ELKH | Eötvös Loránd Kutatási Hálózat
tkjti

MTA Law Working Papers
2024/11

The Luxembourg Court Faced with the COVID-19 Pandemic: The Example of 'Due Process' Rights

Daminova, Nasiya

ISSN 2064-4515
http://jog.tk.mta.hu/mtalwp
Társadalomtudományi Kutatóközpont – MTA Kiválósági Kutatóhely
HUN-REN Centre for Social Sciences – MTA Centre of Excellence

Daminova, Nasiya[1]

The Luxembourg Court Faced with the COVID-19 Pandemic: The Example of 'Due Process' Rights

Abstract: The so-called 'due process' rights captured by Arts. 47-50 CFREU are crucial for proper functioning of the European Union's internal market and of the EU's Area of Freedom, Security and Justice. At the same time, they are often applied in conjunction with other CFREU rights drafted specifically for the Union's legal order (Arts. 15-17), which led to a significant autonomy of standards of the Human Rights protection in this area. The global COVID-19 pandemic caused by the novel Coronavirus SARS-CoV-2 (2020-2022) added complexity to the overall situation, requiring the CJEU to develop new proportionality tests within the context of a public health emergency. This contribution attempts to analyse if and how the Coronavirus pandemic influenced the way the CFREU 'due process' provisions are applied and interpreted by the Luxembourg Court, given their vital importance for the enforcement of all other substantive rights captured by the EU Charter of Fundamental Rights. The main argument presented is that this body of law can be conventionally divided into five categories: (1) 'EU's Competition, Public Procurement and State Aid', (2) 'EU's Economic Policy Governance', (3) 'Area of Freedom Security & Justice', (4) 'EU's Environmental Laws and Policies' and the (5) 'Rule of Law Backsliding' – with the sector-specific legal reasoning based on the Title VI 'Justice' CFREU provisions. It will be stated that this case-law reflects general trends in the Luxembourg Court's jurisprudence – such as, for instance, the systemic interpretation of the Title VI 'Justice' CFREU as a whole - but also adds novelty to the existing CJEU's proportionality tests due to the specificity of the legal background, namely the assessment of the COVID-19 legislation or the pandemic-related restrictions.

Keywords: COVID-19, 'due process' rights, CJEU, CFREU, 'Rule of Law Backsliding'

Introduction

The pandemic caused by the novel Coronavirus SARS-CoV-2 (COVID-19) was declared by the World Health Organization (WHO) to be a global health emergency on 30 January 2020,[2] which immediately required legal responses on the international and (*supra*-) national levels – comprising the European Union as a key actor in the European legal space.[3] Within the EU's

---

[1] Postdoctoral Research Fellow ('*Just Recovery from Covid-19? Fundamental Rights, Legitimate Governance and Lessons Learnt' ('JuRe')* project), University of Tampere, Faculty of Management and Business, LLM in European Law (Stockholm University, 2014), PhD in Transnational and Comparative Law (Scuola Superiore Sant'Anna, 2018). This work was funded by the Strategic Research Council (SRC) established within the Research Council of Finland, grant numbers 345950 and 346002 – in collaboration with the Hungarian Academy of Sciences within the framework of the project 'The resilience of the legal system in post-COVID societies: risks and opportunities', grant number 05016764. An earlier draft of this paper was presented at the Conference *'Resilience of COVID and Post-COVID legal systems: Challenges and Responses in Hungary and in Northern Europe'* (HUN-REN CSS Institute for Legal Studies, 7 – 8 March 2024). The author would like to thank Prof. Dr. Fruzsina Gárdos-Orosz, Prof. Dr. Nóra Chronowski, Prof. Dr. András László Pap, Dr. Anu Mutanen, Dr. Viktor Lőrincz, Dr. Boldizsár Szentgáli-Tóth and other conference participants for their thoughtful comments and advice. Any errors that remain are my sole responsibility of course.

[2] Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV), *WHO Official Website* (30 January 2020), available at www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov), accessed on 26 June 2024.

