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## *The autonomy of European Union Law*

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# The autonomy of European Union Law

SUMMARY: 1. Introduction. – 2. What EU law is not: it is not ordinary international law. – 3. What EU law is: an autonomous, self-sufficient and coherent system of norms. – 4. Concluding remarks.

1. The autonomy of EU law is a topic that has drawn a great deal of interest from academics since the Court of Justice of the European Union (the ‘Court of Justice’ or the ‘Court’) gave its ruling in Opinion 2/13.<sup>1</sup> That is perhaps unsurprising as that Opinion contains what is probably the most detailed and comprehensive analysis of the autonomy of EU law.<sup>2</sup>

That said, when examining the concept of autonomy of EU law, one should begin by revisiting the classics. As is well known, the ‘constitutionalisation’ of the EU integration project began fifty five years ago when the Court of Justice delivered its ground-breaking judgment in *van Gend en Loos*.<sup>3</sup> In what is probably the most famous passage ever written by the Court, the latter held that

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<sup>1</sup> Opinion 2/13 (*Accession of the European Union to the ECHR*) of 18 December 2014, EU:C:2014:2454.

<sup>2</sup> See, e.g., D. Kochenov, ‘EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?’ (2015) 34 *Yearbook of European Law* 74; E. Spaventa, ‘A Very Fearful Court? The Protection of Fundamental Rights in the European Union after Opinion 2/13’ (2015) 22 *Maastricht Journal of European and Comparative Law* 35; P. Eeckhout, ‘Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue—Autonomy or Autarky?’ (2015) 38 *Fordham International Law Journal* 955, and S. Peers, ‘The EU’s Accession to the ECHR: The Dream Becomes a Nightmare’ (2015) 16 *German Law Journal* 213. But see D. Halberstam, ‘“It’s the Autonomy, Stupid!” A Modest Defence of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward’ (2015) 16 *German Law Journal* 105; F. Picod, ‘La Cour de justice a dit non à l’adhésion de l’Union européenne à la Convention EDH. - Le mieux est l’ennemi du bien, selon les sages du plateau du Kirchberg, (2015) *Semaine Juridique Edition Générale* 230; J. Malenovský, ‘Comment tirer parti de l’avis 2/13 de la Cour de l’Union européenne sur l’adhésion à la Convention européenne des droits de l’homme’ (2015) *Revue générale de droit international public* 705.

<sup>3</sup> Judgment of 5 February 1963, *van Gend & Loos*, 26/62, EU:C:1963:1. See A Tizzano, J Kokott and S Prechal (eds), *50<sup>th</sup> Anniversary of the Judgment in van Gend en Loos* (Luxembourg: EU Publications Office, 2013).

‘... the [European Union] constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the Member States but also their nationals’.<sup>4</sup>

Contrary to the position in relation to international agreements in general, the Court of Justice held that it is not for the constitutions of the Member States to determine whether an EU Treaty provision may produce direct effect, as that determination is to be found in ‘the spirit, the general scheme and the wording’ of the EU Treaty itself. Questions regarding the normative nature of EU law are to be solved in the light of the Treaties themselves.

It follows from *van Gend en Loos* that the autonomy of EU law is governed by two different, albeit intertwined, dynamics. Negatively, autonomy seeks to define what EU law is not, i.e. it is not ordinary international law. Positively, autonomy seeks to define what EU law is, i.e. an autonomous legal order that has the capacity to operate as a self-sufficient system of norms. The present contribution will focus on exploring those two dynamics of autonomy.<sup>5</sup> To that effect, it is divided into two parts, each focusing on one of those two dynamics. Finally, a brief conclusion supports the contention that the concept of autonomy of EU law in no way conveys the message that the EU and its law are euro-centric and that the Court of Justice seeks to insulate EU law from external influences by building legal walls that prevent the migration of ideas.

2. The autonomy of EU law may be defined in a negative fashion: EU law is not ordinary international law. Traditionally, international law has operated on the assumption that actions brought by a contracting party against another contracting party are sufficient to guarantee respect for an international agreement.

