule of law hinges upon judicial control over administrative power. The UKSC (and the House of Lords before it) has been experimenting with securing this judicial control since the 1970s. Proportionality has been one tool in the toolbox. Now that the UK is leaving the EU, it remains to be seen how this toolbox will evolve, and how resistance and strategy among the main administrative actors may shape this evolution.

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The Case of Legal Certainty, an Uncertain Transplant Process in France

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Abstract

The reception of the fundamental principle of legal certainty in France shows how the characteristics of the French administrative system have consequences for the development and consideration of this principle. An analysis of the transplantation process reveals that it has been largely prepared, knowingly or unknowingly, to allow the principle of legal certainty to find at least a partial place in the French administrative system. It also shows the central role of the administrative judge in this process which led to the adaptation of the principle of legal certainty to the French legal order, and vice versa.

1. Introduction: the French administrative system and legal certainty, a hazardous meeting

The principle of legal certainty is considered to be a fundamental principle, which did not wait for European integration to develop.[1] Grounded on the rule of law, it expresses individuals' need for a stable and accessible legal order. More precisely, one may distinguish between the certainty of the law and the certainty of individual situations.[2] Thus, legal certainty has a double dimension: an objective and a subjective one. For many years now, it has been considered a fundamental European principle, with solid grounds in most European states. Obviously, there has been genuine European enthusiasm for the principle. French administrative law has been, and is still, to some extent equivocal. The principle of legal certainty had been considered foreign to the French system for a long time before its 'official' recognition in the ruling of

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1 J Van Meerbeeck, 'The Principle of Legal Certainty in the Case Law of the European Court of Justice: From Certainty to Trust' (2016) 41 European Law Review 275-288.

2 J-L Bergel, *Théorie générale du droit* (Dalloz 2012) 43 : 'Objective legal certainty, of the law and its sources, is threatened by the disorderly proliferation of texts, the growing instability of rules and the deterioration in the quality of the law [...] As for subjective legal certainty, of the rights of legal persons, parties and third parties, positive law already includes, in most systems, mechanisms that allow its protection.'[own translation].

the Council of State of 2006, the so-called KPMG case.[3] Yet, the principle of legal certainty was not ignored by the French legal order even before this case. Indeed, if we consider that the principle of legal certainty is closely linked to the rule of law, it is obvious that it was taken into account in the French system. Nevertheless, it is still relevant to speak of transplanting when analysing the development of the principle of legal certainty here.

Legal transplant can be understood, basically, as the dissemination of a legal concept from an exporting legal order to a receiving legal order.[4] Such a process is usually not linear and direct. In the case of the principle of legal certainty and the French system, it has been regularly assessed as the result of processes of convergence between systems under European influences, favouring the circulation of models, especially between the Member States of the European Union.[5] The originality of this article lies in its analysis of the process of legal transplantation of the principle of legal security, which allows for a deeper analysis, going beyond the observation of influences and convergences. It is interesting to carry out this analysis, because it makes it possible to consider both the openness of the French administrative system, especially with regard to a principle that was considered foreign to it, and the extent to which the interaction of actors in charge of various missions is decisive, both for the preparation and for the realisation of the transplant. Thus, the analysis of the legal transplant process is key to understanding the implementation of a foreign principle in the host legal order.

The transplant process can be identified when considering the principle of legal certainty in its justiciable form, i.e., as an element to be considered by the judge, particularly in the context of judicial review and the weighing up of the various interests in a given case. In fact, despite its inherent character in any State governed by the rule of law, the principle of legal certainty has for a long time not been taken into account by the administrative courts while reviewing administrative action. For some years now, however, it has found its place in judicial review, and this process is clearly the result of the circulation of standards of judicial review across legal systems. The transplant process was largely orchestrated by the Council of State, which continues to shape its content and its adaptation to the French administrative order. This process has been shaped by different factors, of distinct significance, playing a role in sponsoring or, on

3 CE Ass, *Société KPMG et autres*, n° 228460, 24 March 2006.

4 See Y Marique & E Slautsky, 'Resistance to Transplants in the European Administrative Space – An Open-Ended Reading of Legal Changes' in the introduction to this special issue.

5 J Bell, 'Mechanisms for Cross-fertilization of Administrative Law in Europe' in J Beatson and T Tridimas (eds), *New Directions European Public Law* (Hart 1998) 47-67; F Chaltiel, 'La sécurité juridique' in J-B Auby (ed), *L'influence du droit européen sur les catégories du droit public* (Dalloz 2010) 579; F Train, 'L'articulation des conceptions nationales et communautaires en matière de sécurité juridique et de protection de la confiance légitime' (2007/2008) Revue des affaires européennes, 611.

the opposite side, of limiting the development of the principle. Those factors may sometimes have been overcome or have led to unexpected developments.

Four main factors may be identified to explain why and how the principle of legal certainty in the French administrative system has been developed: the historical structure of administrative law, the Europeanisation process, the place of the Council of State in the development of French administrative law, and the ambivalent role of the actions of judicial authorities. More precisely, it is the interaction between those various factors which has guided the process of transplanting the principle of legal certainty.

2. The cultural factor as delaying the explicit recognition of legal certainty

The unease provoked by the principle of legal certainty, taking the form of indifference or even reluctance to integrate it, may be explained mainly and primarily by the particular characteristics of French administrative law. Nevertheless, there have been regular discussions on the relevance of the principle of legal certainty for the French legal system.

2.1. The historical development of French administrative law

French administrative law emerged in the 19th century, following the French Revolution. In this context its development was a means to ensuring the effective separation of powers, in order to prevent judiciary power adjudicating on administrative matters.[6] Promoting administrative law was a way to provide a specialised set of rules for dealing with administrative matters. Consequently, administrative law was developed to ensure that administrative matters would be excluded from the judiciary's scope of jurisdiction (*juge judiciaire*). To this extent, it was not really regarded as a way to limit administrative powers, but rather as a way to take into account the peculiarities of administrative functions.[7] The basic idea was to decide that administrative matters should be adjudicated and reviewed by administrative authorities themselves. The Council of State, set up under Napoleon Bonaparte's regime in 1799, was not an independent court, but rather a 'councillor' to the head of state. It was only from

6 Loi of 16 and 24 August 1790 *sur l'organisation judiciaire*, article 13: 'Judicial functions are separate and shall always remain separate from administrative functions. Courts shall not, on pain of forfeiture, disrupt in any way the operation of administrative bodies, or summon administrators to appear before them by reason of their duties' [own translation].

7 B Sordi, 'Révolution, Rechtsstaat and the Rule of Law: Historical Reflections on the Emergence and Development of Administrative Law' in P Lindseth, S Rose-Ackerman and B Emerson (eds), *Comparative Administrative Law* (2nd edn Edward Elgar 2017) 23-37.

1872 onwards that the Council of State became a proper court with jurisdiction to rule on cases involving administrative authorities.[8] This led to the development of a specific corpus of rules applicable to administrative authorities and activities, under the authority of the Council of State.[9] The French system is then dualistic, composed of two different judicial orders: the judiciary courts and the administrative courts (which now comprise administrative courts and administrative courts of appeal, as well as the Council of State). Judiciary courts are empowered to apply private law to private activities, whereas the jurisdiction of administrative courts encompasses administrative activities which imply the enforcement of prerogatives of public power (*prérogatives de puissance publique*).[10] For a long time, administrative law mainly developed through case law. Thus, French administrative law qualifies as judge-made law. Case by case, the Council of State has developed the fundamental principles and rules underlying administrative action.[11]

In this context, the Council of State has widely promoted an objective conception of administrative law based on the pursuit of the general interest by public bodies. This implies that the first aim of administrative law is to ensure the enforcement of the general interest, rather than protection of individual rights, meaning that sometimes the balancing of interests may be to the detriment of the protection of individual rights. Thus, the Council of State's task is, first, the promotion of an objective conception of the legality principle. For a long time, due to the limited promotion and weakness of constitutional law, the legality principle was understood as the compliance of administrative decisions with legislative rules. From the second part of the 20th century onwards, however, the promotion of individual rights began to be included in administrative law through the development of general principles of law (*principes généraux du droit*). However, this conception, centred on the administration, rather than on individuals, creates an unfavourable context for the recognition of the legal certainty principle.

2.2. Highlighting French specificities

For decades, it was pointed out that the principle of legal certainty could not find its place in the French legal order because of the very logic

8 Loi of 24 May 1872 *sur la réorganisation du Conseil d'État*, article 9: 'The Council of State (Conseil d'État) adjudicates ... on actions for the annulment (annulation pour excès de pouvoirs) of the acts of the various administrative authorities'; H McCleave Cake, 'The French Conseil d'État — An Essay on Administrative Jurisprudence' (1972) 24(3) Administrative Law Review 315-334.

9 Tribunal des conflits, *Blanco*, 8 February 1873.

10 Conseil constitutionnel (CC), Decision n° 80-119 DC, Loi de validation législative: Conseil constitutionnel, 22 July 1908; Décision n° 86-224 DC, Loi relative au Conseil de la concurrence, 23 January 1987.

11 J Chevallier, 'Le Conseil d'Etat, au coeur de l'Etat' (2007) 123 Pouvoirs 5-17.

of the administrative system. In particular, it seemed to be opposed to the principle of mutability.[12] Based on the general interest, this principle refers to the constant adaptation of administrative action, which therefore implies the potential calling-into-question of administrative acts, where the general interest takes precedence over the protection of the rights acquired by individuals.[13] In this respect, the principle of legal certainty appears, then, to be a principle that paralyses administrative action, while at the same time calling into question the satisfaction of the general interest. According to the classical conception, '(r)egulation does not create any acquired right to its maintenance'.[14] However, one should not have an absolute vision of the principle of mutability, and the French system has never been radical in this regard. Thus, it is necessary to distinguish between a legal act and the situation it creates. An act benefits from the principle of mutability, whereas the situation created benefits from the principle of intangibility: the individual effects of an act are thus protected. Such an understanding of the principle of mutability then makes it more open to considerations of legal certainty, and justifies rules limiting the repealing of an administrative act in certain cases, or the time limits applicable to a judicial appeal, thus preserving the legal certainty of citizens *vis-à-vis* third parties. Nevertheless, it is accepted that, in the French legal system, citizens do not, in principle, have any subjective rights that can be invoked against the administration while adopting or amending regulations.[15]

However, some argue that, in addition to the lack of any need for such a principle, there would be no legal basis for enforcing such a principle in the French legal order, noticeably because of a lack of reference in the Constitution. However, some have pointed out that in the French legal order there are textual bases for deriving an unwritten principle or requirement of legal certainty without relying on a constitutional revision procedure.[16] Furthermore, as will be shown once more below, the absence of an explicit constitutional reference is not, in most cases, considered to be a decisive obstacle to the promotion of a 'new' principle.

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12 CE, *Compagnie des chemins de fer de l'est et autres*, n° 4244, 6 December 1907.

13 It is one of the three 'laws' of public service, see R Chapus, *Droit administratif général*, vol 1 (Montchrestien, Domat droit public 2001) 604; J-M Auby, 'L'abrogation des actes administratifs' (1967) I Actualité Juridique du Droit Administratif 131.

14 Auby (n13) 136; CE, *Mme Lacroix*, n° 287845, 13 December 2006 (decided a few months after the *KPMG* case).

15 N Foulquier, *Les droits publics subjectifs des administrés. Émergence d'un concept en droit administratif français du XIX^e au XX^e siècle* (Dalloz 2003).

16 Among the constitutional sources often mentioned are articles 2 and 16 of the Declaration of Human and Civic Rights of 26th August 1789. See M De Salvia, 'La sécurité juridique en droit constitutionnel français' (2001) 11 Cahiers du Conseil constitutionnel; AV Naquet, 'La sécurité en droit constitutionnel: non-dit ou non-être?' in *La sécurité en droit public*, 2018.

2.3. Discussions on the relevance of the principle of legal certainty in the academic world

While for a long time the principle of legal certainty was widely presented as absent from French administrative law, it is noteworthy that it has been the subject of much interest from French academics without, however, saying that the French doctrine has developed a 'real cult'[17] around legal certainty. The points of view addressed are certainly different. Since the 1990s, PhD dissertations have been devoted to the topic.[18] Especially in administrative law, a number of academics have aimed at recognizing the existence of a principle of legal certainty in most legal orders, while stressing that, in France, such a principle is not necessary. Some have argued that the concept of legal certainty is too vague, too uncertain, to be invocable,[19] and above all to constitute a limit to the discretionary power of the administration.[20]

One may have wondered whether it could be a 'principle that we are missing'[21], a question also considered by the French Constitutional Law Association.[22] Others have considered its possible incorporation in French administrative

17 F Rigaux, *Introduction à la science du droit* (EVO 1975) 373.

18 F Douet, *Contribution à l'étude de la sécurité juridique en droit fiscal interne français* (LGDJ 1997); F Touboul, *Le principe de sécurité juridique, essai de législation* (Thèse dactyl, Paris XI 1996); I Fournol, *Le principe de sécurité juridique en droit communautaire et en droit administratif* (Thèse dactyl, Paris II 1999); E Ben Merzouk, *Le principe de sécurité juridique en droit positif* (Thèse dactyl, Paris II 2003); A-L Valembois, *La constitutionnalisation de l'exigence de sécurité juridique en droit français* (Paris, LGDJ 2005); P Raimbault, *Recherches sur la sécurité juridique en droit administratif français* (LGDJ 2009); T Piazzon, *La sécurité juridique* (Defresnois-Lextenso 2009).

19 J-E Schoettl, 'Décisions du Conseil constitutionnel. Loi MURCEF' (1997) Actualité Juridique du Droit Administratif 971; L Favoreu and L Philip, *Les grandes décisions du Conseil constitutionnel* (Dalloz 2007) 793.

20 S 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 ' (2001) 11 Cahiers du Conseil Constitutionnel.

21 B Pacteau, 'La sécurité juridique, un principe qui nous manque ?' (1995) (special issue) Actualité Juridique du Droit Administratif 151.

22 See the various reports and debates around the conference 'Constitution et sécurité juridique' organised in Aix-en-Provence in September 1999, Annuaire International de Justice Constitutionelle 71 ; B Mathieu, 'Le principe de sécurité juridique' (2001) 11 Cahiers du Conseil constitutionnel 66.

law,[23] or in specific fields of public law.[24] Moreover, comparative approaches also have their place.[25] Eventually, other articles have appeared from authors with a strong European background, aimed more at developing the idea of circulating legal solutions, as a source of inspiration for French system. It is also worth noting that practitioners such as lawyers,[26] notaries,[27] and public authorities,[28] have demonstrated an interest in the principle of legal certainty.

Of course, it is always complicated to determine the reasons why these actors and authors have become interested in the principle of legal certainty. Concerning the actions of the Senate, they are part of a broader advocacy approach for better security of the normative framework applicable to local authorities, criticizing in particular the legislative inflation which generates vagueness and complexity for local authorities, and especially locally elected officials.[29] Moreover, it can legitimately be considered that developments at the European Union level as well as a growing general interest in the circulation of norms, including in administrative law, have provided a context conducive to arousing

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23 M Fromont, 'Le principe de sécurité juridique' (1996) (special issue) Actualité Juridique du Droit Administratif 178 ff; D Labetoulle, 'Principe de légalité et principe de sécurité' in *L'État de droit, Mélanges Guy Braibant* (Dalloz 1996) 403; L Vapaille, 'Le principe de sécurité juridique: réalité et avenir en droit administratif français' (10 Aug 1999) 158 Les Petites Affiches 18; M Delamarre, 'La sécurité juridique et le juge administratif français' (2004) Actualité Juridique du Droit Administratif 186; A Cristau, 'L'exigence de sécurité juridique ' (2002) Recueil Dalloz 2814; Y Benhamou, 'Cursives remarques sur la sécurité juridique ' (3 May 1996) 54 Les Petites Affiches 19; G Pelissier, 'Développements récents de l'impératif de sécurité juridique' (20 Feb 1998) 22 Les Petites Affiches 6; L Tesoka, 'Principe de légalité et principe de sécurité juridique en droit administratif français' (2006) Actualité Juridique du Droit Administratif 2214.

24 J-R Pellas, 'Le principe de sécurité juridique en droit fiscal' in *Études en l'honneur de Georges Dupuis* (LGDJ 1997) 261; R Ricci, 'Les sources normatives du principe de sécurité juridique en droit public économique' (2000) Revue Internationale de Droit Economique 299; P Hocreitere, 'Sécurité et insécurité juridiques après la loi Solidarité et renouvellement urbains' (2003) Revue Française de Droit Administratif 141; B Teyssie, 'Sur la sécurité juridique en droit du travail' (2006) Droit social 703.

25 F Moderne, 'Une communicabilité contrastée: le principe de sécurité juridique en droit français et espagnol' in *Liber amicorum Jean-Claude Escarras. La communicabilité entre les systèmes juridiques* (Bruylant 2005) 835.

26 A conference was organised by the Confederation of Lawyers, see 'Les entretiens de Nanterre' (1990) 48 Juris-Classeur Périodique 1. The Senate also discussed the issue during a conference 'Sécurité juridique et action publique locale' (held on 29 April 1999). A report has added information to these discussions: J-P Delevoye and M Mercier, *Sécurité juridique, conditions d'exercice des mandats locaux: des enjeux majeurs pour la démocratie locale et la décentralisation*, Les rapports du Sénat, n° 166, 1999-2000; Y Gaudemet, 'La sécurité juridique' (1996) 8/9 Géomètre 26 ff; C Lepage, 'Sécurité juridique et contrats des collectivités locales' (9 and 10 Jun 1999) 160/161 Gaz Pal 1-49.

27 89th Congress of Notaries, Urbanisme et sécurité juridique (Notaires de France 1993); 94th Congress of Notaries, Liberté contractuelle et sécurité juridique (1998) 54 Les Petites Affiches 1.

28 The French Senate also organized a conference on this topic in 1999, 'Sécurité juridique et action publique locale'. See also Delevoye & Mercier and Gaudemet (n26).

29 Senate, *Renforcer la sécurité juridique de l'action publique locale*, 18 January 2000, available at https://www.senat.fr/rap/r99-166/r99-166.html accessed 23 April 2021.

curiosity and interest.[30] Furthermore, the consideration of solutions developed in European Union law could be part of the reflections on a common administrative law. More precisely, Michel Fromont, a specialist in German administrative law, studied the principle of legal certainty in Union, French and German law.[31] Above all, his article is part of a special issue on Administrative Law and European Community Law, edited in the review 'Actualité Juridique du Droit Administratif' (AJDA).

Among this work, a special issue published in the Cahiers du Conseil Constitutionnel in 2001 is noteworthy for its inclusion of contributions revealing the position of French public law on the case law of the European Court of Justice regarding the legal certainty principle. Two contributions are particularly relevant because they are authored by members of the Council of State. To a certain extent, they reflect the state of acclimatisation and openness of the French administrative system with regard to the principle of legal certainty. First, an article on 'The principle of legal certainty in the case law of the Court of Justice of the European Communities'[32] was written by Jean-Pierre Puissochet and Hubert Legal, then respectively a judge at the Court of Justice and a judge at the Court of First Instance. Above all, it is important to stress that they are members of the Council of State. Indeed, judges of French nationality within the Court of Justice are irremediably either magistrates of the Court of Cassation or Councillors of State. For completeness' sake, it should be noted that this article was published in the *Cahiers du Conseil constitutionnel*, a legal journal directed by the Constitutional Council. Puissochet and Legal first explain to what extent the recognition of the principle of legal certainty by the Court of Justice requires national authorities to respect it when implementing Union law. They then stress the limits of this case law by stating:

> *[t]he fact remains that the practice of the Community courts in this area, which it would certainly be fanciful to pretend to export as it stands, can be explained fairly well by the situation of compromise between dissimilar legal traditions in which the work of the judges in Luxembourg finds itself.*[33]

Moreover, they point out that French public law provides for most of the solutions developed by the ECJ case law on legal certainty, whereas the same cannot be said for the principle of legitimate expectations. The authors' conclusion is realistic about the caution expressed by the members of the French administrative courts with regard to the principle of legal certainty, seeking to

30 See below Section 3.
31 Fromont (n23).
32 J-P Puissochet and H Legal, 'Le principe de sécurité juridique dans la jurisprudence de la Cour de justice des Communautés européennes' (2001) 11 Cahiers du Conseil constitutionnel.
33 Puissochet and Legal (n32).

limit its potential impact on French administrative law,[34] even if this impact already seems unavoidable at this stage.

From a comparable perspective, we can refer to, in the same special issue, the contribution of Sophie Boissard, also a member of the Council of State, entitled 'How to guarantee the stability of individual legal situations without depriving the administrative authority of all means of action and without compromising on the respect of the principle of legality? The difficult dilemma of the administrative judge'.[35] The title testifies to the French system's desire not to be on the sidelines of European developments concerning the principle of legal certainty and, at the same time, to control its channels of reception in the national legal order. The article is interesting because it indicates, firstly, that the principle of legal certainty in itself would not bring about any upheaval for French administrative law. Many of the solutions it contains concerning the accessibility of the law or the stability of the law are already recognised. However, in a final stage, the author stresses that this principle could be useful for bringing relevant changes in French administrative law, noticeably regarding better safeguarding of the stability of individual situations.

This approach confirms the decisive weight of the administrative judges, and especially of the supreme administrative judges, in the production and shaping of administrative law. We also see that, from the perspective of French administrative law, this acclimatation by the administrative judges is an essential step for the appropriation of the principle.[36]

Another example is the contribution of Daniel Labetoulle, important former member of the Council of State, in the *Mélanges* dedicated to Guy Braibant, also former member with a significant academic career. It is perhaps necessary to point out that the *Mélanges* are works that aim to pay tribute to an eminent academic or lawyer and allow the contributing authors to tackle more original, innovative subjects, or with more freedom, especially for members of the Council of State. In an intervention in 2018 entitled 'Légalité et sécurité juridique en droit interne' (Legality and legal certainty in national law), on the occasion of a meeting entitled 'Entretiens du Conseil d'Etat',[37] Daniel Labetoulle referred

34 ibid: 'We therefore believe that we are dealing with a useful principle in Community case law, which must be implemented, as a fundamental principle, by the courts of the Member States in the context of their review of the application of Community law, but which does not require them - at least in the case of the French courts - to make significant changes to their reasoning and methods.' [own translation].

35 Boissard (n20).

36 ibid: 'The first question that may be asked concerns the need for the administrative court, as part of the doctrine invites it to do, to develop its case law in order to apply the Community principle of legal certainty more widely or even to enshrine the existence of an autonomous principle of legal certainty in domestic law in order to better define the terms of its review.' [own translation].

37 D Labetoulle, 'Légalité et sécurité juridique en droit interne' (Entretiens du Conseil d'Etat, 16 November 2018).

to his previous article, emphasising his interest in the subject, but above all the regret that he had, as a government commissioner,[38] 'failed to get the jurisprudence that a pecuniary decision cannot create rights to be abandoned.'[39] He also expresses his own 'reservations about the most recent Alitalia case law'.[40] In the *Alitalia* judgment,[41] the Council of State enshrined the general principle of law according to which the administration has a duty to repeal any act that has been illegal since its origin, or has become illegal, in particular as a result of the adoption of European Union law. Daniel Labetoulle went on to point out that the topic of this article was also a 'double wink'.[42] On the one hand, it was a reference to the 1991 report of the Council of State prepared under the authority of Guy Braibant, then President of the Report and Studies Section. On the other hand, he reported that

> *I had often told Guy Braibant that I was in complete disagreement with case law adopted in 1966 in accordance with his conclusions (Ville de Bagneux) which, starting from the idea that, according to the Dame Cachet case law, the administration could withdraw an act creating rights for illegality if the time limit for appealing against this act had not expired, had deduced that, when the time limit for appeal had not begun to run, withdrawal was possible indefinitely, without any time limit conditions: in this case the act creating rights could be withdrawn six months, one year, ten years after its enactment.*[43]

These contributions are therefore part of publications questioning approaches to French administrative law, especially those based on a conception of legality that is sometimes considered too radical. Daniel Labetoulle, in his 1996 article, thus pleaded for 'reciprocal accommodations'[44] of the principles of legality and legal security.

Consequently, the existence of a concern for legal certainty is evident and is reflected in particular in the desire to facilitate the transplantation of the principle into national law,[45] showing that the French administrative system is not so hostile to it, and shaping a more favourable context for its future recog-

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38 The government commissioner was replaced by the public rapporteur (*rapporteur public*). Despite being an ordinary member of the court, he has no adjudicating tasks. S/he merely gives his/her assessment of the case at hand and formulates what s/he thinks is the best possible outcome, proposing, if necessary, a change in the case law. His/her function is comparable to the one of the Advocate General before the ECJ.

39 Labetoulle (n37).

40 ibid.

41 CE, Ass., *Alitalia*, n° 74052, 3 February 1989.

42 Labetoulle (n37).

43 Labetoulle (n37).

44 ibid.

45 Raimbault (n18).

nition. Here, the Europeanisation process has played a significant role in initiating the circulation of the principle of legal certainty, testing the openness of French administrative law.

3. The Europeanisation process as a factor of circulation of the principle of legal certainty

What has been undeniably decisive is the promotion of the principle of legal certainty at European level, by Member States of the Union, the Court of Justice and the European Court of Human Rights.

3.1. Solutions developed by the European States

The principle of legal certainty is deeply rooted in the German system. In Germany, the guarantee of legal certainty counts as a fundamental constitutional principle. The German Constitutional Court mentions, in a decision of 1 July 1953 (later confirmed on 19 December 1961), that legal certainty is a key component of the *Rechsstaat*. It includes four principles: good faith (or legitimate expectations), clarity of legal rules, publicity of legal norms, and the *res judicata* principle. What characterizes the German conception is the particular attention paid to its subjective dimension, aiming at also protecting individual situations and rights.[46] This principle has also been developed in Spain, where it is recognized by the Constitution itself,[47] and in Portugal, Belgium, Luxembourg, Denmark, and Lithuania. Moreover, even in systems in which it is not expressly enshrined, it obviously exists, can take different forms, and be linked to other related notions.[48] For example, in Italy, the principles of good faith (*buona fede*) and trust (*affidamento*) are recognised in public law.[49] Even in common law systems, such as the United Kingdom or Ireland, the promotion of concepts such as estoppel or legitimate expectations may fall under the principle of legal certainty.[50]

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46 DS De Russel & P Raimbault, 'Nature et racines du principe de sécurité juridique: une mise au point ' (2003) 1 Revue Internationale de Droit Comparé 85; J Schwarze, *Droit administratif européen* (Bruylant 2009) 933; J-M Woehrling, 'Les principes de sécurité juridique et de confiance légitime dans la jurisprudence administrative française: un exemple de réception en droit français d'un principe européen d'origine allemande' in *Verfassung und Verwaltung in Europa* (Nomos 2014) 437.

47 Art 9 of the Spanish Constitution of 27 December 1978.

48 X Lamprini, *Les principes généraux du droit de l'Union européenne et la jurisprudence administrative française* (Bruylant 2017) 291 ff.

49 M Fromont, *Droit administratif des Etats européens* (PUF 2006) 266.

50 P Craig, *Administrative Law* (Sweet & Maxwell 2016) 672; R Thomas, *Legitimate Expectations and Proportionality in Administrative Law* (Hart Publishing 2000).

3.2. Promotion of legal certainty by the Court of Justice

The case law of the Court of Justice is undeniably a key element in the circulation of the principle of legal certainty within the European area.[51] The Court of Justice has recognised the principle of legal certainty within the Union's legal order since the early 1960s. It is clearly linked to the stability, accessibility, and clarity of the legal norm, which takes on a particular dimension from the point of view of the Union's legal order of integration. The principle of legal certainty is a general principle and a fundamental requirement of Union law.[52] It 'aims to ensure both the quality and integrity of the norm and the stability of legal situations.'[53] Above all, it is the basis for the recognition of rules such as the prohibition of retroactivity, the clarity and predictability of legal rules, and the limitation of the modulation of effects of its rulings over time.

This case law has undeniably had an impact on the legal systems of the Member States. As a general principle of Union law, it can be invoked against national authorities, especially national administrative authorities, when they 'implement' Union law or when their actions fall within the scope of EU law.[54] In these cases, French administrative authorities, and consequently the French administrative judge, have to respect and to ensure compliance with the EU general principle of the law of legal certainty.[55] Obviously, the status of a 'general principle of EU law' is very powerful, to ensure the dissemination of this legal principle in the Member States' legal orders.

3.3. Promotion of legal certainty by the European Court of Human Rights (ECtHR)

While the role of the Court of Justice in promoting legal certainty at the European level is widely emphasised, the role of the European Court of Human Rights should not be overlooked. Indeed, it may have been at least equally important, especially since the authority of its case law is not limited, at least from a formal point of view, by the same conditions as Union law.

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51 Lamprini (n48) 290 ff.

52 Joined cases 7/56, 3/57 to 7/57 *Mlle Dineke Algera, M. Giacomo Cicconardi, Mme Simone Couturaud, M. Ignazio Genuardi,Mme Félicie Steichen contre Assemblée Commune de la CECA* EU:C:1957:7; Joined cases 42 and 49/59 *S.N.U.P.A.T. v. Haute Autorité de laCECA* EU:C:1961:5; J Boulouis, 'Quelques observations à propos de la sécurité juridique' in *Liber Amicorum P. Pescatore* (Nomos-Verlag 1987) 53.

53 R Mehdi, 'Variations sur le principe de sécurité juridique' in *Le droit de l'Union européenne en principes,Liber amicorum en l'honneur de Jean Raux* (Apogée 2006) 177, 178.

54 D Simon, 'L'application de la Charte par les juges administratifs' (2014) Europe 1; S Platon, 'La Charte des droits fondamentaux et la "mise en œuvre" nationale du droit de l'Union: précisions de la Cour de justice sur le champ d'application de la Charte' (2013) (chron 11) Revue des Libertés et Droits Fondamentaux.

55 See below.

It has, however, followed the path traced by the Court of Justice. Thus, in the *Marckx* judgment, the Court considered that the legal certainty principle is 'necessarily inherent in both Convention law and Community law'.[56] In its case law, several rights linked to the principle of legal certainty have been recognised, even if the principle is not explicitly enshrined in the Convention.[57] The requirements of accessibility, predictability and stability of the law are attached to it. It is also worth mentioning that the concept of 'legitimate expectations' (*espérance légitime*) has been widely developed, according to Article 1 Protocol n°1,[58] which may also have consequences for the dissemination of the legitimate expectations principle across Member States.[59]

The principle of legal certainty is therefore, undeniably, a widely circulating principle. The former President of the European Court of Human Rights stressed that 'the principle of legal certainty is interesting because it comes from German law and has been imported into the case law of the Court (and into different national systems in Europe) through the European Court of Justice and Community law',[60] adding that 'the case law of the European Court of Human Rights is, of course, a collective creation'. Many influences are exchanged and shared by judges.

However, it is worth noting that the prevailing conception of the legal certainty principle which is promoted at the European levels is not so much about the immutable stability of the law, but rather about the preservation of individual rights in a changing context.

4. The Council of State as the conductor in chief of the integration of the principle of legal certainty

The reception process was initially, and finally for quite a long time, in the hands of the Council of State. Clearly, the borrowing of principles of European law, as well as the inspiration drawn from other national systems, was from the outset expressly noted, whether in the Council of State's 2006 report on legal certainty, or following the case law enshrining the principle of legal certainty.

56 *Marckx v. Belgium* (1979) Series A No 31 [58].

57 M De Salvia, 'La place de la notion de sécurité juridique dans la jurisprudence de la Cour européenne des droits de l'homme' (2001) 11 Cahiers du Conseil constitutionnel.

58 *Kopecky v. Slovaquie* (2004) 41 EHRR 944.

59 See below.

60 J-P Costa, 'Concepts juridiques dans la jurisprudence de la Cour européenne des droits de l'homme: de l'influence de différentes traditions nationales' (2004) 57 Revue Trimestrielle des Droits de l'Homme 101.

4.1. A legal system more open to legal certainty requirements

Through the intervention of the administrative judge, the requirements of legal certainty began to have a more significant impact on the French administrative system. Above all, what reflects the consideration of the requirement of legal certainty, in line with the German conception and that of the Court of Justice, is the development of a conception which takes into account the importance of preserving the stability of individual situations. The judge has thus developed, following a case-by-case approach, ways to limit the consequences of illegality. The *Conseil d'Etat* has recognised the possibility of neutralising the effects of certain illegalities. In its *Vassilikiotis*[61] and *Titran*[62] judgments the judge developed powers of partial annulment with the delivery of an injunction, or of conditional abrogation with differed effects. Even more emblematic, and directly inspired by the case law of the Court of Justice,[63] the *AC!* judgment[64] was the first case in which the Council of State modulated the effects of the annulment over time. It then stressed that the

retroactive effect of the annulment is likely to have manifestly excessive consequences because of the effects that this act has produced and the situations that may have arisen when it was in force, and because of the general interest that may attach to a temporary maintenance of its effects, it is for the administrative judge (…) to determine whether the annulment is retroactive or whether it is in the general interest to maintain its effects temporarily, while taking into consideration, on the one hand, the consequences of the retroactivity of the annulment for the various public or private interests involved and, on the other hand, the disadvantages that a limitation in time of the effects of the annulment would present, with regard to the principle of legality and the right of individuals to an effective remedy; that it is for the Court to assess, by comparing those factors, whether they can justify derogating exceptionally from the principle of the retroactive effect of contentious annulments and, if so, to provide in its annulment decision that, subject to any contentious actions instituted on the date of the annulment against acts taken on the basis of the act in question, all or part of the effects of that act prior to its annulment shall be regarded as definitive or even, where appropriate, that the annulment shall not take effect until a later date to be determined by it.[65]

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61 CE, *Vassilikiotis*, n° 213229, 29 June 2001.
62 CE, *Titran*, n° 222509, 27 July 2001.
63 See O Dubos and F Melleray, 'La modulation dans le temps des effets de l'annulation d'un acte administratif' (2004) (n° 8, Étude 15) DA 11.
64 CE Ass., *Association AC!*, n° 255886, 11 May 2004.
65 ibid. [own translation].

Such an approach is quite similar to that adopted by the Court of Justice.[66] However, the Council of State has made sparing use of it, since it does not involve any major upheavals in the litigation,[67] and it is only used in exceptional cases.

4.2. The 2006 Council of State report on legal certainty[68]

Each year the Council of State draws up a report which aims both to give an account of its activity during the past year and to deal with a topical legal issue. This annual report is part of the dual functions of the Council of State, both advisory and contentious. In the 2006 report, and therefore the one that concerned the activity of 2005, the topic was legal certainty. The topic was not new for the Administrative Supreme Court, since the annual report of 1991 had already covered this topic.[69] This choice is obviously not insignificant or innocent. It is clearly a matter of laying the foundations for future developments. In this report, the Council of State notes the broad development of the principle of legal certainty, particularly in other European systems, also with reference to constitutional case law. Moreover, what is interesting is that the concept of legal certainty that will prevail following the *KPMG* ruling of the Council of State has already been developed. It is based on a number of axes reinforcing the objective dimension of legal certainty: accessibility, simplification, and the quality of legislation. So, the promotion of the legal certainty principle is here interconnected with the need to fight against the complexity of law. Of course, it already expresses a way to take into consideration the situations of citizens, but it does not aim at creating more subjective rights for the protection of their individual situations. And, in the report, the Council of State stresses the fact that 'despite the absence of solemn recognition of a principle of legal certainty, numerous rules have resulted from this'.[70] It is worth noting that in the report the Council of State widely referred to the case law of the

66 Article 264 TFEU; Case C-402/05 *Kadi and others v. Commission* EU:C:2008:461.

67 CE Section, *France Télécom, Rec.*, 86, 25 February 2005; EP Bordenave, 'Conclusions' (2005) Revue Française de Droit Administratif 787; (2005) Actualité Juridique du Droit Administratif 997, chr. Landais and Lenica; (2005) 57 DA note Bazex and Blazy; (2005) Juris-Classeur Périodique A 1162, note Saulnier-Cassia; CE 11 January 2006 *Association des familles victimes du saturnisme*, Req. n° 267251; (2006) Actualité Juridique du Droit Administratif 116 ; CE 12 December 2007 *M. Sire* et *M. Vignard*, Req. n° 296072 et 296818; (2008) Actualité Juridique du Droit Administratif 638, concl Guyomar.

68 Available at https://www.conseil-etat.fr/ressources/etudes-publications/rapports-etudes/rapports-annuels/securite-juridique-et-complexite-du-droit-rapport-public-2006 accessed 23 April 2021.

69 Council of State, 'De la sécurité juridique' EDCE n° 43, *Rapport public1991* (Documentation Française 1992).

70 Council of State, 2006 report, 291.

Court of Justice, and to European Member States, to explain, in a summary comparative perspective, how the legal certainty principle is enforced.[71]

4.3. The reception of legal certainty while 'enforcing EU law'

Since 2001, there has been no further discussion of the primacy of general principles of Union law over national law, such as their direct effect, at least not down to the legislative level.[72] Thus, they can be invoked against national administrations whenever they 'implement Union law'[73] or in situations 'governed by Union law'[74]. Consequently, in such a case, applicants could rely on the principle of legal certainty before the administrative court, and even on the principle of legitimate expectations. Classically, it is considered that the vehicle of Union law 'constitutes a strong incentive to consider their acculturation into the national legal order'.[75]

4.4. The enforcement of legal certainty in purely national cases

The general principle of the law of legal certainty was recognised in the *KPMG* ruling of 24 March 2006, handed down by the *Conseil d'Etat en Assemblée* (the solemn Council of State formation that decides on important cases or reversals).[76] The challenged decree aimed to strengthen the independence of 'statutory auditors' by approving their code of ethics, following the Enron affair. In particular, the applicants challenged the legality of the decree in the light of the principle of legal certainty. The judge then considered

that a new legislative or regulatory provision cannot apply to contractual situations in progress on the date of its entry into force, without thereby taking on a retroactive character (...); that, irrespective of compliance with this requirement, it is on the authority vested with the regulatory power to enact, for reasons of legal certainty, the transitional measures implied, if necessary, by a new regulation.[77]

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71 See, for example, for the question of abrogation of administrative acts, Council of State, 2006 Report, 283.

72 CE, *Syndicat national de l'industrie pharmaceutique*, n° 226514, 3 December 2001; A-L Valembois, 'La prévalence des principes généraux du droit communautaire sur le droit national' (2002) Actualité Juridique du Droit Administratif 1219.

73 CE, *SCI Résidence Dauphine*, n° 128516, 30 November 1994; CE Ass., *Fédération nationale des exploitants agricoles et autres*, n° 221274, 11 July 2001.

74 CE, *Mme Triboulet et Mme Brosset-Pospisil*, n° 217646, 6 March 2002.

75 Raimbault (118) 25.

76 See P Cassia, 'La sécurité juridique, un "nouveau" principe général du droit aux multiples facettes' (2006) Recueil Dalloz 1190 ff; F Moderne, 'Sécurité juridique et sécurité financière' (2006) Revue Française de Droit Administratif 485.