[3] In this sense, see for instance Christophe Hillion, 'Disease and Recovery in (COVID afflicted) Europe' [2020] 57 Common Market Law Review, 619-630.

context, the '*common safety concerns in public health matters*' lie within the shared competencies of the Union and the Member States,[4] while the *'protection and improvement of human health'* remain among the EU's supporting competences.[5] Overall, the Union's action in these areas *'shall complement national policies'*, and be '*directed towards improving public health, preventing physical and mental illness and diseases, and obviating sources of danger to physical and mental health'*.[6]

In particular, the European Union may adopt *coordination* measures to improve the complementarity of the Member States' health services,[7] *incentive* measures to combat major cross-border health threats, such as COVID-19,[8] or the *harmonising* measures concerning safety of medicinal products and devices.[9] At the same time, the EU's Treaty framework does not create any common emergency mechanisms - such, for instance the states of emergency similar to the national legal orders, or the derogation clauses analogous to Art. 4 of the International Covenant on Civil and Political Rights (ICCPR) or Arts. 15 of the European Convention on Human Rights (ECHR).[10]

The (now repealed) '*Decision on Cross-border Threats'* No. 1082/2013/EU also indicated legal gaps deriving from the subsidiarity of the EU's role during the COVID-19 pandemic.[11] This legal act allowed the European Commission to declare a '*public health emergency'* (PHE) only in some cases, for example, when the WHO has been informed and has not yet adopted a decision declaring a '*public health emergency of international concern'* (PHEIC),[12] which made the effective application of this legal mechanism merely impossible and indicated a need in the EU's legislative intervention.[13]

The recently adopted '*Regulation on serious cross-border threats to health'* (EU) 2022/2371[14] – repealing the above-mentioned decision – aims to build a stronger health security framework by creating a more robust mandate for coordination by the European Commission and agencies of the European Union.[15] For instance, the Regulation establishes an advisory committee for the occurrence and recognition of a public health emergency with a cross-border dimension,[16] and lays down rules on recognition of such an emergency at the Union level in a more clear and precise manner.[17] Chapter V '*Public health emergency at Union level'* specifically creates proper procedural framework for this type of situations – which is however still subject to testing during future pandemics.[18]

---

[4] Art. 4(2)k TFEU.

[5] Art. 6(a) TFEU.

[6] Art. 168(1) TFEU.

[7] Art. 168(2) TFEU.

[8] Art. 168(5) TFEU.

[9] Art. 168(4) TFEU.

[10] In this sense, see for example Joelle Grogan, 'The Limited Role of the European Union in the Management and Governance of the COVID-19 Pandemic' [2021] 18 International Organizations Law Review, 482–506.

[11] Nicole Mauer, Dimitra Panteli, Dorli Kahr-Gottlieb and Isabel De La Mata, 'Towards a European Health Union: new instruments for stronger and more resilient health systems' [2022] 28 (1), Eurohealth, 57 – 61, 59.

[12] Decision No. 1082/2013/EU of the European Parliament and of the Council of 22 October 2013 on serious cross-border threats to health and repealing Decision No. 2119/98/EC, Art. 12(1)b.

[13] In this sense, see for instance Rebecca Forman, Elias Mossialos, 'The EU Response to COVID-19: From Reactive Policies to Strategic Decision-Making' [2021] 59 Journal of Common Market Studies, 56–68, 59; Anne Bucher, 'Does Europe need a Health Union?' [2022] 2 Bruegel Policy Contribution, 1-15, 10; Andrea Renda, Rosa Castro, 'Towards Stronger EU Governance of Health Threats after the COVID-19 Pandemic' [2020] 11(2) European Journal of Risk Regulation, 273 - 282, 276.

[14] Regulation (EU) 2022/2371 of the European Parliament and of the Council of 23 November 2022 on serious cross-border threats to health and repealing Decision No. 1082/2013/EU, OJ L 314.

[15] Sandra Gallina, 'Preparing Europe for future health threats and crises: the European Health Union' [2023] 28(5) Eurosurveillance, 1-3, 1.

[16] Regulation (EU) 2022/2371 of the European Parliament and of the Council of 23 November 2022 on serious cross-border threats to health and repealing Decision No. 1082/2013/EU, OJ L 314, Rec. 35, Art. 24.

[17] *Ibid*., Art. 23.

[18] *Ibid*., Arts. 23-25.

Moreover, the COVID-19 pandemic predictably led to the multiple restrictions imposed on a number of rights, such as the right to liberty and security (Art. 6), respect for private and family life (Art. 7), freedom of assembly and of association (Art. 12), freedom to choose an occupation and right to engage in work (Art. 15), freedom to conduct a business (Art. 16) or the group of the so-called '*due process'* - or procedural - guarantees (Arts. 47-50) of the EU Charter of Fundamental Rights (CFREU, or the EU Charter). Hence, the Court of Justice of the European Union (CJEU, or the Luxembourg Court) became one of the main authorities in the European legal space offering new balancing tests in these areas, by responding to the wave of requests for the preliminary rulings (Art. 267 TFEU) or the actions for annulment (Art. 263 TFEU).[19]