However, in *van Gend en Loos*, the Court of Justice rejected that assumption. It explained that if the judicial protection of EU rights were limited to proceedings brought by the European Commission or a Member State, that limitation ‘would remove all direct legal protection of the individual rights of [Member State] nationals’. Hence, the judicial protection of EU rights is based on a system of ‘dual vigilance’: in addition to the supervision carried out by the European Commission and the Member States, individuals are entitled to rely on their EU rights in the national courts.<sup>6</sup>

*Van Gend en Loos* established the autonomy of the EU legal order vis-à-vis international law. In the following years, the Court of Justice continued to distance itself from international law. For example, whilst in *van Gend en Loos*, it wrote ‘the [Union] constitutes a new legal order of *international law*’,<sup>7</sup> in subsequent judgments, the expression ‘of international law’ was abandoned by the Court.

<sup>4</sup> Judgment of 5 February 1963, *van Gend & Loos*, 26/62, EU:C:1963:1.

<sup>5</sup> K. Lenaerts and J.A. Gutierrez-Fons, ‘The European Union: a Constitutional Perspective’, in R. Schütze and T. Tridimas (eds), *Oxford Principles of European Union Law - Volume I: The European Union Legal Order* (Oxford, OUP, 2018), at 103-141.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid* (emphasis added).

For example, in *Commission v Luxembourg*,<sup>8</sup> decided a year and a half later, the Court of Justice refused to apply, in the context of infringement proceedings, the principle of international law according to which ‘a party, injured by the failure of another party to perform its obligations, [may] withhold performance of its own’ (the so-called ‘*exceptio non adimpleti contractus*’). ‘[T]he Treaty is not limited to creating reciprocal obligations between the different natural and legal persons to whom it is applicable’, the Court wrote, ‘but establishes a *new legal order* which governs the powers, rights and obligations of the said persons, as well as the necessary procedures for taking cognisance of and penalising any breach of it’.<sup>9</sup>

In the same way, in *Costa v ENEL*, the Court of Justice ruled that ‘[by] contrast with ordinary international treaties, the EEC Treaty has created its *own legal system* which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply’.<sup>10</sup>

Similarly, in Opinion 1/91, the Court of Justice refused to interpret the provisions of the envisaged EEA Agreement and the corresponding Treaty provisions in the same fashion, in spite of the fact that they were identically worded. The reason was that, whilst ‘[t]he EEA is to be established on the basis of an international treaty which, essentially, merely creates rights and obligations as between the Contracting Parties and provides for no transfer of sovereign rights to the inter-governmental institutions which it sets up’, the Treaties ‘albeit concluded in the form of an international agreement, nonetheless constitut[e] the constitutional charter of a [Union] based on the rule of law’.<sup>11</sup>

Again, this idea of autonomy finds an echo in the recent judgment of the Court of Justice in *XC and Others*.<sup>12</sup> That judgment constitutes an important development in the case law of the Court as it serves to illustrate the fact that the EU system of judicial protection of fundamental rights operates in a different fashion from that of other international systems of protection, such as the European Convention on Human Rights (the ‘ECHR’).

As I mentioned in January 2018 during my speech at the Opening of the European Court of Human Rights’ (the ‘ECtHR’) Judicial Year, although both the ECHR and the EU legal order are committed to protecting fundamental rights, their respective systems of protection do not operate in precisely the same way. Whilst the ECHR operates as an external check on the obligations imposed by that international agreement on the Contracting Parties, the EU system of fundamental rights protection is an internal component of the rule of law within the EU.<sup>13</sup> That distinction can be seen clearly in *XC and Others*.

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<sup>8</sup> See, e.g., judgment of 13 November 1964, *Commission v Luxembourg and Belgium*, 90/63 and 91/63, EU:C:1964:80, at 631.

<sup>9</sup> *Ibid* (emphasis added).

<sup>10</sup> Judgment of 15 July 1964, *Costa*, 6/64, EU:C:1964:66.

<sup>11</sup> Opinion 1/91 (First Opinion on the EEA Agreement) of 14 December 1991 (EU:C:1991:490), paras 20 and 21.

<sup>12</sup> Judgment of 24 October 2018, *XC and Others*, C-234/17, EU:C:2018:853.