77 CE Ass., *Société KPMG et autres*, n° 228460, 24 March 2006. [own translation].

In the present case, failure to adopt transitional measures leads to the illegality of the decree. Thus,

in the absence of any transitional provision in the contested decree, the requirements and prohibitions resulting from the code would, in the contractual relations lawfully instituted prior to its intervention, cause disturbances which, because of their excessive nature in the light of the objective pursued, are contrary to the principle of legal certainty.[78]

This judgment thus marked the 'domestication' of the principle,[79] since the case did not fall within the scope of EU law. Inspiration from European solutions remained discreet in the ruling. However, it is worth noting that distinguished members of the Council of State (Jean-Marc Sauvé, former vice-president of the Council of State, and Bernard Stirn, former president of the litigation Section of the Council of State) expressly recognized the principle.[80]

One can consider that explicit recognition of legal certainty should not be a vector for deep evolutions, since French administrative law had progressively become more and more familiar with it. The transplantation process had obviously started earlier. The principle became latent because the French legal order is permeable to European legal developments and within the Member States of the Union. Nevertheless, official recognition of legal certainty as a general principle of law by the Administrative Supreme Court was awaited in order to consider it part of French administrative law. Since then, its consequences have gradually irrigated the French legal system.[81]

4.5. The follow-up to the *KPMG* case

It is always sensitive and complex to identify with certainty the developments brought about by the innovative enshrinement of a principle, since such references are rarely explicit. Above all, it should be stressed that the French administrative system did not wait until 2006 to take into consideration the acquired rights of citizens, in any case to better protect the individuals against the administration.[82] However, it is worth stressing that the *KPMG* case was a key step in confirming such trends and furthering these developments.

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78 CE Ass. *Société KPMG et autres*, n° 228460, 24 March 2006. [own translation].

79 Raimbault (n18) 28.

80 See for example B Stirn, 'Ouverture de la première table-ronde des entretiens du contentieux du Conseil d'Etat' 16 November 2018, available at https://www.conseil-etat.fr/actualites/discours-et-interventions/entretien-du-contentieux-du-conseil-d-etat-ouverture-de-la-1ere-table-ronde-par-bernard-stirn accessed 23 April 2021.

81 Pacteau (n21) 153.

82 P Soler-Couteaux, 'Réflexions sur le thème de l'insécurité du droit administratif ou la dualité moderne du droit administratif ' in *Gouverner, administrer, juger, Liber amicorum Jean Waline* (Dalloz 2002) 381 & 384. Historically, priority has been given to the instrumental dimension

Since 2000, there has been a significant movement in France to promote the stability of legal situations. First, we can mention the amendment of the rules related to the abrogation and withdrawal of administrative decisions.[83] Another interesting example is the modulation of the effects of a reversal of case law. Since the French system is based on the Romano-Germanic civil law tradition, case law is not a source of law as such. However, in practice, and especially in the context of administrative law – a judge-made law – administrative case law contributes to the evolution of applicable norms. As a result, a reversal of case law can have a significant impact on individual situations, and therefore especially on the situations of applicants who have brought a matter before the court and are at the origin of an appeal leading to the reversal of case law. In order to ensure a certain stability, the Council of State has traditionally adopted an incremental strategy, starting first with reversing its case law in dismissal judgments; i.e., confirming the legality of the administrative act in question.[84] Under this hypothesis, it is interesting to note that it is first of all the legal certainty on the side of the administration that is preserved. In a judgment of 14 June 2004,[85] the Council of State first of all confirmed the retroactive scope of its reversals of case law, considering that an applicant 'could not rely on a principle of legal certainty set out in Article 6 of the ECHR to maintain that the legality of the withdrawal of a permit should only have been assessed in the light of the case law established at the date it was pronounced'. However, in the *Tropic Signalisation* judgment, the Council of State admitted the contrary by basing this new practice directly on 'the imperative of legal certainty', and not on Article 6 (1) of the ECHR. Thus, 'subject to legal actions having the same object and already initiated before the date of reading of this decision', the new recourse open to 'competitors who have been ousted' against certain administrative contracts 'may only be exercised against contracts for which the award procedure was initiated after that date'.[86] It is interesting to note, however, that this decision was taken in the context of contractual litigation, which is a subjective dispute, as opposed to the objective dispute of an appeal against excessive power.

Furthermore, there has been a movement to promote better accessibility to law, noticeably through the requirement to publish administrative decisions and internal administrative acts, and through the recent codification process. Since the 1970s, written administrative law has been developed through the

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of administrative law, and concern for the protection of citizens has only been developing since the end of the 1970s with the first texts aimed at bringing citizens closer to the administration.

83 Articles L 242-1 ff. of the Code of relations between the public and administration.

84 See eg CE, *Nicolo*, n° 108243, 20 October 1989: the first case where the administrative judge agreed to review the compliance of a piece of legislation with the Rome Treaty, while rejecting the action since the legislation was considered compatible with the Treaty.

85 CE, *SCI Saint-Lazare*, n° 238199, 14 June 2004.

86 CE, Ass., *Société Tropic travaux signalisation*, n° 291545, 16 July 2007.

adoption of specific statutes related to the principles applicable to the administrative decision-making process and to the accountability of administrative power, such as access to administrative documents. In addition, a codification process has been completed, but it still focuses only on specific topics.[87] Codification was seen as a threat to the role to be played by the administrative judge (especially the CE),[88] specifically in procedural matters, through the development of general principles of law. There have been several attempts to codify administrative proceedings. The first (a rather limited one) was the decree of 28 November 1983 concerning the relationships between administrations and users, which was finally abrogated.[89] Second, Act N° 2000-321 of 12 April 2000[90] was also an effort to codify in one single act the requirements and the procedural guarantees applicable to the decision-making process, but it was not considered a proper codification due to its limited scope. Eventually, the Code of relations between the public and the administration was adopted in 2015. Interest in codification of administrative proceedings was renewed from 2012. Article 3 of Law N°2013-1005 of 12 November 2013 empowered the government to simplify the relationship between the administration and citizens through an ordinance.[91] It gave the government the power and the mission to adopt a Code that would gather

> *the general rules related to administrative proceedings applicable to the relations between the public and administrative bodies of the State and local entities, public establishment and bodies performing a public service task. (...) It gathers the general rules related to the regime of administrative acts. The codified rules are those which are in force at the date of the publication of the ordinance and, if needed, the rules already published but not yet in force at this date.*[92]

Two years later, the Code of relations between the public and the administration (*Code des relations entre le public et l'administration* – CRPA) was enacted

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87 Code général de la propriété des personnes publiques (General Code on the Property of Public Entities); Code des marchés publics (Public Procurement Code); Code général des collectivités territoriales (Local Authorities Code); Code de justice administrative (Code of administrative justice).

88 P Gonod, 'La codification de la procédure administrative' (2006) Actualité Juridique du Droit Administratif 489.

89 *Décret n°83-1025 concernant les relations entre l'administration et les usagers* of 28 November 1983.

90 *Loi n° 2000-321 relative aux droits des citoyens dans leurs relations avec les administrations* of 12 April 2000.

91 *Loi n° 2013-1005 habilitant le Gouvernement à simplifier les relations entre l'administration et les citoyens* of 12 November 2013.

92 *Loi n° 2013-1005 habilitant le Gouvernement à simplifier les relations entre l'administration et les citoyens* of 12 November 2013. [own translation].

by ordinance n° 2015-1341[93] concerning its legislative provisions and by decree n° 2015-1342[94] concerning its regulatory provisions. It is worth noting here that the Council of State was involved in this codification process,[95] which was also influenced by academics, and by European developments.[96]

It is generally considered that these developments on the principle of legal certainty contributed to a shift in the relationship between the administration and individuals, in the direction of a rebalancing in favour of individuals (or at least in the general direction of this rebalancing).[97]

5. The subsequent reactions of the judges, building the limits of transplantation process

The position of the Council of State eventually showed openness to the introduction and development of the principle of legal certainty in French administrative law. However, this does not mean that the principle has just been transposed, following the European or German conceptions. On the contrary, French public authorities have clearly kept control over the process by limiting its scope and sticking to an objective conception. Clearly, French administrative law does not worship the principle of legal certainty. Although the integration of this principle into the French administrative order has brought about changes, reflecting an acceptance of the principle, limits remain.

5.1. Resistance from the Constitutional Council

There has been no explicit recognition of the principle of legal certainty by the Constitutional Council (Conseil Constitutionnel), meaning that the principle of legal certainty has only a supra-regulatory value, and is not of constitutional value. Indeed, the Constitutional Council does not consider that it is binding on the legislator. However, rather classically, it is admitted that it

93 *Ordonnance n° 2015-1341 relative aux dispositions législatives du code des relations entre le public et l'administration* of 23 October 2015.

94 *Décret n° 2015-1342 relatif aux dispositions réglementaires du code des relations entre le public et l'administration* of 23 October 2015.

95 See J-M Sauvé, 'A la recherche des principes du droit de la procédure administrative', Intervention lors du colloque organisé par la Chaire Mutations de l'action publique et du droit public (MADP) de l'Institut d'études politiques de Paris au Conseil d'État, 5 December 2014, available at <https://www.conseil-etat.fr/actualites/discours-et-interventions/a-la-recherche-des-principes-du-droit-de-la-procedure-administrative> accessed 23 April 2021.

96 See, for a comparative work on administrative procedure: J-B Auby (ed), *Comparative Law of Administrative Procedure* (Buylant 2016); C Boutayeb, 'De l'influence inégale du Droit de l'Union européenne sur le Code' in G Koubi, L Cluzel-Métayer and W Tamzini (eds), *Lectures critiques du Code des relations entre le public et l'administration* (2018 LGDJ) 155.

97 Raimbault (118) 32.

is 'implicitly' taken into consideration. Thus, the Constitutional Council refers to requirements which are connected to legal certainty: non-retroactivity, accessibility of the law, stability (etc).[98] The legal certainty principle is even qualified as a 'clandestine principle' (freerider).[99] The decision of the Constitutional Council of 11 February 2011 is interesting with regard to assessing the position of the Council towards the principle. Indeed, it recognized an obligation imposed on the legislator to take into consideration 'the legal guarantees of constitutional requirements' while amending legislation.[100] In doing so, it limited the possibility of modifying existing legislation. Basically, this is the same requirement as the one recognized in the *KPMG* case. So, if the Constitutional Council did not take the opportunity to expressly recognize a constitutional principle of legal certainty, it was obviously a deliberative choice.[101] However, some have stressed that the Constitutional Council could not long remain insensitive to the foreign examples of other Constitutional courts, to EU law, and also to the risk of being less protective than the Council of State.[102] Moreover, there no longer seems to be any insurmountable obstacle to considering an evolution.[103] So, if we can talk about resistance of the Constitutional Council, the position is more formal, and this does not prevent the principle of legal certainty from being taken into account as a fundamental requirement. [104] This lack of formalisation does, however, have an important advantage. It allows the constitutional court to control its content and its consequences in terms of obligations, especially for the legislator.

5.2. The refusal to integrate the legitimate expectations principle

The main and notable resistance remains the lack of integration of the principle of legitimate expectations. Obviously, the principle of legitimate expectations cannot be assimilated to that of legal certainty, but beyond their conceptual proximity a similar integration process could have been followed. It is then a source of an obligation for public authorities to protect 'unless

98 See J Dellaux, 'Le principe de sécurité juridique en droit constitutionnel. Signes et espoirs d'une consolidation de l'ordre juridique interne et de l'État de droit' (2019) Revue Française de Droit Constitutionnel 665.

99 B Mathieu, 'Le principe de sécurité juridique : un principe constitutionnel clandestin mais efficient' in *Droit constitutionnel, Mélanges en l'honneur de Patrice Gélard* (Montchrestien 2000) 301.

100 CC, Decision n° 2010-102 QPC, *M. Pierre L.*, 16 July 2007 [4].

101 G Eveillard, 'Sécurité juridique et dispositions transitoires. Huit ans d'application de la jurisprudence KPMG' (2014) Actualité Juridique du Droit Administratif 492; Lamprini (n48) 302 ff.

102 Raimbault (n18) 563 ff.

103 Dellaux (n98).

104 L Azoulai, 'La valeur normative de la sécurité juridique' in L Boy, JB Racine, F Siiriainen (eds), *Sécurité juridique en droit économique* (Larcier 2008) 33.

there is an overriding public interest to the contrary, the well-founded expectations of private persons which they have created - by a previous act or action, even if illegal - under penalty of sanction by the judge'.[105] Indeed, its status as a general principle of Union law, also inspired by German law, has the consequence that it can be invoked before the French administrative court when Union law is implemented.

Here too, however, it is rather interesting to note that the increasing restriction of the conditions for withdrawal and termination is more a matter of legitimate expectations than of legal certainty. Similarly, it is interesting to note that for some years now there has been a growing framework for the practice of rescript, especially in tax matters, which corresponds to 'a formal position taken by the administration, which is opposable to it, on the application of a rule to a factual situation described fairly in the application submitted by a person and which does not require any subsequent administrative decision.'[106] In tax matters, it is also possible for a taxpayer to avail himself of the 'administrative doctrine' (which are rules developed by the tax administration itself), even if this doctrine is illegal.[107] However, there seems to be a certain mistrust of the principle of legitimate expectations, which would guarantee a lower level of protection than the national principle of non-retroactivity.[108]

The Constitutional Council has confirmed such a reluctance with regard to the principle of legitimate expectations. It has explicitly denied the existence as a constitutional norm of "a principle known as 'legitimate expectations'".[109] It would seem complicated to identify a constitutional basis for this principle[110], or else it is the *a priori* nature of the constitutionality review that has prevented a subjective dimension from being taken into account. However, it would seem that, more recently, the Constitutional Council could be the subject of greater openness[111] because of the introduction of an *a posteriori* constitutionality review (*question prioritaire de constitutionnalité*), accessible to individuals, whose purpose is the guaranteeing of constitutional rights and liberties.[112] It may be that the principle of legitimate expectations will be explicitly enshrined more rapidly in

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105 S Calmes, *Du principe de protection de la confiance légitime en droits allemand, communautaire et français* (Dalloz 2001) 31; D Simon 'La confiance légitime en droit communautaire: vers un principe général de limitation de la volonté de l'auteur de l'acte?' in *Le rôle de la volonté dans les actes juridiques, études à la mémoire du professeur Alfred Rieg* (Bruylant 2000) 750.

106 See Council of State, 2006 Report.

107 Article L. 80-A of the Book on tax procedures.

108 Calmes (n105) 553.

109 CC, Decision 96-385 DC, 30 December 1996 [18].

110 F Moderne, 'A la recherche d'un fondement constitutionnel du principe de protection de la confiance légitime' in *Au carrefour des droits, Mélanges en l'honneur de Louis Dubouis* (Dalloz 2002) 595 ff.

111 B Delaunay, 'La confiance légitime entre discrètement au Conseil constitutionnel' (2014) Actualité Juridique du Droit Administratif 649.

112 Article 61-1 of the Constitution of 4th October 1958.

this way than the principle of legal certainty. Indeed, the principle of legal certainty can hardly be considered a right or a freedom, unlike legitimate expectations.[113] Moreover, it is interesting to note that the position of the Constitutional Council is very similar to that adopted with regard to the principle of legal certainty. While it does not expressly enshrine the principle, it is reflected in constitutional case law, in particular the principle of protection of legally acquired situations.[114]

The Council of State remains faithful to its traditional mistrust[115] and confirms that its 'case law has reserved for the principle of legitimate confidence only the minimum extension that may be required by the case law of the Court of Justice of the European Communities.'[116] In fact, it usually rejects a plea alleging a breach of legitimate expectations as inoperative where the contested act 'is not one of the acts taken by the French Government for the implementation of Community law'.[117] However, the Administrative Court of First Instance of Strasbourg admits that in 'failing to respect this principle of legitimate expectations in the clarity and predictability of legal rules and administrative action, the administration is liable for abnormal damage resulting from an unnecessarily sudden change in these rules or behaviour'.[118] Through this statement, inserted in a judgment with lengthy reasons, it enshrines the protection of legitimate confidence as a general principle of domestic law, vividly confirming the solutions outlined by some other lower courts.[119] The principle of legitimate expectations still appears to be an external principle for the French administrative system.

6. Conclusion

The characteristics of the French administrative system have consequences for the development and consideration of the principle of legal certainty. An analysis of the transplantation process reveals that it has been

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113 Dellaux (n98)

114 Valembois (n18); CC, décision n° 2005-530 DC, Loi de finances pour 2006, 20 December 2005; CC, décision n° 2016-604 QPC, Société Alinéa, 14 January 2017.

115 CE, *Entreprise personnelle transports Freymuth et Société mosellane de tractions*, n° 210944, 211162, 9 May 2001.

116 A Seban, 'Conclusions sur CE 9 mai 2001 Entreprise personnelle transports Freymuth et Société mosellane de tractions' (not published).

117 CE, *Association des élèves, parents d'élèves et professeurs des classes préparatoires vétérinaires et Melle Poujol*, n° 190768, 16 March 1998.

118 TA Strasbourg, *Entreprise Freymuth v. Ministre de l'Environnement*, n° 931085, 8 December 1994.

119 See TA Grenoble, *Caisse régionale de Crédit Agricole mutuel de Savoie*, n° 88-34940, 30 June 1993; CAA Bordeaux, *Ministre du Budget v. Banque Populaire Centre-Atlantique*, Req. n° 92BX00939, 22 February 1994; CAA Bordeaux, *Ministre du Budget v. Caisse régionale de Crédit Agricole mutuel du Lot*, Req. n° 92BX00716, 8 March 1994.

largely prepared, knowingly or unknowingly, to allow the principle of legal certainty to find at least a partial place in the French administrative system. The legal transplant is first and foremost a process. So, the idea is not foreign to the French system, but the real development lies in the fact that it can become a principle opposable to public authorities when they legislate or regulate a situation, and in its explicit recognition. Obviously, the occasional reluctance to use the words 'legal certainty principle' explicitly shows that explicit recognition is a way to make the transplant process visible. Unsurprisingly, as far as administrative law is concerned, the process has been controlled, and kept under control, by the Council of State. Due to the still largely judge-made law dimension of administrative law, the positions of the Council of State and the Constitutional Council are essential milestones for assessing the integration of the principle of legal certainty. Nevertheless, the Europeanisation process, as well as academic work, have laid the foundations for integrating the principle, making its integration in the French administrative legal system seem unavoidable. The different factors impacting the transplant process have then structured the chronology of integrating the principle of legal certainty: time for preparation, reception, adaptation, and finally, resistance.

The transplant process can be regarded as successful, at least from the French point of view, since it has brought new dynamics into the conception of French administrative law and of the relationship between the administration and citizens. However, its integration has certainly only been made possible because of the way in which the administrative judge has had to shape it in order to adapt it to the French administrative system. Indeed, four main factors have been identified to explain why and how the principle of legal certainty in the French administrative system has been developed: the historical structure of administrative law, the Europeanisation process, the place of the Council of State in the development of French administrative law, and the ambivalent role of the actions of judicial authorities. The judge has played a decisive role in creating a link between an apparently unfavourable context and an exogenous principle of legal certainty. Such a statement may not be so surprising, for two reasons at least. First of all, because of the weight of the administrative judge in the development of French administrative law and of the Constitutional judge as far as constitutional law is concerned. So, the judge-made law dimension of administrative law is an especially important element for the transplant process of a foreign principle. Second, in the context of the European integration process, it is well-known that the national judge, noticeably under the impulse of the European Court of Justice, has been the cornerstone of the cross-fertilization process of legal principles within the European administrative space.[120] Never-

[120] G De Vergottini, *Au-delà du dialogue entre les cours. Juges, droit étranger, comparaison* (Dalloz 2013).

theless, one consequence of the central role of the judge is that the transplant process of a given principle may be hazardous, both from a temporal perspective and from that of content. Indeed, the integration of the principle in the internal legal order may be at the cost of adapting the principle, noticeably to internal constraints. So, the transplant process is key to analysing the cross-fertilization existing in the European administrative space, but also to understand the diversity inherent to it.

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The Failure of Leniency as a Regulatory Transplant in Hungary

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Abstract

While leniency has become the main pillar of EU cartel enforcement, its expediency can be questioned, particularly if we consider that the vast majority of leniency applications arrive after the first dawn raids or failed cartels. Leniency can be criticized not only for uncovering only cartels that are already doomed, but also for its cartel-inducing effect, where periodic whistle blowing or the mutual threat of disclosure stabilizes anti-competitive agreements. The effectiveness of leniency policy is strongly influenced by the regulatory mix of incentives (immunity from or reduction in fines, anonymity), sanctions (criminal sentences, disqualification from public procurement), and compensatory measures (private enforcement) introduced in the given jurisdiction. However, certain extra-legal factors may also play a key role: the success of leniency policies differs across company size, whistle-blowing cultures, and awareness of leniency throughout the Member States. In our paper, we analyse Hungarian leniency policy as a legal transplant, describing its design and comparing it to the ECN Model Leniency Programme. We arrive at the conclusion that its failure in Hungary can be explained by extra-legal factors, such as market structure, leniency awareness, company culture, and ingrained attitudes towards competitors and the state.

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1. Introduction

Leniency policy is an instrument designed to enhance the effectiveness of competition law enforcement. The common EU approach to leniency is laid down in the European Competition Network (ECN) Model Programme which, whilst being a soft law measure, is meant to bring about some convergence across Member States to ensure transparency for undertakings and more effective enforcement of anti-trust law.

Like other Member States, Hungary implemented a national leniency policy based on the ECN Model Programme in 2003. The Hungarian competition authority (Gazdasági Versenyhivatal, GVH) issued the leniency rules applicable in Hungary in its Notice No. 3/2003, later amended by notices No. 1/2006 and 2/2009. Leniency was also statutorily enshrined in Act No. LVII of 1996 on the prohibition of unfair and restrictive market practices (Competition Act) in June 2009[1] with the regulation taking its current form in 2013. While Hungarian leniency regulation essentially follows the best practice – allowing for conditional leniency and the application of a marker system, and even introducing the innovative tool of 'Cartel chat' to leniency conditions and benefits[2] – the legal transplanting of leniency may be considered a relative failure, since whistle blowing is rare in Hungary.[3] The reasons for such a failure of leniency policy are manifold, and relate to the Hungarian business structure and culture. In particular, Hungary is a small market where business owners and managers of undertakings know each other personally. Knowing that they will have to continue to operate in the same market with those on whom they blew the whistle is a deterrent. Further reasons include the socialist history of the country where 'spying' and 'snitching' were shunned. As a result, a culture of whistle blowing has not developed.

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1 Act No XIV of 2009 on the amendment of the Competition Act amended the Competition Act, supplementing it with rules on leniency (hereinafter Competition Act).

2 'Cartel Chat' is described as a 'closed and protected system that assures persons (individuals and undertakings) who have information about secret cartels by a simple, anonymous registration that they can share their special knowledge with the employees of the Cartel Detection Section of the GVH, in full anonymity and without fear of negative consequences or retaliation. (...) They can also ask questions about cartels, the leniency policy and the procedure of the policy and about the informant reward. In every case, they will receive answers from the same employee of the GVH who they have previously dealt with in the event that they have further questions.': 'Cartel chat and leniency campaign' (*European Commission*) <https://webgate.ec.europa.eu/multisite/ecn-brief/en/content/cartel-chat-and-leniency-campaign> accessed at 11 November 2020. See, for similar tools, J Ysewyn and J Boudet, 'Leniency and competition law: An overview of EU and national case law' (*e-Competitions Special Issue Leniency*, 2 August 2018) 5 <www.concurrences.com/en/bulletin/special-issues/leniency/leniency-and-competition-law-an-overview-of-eu-and-national-case-law-72355> accessed 14 February 2021.

3 Z Bara, 'A kartellek szerepe a verseny alakulásában (2006-2007)' (2009) 5 Vezetéstudomány 11.

In the following sections, we expound generally on legal transplants, and on their role in Hungary in more detail. Next, we describe the rules governing leniency as implemented in Hungarian competition law, including the upcoming amendments to the system which are to take effect in 2021. Finally, we elaborate on the relative failure of leniency in Hungary and the possible geo-cultural reasons behind it.

2. Regulatory transplants in Hungary

2.1. Why do states rely on legal transplants?

In a broad sense, legal transplants[4] date back to the emergence of legal systems. It suffices to think of the many elements of Roman law that have survived the fall of the Empire and that continue to affect the development of our legal systems. Jonathan M. Miller distinguishes between four categories of legal transplants based on their purpose: (i) the cost-saving transplant; (ii) the externally dictated transplant; (iii) the entrepreneurial transplant; and (iv) the legitimacy-generating transplant.[5]

A cost-saving transplant is introduced in the hopes of achieving an economic advantage. It is expected that – in the medium or long term – the transplant will generate budgetary revenue through an increase in taxable entities and employment. Examples of cost-saving transplants typically include environmental and health care policy solutions, and even the 1941 introduction of right-hand traffic in Hungary.

While cost-saving transplants are introduced voluntarily by the state, externally-dictated transplants are the exact opposite, and in fact a traditional, centuries-old form of legal transplant. A prominent example of such an externally-dictated transplant is the 1949 Hungarian constitution, modelled upon the 1936 'Stalinist' Soviet constitution.[6] Today, externally-dictated transplants mainly ensue in the form of economic and budgetary restructuring set forth as a precondition for loans granted by international financial institutions. However, the line between cost-saving and externally-dictated transplants is not always obvious: the intro-

4 According to Professor Alan Watson, legal transplantation is the 'moving of a rule (...) from one country to another, or from one people to another': A Watson, *Legal Transplants: An Approach to Comparative Law* (2nd edn, University of Georgia Press 1993) 21.

5 JM Miller, 'A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process' (2003) 4 The American Journal of Comparative Law 842.

6 This, however, affected almost the entire Hungarian legal system at the time: see, for instance, J Verebics, 'A szovjet polgári jog és hatása az alakulóban levő magyar civilisztikára 1948-1951' (2017) 3 Állam- és Jogtudomány 45.

duction of legal institutions foreseen under EU law by Member States and, in particular, candidate countries, is both an obligation and a convenience.[7]

Entrepreneurial transplants are promoted by independent, non-state private entities (e.g. experts, NGOs and lobbyists participating in the preparation of draft bills). These transplants are typically introduced to fill a regulatory gap in the domestic legal system, with the expectation that it will yield professional benefits or a competitive advantage. One example of entrepreneurial transplants in Hungarian law is the institution of trust, introduced by the new Civil Code of 2013.[8]

No individual or public benefits are expected from legitimacy-generating transplants, nor is there an obligation to implement them in the domestic system. These transplants are introduced primarily because they have been implemented and applied by other countries, and are considered to be a model for the transplanting state due to their development or affiliation with an international organization. As such, the transplant stands for adherence to values proclaimed by the model states. Such legitimacy-generating transplants are the findings of 'European consensus' in the jurisprudence of the ECtHR,[9] as a result of which states applying a different regulatory model are induced to implement the majority (consensual) regulatory solution. However, such legitimacy-generating transplants often fail to bring about veritable change in the domestic legal system, not least because the implementing state only attaches symbolic relevance to the transplant.

When looking to analyse a legal transplant implemented by an EU Member State (in particular, by a former socialist state), reaching for a legal institution related to competition law seems an obvious choice.[10] Competition law is fundamental in developing the conditions of a market economy, and the EU enjoys particularly strong powers in this field. Competition was unknown to the socialist economy: former socialist states followed the model of a centrally planned economy. This was the case for Hungary, too, which later sought both to develop market economy conditions and to join the EU, a situation which made the implementation of EU competition law solutions expedient and necessary.[11] As

7 When Hungary acquired candidate country status, the implementation of the institution of EU law was primarily externally-dictated, while in the period preceding the application for membership the state transplanted legal solutions mostly for cost-saving or to generate legitimacy.

8 See I Sándor, *A bizalmi vagyonkezelés és a trust. Jogtörténeti és összehasonlító jogi elemzés* (HVG ORAC 2014).

9 See, for instance, P Kapotas and V P Tzevelekos (eds), *Building Consensus on European Consensus. Judicial Interpretation of Human Rights in Europe and Beyond* (Cambridge University Press 2019).

10 For a general approach, see W Twinning, 'Diffusion of Law: A Global Perspective' (2004) 49 Journal of Legal Pluralism 5-6, 9.

11 It should be noted that Hungary had implemented modern and fully functioning anti-trust regulation in the 1930s: Act No. XX of 1931, provided that, owing to the principle of contractual freedom, undertakings were free to cooperate. However, in order to guarantee that such forms of cooperation could be monitored in the public interest, cartels had to be registered. Cartels

such, from a different point of view, the same institution may be considered a different model of legal transplant.

2.2. The introduction of leniency in Hungarian law

Leniency was introduced in Hungary in 2003, directly preceding the country's accession to the EU in 2004. What is interesting about leniency is that it became part of Union law as a regulatory transplant itself, since leniency in fact stems from US antitrust law. The Hungarian regulation of leniency was, however, clearly based on the EU, and not on the original US model of leniency. The idea behind leniency programmes is that it is worth incentivizing perpetrating cartels to assist authorities by providing information which facilitates prosecution. In exchange, the leniency applicant can expect favourable treatment (e.g. a reduction in fines),[12] rendering leniency a special version of plea bargaining in the field of antitrust law.[13]

Leniency appeared in US law in 1978, when the Department of Justice implemented an Amnesty Program with the purpose of 'rewarding' perpetrating companies voluntarily cooperating with the authorities. The original version of the programme, however, suffered from several deficiencies: the rules were difficult to interpret, and receiving favourable treatment was not automatic but always dependent upon the discretion of the Department of Justice. Seeing as the program was merely a mild success, it was revised by the Department of Justice in 1993. Since then, 'amnesty is automatic if there is no pre-existing investigation, amnesty may still available even if cooperation begins after the investigation is underway, and all officers, directors, and employees who cooperate get complete protection".[14] This has become the foundation of leniency as we know it today.

Encouraged by the success of leniency in the US, the European Commission set out to design its own leniency programme in 1996, clearly aspiring to a cost-saving transplant. Not unlike its US counterpart, the first version of the EU le-

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were monitored by the Cartel Commission which, along with other applicants, could bring a case before the Cartel Court that a specific cartel violated the public good. See, in detail, I Szabó, 'A kartellfelügyelet szervezete és hatásköre az 1931. XX. törvénycikk nyomán' (2016) II Versenytükör 64.

12 L Márk 'Az engedékenységi politika hatásai és alkalmazása' in P Valentiny and others (eds) *Verseny és szabályozás* (Budapest 2017) 193.

13 See, for instance, AW Alschuler, 'Plea Bargaining and Its History' (1979) 1 Columbia Law Review 1.

14 GR Spratling, 'Making Companies an Offer They Shouldn't Refuse: The Antitrust Divisions's Corporate Leniency Policy -- An Update' (*United States Department of Justice*, 16 February 1999) <www.justice.gov/atr/speech/making-companies-offer-they-shouldnt-refuse-antitrust-divisions-corporate-leniency-policy> accessed 11 November 2020.

niency programme was not a complete success: between 1996[15] and 2002 (when the Commission revised its Communication on leniency),[16] only 188 applications were submitted. Moreover, the majority of these leniency applications were submitted in ongoing cases following dawn raids or in derivative cases where the cartel had already been detected in the US.[17]

When the GVH introduced leniency one year before Hungary joined the EU,[18] there were ample experiences available relating to the operation of this legal institution.[19] The Hungarian implementation of leniency can be considered a legitimacy-generating transplant (and, in part, a cost-saving transplant) since Member States and, in particular, candidate countries, were not obliged to introduce this policy in their domestic systems.[20] According to Tihamér Tóth – former President of the GVH Competition Council at the time of Hungary's accession to the EU – while there was no obligation or pressure on Member State NCAs to introduce leniency programmes, the European Competition Network is a professional framework inducing like-minded national officials to seek and implement common solutions to problems of competition law and enforcement. The GVH considered leniency to be a useful addition to its investigative efforts, with the ECN Model Programme exerting a reputational pull on the design of national leniency notices. Moreover, it was the GVH – not the European Commission – who lobbied for the codification of leniency rules into the Hungarian Competition Act, reproducing rules already implemented from the ECN Model Programme.

Since there was no external (legal) pressure to implement leniency in Hungarian competition law, one could legitimately expect that this legal transplant – based on the lessons learned from the operation of leniency in other jurisdictions – and its adaptation to domestic circumstances would be a real success story in Hungary.

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15 Commission Notice on the non-imposition or reduction of fines in cartel cases [1996] OJ C207/4.

16 Commission Notice on immunity from fines and reduction of fines in cartel cases [2002] OJ C45/3.

17 See 'Joint answer given by Ms Kroes on behalf of the Commission to Written questions: E-0890/09, E-0891/09, E-0892/09' (*European Parliament*, 2 April 2009) <www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2009-0892&language=DA> accessed 11 November 2020.

18 See (in Hungarian) Notice No. 3/2003 of the President of the Hungarian Competition Authority and the President of the Competition Council of the Hungarian Competition Authority on the application of a leniency policy to promote the detection of cartels.

19 ÁR Kaszás, 'A kartellezők "jussa" hazánkban és az Európai Unióban' (2010) 11 Jogtudományi Közlöny 560.

20 According to the website of the European Commission, Malta does not even have a leniency program: see Commission, 'Authorities in EU Member States which operate a leniency programme' (*EuropeanCommission*, 22 November 2012) <https://ec.europa.eu/competition/ecn/leniency_programme_nca.pdf> accessed 11 November 2020.

3. Leniency in Hungary: regulatory design and comparison with the ECN model leniency programme

Leniency was incorporated into Chapter XI of the Competition Act with Section 66 of Act No. CCI of 2013. Prior to that, leniency was governed by notices issued by the GVH.[21] Finally, the statutory rules governing leniency are laid down in sections 78/A to 79, which regulate the conditions for applying leniency and the procedure followed by the Competition Council. In 2009, the domestic rules governing leniency were fine-tuned to harmonize with the ECN's Model Leniency Programme. Amendments were further made to the statutory rules on leniency in 2013 to reconcile the system with the criminal sanctions applicable to hard-core cartels and bid rigging; applying for leniency lost its appeal with the 2005 introduction of criminal sanctions for these types of anti-competitive conduct. As will be demonstrated below, the Hungarian legislator took pains to design domestic leniency rules providing an attractive regulatory context for whistle-blowing undertakings, and the Hungarian Competition Authority was instrumental in advising the legislator on designing an optimal regulatory mix.

3.1. Conditions for applying leniency

According to Section 78/A (1) of the Competition Act, if an undertaking discloses its participation in a cartel or other agreement or concerted action in relation to price fixing, the GVH may grant it immunity from – or a reduction in – fines if it makes a leniency application to the GVH and ceases its participation in the anti-competitive scheme. It must further fully and continuously cooperate with the GVH in good will until the cartel proceedings are closed.

Immunity from fines may only be granted to those undertakings that have not coerced another undertaking into participating in the anti-competitive scheme,[22] and only if the following two cumulative conditions are met: (i) the undertaking must be the first to submit the leniency application, and (ii) it must provide evidence to the GVH which suffices for the court to grant a search warrant or sufficient evidence to prove the infringement. The latter also implies that immunity will not be granted if the GVH is already in possession of information that would suffice for a search warrant or for proving the infringement. The Competition Act even allows for immunity applications in cases where a

21 For instance, Notices No 3/2003, 2/2009 and 1/2006 of the President of the Hungarian Competition Authority and the President of the Competition Council of the Hungarian Competition Authority.

22 Section 78/A. (2) and (8) Competition Act.

'formal investigation' has already been launched and communicated to the undertaking, provided that the applicant delivers evidence to prove the infringement. However, owing to the changes brought about by the ECN+ Directive, the Competition Act has been amended to exclude this possibility as of 1 January 2021.

Where the conditions for immunity are not met, a reduction in fines may still be granted upon the leniency application of the undertaking if the undertaking provides the GVH with evidence on the infringement which represents significant added value with respect to the evidence already held by the GVH. The reduction in fines for the first undertaking to make an application with evidence representing significant added value may range from 30-50%; for the second, 20-30%. All subsequent undertakings may receive a reduction of up to 20% of the fine. Should the applicant undertaking provide evidence with significant added value which may lead to an increase in the fine, the GVH will not take such additional facts into account when setting the fine for the relevant undertaking.[23]

Finally, the possibility of settlement must also be mentioned. Should an undertaking applying for leniency acknowledge its liability for the infringement and waive all its rights – to further access to its file, making a formal statement, holding a hearing and filing for appeal – the GVH will grant a further 10-30% reduction in fines.[24] Settlements render leniency applications more appealing to undertakings not eligible for immunity, while at the same time saving time and costs for the GVH's and the domestic courts' proceedings.

3.2. Leniency applications

The Competition Act expressly provides for the possibility of a group of undertakings submitting joint leniency applications, or for the controlling undertaking to submit a leniency application also covering the controlled undertakings.[25] Section 78/B (1) of the Competition Act follows the Model Leniency Programme in determining the minimum content of leniency applications (name and address of the applicant, the nature of the cartel conduct, duration, affected products and territories, other parties to the cartel, EEA states where the evidence is likely to be located, NCAs, where the undertaking has submitted or is considering submitting a leniency application).[26] All available evidence must be enclosed with the application.

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23 Section 78/A. (3)-(6) Competition Act.
24 Section 73/A. Competition Act.
25 Section 78/A. (9) Competition Act.
26 ECN Model Leniency Programme, para 24.

So-called marker applications are, since 2009, also possible under the Act in Type 1A cases:[27] that is, where the Competition Authority does not yet have enough evidence to seek a court warrant or has not yet carried out an inspection. In these cases, the application is made as a sort of place-holder to secure immunity, with a commitment to providing the necessary evidence at a later time when the information is available, and sufficient reasons are given for the delay in providing the evidence. Finally, non-definitive preliminary applications (summary application markers) may be submitted to the GVH contemporaneously with an application to the European Commission.[28]

3.3. Leniency procedure and confidentiality

The proceeding Competition Council considers leniency applications in the order of their arrival and decides, based on the fulfilment of immunity and leniency requirements, on granting immunity or a reduction in fines.[29] In line with the ECN Resolution on the Protection of leniency material in the context of civil damages actions,[30] and to instil confidence in potential applicants, access to files made available to the GVH is restricted. In fact, leniency applications and statements made by applicant undertakings or settlement statements can only be disclosed to other applicants to the extent necessary for exercising their right of defence. Until the application for immunity is decided upon, access to the application and the evidence enclosed is restricted to the official investigating the case, the proceeding Competition Council and the court. Should the application be withdrawn, the application and evidence must be returned to the applicant.[31]

4. A failed transplant: geo-cultural considerations

In the framework of harmonization of Hungarian laws with those of the EU, the Hungarian leniency programme was designed according to European best practices, which in theory should ensure the effective operation of the programme.[32] In fact, according to Transparency International, the

27 ECN Model Leniency Programme, para 16 et seq.
28 Section 78/B. (4) Competition Act.
29 Section 78/C. Competition Act.
30 ECN, 'Resolution of the Meeting of Heads of the European Competition Authorities of 23 May 2012: Protection of leniency material in the context of civil damages actions' (*European Commission*, 23 May 2012) < ec.europa.eu/competition/ecn/leniency_material_protection_en.pdf > accessed 14 February 2021.
31 Section 78/D. (1) Competition Act.
32 L Márk 'Az engedékenységi politika hatásai és alkalmazása' in P Valentiny and others (eds) *Verseny és szabályozás* (Budapest 2017) 222.