Given these premises, this paper aims to address how the COVID-19 pandemic influenced the way the CFREU provisions are applied and/or interpreted by the Luxembourg Court. In order to analyse this question, the author proposes to use a group of the so-called '*due process'* rights captured by Arts. 47 ('*right to an effective remedy and to a fair trial'*), 48 ('*presumption of innocence and right of defence'*), 49 ('*principles of legality and proportionality of criminal offences and penalties'*) and 50 ('*right not to be tried or punished twice in criminal proceedings for the same criminal offence'*) for a case study.[20] These guarantees are important for proper functioning of the European Union's internal market and of the EU's Area of Freedom, Security and Justice (AFSJ) – and, at the later date, are crucial for the enforcement of all other substantive rights captured by the EU Charter of Fundamental Rights.[21] However, they are also often applied in conjunction with other CFREU provisions drafted specifically for the Union's legal order (Arts. 15-17), which led to a significant autonomy of standards of the Human Rights protection in this area.[22] The COVID-19 pandemic added complexity to the overall situation, requiring the CJEU to develop new proportionality tests on the *'due process'* rights – now within the context of a public health emergency.

The main argument presented is that this new body of law can be conventionally divided into five categories: (1) 'EU's Competition, Public Procurement and State Aid', (2) 'EU's Economic Policy Governance', (3) 'AFSJ', (4) 'EU's Environmental Laws and Policies' and the (5) 'Rule of Law Backsliding' – with the sector-specific legal reasoning based on Arts. 47-50 and – sporadically – Art. 41 CFREU provisions. It will be stated that this case-law reflects general trends in the Luxembourg Court's jurisprudence – such as, for instance, the systemic interpretation of the Title VI 'Justice' CFREU as a whole - but also adds novelty to the existing CJEU's proportionality tests due to the specificity of the legal background, namely the assessment of the COVID-19 legislation or the pandemic-related restrictions.

1. The EU's Competition Law, Public Procurement and State Aid

[19] In this sense, see for example Kate Shaw, '*The Court of Justice of the European Union: Rule of Law Guardian for the Public Health Derogation'* (Brill Publishing, 2022) 105–138; Oliver Bartlett, 'COVID-19, the European Health Union and the CJEU: Lessons from the Case Law on the Banking Union' [2020] 11(4) Beyond COVID-19: Towards a European Health Union, 781-789; Vincent Delhomme, Tamara Hervey, 'The European Union's response to the Covid-19 crisis and (the legitimacy of) the Union's legal order' [2022] 41 Yearbook of European Law, 48–82, 55, 69-70, 75.

[20] For this purpose, the author suggests to use the CJEU's judgments and orders containing the substantive analysis of the CFREU's 'due process' rights as an empirical basis for the current research, hence excluding the Advocate General's Opinions suggesting the substantive assessment of these provisions which were not followed by the subsequent CJEU's judgments.

[21] In that sense see, for example, Jan-Jaap Kuipers, '*The Right to a Fair Trial and the Free Movement of Civil Judgments*' [2010] 6 Croatian Yearbook of European Law and Policy, 24; Christine Janssens, '*The Principle of Mutual Recognition in EU Law' (*Oxford University Press, 2013), 266-267; Bas van Bockel, '*The Ne Bis in Idem Principle in EU Law*' (Kluwer Law International, 2010), 75-80; Arianna Andreangeli, '*EU Competition Enforcement and Human Rights*' (Edward Elgar Publishing, 2008), 110-114.

[22] Nasiya Daminova, 'The CJEU and the EU 'Due Process' Rights: Challenging the ECHR Standards?' [2018] 10 Silesian Journal of Legal Studies, 11-30.

The EU's Competition Law was one of the areas strongly affected by the Coronavirus crisis, requiring joint efforts of the European Commission, the national competition authorities and the enterprises to ensure the stability of supply and fair distribution to the (non-) EU's consumers of essential and possibly scarce pandemic-related products and services.[23] Moreover, the European Union was forced to handle other urgent deriving issues, such as granting of state aids, regulation of crisis cartels and requests to suspend competition law enforcement in times of the COVID-19 pandemic.[24]

Attempting to address these challenges, the European Commission released the State Aid Temporary Framework on 20 March 2020, in order to enable the EU Member States to remedy a serious disturbance in the economy in the context of the Coronavirus pandemic.[25] The EU's legislator recognized that the entire Union economy is experiencing serious disturbance, and called the EU Member States to use the full flexibility foreseen under State Aid rules. In regard to fishery, aquaculture and agriculture, Section 3.1 specifically allowed the States to support affected fishermen and aquaculture producers by allowing aid up to a level of EUR 120,000 (later increased to EUR 800,000) per undertaking through direct grants, repayable advances or tax advantages. The Commission was authorized to consider such State Aid compatible with the internal market on the basis of Art. 107(3)(b) TFEU, provided that all the specified conditions are met.[26]