<sup>13</sup> K. Lenaerts, ‘The ECtHR and the CJEU: Creating Synergies in the Field of Fundamental Rights Protection’, speech delivered on the occasion of the Opening of the Judicial Year at the ECtHR, 26 January 2018, Strasbourg. An article based on that speech was published in (2018) *Il Diritto dell’Unione Europea* 9.

In that case, Austrian legislation provided for a judicial remedy that allowed for criminal proceedings closed by means of a final decision to be reheard in the event of a violation of the ECHR. That remedy was applicable where the ECtHR had issued a ruling finding that Austria had committed such a violation. In addition, the same applied where it was the Austrian Supreme Court itself that made that finding, provided that the conditions of admissibility set out in the ECHR were met, notably that concerning the exhaustion of domestic remedies.<sup>14</sup> However, the judicial remedy at issue did not apply where the final decision was adopted in breach of EU law, and in particular of the Charter of Fundamental Rights of the EU (the ‘Charter’). Thus, the question that arose was whether, in order for that remedy to comply with the principles of equivalence and effectiveness, its scope had to be expanded so as to include infringements of EU law.

As to the principle of equivalence, the Court of Justice examined whether the judicial remedy at issue was, in the light of its purpose and cause of action, similar to those that seek to safeguard the rights that EU law confers on individuals.<sup>15</sup>

On the one hand, the Court of Justice described the main features of the remedy at issue in the main proceedings. It pointed out that that remedy was functionally linked to proceedings before the ECtHR.<sup>16</sup> It sought to implement the rulings of the ECtHR in the Austrian legal order. In addition, it aimed to anticipate situations where the ECtHR would find that Austria had breached the ECHR. That was the reason why reliance on the remedy at issue was made conditional upon complying with the admissibility requirements set out in the ECHR.<sup>17</sup>

On the other hand, the Court of Justice provided an overview of the constitutional framework within which judicial remedies that seek to protect EU rights operate. First, by virtue of the principles of primacy and direct effect, national measures that are incompatible with directly effective rights recognised in the Charter cannot form part of the EU legal order.<sup>18</sup> Second, the EU system of judicial protection entrusts national courts with responsibility for protecting effectively the rights that EU law confers on individuals. To that end, those courts may and, where appropriate, must engage in a dialogue with the Court of Justice, by means of the preliminary reference mechanism.<sup>19</sup> That mechanism has the object of securing uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties. Third and last, national courts called upon to apply provisions of EU law are under a duty to give full effect to those provisions, if necessary refusing of their own motion to apply any conflicting provision of national law, and without requesting or awaiting the prior setting aside of that provision of national law by legislative or other constitutional means.<sup>20</sup>

Accordingly, the Court of Justice reached the conclusion that the remedy in question and those that seek to protect the rights that EU law confers on individuals

<sup>14</sup> See Article 35 ECHR.

<sup>15</sup> Judgment of 24 October 2018, *XC and Others*, C-234/17, EU:C:2018:853, para. 27.

<sup>16</sup> *Ibid.*, para. 31.

<sup>17</sup> *Ibid.*, para. 34.

<sup>18</sup> *Ibid.*, para. 37.

<sup>19</sup> *Ibid.*, paras 40 and 41.

<sup>20</sup> *Ibid.*, para. 44.

were not similar, given that the EU ‘constitutional framework guarantees everyone the opportunity to obtain the effective protection of rights conferred by the EU legal order even before there is a national decision with the force of *res judicata*’.<sup>21</sup>

As to the principle of effectiveness, the Court of Justice recalled its previous case law on the principle of *res judicata*. In that regard, it held that EU law does not require a national court automatically to go back on a judgment having the authority of *res judicata* in order to take into account the interpretation of a relevant provision of EU law adopted by the Court of Justice after delivery of that judgment. Given that no element of the file called into question the effective protection of the rights of the applicants in the main proceedings, the Court ruled that the principle of effectiveness did not preclude a limitation of the scope of the remedy at issue to a violation of the ECHR. In any event, the Court of Justice added that, where a final decision is adopted in breach of EU law, applicants can still seek damages against the defaulting Member State in accordance with the *Köbler* line of case law.<sup>22</sup>