Hungarian policy is among the most favourable for a leniency applicant:[33] criminal penalties may be reduced without limitation,[34] no disqualification from public procurements (safe harbour), deficiency suretyship for damages claims[35] which will be supplemented by a marker regulation, non-disclosure of data to other NCAs beginning in 2021.[36] According to the research done by Csongor István Nagy into the GVH's reports to the Parliament, between 2006 and 2011 only five leniency applications were accepted by the GVH, meaning an average of 0.8 applications annually.[37] By comparison, in the 10-year period between 2000 and 2010, the German NCA received a total of 288 leniency applications, amounting to an average of 28.8 applications per annum.[38] Márk points out that, while it is difficult to conclude from the mere number of applications whether leniency policy has been a success – and in every country it took a few years for the number of applications to pick up after leniency was introduced – it is nevertheless the case that, subsequently, 'in the US and the European Union, applications preceding detection by the authorities became widespread, which is something that we are not witnessing in Hungary'.[39]

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33 Transparency International Magyarország (ed), *Az engedékenységi politika keretében való együttműködés fékező és hajtó erői* (Transparency International Magyarország 2013) 18 and CI Nagy, 'Az engedékenységi politika keretében való együttműködés fékező és hajtóerői. Összehasonlító jogi adalékok' in P Valentiny and others (eds) *Verseny és szabályozás* (Budapest 2017) 184.

34 For details, see B Páhi, 'A versenyjogi engedékenységi politika büntetőjogi mengjelenése' in Miskolci Doktorandusz Konferencia Tanulmánykötet (Miskolc 2017) 189-190 and CI Nagy, 'Az engedékenységi politika keretében való együttműködés fékező és hajtóerői. Összehasonlító jogi adalékok' in P Valentiny and others (eds) *Verseny és szabályozás* (Budapest 2017) 181-182.

35 See the section on Hungary in OECD, 'Policy Roundtables. Leniency for Subsequent Applicants. 2012' (*OECD*, October 2012) 65-66 <www.oecd.org/competition/Leniencyforsubsequentapplicants2012.pdf> accessed 14 February 2021; C Bán, 'Hungary' in J Buhart (ed), *Leniency Regimes* (4th edn, European Lawyer Reference 2012) 192-194 and A Jádi Németh, 'Hungary: A Long Desired Step in the Right Direction – Leniency Policy' (*Kluwer Competition Law Blog*, 19 July 2012) <http://competitionlawblog.kluwercompetitionlaw.com/2012/07/19/hungary-a-long-desired-step-in-the-right-direction-leniency-policy/?doing_wp_cron=1590564303.5075469017028808593750> accessed 11 November 2020.

36 A Turi and M Kovács, 'Hungary Update: Upcoming Amendments to the Competition Act' (*CEE Legal Matters*, 6 May 2020) <https://ceelegalmatters.com/hungary/13474-hungary-update-upcoming-amendments-to-the-competition-act#/ref/h9S5F4m6EeBqqJ7n> accessed 11 November 2020 and Z Székely, 'A magánjogi jogérvényesítés néhány aktuális kérdése a 2014/104/EU irányelv tükrében' (2017) 1 Miskolci Jogi Szemle 159, 159-160.

37 CI Nagy, 'Az engedékenységi politika keretében való együttműködés fékező és hajtóerői. Összehasonlító jogi adalékok' in P Valentiny and others (eds) *Verseny és szabályozás* (Budapest 2017) 174.

38 Concerning Germany, see Transparency International Magyarország (ed), *Az engedékenységi politika keretében való együttműködés fékező és hajtó erői* (Transparency International Magyarország 2013) 16.

39 L Márk 'Az engedékenységi politika hatásai és alkalmazása' in P Valentiny and others (eds) *Verseny és szabályozás* (Budapest 2017) 221 and Transparency International Magyarország (ed), *Az engedékenységi politika keretében való együttműködés fékező és hajtó erői* (Transparency International Magyarország 2013) 18.

It is worth noting that, while on an EU level the Hungarian leniency programme cannot be considered a success, there are jurisdictions with even fewer leniency applications in the region: in the span of a decade, Romania saw merely two cartel cases sanctioned by the Romanian NCA based on leniency.[40] This seems to be a general trend in Eastern Europe. Twinning quotes the USAID C-LIR, which reported in 1999 with respect to commercial legal and institutional reform in Eastern Europe and Eurasia that, while laws were often copied verbatim, these efforts failed to yield lasting change. This was followed by a strong emphasis on the reinforcement of the institutional context of commercial law. While advances were made in certain areas of commercial law, the C-LIR expressly mentioned that little progress was made in, for example, antitrust law.

While measuring the 'success' or 'failure' of legal transplants is highly criticized in comparative law literature, it is now recognized that, in order to refine regulation and improve enforcement, analysing the workability of legal transplants is indispensable.[41] Literature and the GVH's own trends suggest that applications for leniency have remained scarce – in Eastern Europe in general, and in Hungary in particular – and trends over the past fifteen years show strong volatility.

In the past few years, two important studies have been commissioned by the GVH to take stock of the possible legal and extra-legal factors that have led to the relative failure of the Hungarian leniency programme. The TNS Hoffman survey[42] and the Transparency International study – quoted in this paper – surveyed hundreds of CEOs of SMEs active in Hungary, as well as lawyers working with Hungarian companies on their leniency applications. They sought to identify and quantify these factors and to make suggestions regarding the regulatory design of leniency policy in Hungary. These studies and the scholarly literature agree that it is primarily extra-legal factors, and not the design of leniency rules, that compromise the operation of Hungarian leniency policy.

Below, we describe the extra-legal factors contributing to the geo-cultural landscape which have doomed the favourable Hungarian leniency policy to failure. We depart from the findings of the studies cited above. We further supplement their data with our own in-person interviews, conducted with attor-

40 A-F Fora and others, 'The knowledge of the leniency policy at the level of the management of companies operating in Romania' (Proceedings of the 13th International Management Conference 'Management Strategies for High Performance', Bucharest, Romania, 31 October-1 November 2019) 410. See also D Jalba and others, 'Romania's leniency programme: critical overview' (*Thomson Reuters Practical Law*, 1 June 2013) <https://uk.practicallaw.thomsonreuters.com/4-532-4276?transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed 14 February 2021 and CI Nagy, 'Az engedékenységi politika keretében való együttműködés fékező és hajtóerői. Összehasonlító jogi adalékok' in P Valentiny and others (eds) *Verseny és szabályozás* (Budapest 2017) 173.

41 ibid, 33-35.

42 The TNS Hoffman survey was commissioned by the GVH in 2016.

neys of leading Hungarian law offices representing Hungarian businesses in their proceedings before the GVH.

4.1. Awareness and perception of cartels and leniency policy among Hungarian market participants

Based on a survey carried out among 350 CEOs of small and medium-sized businesses active on the Hungarian market in 2016,[43] we may conclude that market participants are aware that cartels are formed in the segment they are competing in. They report that market sharing, the disclosure of sales data, and price fixing are the most widespread forms of anti-competitive agreements. However, the level of acceptance of the different types of cartels among the market participants varies, with only 6% finding bid-rigging cartels acceptable, yet as many as 34% accepting the disclosure of sales data. Businesses qualified the communication of prices and coordination on the opening of stores as fairly acceptable, and information sharing within the framework of professional organizations as typical and acceptable. Meanwhile, the vast majority of businesses on the Hungarian market know that cartels are prohibited by law and may result in fines, damages claims, disqualification from public procurement, and even criminal penalties.

Based on this data, we may conclude that businesses operating in Hungary are aware that certain forms of cooperation between competitors are illegal and will draw sanctions if detected.[44] It is surprising, in this light, that business owners and managers are unaware that disclosure of sales data – even if done under the umbrella of a professional organization – is illegal. Acceptance of certain forms of cooperation is higher, with others, particularly bid-rigging cartels, being the least accepted. As the TNS Hoffman survey concluded, while CEOs 'are aware of the statutory consequences, the perception of certain events depends much more on market practice, custom, than the knowledge of the law'.[45]

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43 For the sake of simplicity we refer to these as Hungarian businesses and companies, as well as Hungarian CEOs. This reference is not meant to indicate the origin of the company or the nationality of its CEO, although to a large extent these will be Hungarian, but much rather the fact that they operate on the Hungarian market, and shall accordingly include Hungarian subsidiaries of multinational or foreign companies and CEOs of Hungarian or foreign companies operating in Hungary.

44 Law faculties in Hungary feature competition law in their curricula. As such, Hungarian lawyers are trained to identify cartels and other anti-competitive conduct. While business schools also include industrial organization studies (as a mandatory or optional course) in their curricula, this does not necessarily mean that competition law is also taught to students aspiring to a business degree.

45 TNS Hoffmann and GVH, *TCR Kampányhatékonyság-mérés 2015* (Gazdasági Versenyhivatal 2015) 3.

Finally, the survey also included questions related to the awareness and perception of leniency policy among Hungarian business operators. While the majority of Hungarian CEOs are aware of the fact that cartels are prohibited under the law, only 27% of small businesses and 43% of medium-sized companies are aware that the GVH operates a leniency policy.[46] After learning about the purpose and design of the leniency policy, 46% of respondents concluded that they did not agree with the leniency policy.[47]

In light of the awareness among Hungarian business operators of the illegality and sanctions on cartels, the question that arises is the following: what could be the reason for the indifference, or outright resistance, towards leniency policy that leads to the relative failure of this transplant in Hungarian competition policy?

4.2. Structure of the Hungarian market

In our research, we hypothesized that the specific ratio of SMEs to large corporations on the Hungarian market might render domestic companies more prone to cooperation. We departed from an overview of the Hungarian corporate landscape to unpack this assumption.

An analysis of the structure of Hungarian businesses shows that, while the proportion of medium-sized companies has declined over the past decade, the total proportion of SMEs in the Hungarian economy has not changed, amounting to 99.8% of the companies operating on the Hungarian market.[48] Literature shows that, while financial backing of companies by family and friends is important in all countries, in Hungary the amount of such support is ten times the amount of venture capital flowing into companies.[49] Nevertheless, a brief look at the average proportion of SMEs in EU Member States reveals that the Hungarian data completely corresponds to the EU average of 99.8%. This means that there is nothing extraordinary or different in the Hungarian

46 Transparency International concluded that the majority of CEOs and legal representatives of Hungarian owned companies had scarce knowledge of leniency policy: Transparency International Magyarország (ed), *Az engedékenységi politika keretében való együttműködés fékező és hajtó erői* (Transparency International Magyarország 2013) 35.

47 TNS Hoffmann and GVH, *TCR Kampányhatékonyság-mérés 2015* (Gazdasági Versenyhivatal 2015) 25.

48 cfr L Szerb and others, 'Kompetencia-alapú versenyképesség-mérés és -elemzés a magyar kisvállalati (mKKV) szektorban' in L Szerb and others (eds) *Kompetencia-alapú versenyképesség-mérés és -elemzés a magyar kisvállalati (mKKV) szektorban. Kutatási beszámolók* (RIERC 2019) 12; L Szerb and others, 'Mennyire versenyképesek a magyar kisvállalatok? A magyar kisvállalatok (MKKV szektor) versenyképességének egyéni-vállalati szintű mérése és komplex vizsgálata' (2014) special issue Marketing és menedzsment 10 and L Szerb, 'A magyar mikro-, kis- és középvállalatok versenyképességének mérése és vizsgálata' (2010) 12 Vezetéstudomány 26, 31.

49 L Szerb and A Petheő, 'Globális Vállalkozói Monitor kutatás adatfelvételei' (1992) 1 Statisztikai Szemle 27.

corporate landscape that would set it apart from other Member States' systems and explain divergencies in the functioning of anti-cartel rules.

We do not exclude the possibility that the dominant company size in Hungary may have explanatory force for the failure of leniency in certain sectors. Still, due to the similarity of company size ratios across the EU we maintain that, at best, it is the size of the Hungarian market in terms of the number of companies active in the given sector that may contribute to rejecting leniency.[50] This may be down to the fact that the relatively smaller number of companies inhabiting specific sectors within Hungary possibly allows for familiarity between business operators, and hence reduces the inclination to blow the whistle. Aversion towards whistle blowing, however, can be more persuasively explained by other contributing factors, as discussed below.

4.3. Cultural considerations

According to the surveys mentioned above, companies active in Hungary are reluctant to apply for leniency, and assume that other companies on the Hungarian market would also be unwilling to report a cartel.[51] In fact, according to the data of the GVH, 65% of leniency applicants in Hungary are partly or fully foreign-owned undertakings, with only 35% of applicants being Hungarian-owned.

Since the vast majority of companies assume that they would not apply for leniency, most of them accordingly have no policy in place for how to deal with a situation where suspicion of the existence of a cartel arises.[52] Market participants are so confident that cartel members will not blow the whistle that the main goal of leniency – to plant the seed of distrust among cooperating competitors – misses its mark, and, if made at all, leniency applications are generally made to mitigate the effects of detection only after the GVH has already detected the cartel.[53] This mutual confidence of market participants that others will also refrain from whistle blowing becomes a self-fulfilling prophecy, thus sealing the fate of leniency policy. However, what are the individual, culturally ingrained elements holding back Hungarian business operators from reporting a cartel and applying for leniency?

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50 See Eurostat, 'Business demography by size class (from 2004 onwards, NACE Rev. 2)' (*Eurostat,* 8 February 2021) <https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=bd_9bd_sz_cl_r2&lang=en> accessed 14 February 2021.

51 Only 1% think that everyone would report a cartel they gained knowledge of. See TNS Hoffmann and GVH, *TCR Kampányhatékonyság-mérés 2015* (Gazdasági Versenyhivatal 2015) 27.

52 ibid, 3.

53 Transparency International Magyarország (ed), *Az engedékenységi politika keretében való együttműködés fékező és hajtó erői* (Transparency International Magyarország 2013) 39.

4.4. Lack of trust in the authorities

Respondents in our interview emphasized Hungarian business operators' deep-seated lack of trust in the authorities.[54] This may be traced back, among other things, to Hungary's socialist past, where the single-party state upheld the socialist system through authorities relying on a mix of snitches and force. According to the survey of Transparency International, a further cause for reluctance is that CEOs and business owners are uncertain about the fate of the information provided to the GVH, and fear that the data surrendered to the authority will later be used against them.[55] As a result of this distrust, no routine of cooperation has emerged between authorities and business operators. Finally, some CEOs report that there is such a saturation of cartels in their segment that they feel participating in leniency will have no positive effect, and that the authorities are helpless in this respect. By blowing the whistle, these operators feel they will only harm themselves, which leads us on to the next issue: the fear of repercussions.

4.5. Fear of repercussions

As indicated above, the size of the Hungarian market may mean that small and medium-sized companies' CEOs know each other and their clients personally, so that their business dealings involve trust and personal attention.[56] This is all the more the reason why operators assume that cooperation with the GVH would damage their reputation and partnerships and undermine their position on the market.[57] Fear of economic repercussions fuels businesses' resistance towards leniency options.

In the interviews conducted by Transparency International, several of the subjects indicated that 'snitching' is culturally unacceptable in Hungary,[58] and that it is generally frowned upon.[59] In fact, it is considered to ruin the reputation and prestige of the company in question, with 84% of respondents fearing they

54 TNS Hoffmann and GVH, *TCR Kampányhatékonyság-mérés 2015* (Gazdasági Versenyhivatal 2015) 3.

55 Transparency International Magyarország (ed), *Az engedékenységi politika keretében való együttműködés fékező és hajtó erői* (Transparency International Magyarország 2013) 5.

56 ibid, 36.

57 TNS Hoffmann and GVH, *TCR Kampányhatékonyság-mérés 2015* (Gazdasági Versenyhivatal 2015) 3.

58 International Competition Network, 'Good practices for incentivising leniency applications. Subgroup 1 of the Cartel WG' (*International Competition Network*, 30 April 2019) 35 <www.internationalcompetitionnetwork.org/wp-content/uploads/2019/05/CWG-Good-practices-for-incentivising-leniency.pdf> accessed 14 February 2021.

59 Transparency International Magyarország (ed), *Az engedékenységi politika keretében való együttműködés fékező és hajtó erői* (Transparency International Magyarország 2013) 39.

would be 'shunned' by the sector.[60] In our interviews one of the lawyers representing Hungarian companies explained that, before the change of political system, the planned economy relied on huge state-owned companies where bright Hungarian engineers, lawyers, and economists (among others) worked side by side.[61] Later, in the 1990s, these erstwhile state companies were privatised and the very same staff now competed on the Hungarian market. The routine of cooperation they had been socialized in – and the growing pains of early competition law enforcement in the context of the budding social market economy – meant that the former colleagues-cum-new entrepreneurs had their own understanding of 'market rivalry'. Not only were these strong personal relationships a breeding ground for anti-competitive agreements, but they were also a strong deterrent for whistle blowing.

Thirty years following the change of political system, reluctance to turn on competitors still remains. Not only has the new generation of CEOs and business owners been trained in the same atmosphere of non-snitching, but the Hungarian market remains small: informing on former classmates and business partners is still inconceivable, especially where criminal prosecution is a possibility. Respondents feel that applying for leniency would mean their business relationships, future partnerships, reliability, and business credibility and reputation would suffer to such a degree that this would outmatch the disadvantages incurred by being detected by the GVH as having participated in a cartel.[62] This is particularly the case for Hungarian-owned companies, where the decision to apply for leniency and disclose evidence to the GVH is directly associated with the CEO of the company. The same is less true for multinational companies active on the Hungarian market, where decisions are considered to have been made at headquarters and not by those managing the Hungarian branch.[63]

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60 ibid, 53.

61 As Tóth puts it in T Tóth, 'The reception and application of EU competition rules in Hungary: an organic evolution' (2013) Pázmány Law Working Papers 2013/17, 24 <https://plwp.eu/evfolyamok/2013/40-2013-17> accessed 14 February 2021: 'Leniency was never a success story in Hungary. That was neither because of the wording of the rules nor due to the unreliable practice of the GVH. On the contrary, the Competition Council always respected the investigators` preliminary decision as regards zero or reduced fines, even in cases where it was not sure whether the undertaking really deserved the lenient treatment. A possible explanation is that sanctions affecting only undertakings did not prove to have a sufficient deterrent effect on the individuals operating that undertaking, or at least not sufficient enough to override decade long friendly relationships existing between competitors in the same sector of the economy. Most leniency applications were handed in by foreign companies, usually as an afterthought to their identical application in Brussels.' T Tóth, 'The reception and application of EU competition rules in Hungary: an organic evolution' (2013) 7 Pázmány Law Working Papers 24.

62 Transparency International Magyarország (ed), *Az engedékenységi politika keretében való együttműködés fékező és hajtó erői* (Transparency International Magyarország 2013) 5.

63 ibid, 40 and 51-52.

However, while the decision to apply for leniency is made by multinational corporations implementing a zero-tolerance cartel-policy, managers of Hungarian subsidiaries still fear personal accountability for their participation in a cartel. Thus, although most multinational companies have a reporting policy for cartels,[64] Hungarian branches exhibit a strong resistance towards complying and/or providing the necessary evidence, for fear that they will personally suffer the consequences by being made an example of and laid off from the company.[65] Several lawyers indicated that managers will only be swayed to cooperate by 'smoking gun' evidence, and will otherwise try to deny involvement. Moreover, not only do managers fear being dismissed from their company, but they also suspect that having blown the whistle may adversely affect their future career in business as a whole.[66] It is consequently often the case that, even where the headquarters of multinational corporations decide that leniency should be sought, managers at the Hungarian branch deny the availability of evidence to substantiate the application.[67] Evidence of anti-competitive conduct often comes to light in a due diligence procedure when the Hungarian subsidiary is purchased by a new owner, who may then apply for leniency to ensure a clean slate. All these factors combined have induced certain companies to launch a sort of in-house leniency, promising better outcomes for those employees who are willing to come forward.

4.6. Costs of leniency

Finally, there is another point that business operators consider when deciding whether or not to apply for leniency: the costs of leniency (and private enforcement) versus the fine imposed by the GVH (and private enforcement). A leniency application potentially involves several years of cooperation with the GVH – including screening, the use of forensic IT tools, and several rounds of interviews by consulting firms and law firms – and may thus clock up a hefty bill for companies.

Leniency also means exposure to private enforcement which, whilst only gaining ground slowly in Hungary, still poses a real financial threat to companies.[68] Thus, Cauffman makes the case that the risk of follow-on damages ac-

64 ibid, 37: Respondents to the survey stated that while British and US-owned corporations are open to cooperating with the GVH in leniency, continental corporations are less willing, while in the case of Asian-owned companies applying for leniency is completely rejected.

65 ibid, 44.

66 ibid, 5.

67 ibid, 37.

68 T Tóth, 'The Interaction of Public and Private Enforcement of Competition Law Before and After the EU Directive – a Hungarian Perspective' (2016) 14 Yearbook of Antitrust and Regulatory Issues 65 and P Szilágyi, 'Private Enforcement of Competition Law and Stand-alone Actions in Hungary' (2013) 3 Global Competition Litigation Review 141.

tions has a deterrent effect on leniency applicants.[69] The Competition Act provides for a *popularis actio* of the GVH against the infringing undertaking, as well as the possibility of private enforcement of damages claims for consumers harmed by hard-core cartel conduct.[70] Since courts may oblige persons to disclose evidence in relation to the enforcement of damages – and since, if the violation is established, there is a rebuttable presumption of a 10% damage caused by the cartel – parties seeking compensation have a real chance of judicial award. The risks involved in the unpredictable costs of private enforcement are a strong deterrent for undertakings to refrain from applying for leniency, and not only in Hungary.[71]

Since most Hungarian businesses will only consider leniency when a competition authority investigation is already underway, they can only attain a lower reduction of fines. Therefore, depending on the situation, the optimal strategy could be to refrain from leniency, and instead focus on the defence in the cartel proceedings to avoid or reduce the fine imposed.

5. Conclusion

The Hungarian legislator introduced leniency as a legal transplant into domestic competition law early on, and has since taken pains to design a regulatory framework which renders leniency applications attractive to perpetrating companies. A comparison with the model rules shows that Hungarian leniency conditions are particularly favourable. Nevertheless, based on the past one and a half decades of experience with leniency, we can say that in Hungary this transplant is a relative failure, with businesses exhibiting strong resistance towards cooperation with the GVH. Based on scholarly literature, available surveys, and interviews we have carried out with leading law firms specializing in competition law, the main reasons for Hungarian companies' lax interest in leniency are primarily of an extra-legal nature. While CEOs of companies must consider the criminal, damages claims, competition law, and public procurement consequences of cartels, the level of trust that they will not

69 C Cauffman, 'The Interaction of Lenience Programmes and Actions for Damages' (2011) 2 The Competition Law Review 182; and L Márk 'Az engedékenységi politika hatásai és alkalmazása' in P Valentiny and others (eds.) *Verseny és szabályozás* (Budapest 2017) 207.

70 Sections 85/A.-88/T. Competition Act.

71 OECD Directorate for Financial and Enterprise Affairs Competition Committee. Working Party No. 3 on Co-operation and Enforcement. Summary of Discussion of the Roundtable on Challenges and Co-ordination of Leniency Programmes DAF/COMP/WP3/M(2018)1/ANN1. 3-4. Moreover, according to the relevant Hungarian regulation, the undertaking receiving immunity under leniency has the privilege of only having to shoulder damages to the extent of the damages caused directly or indirectly to its own customers or suppliers, with the exception that the remaining damages cannot be reimbursed from any other jointly and severally liable members of the cartel. Section 88/I. (1)-(2) Competition Act.

be detected and that other companies will not whistle blow is key. Factors undermining the operability of the leniency policy in Hungary include the business culture, the strong reliance on personal relationships when doing business, the routine of cooperation and lack of competition-mindedness, and strong aversion to and distrust of the authorities. These considerations substantiate that, in the case of legal transplants, even optimal regulatory design cannot ensure success without the appropriate socio-cultural context.

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Judicial Protection and Competitive Award Procedures in Germany

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Abstract

The history of German public procurement law is a history of attempts by the German legislator to implement the EU public procurement directives on judicial protection, namely Directive 89/665/EEC of 21 December 1989, as minimally as possible. Paradoxically, the history of German procurement law is also the history of an increased spreading of the model of judicial review in 'competitive award procedures' underlying Directive 89/665/EEC to other administrative procedures. Here, one can discern mutual fertilization of the discussions on the minimal standards for judicial protection foreseen in Directive 89/665/EEC, as well as a parallel discussion on minimal standards (directly derived from the German constitution) for judicial review in competitive award procedures concerning the recruitment of public officials. On this basis, one may discern trends in German case law, administrative practice, and scholarship towards developing judicial review systems in competitive award procedures for public procurement beyond the thresholds set by the EU directives. This is relevant for privatizations, gambling licences, and procedures to grant the right to use public spaces, to name only a few. However, these trends encounter difficulties because the German General Administrative Court Procedure Act and other relevant legislation are not tailored to competitive award procedures. This article will analyse these different trends and suggest explanations for them.

1. Introduction[1]

That the concepts of French administrative law directly influenced the doctrine of German administrative law in the 19th century (especially

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1 List of German abbreviations: BAG = Bundesarbeitsgericht (Federal Labour Court); BGBl = Bundesgesetzblatt (Federal Gazette); BGH = Bundesgerichtshof (Federal Court of Justice); BGHZ = Entscheidungen des BGH in Zivilsachen (collection of decisions on private law of the BGH); BVerfG = Bundesverfassungsgericht (Federal Constitutional Court); BVerfGE = Entscheidungen des Bundesverfassungsgerichts (collection of decisions of the BVerfG);

through the work of *Otto Mayer*)[2] has become commonplace. In general, all over Europe there have been 'transplants' of administrative law concepts and institutions between 1880s and 1920s which may justify classifying the administrative legal orders of these states into 'legal families'.[3] By contrast, the development of German administrative law after 1945 can clearly be described as an autonomous *national* development, at least until (the end of) the 1980s. Within this time frame the situation is, again, not very different in Germany from other West European States.[4] Comparative reasoning has played only a very small role, if any, in drafting new statutes, legal education, and the day-to-day practice of the administration and the courts. For instance, two of the most important German codifications of general administrative law – namely the Code of Administrative Court Procedure of 1960 (*Verwaltungsgerichtsordnung – VwGO*)[5] and the Federal Administrative Procedure Act of 1976 (*Verwaltungsverfahrensgesetz – VwVfG*)[6] – were drafted without any reference to other admin-

BVerwG = Bundesverwaltungsgericht (Federal Administrative Court); BVerwGE = Entscheidungen des Bundesverwaltungsgerichts (collection of decisions of the BVerwG); DVBl = Deutsches Verwaltungsblatt (law journal); DÖV = Die Öffentliche Verwaltung (law journal); GG = Grundgesetz (Basic Law - Federal Constitution of Germany); GWB = Gesetz gegen Wettbewerbsbeschränkungen (Act Against Restraints of Competition); LKV = Landes- und Kommunalverwaltung (law journal); NJW = Neue Juristische Wochenschrift (law journal); NVwZ = Neue Zeitschrift für Verwaltungsrecht (law journal); NVwZ-RR = Neue Zeitschrift für Verwaltungsrecht – Rechtsprechungsreport (law journal); NZA = Neue Zeitschrift für Arbeitsrecht (law journal); NZBau = Neue Zeitschrift für Baurecht und Vergaberecht (law journal); OLG = Oberlandesgericht (higher ordinary court); VwGO = Verwaltungsgerichtsordnung (Code of Administrative Court Procedure); OVG = Oberverwaltungsgericht (higher administrative court); VGH = Verwaltungsgerichtshof (designation of the higher administrative courts in Baden-Württemberg, Bayern and Hessen, cf. § 184 VwGO); VwVfG = Verwaltungsverfahrensgesetz (Administrative Procedure Act); ZBR = Zeitschrift für Beamtenrecht (law journal); ZIP = Zeitschrift für Wirtschaftsrecht und Insolvenzpraxis (law journal); ZPO = Zivilprozessordnung (Code of Civil Court Procedure).

2 The influence of French administrative law on the work of *Otto Mayer* should not be underestimated: O Jouanjan, 'Die Belle époque des Verwaltungsrechts – Zur Entstehung der modernen Verwaltungsrechtswissenschaft in Europe (1880-1920)' in A von Bogdandy, S Cassese and PM Huber (eds), *Handbuch Ius Publicum Europaeum – Band IV: Verwaltungsrecht in Europa: Wissenschaft* (C. F. Müller 2011) 425-459, § 69 n° 9. See also, for more details on the French influence on German administrative law, U Scheuner, 'Der Einfluß des französischen Verwaltungsrechts auf die deutsche Rechtsentwicklung' (1963) 16 DÖV 714, 718f.

3 M Fromont, 'A Typology of Administrative Law in Europe' in A von Bogdandy, PM Huber and S Cassese (eds), *The Max Planck Handbooks in European Public Law – Vol. 1: The Administrative State* (Oxford University Press 2017) 579-600, 580ff.

4 U Stelkens, A Andrijauskaitė and Y Marique, 'Mapping, Explaining, and Constructing the Effectiveness of the Pan-European Principles of Good Administration – Overall Assessment' in U Stelkens and A Andrijauskaitė (eds), *Good Administration and the Council of Europe – Law, Principles and Effectiveness* (Oxford University Press 2020) 757-822, para 31.18.

5 For the basic principles of the VwGO see MP Singh, *German Administrative Law in Common Law Perspective* (Springer 2001) 183ff.

6 It directly applies only to federal authorities, but the 16 *Länder* have either passed similar laws or simply declared the federal VwVfG to also govern the activities of their respective authorities. Consequently, it is common to refer *pars pro toto* only to the federal VwVfG when speaking of the German codification of administrative procedure law. For the constitutional reasons for this complex situation, see A Jacquemet-Gauché and U Stelkens, 'Caractères essentiels du droit allemand der la procédure administrative' in J-B Auby and T Perroud (eds), *Droit comparé*

istrative systems in their *travaux préparatoires*.[7] Furthermore, the courts have developed administrative law through general principles of administrative law without reference to 'foreign' sources or concepts, but by reference to national 'meta concepts' (good faith, rule of law, legality, legal security, reasonability, proportionality, equality, etc.). At the time, these 'meta concepts' were by no means considered to be European or even 'global'.[8] Until the 1990s, the *Europeanisation* of *national* administrative law in general and of German administrative law in particular was not discussed – even with regard to the national administrative law of Member States of the (then) European Economic Community (EEC).[9]

This all changed in the 1990s: a turning point in the history of German administrative law, especially with regard to its 'Europeanisation'. In one fell swoop, the extent to which the *acquis* had gradually grown over the years since the founding of the EEC was made clear to German politics and scholarship when the need to implement the whole *acquis communautaire* more or less from day one in the territory of the former German Democratic Republic arose.[10] Furthermore, the entry into force of the Single European Act of 1986 added environmental law as a very 'prominent' field of EEC activity, with implications for all levels of administration. Moreover, the legislation of the EEC and – following the Treaty of Maastricht – of the European Community (EC) was increasingly spreading into areas which had previously been regulated exclusively or

de la procédure administrative (Bruylant 2016) 15-36, 21ff and J-P Schneider, "Germany" in J-B Auby (ed), *Codification of Administrative Procedure* (Bruylant 2014) 203-226, 207ff.

7 To simplify matters, in the following we only refer to the legislation concerning administration in general. This means, above all, that we will *not* refer to the special legislation on administrative procedure and court procedure in social and fiscal law matters (each of them having a special hierarchy of courts). See on this U Stelkens, 'Administrative Appeals in Germany' in D Dragos and B Neamtu (eds), *Alternative Dispute Resolution in European Administrative Law* (Springer 2014) 3-55, 5ff.

8 See U Stelkens, 'The Impact of the Pan- European General Principles of Good Administration on German Law - Is Yet to Come!' in U Stelkens and A Andrijauskaitė (eds), *Good Administration and the Council of Europe – Law, Principles and Effectiveness* (Oxford University Press 2020) 301–329, para 11.47ff.

9 It has to be recalled that the first edition of Jürgen Schwarze's ground-breaking work on European administrative law was first published in its original German version (in two volumes) in 1988 (J Schwarze, *Europäisches Verwaltungsrecht* (1st edn, Nomos 1988)). Its English translation was published in 1992 (J Schwarze, *European Administrative Law* (1st edn Oxford University Press 1992); its objective was ('only') to define – in accordance with the general principles common to the laws of the Member States – general principles of EEC law to be respected by the EEC's institutions. Thus, it followed the model of Article 215(2) of the Treaty establishing the European Economic Community (Article 340(2) Treaty on the Functioning of the European Union [2016] OJ C202/49 (TFEU)) and Joined Cases 7/56, 3/57 to 7/57 *Algera and Others v Common Assembly of the European Coal and Steel Community*, ECLI:EU:C:1957:7, [54]ff. Schwarze's work was (initially) not about detecting general principles of European administrative law which could harmonise the national administrative law of the Member States of the EEC or, later, the EU.

10 AK Mangold, *Gemeinschaftsrecht und deutsches Recht* (Mohr Siebeck 2011) 241.

mostly by the national legislature. Finally, EC secondary law and the case law of the European Court of Justice (ECJ) created more and more obligations for Member States to effectively enforce Community law, above all by creating new (directly applicable) rights for individuals, enterprises, and NGOs, and by giving them access to national courts in order to seek the enforcement of EEC/EC law by national authorities.[11]

This trend in Community legislation was met with a diametrically opposed trend in Germany in the 1990s. The enormous challenges of Reunification, coming on top of problems also triggered in West Germany by the structural change from an industrial to a service society and its economic consequences, questioned the suitability of the basic structures of administration and administrative law developed in the comparatively 'contemplative' 'Bonn Republic'. The new 'Berlin Republic' had to manage the transformation from a planned economy to a market economy in the 'new *Länder*', as well as having to rehabilitate and reconstruct most of the East German infrastructures that had been neglected over decades. Furthermore, the enormous costs of the reunification led to the need for substantial austerity measures in West Germany as well. The 'old *Länder*' were (and still are) challenged by the fact that most of the West German infrastructures built between the 1950s and 1980s needed (and mostly still need) considerable investments. All this led to an 'economy first' approach in German politics in the 1990s to attract investors – a policy to which all other objectives were, seemingly, ultimately subordinated.[12] Lengthy administrative procedures for granting licences, building permits, and the planning of infrastructures – as well as wide access to courts for individuals against such 'investor-friendly decisions' leading to (alleged) lengthy administrative court procedures – were (and still are) the last thing wanted. Thus, in quite comprehensive legislation at both federal and *Land* levels, the procedural standards of the VwVfG and the VwGO for third parties were reduced, and access to court for third parties limited to 'accelerating' procedures to the benefit of investors and to reduce costs.[13]

These diametrically opposed trends in German and EC politics led to increased interest in the concepts underlying the EC's legislation within German politics and legal scholarship. These concepts were often identified as 'foreign'

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11 In Germany, this trend is often called 'functional subjectivisation' ('*funktionale Subjektivierung*') of EU Law: see e.g. J Masing, 'Der Rechtsstatus des Einzelnen im Verwaltungsrecht' in W Hoffmann-Riem, E Schmidt-Aßmann and A Voßkuhle (eds), *Grundlagen des Verwaltungsrechts I* (2nd edn, CH Beck 2012) 437-542, § 7 para 91ff.

12 A Jacquemet-Gauché and U Stelkens, 'La simplification administrative en Allemagne' in J-B Auby and T Perroud (eds), *Droit comparé de la procédure administrative* (Bruylant 2016) 365-377.

13 See, on this development, E Schmidt-Aßmann, 'Der Verfahrensgedanke im deutschen und europäischen Verwaltungsrecht' in W Hoffmann-Riem, E Schmidt-Aßmann and A Voßkuhle (eds), *Grundlagen des Verwaltungsrechts II* (2nd edn, CH Beck 2012) 495-555, § 27 para 86ff.

concepts, mainly following French and British models, which needed to be understood to ensure a minimal implementation entailing as few changes in German law as possible. In general, German administrative law was considered to be a 'victim of Europeanisation', and the transposition of directives an unwanted transplant. This led to – partly excessive – defensive reactions by German politicians and scholarship, illustrated by the famous dictum of J. Salzwedel comparing EC law with 'occupation law' intervening in 'established national legal systems'.[14] This was, of course, particularly exaggerated, but nevertheless characteristic of the perception of Europeanisation in Germany at the time.[15] It expressed the frustration of German politicians and scholars about the loss of authority to interpret administrative law applicable in Germany.

This situation has mainly been documented and analysed with regard to infrastructure planning and environmental law. However, the same type of reaction happened with regard to the transposition of Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures, to the award of public supply, and to public works contracts (Directive 89/665/EEC).[16] Its recitals explicitly stated that the then existing directives on public procurement[17] 'do not contain any specific provisions ensuring their effective application' and that 'the existing arrangements at both national and Community levels for ensuring their application are not always adequate to ensure compliance with the relevant Community provisions'.[18] Thus, it was considered 'necessary to ensure that adequate procedures exist in all the Member States to permit the setting aside of decisions taken unlawfully and compensation of persons harmed by an infringement'.[19]

The implementation of such procedures for the conclusion of public contracts covered by Directive 89/665/EEC (i.e. 'contracts for pecuniary interest concluded between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of

14 J Salzwedel and M Reinhardt, 'Neue Tendenzen im Wasserrecht' (1991) 10 NVwZ 946-952, 947.

15 R Wahl, 'Die Rechtsbildung in Europa als Entwicklungslabor' (2012) 18 Juristenzeitung 861-870, 862f.

16 Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures, to the award of public supply, and to public works contracts [1989] OJ L395/33.

17 Namely, Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts and Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts [1971] OJ L209/1.

18 Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures, to the award of public supply, and to public works contracts [1989] OJ L395/33, Recital 1.

19 ibid, Recital 6.

products or the provision of services')[20] was met with considerable resistance in Germany, and the German legislator sought to minimally implement this directive.[21] Recognizing enforceable individual rights to competitors in procurement procedures leading to public contracts covered by Directive 89/665/EEC was mostly considered superfluous: it would create unnecessary bureaucratic burdens for the administration, thus delaying and even hindering much-needed public investments.[22] This explains why, firstly, in 1993 the German legislator tried, unsuccessfully, to 'circumvent' Directive 89/665/EEC by creating a review system 'equivalent to a judicial procedure' without being one,[23] and tried to do so by changing budgetary law.[24] This also explains, secondly, why, after the foreseeable failure of this attempt[25] and in order to avoid an infringement procedure,[26] in 1998 the German legislator adopted a finally successful but minimalistic transposition of Directive 89/665/EEC. The transposition inserted a new 'Part IV' entitled 'Award of Public Contracts' into the Federal Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen – GWB*).[27] To be more concrete, since 1998, the §§ 97ff of the GWB establish a special review procedure for unsuccessful competitors. The §§ 97ff. GWB have been modified first in 2009 to transpose Directive 2007/66/EC amending directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts,[28] and then in 2016 to

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20 See the definition of Article 2 (1) No. 5 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L94/65.

21 PM Huber, 'The Europeanization of Public Procurement in Germany' (2007) 7 European Public Law 33.

22 M Burgi and F Koch, 'Contracts below the Thresholds and List B Services from a German Perspective' in R Caranta and D Dragos (eds), *Outside the EU Procurement Directives - Inside the Treaty?* (Djøf Publishing 2012) 119-161, 120.