Further, the European Competition Network (ECN)[27] issued a joint statement on the application of the EU's competition rules during the crisis resulting from the Coronavirus disease outbreak on 23 March 2020.[28] The special emphasis was made on the deriving need for companies to cooperate to ensure the supply and fair distribution of scarce pandemic-related products to all consumers: within the given context, '*such measures would either not amount to a restriction of competition under Article 101 of the TFEU/ Article 53 of the EEA Agreement or generate efficiencies that would most likely outweigh any such restriction*'.[29] However, the ECN seemed to be less tolerant of cartelizing and/ or abusing the dominant position through the excessive pricing – in particular the unjustified price increases at the distribution level - on the products considered essential to protect the health of the population in the current situation (such as face masks and sanitizing gel).[30]

In the same vein, the Commission Communication *'Guidance on using the public procurement framework in the emergency situation related to the COVID-19 crisis'* allowed for some degree of flexibility offered to the public procurement authorities to respond to such urgent national needs as purchasing '*face masks and protective gloves, medical devices,*

[23] European Commission, 'Antitrust rules and coronavirus: The Commission's response to the Coronavirus outbreak in the context of EU Antitrust Rules'. *European Commission Official Website*, available at: https://competition-policy.ec.europa.eu/antitrust-and-cartels/legislation/coronavirus_en, accessed on 26 June 2024.

[24] In this sense, see for example Commission Staff Working Document Accompanying the Document, 'Commission Report on Competition Policy 2022', COM(2023) 184 final, or Francisco Costa-Cabral, 'From Crisis Cartels to Covid-19 State Aid and Cooperation: The Non-Exceptionality of Crisis Management by EU Competition Law' [2023] TILEC Discussion Paper No. 2023-06, 1-4.

[25] Communication from the Commission, 'Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak', 2020/C 91 I/01, OJ C 91I.

[26] *Ibid*., paras. 21-22.

[27] Comprising the European Commission, the EFTA Surveillance Authority, and the national competition authorities of the EU/EEA.

[28] European Competition Network, Antitrust: Joint statement by the European Competition Network (ECN) on application of competition law during the Corona crisis, 23 March 2020. *European Commission Official Website*, available at: https://competition-policy.ec.europa.eu/system/files/2021-03/202003_joint-statement_ecn_corona-crisis.pdf, accessed on 26 June 2024.

[29] *Ibid*., para. 4.

[30] *Ibid*., para. 5.

notably ventilators, [and] other medical supplies'.[31] In particular, national procurement bodies were allowed to (a) reduce substantially the deadlines to accelerate open or restricted tender procedures - in cases of urgency; (b) recourse to a negotiated procedure without publication - or even make a direct award to a preselected economic operator, provided the latter is the only one able to deliver the required supplies within the technical and time constraints imposed by the extreme urgency [*caused by the Coronavirus pandemic*]; and (c) also consider looking at alternative solutions and engaging with the market.[32]

On 8 April 2020, a Temporary Framework Communication, listing the key criteria for assessing cooperation projects aimed at addressing a shortage of supply of essential products and services during the COVID-19 outbreak was issued.[33] In particular, the Commission mentioned that the cooperation in the health sector could take place in the following forms: (a) coordinating joint transport for input materials; (b) contributing to identifying those essential medicines for which, in view of forecasted production, there are risks of shortages; (c) aggregating production and capacity information, without exchanging individual company information; (d) working on a model to predict demand on a Member State level, and identifying supply gaps; (e) sharing aggregate supply gap information.[34]

These extraordinary cooperative measures are acceptable under Art. 101 TFEU within the Coronavirus pandemic context if: (i) designed and objectively necessary to actually increase output in the most efficient way to address or avoid a shortage of supply of essential products or services, such as those that are used to treat COVID-19 patients; (ii) temporary in nature (i.e. to be applied only as long there is a risk of shortage during the Coronavirus outbreak); and (iii) not exceeding what is strictly necessary to achieve the objective of addressing or avoiding the shortage of supply.[35]

In case of doubts on the compatibility of the enterprises' conduct with the requirements of Arts. 101 TFEU, the European Commission allowed for an exceptional procedure to provide guidance on these specific cooperation projects (i.e. aimed at addressing the shortage of essential products and services during the COVID-19 outbreak) resulting in an *ad hoc* 'comfort' letter issued by the Directorate General for Competition.[36] In light of coping with the Coronavirus crisis in Europe and the relaxation of the pandemic-related restrictions, the Commission withdrew the Temporary Framework on 4 October 2022.[37] At the same time, these Commission communication documents presumably defined the development of the CJEU's pertinent practice on Arts. 47-50 CFREU in the area of Competition Law, as indicated by the *EPIC Financial Consulting*, *Inivos* and *Ryanair* lines of reasoning.