However, the emphasis that the Court of Justice places on autonomy cannot be read as an attempt to cut the EU loose from its international law origins entirely; autonomy must not be confused with complete detachment. In the light of *van Gend en Loos* and the cases that followed, the Court strives to define the EU constitutional space, but without denying the fact that EU law influences, and is influenced by, the legal orders that surround it.<sup>23</sup>

For example, when called upon to interpret international agreements to which the EU is a Contracting Party, the Court of Justice will interpret those agreements consistently with customary international law. For example, in *Front Polisario*,<sup>24</sup> the Court was asked to interpret the expression ‘territory of the Kingdom of Morocco’ contained in the EU-Morocco Liberalisation Agreement (the ‘Liberalisation Agreement’), so as to determine whether that agreement applied to the territory of Western Sahara. Taking account of the principle of self-determination, the rule codified in Article 29 of the Vienna Convention and the principle of the relative effect of treaties, the Court of Justice replied in the negative. Notably, drawing on several resolutions of the UN General Assembly and on the Advisory Opinion of the ICJ on Western Sahara, the Court observed that, since the indigenous population of Western Sahara must exercise its right to self-determination, international law accords to the territory of Western Sahara a separate and distinct status. Thus, in accordance with that principle, the expression ‘territory of the Kingdom of Morocco’ could not be interpreted as including the territory of Western Sahara within the geographical scope of the Liberalisation Agreement.

3. Expressed positively, the autonomy of EU law focuses on the fact that the EU legal system functions as an autonomous legal order, since it has the capacity to operate as a self-sufficient system of norms. As mentioned in my introduction, in

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<sup>21</sup> *Ibid.*, para. 46.

<sup>22</sup> *Ibid.*, paras 54, 55 and 58.

<sup>23</sup> See J Malenovský, ‘La contribution ambivalente de la Cour de justice de l’Union européenne à la saga centenaire de la domestication du droit international public’ in V Kronenberger, MT D’Alessio and V Placco (eds), *De Rome à Lisbonne: les juridictions de l’Union à la croisée des chemins, Mélanges en l’honneur de Paolo Mengozzi* (Brussels: Bruylant, 2013) at 25.

<sup>24</sup> Judgment of 21 December 2016, *Council v Front Polisario*, C104/16 P, EU:C:2016:973.

Opinion 2/13 the Court of Justice undertook what is probably the most detailed and comprehensive analysis of the autonomy of EU law.<sup>25</sup> By giving concrete expression to the relevant passages of *van Gend en Loos* and *Costa v ENEL*,<sup>26</sup> the Court explained that the concept of ‘autonomy’ relates to the constitutional structure of the EU,<sup>27</sup> the nature of EU law,<sup>28</sup> the principle of mutual trust between the Member States,<sup>29</sup> the system of fundamental rights protection provided for by the Charter,<sup>30</sup> the substantive law of the EU that directly contributes to the implementation of the process of European integration,<sup>31</sup> the principle of sincere cooperation,<sup>32</sup> and the EU system of judicial protection of which the preliminary reference procedure laid down in Article 267 TFEU is conceived as its keystone.<sup>33</sup>

One may draw five distinct conclusions from that positive understanding of autonomy. First, it is the Treaties themselves that determine whether a norm belongs to the EU legal order. The incorporation of external norms into EU law is made conditional upon those norms complying with the fundamental values and structures on which the European Union is founded.<sup>34</sup> If those norms fail to comply with those values and structures, then they cannot form part of EU law.

For example, the *Kadi I* and *II* judgments demonstrate that no public international law obligation may be incorporated into the constitutional fabric of the EU if compliance with that international obligation entails a violation of fundamental rights as recognised in the Charter.<sup>35</sup> In the same way, it follows from Opinions 1/09 and 2/13 that the EU may not enter into an international agreement the effects of which would be to compromise the judicial dialogue between the Court of Justice and national courts.<sup>36</sup>

More recently, in *Achmea*, the Court of Justice held that the autonomy of EU law precludes an international agreement entered into by the Member States the effect of which would be to remove from the jurisdiction of national courts – and thus from the scope of the preliminary reference procedure – disputes that may

<sup>25</sup> Opinion 2/13 (*Accession of the European Union to the ECHR*) of 18 December 2014, EU:C:2014:2454.