23 H-J Priess, 'New infringement proceeding regarding the transposition of the Remedies Directives' (1996) 2 Public Procurement Law Review 51-53.

24 *Zweites Gesetz zur Änderung des Haushaltsgrundsätzegesetzes* of 26 November 1993 (BGBl I 1993 1928). See, in detail on the 1994 legislation, A Niedzela, 'Recent legislation on Public Procurement in Germany: Measures for Implementing the E.C. Procurement Rules' (1994) Public Procurement Law Review 44. See also PM Huber, 'The Europeanization of Public Procurement in Germany' (2007) 7 European Public Law 33, 39ff.

25 M Dreher, 'Der Rechtsschutz bei Vergabeverstößen nach 'Umsetzung' der EG-Vergaberichtlinien' (1995) ZIP 1869-1879.

26 See letter from EC Commissioner Mario Monti to the German Foreign Minister of 31 October 1995 (SG (95) D/13624-95/2044) available in (1995) ZIP 1940-1946. See also, on this proceeding, PM Huber, 'The Europeanization of Public Procurement in Germany' (2007) 7 European Public Law 33, 40.

27 *Gesetz zur Änderung der Rechtsgrundlagen für die Vergabe öffentlicher Aufträge (Vergaberechtsänderungsgesetz – VgRÄG)* of 26 August 1998 (BGBl I 1998 2512).

28 Article 1 of the *Gesetz zur Modernisierung des Vergaberechts* of 20 April 2009 (BGBl. I 2009 790). See also Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts [2007] OJ L335/31.

implement the European legislative package for the modernisation of the public procurement directives of 26 February 2014. On this last occasion, nearly all of these GWB provisions were reformulated and renumbered by the Act to Modernise the Law on Public Procurement of 17 February 2016.[29] However, the specific review mechanisms of §§ 97ff GWB (in their original version of 1998 and their reformed version of 2016) are only available for contract awards exceeding the European threshold values. No specific judicial review procedure exists for contracts 'below the thresholds'. This leads to a complete disjuncture in procurement law according to whether a contract falls under the scope of the EU directives or not, and thus to the famously infamous dichotomy of German public procurement law ('*Zweiteilung des Vergaberechts*').[30]

In fact, the idea of creating enforceable individual rights for competitors in public procurement matters as required in Directive 89/665/EEC was completely 'foreign' to the German administrative law of the 1990s.[31] This is explained in this article's introductory section. However, German administrative law has incrementally domesticated this foreign element in two ways. The third section explains a first 'conceptual spill over effect' of Directive 89/665/EEC. Indeed, recognition of the need for judicial protection developed in competitive award procedures outside the scope of Directive 89/665/EEC and even outside the scope of public procurement, i.e. in other procedures used to allocate scarce goods.[32] The fourth section explains a second form of 'conceptual spill over effect' of the transposition of Directive 89/665/EEC. It became clear that the regular types of action foreseen for judicial review in administrative matters were inadequate for judicial protection in public procurement matters, so that in 1998 a completely new system of judicial protection (which became §§ 97ff GWB) had to be designed more or less 'from scratch'. This nevertheless sheds

29 *Gesetz zur Modernisierung des Vergaberechts (Vergaberechtsmodernisierungsgesetz – VergRModG)* of 17 February 2016 17.02.2016 (BGBl I 2016 203).

30 M Burgi and F Koch, 'Contracts below the Thresholds and List B Services from a German Perspective' in R Caranta and D Dragos (eds), *Outside the EU Procurement Directives - Inside the Treaty?* (Djøf Publishing 2012) 119-161, 119ff; K Summann, 'Winds of Change: European Influences on German Procurement Law' (2006) 35 Public Contract Law Journal 563, 564 and U Stelkens, 'Le contrôle et le contentieux des contrats publics en Allemagne' in L Folliot-Lalliot and S Torricelli (eds), *Contrôles et contentieux des contrats publics/Oversight and Challenges of Public Contracts* (Bruylant 2018) 33-66, 36ff.

31 Nevertheless, there has been a quite extensive scholarly discussion on the subject: cf PM Huber, 'The Europeanization of Public Procurement in Germany' (2007) 7 European Public Law 33, 34.

32 The term 'competitive award procedure' is taken from Article IV-9 of the ReNEUAL Model Rules on EU Administrative Procedure (<www.reneual.eu/index.php/projects-and-publications/reneual-1-0>). In our view, it describes the specific character better than the term 'allocation procedures', which is also often used: cf P Adriaanse and others, 'The Allocation of Limited Rights by the Administration: A Quest for a General Legal Theory' in P Adriaanse and others (eds), *Scarcity and the State I* (Intersentia 2016) 3-25, 11ff and F Wollenschläger, 'EU Law Principles for Allocating Scarce Goods and the Emergence of an Allocation Procedure' (2015) 8 Review of European Administrative Law 205.

light on the need to further develop the 'regular' system of administrative justice to cope with the particularities of competitive award procedures.

2. Public procurement, fundamental rights and public authority

The reasons why the creation of enforceable individual rights for competitors in public procurement matters was so completely 'foreign' to German administrative law are twofold. The first reason is that in Germany, after 1945, the protection of individual (fundamental) rights against acts of 'public authority' was considered the most prominent task of administrative law and administrative justice. However, some administrative decisions were not considered to be an expression of 'public authority'. In these cases, they were neither considered as being subjects of administrative justice nor as being applicable to the (directly applicable and enforceable) fundamental rights provided by the Constitution of the Federal Republic of Germany – the 'Basic Law' (*Grundgesetz – GG*) of 23 May 1949. A theory similar to the French theory of '*actes détachables*' did not develop in a general manner.[33] The German approach to administrative justice focused on those relationships between the individual and the administration characterized by 'subordination of the individual to the administration' (subsection 2.1.). In public procurement matters, this has only lately been (mostly) overcome by case law and scholarship, yet it still has considerable repercussions (subsection 2.2).

2.1. Article 19(4) GG and the German public-private law divide

As a reaction to the atrocities of the Nazi regime (and the developments in the Soviet Occupation Zone), the *Grundgesetz* places great emphasis on the binding force of fundamental rights on all powers of the state as directly applicable law (see Article 1(3) GG)[34], as well as on the binding force of the constitutional order, law and justice (Article 20(3) GG)[35]. To guarantee the enforceability of these obligations, Article 19(4) GG stipulates that

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33 H Schröder and U Stelkens, 'Le contentieux des contrats publics en Allemagne' (2011) Revue française de droit administratif 16, 17. The German 'two-step theory' ('*Zweistufentheorie*') – consisting in the construction of an administrative act in the sense of § 35 VwVfG prior to the conclusion of a private law contract – is only applied in matters of subsidy law and access to public facilities but not with regard to public procurement.

34 Article 1 (3) GG reads: 'The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law'. All translations of the articles of the *Grundgesetz* are taken from <www.gesetze-im-internet.de/englisch_gg/englisch_gg.html>.

35 Article 20(3) GG reads: 'The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice'.

Should any person's rights be violated by public authority, he may have recourse to the courts. If no other jurisdiction has been established, recourse shall be to the ordinary courts. (...).[36]

Thus, since 1949 the most prominent task of administrative law and administrative justice has been to protect citizens from arbitrary (ab)use of governmental power. This conception of the role of administrative law and the focus on its limiting function (in contrast to the 'enabling function' of administrative law)[37] characterized the case law of the newly (re-)established administrative courts and the (West) German codifications of general administrative law until the 1980s.[38] However, the challenges of West Germany after the end of the Nazi regime 'only' concerned the robust implementation of human rights, democracy and the rule of law in the existing administrative legal system. It was neither possible nor desired to instead have a parallel total change of the pre-1933 general and sector-specific legislative framework,[39] to be used as the basis of administrative routines in day-to-day practice, which defines administrative missions and enables the different branches of administration to fulfil their tasks.[40] Hence, the 'limiting function' of German administrative law could be strengthened while maintaining its enabling instruments, which were known to be sufficiently effective to deliver public services. For this reason, it can be said that, in West Germany, adding and strengthening democratic, rule of law

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36 See, on the crucial role of Art. 19 (4) GG for the further development of German administrative law: E Riedel, 'Access to Justice as a Fundamental Right in the German Legal Order' in E Riedel (ed), *German Reports on Public Law* (Nomos 1998) 77-102; cf. on Article 19 (4) GG in general: C Bumke and A Voßkuhle, *German Constitutional Law* (Oxford University Press 2019), para. 1270ff.

37 The 'limiting function' of administrative law has to be contrasted with its 'enabling function'. The latter is the function of 'enabling' the administration to fulfil its tasks (as defined by the legislator and the government) by releasing it from the bonds of private law (in the sense of common law or '*droit commun*') and providing it with a legal toolkit more adequate for pursuing public interests than private law can provide. Cf. on the different conceptions of the tasks of administrative law which are, however, not mutually exclusive C Harlow, 'European Administrative Law and the Global Challenge' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 1999) 261-85. It seems plausible that this differentiation between the 'enabling function' and 'limiting function' of administrative law reflects the very influential juxtaposition of the 'green light theory' and the 'red light theory' developed by C Harlow and R Rawlings (in *Law and Administration* (3rd edn, Cambridge University Press 2009) 1ff). See also, on these different tasks of administrative law, U Stelkens and A Andrijauskaitė, 'Introduction: Setting the Scene for a True European Administrative Law' in U Stelkens and A Andrijauskaitė (eds), *Good Administration and the Council of Europe – Law, Principles and Effectiveness* (Oxford University Press 2020) 1-16, para 0.25ff.

38 See, on the (re-)establishment of administrative courts in West Germany: M Niedobitek, 'Die Neugründung der Verwaltungsgerichtsbarkeit in Westdeutschland ab 1945' in K-P Sommermann and B Schaffarzik (ed), *Handbuch der Geschichte der Verwaltungsgerichtsbarkeit in Deutschland und Europa – Vol. 1* (Springer 2019) 915-958.

39 This pre-1933 legal framework continued to be applied or even developed further during the Nazi regime if it pleased or did not disturb the National Socialist leaders.

40 See also Article 123(1) GG: 'Law in force before the Bundestag first convenes shall remain in force insofar as it does not conflict with this *Grundgesetz*'.

and human rights elements to administrative law could be understood as a (far-reaching) process of 're-founding'[41] the pre-1933 German system of public administration and its law. It was not the start of a completely new administrative law.

This meant that the particularities of the German 'public-private law divide' and its functions – dating from the foundation of the German Reich in 1871 (and even earlier) – were transposed into the administrative legal order of the (West) German Federal Republic founded in 1949.[42] From the perspective of legal practice, the German 'public-private law divide' is only of relevance with regard to the scope of application of either public or private law to administrative action.[43] The delimitation of the scope of private law and public law is a problem in practice only because (1) public bodies are allowed to use private law instruments (namely to conclude contracts governed by private law) and because (2) if private law is applicable to administrative action, the administration is 'subjected' to private law and to the jurisdiction of the ordinary courts. This principle was considered to be necessary to guarantee the rule of (private) law and equality before the (private) law: it meant that public authorities had no special rights in the sense of privileges, and their actions could be submitted to the judicial review of the ordinary courts ('*Fiscus iure privato utitur*').[44] It is also the expression of a strict separation between, on the one hand, the scope of private law and the jurisdiction of the ordinary courts (guaranteed by the Reich's legislation on the establishment of ordinary courts and ordinary court procedures of 1877, the so-called '*Reichsjustizgesetze*') and, on the other hand, the scope of public law, where judicial review over administrative decisions did not necessarily exist until the entry into force of Article 19(4) GG. That separation therefore divided administrative activity into (1) an area in which (federal) private law was applicable and administrative action was subject to review by the ordinary courts, and (2) an area open to regulation by a special (public) law (open to regulation

41 The term is used with regard to Germany by J-P Schneider, 'German Traditions in Administrative Law' in M Ruffert (ed), *Administrative Law in Europe: Between Common Principles and National Traditions* (European Law Publishing 2013) 49-65, 54.

42 For this evolution, see U Stelkens, *Verwaltungsprivatrecht* (Duncker & Humblot 2005) 53ff. See also J-P Schneider, 'The Public-Private Law Divide in Germany' in M Ruffert (ed), *The Public-Private Law Divide: Potential for Transformation* (European Law Publishing 2009) 85-98, 85ff.

43 The question of whether a specific legal provision is part of public law or private law is clear in most cases: see M Burgi, 'Rechtsregime' in W Hoffmann-Riem, E Schmidt-Aßmann and A Voßkuhle (eds), *Grundlagen des Verwaltungsrechts Vol I* (2nd edn, CH Beck 2012) 1257-1318, § 18 para 18ff.

44 J Hatschek, 'Die rechtliche Stellung des Fiskus im Bürgerlichen Gesetzbuche' (1899) 7 Verwaltungsarchiv 424 and O Mayer, *Deutsches Verwaltungsrecht – Vol. I* (1st edn, Duncker & Humblot 1895) 53ff and 138. This has been 'labelled' by the author of the present piece as 'principle of the administration being bound by private law' ('*Grundsatz der Privatrechtsbindung der Verwaltung*'): cf U Stelkens, *Verwaltungsprivatrecht* (Duncker & Humblot 2005) 52ff.

also by the *Länder* to a large extent) and (depending on the legislation of the *Länder*) not necessarily subject to judicial review in every case.

This explains why the administrative court system established by West Germany after 1949 pursuant to Article 19(4) GG was mostly meant to establish and guarantee judicial review over administrative action where public law was applicable. The focus was not on bridging the public-private law divide by extending and enforcing judicial review over administrative action governed by private law. Furthermore, when speaking of any person's rights, Article 19(4) GG makes it clear that judicial protection in administrative matters is primarily conceived to enable individuals to enforce their individual rights (namely fundamental rights) against illegal administrative action. The newly established administrative courts were thus mainly conceived to protect the individual against the administration – and not to ensure the legality of the administration as such.[45]

2.2. Public procurement and fundamental rights

Now we come back to public procurement by describing the German situation until the transposition of Directive 89/665/EEC in 1998. There was (and still is) no overarching special regime granting specific powers to contracting public entities, such as those existing in French administrative law.[46] On the contrary, public contracts were (and still are) considered to be private law contracts that do not imply any specific powers for the contracting public entity, unless provided for by contractual clauses.[47] This means, too, that the courts considered the whole procurement process to be subject to private law.[48] Furthermore, public contracts resulting from these procedures were (and are) concluded to be valid or invalid and executed according to private law

45 See BW Wegener, 'Subjective Public Rights – Historical Roots versus European and Democratic Challenges' in H Pünder and C Waldhoff (eds), *Debates in German Public Law* (Hart 2014) 219-237.

46 The German 'public law contract' ('*öffentlich-rechtlicher Vertrag*'), codified in §§ 54ff VwVfG, is not conceived of as being a means for procurement or similar contracts, but as an alternative to administrative single case decisions, especially in cases in which pre-existing public law relationships are to be modified: cf U Stelkens and H Schröder, 'Allemagne/Germany' in R Noguellou and U Stelkens (eds), *Droit comparé des Contrats Publics – Comparative Law on Public Contracts* (Bruylant 2010) 307-338, 315f.

47 See, on this, J Masing, 'Les prérogatives de contrôle exercées par l'administration relativement à l'exécution des marchés publics en Allemagne' in G Marcou and others (eds), *Le contrôle des marchés publics* (IRJS Editions 2009) 311-322 and U Stelkens, 'Le contrôle et le contentieux des contrats publics en Allemagne' in L Folliot-Lalliot and S Torricelli (eds), *Contrôles et contentieux des contrats publics/Oversight and Challenges of Public Contracts* (Bruylant 2018) 55ff.

48 See the references at U Stelkens, *Verwaltungsprivatrecht* (Duncker & Humblot 2005) 415ff. Above all, this view on the procurement process as being entirely subjected to private law is still held by Bitterich: see K Bitterich, *Vergabeverfahren und Bürgerliches Recht* (Nomos 2013) 693ff.

rules.[49] That there were specific procedural rules for public entities for awarding public contracts in budgetary law – which still apply for public contracts 'below the thresholds' in addition to some special legislation of the *Länder* (*Landesvergabegesetze*) –[50] does not contradict this statement. Both these budgetary rules and the *Landesvergabegesetze* were (and are) aimed at ensuring the sound management of public funds. They did (and do) not create individual (enforceable) rights for the applicants for the sole reason that they are not meant to protect them. In general, German budgetary rules have no direct effect on the relationship between the individual and the administration and are only binding 'internally', i.e. within the administration.[51] Compliance with these budgetary rules was (and is) therefore not a condition for the validity of a public contract. In sum, this system did not provide for the possibility of any action to prevent or quash a public contract following the discovery of irregularities in the award procedure. Only the possibility of an *a posteriori action* for damages was then recognised for unsuccessful applicants on the basis of the principle of *culpa in contrahendo*, i.e. an action based on violation of the pre-contractual relationship of trust established between the contracting authority and the applicants in the award procedure.[52]

What is more, in 1961 the supreme ordinary court – the Federal Court of Justice (*Bundesgerichtshof – BGH*) – ruled in the famous *Gummistrümpfe* ('elastic stockings') decision that the contracting authority is simply not bound by the fundamental rights guaranteed by the *Grundgesetz* in public procurement matters because it does not act as a public authority. The relationship between the public authorities and applicants for an award is 'from the outset and exclusively' governed by private law.[53] Following a judgment in 1962 of the Federal

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49 This, at any rate, is the largely undisputed starting point. In contrast, it is highly controversial whether, how, and to which extent the disregard of public law requirements in the conclusion and enforcement of public contracts governed by private law can be sanctioned by applying general private law provisions. This is, however, not a specific problem of public procurement contracts, but of all public contracts governed by private law: see U Stelkens, *Verwaltungsprivatrecht* (Duncker & Humblot 2005) 904ff.

50 A collection of the *Landesvergabegesetze* may be found at <www.saarheim.de/Gesetze_Laender/vergabegesetze-laender.htm>. Those *Landesvergabegesetze* mostly deal with issues related to 'green' and 'social' award criteria; special control institutions are sometimes provided for. However, those are considered to be structured procedures dealing with petitions of the unsuccessful bidders, but not as legal remedies: U Stelkens, 'Le contrôle et le contentieux des contrats publics en Allemagne' in L Folliot-Lalliot and S Torricelli (eds), *Contrôles et contentieux des contrats publics/Oversight and Challenges of Public Contracts* (Bruylant 2018) 49.

51 For the entrenchment of German public procurement law in budgetary law and its consequences, see K Bitterich, *Vergabeverfahren und Bürgerliches Recht* (Nomos 2013) 212ff.

52 M Burgi, 'EU Procurement Rules - A Report about the German Remedies System' in S Treumer and F Lichére (ed), *Enforcement of the EU Public Procurement Rules* (Djøf Publishing 2011) 105-153, 142 and M Burgi and F Koch, 'Contracts below the Thresholds and List B Services from a German Perspective' in R Caranta and D Dragos (eds), *Outside the EU Procurement Directives - Inside the Treaty?* (Djøf Publishing 2012) 152f.

53 BGH, case KZR 1/61 [1961], BGHZ 36, 91-105, 96.

Administrative Court (*Bundesverwaltungsgericht – BVerwG*), this, among other things, ruled out any possibility of construing a decision on the conclusion of a contract as a decision that could be challenged before the administrative courts in public procurement matters.[54] In the same vein, to date it is not disputed that the VwVfG neither directly nor indirectly covers administrative procedures aimed at the conclusion of private-law contracts.[55]

Nevertheless, the 'constitutional setting' of judicial review in public procurement matters has partly changed since the 1990s. The aforementioned case law of the BGH has been partly overruled. Today, following recently established case law of the Federal Constitutional Court (*Bundesverfassungsgericht – BVerfG*), any administrative action – even if governed by private law – is bound by fundamental rights.[56] However, in a judgment of 2006 the BVerfG still argued that in public procurement matters the

State acts as a demand party on the market to meet its needs for certain goods or services. In this role, the State is not fundamentally different from other market participants. It does not rely on its superior public legal power when deciding on the award of a contract, so there is no reason to classify its measure as an exercise of public authority within the meaning of Article 19(4) GG.[57]

Based on this decision, the BVerwG concluded that the private law nature of procurement contracts justifies procurement litigation falling under the jurisdiction of the ordinary courts if not stipulated otherwise by statute.[58] Such a statutory basis is missing for most public contracts 'below the thresholds'.

3. The (reluctant) 'spill over effects' of Directive 89/665/EEC

Against this background, it becomes clear that the transposition of Directive 89/665/EEC obliged the German legislator to establish effective judicial protection in a field where it was (1) not necessary from the point of

54 BVerwG, case VIII C 160/60 [1962], BVerwGE 14, 65-72, 66f.

55 M Burgi, 'EU Procurement Rules - A Report about the German Remedies System' in S Treumer and F Lichére (ed), *Enforcement of the EU Public Procurement Rules* (Djøf Publishing 2011) 106f.

56 BVerfG, case 1 BvR 699/06 [2011] ECLI:DE:BVerfG:2011:rs20110222.1bvr069906), BVerfGE 128, 226–278, 244 and BVerfG, Case 2 BvR 470/08 [2016] ECLI:DE:BVerfG:2016:rk20160719.2bvr047008.

57 BVerfG, case 1 BvR 1160/03 [2006] ECLI:DE:BVerfG:2006:rs20060613.1bvr116003, BVerfGE 116, 135–163, 149f. Translated from the original German by the author. F Wollenschläger, 'The allocation of limited rights by the administration: Challenges of legal protection' in P Adriaanse and others (eds), *Scarcity and the State I* (Intersentia 2016) 93-124, 99.

58 BVerwG, case 6 B 10/07 [2007], BVerwGE 129, 9–20, 13ff.; F Wollenschläger, 'The allocation of limited rights by the administration: Challenges of legal protection' in P Adriaanse and others (eds), *Scarcity and the State I* (Intersentia 2016) 107f.

view of the German public and constitutional law and (2) not wished for because it was considered to slow down public investments, as described before. This explains why, firstly, in 1993 the German legislator tried (unsuccessfully) to 'outsmart' Directive 89/665/EEC by creating a review system 'equivalent to a judicial procedure' without being one, as already mentioned.[59] It also explains, secondly, why in 1998 the transposition of Directive 89/665/EEC was carried out in a minimalistic fashion: the specific review mechanisms of the GWB were only available for contract awards exceeding the European threshold values, leading to the aforementioned '*Zweiteilung des Vergaberechts*'.[60] For contracts 'below the thresholds', no specific judicial[61] review procedure is foreseen. Nevertheless, Directive 89/665/EC created a certain awareness of the specific challenges of judicial review in competitive award procedures in cases where the enforceable individual rights of applicants were either already or newly recognized in German administrative law or newly derived by the ECJ from the Treaties or secondary law. Thus, Directive 89/665/EC triggered academic reflection and shaped the case law of the ordinary and administrative courts dealing with these procedures. The following paragraphs will outline the most important fields in which this development has been discussed.

In this sense, the most important 'national counterpart' to Directive 89/665/EC is the case law on selection procedures for public officials based on Article 33(2) GG, stipulating that

Every German shall be equally eligible for any public office according to his aptitude, qualifications and professional achievements.[62]

This provision is applicable to both public officials with the specific status of '*Beamte*' (those members of the public service who stand in a relationship of service and loyalty defined by public law: cf Article 33(4) GG) and public officials employed on the basis of employment contracts under private law.[63] Furthermore, it is undisputed that Article 33(2) GG creates a directly enforceable right for each applicant to be recruited and promoted on the basis of his/her merits. If there are more applicants than open positions, the competent authority has to choose the 'best' applicant – a choice which can be judicially

59 See *supra* text attached to (n 23).

60 See *supra* text attached to (n 30).

61 See, for administrative review systems established in some *Länder*, U Stelkens, 'Administrative Appeals in Germany' in D Dragos and B Neamtu (eds), *Alternative Dispute Resolution in European Administrative Law* (Springer 2014) 44f and U Stelkens, 'Le contrôle et le contentieux des contrats publics en Allemagne' in L Folliot-Lalliot and S Torricelli (eds), *Contrôles et contentieux des contrats publics/Oversight and Challenges of Public Contracts* (Bruylant 2018) 48f.

62 All translations of the articles of the *Grundgesetz* are taken from <www.gesetze-im-internet.de/englisch_gg/englisch_gg.html>.

63 W Laubinger, 'Die Konkurrentenklage im öffentlichen Dienst – eine unendliche Geschichte' (2010) 10 ZBR 289, 290.

reviewed and which falls under the scope of Article 19(4) GG.[64] Until the 1990s, there were only a few cases where applicants contested general exclusion from access to the civil service. Since the 1990s, however, selection decisions in this matter have increasingly been contested.[65] This leads to an extensive case law from both the administrative courts[66] and the labour courts[67] (the latter being competent for litigation when a private law labour contract is at stake).[68] Quite soon, parallels between judicial review in these recruitment procedures and the system of Directive 89/665/EC were detected.[69]

The same applies to competitive award procedures concerning the classical cases of 'scarce licences' (especially in traffic law and gambling law) and 'concessions' (e.g. stands at a public market) in public economic law. Here it was recognized as far back as the 1950s that applicants could refer to their fundamental right to conduct a business or to freely choose their occupation, deriving from Article 12(1) GG[70] a right to equal treatment and equal opportunities in the respective competitive award procedures.[71] Furthermore, in a famous decision of 1972, the BVerfG deduced from Article 12(1) GG a right to access to higher education, which again leads to the recognition of a right to equal treatment and equal opportunities in competitive award procedures for study places.[72] Directive 89/665/EC has here once again shed light on comparable minimum standards for effective judicial review in these procedures.

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64 See e.g. BVerfG, case 2 BvR 1576/88 [1989] (1990) NJW 501-502; BVerfG, case 2 BvR 311/03 [2003], ECLI:DE:BVerfG:2003:rk20030729.2bvr031103 (2004) NVwZ 95-96 and BVerfG, case 2 BvR 206/07 [2007] ECLI:DE:BVerfG:2007:rk20070709.2bvr020607 (2007) NVwZ 1178-1179.

65 BVerfG, case 2 BvR 1576/88 [1989], (1990) NJW 501-502: this case was of specific importance here.

66 See, for a summay of the current case law regarding '*Beamte*': R Brinktrine, 'Konkurrentenstreitverfahren im Beamtenrecht' (2015) 11 Juristische Ausbildung 1192. See also, in more detail, M Kenntner, 'Rechsstruktur und Gestaltung von Konkurrentenstreitigkeiten für die Vergabe öffentlicher Ämter' (2016) 6 ZBR 181.

67 See e.g. BAG, case 9 AZR 837/13 [2015] ECLI:DE:BAG:2015:190515.U.9AZR83, (2015) NZA 1074-1076.

68 See, for a critique, B Pützner, 'Der Rechtsweg für arbeitsrechtliche Konkurrentenklagen im öffentlichen Dienst' (2016) Recht der Arbeit 287-291. See also OVG Rheinland-Pfalz, case 2 B 10139/19.OVG [2019] ECLI:DE:OVGRLP:2019:0325.2B10139.19.00, (2019) NVwZ-RR 562-566.

69 See e.g. J Gundel, 'Neue Entwicklungen beim Konkurrentenstreit im Öffentlichen Dienst' (2004) 37 Die Verwaltung 401-430, 420ff and A Voßkuhle, 'Strukturen und Bauformen neuer Verwaltungsverfahren' in E Hoffmann-Riem and E Schmidt-Aßmann (eds), *Verwaltungsverfahren und Verwaltungsgesetz* (Nomos 2002) 277-347, 290ff.

70 In a 1972 decision, the BVerfG deduced from Article 12 (1) GG a right to access to higher education: BVerfG, cases 1 BvL 32/70 and 1 BvL 25/71 [1972], BVerfGE 33, 303-358, 329ff.

71 See, for the historical development using the example of gambling licences, M Martini, 'The Allocation of Gambling Licences, Radio Frequencies and CO2 Emission Permits in Germany' in P Adriaanse and others (eds), *Scarcity and the State II* (Intersentia 2016) 42-85, 48ff. See, for traffic law, F Wollenschläger, *Verteilungsverfahren* (Mohr Siebeck 2010) 379ff.

72 See, for a general overview, F Wollenschläger, *Verteilungsverfahren* (Mohr Siebeck 2010) 354ff.

Another 'conceptual spill over effect' of Directive 89/665/EC can be discerned in public procurement outside the scope of Directive 89/665/EC, i.e. contracts 'below the thresholds'. It became clear that limiting judicial protection to an *a posteriori action* for damages on the basis of *culpa in contrahendo* (as described above)[73] is hardly in line with the newer case law of the ECJ, which derives general principles of non-discrimination and transparency in public procurement directly from EU primary law if a certain 'cross-border interest' for the contract in question cannot be excluded.[74] Furthermore, a right to equal treatment and equal opportunities in public procurement for all applicants for public contracts even 'below the thresholds' follows from the aforementioned recent case law of the BVerfG binding all administrative action (including public procurement) to the fundamental rights guaranteed by the *Grundgesetz*.[75] Even though the BVerfG did not expand Article 19(4) GG to this field in 2006,[76] it has become increasingly clear that the non-application of Article 19(4) GG in such cases is incoherent and does not reflect 'the state of the art' in constitutional law. This is why the ordinary courts are developing a more or less effective system of judicial review for public contracts 'below the thresholds'. They 'tweak' the general rules on interim measures of §§ 923ff of the Code of Civil Court Procedure (*Zivilprozessordnung – ZPO*) by drawing from the minimal requirements provided for in Directive 89/665/EC and the case law on selection procedures for public officials without saying so.[77] This does not exclude legal uncertainties, also due to the fact that this case law is developed by the higher civil courts (*Oberlandesgerichte – OLG*) alone as there is no possibility of appeal to the BGH in respect of interim relief orders within the meaning of §§ 935 ff. ZPO. Thus, the BGH has neither the opportunity nor the possibility to create and ensure uniform case law in this area.

Finally, the situation is unclear regarding sales or leases of public assets and public undertakings, i.e. privatization procedures leading to a transfer or lease of assets from the state to a private undertaking or an individual. Here, in

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73 See *supra* text attached to (n 52).

74 For a summary of this case law, see R Caranta, 'The Borders of EU Public Procurement Law' in in R Caranta and D Dragos (eds), *Outside the EU Procurement Directives - Inside the Treaty?* (Djøf Publishing 2012) 25-60 and F Wollenschläger, 'EU Law Principles for Allocating Scarce Goods and the Emergence of an Allocation Procedure' (2015) 8 Review of European Administrative Law 205, 209ff.

75 See *supra* text attached to (n 56).

76 See *supra* text attached to (n 57).

77 See M Burgi and F Koch, 'Contracts below the Thresholds and List B Services from a German Perspective' in R Caranta and D Dragos (eds), *Outside the EU Procurement Directives - Inside the Treaty?* (Djøf Publishing 2012) 151ff; M Jansen and OM Geitel, 'Rügen und richten außerhalb des Kartellvergaberechts' (2015) 2 Vergaberecht 117; T Siegel 'Das Haushaltsvergaberecht' (2016) 107 Verwaltungsarchiv 1, 26ff and U Stelkens, 'Le contrôle et le contentieux des contrats publics en Allemagne' in L Folliot-Lalliot and S Torricelli (eds), *Contrôles et contentieux des contrats publics/Oversight and Challenges of Public Contracts* (Bruylant 2018) 49ff.

practice, the principles of the *Gummistrümpfe* decision of 1961[78] still apply, and individual rights of the bidders are not recognized. For instance, the idea of understanding the privatisation procedures of the *Treuhand* (the agency established to privatize East German enterprises from 1990 to 1994) as administrative procedures and asking for effective judicial review for unsuccessful applicants[79] was quickly rejected by the courts in favour of a purely private law approach.[80] Today, this still corresponds to the current case law of the administrative and ordinary courts concerning the sale and lease of public assets.[81] These procedures are only governed by budgetary law[82] and EU state aid law, with the latter being, however, mostly considered as not really governing the procedure but as rules permitting private enforcement of (material) law.[83] In contrast to the situation in public procurement matters 'below the thresholds', ordinary courts do not systematically develop case law to recognise the effective judicial protection of unsuccessful applicants. This is different in situations where sale and lease contracts are not awarded to the highest bidder, whether this occurs to subsidise investors or in pursuing social policy considerations (e.g. selling building plots to large families at a price below the market price). Since the 1950s, it has been established case law that the administration has to respect the right to equal treatment in state aid matters regardless of the public or private law character of the act allocating the grant and the form of the grant (a financial subsidy or a real subsidy).[84] This situation is quite paradoxical: whereas the EU Commission recommends competitive award procedures for the privatization of public undertakings and the sale of assets to prove the market conformity of the transaction (and thus to eliminate any suspicion of illegal state aid from the outset),[85] the case law of the German courts requires a transparent award procedure only

78 See *supra* text attached to (n 53).

79 See e.g. R-F Fahrenbach, 'Das Privatisierungsverfahren nach dem Treuhandgesetz' [1990] Deutsch-Deutsche Rechts-Zeitschrift 268-270; R-F Fahrenbach, 'Die Treuhandanstalt im Verwaltungsprivatrecht' (1993) ZIP 1-14; W Krebs, 'Rechtsschutzprobleme bei Entscheidungen der Treuhandanstalt' (1990) ZIP 1513-1523, 1522ff and R Weimar, 'Handlungsformen und Handlungsfelder der Treuhandanstalt – öffentlich-rechtlich oder privatrechtlich?' (1991) DÖV 813-823, 818.

80 See e.g. BGH, case III ZR 90/03 [2004], BGHZ 158, 253-263, 259 (with further references).

81 See e.g. BGH, case V ZR 56/07 [2008], (2008) NZBau 407-408; OLG Koblenz, case 1 U 7/17 [2017], (2017) NJW 3310-3311 and VGH Baden-Württemberg, case 1 S 2403/17 [2018] ECLI:DE:VGHBW:2018:0424.1S2403.1, (2018) NJW 2583-2586.

82 F Wollenschläger, *Verteilungsverfahren* (Mohr Siebeck 2010) 466f.

83 See e.g. OVG Bremen, case 2 B 266/18 [2018] ECLI:DE:OVGHB:2018:1120.2B266.18.00 [2018], (2019) DVBl., 584-586; O Philipp, S Vetter, and J Kiesel, 'Veräußerung von Grundstücken durch die öffentliche Hand' (2020) LKV 539-549.

84 See, for the development of this case law, U Stelkens, *Verwaltungsprivatrecht* (Duncker & Humblot 2005) 968ff.

85 F Wollenschläger, 'EU Law Principles for Allocating Scarce Goods and the Emergence of an Allocation Procedure' (2015) 8 Review of European Administrative Law 205, 242ff (with further references).

for awarding a subsidy. In sum, it is hard to understand why – in contrast to the other situations explained above – Directive 89/665/EEC is not used as sort of a 'template' to design effective judicial protection in privatization procedures. In any case, the long term repercussions of the *Gummistrümpfe* decision of 1961 are still particularly noticeable here.

4. Inadequacy of the regular types of action of the VwGO and the ZPO for judicial review of competitive award procedures and the solutions proposed by the GWB

When drafting the new system of judicial review – which finally entered into force in 1998 – it was discussed whether the administrative courts should be declared competent for judicial review in public procurement matters.[86] However, 'administrative court bashing' was quite popular in politics at the time: administrative courts were accused of conducting proceedings far too slowly and sluggishly, and of applying the existing legislation far too strictly to the detriment of economical needs and public welfare. The ordinary courts were considered to have far more economic expertise and understanding of economic issues. Debating the merits of this rhetoric – which we would call 'populist' today for being based more on feelings than verifiable facts – is not intended here.[87] What is currently more interesting is that the 'regular types of action' foreseen in the VwGO have been considered, rightly, as inadequate for litigation, in public procurement matters, in particular, and competitive award procedures, in general. Should the administrative courts become competent for judicial review in competitive award procedures, the rules of the VwGO would have to be tweaked to guarantee effective legal protection to an unsuccessful applicant to the extent that they become barely recognizable. The same applies to the regular types of actions foreseen in the ZPO. For this reason, the legislator instead introduced a completely new review system in public procurement matters 'above the thresholds' (§§ 97ff GWB).

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86 PM Huber, 'The Europeanization of Public Procurement in Germany' (2007) 7 European Public Law 33, 47.

87 Summarizing these discussions from the perspective of an administrative judge: P Stelkens, 'Verwaltungsgerichtsbarkeit in der Krise' (1995) DVBl. 1105-1114; P Stelkens, 'Verwaltungsgerichtsbarkeit im Umbruch - eine Reform ohne Ende?' (1995) NVwZ 325-335 and P Stelkens, 'Aktuelle Probleme und Reformen in der Verwaltungsgerichtsbarkeit' (2000) NVwZ 155-159.

4.1. The object of judicial review

The first issue is to identify which administrative decision can be challenged by an unsuccessful applicant: what is the principal *object* of judicial review? It seems quite obvious that, at the end of the award procedure, two administrative decisions have to be distinguished. The first decision regards who wins the competition and who loses it (award decision). The second decision concerns allocating the scarce good which was the object of the competition to the winner (allocation decision). In the current version of Directive 89/665/EEC (as amended by Directive 2007/66/EC),[88] Article 2a clearly differentiates between the 'contract award decision' and the contract.

Even though this differentiation seems to be logical, no such distinction is made in Germany (in most cases), but it is considered that – in principle – the allocation decision includes or coincides with the award decision. This 'unique' decision has to be challenged by an unsuccessful applicant in court. If it is quashed to the detriment of the successful applicant, the award procedure can be pursued further and lead to a different award decision. This, at least, is the solution in the classical cases of 'scarce licences' (especially in traffic law and gambling law) or allocation of scarce goods (e.g. stands at a public market) by administrative acts (*Verwaltungsakte*) in the sense of § 35 VwVfG,[89] as well as (in principle) for selection procedures for '*Beamte*', who are also appointed by a *Verwaltungsakt*. However, this system is only effective if the procedure is merely concerned with the allocation of one single 'good'. If more than one 'good' – e.g. 100 study places or 10 gambling concessions – is to be awarded in one procedure, one cannot ask an unsuccessful applicant to challenge all these decisions to 'reopen' the procedure for their benefit.[90] Indeed, requiring such a challenge with its corresponding cost risks would not be considered to provide effective judicial protection.[91]

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88 See Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts [2007] OJ L335/31 and Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures, to the award of public supply, and to public works contracts [1989] OJ L395/33.

89 § 35 VwVfG defines the *Verwaltungsakt* as a unilateral decision taken by an authority to regulate an individual case in the sphere of public law and intended to have a direct, external legal effect. See, for more details on the concept of '*Verwaltungsakt*' in German administrative law, MP Singh, *German Administrative Law in Common Law Perspective* (Springer 2001) 63ff and U Stelkens, 'Administrative Appeals in Germany' in D Dragos and B Neamtu (eds), *Alternative Dispute Resolution in European Administrative Law* (Springer 2014) 7ff.

90 F Wollenschläger, 'The allocation of limited rights by the administration: Challenges of legal protection' in P Adriaanse and others (eds), *Scarcity and the State I* (Intersentia 2016) 113ff.

91 See e.g. VGH Bayern, case 22 B 15.620 [2015] ECLI:DE:BAYVGH:2015:0722.22B15.62, NVwZ-RR 2016, 39-43 and F Wollenschläger, 'The allocation of limited rights by the administration: Challenges of legal protection' in P Adriaanse and others (eds), *Scarcity and the State I* (Intersentia 2016) 110.

Furthermore, this system simply does not work if the unique awarding and allocation decision cannot be quashed by the court – namely if the stake of the competition is the conclusion of a contract. In German law, the acceptance of an offer to contract can be either valid or invalid *ipso iure,* leading to an invalid contract independently of a judicial decision.[92] Thus, if the contract concluded with the successful applicant is invalid, the award procedure is *de jure* still 'open' independently of a judicial decision, and the applicant has to find a way to prompt the contracting authority to recognize this and to, in fact, reopen the procedure. However, the validity of contract is governed by private law which – except for special provisions – only provides for certain cases of nullity (e.g. breach of a statutory prohibition in § 134 BGB and breach of morality in § 138 BGB). Already in view of the prerequisites of these provisions, it should be clear that these provisions should not be applied light-handedly in case of a breach of public procurement rules. This is all the more true in view of the drastic consequences of nullity under German law. A void contract is void *ex nunc*: services already performed must be returned. Therefore, the assumption of nullity of a public contract according to § 134 or § 138 (1) BGB can only be considered in extreme cases (collusion, bribery, and similar).[93]

This leads to a second issue: there is no coherent case law pertaining to the effects on allocation decisions of deficiencies in the awarding procedure. At least for selection procedures for '*Beamte*', as well as in most cases where the competitive award procedure leads to the conclusion of a contract, the courts have established a principle of the 'stability of the allocation decision'.[94] This means that, once this allocation decision is taken, it cannot be repealed following deficiencies in the award procedure. Thus, the allocation decision becomes 'immune' to judicial review with its adoption, and every action in court has to take place before this decision is taken. Otherwise, an unsuccessful applicant can only claim damages. The reasons behind this principle of the 'stability of the allocation decision' are quite simple: it allows the immediate execution of the allocation decision, therefore speeding up its implementation and creating legal certainty for the successful applicant. In public procurement, this 'stability' principle was more or less logical as long as no individual rights of the applicants were recognized. The non-respecting of simple budgetary law with its merely 'internal effects' could have no effect on the 'external' contractual relationship between the successful applicant and the contracting authority.[95] However,

92 U Stelkens and H Schröder, 'Allemagne/Germany' in R Noguellou and U Stelkens (eds), *Droit comparé des Contrats Publics – Comparative Law on Public Contracts* (Bruylant 2010) 326.

93 U Stelkens, 'Le contrôle et le contentieux des contrats publics en Allemagne' in L Folliot-Lalliot and S Torricelli (eds), *Contrôles et contentieux des contrats publics/Oversight and Challenges of Public Contracts* (Bruylant 2018) 41.

94 F Wollenschläger, 'The allocation of limited rights by the administration: Challenges of legal protection' in P Adriaanse and others (eds), *Scarcity and the State I* (Intersentia 2016) 111ff.

95 See *supra* text attached to (n 52).

even though § 97(6) GWB (formerly § 97(7) GWB) explicitly states, for public contracts 'above the thresholds', that 'Undertakings shall have a right to have the provisions concerning the procurement procedure complied with', § 168(2) GWB (formerly § 114(2) GWB) provides that 'Once an award has been made, it cannot be revoked'.[96] The latter provision was in line with the initial version of Article 2(6) of Directive 89/665/EEC in allowing as phrased in the Directive that 'a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement'.

It is clear that combining the principle of the 'stability of the allocation decision' with the principle of 'coincidence' between the awarding decision and the allocation decision can make effective judicial review for an unsuccessful applicant impossible. Thus, in 1999, the ECJ held in the Austrian *Alcatel Austria* case[97] that such a combination is not in line with Directive 89/665/EEC and that it must be possible to effectively challenge an award decision. The ECJ deduced from this consideration that

Member States are required to ensure that the contracting authority's decision prior to the conclusion of the contract as to the bidder in a tender procedure with which it will conclude the contract is in all cases open to review in a procedure whereby an applicant may have that decision set aside if the relevant conditions are met, notwithstanding the possibility, once the contract has been concluded, of obtaining an award of damages.[98]

Interestingly, the BVerfG had already followed the same reasoning in a decision of 1990 concerning the selection procedures for '*Beamte*'.[99] It accepted that the BVerwG could apply the 'stability principle' for the appointment of '*Beamte*' as long as unsuccessful applicants were informed about the award decision and the recruiting authority respected a standstill period of at least two weeks before appointing the successful applicant. This enabled an unsuccessful applicant to apply to the administrative courts for interim relief, namely a court order not to appoint the successful applicant. As a consequence, the BVerwG loosened up the 'stability principle' in the case of '*Beamte*', and it does not apply if: (1) the unsuccessful applicant has not been informed; (2) the standstill period has not been respected; or (3) an interim order of the court has not been respected.[100] The idea of a 'stand still period' in competitive award procedures was

96 All translations of the sections of the GWB are taken from <www.gesetze-im-internet.de/englisch_gwb/index.html>.

97 Case C-81/98 *Alcatel Austria* ECLI:EU:C:1999:534.

98 ibid, para 43.

99 BVerfG, case 2 BvR 1576/88 [1989], (1990) NJW 501-502. See on this case C Bumke and A Voßkuhle, *German Constitutional Law* (Oxford University Press 2019), para. 1793ff.

100 BVerwG, case 2 C 16/09 [2010], BVerwGE 138, 102-122. For a critique, see W Schenke, 'Rechtsschutz bei Auswahlentscheidungen – Konkurrentenklage' (2015) DVBl. 137-143.

therefore well-known in Germany, enabling smooth implementation of the *Alcatel Austria* decision in 2001 by introducing such an obligation in § 13 of the implementing regulation to §§ 97ff GWB (*Vergabeverordnung – VgV*).[101] This solution, for its part, seems to have shaped Articles 2a to 2d of Directive 89/665/EEC as amended by Directive 2007/66/EC. In 2009, to transpose Directive 2007/66/EC into German law, § 13 VgV was repealed and new provisions were introduced into the GWB:[102] § 101a and § 101b, today § 134 and 135 GWB. These provided for ineffectiveness of a contract in cases of violation of the standstill period, provided that unsuccessful candidates claim ineffectiveness within 30 calendar days of the public contracting authority informing them of the conclusion of the contract.[103] By contrast, in its decision of 2006, the BVerfG explicitly stated that there is no constitutional need to guarantee effective judicial protection for unsuccessful applicants in public procurement 'below the thresholds'.[104] However, there is newer case law of the ordinary courts on the issue which does not agree with this view.[105] The development is in flux here: even if changes may be on the horizon, the time lapse before these changes percolate deeper into the judicial mindset demonstrates resistance on these matters.

4.2. The timing of judicial review

The above explanations have shown that there is a discrepancy in those competitive award procedures to which the 'stability principle' applies between what can be claimed in interim procedures – namely an order *not* to issue the allocation decision – and what can be claimed in the main proceedings – namely repealing the award decision to 'reopen' the award procedure. Such

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101 *Vergabeverordnung (VgV)* of 9 January 2001 (BGBl I 2001 110). See, on this solution and its shortcomings, K Hailbronner, 'Rechtsfolgen fehlender Information oder unterlassener Ausschreibung bei Vergabe öffentlicher Aufträge (§ 13 VgV)' [2002] NZBau, 474-481.

102 Art 1 of the *Gesetz zur Modernisierung des Vergaberechts* of 20 April 2009 (BGBl. I 2009 790).

103 For more details, see M Burgi, 'EU Procurement Rules - A Report about the German Remedies System' in S Treumer and F Lichère (ed), *Enforcement of the EU Public Procurement Rules* (Djøf Publishing 2011) 126ff and 136ff; U Stelkens, 'Le contrôle et le contentieux des contrats publics en Allemagne' in L Folliot-Lalliot and S Torricelli (eds), *Contrôles et contentieux des contrats publics/Oversight and Challenges of Public Contracts* (Bruylant 2018) 41ff and F Wollenschläger, 'The allocation of limited rights by the administration: Challenges of legal protection' in P Adriaanse and others (eds), *Scarcity and the State I* (Intersentia 2016) 112f.

104 BVerfG, case 1 BvR 1160/03 [2006] ECLI:DE:BVerfG:2006:rs20060613.1bvr116003, BVerfGE 116, 135–163, 155f.

105 See A Dagenförde, 'Die Vorabinformationspflicht im Vergaberechtsschutz: Eine unendliche Geschichte' [2020] NZBau 72-77; M Jansen and OM Geitel, 'OLG Düsseldorf: Informieren und Warten auch außerhalb des GWB' (2018) 4 Vergaberecht 376-387; M Sitsen, 'Ist die Zweiteilung des Vergaberechts noch verfassungskonform?' (2018) 7 Zeitschrift für deutsches und internationales Bau- und Vergaberecht 654-660; cf however, OLG Celle, case 13 W 56/19 [2020] ECLI:DE:OLGCE:2020:0109.13W56.19.00, (2020) NZBau 679-680 and Kammergericht Berlin, case 9 U 79/19 [2020], (2020) NZBau 680-683.

a discrepancy between the object of the interim procedure, on the one hand, and the object of the main procedure, on the other hand, is extremely unusual and does not fit in the ordinary structure of court proceedings as regulated in the VwGO or the ZPO. In the end, unlike in ordinary interim procedures, the interim procedure replaces the main proceedings and obliges the courts to apply strict scrutiny.[106]

Moreover, the VwGO is mostly conceived of as an *a posteriori* legal protection which can only be sought once a definitive administrative decision has been taken, so that courts may, in general, *not* be competent to preventively forbid the adoption of an administrative decision[107] or to intervene in an ongoing administrative decision-making process. The latter, in general, does not necessarily have to be the object of an interim measure of the court, and is derived quite clearly from § 44a VwGO.[108] The idea behind § 44a VwGO is that a procedural error can only infringe on the rights of an applicant if the final decision infringes their rights. This means that errors in procedure only need to be corrected by courts if the outcome of the procedure may interfere with claimants' rights.[109] This exclusion of appeals against procedural acts is, however, problematic in complex procedures with many parties. Above all it may delay the allocation decision in competitive award procedures. A procedural error at the very beginning of the procurement may easily infect all the following procedural steps and the final decision, meaning that the procedure may have to be re-opened from scratch if a judicial challenge is successfully lodged. The disadvantages are all the more unacceptable, as in these procedures the individual procedural steps can also be distinguished easily (call for application, establishment of selection criteria, exclusion of completely unsuitable applicants, evaluation of individual applications, establishment of a ranking list, etc.). Furthermore, some of these procedural steps may only concern individual applications. It may thus be justifiable to limit judicial review to these procedural defects in review processes only when initiated by applicants affected by these defects.

The review system of §§ 97ff GWB is quite well-adapted to these needs: in fact, the review bodies[110] may not take up the matter *ex officio*, and review is

106 F Wollenschläger, 'The allocation of limited rights by the administration: Challenges of legal protection' in P Adriaanse and others (eds), *Scarcity and the State I* (Intersentia 2016) 113.

107 See F Hufen, *Verwaltungsprozessrecht* (11th edn, CH Beck 2019) s16 paras 9ff.

108 'Appeals against procedural acts by authorities may only be asserted at the same time as appeals which are admissible against the factual decision' (all translations of the sections of the VwGO are taken from <www.gesetze-im-internet.de/englisch_vwgo/index.html>).

109 Hufen, *Verwaltungsprozessrecht* (11th edn, CH Beck 2019) s 23 para 94 ff. See also, in the allocation context, F Wollenschläger, *Verteilungsverfahren* (Mohr Siebeck 2010) 654ff.

110 See, in detail, on the structure of the review process foreseen in §§ 155ff GWB (formerly §§ 102ff GWB): M Burgi, 'EU Procurement Rules - A Report about the German Remedies System' in S Treumer and F Lichère (ed), *Enforcement of the EU Public Procurement Rules* (Djøf Publishing 2011) 111ff; U Stelkens, 'Administrative Appeals in Germany' in D Dragos and B Neamtu (eds), *Alternative Dispute Resolution in European Administrative Law* (Springer 2014) 40ff and U Stelkens, 'Le contrôle et le contentieux des contrats publics en Allemagne' in L Folliot-Lalliot

opened only on appeal (§ 160(1) GWB). This appeal is only available to applicants, who must claim that their rights under § 97(6) GWB have been infringed by the contracting authority's failure to comply with the procurement rules (cf § 166(2) GWB). The admissibility of this appeal is subject to strict conditions: the applicant must first complain to the contracting authority about the alleged and established irregularities in order to enable immediate regularisation (§ 166(3) GWB). This has implications for the review procedure. Overall, the review system is akin to an emergency procedure designed to ensure compliance with the rules of public procurement by the contracting authority in an ongoing contract award procedure, i.e. one which has not yet resulted in the actual conclusion of the contract in question with the contracting authority. Thus, the review procedure must in principle be conducted *in parallel with* the award procedure and may – or must, if necessary – be introduced even before the decision to award the contract is finally taken. The real object of the review procedure of §§ 97ff GWB is therefore not the review of the award decision, but the respect of all the procedural measures carried out by the contracting authority up to the conclusion of a valid contract.

Creating such a review procedure by 'tweaking' the procedural rules of the VwGO or the ZPO in those competitive award procedures not covered by §§ 97ff GWB seems impossible. Nevertheless, the question arises of whether §§ 160ff GWB could serve as a template for general rules on (administrative) court procedure, creating a new type of court action in the VwGO – namely a court action tailored to the particularities of competitive award procedures. The ZPO could refer to these rules in cases where the ordinary courts have jurisdiction.

5. Conclusion

In the 1980s, German actor Walter Giller regularly ended his comedy TV show with the words 'It [meaning life] remains difficult'. This wisdom applies to German law as a whole, but above all to the way the German legislator implements EU directives in German law when they do not really 'fit' with existing legal concepts.[111] Here, it may take a long time until (if at all) these new rules are really integrated and 'adopted' as making sense by the relevant stakeholders. Today – in contrast to the 1990s – one can say that the regulatory aim of Directive 89/665/EEC is accepted, and its transposition in §§ 97ff GWB

and S Torricelli (eds), *Contrôles et contentieux des contrats publics/Oversight and Challenges of Public Contracts* (Bruylant 2018) 42ff.

111 See M Payrhuber and U Stelkens, '1:1-Umsetzung" von EU-Richtlinien: Rechtspflicht, rationales Politikkonzept oder (wirtschafts)politischer Populismus?' (2019) 2 Europarecht 190, 215ff.

can be considered to be a success.[112] However, the review system introduced by §§ 97ff GWB still forms a sort of 'foreign body' in the system of judicial review in administrative matters in Germany. Its potential to serve as a model for 're-designing' and improving judicial review in all kinds of competitive award procedures is far from exhausted. Improving judicial review in competitive award procedures does not necessarily mean creating/recognizing more rights for unsuccessful applicants. It means, rather, adapting the 'standard procedures' for judicial review to the specific needs of these specific kinds of procedures.

[112] See M Burgi, 'Entwicklungstendenzen und Handlungsnotwendigkeiten im Vergaberecht' [2018] NZBau 579-585.

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Procedural Rights in Lithuanian Administrative Law – Resistance Fuelled by the Past?

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Abstract

Despite the prevailing trend towards the codification of administrative procedures on the European plane – both on supranational and domestic levels –, the Lithuanian legal system stays immune to it. The purpose of this article is, hence, to explore the underlying reasons for the said resistance towards a clear enunciation of procedural rights on statutory level as well as its more practical implications in Lithuania. Namely, the main focus lies on the analysis of the said deficiencies as reflected by the administrative case law. In order to reach this goal, firstly, the (somewhat limited) notion of administrative procedure found in the legal framework of Lithuania is dissected and compared to respective notions found in few other legal systems of EU Member States boasting more comprehensive codifications of administrative procedure. Secondly, the relevant administrative case law in which the paradigmatic examples of procedural rights (such as the right to be heard and access to one's file) can be found is analysed. In the end, the reasons of the said resistance towards codification of procedural rights in the Lithuanian legal system are offered together with a reflection on whether that can still be justified in view of the results revealed by the case law analysis, or whether the time to innovate has come and the more coherent and logically-organized system of administrative procedure is needed.

1. Introduction

Administrative procedures and the individual rights stemming therefrom under European administrative law seem to be flourishing. A telling example of this is the fact that the European Union has managed to juridify them despite its supposed commitment to national procedural autonomy.[1] Nor has the European Court of Human Rights (ECtHR) stayed immune from eliciting certain important aspects (even if inconclusively) as to the proper way of

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1 For example, in EU competition law, the practice of claiming different procedural breaches has proliferated, as well as the judicial response thereto. See in general RD Kelemen, 'Adversarial legalism and administrative law in the European Union' in S Rose-Ackerman & PL Lindseth (eds), *Comparative Administrative Law* (1st edn, Edward Elgar 2010) 606, 606. For scholarship

conducting an administrative procedure,[2] whereas the Council of Europe (CoE) began to highlight its importance decades ago by undertaking standard-setting activities in this domain.[3] Another testimony to the evergreen significance of administrative procedures are the numerous academic and legislative projects dedicated to their codification.[4] Indeed, the codification of procedural administrative rights is often considered a clear and convenient way to transfer them into the minds and actions of both individuals and administrative authorities. With these trends in mind, one could say that the supranational 'normative' pressure to transplant administrative procedural rights into domestic legal systems continues to be strong.[5] Even if there are no 'hard' provisions on individual procedural rights that must be implemented or have been implemented by extraneous actors as, say, from EU directives into domestic law, and even if such provisions have a limited scope of application, the growing awareness and use of procedural rights in the European developments described above leads to a claim that these procedural rights may be perceived as legal transplants *lato sensu;* i.e., foreign techniques that become slowly acclimated into a legal

regarding procedural rights in EU law, see *inter alia*, J Mendes 'Administrative procedure, administrative democracy' in JB Auby & T Perroud (eds), *Droit comparé de la procédure administrative* (Bruylant 2016) 235-244; J Mendes, *Participation in EU Rule-Making* (Oxford University Press 2011); J Schwarze, *European Administrative Law* (Sweet and Maxwell 2006) 1173 et seq (ch 7); HP Nehl, *Principles of Administrative Procedure in EC Law* (Hart Publishing 1999).

2 See eg *Jehovah's Witnesses of Moscow v Russia* App no 302/02 (ECtHR, 10 June 2010) paras 174-175 on the duty to give reasons; *Rysovskyy v Ukraine* App no 29979/04 (ECtHR, 20 October 2011) para 73 on the right to be heard, etc. See more on the ECtHR 'slowly but surely' expanding its jurisdiction into the realm of administrative procedure in C Harlow & R Rawlings, 'National Administrative Procedures in a European Perspective: Pathways to a Slow Convergence' (2010) 2 Italian Journal of Public Law 215, 226-229.

3 See Council of Europe (CoE), *The protection of the individual in relation to acts of administrative authorities – An analytical survey of the rights of the individual in the administrative procedure and its remedies against administrative acts* (1975). See also CoE, Resolution (77)31 on the protection of the individual in relation to the acts of administrative authorities codifying individual rights vis-à-vis administrative authorities (adopted 28 September 1977 by the Committee of Ministers).

4 The ReNEUAL project aimed at developing a set of rules for administrative procedures, with the EU's legal framework being the most prominent one, even if it has not turned into a concrete piece of legislation. For academic works on the codification of administrative procedures see G della Cananea, *Due Process of Law Beyond the State* (Oxford University Press 2016) 23 et seq.; JB Auby, *Codification of Administrative Procedure* (Bruylant 2014); Auby & Perroud (n1). In fact, even legal systems known for their resistance to the codification of administrative procedures seem to have yielded to this general trend recently. The most notable example thereof is France, with its adoption of *Code des relations entre le public et l'administration* (Order no 2015-1341 of 23 October 2015, entry into force 01 January 2016).

5 The explicit impulse in this regard for Lithuania came from the SIGMA programme around the time when the country was preparing to join the EU. It was deemed that to build capacity for the public administration to effectively implement the *acquis communautaire,* 'procedural fairness' also had to be ensured in the candidate's country system. See more in SIGMA, 'European principles for public administration' (1999) Sigma Paper No. 27, CCNM/SIGMA/PUMA(99)44/REV1, 10-11. Similar conclusions appear in European Commission, Opinion on Lithuania's Application for Membership of the European Union (1997), DOC/97/15, 15th July 1997.

system in which they were not formerly recognized. Despite this, the 'procedural talk' in Lithuanian administrative law does not really seem to have taken root, and the enunciation of procedural rights at the statutory level remains very limited. More precisely, these rights are tied either to a specific type of administrative action, described below, or to the imposition of economic sanctions.[6] In the absence of specific legal provisions mandating their respect, procedural rights are not generally embedded in the relationships between the administration and citizens. They do not permeate the whole system of public administration *ex lege* and, hence, cannot be said to be adequately embedded in the daily workings of the administration. This lack of attention is regrettable because, firstly, procedural rights aim to protect significant 'dignitarian' interests; in fact, sometimes procedure can even be equated with justice itself.[7] Secondly, if taken seriously, procedural rights are able to facilitate administrative decision-making by providing the administration with an informational input that may be vital for the proper outcome. In other words, by vindicating procedural rights, individuals are able to efficiently communicate with the administration and ensure the 'rationality' of state action.[8] Hence, procedure impacts substance and *vice versa*.[9] Individual rights, in turn, may unburden the courts since administrative procedures are more accessible and 'user-friendly' than their judicial counterparts.[10] Attaching a broad range of rights to them has an incidental effect on fostering the legitimacy of administrative decisions or could at least speed up adjudication.

Against this backdrop, this article seeks to analyze the current state of the protection of procedural rights in Lithuania and to provide an assessment of the implications stemming therefrom. This will be done by first outlining the relevant regulatory framework as well as dissecting the concrete notion of administrative procedure found therein. This will be followed by comparing this notion with that of the EU Member States boasting more comprehensive codi-

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6 Article 36^8 (3) of the Lithuanian Law on Public Administration stipulates the right to be heard and access to one's file for business units before the imposition of an economic sanction. This provision was added to the LPA in 2010.

7 In this regard, an eloquent example provided by legal theorist Fuller can be referenced: the attempt in the former Soviet Union to retroactively increase the sentence for robbery, i.e. for those sentenced for this crime in the past. Despite being only 'procedural' and not 'substantive' in nature, this attempt provoked a strong reaction even in the Soviet Union, not known for its adherence to the rule of law, and was perceived as a matter of justice, see B Bix, 'Natural Law Theory' in D Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (2nd edn, Blackwell Publishing 2010) 211, 220.

8 E Schmidt-Aßmann, 'Der Verfahrensgedanke im deutschen und europäischen Verwaltungsrecht' in W Hoffmann-Riem, E Schmidt-Aßmann & A Voßkuhle, *Grundlagen des Verwaltungsrechts (Band II)* (2nd edn, CH Beck 2012) 495, 498-499.

9 And, hence, the boundaries between the two remain fluid, see more in della Cannanea (n4) 7.

10 See for a common law approach C Harlow & R Rawlings, *Law and Administration* (3d edn, Cambridge University Press 2009) 42.

fications of administrative procedure, to show its conceptual insufficiency in the Lithuanian legal system. The comparison will be performed by using textual analysis and systemic methods. The German and Croatian legal systems were selected for the analysis because they both explicitly define the notion of an administrative procedure. Besides, the Croatian example is interesting because it is not the 'usual suspect' in European comparative law but at the same time (in terms of democratic development) can be said to be close to Lithuania.[11] Finally, Lithuanian case law will be examined with regard to procedural rights, i.e. the right to be heard and some elements of access to one's file.[12] Such a 'litmus test' should enable us to tackle the question of whether the resistance towards procedural rights in the Lithuanian legal system can still be justified in view of the empirical results and if the current level of procedural protection can be deemed adequate. Or, on the other hand, if the time to innovate has come and a more coherent and better-organized system of administrative procedure is due. Some normative suggestions will be made in that regard in the final part of this article.

2. Administrative procedure within the Lithuanian legal framework: some basics

The analysis must start with a brief *tour d'horizon* of the origins of the Lithuanian framework, the (overall) structure of the regulation on public administration within the Lithuanian legal framework, and the place of administrative procedures therein.

The Lithuanian Law on Public Administration was an intellectual product of the time of its adoption, in the late 1990s, after five decades of Lithuania being an (illegally annexed) part of the former USSR. This meant that before 1989 Lithuanian administrative law was 'socialist', for a lack of a better word. All in all, the former administrative law could be described as a mélange of the *nomenklatura* administrative tradition (in which a formalist approach to law was prevalent), the authoritarian regime of President Smetona in the interwar independent Lithuania, and the legacy of the empire of Russian tsars, to which

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11 A Andrijauskaitė, 'Creating Good Administration by Persuasion: A Case Study of the Recommendations of the Committee of Ministers of the Council of Europe' (2017) 15 International Public Administration Review 39, 41.

12 These rights can be labelled 'paradigmatic' because they are *expressis verbis* enshrined in Article 41 (2) a) and b) of the Charter of Fundamental Rights of the European Union alongside with a (more substantive) requirement to give reasons for administrative decisions. They are thus part of the EU's primary law. See European Union: Council of the European Union, Charter of Fundamental Rights of the European Union (2007/C 303/01), 14 December 2007, art 41(2)(a) and (b) (CFR).

Lithuania belonged in the nineteenth century.[13] So-called 'state estrangement' in Lithuania was prevalent[14] and interaction with public authorities was predominantly perceived through an 'antagonistic prism'. After the fall of the Berlin Wall, Lithuania quickly became independent, a constitution was adopted and a new administrative system set up thanks to an 'unflinching' desire to join the EU, as well as 'foreign' consultations, including SIGMA papers. In fact, there was very little time to shed one system of administrative law and transition into another. This means that part of the modern administrative law retains some of the features that had underpinned the administrative law of the country's communist past. In particular, modern Lithuanian administrative law and the academic discussions pertaining to the tasks of the administration vis-à-vis the individual started to develop very late due to these historical reasons, i.e. later than said law was adopted.[15]

Returning to the modern-day Lithuanian legal framework, it should be underscored that the level of codification of administrative procedures in Lithuanian law can be described as inchoate and blended at best.[16] This is because there is no separate act on administrative procedures in the Lithuanian legal system in the strict sense. Instead, the notion of administrative procedure (as a sub-category of administrative services) is stipulated by the Law on Public Administration (*Viešojo administravimo įstatymas* No. VIII-1234 of 17 June 1999, henceforth 'LPA') that regulates the organization of the system of public administration in broad strokes.

This law was adopted in 1999 together with the establishment of administrative courts and has been through multiple revisions ever since. These revisions include reframing the cornerstone notion of public administration and its modalities, i.e. the concrete actions by administrative authorities that it may entail, as well as the introduction of pre-trial administrative proceedings, to name but a few. The law is generally intended to implement the constitutional

13 S Pivoras, 'Post-Communist Public Administration in Lithuania' in S Lieber, SE Condrey & D Goncharov (eds), *Public Administration in Post-Communist Countries* (Taylor & Francis Group 2013) 135, 137.

14 ibid 137.

15 The first book on administrative law in Lithuania appeared as late as 2004, ie the year Lithuania joined the EU. Lithuanian administrative law during the interwar period was rudimentary and underdeveloped: basic 'administrative law terminology' was missing in the scholarship, European impulses on national administrative law appeared to be fragmented and no single act covering basic administrative law matters was adopted, see more in I Deviatnikovaitė, 'Administracinės teisės samprata ir mokslas tarpukario Lietuvoje [The Concept and Science of Administrative Law in the Interwar Period in Lithuania]' (2018) Teisė No. 106, 80-98. Hence, the country did not really have an administrative law tradition to fall back on and, as mentioned above, had to prepare its Law on Public Administration in haste to join the EU.

16 For different models of regulation of administrative procedure see X Arzoz, 'Administrative Procedures' in R Grot, F Lachenmann & R Wolfrum (eds), *Max Planck Encyclopedia of Comparative Constitutional Law* (Oxford University Press 2017), para 11. Lithuania's path can be attributed to 'brief frame regulation'.

provision that 'State institutions shall serve the people' (Art. 5 (3) of the Lithuanian Constitution)[17] – a point of departure for many developments under public law since it is one of the few constitutional norms loaded with direct and explicit content relevant to administrative law. For example, the establishment of national ombudspersons was based on this provision.[18] Moreover, the principle of the rule of law and good administration are also usually derived from Article 5 of the Constitution in the case law because (save for the preamble) there are no other constitutional provisions enunciating these concepts in explicit terms. The LPA encompasses a rather broad and scattered range of issues, including the principles of public administration, the activities of public administration, the system of its organs, the basics of administrative procedure, the right to appeal against administrative decisions or inaction by public authorities, the right to have one's complaints and pleas examined, and other rights and duties related to public administration (Art. 1 LPA).[19] Thematically, it is arranged into six sections that deal with general provisions such as definitions used in this law and the principles of public administration (Section I), public administration, including its various declinations and the adoption of administrative acts (Section II), administrative procedure (Section III), supervision of activities of economic entities (Section IV), terms and conditions of institutional assistance (Section V) and final provisions (Section VI).

Thus, the scope of the LPA can be characterized as rather broad even if some crucial parts, such as rules on state liability, administrative discretion or the revocation of administrative decisions, are missing.[20] Administrative procedure, for its part, has a separate section in the LPA which would *prima facie* imply its saliency. However, it is also integrated into a wider category of 'administrative services'[21] in terms of the structure of this law, and the relevant wording reveals that its notion and scope are rather limited:

'the administrative procedure shall comprise of mandatory actions performed pursuant to this Law by an entity of public administration while considering a person's

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17 Lithuanian Constitution, art 5(3).

18 See more in J Paužaitė-Kulvinskienė & A Andrijauskaitė, 'The Pan-European General Principles of Good Administration in Lithuania – A Success Story with Caveats' in U Stelkens & A Andrijauskaitė (eds), *Good Administration and the Council of Europe: Law, Principles and Effectiveness* (Oxford University Press 2020) 559-582.

19 LPA, art 1.

20 The duty to make good damage caused by public authorities is only rudimentarily enshrined in Article 39 LPA. The legal conditions for state liability, for their part, are laid down in the Civil Code of Lithuania.

21 Art 15(1)(6) LPA. Other administrative services include: issuance of authorisations and licences, issuance of documents confirming particular legal facts, acceptance and processing of declarations, provision of consultations to persons on the issues of the competence of a public administration entity, submission to persons of information stipulated in laws and available to an entity of public administration.

complaint about a violation, allegedly committed by acts, omissions or administrative decisions of the entity of public administration, of the rights and legitimate interests of the person referred to in the complaint and adopting a decision on administrative procedure' (Article 19 (1) LPA).[22]

Article 2 (15) LPA, for its part, enshrines the following definition of a 'complaint', which is a central element of an administrative procedure:

'Complaint shall mean a person's written application to an entity of public administration where it is indicated that his rights or legitimate interests have been violated and it is requested to defend them.'[23]

Article 20 (1) LPA, for its part, lays down a list of procedural rights that may be invoked by either the applicant or a third person.[24] However, a precondition to invoke these rights is the existence of a violation of rights or legitimate interests by the actions, omissions, or administrative decisions of an entity of the public administration regarding either the applicant or the third person. If a complaint is received, then the head of an entity of public administration or an official or a civil servant authorised shall initiate an administrative procedure with respect to the person's claim or notification.

This catalogue of rights, among other things, includes access to one's file, the right to supply additional information and provide explanations, to call for the removal of an official entrusted with carrying out the procedure or the civil servant or employee that carries out the administrative procedure, to have an interpreter, to participate when checking the factual data on site, to express one's opinion on issues arising during the administrative procedure, to request that a public administration entity which has initiated the administrative procedure terminate it, to receive a decision on the administrative procedure, to appeal against an adopted decision, and to have a representative.

These provisions indicate a number of things. Firstly, an administrative procedure in Lithuanian law is, for lack of a better word, 'rigid'[25] in that it is perceived as a series of *mandatory* actions to be taken by an administrative authority while dealing with a particular (narrowly constructed) type of situation, i.e., the handling of a complaint involving an alleged violation of rights and legitimate interests by public authorities. In fact, relevant *travaux préparatoires*

22 Art 19(1) LPA.

23 Art 2(15) LPA.

24 Art 20(1) LPA.

25 The narrow interpretation of an administrative procedure is also confirmed by administrative case law: it has been *expressis verbis* highlighted that this institute is reserved for dealing with complaints about alleged violations of rights. Thus, administrative services, such as consultation cannot be equated therewith, see SACL, Decision of 26 March 2012 – Case No. A602-1252-2012.

of the LPA reveal that 'an alleged violation of rights *by public authorities*' and not 'any kind of violations of rights' was always an element quintessential for the perception of an administrative procedure in Lithuanian administrative law.[26] The term 'violation of rights', however, remains unspecified, most likely because it may have many guises. Overall, the said enunciation denotes a heavily 'adversarial' character for an administrative procedure, marked by its conceptual kinship with Article 33 of the Constitution enshrining the right to criticise the work of state institutions or their officials and to appeal against their decisions.[27]

Such a limited notion of administrative procedure furthermore excludes from its scope many other types of administrative action which may not be 'adversarial' *per se* but should be regarded as no less important in that their outcome may have detrimental effects for the individual, such as the (non)-issuance of a licence or (not) acquiring other administrative services. The handling of such types of pleas or requests which are not connected with a violation of rights falls under sub-statutory level, only with no discernible emphasis on procedural rights.[28] Moreover, the provision regulating administrative procedure prescribes only one possible outcome – the adoption of a decision.[29] Finally, it must be noted that the remaining types of administrative interaction are still subject to the requirements applicable for the adoption of an administrative act found elsewhere in the LPA[30] but are not *ex lege* tied to any of the procedural rights explicitly enumerated in Article 20 (1) LPA. So, for example, there is no individual right to be heard when an administrative decision bearing negative consequences is adopted that does not fit into the narrow definition of 'administrative procedure' as a sequence of mandatory actions aimed at investigating a possible violation of the rights enshrined in the LPA.

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26 See the Explanatory Memorandum on the Amendments on LPA of 2002 November 6 No. IXP-1223. Tracking down the evolution of the regulation of an administrative procedure in the LPA also shows that it has only occurred through 'cosmetic surgery', intended to reduce the administrative burden by including the possibility of initiating an administrative procedure via electronic means, without ever straying from this conceptual core.

27 Constitution of Lithuania, art 33.

28 Regulations for Examination of Requests of Persons and for their Servicing at Public Administration Authorities, Institutions and Other Entities of Public Administration approved by Resolution No. 875 of the Government of the Republic of Lithuania of 22 August 2007 (as amended by Resolution No. 2017-18411 of 11 November 2017).

29 Whereas other European systems, such as the Italian, Spanish or German ones, accept that an administrative procedure may end with something other than a decision, eg an agreement, see Auby (n4) 14, 21.

30 Namely, art 8 LPA that forms the core of the LPA. It stipulates, among other things, the duty to state reasons in an administrative act as well as the duty to notify of its adoption.

3. The notion of (Lithuanian) administrative procedure vs. administrative procedures in other legal systems

Having outlined the notion of an administrative procedure within the Lithuanian legal framework, it is now time to put it in a comparative perspective. Even if some European legal systems successfully forgo administrative codifications – such as Britain, where procedure has always been crucial without a broader systematization thereof,[31] or Belgium, where this need has been covered by the development of general principles of administrative law[32] – the prevailing trend points to the codification of administrative procedures, i.e., the enactment of legally binding rules creating concrete rights for the individual. Such codifications are usually marked by a broad scope of administrative procedure as a key factor. This trend is attested not only by a majority of systems with codifications in place but also by a modern understanding that administration needs codified and published rules to fetter the bureaucracy.[33] For the purposes of this article, European legal systems with comprehensive and well-established codification traditions have been chosen. It was deemed that – although the European approach is diverse – the Lithuanian legal system, that lacks authentic and fully-fledged traditions when it comes to administrative law, might learn from these systems. More precisely, the conceptions found therein – the modalities, scope and instrumentalization of procedural rights – are of particular interest. The first example worthy of consideration is the German one. It boasts a codification dating back to 1976 and was intended to provide the administration with a 'robust' working tool[34] whose formation was fuelled by solid academic discussion. This system defines an administrative procedure as follows:

'...administrative procedure shall be the activity of authorities having an external effect and directed to the examination of basic requirements, the preparation and

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31 See more on the British tradition of procedural fairness and reasonableness in DJ Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (Clarendon Press 1996) 165-185.

32 In a similar fashion, the right to be heard started to be recognised in case law in a range of legal systems, including in France: see Conseil d'Etat, 5 mai 1944, Dame Veuve Trompier-Gravier, Rec., 133; and commentary in M Long et al., *Les grands arrêts de la jurisprudence administrative* (22nd edn, Dalloz 2019) 322-329.

33 J Ziller, *Administrations Comparées: Les systèmes politico administratifs de l'Europe des douze* (Montchrestien 1993) 267 et seq.

34 See more in U Stelkens, 'Kodifikationssin, Kodifikationseignung und Kodifikationsgefahren im Verwaltungsverfahrensrecht' in H Hill et al., *35 Jahre Verwaltungsverfahrensgesetz – Bilanz und Perspektiven: Vorträge der 74. Staatswissenschaftlichen Fortbildungstagung vom 9. bis 11. Februar 2011 an der Deutschen Hochschule für Verwaltungswissenschaften Speyer* (Duncker & Humblot 2011) 271–295.

adoption of an administrative act or to the conclusion of an administrative agreement under public law; it shall include the adoption of the administrative act or the conclusion of the agreement under public law' (§ 9 of the German Administrative Procedural Act [Verwaltungsverfahrensgesetz]*).*[35]

As becomes evident from this definition, the German legal system conceptualizes an administrative procedure broadly, i.e., without contours,[36] as any activity by authorities having an external effect, and clearly highlights the preparation and adoption of an administrative act as its core. In contrast to the Lithuanian LPA, violation of the rights or legitimate interests of the applicant is not made into a characterising feature of an administrative action as an 'administrative procedure' for the purposes of the German APA. Hence, its scope is not limited to the 'adversarial' type of administrative action but goes so far as to include administrative agreements. The definition of an administrative procedure is furthermore put together under the same structural part ('Procedural principles') as §§ 28 and 29 of the German APA, enshrining two paradigmatic procedural rights – the right to be heard and access to one's file. These articles, as opposed to the Lithuanian 'catalogue' of procedural rights, are laid down in separate articles that purportedly result in higher visibility and accessibility for concerned individuals. This, together with Article 10 of the German APA enshrining the freedom of form of procedural means,[37] renders the whole concept of an administrative procedure much more flexible in comparison to the notion known in the Lithuanian legal system.

Another legal system in which the notion of an administrative procedure is well-pronounced and, hence, suitable for the purposes of this paper is the Croatian one. The tradition of codifying administrative procedure in Croatia has Austro-Hungarian underpinnings, with the first modern attempt to adopt the general administrative procedure act made as early as 1931.[38] Currently, these matters are regulated by the General Administrative Procedure Act adopted on 27 March 2009 ('GAPA').[39] Article 3(1) and (2) of the Croatian GAPA defining

35 The official translation taken from the website of the German Federal Ministry of the Interior, Building and Community <www.bmi.bund.de/SharedDocs/downloads/EN/gesetztestexte/VwVfg_en.html> accessed 02 March 2021.