<sup>26</sup> *Ibid.*, paras 157 to 177.

<sup>27</sup> *Ibid.*, para. 165 (referring to the principle of conferral and to the institutional framework of the EU).

<sup>28</sup> *Ibid.*, para. 166 (referring to the principles of primacy and direct effect).

<sup>29</sup> *Ibid.*, paras 167 and 168.

<sup>30</sup> *Ibid.*, paras 169 to 171.

<sup>31</sup> *Ibid.*, para. 172 (referring to the Treaty provisions ‘providing for the free movement of goods, services, capital and persons, citizenship of the Union, the area of freedom, security and justice, and competition policy’).

<sup>32</sup> *Ibid.*, para. 173.

<sup>33</sup> *Ibid.*, paras 174 to 176.

<sup>34</sup> See Opinions 1/00 (*Agreement on the establishment of a European Common Aviation Area*) of 18 April 2002, EU:C:2002:231, paras 21, 23 and 26; 1/09 (*Agreement creating a Unified Patent Litigation System*) of 8 March 2011, EU:C:2011:123, para. 76, and 2/13 (*Accession of the European Union to the ECHR*) of 18 December 2014, EU:C:2014:2454, para. 183.

<sup>35</sup> Judgments of 3 September 2008, *Kadi and Al Barakaat International Foundation v Council and Commission*, C402/05 P and C415/05 P, EU:C:2008:461, and of 18 July 2013, *Commission and Others v Kadi*, C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518.

<sup>36</sup> See Opinions 1/09 (*Agreement creating a Unified Patent Litigation System*) of 8 March 2011, EU:C:2011:123, and 2/13 (*Accession of the European Union to the ECHR*) of 18 December 2014, EU:C:2014:2454.

involve the application and interpretation of EU law. *Achmea* clarifies that the application of EU law at national level and judicial dialogue between the courts of the Member States and the Court must *always* go hand-in-hand.<sup>37</sup>

Moreover, as the *Pringle* case shows,<sup>38</sup> changes to the founding Treaties may only be made in accordance with Article 48 TEU. For example, a Treaty amendment adopted under the simplified revision procedure must comply with the requirements laid down in Article 48(6) TEU.<sup>39</sup>

Second, it is the EU law provision itself that determines whether it produces direct effect. As *van Gend en Loos* made clear, it is by interpreting the EU law provision in question that one may determine whether it vests rights in individuals which may be judicially enforced. Thus, the Treaties and EU legislation adopted pursuant to those Treaties are not mere 'programmatic' norms without legal effects. On the contrary, the very *raison d'être* of EU law is inherently linked to the creation of individual rights that are directly enforceable before national courts. For every EU right, there must be a judicial remedy. It is on this founding postulate that the entire EU system of judicial protection is based.<sup>40</sup>

In that regard, it is worth noting that the Court of Justice has explicitly held that a right recognised in the Charter may produce horizontal direct effect where the Charter provision setting out that right is sufficient in itself and does not need to be further specified by other provisions of EU or national law in order to confer on individuals a right which they may rely on as such. Accordingly, such a right is unconditional and mandatory in nature, applying not only to action taken by public authorities, but also in disputes between private parties. Thus, the Court has noted that Articles 21 and 47 as well as the essence of Article 31(2) of the Charter may produce horizontal direct effect.<sup>41</sup>

Third, EU law does not allow normative gaps to appear. Indeed, autonomy could hardly be achieved in a legal system that was not self-sufficient and complete. In order for the EU legal order to find its own independent space between national and international law, the fragmentation that would inevitably result from constitutional and legislative gaps cannot be allowed to persist. Although the solutions adopted to fill any gaps may be inspired by the constitutional traditions common to the Member States or by international treaties, those solutions must come from within the Union legal order itself.<sup>42</sup> Thus, the very nature of EU law requires the Court of Justice to 'find' the law (*Rechtsfindung*) by fashioning general principles of law where necessary. Gap-filling grounded in the 'system of the Treaty' aims

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<sup>37</sup> Judgment of 6 March 2018, *Achmea*, C-284/16, EU:C:2018:158.