36 However, the need to include 'novel' types of administrative action, not exclusively revolving around the adoption of an administrative act, such as notification procedure in planning law or decisions on public procurement matters, into its definition, is also sufficiently discussed in the scholarship, see more in U Stelkens, M Sachs & H Schmitz, *Verwaltungsverfahrensgesetz Kommentar* (9th edn, CH Beck 2018) 48 et seq.; See further Schmidt-Aßmann (n8) 505.

37 'The administrative procedure shall not be tied to specific forms when no legal provisions exist which specifically govern procedural form. It shall be carried out in an uncomplicated, appropriate and timely fashion' (art 10 of the German APA).

38 JSD Dario-Derda, 'Chapter 4. Republic of Croatia' in Auby (n4) 107, 108.

39 Translation into English accessible at <www.legislationline.org/documents/id/16474> accessed 02 March 2021.

the notion of an administrative procedure includes all 'administrative matters' as well as the conclusion of administrative agreements within its scope, save for those exceptions regulated by a separate law. Article 2(1) of the Croatian GAPA, for its part, stipulates that

'administrative matters are matters in which public law authorities in administrative proceedings decide on the rights, obligations and legal interests of natural or legal persons or other parties ... pursuant to the direct application of laws and other regulations and general acts governing the appropriate administrative field'[40]

In contrast to the German notion of administrative procedure, the Croatian one does not make the preparation of the administrative act its main focus but rather emphasizes 'direct application' of laws. However, both notions (despite the modalities) appear to be 'shoreless', i.e. very broad and (rather tautologically) encompassing any matters (including the conclusion of administrative agreements) that necessitate a decision on rights, obligations and legal interests by public authorities based on the general rationale of administrative law, i.e. applying statutory laws. However, no nexus to the (alleged) violation of rights of the applicant by public authorities is required by this definition, in contrast to the Lithuanian notion of an administrative procedure. Instead, the 'qualifying criterion' is based on the 'direct effect' of administrative matters (cf. with the 'external effect' stipulated by the German APA) on the rights, obligations and legal interests of the applicant. This allows a very broad range of administrative matters to be subjected to the procedural safeguards enshrined in the subsequent parts of the Croatian GAPA. Namely, to Article 11 of the GAPA stipulating, among other things, the obligation on public law authorities to provide parties with access to the necessary data and to Article 30 (1) of the GAPA furnishing applicants with the right to be heard.[41] ('In the course of proceedings parties must be given the opportunity to make a statement on all circumstances, facts and legal issues which are important for resolving the administrative matter'.)[42]

4. Procedural rights in action

The case law analysis performed for the purposes of this paper has revealed that the right to be heard – as a litmus test for procedural rights – is upheld by Lithuanian administrative courts as a general tendency, regardless of the narrow definition of administrative procedure. The most prominent ex-

40 ibid art 2(1).
41 ibid art 11 and 30(1).
42 Article 30 (1) of GAPA.

amples thereof are found in cases concerning immigration issues, EU subsidies, and land restitution disputes as well as tax, civil service and social security laws. Considering that this right is not stipulated by an overarching provision of the LPA (as demonstrated above) it comes as no surprise that its protection does not happen in a neatly organized but rather in a haphazard manner. Three main strands of the case law may be distinguished in this context: 1) deriving the right to be heard from *legi speciali* which stipulate certain procedural rules on the participation of the applicants (eg the Lithuanian Law on Tax Administration or Lithuanian Law on Competition); 2) deriving the right to be heard from supranational and constitutional sources of law and by invoking the method of systematic interpretation of laws or accepting it as a 'general principle of administrative procedure'; and/or 3) expanding the scope of application of Section III of the LPA to those situations which do not seem to match the definition of an administrative procedure (Article 19(1) LPA). Whereas the first example is relatively clear,[43] although limited since not all laws in special fields of administrative law enshrine this right, the latter two deserve a short discussion in their own right.

4.1. Reliance on supranational/constitutional sources systematically construed

The first example from the case law in which recourse to supranational sources was taken concerned the question of whether the Lithuanian migration authorities had lawfully withdrawn subsidiary protection given to an asylum seeker without providing him with a possibility to be heard.[44] The right to be heard in a procedure for subsidiary protection was not enshrined in any *legi speciali*. Thus, the Supreme Administrative Court of Lithuania ('SACL') had to turn to constitutional provisions and supranational sources of law to resolve the case. The right to be heard was derived from a multitude of sources – firstly, from the relevant EU directives enshrining the need to ensure efficient protection for asylum seekers and carry out examinations of their requests on an individual basis.[45] Their transposition into Lithuanian law was deemed to

43 See to this effect eg SACL, Decision of 25 November 2013 – Case No. A520-1831/2013, in which Art. 126 (3) of the Lithuanian Law on Tax Administration stipulates that 'The taxpayer shall have the right in the course of a tax inspection and the approval of its results to submit comments and statements concerning the object of inspection and other circumstances related to the inspection' was used for protecting the applicant's right to be heard in the particular dispute. See further SACL, Decision of 1 July 2020 – Case No. eA-2586-629/2020 in which the right to be heard was upheld following the Lithuanian Law on Product Safety; or SACL, Decision of 17 May 2019 – Case No. eA-1316-1062/2019 in which the said right was granted before a professional sanction on a newspaper could have been imposed.

44 See SACL, Decision of 8 December 2010 – Case No. A756-686/2010.

45 Article 4(3) of the Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted

be deficient. Secondly, it was derived from the already-quoted Article 5(3) of the Lithuanian Constitution providing that 'State institutions shall serve the people' as (implicitly) encapsulating the principle of good administration.[46] Thirdly, from Article 41 of the Charter of Fundamental Rights of the European Union ('CFR') enshrining the corresponding principle of good administration and the right of every person to be heard before any individual measure which would affect him or her adversely is taken as a component.[47] Finally, from Article 14 of the Council of Europe's Recommendation CM/Rec(2007)7 on good administration stipulating that an opportunity to express views must be given to private persons before issuing any measure which may adversely affect their rights.[48] The systematic interpretation of all these acts allowed the SACL to come to the conclusion that the national migration authorities were also obliged to furnish an asylum seeker with the possibility of being heard before withdrawing subsidiary protection, regardless of the fact that the national law did not explicitly grant such a right. The reliance on so many legal provisions by the SACL ('provision overkill') might be explained precisely by the latter circumstance, i.e., by the need to normatively justify the creative application of the right to be heard.

The 'heavy' reliance on supranational sources to derive procedural rights is further discernible in cases concerning EU subsidies.[49] For example, in one case, the applicant was ordered to return payments received from the National Paying Agency under a direct support scheme for farmers. This was ordered after it was established that the applicant had inaccurately declared the size of a plot of land relevant for the payments at issue – a fact that transpired during an administrative check-up. It was highlighted in the case that the applicant was neither informed of this procedure nor had the possibility to present his arguments as to the accuracy of the size of the plot of land that bore relevance for the payments received. Here again, together with the relevant EU regulations

(L304/12, 2004); Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (L326/13, 2005).

46 In other cases the right to be heard was also derived from art 30 (1) of the Constitution providing that 'The person whose constitutional rights or freedoms are violated shall have the right to apply to court'; hence, was deemed to be a part of the defence rights at the level of administration, see eg SACL, Decision of 7 January 2020 – Case No. eA-859-602/2019; SACL, Decision of 11 December 2019 – Case No. eA-2473-1062/2019.

47 CFR (n12) art 41.

48 CoE, Recommendation CM/Rec(2007)11 of the Committee of Ministers to member states on promoting freedom of expression and information in the new information and communications environment (adopted 26 September 2007 by the Committee of Ministers).

49 See SACL, Decision of 11 September 2014 – Case No. A438-1102/2014. See, *mutatis mutandis*, SACL, Decision of 12 March 2014 – Case No. A261-214/2014 in which similar reasoning was invoked although without finding a violation of *audiatur et altera pars* in the imposition of a financial correction.

laying down rules for the legal relationship at issue,[50] the SACL derived the right to be heard from Article 41 of the CFR, also fortifying its reasoning with the relevant case law of the Court of Justice of the European Union, which expands upon the scope of this right.[51] The combined and open method of systematic interpretation of various sources of law allowed the SACL to grant the protection of – what were termed as – the 'defence rights' of the applicant during the administrative procedure and annul the order to return payments on that basis.

4.2. No clear normative basis and a 'flexible' approach to administrative procedure

Whereas the foregoing cases had a clear 'EU law touch' and, thus, a discernible supranational normative base to fall back on, the following cases involved issues of a more 'domestic' nature and, thus, the SACL employed another type of reasoning to safeguard procedural rights. For example, in a case concerning land restitution,[52] the impugned administrative act refusing to restore the applicant's right to property was deemed to be deficient. This was because the administrative authority had failed to inform the applicant about the possibility of establishing the (fact of) ownership at the time of nationalization by means of civil procedure, as well as failing to inform her of the consequences of not doing so. This would have enabled the administrative authority to adopt an administrative decision based on the objective facts, i.e., to restore property rights to the applicant or not, contingent on the fact of ownership at the time of nationalization. While coming to this conclusion the SACL referred to Article 8 LPA, laying down the substantive requirements of an administrative act.[53] It furthermore denoted the right to be heard as a 'general principle of administrative procedure', without providing any explicit basis in positive law. This case shows two things quite clearly: firstly, how disregard for procedural rules may incapacitate the adoption of an administrative decision altogether (and, hence, impact its substance) and, secondly, that in cases where no clear procedural rules can be discerned from the relevant legal framework, the judiciary is left

50 Among other things, the Commission Regulation (EC) No. 795/2004 of 21 April 2004 laying down detailed rules for the implementation of the single payment scheme provided for in the Council Regulation (EC) No. 1782/2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers (OJ L 141, 2004).

51 i.e. the jurisprudential precept that 'the addressees of decisions which significantly affect their interests should be placed in a position in which they may effectively make known their views', see Case C-395/00 *Distillerie Fratelli Cipriani SpAv Ministero delle Finanze* [2002] ECLI:EU:C:2002:751.

52 See SACL, Decision of 25 April 2013 – Case No. A261-604/2013.

53 Article 8(1) LPA stipulates that "an individual administrative act must be based on objective data (facts) and the norms of legal acts, and the sanctions applied must be reasoned."

to 'divine them from the ether'; for example, in the guise of a general administrative law principle.

Another case that, for lack of a better word, can be classified as 'bizarre', but shows the flexible approach aimed at bringing procedural rights into life given by the SACL, concerned social security law.[54] More precisely, the Lithuanian State Social Insurance Fund Board (the 'Board') required the applicant, as inheritor, to return a widow's pension unduly received following the death of a relative. The curious aspect of this case is the fact that the impugned administrative act was adopted after the death of the testator, when the Board carried out a random audit as to the validity of data submitted by the testator. Again, there were no discernible procedural rules in positive law for establishing the guilt that was a necessary precondition for requesting the repayment of an unduly received widow's pension. The SACL (once again) turned to Article 8 LPA, laying down the substantive requirements for the adoption of an administrative act, and highlighted that, in order to adopt reasonable administrative acts, adherence to the procedural rules is also necessary, including those enshrined in Section III of the LPA.[55] According to the reasoning of the SACL, total disregard for the procedural rights of the concerned individuals renders an administrative procedure 'meaningless'. Bearing in mind the fact that in this case the testator was dead by the time the administrative decision was adopted, and that it had direct implications on the inheritor – this requires no further comment. The administrative act was consequently quashed and the requirement to repay the unduly received pension was held to be unlawful.

5. Conclusion

The foregoing analysis has shown that the notion of administrative procedure and its attendant rights (especially the right to be heard) in Lithuanian (statutory) administrative law is conceived very narrowly compared to the selected European legal systems. This leads to a claim that 'transplanting' its full potential is still resisted by the legislator. Instead, the notion of an administrative procedure is anchored to *an alleged violation of rights or legitimate interests by public authorities* as a precondition for its commencement and the triggering of said rights. The (general) adoption of an administrative act, for its part, is not covered by the notion of an administrative procedure *stricto sensu,* let alone the conclusion of administrative agreements in positive law. It remains unclear why the Lithuanian legislator chose to tailor administrative procedure

54 See SACL, Decision of 24 October 2019 – Case No. eA-243-822/2019.

55 The SACL also included elements stemming from the case law of the Court of Justice of the European Union on access to one's file in its reasoning.

in such a fashion. However, one can speculate that this is a kind of 'mental leftover' from the *nomenklatura* time, that may be difficult to shake off.[56] The reference to Article 33 (2) of the Lithuanian Constitution enshrining citizens' right to criticise the work of state institutions or their officials and to appeal against their decisions in the relevant *travaux préparatoires* seems to corroborate this claim. It is plausible that only the aforesaid 'adversarial' or 'antagonistic' type of interaction with the public authorities hinting at a violation of rights was deemed worthy of 'enhanced' procedural protection regulated in a formalized and meticulous manner.[57] At the end of the day, administrative procedural law is nothing but a reflection of a particular administrative culture.[58] Moreover, due to the aforementioned historical reasons, there was simply no time to develop procedural standards in an 'organic' way, i.e., by the judiciary pressurizing the administration to follow a certain set of procedures through its case law. This appears to have been a standard route before any codifications took place in other European jurisdictions.[59] However, such a narrow conception of administrative procedure is regrettable from a contemporary perspective because it leaves out (too) many other types of administrative action that, if performed deficiently, could also account for prospective violations of rights. Besides, where the legislator does not take the lead, judges need to be creative and find solutions to consecrate procedural rights.

This, among other things, manifests in the judiciary having to derive some 'classical' procedural rights from either supranational or constitutional sources or by means of simply expanding the purview of Section III of the LPA, in which the notion of an administrative procedure and its accompanying rights is stipulated, to a broader range of administrative action, or by having recourse to the general principles of law. Although the tendency of administrative courts to funnel constitutional standards into practice in the guise of procedural rights is laudable, the judicial path may not be the optimal solution, since the legal clarity and accessibility that are constitutional values *per se* might be undermined. The experience of the legal systems chosen for the purposes of analysis (German and Croatian) militates for another type of solution: laying broad contours of the notion of administrative procedure into law and annexing procedural rights thereto. The vigorous developments in EU law, for their part, only strengthen this claim, as the utility of codifying administrative procedures has long been

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56 Cf AJG Verheijen, 'Public Administration in Post-Communist States' in BG Peters & J Pierre (eds), *The Handbook of Public Administration* (2nd edn, SAGE Publications 2007) 311, 311 & 315. See also Stelkens & Andrijauskaitė (n18), MN. 31.44 claiming that an undemocratic past clearly leads to a general distrust towards the administration in society.

57 LPA, art 36(3) connecting procedural rights with the imposition of sanctions (although enacted much later) replicates this logic.

58 Schmidt-Aßmann (n8) 504.

59 See W Rusch, 'Administrative Procedures in EU Member States' (2009) SIGMA Paper [available online], para 30. See also Arzoz (n16), para 48.

understood. It furthermore goes without saying that it is easier for public authorities to become accustomed to requirements stemming from statutory law than it is for them to comb through and 'learn' from the heaps of judge-made case law. Furthermore, by turning procedural rights into clear, across-the-board legal provisions, the administration will be additionally motivated to follow them due to state liability concerns.[60] The same logic applies to citizens – clearly enunciated and accessible procedural rules shape their (behavioural) expectations with regard to administration. This is especially important in 'sensitive' fields of administrative action, such as social security lacking fall-back supranational provisions, as has been demonstrated above. Another flaw in the administrative courts taking centre stage in developing procedural guarantees is the fact that this may be done in a rather sporadic way, i.e., contingent on the succession of proceedings initiated against public administration.[61]

Hence, a re-evaluation of the system is very much needed (hopefully fuelled by academic discussions or – at the very least – by drawing inspiration from comparative law in legal systems that have refined their administrative procedural laws over long periods of time). The Lithuanian legislator should find a way to integrate the current 'state-of-the-art' procedural standards (among other things, as developed in the case law) into positive law, make the notion of administrative procedure more flexible by expanding its scope and laying more emphasis 'on the administrative behaviour (functioning), and not only focus on the outcome of administrative action (result)'.[62] This is not only important for precluding arbitrary action by public authorities, upholding the dual rationale of administrative procedures outlined in the introduction, and turning 'good administration rhetoric' into practice, but also for equipping national agencies with efficient and responsive procedural tools for dealing with urgent matters within the framework of EU law.[63] This would, among other things, enable the creation of the European intra-administrative trust that is one of the factors ensuring that Member States do not stray from creating 'an ever closer Union'.

60 Because, according to well-established case law, in order to prove state liability it is necessary to establish 'which legal provisions regulating the activities of a public authority have been violated', see eg SACL, Decision of 28 October 2005 – Case No. A11-1642/2005.

61 J Ziller, 'The Continental System of Administrative Legality' in Peters & Pierre (n56) 167, 173.

62 T Fortsakis, 'Principles Governing Good Administration' (2005) 11 European Public Law 207, 217.

63 Harlow & Rawlings (n2) 244.

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The Romanian Ombudsman – A Legal Transplant Moulded by the Domestic Legal Culture

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Abstract

Romanian administrative law has undergone transitory challenges, both following the changing of the political regime in 1989 and following the EU accession in 2007. The transplanting of international models of legal institutions has been strenuous at times has been strenuous. This paper showcases the trials and tribulations of a novel institution for the Romanian system: the Ombudsman. The Ombudsman was meant to mediate between the administration and citizens, to issue recommendations, and to foster good administrative practices. Over time, however, its role has been diverted to that of a constitutional mediator between the powers of the state.

1. Introduction

This contribution looks at the Romanian Ombudsman as a legal transplant that has undergone significant changes from its initial set up to the institution that it is today. From its inception as a pure mediator between citizens and the administration, the Ombudsman has rapidly been 'adapted' to the local context in order to become, over time, a 'public lawyer' and a 'constitutional lawyer' deeply involved in the political disputes of the moment. This also includes the public health crisis that broke out in the Spring of 2020. In that sense, the transplant, resistance, and subsequent bold adaptation of the Ombudsman in Romania provides an excellent illustration of what Sabine Carl has termed 'an organic historical process'.[1] A systematic analysis of the Romanian Ombudsman contributes to shed more light on the overall process of global diffusion of the Ombudsman worldwide, as recounted by Tero Erkkila:[2] the diffusion of the Ombudsman 'remove[s] the ombudsman from its legal roots

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1 S Carl, 'The history and evolution of the ombudsman model' in M Hertogh and R Kirkham (eds), *Research Handbook on the Ombudsman* (Edward Elgar 2018) 17-33, 18.

2 T Erkkilä, *Ombudsman as a Global Institution* (Springer 2020) ch 2.

in administrative law'.[3] This paper provides a case study for such a change despite early resistance. In some forms, law and politics keep interacting when it comes to administrative transplants in the European administrative space. Legal, administrative, and institutional changes do not happen in a void, but within a political context and within values that are both historically marked.[4]

This analysis builds on legal material supplemented by the reports of the institution and on empirical research conducted with colleagues and students during the last fifteen years with the Centre for Good Governance Studies at Babes-Bolyai University.

This paper begins by explaining why the Ombudsman can be defined as a legal transplant in the Romanian legal system (Section 2). It then moves on to a discussion on the legitimacy and public perception of the institution, both of which are strongly influenced by the institution's novelty in our legal system (Section 3). The discussion continues with the somewhat 'enforced' role of the Ombudsman as a public litigator for citizens (Section 4) and the development of the most-used legal weapon – the plea of unconstitutionality (Section 5). Finally, this paper discusses recent developments that were strongly influenced by the different personalities of Ombudsman office holders (Section 6) and what would be considered to be an effective Ombudsman (Section 7). This leads to a drawing of conclusions on the effectiveness of the Ombudsman as a legal transplant (Section 8).

2. The Romanian ombudsman as a legal transplant

The fall of the Communist regime in 1989 brought about a structural reform of the Romanian legal system, including also a reform in the administrative element. Following the adoption of a new Constitution in 1991, the architecture of the Romanian administrative justice system was designed to include courts with specialized panels of administrative law judges. These were to be complemented by quasi-judicial bodies for certain matters (fiscal cases, for example) and by alternative dispute resolution tools, such as administrative appeals and the Ombudsman.

The changes in the Romanian legal system occurred in a specific international legal context. Thus, one needs to consider that, over the past forty years, the Ombudsman Institution had spread very quickly, leading to talk about

3 ibid, 24.

4 For more a detailed discussion, see Y Marique and E Slautsky, 'Resistance to Transplants in the European Administrative Space - An Open-Ended Reading of Legal Changes' (2021) Review of European Administrative Law (in this issue).

'ombudsmania'.[5] The Ombudsman Institution has its origins in Sweden, where the Ombudsman was introduced in 1809. While the concept was not known outside Scandinavia until 1953, now almost every country has established this type of institution, either at national, sub-national, or regional level. According to the International Ombudsman Institute, the Ombudsman office is established and functions at the national level of government in 120 countries.[6]

A good reason for this great expansion of the Ombudsman Institution is that the institution is seen as a manifestation of a country's attempts to develop democratic accountability and good governance. In Europe, countries adopted the institution as a requirement of democracy after the collapse of totalitarianism. What should be mentioned, however, is that countries adapted and modified this institution to the social, economic, cultural, and political context of their societies. In this way, the institution could integrate into the existing system, and it consequently proved to be successful in most countries.[7]

The Romanian Ombudsman institution (the *People's Advocate* in Romanian, or 'Advocate') was set up in 1991, when the newly democratic constitution was adopted.[8] It was the first country from the former Eastern Communist Bloc to adopt such a structure. Even so, the institution began to function only in 1997, when the law giving it effect was adopted by the Parliament.[9] Its mission was to offer citizens an additional means to defend their rights and liberties from arbitrary actions by central and local public administration.[10]

According to Miller's typology, the most important types of legal transplant are the following: (i) the cost-saving transplant; (ii) the externally dictated transplant; (iii) the entrepreneurial transplant; and (iv) the legitimacy-generating transplant.[11] The Ombudsman can be seen both as a *legitimacy-generating transplant* – since it was intended to contribute to the legitimacy of public decision-making by explaining administrative decisions to citizens – and, at the

5 LC Reif, *The Ombudsman, Good Governance, and the International Human Rights System* (Martinus Nijhoff Publishers 2004) and R Gregory and PJ Giddings, *Righting Wrongs: the Ombudsman in Six Continents* (IOS Press 2000) 406.

6 See the International Ombudsman Institute website: <www.theioi.org/> accessed 25th October 2020.

7 D Balica, The Institution of the Romanian Ombudsman in a Comparative Perspective, in D Dragos, B Neamtu and R Hamlin (eds), *Law in Action: Case Studies in Good Governance* (Institute for Public Policy and Social Research, Michigan State University, East Lansing, Michigan 2011) 334-358.

8 See the Romanian Constitution of 1991, arts 55-57.

9 See the Romanian Ombudsman Institution website: <www.avpoporului.ro/index.php?option=com_content&view=article&id=394&Itemid=266&lang=en> accessed 12th October 2020.

10 L Hossu and D Dragos, 'Decentralization of the Ombudsman Institution in Romania: How Effective Is It?' (2013) 13 Romanian Journal of European Affairs 66 and I Stanomir, *Constitutionalism şi postcomunism. Un comentariu al Constitutiei Românei* (Editura Universităţii din Bucureşti 2007) 97.

11 J Miller, 'A Typology of Legal Transplants' (2003) 51 American Journal of Comparative Law 839.

same time, as a *cost-saving transplant* – since it was intended to help keep administrative conflicts out of cost-incurring courts.

The powers of the institution were extended when the Constitution was amended in 2003 to offer the Ombudsman the possibility of raising the plea of unconstitutionality of laws and governmental ordinances in front of the Constitutional Court. In 2004, when redesigning the Administrative Courts Law (554/2004), the Ombudsman was further authorized to file a court action in a plaintiff's name if he believed that administrative conduct was producing serious negative consequences for the individual.[12]

This is not completely unusual in comparative law. In several countries, in fact, Ombudsmen have certain responsibilities with respect to the constitutionality and lawfulness of legislation and administrative regulations: this is the case in Albania, Austria, Hungary, Moldova, Poland, Portugal, Russia, and Ukraine, where the Ombudsmen may apply to the Constitutional Court under various circumstances for declarations of illegality or unconstitutionality, interpretations, or invalidation.[13] The Ombudsman's power to defend human rights in front of the Constitutional Court has been praised also by the Venice Commission.[14] However, it could be argued that putting the emphasis on this power instead of on mediation diverges the initial scope of this institution.

Currently, the Ombudsman has the following attributions. First, the institution receives and coordinates requests made by persons aggrieved by a violation of their rights or freedoms by the public administration authorities, and decides upon these requests. It also supervises the legal settlement of received requests, and asks the authorities or public servants to stop the abuse and to remedy damages. The Ombudsman drafts opinions, at the request of the Constitutional Court, when a law is challenged in front of it, and such opinions are also necessary for the draft versions of laws before their promulgation by the President. Finally, the Ombudsman can directly challenge a law before the Constitutional Court.

The Ombudsman has access to any information, documents, or other acts that the public authorities possess which are related to a complaint, and public authorities have to provide any support for the exercise of his duties. The Ombudsman may hear and take depositions from chief officials of the public ad-

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12 D Balica, 'The institution of the Romanian Ombudsman in a comparative perspective' in D Dragos, B Neamtu and R Hamlin (eds), *Law in Action: Case Studies in Good Governance* (East Lansing 2011) 334-358.

13 Council of Europe, 'For debate in the Standing Committee – see Rule 15 of the Rules of Procedure. Doc- 9878. 16 July 2003. The institution of the Ombudsman' (*Council of Europe*, 16 July 2003) <www.assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=10235&lang=en> accessed 25 February 2021.

14 Venice Commission, 'Ombudsman Institutions' (*Council of Europe*, — —) <www.venice.coe.int/WebForms/pages/?p=02_Ombudsmen&lang=EN> accessed 25 February 2021.

ministrative authorities, or from any civil servant who may provide useful information for the resolution of a complaint. Moreover, it has access to any classified information held by public authorities to the extent that it is considered necessary in order to solve complaints.[15] If the Ombudsman concludes that a complaint is well-founded, he must send the concerned authority a written request to put an end to the violation, to reinstate the complainant's rights, and to redress the damages caused. The authority is obliged to immediately comply with this request and remedy the caused deficiencies or fostered violations, meanwhile informing the Advocate of the measures taken. If this duty is not complied with within thirty days, the Ombudsman may send the request to the hierarchically superior administrative authority, which then has forty-five days to comply with it. If the concerned public authority belongs to the local public administration, the Advocate must address himself to the county prefects (i.e. the state representatives at local level), who have forty-five days to comply with it. The Ombudsman may also inform the government about any illegal administrative act or fact concerning the central public administration and the prefects. If the government does not resolve the illegality of administrative acts or facts within twenty days, the Advocate has to bring the case to the attention of the Parliament.[16]

The Ombudsman has the right to bring an administrative act in front of the administrative courts in the name of the complainant if he believes that illegality can be removed only by justice. If the Advocate does so, the aggrieved person is automatically granted the status of an applicant and the decision of the concerned authority is suspended.[17] Courts – which include administration of justice and the public prosecutor – cannot be directly overseen by the Ombudsman. If the institution receives complaints relating to these authorities, they can be sent to the minister of justice, the Public Ministry or the president of the court of law. These organs then have to inform the institution about any measures taken.[18] The Superior Council of Magistracy – the disciplinary organ of judges – cannot receive recommendations from the Ombudsman.[19]

The Ombudsman is involved in the constitutional control of a law by challenging the law at the Constitutional Court before its promulgation by the president, or by challenging a law that already applies through an exception or plea of unconstitutionality). The Ombudsman is also asked to provide an advisory

15 Chapter I, art. 4 and Chapter IV, art.20, art.22, from Law no. 35/1997 regarding the Organisation and Functioning of the Institution of the Advocate of the People.

16 Chapter IV, art. 23, art. 24, art. 25 and art. 26 from Law no. 35/1997 regarding the Organisation and Functioning of the Institution of the Advocate of the People.

17 Chapter I, art. 1, alin.3 from Law no. 544/2004 regarding the Judicial Review.

18 Chapter IV, art. 18 from Law no. 35/1997 regarding the Organisation and Functioning of the Institution of the Advocate of the People.

19 J Stern, 'Romania' in G Kucsko-StadlMayer (ed), *European Ombudsman-Institutions. A Comparative Legal Analysis regarding the Multifaceted Realization of an Idea* (Springer 2008) 362.

opinion on cases relating to human rights pending before the Constitutional Court.

The Ombudsman presents an annual report to the Chambers of Parliament in a joint session by February 1st of each year. The report has to be discussed and published by the Chambers.[20] If the Ombudsman finds gaps in legislation or serious cases of corruption or violations of the country's laws, it may submit reports to the presidents of the Chambers, to the government, or to the prime minister.[21] The Ombudsman may participate in parliamentary sessions only if he is invited.

The main competences of the Ombudsman Institution, spelled out a long time ago by Rowat[22] and which are now common to most European law systems, are as follows. The Ombudsman receives the grievances of citizens against the administration, for which he tries to find solutions if he considers the complaints to be well grounded. However, he is not entitled to give instructions or to decide on the annulment of the challenged decisions, because he does not have power of command over the public administration.

Based on the typologies of Ombudsman institutions throughout the world,[23] the Romanian Ombudsman corresponds to the 'hybrid model', being a national human rights institution as well as having extensive powers to investigate the activities of public authorities. The Romanian Ombudsman also has powers to protect the right to information. During the period 2001-2005, the institution was responsible for the protection of personal data until a special authority was created in this area – the National Authority for the Protection of Personal Data. Ion Muraru – a former Ombudsman for two consecutive terms (2001-2011) – considers in this respect that the institution meets the requirements of a classical Ombudsman or of the European Ombudsman, having also 'a few extra features regarding the control of constitutionality and the relationship with the constitutional judges'.[24] Other scholars[25] define the Romanian Ombudsman

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20 Chapter I, art. 5, alin 1 and 2 from Law no. 35/1997 regarding the Organisation and Functioning of the Institution of the Advocate of the People.

21 Chapter IV, art. 26 from Law no. 35/1997 regarding the Organisation and Functioning of the Institution of the Advocate of the People.

22 DC Rowat (ed), *The Ombudsman - Citizen's Defender* (University of Toronto Press 1965).

23 D Balica, 'The institution of the Romanian Ombudsman in a comparative perspective' in D Dragos, B Neamtu and R Hamlin (eds), *Law in Action: Case Studies in Good Governance* (East Lansing 2011) 335. See also G Kucsko-StadlMayer (ed), *European Ombudsman-Institutions. A Comparative Legal Analysis regarding the Multifaceted Realization of an Idea* (Springer 2008) and LC Reif, *The Ombudsman, Good Governance, and the International Human Rights System* (Martinus Nijhoff Publishers 2004) .

24 G Rădulescu, 'Ioan Muraru: Românii îi simt pe demagogi' (Newspaper Adevărul, 2009) <www.adevarul.ro/Romanii-Ioan-demagogi-simt-ii_0_55794421.html> accessed on 26 March 2013

25 T Drăganu, *Drept constituttonal şi institutii politice. Tratat elementar* (Lumina Lex 1998); I Muraru, *Avocatul poporului – institutie de tip Ombudsman* (All Beck 2004) and M Vlad, *Ombudsman-ul în dreptul comparat* (Servo Sat 1998).

both as an administrative one – focused on mediating the relationship between the administration and the people – and a parliamentary one – mandated to observe the lawfulness of administrative action between parliamentary sessions.[26]

3. Legitimacy and public perception of the ombudsman

Capraru and Carp[27] refer to the heated debates around the institution at the time of its adoption. They observe that the 1991 Romanian Constitution – which contributed to the 'crystallization of the fundamental institutional structures of the Romanian state' – took over and mechanically implemented institutions that were specific to other economic, political, and social environments, and attempted to adapt them to the Romanian constitutional context.[28] The Romanian Ombudsman is an example of such an institution, Romania being the first post-communist country to envisage such an institution in its Constitution.[29]

The concept behind the analysis of the institution in the Romanian context was at first that of *acculturation*.[30] One of the early commentators on the Constitution, Mihai Constantinescu, acknowledged the novelty of the institution in the tradition of Romanian constitutional law, concomitantly mentioning its adoption by 'all countries' and praising its benefits: the institution's most important power and obligation was that of being 'an alert function' – that is, the Ombudsman's duty to make recommendations and suggestions while having the ability to make accountable those responsible for obstructing his activity.[31]

Other constitutional law scholars give an account of the fact that the introduction of this institution in the 1991 Romanian Constitution generated 'the most contradictory and heated debates regarding its usefulness[,] or the opposite

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26 ibid.

27 L Hossu and R Carp, 'Access to Public Information: a Critical Assessment of the Role of the Ombudsman' in D Dragos, B Neamtu and R Hamlin (eds), *Law in Action: Case Studies in Good Governance* (East Lansing 2011) 230-250. See also L Hossu and R Carp, 'A Critical Assessment of the Role of the Romanian Ombudsman in Promoting Freedom of Information' [2011 (No. 33 E/June)] Transylvanian Review of Administrative Sciences 90.

28 A Banciu, *Istoria constitutională a României: deziderate naţionale şi realităţi sociale* (Lumina Lex 2001) 403-404.

29 J Stern, 'Romania' in G Kucsko-StadlMayer (ed), *European Ombudsman-Institutions. A Comparative Legal Analysis regarding the Multifaceted Realization of an Idea* (Springer 2008) 358.

30 T Pegram, 'Diffusion Across Political Systems: The Global Spread of National Human Rights Institutions' (2010) 32 Human Rights Quarterly 729.

31 L Hossu and R Carp, 'Access to Public Information: a Critical Assessment of the Role of the Ombudsman' in D Dragos, B Neamtu and R Hamlin (eds), *Law in Action: Case Studies in Good Governance* (East Lansing 2011) 90.

[–] the much-awaited panacea for the entire citizenry's sufferings'.[32] There were sceptics who feared possible interference by the Ombudsman in the sphere of competence of some public authorities, and thus the inefficiency of the new institution.[33] Others, more optimistically, considered that the Ombudsman would offer the possibility of regaining trust in the government by supplying the public administration with information on the way their actions were perceived by citizens, and vice versa.[34]

The trials and tribulations over the setting up of the Ombudsman institution are relevant for the course it took during the first few years. In the Constituent Assembly of 1990, the liberal Dan Amedeo Lăzărescu had the idea – completely unusual for most members of the assembly – of setting up a new institution based on the Swedish model that was meant to protect citizens from abuses by the state administration.[35] Other parties opposed this, as they did not see why an institution should be imported from a political space so 'distant in spirit from Romanian society'; they considered that citizens' complaints could be resolved through administrative litigation, similar to what was the norm in the legal system before the communist era. However, the modernist idea of Dan Amedeo Lăzărescu was reluctantly accepted, following which the institution of the People's Advocate was enshrined in the Constitution. Even so, the express and discreet opposition encountered during parliamentary debate was one of the factors that set the course of the Ombudsman institution in its initial years: the institution failed to acclimatize, being completely ignored for many years by society; citizens' complaints followed a complicated path and seldom came to a solution. The budgets allocated were themselves too small for an institution with a role as generous as that of protecting citizens from state abuses – abuses which seemed to spring from an infinite reservoir.[36]

For a long time following its setting up, the institution was considered a 'foreign import' that would never fit the Romanian system. The lack of enforcement tools has been considered the main weakness of this type of institution. The longest office holder complained that public institutions constantly ignored recommendations by the Ombudsman, and that less than half of petitioners

32 I Deleanu, *Institutii şi proceduri constitutionale: în dreptul român şi în dreptul comparat* (CH Beck 2006) 546 (translation by the author DCD)

33 I Les, 'Avocatul Poporului, institutie a statului de drept' (1997) 7 Revista Dreptul 3.

34 C Brânzan and M Oosting, 'Rolul Ombudsmanului într-o societate democratică' (1997) 5 Revista Dreptul 3.

35 See for details H Pepine and DW Bucuresti, 'Avocatul poporului, un izvor discret de putere politică' (*Deutsche Welle,* 3 July 2012) <www.dw.com/ro/avocatul-poporului-un-izvor-discret-de-putere-politic%C4%83/a-16069611> accessed 20 October 2020.

36 ibid.

found a solution as a result of the intervention of the Ombudsman.[37] The institution was accused, on the other hand, of not using the tools at its disposal, and of not being visible or bold enough to take on the systemic problems of the administrative system.[38]

The abovementioned perception led to the perceived need for reform, concretized by the creation of enforcement tools for the Ombudsman in 2003 – the plea of unconstitutionality – and then in 2004 by assigning the competence to challenge administrative acts directly in court.

In light of this context described above, it is safe to say that the institution has faced many challenges over time. There was a slow change in social perceptions regarding human rights, a process which took a great amount of time due to the communist legacy. The features of communist society – 'proclaiming the welfare of the community' to the detriment of individuals' rights, and an obedient and passive attitude among citizens – created infertile ground for the introduction of the Ombudsman Institution.[39]

The political context was also decisive for the success of the institution. Its independence from the executive was important in order to avoid a 'patron-client relationship' which would also have influenced the way the institution was received by the civil society and administrative institutions.

Despite numerous powers and tools being given to the Romanian Ombudsman, over the years there seems to have been general dissatisfaction with Ombudsman activity. In the beginning, the lack of enforcement tools (the possibility of applying sanctions) was considered to be a weakness of the institution. The office holders from 1991 to 2003 did not make use of soft law tools (recommendations) in an effective way, complaining about the lack of enforcement tools and lack of resources. A phenomenon of 'institutional hypocrisy' started to develop, where the institution blamed a lack of resources and society blamed the ineffectiveness of the institution. However, overall, the visibility of the institution was almost non-existent, and its persuasive power limited. Ion Muraru – the office holder for two mandates (2001-2011) – stated, with respect to the special reports issued by the Ombudsman (e.g. on social security or forced labour), that the Parliament and MPs completely disregarded them. The same situation occurred if the Ombudsman, dissatisfied with the lack of action of a public authority found guilty of breaching the rights of a citizen, notified the government or a prefect (the representative of the government in the territory).[40]

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37 'Avocatul Poporului: Cetateanul nu prea mai conteaza in fata guvernantilor' (*Stirile ProTV*, 10 May 2011) <https://stirileprotv.ro/stiri/social/avocatul-poporului-cetateanul-nu-prea-mai-conteaza-in-fata-guvernantilor.html> accessed 12 October 2020.

38 M Bercea, 'Avocatul aproape anonim al Poporului' (Revista 22, 7 September 2005) <https://revista22.ro/interviu/avocatul-aproape-anonim-al-poporului> accessed on 12 October 2020.

39 M Vlad, *Ombudsman-ul în dreptul comparat* (Servo Sat 1998) 163.

40 M Bercea, 'Avocatul aproape anonim al Poporului' (Revista 22, 7 September 2005) <https://revista22.ro/interviu/avocatul-aproape-anonim-al-poporului> accessed on 12 October 2020.