<sup>38</sup> Judgment of 27 November 2012, *Pringle*, C370/12, EU:C:2012:756.

<sup>39</sup> *Ibid.*, paras 70 and 76.

<sup>40</sup> See, e.g., K Lenaerts, 'The Rule of Law and the Coherence of the Judicial System of the European Union' (2007) 44 *Common Market Law Review* 1625.

<sup>41</sup> See judgments of 19 January 2010, *Küçükdeveci*, C555/07, EU:C:2010:21; of 19 April 2016, *DI*, C441/14, EU:C:2016:278; of 17 April 2018, *Egenberger*, C414/16, EU:C:2018:257.; of 11 September 2018, *IR*, C68/17, EU:C:2018:696, and of 6 November 2018, *Bauer and Broßonn*, C569/16 and C570/16, EU:C:2018:871 and *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, C684/16, EU:C:2018:874.

<sup>42</sup> P Pescatore, 'La carence du législateur communautaire et le devoir du juge' in G Lüke, G Röss, and MR Will (eds), *Rechtsvergleichung, Europarecht und Staatenintegration: Gedächtnisschrift für Léontin – Jean Contantinesco* (Köln : Heymanns Verlag, 1983), at 559–580.

to create norms that properly reflect the nature, objectives and functioning of the European Union.<sup>43</sup> This applies not only to substantive EU norms but also to the EU system of judicial protection.

In *Rosneft*, for example, the Court of Justice ruled that it has jurisdiction to give judgment, by way of a preliminary ruling, on the validity of an EU act adopted under the EU's common foreign and security policy (the 'CFSP'), provided that the questions referred relate to one of the following two matters. First, whether the CFSP act at issue complies with the constitutional principle requiring that the implementation of the CFSP does not encroach upon the powers conferred on the EU institutions under the TFEU. Second, whether the CFSP act in question relates to restrictive measures adopted against natural or legal persons. In that regard, the Court noted that in the context of actions for annulment, the EU Courts enjoy jurisdiction *ex ratione materiae* to rule on the validity of CFSP acts that relate to restrictive measures adopted against natural or legal persons. Accordingly, 'it would be inconsistent with the system of effective judicial protection established by the Treaties to interpret the [relevant Treaty provision] as excluding the possibility [for national courts to make preliminary references to the Court of Justice] on the validity of [CFSP] decisions prescribing the adoption of such measures'.<sup>44</sup>

Fourth, that positive understanding of autonomy favours 'a spacious approach to constitutional language'.<sup>45</sup> This means, in essence, that the Treaties and the Charter are to be construed as 'the basic constitutional charter'<sup>46</sup> of the EU and that as such, they provide a 'great outline'. As Chief Justice Marshall famously wrote in *McCulloch v. Maryland* almost 200 years ago, 'we must never forget that it is a *Constitution* we are expounding'.<sup>47</sup> The philosophy underpinning that famous passage finds an echo in the autonomy of EU law: the Treaties and the Charter must be read with sufficient flexibility in order for the EU legal system 'to endure for ages to come, and consequently to be adapted to the various crises of human affairs'.<sup>48</sup> The autonomy of EU law enables the Court of Justice to interpret the Treaties and the Charter as a 'living instrument' that takes account of the ongoing changes in the societies of the Member States,<sup>49</sup> whilst remaining faithful to the immutable values on which the entire EU project is founded, such as respect for democracy, fundamental rights,<sup>50</sup> and the rule of law.<sup>51</sup>

Fifth and last, normative conflicts between EU norms (internal conflicts) or between an EU norm and norms belonging to other legal orders (external conflicts)

<sup>43</sup> See, in this regard, K Lenaerts and JA Gutiérrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU law' (2010) 47 *Common Market Law Review* 1629, at 1631.

<sup>44</sup> Judgment of 28 March 2017, *Rosneft*, C-72/15, EU:C:2017:236, para. 76.

<sup>45</sup> LH Bloom, *Methods of Interpretation: How the Supreme Court Reads the Constitution* (Oxford, OUP, 2009), at 7.

<sup>46</sup> Judgment of 23 April 1986, *Les Verts v Parliament*, 294/83, EU:C:1986:166, para. 23.

<sup>47</sup> *McCulloch v. Maryland*, 17 U.S. 316, 433 (1819).

<sup>48</sup> *Ibid.*, at 415.

<sup>49</sup> See, in this regard, judgment of 5 June 2018, *Coman and Others*, C673/16, EU:C:2018:385, paras 49 and 50 (where the Court of Justice held that Article 7 of the Charter is to be interpreted as protecting the rights of homosexual couples to have and develop a family life in the same way as heterosexual couples).

<sup>50</sup> judgment of 6 October 2015, *Schrems*, C362/14, EU:C:2015:650.

<sup>51</sup> judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C64/16, EU:C:2018:117.

are to be solved in accordance with primary EU law. Internally, the principle of hierarchy of norms pervades EU law.<sup>52</sup> Secondary EU law must comply with primary EU law. In the same way, EU administrative measures which are incompatible with EU legislative measures will be annulled or declared invalid. Externally, the Court of Justice has held that international treaties which have been incorporated into EU law enjoy a 'supra-legislative' status<sup>53</sup> but, as mentioned above, may not prevail over the constitutional tenets on which the EU is founded.<sup>54</sup> Rules of national law, even those of constitutional rank, that conflict with EU law must be set aside.<sup>55</sup> Since EU law indicates how normative conflicts are to be solved, that law establishes a coherent legal order based on the rule of law.

However, it does not follow from the fact that EU law itself determines how normative conflicts are to be solved – and, in particular, that EU law prevails over conflicting provisions of national law – that the autonomy of EU law rules out value diversity. On the contrary, diversity forms part and parcel of that autonomy. In the field of fundamental rights, the case law shows that it is ultimately for the EU political process to decide whether a uniform standard of protection is to replace a plurality of national standards.

Where EU law allows room for such a plurality, national standards must comply with three cumulative conditions. First, those standards must comply with the level of protection guaranteed by the Charter. Second, national standards may only be applied where the EU has not adopted a uniform level of protection which, needless to say, must itself comply with the Charter. Last but not least, a higher level of protection provided for by national law must not jeopardise the objectives pursued by EU law.

Allow me to illustrate that point by highlighting the contrast between, on the one hand, the ruling of the Court of Justice in *Melloni* and, on the other hand, that in *M.A.S. and M.B.* Whilst in the first case, it was held that EU law did indeed prescribe a uniform level of fundamental rights protection, in the circumstances of the latter case the opposite conclusion was reached, leaving room for national diversity.

In *Melloni*,<sup>56</sup> the EU legislator amended, in 2009, the European Arrest Warrant Framework Decision with a view to protecting the procedural rights of persons subject to criminal proceedings whilst improving mutual recognition of judicial decisions between Member States. To that effect, the EU legislator introduced a new provision that lists the circumstances under which the executing judicial authority may *not* refuse execution of a European Arrest Warrant issued against a person convicted *in absentia*. The Court of Justice noted that the new provision complied

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<sup>52</sup> See, generally, K Lenaerts and P Van Nuffel, *European Union Law*, 3<sup>rd</sup> Ed (London: Sweet& Maxwell, 2011), at 817 et seq.

<sup>53</sup> Judgment of 3 June 2008, *The International Association of Independent Tanker Owners and Others*, C308/06, EU:C:2008:312, para. 42.

<sup>54</sup> Judgment of 3 September 2008, *Kadi and Al Barakaat International Foundation v Council and Commission*, C402/05 P and C415/05 P, EU:C:2008:461, para. 282.

<sup>55</sup> Judgments of 15 July 1964, *Costa*, 6/64, EU:C:1964:66, and of 9 March 1978, *Simmenthal*, 106/77, EU:C:1978:49. See, also, judgments of 17 December 1970, *Internationale Handelsgesellschaft*, 11/70, EU:C:1970:114, para. 3, of 8 September 2010, *Winner Wetten*, C409/06, EU:C:2010:503, para. 61, and of 15 January 2013, *Krizan and Others*, C416/10, EU:C:2013:8, para. 70.