On the occasion of the constitutional revision in 2003, the office holders tried to beef the institution up with new powers, such as direct pleas of unconstitutionality, and then in 2004 with direct court actions. However, this did not greatly change the perception of the institution in society. For instance, on the occasion of the setting up of the National Council for the Study of the Security Files (CNAS) – the institution that was meant to study the communist past of public officials – the Ombudsman took a controversial position, declaring CNAS as outside the law and an 'unconstitutional venom'.[41]

Empirical studies on the perception of the institution among the population show that the institution was, for a long time, quasi-unknown and, due to the misleading name (People's Advocate), even when known it was wrongly thought to be a 'free attorney' for court proceedings.[42]

Other studies (Hossu) have argued that the functioning of the Ombudsman Institution in Romania has been characterized by institutional hypocrisy.[43] This concept is based on an analytical distinction found in the literature between two ideal models of organizations: one based on action and one 'political'.[44] The action-based one focuses on independence from the environment in which it is located and on solving problems with the use of adequate resources and the production of widely accepted goods. At the opposite pole is the 'political' organization, where the emphasis is on dependence on the environment in which it operates, sometimes confused with the environment to be evaluated. The 'political' organization gains legitimacy and acquires resources for fighting for several interests, not just a single one. Institutional hypocritical 'behaviour' means communicating in a way that satisfies one interest, acting in a way that satisfies another interest, and offering results that satisfy a third party: in other words, inconsistency between ideas and action.[45] Hypocrisy is not the result of a conscious tactic of individuals, groups, or the leadership of an organization, but occurs without a conspiratorial character. Hossu[46] argues that the institution of the Ombudsman acted in a hypocritical way sometimes, thus justifying its

41 A. Pora, 'Consiliul National pentru Studierea Arhivelor Securitatii se va desfiinta' HotNews.ro, 31 ianuarie 2008, <www.hotnews.ro/stiri-esential-2266711-consiliul-national-pentru-studierea-arhivelor-securitatii-desfiinta.htm>last acceseed 17 March 2021.

42 D Dragos, B Neamtu and R Hamlin (eds), *Law in Action: Case Studies in Good Governance* (East Lansing 2011) and D Dragos and B Neamtu (eds), *Institutia Ombudsmanului; Justitie alternativa?* (CH Beck 2011).

43 L Hossu, 'Institutia Avocatului Poporului: posibil studiu de caz pentru „ipocrizia organizațională"?' in D Dragos and B Neamtu (eds), *Institutia Ombudsmanului; Justitie alternativa?* (CH Beck 2011) 89-124.

44 N Brunsson, *The Organization of Hypocrisy. Talk, Decisions and Actions in Organizations* (2nd edn, Copenhagen Business School Press 2002) 194.

45 ibid, 27.

46 L Hossu, 'Institutia Avocatului Poporului: posibil studiu de caz pentru „ipocrizia organizațională"?' in D Dragos and B Neamtu (eds), *Institutia Ombudsmanului; Justitie alternativa?* (CH Beck 2011) 89-124.

lack of results through extrinsic elements (budget, structure, lack of sanctioning power, etc.), and reacted to the political environment at other times instead of being a pillar of independence within the system.

In administrative reforms there are 'defining moments' or 'turning points' that can have an impact on transplants and resistance (either accelerating acceptance or intensifying resistance). Two of the defining moments for the Romanian Ombudsman seem to have been the rule of law crisis of 2019 and the public health crisis of 2020 generated by the COVID-19 virus. The recent involvement of the Ombudsman in the political debates around these two issues has definitely impacted the institution's visibility, and has increased the awareness of the population. It has also, however, simultaneously maintained controversy in society at large over the independence of the institution.

It took some time for society to understand that the Ombudsman lacks the power to impose sanctions, and that its effectiveness depends upon the authority the office holder enjoys, the power to criticize, the moral support of public opinion, and the responsiveness of all public authorities.[47] Its recommendations are not binding norms, but in some other jurisdictions they are considered to be norms and/or principles of good administration. A study from 2011[48] inquired whether judges ever considered the recommendations of the Ombudsman as a source of law, even soft law, but the answer was negative. By the same token, interaction between the courts and the Ombudsman is limited, and most judges are unaware of the institution's activity.

4. The ombudsman as a (public) lawyer for citizens?

One reason for resistance regarding the institution of the Ombudsman has been its perceived lack of resources or legal tools to fight maladministration when compared to courts or administrative review bodies. This was partly addressed in 2004 when new powers were granted to the Ombudsman, as will be shown here below.

For instance, a petition sent to the Ombudsman has no prorogation effect on the time limits applicable for filing either an administrative appeal or a court action against a violation of a right by a public institution. Consequently, a pragmatic petitioner would not lose any time with the Ombudsman while deadlines for instituting 'proper' review proceedings are in jeopardy of being

47 I Deleanu, *Institutii şi proceduri constitutionale: în dreptul român şi în dreptul comparat* (CH Beck 2006) 547, footnote 59.

48 DC Dragos, B Neamtu and D Balica, 'Ombudsman and the courts: Living in different worlds' in D Dragos, B Neamtu and R Hamlin (eds), *Law in Action: Case Studies in Good Governance* (East Lansing 2011) 384-399.

forfeited. From the reports of the Ombudsman[49] it emerges that, in most cases, a petition to the Ombudsman is filed after the administrative authority has already been approached by the aggrieved citizen (after an administrative appeal). In theory, the Ombudsman can be approached at the same time as an action lodged before a court of law. However, as there is no provision in the law that a court investigation suspends the action before the Ombudsman, this becomes futile. As a consequence of this interplay between the Ombudsman and judicial review, the preference of aggrieved citizens is clearly judicial review.

Since 2004, when the General Law on Administrative Review was amended, the Ombudsman can lodge a court action in a plaintiff's name, challenging the public administration over its illegal acts or activities or its silence (lack of action or response). In theory, such a provision can be justified as offering an instrument of compensation for a complainant's lack of opportunity to become a proper plaintiff (for example, expiration of time limits or other barriers regarding access to justice), and also to preserve the observance of the legal order and of human rights.[50]

Previous research shows that this has generated even more confusion among citizens with regard to the mission and role of the Ombudsman Institution. First, the name of the institution in Romanian – People's Advocate or, more precisely, Lawyer – is misleading, with many citizens declaring that they see the Ombudsman as a personal lawyer who can act on their behalf, a last resort instance when other options either have been exhausted or are lacking. Second, in that context, the new powers endowed in 2004 came merely as a validation of this confusion. Now, the Ombudsman could indeed be a lawyer for citizens, however individually and not in the name of the public interest.

Ion Muraru – a former Ombudsman (2001-2011) – argued against this power being made available to the Ombudsman. He stated that there was a deviation from mediation role of the institution in this case, with the Ombudsman becoming nothing more than a pro-bono lawyer for the aggrieved citizen. For a while, the Ombudsman officeholders made no use of this power, and there were authors in the doctrine who described the legal provision consecrating this power as obsolete.[51] However, the provision in the law remained in force and the legal mind-set of officeholders has changed in recent years, so they have steadily begun putting it to use. Thus, in 2015 there was a first court action

49 Website of the Ombudsman, Annual reports, <https://avp.ro/index.php/en/activity/annual-report/> accessed 12 October 2020.

50 R Gregory and PJ Giddings, *Righting Wrongs: the Ombudsman in Six Continents* (IOS Press 2000) 406.

51 D Dragos, *Legea contenciosului administrativ comentata* (CH Beck 2009).

for annulment of an urban planning act by a municipality, followed by two actions in 2016, four in 2017, three in 2018, six in 2019 and two so far in 2020.[52]

It is the view of the author that such court actions are a bizarre legal occurrence, as the process is only initiated by the Ombudsman and needs to be continued by the interested person, so that the Ombudsman acts in fact as a pro bono lawyer. The fact that the majority of such actions could also have a public interest component does not change the fact that the nature and role of the Ombudsman as a mediator between the administration and its citizens becomes side-tracked. It is an 'adaptation' of the institution to the local mindset, making it a 'deteriorated' transplant since the institution has powers that are moving away from the alternative administrative dispute resolution (ADR) model and its core philosophy.

5. The legal weapon that changed it all: the plea of unconstitutionality

Generally speaking, interested parties can raise the plea of unconstitutionality only as a procedural incident during court proceedings. The Ombudsman, however, is the only institution that can raise exceptions of unconstitutionality directly, either on its own initiative or following requests from any interested party.[53] The argument is that the Ombudsman acts as a link to civil society and needs to be able to refer unconstitutional laws to the Constitutional Court. The position of the first Ombudsman is well-known: he 'lobbied' the Parliament to increase his powers in this respect, and was instrumental in the Constitutional amendment of 2003. The fact that the office holder was a professor of constitutional law might have made an important contribution in this regard, as he was trying to place the institution in a more powerful position in the constitutional arena.[54]

There were many voices who argued that it was inappropriate to allow the Ombudsman to raise a plea of unconstitutionality directly:[55] first, because this was not in line with the model institution; and, second, because it transformed the procedural exception of unconstitutionality into a direct plea in front of the

52 Website of the Ombudsman, Annual reports, <https://avp.ro/index.php/en/activity/annual-report/> accessed 12 October 2020

53 D Tofan, 'Raporturile Avocatului Poporului cu jurisdictia constitutională' in D Dragos and B Neamtu (eds), *Institutia Ombudsmanului; Justitie alternativa?* (CH Beck 2011) 36-59.

54 I Muraru, *Avocatul poporului – institutie de tip Ombudsman* (All Beck 2004).

55 D Balica, 'The institution of the Romanian Ombudsman in a comparative perspective' in D Dragos, B Neamtu and R Hamlin (eds), *Law in Action: Case Studies in Good Governance* (East Lansing 2011) 334-358.

Constitutional Court.[56] It was claimed that harmed parties could do this within the framework of court proceedings, and thus the competence given to the Ombudsman was excessive. Even the Constitutional Court argued[57] that the provision did not confer a guarantee for the protection of individual rights, as was alleged, since the person interested could raise the plea on their own initiative. The Ombudsman should intervene in the relationships between citizens and administration, and not in relation to the courts.

However, over time the provision survived despite this criticism, and a number of pleas of unconstitutionality have been raised directly in recent years: thirteen in 2012, six in 2013, three in 2014, seven in 2015, five in 2016, seven in 2017, five in 2018, twelve in 2019 and eleven to date in 2020.[58]

Quantitatively, these numbers are evidently much lower than 'regular' pleas of unconstitutionality invoked by parties in a judicial procedure. They are, however, also more visible, as the press reports on them instantly, which places the Ombudsman on the side of the political forces that stand to gain from pleas raised directly by the institution. The impression that the Ombudsman reacts to political stimulus is confirmed by the fact that, even qualitatively, there are no specific themes which come back more frequently, making it impossible to conclude that the Ombudsman seeks to develop a specific profile. The institution does not tackle the systemic problems of the administration, the performance of public services, and so on. Rather, the topics of investigation are handpicked based on a political agenda, if not sometimes even on a personal one.[59] As will be shown further on, the pleas raised by the Ombudsman mould exactly to politically motivated controversies in society, consequently contributing to the image of the institution as a partisan one.

This has made the Ombudsman the centre of attention for political parties in their fight over legislation, thus overshadowing its role as a defender of citizens' rights against the administration. Although constitutionality filters existed before the laws were adopted, all political actors attempt to use the Ombudsman as the final 'weapon' against alleged unconstitutional legislation: the president, the government, and the presidents of the Chambers can send a draft bill to the Constitutional Court.

As a consequence, the Ombudsman has been immersed in political debate, taking sides by either action or inaction. For instance, although civil society was petitioning him to act, Ombudsman Victor Ciorbea (2015-2019) watched from

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56 I Vida, '*Curtea Constitutională a României. Justitia politicului sau politica justitiei?* (Edit. Monitorul Oficial. RA 2011) 95 and B Selejan-Gutan, *Exceptia de neconstitutionalitate* (2nd edn, CH Beck colectia Praxis 2010) 184.

57 Constitutional Court, decision no 148/2003, published in the Official Journal no.317/12.05.2003.

58 Website of the Ombudsman, Annual reports, <https://avp.ro/index.php/en/activity/annual-report/> accessed 12 October 2020.

59 Some office holders lobbied to get special pensions by law and then defended these special pensions by challenging the laws that would get rid of them

the side lines when the rule of law was attacked through an Emergency Governmental Ordinance, by the decriminalizing of corruption offences in December 2018, which led to massive street protests in 2019. Since the change in the office holder, with Renate Weber being appointed in 2019, the institution has reacted to important laws highly debated by both politicians and the mass media (the Administrative Code, for instance).[60] It has also been raising pleas of unconstitutionality against laws that were meant to reform the pension system – thus dismissing privileges such as special pensions – or which sought to legislate during the COVID-19 crisis. All these laws have divided the Romanian society, and the rift is not helped by the often-partisan stances taken by the Ombudsman.

This line of conduct has brought harsh criticism to the institution, which has been accused of being politicized. The problem lies in the fact that the role of the Ombudsman has been side-tracked from a defendant of citizens' rights against the administration to a constitutional mediator between the major institutions of the state (Parliament and president; government and president; government and Parliament; Parliament and the Highest Court). The Ombudsman is both a 'victim of its success' and the object of new and growing resistance, as its new role is not easily accepted in society. The author finds himself in full agreement with this line of criticism: the Ombudsman should stay true to its original scope – that of mediator between administration and citizens – and not be involved in constitutional disputes which are inevitably politically charged.

In adding to this conclusion, one may take notice of the fact that the Ombudsman has the obligation – not only the possibility, like the government and the Chambers of the Parliament have – to issue opinions on additional pleas of unconstitutionality raised by other parties. As a result of this task, a large part of the activity of the institution is dedicated to issuing such opinions. For instance, the number of opinions has increased steadily – and sometimes abruptly – over time: from 180 in 2002, 386 in 2003, 621 in 2004, to 1005 in 2005, 1375 in 2006, and 2088 in 2008. Some changes in the law on the functioning of the Constitutional Court have led to fewer pleas being admitted for discussion by the Court, so consequently the opinions of the Ombudsman have been fewer as well, with only 1905 in 2009. The data on the website is missing for a while for the period between 2009 and 2015, but resumes in 2016 with six; no information is available between 2016 and 2018, but the data then resumes in 2019 with 23 and up to now in 2020 with six.[61]

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60 'Ombudsman Refers The GEO On The Administrative Code To The Constitutional Court' (Romania Journal, 28 August 2019) <www.romaniajournal.ro/politics/ombudsman-refers-the-geo-on-the-administrative-code-to-the-constitutional-court/> accessed 12.10.2020).

61 Website of the Ombudsman, Annual reports, <https://avp.ro/index.php/en/activity/annual-report/> accessed 12 October 2020

6. Recent developments: the ombudsman finally living up to their role?

With the appointment of a new Ombudsman in 2012, several changes have occurred with regard to the activity of the institution as a defender of constitutional rights. The active role of the Ombudsman, the implications of the institution, and its aggressive attitude in cases where citizens' rights and liberties are breached have become more prominent in recent years. This is proved by an increasing number of situations in which the Ombudsman has been acting on his own initiative, conducting investigations or inquiries. The institution has also started to show less tolerance with regard to those public authorities which have breached certain legal provisions, thus violating the rights or liberties of citizens. In 2019, the number of *ex officio* investigations reached 1749, up from 379 in 2018 and 198 in 2017 and inquiries 429, up from 219 in 2018. An increase in the number of recommendations issued is also detectable from annual reports.[62] Recently, the Ombudsman has also increased the number of special reports that investigate systemic deficiencies in the administrative system.[63]

By examining the annual reports, it is clear that a growing number of petitions and complaints are being made to the Ombudsman. This shows that the institution is more and more accessible to citizens and that it is now better known. This is owing also to the increasing media visibility the institution has, both because of its campaigns focused on making itself better known and because of its activity in the area of constitutional protection, which has put the institution at the centre of some sensitive debates – for example, the budgetary cuts in 2008 or the political crisis in 2011. The annual reports do not mention how many cases are solved annually by the Ombudsman; they only state the total number of complaints received. Such data would allow us to better evaluate the citizen demand for Ombudsman services as well as the way in which the institution responds.

However, the overall impression is that the institution is better known than, say, ten years ago, mainly because of political crises that have involved the Ombudsman on one side or the other of the debate. The main task of the institution seems to be making sure that laws benefit from an extra control of constitutionality instead of making sure that the administration is applying good governance principles.

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62 Website of the Ombudsman, Annual reports, <https://avp.ro/index.php/en/activity/annual-report/> accessed 12 October 2020

63 Website of the Ombudsman, Annual reports, <https://avp.ro/index.php/en/activity/annual-report/> accessed 12 October 2020

7. The effectiveness of the ombudsman. Has the transplant been met with resistance?

The importance of alternative means of solving administrative disputes has been stressed repeatedly, due to their role in reducing the caseload of the courts while still securing a fair access to justice.[64] Additional reasons for the use of ADR mechanisms in administrative matters include the fact that court procedures in practice may not always be the most appropriate way to resolve administrative disputes. Moreover, the widespread use of alternative means of resolving administrative disputes can allow these problems to be dealt with, and can bring administrative authorities closer to the public. Among the ADR tools implemented recently in the majority of jurisdictions, the Ombudsman stands out as both a means to redress administrative errors and as a mediator. When acting as a mediator, the Ombudsman is able to educate both administration and citizens on good governance.

The effectiveness of the Ombudsman Institution needs to be understood in the context of the transition from the communist regime to a democratic one.[65] The Ombudsman institution, alongside other 'ideals' of democracy – such as openness and transparency in government, protection of personal data, freedom of speech, etc. – has been perceived more as a value associated with democracy than an instrument for achieving good administration. In this context, the institution of the Ombudsman has been regarded as a tool to fight the bureaucracy. The challenges encountered in the functioning of the institution have proved, however, that the former communist countries required more learning-by-doing than the earlier mass democracies of the West.[66] The mere existence of the Ombudsman institution – regulated through the Constitution and its statute – has not automatically improved the level of legal protection enjoyed by citizens in their relationship with public institutions. Implementing the Ombudsman institution requires time, a democratic environment, a legal and political culture, kindness, and solicitude.[67] This was hardly the case for

64 See, generally, D Dragos and B Neamtu (eds), *Alternative Dispute Resolution in European Administrative Law* (Springer 2014).

65 D Balica, 'The institution of the Romanian Ombudsman in a comparative perspective' in D Dragos, B Neamtu and R Hamlin (eds), *Law in Action: Case Studies in Good Governance* (East Lansing 2011) 350.

66 Balcerowicz (1994) 75-89 cited by L Hossu and R Carp, 'A Critical Assessment of the Role of the Romanian Ombudsman in Promoting Freedom of Information' [2011 (No. 33 E/June)] Transylvanian Review of Administrative Sciences 90, 96.

67 I Deleanu, *Institutii şi proceduri constituţionale: în dreptul român şi în dreptul comparat* (CH Beck 2006) 547, footnote 59.

Romania in 1991, the year when the institution was first introduced in the Constitution.[68]

Given this context, namely a model transplanted into a post-communist society, a legitimate question appears: Do the origins of the institution affect its performance? Does initial resistance towards its setting up impact its work? The answer is definitely 'Yes'.[69]

First, the idea of having an Ombudsman included in the Constitution belonged to a member of the Constitutional Assembly, and was reluctantly accepted by others who did not exactly understand the role of an institution based on the Swedish model transplanted into the Romanian legal order. This was confirmed by its first years of activity, marked by stagnation and irrelevance, although it was actually more independent and non-partisan then than it is now. The institution started to play a role and became visible only when it was granted constitutional powers and became a 'weapon' in the political arena. Finally, when confronted with taking sides during major crises – the rule of law and COVID-19 – the institution became so intertwined with political actors and part of the political process that nobody even remembered that it was supposed to be independent and non-partisan.

Secondly, one might say that post-totalitarian rule of law 'filled with the after-effects of state tyranny' was not an adequate environment for transplanting a two-hundred-year-old genuinely democratic institution.[70] However, in time, by adapting some classical functions to the realities of the local legal system, the institution has constructed a role and place within the constitutional system.

Thirdly, the question remains whether such transplants come to function properly and according to their mission in the new environment. Here it is useful to compare the specific features usually connected to the Ombudsman with their actual implementation in Romania. The nature of the Ombudsman is quite complex, given its three dimensions – institution, function and incumbent – and their special interaction with the administrative authorities. If we are to use Hill's definition of what exactly is and is not an Ombudsman, a functioning ombudsman institution is (i) legally established; (ii) functionally autonomous; (iii) external to the administration; (iv) operationally independent

68 L Hossu and R Carp, 'A Critical Assessment of the Role of the Romanian Ombudsman in Promoting Freedom of Information' [2011 (No. 33 E/June)] Transylvanian Review of Administrative Sciences 90, 96.

69 L Hossu and R Carp, 'Access to Public Information: a Critical Assessment of the Role of the Ombudsman' in D Dragos, B Neamtu and R Hamlin (eds), *Law in Action: Case Studies in Good Governance* (East Lansing 2011) 230-250. See also L Hossu and R Carp, 'A Critical Assessment of the Role of the Romanian Ombudsman in Promoting Freedom of Information' [2011 (No. 33 E/June)] Transylvanian Review of Administrative Sciences 90.

70 M Vlad, 'Ombudsmanul Românesc în contextul integrării europene' in I Muraru, S Tanasescu and S Deaconu (eds), *Despre Constitutie şi Constitutionalism* (Editura Hamangiu 2006) 74 and C Brânzan and M Oosting, 'Rolul Ombudsmanului într-o societate democratică' (1997) 5 Revista Dreptul 3.

of both the legislature and the executive; (v) specialist; (vi) expert; (vii) nonpartisan; (viii) normatively universalistic; (ix) client-centred but not anti-administration; and (x) both popularly accessible and visible.[71]

The efficiency and effectiveness of Ombudsman institutions have been an issue of debate for quite some time now. An efficient Ombudsman can promote good governance by raising the accountability of the public administration, and both classic and human rights Ombudsmen can act as internal mechanisms of human rights protection.[72] The Romanian Ombudsman has prolific activity in terms of issuing recommendations to public authorities, but this activity is overshadowed by the role of constitutional arbiter.

When it comes to the function of the Ombudsman, three main features are key to its effectiveness, namely: their informal way of taking action, their independence, and their moral authority.[73] First, the informal way of taking action was not a strong point of the Romanian Ombudsman at the start. On the contrary, it became known only from the moment it started using hard law mechanisms, such as the plea of unconstitutionality. Secondly, in terms of independence, the Romanian Ombudsman has had its controversies, since office holders have been accused of being politicians serving those who appointed them (i.e. the parliamentary majority). Obedience towards the Parliament has manifested itself in two ways: disregarding issues that should have been raised and investigated; or, in contrast, using the tool of a plea of unconstitutionality to block initiatives that were opposed by the majority and where society had a very strong position. Thirdly, the Ombudsman's main feature is the office holder's moral authority.[74] Lacking the power of sanctioning, the Ombudsman bases their actions on the power of persuasion; such actions envisage finding an amiable solution, 'this philosophy being based on the good faith of the public administration'.[75]

A last dimension is key to grasping the effectiveness of the Ombudsman, namely the personal features of the incumbent. The office holders of the Romanian Ombudsman have been quite diverse: the first one, Paul Mitroi (1997-2001), was active even though the institution was barely known in society. The second one, Iona Muraru (2001-2011), a reputable professor of constitutional law and former president of the Constitutional Court, succeeded in moulding

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71 HL Bill, 'Institutionalization, the Ombudsman, and Bureaucracy' (1974) 68 The American Political Science Review 1077.

72 LC Reif, *The Ombudsman, Good Governance, and the International Human Rights System* (Martinus Nijhoff Publishers 2004) 411.

73 G Kucsko-StadlMayer (ed), *European Ombudsman-Institutions. A Comparative Legal Analysis regarding the Multifaceted Realization of an Idea* (Springer 2008) 66.

74 M Vlad, 'Ombudsmanul Românesc în contextul integrării europene' in I Muraru, S Tanasescu and S Deaconu (eds), *Despre Constitutie şi Constitutionalism* (Editura Hamangiu 2006) 67.

75 L Coman-Kund, 'Avocatul Poporului din România şi Mediatorul European în lumina Tratatului Instituind o Constituţie pentru Europa' (2006) 3 Revista de Drept Public 28.

the institution with his own expertise. He further lobbied for the introduction of two legal competences that would change for good the role and place of the institution in the system: a consultative role for new draft laws; and the power to raise a plea of unconstitutionality. From then on, the institution would be associated with these hard powers more than with the classical soft powers of an Ombudsman (that of a mediator between citizens and administration). Gheorghe Iancu (2011-2012), another constitutional scholar – this time coming from politics – had a short mandate, and as did Anastasiu Crisu (2013). The political structure of the Parliament, in fact, dictates who is appointed Ombudsman, so the process has become more politicized over time. After a period of vacancy, the most controversial office holder[76] was former prime minister Victor Ciorbea (2015-2019), who reigned during the period in which the rule of law crisis unfolded.[77]

Renate Weber (2019-) – the current Ombudsperson (the first woman to take the position) – is a politician,[78] a former member of the European Parliament with a background in civil society. She has been quite active, seen in her taking sides on the issue of special pensions[79] and then during the COVID-19 crisis.[80] She made a name for herself by challenging the constitutionality of measures taken by the government during the state of emergency.[81] However,

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76 For instance, he opposed the reform of the special pension system out of pure personal interest: see C Citre, 'Victor Ciorbea se plânge senatorilor că Iohannis vrea să îi taie pensia specială dată de PSD / Invocă rapoarte ale Comisiei de la Venetia în care sunt date exemple de salarii mari ale Avocatilor Poporului – o garan ia independentei lor' (*G4Media.ro*, 1 February 2019) <www.g4media.ro/victor-ciorbea-se-plange-senatorilor-ca-iohannis-vrea-sa-ii-taie-pensia-speciala-data-de-psd-invoca-rapoarte-ale-comisiei-de-la-venetia-in-care-sunt-date-exemple-de-salarii-mari-ale-avocatilor-popor.html> accessed 12 October 2020

77 R Dumitrescu, 'Democracy Under Pressure – Romania: Between Conspiracies and Abuses' (*The New Federalist*, 20 February 2019) <www.thenewfederalist.eu/democracy-under-pressure-romania-between-conspiracies-and-abuses?lang=fr> accessed 12 October 2020.

78 'Romanian lawmakers elect new Ombudsman' (*Romania-Insider.com*, 27 June 2019) <www.romania-insider.com/romania-new-ombudsman-2019> accessed 12 October 2020.

79 'RO Constitutional Court rules abrogating public servants' "special pensions" is not legal' (*Romania-Insider.com*, 7 May 2020) <www.romania-insider.com/ccr-special-pensions-abrogating-unconstitutional-may-2020> accessed 12 October 2020.

80 A Szoó, 'Coronavirus: Romanian Ombudsman requests state of emergency' (*Transylvania* Now, 13 March 2020) <https://transylvanianow.com/coronavirus-romanian-ombudsman-requests-state-of-emergency-declaration/> accessed 12 October 2020

81 Upon the plea of unconstitutionality raised by the Ombudsman, the Court has found that fines given during the state of emergency were unconstitutional on procedural grounds and were provided by administrative acts, not by law: 'Record fines issued by Romanian authorities during COVID-19 state of emergency are unconstitutional' (*Romania-Insider.com*, 6 May 2020) <www.romania-insider.com/romania-covid-19-state-emergency-fines-unconstitutional> accessed 12 October 2020. The state of alert and the quarantine regime was also challenged by the Ombudsman: 'CCR: Carantina izolarea sunt neconstitutionale. Reactia lui Orban' (*Stirile ProTV*, 25 June 2020) <https://stirileprotv.ro/stiri/actualitate/starea-de-alerta-si-carantina-discutate-astazi-de-curtea-constitutionala.html> accessed 12 October 2020. The Ombudsman associated the obligations imposed on patients suspected of COVID with the ones obligations imposed on inmates in jails, which was controversial: 'Romania's Ombudsman monitors hospitals for "torture and inhuman treatments"' (*Romania-Insider.com*, 11 June 2020) <www.romania-insider.com/ro-ombudsman-hospital-monitoring-torture-june-2020> accessed

the political conundrum in which the Ombudsman unfortunately plays a very important role continues. As a consequence, the government is trying to dismiss the office holder,[82] while the Ombudsman is challenging every new legislation regarding the public health crisis on procedural grounds.

8. Conclusions

To sum up, Romania adopted the Swedish model of the Ombudsman and prepared the legal framework for the establishment of this institution, but did not prepared society for it. The original friendly and soft law approaches of the Ombudsman did not bode well in a legal system recovering from a totalitarian regime. The core functions of the institution were disregarded and not put to use properly. There are petitions, enquiries, and investigations followed by recommendations for public administration and special reports, but they are not known to the population and do not illustrate the institution's role in society. The Ombudsman is not a creator or enforcer of good administrative norms. The role of the institution regarding the function of mediation between citizens and administration is less visible than that of constitutional arbiter between the powers of the state.

In time, the institution has tried to assume tasks that are more in line with the legal culture of the country: hard law powers such as standing to sue in courts or at the Constitutional Court. The prestige of the office holder plays an important role, so the main influence over the institution has been exercised by a constitutional law professor and former judge at the Constitutional Court. The independence of the institution is still in question, as recent office holders were previously politicians.

Overall, the Ombudsman proves to be a quasi-successful legal transplant, taking a consecrated model but adapting it to the 'domestic' realities of a transitional legal system. Moreover, having all the required features of a model

12 October 2020. See also 'Government calls on Ombudsman to withdraw requests sent to hospitals treating COVID-19 patients' (*Act Media*, 12 June 2020) <https://actmedia.eu/daily/government-calls-on-ombudsman-to-withdraw-requests-sent-to-hospitals-treating-covid-19-patients/86987> accessed 12 October 2020. At the Constitutional Court, the Romanian Ombudsman challenged two articles from the new quarantine law regarding 'isolation in a health unit or alternative location attached to the health unit', mandatory for 48 hours. In her notification, the Ombudsman stated that the provisions of the contested law violated previous decisions given by the RCC and, in addition, the rules of the ECHR. In her opinion, the hospitalization of patients should be a last resort. In reply, the prime minister said that this action represented 'an attack against Romania's fundamental interests': 'August 7, 2020 UPDATE' (*Radio Romania International*, 7 August 2020) <www.rri.ro/en_gb/august_7_2020_update-2621766> accessed 12 October 2020.

82 'RO PM seeks to dismiss Ombudsman after row over "special pensions"' (*Romania-Insider.com*, 22 June 2020) <www.romania-insider.com/pm-seeks-dismissal-ombudsman-jun-2020> accessed 12 October 2020.

Ombudsman, and with an appropriate office holder, the Romanian Ombudsman can become an effective and visible defender of the rights of the citizens in relation to public administration and an enforcer of norms of good administration.

Case Law Analysis

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The *Google Ireland* Case and the Legal Battle over Digital Taxes in the European Union

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Abstract

The preliminary ruling of the Court of Justice of the European Union in the Google Ireland case turned on the compatibility with the rules on free movement of some of the administrative arrangements put in place by Hungary in order to administer its controversial advertisement tax (namely, the obligation to register and the penalties attached to the failure to comply with that obligation). The preliminary ruling offers some interesting insights on the way in which the Court assesses the compatibility with the freedom to provide services of national administrative arrangements aimed at ensuring the effective collection of taxes. This is a topical issue in the context of the recent efforts made by Member States to tax the digital economy more effectively.

1. Introduction

On 3 March 2020, the Grand Chamber of the Court of Justice issued a preliminary ruling on the compatibility with the free movement rules of the administrative design of the Hungarian advertisement tax. The controversial elements of the tax were the registration obligation imposed upon digital companies that publish advertisements in Hungarian and the harshness of the administrative fines attached to that obligation. After reviewing the background of the case (Section 2) and the preliminary ruling (Section 3), this case note analyses the way in which the Court handled the clash between the administrative arrangements aimed at ensuring the effective collection of the tax and the free movement of services (Section 4). In its preliminary ruling, the Court did not address the compatibility of the Hungarian advertisement tax's substantive legal framework with the rules on free movement. However, on the same day in which the case was decided, the Court rendered two additional rulings on the compatibility with Union law of two other similar taxes adopted by Hungary. The case note briefly discusses both cases (Section 5) and the implications that

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these developments may have from the perspective of the digital service taxes recently implemented by other Member States (Section 6).

2. Background

The Hungarian advertisement tax was introduced in 2014. The tax was meant to be levied upon the net turnover generated by the broadcasting or publication of advertisements in Hungary. Newspapers, media outlets, and other traditional billposters were all subject to the tax, but so were tech companies active in the digital advertising business. Indeed, the Act on the advertisement tax provided that the tax would also be levied upon revenue generated by the publication of paid advertisements on the internet where the advertisements are mainly in Hungarian or on webpages written in that language. From a Union law perspective, two different aspects of the tax proved to be controversial.

The first one was the design of its progressive structure, which *de facto* imposed a heavier burden on foreign than on domestic taxpayers. The original design of the Hungarian advertisement tax included six different bands, with rates ranging from 0 to 50%. However, only providers belonging to foreign corporate groups fell within the scope of the bands subject to the highest rates. Furthermore, while progressivity is standard in direct taxes based on profits, it is not so common in turnover taxes. This is because revenue or turnover are traditionally not deemed to be good indicators to assess the taxpayers' ability to pay, since they do not reflect the costs incurred in the income-generating activities.[1] Taxing revenues rather than profits can generate situations where loss-incurring businesses are liable to pay the tax, and to do so at a potentially higher rate than profitable entities generating smaller revenues.

The peculiar design of the Hungarian advertisement tax drew the attention of the Commission, which censured it on the ground that it favoured small over large advertising companies and was therefore contrary to the rules on State aid.[2] However, the General Court subsequently annulled the recovery decision of the Commission, holding that there was no reason turnover taxes had to be based on a single rate in order to escape the long shadow of the rules

1 W Schön, 'International Tax Coordination for a Second-Best World (part I.)' (2009) 1 World Tax Journal 67, 74.

2 Commission Decision (EU) 2017/329 of 4 November 2016 on the measure SA.39235 (2015/C) (ex 2015/NN) implemented by Hungary on the taxation of advertisement turnover [2016] OJ L49/36, para 60.

on State aid.[3] On appeal, the Court of Justice upheld the judgment of the General Court.[4]

The other controversial aspect of the Hungarian advertisement tax concerned the administrative arrangements made in order to ensure its effective collection from digital service companies with no significant physical or legal presence in Hungary. More specifically, the Act on the advertisement tax made it compulsory to register with the National Tax Authority for anybody publishing online advertisements in Hungarian or on webpages written in that language, unless already registered for the purposes of other taxes. Furthermore, the Act laid down a very severe system of administrative sanctions in case of failure to comply with the registration obligation, which consisted of an initial fine of HUF 10 million [€30.100], which would be tripled on a daily basis until it reached the sum of HUF 1 billion [€3,1 million]. Finally, taxpayers subject to these fines were not given the opportunity to contest them at the administrative stage, their only remedy being to start judicial proceedings.

The dispute at the origins of the *Google Ireland* case revolved around the fines the Hungarian Tax Authority imposed upon Google Ireland Limited in 2016. Google had been carrying out activities that were subject to the Hungarian advertisement tax ever since it entered into force. However, Google had not registered with the Hungarian Tax Authority despite the fact that it did not have any legal presence in the country. The Hungarian Tax Authority noticed the infringement and started sanctioning proceedings against Google. Given the exponential growth of the fine attached to the infringement of the registration obligation, it only took a few days before the Hungarian Tax Authority issued a decision imposing on Google Ireland the maximum fine allowed under the Act [€3,1 million].

It was in the context of the action for judicial review brought against that fine that the Administrative Court of Budapest submitted a preliminary reference pursuant to Article 267 TFEU.[5] The preliminary reference included seven questions. These essentially turned on the conformity with the freedom to provide services under Article 56 TFEU of three different aspects of the Hungarian advertisement tax outlined above: the registration obligation, the system

3 Case T-20/17 *Hungary v Commission*, EU:T:2019:448. For a critical analysis of the Commission decision and of the General Court's ruling, see R Szudoczky and B Károlyi, 'The Troubled Story of the Hungarian Advertisement Tax: How (Not) to Design a Progressive Turnover Tax' (2020) 48.1 Intertax 46.

4 Case C-596/19 P *Commission v Hungary*, EU:C:2021:202. For an early comment of this judgement, see S Moreno González, 'Progressive Turnover Taxes and EU State aid law: Green light for digital services taxes?' (*EU Law Live*, 19 March 2021) <https://eulawlive.com/op-ed-progressive-turnover-taxes-and-eu-state-aid-law-green-light-for-digital-services-taxes-by-saturnina-moreno-gonzalez/> accessed 8 April 2021.

5 Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/49.

of sanctions attached to that obligation, and the remedies available against those sanctions.

In her Opinion of 12 September 2019, Advocate General Kokott defended – as a preliminary point – the compatibility of the Hungarian advertisement tax itself with Union law. Although this was not at stake in the case, she made the point that neither the Union legislation on indirect taxation nor the rules on free movement prevent Member States from putting in place this type of taxes.[6] It is against this background that she addressed the three issues outlined earlier.

She easily disposed of the registration obligation because it involved no discrimination against foreign providers (since Hungarian providers were also subject to that obligation) and because, even if it were a restriction on the freedom to provide services, it would be justified on account of the objective to ensure the effective collection of taxes.[7] However, as regards the system of sanctions attached to the registration obligation for foreign providers, she argued that it was indirectly discriminatory because it was harsher than the sanctions foreseen under the general rules on taxation to which residents are subject. At the justification stage, she also relied on its harshness to argue that it was disproportionate and hence unjustifiable.[8] Finally, she saw no justification whatsoever for the difference in remedies foreseen under the general rules on taxation to which residents are subject (which included administrative and judicial remedies) and under the Act on the advertisement tax (which made no room for administrative remedies).[9]

Consequently, Advocate General Kokott invited the Court to rule that both 'the specific manner in which the Hungarian Law on the taxation of advertisements imposes coercive measures on undertakings established outside Hungary' and 'the limitations of the possibilities for legal redress with regard to the very high coercive penalty payments in connection with the Hungarian tax on advertisements' constituted an unjustified restriction of the freedom to provide services.[10]

6 Case C-482/18 *Google Ireland Limited v Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vámigazgatósága*, EU:C:2020:141, Opinion of AG Kokott, paras 29-56.
7 ibid, paras 57-62.
8 ibid, paras 63-100.
9 ibid, paras 101-107.
10 ibid, para 108.

3. Preliminary Ruling[11]

On 3 March 2020, the Grand Chamber of the Court of Justice delivered its preliminary ruling. Unlike the Advocate General, the Court did not address the compatibility of the tax on advertisements itself with Union law.[12]

The Court ruled that the obligation to register did not amount to a restriction on the freedom to provide services enshrined in Article 56 TFEU, notwithstanding the fact that service providers established in Hungary are not subject to that obligation. In reaching that conclusion, the Court relied on three considerations: foreign providers could also escape the registration obligation if they were already registered for the purposes of other taxes; forcing already registered national providers to register again would be a useless formality; and there were no reasons to believe that the administrative burden of the registration obligation imposed upon non-registered providers was heavier than the registration requirements for other taxes.[13]

As far as the sanctions are concerned, the Court reached the opposite result. The starting point of the Court was the observation that, despite the seemingly neutral character of the severe system of sanctions foreseen for the failure to comply with the registration obligation, national and resident corporations were actually shielded from it. This is because resident corporations are always registered for the purposes of other taxes.[14] The Court therefore looked at the sanctions they could incur should they fail to respect analogous registration obligations foreseen under the general rules on taxation to which residents are subject. These sanctions were considerably lower than the ones laid down by the Act on the advertisement tax, which is why the Court held that the contested measure constituted a restriction on the freedom to provide services of Article 56 TFEU.[15]

The Court then considered the justification for the restriction. After admitting that the need to ensure the effective collection of taxes constitutes a legitimate overriding reason in the public interest,[16] the Court went on to assess its proportionality. The Court concluded that the system of sanctions was 'suitable' but not 'necessary' to achieve the objective of ensuring the effective collection

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11 An earlier version of this summary previously appeared on EU Law Live: F Pastor-Merchante, 'Judgment of the Court of Justice, Google Ireland (C-482/18)' (*EU Law Live*, 4 March 2020) <https://eulawlive.com/analysis-judgment-of-the-court-of-justice-google-ireland-c-482-18-by-fernando-pastor-merchante/> accessed 8 April 2021.

12 Case C-482/18 *Google Ireland Limited v Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vámigazgatósága*, EU:C:2020:141, para 24.

13 ibid, paras 24-36.

14 ibid, para 41.

15 ibid, para 44.

16 ibid, para 47.

of taxes for the following reasons: there was no connection between the exponential increase in the fine and the amount of the tax whose payment was at stake;[17] the exponential increase took place within days, without providing the taxpayer with sufficient time to comply;[18] and, finally, even if the Hungarian Tax Authority had the power to reduce the amount of the fine, the purely discretionary character of this power could not save the lack of proportionality of the measure.[19]

Consequently, the Court concluded that the system of sanctions attached to the registration obligation for the purpose of the Hungarian tax on advertisements was contrary to Article 56 TFEU. This conclusion made it unnecessary for the Court to consider the remedial aspects of the tax.[20]

4. Comment

As already noted, the *Google Ireland* case does not deal with the compatibility of the Hungarian tax on advertising itself with Union law. The referring court did not raise this question and, unlike the Advocate General, the Grand Chamber deemed it unnecessary to address it. It follows that the case only deals with the institutional aspects of the Hungarian advertisement tax – namely, the registration obligation that it imposes upon unregistered taxpayers and the sanctions foreseen in order to promote compliance with that obligation.

It could be tempting to downplay the importance of this issue as a peripheral problem, one of little relevance from the perspective of the broader debate on the taxation of the digital economy. However, there is more to this issue than what would appear at first glance. This is because the institutional design of the Hungarian advertisement tax was clearly motivated by the specific difficulties that the collection of taxes raises in the digital economy. The reason Hungary included a specific registration obligation within the Act on the advertisement tax was that the tax targeted an economic activity that can be carried out without any actual physical or legal presence in Hungary. Similarly, the Act attached such a harsh system of sanctions on the registration obligation because of the belief that digital advertising companies without any presence in Hungary would be tempted to resist that obligation and that, given their size and deep pockets, only a harsh system of sanctions could have some deterrent effect.

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17 ibid, para 50.
18 ibid, para 51.
19 ibid, para 53.
20 ibid, para 55.

If one looks at the case from this angle, it becomes a test on the limits that the free movement rules impose upon Member States in their attempts to shore up their taxing authority vis-à-vis foreign digital companies. In this sense, the preliminary ruling confirms that Member States have a broad margin of manoeuvre when it comes to imposing formal obligations such as the registration obligation, even if they represent an additional administrative burden. However, it also confirms that in Union law 'all roads lead to proportionality',[21] and that the compatibility of the instrumental sanctions attached to those formalities ultimately depends on their conformity with this principle.

As is well known, the Court normally uses a two-step version of the proportionality test when Member States invoke a public interest reason to justify free movement restrictions.[22] The purpose of the first step (suitability) is to verify that the contested measure actually serves the legitimate purpose alleged by the Member State. In this case, Hungary relied on the effectiveness of fiscal supervision and the effective collection of taxes in order to justify the system of sanctions attached to the registration obligation. As it had already done in previous cases, the Court accepted that the deterrent effect of administrative fines makes them suitable to promote compliance with this type of obligations. The purpose of the second step (necessity) is to verify that the contested measure is the least restrictive means to achieve the goal. This is where Hungary's defence failed, because the Court deemed the system of sanctions foreseen in the Act on the advertisement tax to be excessive.

It is important to note that, in free movement cases where national administrative sanctions are at stake, the proportionality test does not limit itself to considering the balance between the fine amounts and the gravity of the infringement that they seek to punish. Needless to say, the fact that a sanction is out of proportion with the gravity of the underlying infringement may be a strong sign that there are less restrictive means to achieve the same result.[23] However, there are other factors to consider. On the one hand, it is not possible to adopt a myopic view and to focus exclusively on the specific rule protected by each sanction. This is because seemingly minor rules may play an important role within the broader regulatory framework to which they belong. Arguably, this is true of formal duties such as the registration obligation that was at stake

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21 B van Leeuwen, 'Rethinking the Structure of Free Movement Law: the Centralisation of Proportionality in the Internal Market' (2017) 10 European Journal of Legal Studies 235, 260.

22 T Marzal, 'From Hercules to Pareto: Of bathos, proportionality, and EU law' (2017) 15 International Journal of Constitutional Law 621, 631-633 and W Sauter, 'Proportionality in EU Law: A Balancing Act?' (2012-2013) 15 Cambridge Yearbook of European Legal Studies 439, 461.

23 The relationship between the sanction and the gravity of the offence may also be relevant from the perspective of the 'requirements of good governance' that the Court has infused into the proportionality test: see C Barnard, *The Substantive Law of the EU. The Four Freedoms* (4th edn, Oxford University Press 2013) 535-536 and S Prechal, 'Free Movement and Procedural Requirements: Proportionality Reconsidered' (2008) 35 Legal Issues of Economic Integration 201.

in the *Google Ireland* case. The registration obligation may seem trivial, but it serves a crucial purpose, which is to provide Member States with the information they need to effectively exercise their tax authority.

On the other hand, it is important to bear in mind that the retributive dimension of administrative sanctions is not necessarily their main function. The main purpose of administrative sanctions is to ensure compliance with the rules that they serve. Consequently, it is not possible to assess the proportionality of sanctions without somehow considering the circumstances in which they project themselves and the optimum level of deterrence required in those circumstances. This means that, in the *Google Ireland* case, the difficulties raised by the collection of service taxes in the digital context could be relevant to assess the proportionality of the sanctions attached to the registration obligation. In her Opinion, Advocate General Kokott hints at this idea when she discusses the amounts of the fines foreseen under the Hungarian Act on advertisements: 'Lower amounts would be a less onerous means, but would not be equally appropriate as they would reduce the financial pressure' and hence call into question 'the objective of ensuring effective and uniform taxation.'[24]

It is true that, in the preliminary ruling, the Court censures the Hungarian system of sanctions without a fully-fledged analysis of these issues. However, this is probably because some of the features of the contested sanctioning scheme were so draconian that they could not be justified under any circumstances (in particular, the automatic and exponential increase of the fine's amount, which left no time for good-faith infringers to comply). The point to note is that the Court took issue with these features, but not with the existence of a specific sanctioning regime for non-resident taxpayers. Indeed, in order to assess the suitability and necessity of the sanctions foreseen under the Act on the advertisement tax, the Court did not give any weight to the fact that they were considerably higher than the sanctions foreseen for the same type of infringements under the general law on taxation. This asymmetry was obviously relevant to assess the discriminatory character of the scheme and to establish that it constitutes a *prima facie* restriction on the rules on free movement. However, it was not fatal at the justification stage, because the whole point of the justification stage is to verify whether there are good reasons behind the asymmetry.

This observation is important, because it goes to show that Union law does not prevent Member States from adapting the institutional design of digital taxes to the special challenges that they raise. The effective collection of digital taxes may require a tailor-made set of institutional arrangements and Union law does not object to that, so long as the principle of proportionality is respected.

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[24] Case C-482/18 *Google Ireland Limited v Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vámigazgatósága*, EU:C:2020:141, Opinion of AG Kokott, paras 88-89.

Less drastic or draconian arrangements may be acceptable even if they primarily or exclusively target digital companies established abroad. However, a more 'proportionate' case will have to reach the Court before we can get more detailed guidance on the topic.

5. Other Related Cases

On the same day in which the *Google Ireland* case was decided, the Court of Justice rendered two additional preliminary rulings on the compatibility with Union law of the substantive framework of two other Hungarian turnover taxes: the tax on turnover of telecommunication operators, which was at stake in *Vodafone*,[25] and the tax on turnover of store retail trade operators, which was at stake in *Tesco*.[26] Like the advertisement tax, these two turnover taxes also featured a progressive rate structure, as a result of which all companies in the lowest tax bracket (0% tax rate) were Hungarian, while most – if not all – of the companies in the highest tax brackets (subject to a 6,5% and 2,5% top marginal rate) belonged to foreign corporate groups.[27]

The preliminary references at the origin of *Vodafone* and *Tesco* went to the core of the problem. They essentially asked the Court whether turnover taxes imposing most or all of their burden on undertakings controlled by individuals or entities established in other Member States were precluded by Article 49 TFEU on freedom of establishment and Article 54 TFEU on equal treatment.

However, the Court reformulated the inquiry. Instead of adhering to and starting its analysis from the postulation that all of the taxable entities in the lower brackets are domestic and those in the upper brackets are foreign, the Court framed the inquiry around the issue of progressivity of the tax rates. Specifically, the Court stated that

> *the referring court considers that it is necessary in order to resolve the dispute in the main proceedings, to determine whether the progressive scale, using bands, of the special tax may constitute, in itself [...] indirect discrimination vis-à-vis taxable persons that are controlled by natural persons or legal persons of other Member States, who bear the actual tax burden, and, therefore, be contrary to Articles 49 and 54 TFEU.*[28]

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25 Case C-75/18 *Vodafone Magyarország*, EU:C:2020:139.

26 Case C-323/18 *Tesco-Global Áruházak*, EU:C:2020:140.

27 R Szudoczky and B Károlyi, 'The Troubled Story of the Hungarian Advertisement Tax: How (Not) to Design a Progressive Turnover Tax' (2020) 48.1 Intertax 46, 57.

28 Case C-75/18 *Vodafone Magyarország*, EU:C:2020:139, para 36 and Case C-323/18 *Tesco-Global Áruházak*, EU:C:2020:140, para 48.

By redefining the case as one challenging the progressive nature of the tax – rather than the discriminatory crafting of thresholds – the Court rapidly came to the conclusion that such progressivity was admissible. Indeed, the Court recognized that 'Member States are free [...] to establish the system of taxation that they deem the most appropriate, and consequently the application of progressive taxation falls within the discretion of each Member State'.[29] It also recognized that

in that context, and contrary to what is maintained by the Commission, progressive taxation may be based on turnover, since, on the one hand, the amount of turnover constitutes a criterion of differentiation that is neutral and, on the other, turnover constitutes a relevant indicator of a taxable person's ability to pay.[30]

Finally, the Court concluded that 'by means of the application of a progressive scale based on turnover, the aim of that law is to impose a tax on taxable persons who have an ability to pay that exceeds the general obligation to pay tax',[31] and that 'the fact that the greater part of such a special tax is borne by taxable persons [from] other Member States cannot be such as to merit, by itself, categorisation as discrimination. [...] Accordingly, that situation is an indicator that is fortuitous, if not a matter of chance'.[32]

By focusing exclusively on the legitimacy of progressivity through apparently neutral turnover thresholds, the Court missed the opportunity to conduct an in-depth and complete analysis of the concrete effects of this type of tax design. In other words, the Court avoided the real issue at stake, which is whether the use of a supposedly neutral criterion such as the turnover threshold may in fact lead to indirect discrimination on the basis of nationality.[33] In so doing, the Court partially deviated from the reasoning advanced by Advocate General Kokott, who had argued that the assessment of indirect discrimination should have been based on a combination of quantitative and qualitative criteria, and that the intention of the legislature should have been taken into consideration.[34]

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29 Case C-75/18 *Vodafone Magyarország*, EU:C:2020:139, para 49 and Case C-323/18 *Tesco-Global Áruházak*, EU:C:2020:140, para 69.

30 Case C-75/18 *Vodafone Magyarország*, EU:C:2020:139, para 50 and Case C-323/18 *Tesco-Global Áruházak*, EU:C:2020:140, para 70.

31 Case C-75/18 *Vodafone Magyarország*, EU:C:2020:139, para 51 and Case C-323/18 *Tesco-Global Áruházak*, EU:C:2020:140, para 71.

32 Case C-75/18 *Vodafone Magyarország*, EU:C:2020:139, para 52 and Case C-323/18 *Tesco-Global Áruházak*, EU:C:2020:140, para 72.

33 L Parada, 'Vodafone Magyarország. Special Hungarian tax on turnover of telecommunications operators is compatible with EU law' (2020) 10 Highlights and Insights on European Taxation 32.

34 Case C-75/18 *Vodafone Magyarország*, EU:C:2020:139, Opinion of AG Kokott, paras 63, 74, 78-81, 83-85.

6. Final Remarks

The Hungarian advertisement tax is just one of the numerous new taxes that Member States have adopted in recent years, with the aim of tackling the 'base erosion and profit shifting' (BEPS) issue and to collect an amount of tax revenue from the so-called digital economy that is consistent with the market size of such industry.[35] The Commission has tried to articulate a coordinated response to this issue. However, its 2018 proposal for the adoption of a common digital service tax (DST) did not gather the unanimous support of Member States, and was therefore placed on hold.[36] As a result, various Member States have unilaterally set in place taxes of this sort.

As of March 2021, Austria, France, Italy, Poland, and Spain have adopted a DST, while other Member States – such as Belgium, the Czech Republic, and Slovakia – have published proposals for the adoption of a DST.[37] Although these unilaterally adopted levies differ in their respective scope, rate, and administrative arrangements, most of them mirror the essential features of the Commission's proposal. In particular, all of these levies are imposed on the gross revenues – net of VAT – originating from enumerated types of digital services rendered by businesses meeting certain quantitative requirements.

The *Google Ireland* case and the other Hungarian cases discussed above are relevant from this perspective, because the compatibility of DSTs with Union law is likely to be questioned in the near future. The preliminary ruling of the Court in *Google Ireland* suggests that the registration duties imposed by Member States on foreign service providers are unlikely to raise any problems. The challenge lies in the design of the sanctions attached to those duties, which shall not run afoul of the proportionality requirements so cherished by the Court, even if some Member States may feel like they are in a David vs Goliath position vis-à-vis large tech corporate groups.

The preliminary rulings in the *Vodafone* and *Tesco* cases could suggest that the Court will refrain from striking down these types of taxes on discrimination grounds. However, the Hungarian turnover taxes analyzed in those cases are not identical to all the DSTs adopted or proposed thus far by Member States.

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35 For a general illustration of the BEPS issue, see OECD, '*Addressing Base Erosion and Profit Shifting*' (OECD Publishing 2013). For a more detailed analysis of the BEPS issue with specific regard to the digital economy, see OECD, '*Tax Challenges Arising from Digitalization – Interim Report 2018: Inclusive Framework on BEPS, OECD/G20 Base Erosion and Profit Shifting Project*' (OECD Publishing 2018).

36 Commission, 'Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services' (Proposal) COM/2018/0148 final.

37 E Asen, 'What European OECD Countries Are Doing about Digital Services Taxes' (*Tax Foundation*, 25 March 2021) <https://taxfoundation.org/digital-tax-europe-2020/> accessed 8 April 2021.

In particular, most DSTs do not provide for a system of progressive rates, but rather for an exception threshold and a single flat rate applicable to any taxable base. Moreover, while the applicable rate of the Hungarian taxes was determined using in-country turnover, the applicability threshold of DSTs refers not only to the amount of domestic revenue, but also to worldwide group revenue.[38] This may appear to be a distinct source of national discrimination that the Court should not ignore and for which additional justifications may be necessary. Consequently, the reasoning of the Court in the Hungarian cases cannot be automatically transplanted to DST cases.

Thus, the preliminary rulings of the Court in *Google Ireland* and in the other Hungarian tax cases cannot be used to make reliable forecasts on the compatibility of the substantive aspects of DSTs with Union law – and, in particular, on the treatment that their quantitative thresholds deserve from a free movement perspective. In any event, a preliminary reference on DSTs could grant the Court a renewed opportunity to provide clear guidance and standards for the assessment of covert tax discrimination through turnover taxes.[39]

38 ibid.

39 For a broad and in-depth discussion of the compatibility of DSTs with Union law, see R Mason and L Parada, 'The Legality of Digital Taxes in Europe' (2020) 40 Virginia Tax Review 175.

Book Review

Varga Z., *The Effectiveness of Köbler Liability in National Courts*, Hart Publishing 2020, ISBN 978 1 509 93920 6, 221 pp., eBook £54.00

The principle of state liability for breach of EU law by national (superior) courts in *Köbler* ('*Köbler* liability') might be described as the highpoint of a line of CJEU jurisprudence, which gradually and progressively extended the reach of the primacy of EU law from the declaration of rights to the enumeration of specific EU law remedies.[1] Our understanding of state liability, in particular, is complicated by the fact that while the conditions of liability are autonomous and European, they are minimum standards of protection that must be implemented by Member State courts, and are often coloured according to the principle of national procedural autonomy.[2] A *Köbler* liability action provides individuals with a remedy for the 'manifest breach' of their EU law rights, and a corresponding procedural duty on Member States' courts to give effect to this rights-remedy regime.[3] This remedy may arise as a result of judicial non-application and, more controversially, misapplication of EU law. The right to compensation for judicial error of law, or indeed potentially *male fides*, is a novel remedy for a large number of jurisdictions, which traditionally resolve judicial error of law by judicial review. It is therefore apt to cause a certain degree of friction between national courts which must give effect to their domestic constitutional and remedial order while, at the same time, reconcile their case-law with their judicial function as 'agents of compliance' within the EU legal order.[4] This friction is reflected in the way in which the principle of procedural autonomy is applied in practice and, in particular, in the relationship between *res judicata* or the finality of judgments and the *Köbler* case-law before national courts. In practical terms, holding a court liable in tort for breaching EU law also involves courts censuring their colleagues on the bench, which may be perceived as scuttling the hierarchy of domestic courts.

Varga, in the first part of her book and against this complex background, sets herself the ambitious task of examining the extent of *Köbler* liability's 'real impact' on Member States' legal orders *de lege lata* from the 'bottom up' and in context.[5] Her analysis is timely given that it is almost twenty years since *Köbler* was decided. Her starting point is to review *Köbler* liability's criteria for recovery,

1 See T Tridimas, 'Liability for Breach of Community Law: Growing Up and Mellowing Down?' (2001) 38(2) Common Market Law Review 301-32 [noting how rights-remedies are part of constitution-building through out-working primacy and direct effect].

2 Up to a point, i.e. *Rewe* effectiveness and equivalence. See Case C-120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] EU:C:1979:42.

3 As Varga clarifies, the national court has a procedural duty to apply EU law rules, and this may give rise to a right to a compensatory remedy where a right is conferred on an individual, see S Varga, *The Effectiveness of Köbler Liability in National Courts* (Hart Publishing: London 2020) 17-19.

4 See ibid 5-7, where Varga discusses the constitutional context.

5 ibid 2. The context, as Varga sees it, is other national remedies, and the structure of other EU law remedies.

namely manifest breach and causation.[6] It seems that the high threshold of manifest breach and the problem of concurrent liability of several branches of government make it very difficult for claimants to successfully obtain a remedy.[7] This holds true whether the relevant 'procedural' breach relates to *inter alia* the direct effect of directives, conforming interpretation or the obligation to make a preliminary reference. The noteworthy exception is for breaches related to the failure to apply established ECJ case-law. In other words, the ECJ itself sets a high bar for bridging the gap between a procedural breach of rights and a substantive action for damages.[8] Varga, then, sets out to examine national case-law and the way in which the inauspiciously high threshold requirement has been interpreted by Member States' courts in practice. A great diversity is apparent among the EU-28.[9] Varga groups Member States' approaches into three categories: regimes compatible with EU law,[10] Member States that refuse to recognise *Köbler* liability,[11] and Member States without any sign of accommodation or refusal.[12] Even in those 'regimes' compatible with *Köbler* liability, its practical impact is limited. Varga seems to attribute this to the high threshold of recovery. For example, in France, while *Köbler* liability is now recognised, and to a degree harmonised with French administrative law's *faute lourde* requirement, no claimant has yet been able to surmount the sufficiently serious breach requirement. This is replicated in almost all other 'European-friendly' regimes.[13] But while some Member States' courts have more or less successfully reconciled their judicial practice with *Köbler* liability,[14] others have refused outright to apply *Köbler* liability. Notable are Hungary, Ireland,[15] and Czechia, where

6 But curiously not conferral of a right. Perhaps she agrees with Dougan who argues that it is under-specified and decides that it does not merit in-depth treatment. See M Dougan, 'Addressing Issues of Protective Scope within the Francovich Right to Reparation' (2017) 13 European Constitutional Law Review 124-65. However, the issue of conferral of a right resurfaces, indirectly, at a later point when Varga discusses the scope of *Köbler* liability in the context of the refusal to make a preliminary reference, see Varga (n3) 191-212.

7 See ibid 59-81 on causation both in EU law theory and Member States' courts practice. An important additional problem here is the duty to mitigate, which might be better called in this context the duty to exhaust domestic remedies.

8 See ibid 23-46.

9 ibid 83-117.

10 Denmark, Latvia, Spain, Sweden, Belgium, Bulgaria, Germany, France, Lithuania, the Netherlands, Austria, Portugal, Finland, the United Kingdom, Italy, and Poland.

11 Czechia, Hungary, Ireland.

12 Cyprus, Croatia, Estonia, Greece, Luxembourg, Malta, Romania, Slovakia, and Slovenia.

13 Finland seems to be the outlier with five awards of *Köbler* damages to date, see Varga (n3) 103.

14 ibid 87. In all 'European-friendly' jurisdictions, a period of bedding down can be observed. In some jurisdictions, some doubts as to the compatibility with EU law remain even if on the whole it appears that *Köbler* liability is accepted (eg Spain).

15 With respect, I think Varga reads too much into *Cronin v Dublin City Sheriff* [2017] IEHC 685 (Ní Raifeartaigh J) discussed at ibid 113. In that judgment, the plaintiff was seeking, erroneously, to rely on *Köbler* as grounds to overturn a judgment, and not to seek damages. The plaintiff's claim was entirely misconceived, and Ní Raifeartaigh J was right to dismiss the *Köbler* aspect of the claim, and instead address the issue based on national procedural rules on *res judicata*. Varga is correct, however, to state that the Court seems to misunderstand the import of the

the principles of *res judicata* and the finality of judgments apparently continue to prevail.[16] The remaining jurisdictions have not considered *Köbler* liability to date and, as such, it is difficult to draw any clear conclusions. But whether in European-friendly jurisdictions, or in those jurisdictions in which the reception has been lukewarm or hostile, the basic point is that *Köbler* liability has had a negligible impact *in practice*.[17] To date,[18] while national courts have considered *Köbler* liability on 60 occasions, damages have only been awarded five times across the EU-28 (at the time of writing).[19]

Varga then attempts to explain why this may be the case, by drawing on 'context'. For Varga, context denotes the alternative remedies available to claimants in Member States' legal orders. In several Member States, at least, national procedural autonomy provides what she regards as functionally equivalent remedies for error of law.[20] In some Member States, for example, non-tortious avenues of recourse exist such as the possibility of a re-trial, *de novo,* where a final judgment is incompatible with EU law. This allows for a judgment that is, otherwise, *res judicata* to be re-opened, and is usually contingent on a heightened standard of review.[21] In some jurisdictions, this right to a re-trial in exceptional circumstances is recognised in Member States' procedural codes.[22] However, even in those Member States that allow for re-trial, it is qualified in certain respects,[23] and there are at least fifteen Member States that exclude re-trial to a large extent or entirely in EU law matters.[24] Varga states that re-trial offers, in certain respects, a higher level of protection that *Köbler* liability, and is better from the point of view of the rule of law and because it does not require the claimant to demonstrate a tort.[25] She shows some evidence that, at least in certain Member States, judiciaries view re-trial and state liability as alternative remedies.[26] In other Member States, certain states give priority to re-trial and

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CJEU's *ex officio* jurisprudence, and, one might add, CJEU jurisprudence on *res judicata,* when coming to its conclusions.

16 Apparently, because in Hungary the jurisprudence is mixed, and for Ireland (n15). It should be added that the Irish Supreme Court has recognised *Köbler* liability since *McGrath v Irish Ispat Limited* [2006] IESC 43 (unrep., SC 2006). It seems that outright rejection is only manifest in Czechia, see Varga (n3) 109-10.

17 See ibid 117-18 for conclusions.

18 Or, rather, as Varga clarifies, her book covers case-law in the period from 2003- 2018, see ibid 5.

19 ibid 4.

20 See ibid 220-1, where Varga includes a helpful annex, including an overview of 'remedies under national law offering a comparable level of protection of individual rights to that provided by the *Köbler* principle in the event of breach of EU law by Member State courts.'

21 See ibid 125, Denmark, Malta, Finland, Sweden, the UK, and Lithuania.

22 ibid, namely Croatia, Romania, and Slovakia.

23 Eg limited to administrative law only.

24 Varga (n3) 126.

25 ibid 125.

26 ibid 145, notably Finland and Lithuania.

others to liability claims. It should be noted that in this discussion Varga is sometimes referring to the general position on re-trial as distinct from the specific issue of whether re-trial is available with regard to EU law matters.[27] It is thus difficult, in my view, to extrapolate from the availability of re-trial in EU law matters in some states, wider conclusions about its contextual position as an EU-law compatible alternative remedy to *Köbler* liability, as Varga seems to do. The same might be said about 'constitutional complaints on the lawful judge principle'.[28] In this context, this principle holds that in circumstances where a court fails to make a preliminary reference, the right to a lawful judge or, more broadly, the right to a fair trial, is violated. The consequence of finding a violation is the annulment of the relevant judgment. The remedy is, in essence, a breach of the right to an effective remedy according to *Member States' constitutional law* applied in the context of EU law. There are two conditions: the first is that the CJEU be recognised as a lawful judge; the second, that individuals have *locus standi* before constitutional courts. To date, five Member States only have recognised the CJEU as a lawful judge.[29] This greatly weakens Varga's argument that it is an alternative remedy insofar as she means to draw a general conclusion about its potency as a contextual alternative remedy to *Köbler* liability within the EU. However, as Varga notes, another and more general path is the ECtHR Article 6 jurisprudence that states that there is an obligation on Member States to state reasons for the refusal to make a preliminary reference.[30] This jurisprudence is ambivalent, but appears, in recent years, to extend a little beyond *Cilfit*; it is not sufficient simply to state one of the *Cilfit* grounds – an explanation for its invocation is required, which will vary with context and the nature of the dispute. This may be viewed as an alternative or indirect non-compensatory remedy in the context of refusal to make a preliminary reference. But if it is an alternative remedy, it is rather uncertain and limited in scope.[31]

Perhaps because her contextual analysis, which argues that alternative remedies explain the lack of recourse to *Köbler* liability, is inconclusive, and (at least in my view) unconvincing, Varga, in her penultimate chapter – the second part of the book – turns from analysing the law *de lege lata* to attempting to reimagine *Köbler* liability *de lege ferenda*. Because it is largely a paper tiger, it should not be considered a compensatory remedy aimed at vindicating EU law rights.[32]

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27 ibid 146, where Varga notes the 'theoretical' possibility of the application of the remedy to EU law claims.

28 ibid 148ff.

29 ibid 150.

30 See ibid 151-56 for analysis.

31 And the ECtHR case-law it is not particularly consistent, see J Krommendijk, '"Open Sesame!": Improving Access to the ECJ by Requiring National Courts to Reason their Refusals to Refer' (2017) 42(1) European Law Review 46-62, at 54-56 esp.

32 See Varga (n3) 177-82 esp., where she canvasses the arguments for *Köbler* liability as a deterrent tool in the arsenal of the CJEU. However, there is no definite statement that it is a deterrent tool, as distinct from a compensatory remedy, until 215. Even so, Varga says this is its '*primary* function'. However, her analysis, which stresses procedural autonomy, belies this statement,

But, then *quō vādis, Köbler* liability? Varga seems to accept the deterrence or 'sanction for the disobedient state'[33] explanation of *Köbler* liability as the only plausible explanation left. Once this explanation is accepted, Varga then considers that its central role should be in relation to the refusal to make a preliminary reference. In other words, *Köbler* liability should not be considered from the point of view of a specific (individual) rights-remedy requirement, but as a means to sanction states for their failure to engage in 'judicial dialogue', which is ultimately apt to undermine the effectiveness of the EU legal order. Buttressing this argument requires some legal casuistry, and Varga skilfully obliges. Her starting point is that Article 267(3), TFEU – the refusal by national courts to refer a case via preliminary reference – does not confer a right to damages for individuals,[34] and should instead be understood as a procedural obligation on Member States to make a reference. However, when Article 267(3) is read against Article 47 of the Charter's declared 'effective judicial protection' requirement, it might justify liability for refusal to refer a question. As is well-known, Article 47 of the Charter concerns fair and effective remedies and, Varga speculates, a failure to refer a question may be considered to impugn the fairness of proceedings. Drawing on ECJ case-law, but also on analogies from ECtHR jurisprudence,[35] Varga concludes that there are certain circumstances in which the failure to state reasons should be considered a violation of Article 47 of the Charter. It apparently follows from CJEU case-law that where 'fundamental procedural rights' are violated, compensation for non-material losses should be awarded and constitute a sufficiently serious breach.[36] Therefore, Varga fashions a potentially novel means of recourse in *Köbler* liability for failure to give reasons above the rather deferential *Cilfit* criteria. Notwithstanding Varga's broad *Köbler* scepticism, here she hints at a residual role for *Köbler* liability when the Member State courts not only misapply EU law, but actively disengage from it. It seems in the end that, aside from such circumstances, Varga's ultimate conclusion is *tant pisKöbler* liability in other circumstances:[37] effectiveness and equivalence can, and do, fulfil the task that Kobler liability perhaps might do, and *Köbler* liability is better considered as a big, deterrent stick when the 'sincere co-operation' between Member States and the CJEU breaks down.[38] The paucity of Member State case-law seems, in her analysis, to serve as a ballast for her

and there is no extensive analysis of the alternative perspective. I take it that she sees it as its exclusive function.

33 C Harlow, 'Francovich and the Problem of the Disobedient State' (1996) 2(3) European Law Journal 199-225.

34 Varga (n3) 201.

35 ibid 207, where Varga notes that art 52(3) provides that the level of protection afforded by the Charter should be at least equivalent to that provided by the ECHR.

36 ibid 207-8.

37 ibid 216 esp.

38 See Varga's findings at ibid 213-219.

argument that *Köbler* liability,[39] in the final analysis, has very little to do with compensating individuals for the violation of their EU law rights, and everything to do with ensuring that the EU legal order is effective.

I wish to contribute three, related criticisms. Varga's monograph, from the outset, largely eschews theory. Instead of theorising about *Köbler* liability, and in particular its relationship to *Francovich* state liability[40] and, more broadly, state liability's place in the overall architecture of EU law – well-trodden ground according to Varga – the added value of her book is that by pursuing a 'bottom-up' doctrinal and contextual analysis, she is better placed to judge 'the real impact of *Köbler* on national remedies.'[41] This 'law in action' approach is presumably meant to expand our understanding of *Köbler* liability in a way that reaches beyond what one might call EU law 'coherentism',[42] namely the unfolding of the internal logic of the law of integration.[43] In a sense, EU law 'rhetoric' is being tested against Member State judicial practice. From the latter perspective, *Köbler* liability is a mirage, because the grounds of liability effectively make recovery impossible. From this finding, she concludes that whatever the law in books says about the compensatory nature of the remedy, practice tells us otherwise, and as such it should be re-imagined in a more modest, and delimited way in the light of its truer role as an arm of EU law effectiveness *in extremis*. It is trite to say that the EU legal order is functionalist, and that its liability law is 'regulatory-instrumentalist' in tenor.[44] But it is rather odd to argue from the principle of effective judicial protection in the Charter of Fundamental Rights to buttress this conclusion. Charter rights, more typically, might be considered as concerned with the protection of individual rights and the rule of law. A deeper engagement with the role of the Charter as a means to effect classical rule of law, or otherwise, would have been beneficial. In other words, EU law is perhaps a bit more complex than Varga seems to intimate.

Varga seems to infer, relatedly, that since *Köbler* liability is a second-best solution to alternative remedies, whether Member State-based, or, one might add, based on EU law, the best explanation of *Köbler* liability is one *exclusively* based on ensuring the effectiveness of EU law.[45] This is certainly true if one

39 See ibid 216 on what the lack of successful claims 'shows'.

40 Although Varga indirectly addresses this issue in her discussion of causation at ibid 59-81.

41 ibid 2.

42 R Brownsword, 'Law and Technology: Two Modes of Disruption, Three Legal MindSets, and the Big Picture of Regulatory Responsibilities' (2019) 14 The Indian Journal of Law and Technology 1-39. For a critique of 'coherentism' in an EU law context, see HW Micklitz, 'The (un)-Systematics of (Private) Law as an Element of European Legal Culture' in G Helleringer & KP Purnhagen (eds), *Towards a European Legal Culture*, (Baden-Baden: Nomos 2014) 81-114.

43 P Pescatore, *Law of Integration: Emergence of a New Phenomenon in International Relations, Based on the Experience of the European Communities* (Leiden: AW Sijthoff 1974).

44 Brownsword (n42).

45 Varga might disagree with my characterisation of her argument here. However, see (n32).

stresses the procedural aspect of the remedy – imposing a duty of co-operation on Member State courts as 'agents of compliance', and the way in which it has arisen alongside *Francovich* state liability and other measures that limit the procedural autonomy of Member States as arising from the outworking of the primacy of EU law. However, it is a *non sequitur* to argue that because it is secondary, and concerned with effectiveness, it is therefore *solely* concerned with compliance *qua* instrumental goal. It is entirely possible to argue that the EU is Janus-faced – not simply a functional legal order, but also concerned with more classical notions of creating an objective legal order of rights and remedies.[46] In this light, Member States' reliance on other, perhaps sub-optimal and non-compensatory avenues, or their outright dismissal of *Köbler* liability, in some circumstances without adequate justification, appear less about providing alternative and effective remedies, and more about the violation of the EU law rights to a *specific* remedy in practice by failing to adequately integrate EU law into their domestic legal orders.[47] In other words, it is one thing to say that the remedy is difficult to apply in practice, and to provide empirical evidence to support this argument; it is quite another to say that it should not be applied in practice, except in an attenuated way, and instead say that other remedies, often non-compensatory, provide 'a comparable level of protection'.[48]

Finally, a pitfall of the 'bottom-up' approach more broadly is that it appears at times that national law is in the driving seat in determining the meaning and scope of *Köbler* liability. Rather than answering the question of 'the real impact of *Köbler* [liability] on national remedies', her stated aim, Varga's analysis seems to show the impact of national remedies on *Köbler* liability. This is evident in the discussion of the very possibility of judicial liability, which traditionally is entirely excluded in six Member States, and recognised with some reservations in the rest.[49] Varga's discussion of the well-known and uneasy relationship between EU law rights and national procedural autonomy is fascinating and comprehensive. But, as Varga acknowledges, procedural autonomy has its limits in effective judicial protection and by focusing on the national 'reception' of EU law, one might be forgiven for thinking that ultimately the meaning of EU law is decided on in a haphazard way by national courts. Thus, for example,

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46 See J Krommendijk, 'Is the Light on the Horizon? The Distinction between "Rewe Effectiveness" and the Principle of Effective Judicial Protection in Article 47 of the Charter after Oriizonte' (2016) 53 Common Market Law Review 1395 [distinguishing a rights-based and effectiveness-based understanding of effective judicial protection].

47 See Varga (n3) 188, where she seems to doubt that it requires the provision of a specific remedy citing M Dougan, 'The "Disguised Vertical Direct Effect of Directives' (2000) 59 Cambridge Law Journal 586-611.

48 Varga (n3) 220. Incidentally, it is not entirely clear how 'comparable' is measured. Are non-compensatory remedies really comparable to compensatory remedies? They are if the focus is entirely on the compliance, but not if on compensation.

49 ibid 80-82 and 82ff.

Varga presents the Spanish legal position as providing judicial liability for 'the improper administration of justice', and states that the same holds true, 'theoretically', for breaches of EU law.[50] Elsewhere, Varga notes how French law has adapted its *faute lourde* criterion in the light of *Köbler* in relation to failure to refer a case,[51] which evidences how French courts have '*acknowledged* that the state may incur liability based on the criteria established by in the ECJ [in *Köbler*]'.[52] Ireland appears entirely resistant to *Köbler* liability claims.[53] Of the 28 jurisdictions surveyed, it is only in Belgium that a sort of *entente* has been reached between *Köbler* liability and domestic law, because the Belgian courts have harmonised, so to speak, the *Köbler* liability criteria and recovery in national law. Rather, the overall picture that emerges is one of grudging acceptance or reception of EU law, but one which is channelled through, and in some cases distorted by, national law particularities.[54] This is an interesting and valuable finding on its own terms, but in the absence of a broader theoretical approach to frame these findings, one which in particular shows exactly how compensatory and non-compensatory remedies are equivalent, it is difficult to endorse Varga's positive argument that the violation of *Köbler* liability by Member State procedural or remedial rules is permissible when other domestic remedies provide for the equivalent and effective protection of EU law.[55] Some reference to, and perhaps treatment, of the theoretical literature on conflict of laws,[56] or hybridisation,[57] for example, might have strengthened this argument, and made it more convincing.

Overall, this book's main achievement is to draw together 60 decided cases spanning 28 jurisdictions, which gives a rich overview of *Köbler* liability from the 'bottom-up'. It is, in other words, a much-needed analysis of the law *de lege lata*, which will no doubt be an invaluable resource for EU law scholars working on the issue of judicial liability in EU law. For this reason, it should be applauded as a welcome, 'bottom-up' addition to EU law scholarship. However, it is my view that it perhaps pays too much heed to procedural autonomy on its own

50 ibid 84.
51 And in other respects, see ibid 94-96.
52 ibid 96 (emphasis added).
53 See n15.
54 See Varga (n3) 90. Similar stories can be told for eg Bulgaria, Germany, Portugal. But Belgium seems to accept EU law without hesitation.
55 See ibid 216, where Varga states that given the principles of equivalence and effectiveness, 'I think that Member State remedial or procedural rules which are in violation of the *Köbler* principle must not be necessarily considered incompatible with EU law.'
56 See eg C Joerges, 'The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutional Perspective' (1997) 3(4) European Law Journal 378–406.
57 See eg M Amstutz, 'In-Between Worlds: *Marleasing* and the Emergence of Interlegality in Legal Reasoning' (2005) 11(6) European Law Journal 766–84.

terms and does not have enough regard for the complexity of state liability in EU law, and, more broadly, the *sui generis* constitutional structure of the EU.

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