<sup>56</sup> See judgment of 26 February 2013, *Melloni*, C399/11, EU:C:2013:107.

with Articles 47 and 48 of the Charter given that it only applied to situations where the person convicted *in absentia* was deemed to have voluntarily and unambiguously waived his or her right to be present at the trial in the issuing Member State. Since the EU legislator had itself struck, in compliance with the Charter, a balance between the protection of those fundamental rights and the requirements of mutual recognition of judicial decisions, the application of higher national standards was ruled out.

The concept of diversity was explained by the Court of Justice in *M.A.S. and M.B.*, a VAT case. There, the Court recalled that the Member States must ensure, in cases of serious VAT fraud, that effective and deterrent criminal penalties are adopted. Nevertheless, in the absence of EU harmonization, it is for the Member States to adopt the limitation rules applicable to criminal proceedings relating to those cases. This means, in essence, that whilst a Member State must impose effective and deterrent criminal penalties in cases of serious VAT fraud, it is free to consider, for example, that limitation rules form part of substantive criminal law. Where that is the case, such a Member State must comply with the principle that criminal offences and penalties must be defined by law, a fundamental right enshrined in Article 49 of the Charter which corresponds to Article 7(1) of the Convention.<sup>57</sup> Accordingly, even where the limitation rules at issue prevent the imposition of effective and deterrent criminal penalties in a significant number of cases of serious VAT fraud, the national court is under no obligation to disapply those rules in so far as that obligation is incompatible with Article 49 of the Charter. That does not mean, however, that those limitation rules are left untouched to the detriment of the financial interests of the EU. In the light of the primacy, unity and effectiveness of EU law, it is, first and foremost, for the national legislator to amend those limitation rules so as to avoid impunity in a significant number of cases of serious VAT fraud.

It follows from those two examples that neither European unity nor national diversity is absolute, as they must both comply with the level of protection provided for by the Charter. In addition, national diversity must not jeopardise the EU integration project, since it must take due account of the primacy, unity and effectiveness of EU law.

4. From a normative perspective, the autonomy of EU law reflects the idea that the Treaties lay down a ‘constitutional order’, given that they have established an autonomous, self-sufficient and coherent system of norms. That constitutional order is to be distinguished from ordinary international law.

However, that concept of autonomy in no way implies that the EU and its law are euro-centric and that the Court of Justice seeks to insulate EU law from external influences by building legal walls that prevent the migration of ideas.

On the contrary, autonomy enables the Court of Justice to strike the right balance between the need to preserve the values that we Europeans cherish and wish to preserve for future generations and the ‘*esprit d’ouverture*’ that inspired the authors of the Treaties when learning vital lessons from the past and more particularly from the ravages of World War II. Accordingly, the autonomy of EU law has, as part of its very DNA, the idea of engaging in a balancing exercise that allows the EU to

<sup>57</sup> See judgment of 5 December 2017, *M.A.S. and M.B.*, C42/17, EU:C:2017:936, para. 55.

find its own constitutional space whilst interacting with the Member States and the wider world.

## Abstract

The autonomy of EU law is governed by two different, albeit intertwined, dynamics. Negatively, autonomy seeks to define *what EU law is not*, i.e. it is not ordinary international law. Positively, autonomy seeks to define *what EU law is*, i.e. an autonomous legal order that has the capacity to operate as a self-sufficient system of norms. That said, it is submitted that the concept of autonomy of EU law in no way conveys the message that the EU and its law are euro-centric and that the Court of Justice of the European Union seeks to insulate EU law from external influences by building legal walls that prevent the migration of ideas. On the contrary, the autonomy of EU law enables the Court of Justice to strike the right balance between the need to preserve the values that we Europeans cherish and wish to preserve for future generations and the '*esprit d'ouverture*' that inspired the authors of the Treaties when learning vital lessons from the past and more particularly from the ravages of World War II. Accordingly, the autonomy of EU law has, as part of its very DNA, the idea of engaging in a balancing exercise that allows the EU to find its own constitutional space whilst interacting with the Member States and the wider world.

## Keywords

Autonomy of EU law – Ordinary International Law – Autonomous, Self-Sufficient and Coherent System of Norms – Balancing Exercise.