1.1. C-274/21, *EPIC Financial Consulting*

For example, in *EPIC Financial Consulting* - one of the first COVID-19 related cases under the CJEU's scrutiny - an Austrian Federal Administrative Court (Bundesverwaltungsgericht) submitted a reference for the Luxembourg Court's preliminary ruling following the assessment of the public contracts based on a framework agreement for the supply of Coronavirus antigen tests made by the Republic of Austria and the federal

[31] Section 1, Communication from the Commission, 'Guidance from the European Commission on using the public procurement framework in the emergency situation related to the COVID-19 crisis' 2020/C 108 I/01, C/2020/2078.

[32] *Ibid*.

[33] Communication from the Commission, 'Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak' (2020/C 116 I/02), Official Journal of the European Union, CI 116/7.

[34] *Ibid*., para. 12.

[35] *Ibid*., para. 15.

[36] *Ibid*., para. 17-18.

[37] Communication from the Commission Withdrawal of Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak 2022/C 381/03, C/2022/6926, OJ C 381, 4.10.2022.

purchasing company (Austrian contracting authorities).[38] Within the given context, the national court made a recourse to Art. 47 ('right to an effective remedy') of the EU Charter of Fundamental Rights, in conjunction with Art. 1(1) of the '*Procurement review procedures'* Directive 89/665 - in order to challenge Austrian rules under which the party is required to specify in his/her application for an interlocutory injunction the specific contract award procedure and the specific decision of a contracting authority - even in the case of award procedures *without prior publication* of a contract notice.[39]

To start with, the Luxembourg Court underlined that the compatibility of '*a negotiated procedure without prior publication of a contract notice'* with Art. 32(2)(c) of the basic '*Public procurement'* Directive 2014/24 ('Use of the negotiated procedure without prior publication') is outside the scope of the scrutiny in the present case. The CJEU's judges seem to be quite acceptive towards the Austrian Government and the Commission's submissions elaborating on the abovementioned point 2.3.4 of the Guidance on using the public procurement framework in the emergency situation related to the COVID-19 crisis which allows for the '*negotiated procedures without prior publication'*, as those procedures offer the possibility to meet immediate needs and *'cover the gap until more stable solutions can be found, such as framework contracts for supplies and services, awarded through regular procedures (including accelerated procedures)*'. [40]

At the same time, it was submitted that this emergency regimen shall be seen through the lens of the principle of *effectiveness*, which requires Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law through the national courts or tribunals (Art. 19(1) TEU).[41] With a reference to its own previous jurisprudence (*Orizzonte Salute*), the CJEU's judges said that the national legislation such as one at issue would render practically impossible the exercise of rights conferred by EU law stemming from the '*Procurement review procedures'* Directive 89/665 - the objective of which is to ensure that decisions taken unlawfully by contracting authorities may be reviewed effectively and as rapidly as possible.[42] The *EPIC Financial Consulting* formula could arguably be considered a strong message to the EU Member States' contracting authorities: public procurement shall remain transparent and 'reviewable' even under the Coronavirus-related restrictions, with the national courts being responsible for the effective enforcement of Directive 89/665 within the given context.[43]

1.2. T-38/21 R, *Inivos and Inivos v Commission*

In the subsequent *Inivos*, the application to suspend the operation of 'Framework contracts for disinfection robots for European hospitals (COVID-19)' concluded by the Commission was scrutinized by the Luxembourg Court. In view of the urgency arising from the Coronavirus crisis, the European Commission decided to use the negotiated procedure without prior publication of a contract notice, in accordance with point 11.1(c) of Annex I to Regulation 2018/1046 on the financial rules applicable to the general budget of the Union. As the applicants (Inivos Ltd/ Inivos BV) were not among the selected two tenderers, the actions

[38] Case C-274/21, *EPIC Financial Consulting Ges.m.b.H. v Republik Österreich and Bundesbeschaffung GmbH* [2022] Judgment of the Court (Eighth Chamber) of 14 July 2022, paras. 1-2.

[39] *Ibid*., paras. 31-55.

[40] *Ibid*., para. 80.

[41] In this sense, see for instance Elvira Mendez-Pinedo, 'The principle of effectiveness of EU law: a difficult concept in legal scholarship' [2021] 11(1) Juridical Tribune (Tribuna Juridica), Bucharest Academy of Economic Studies, Law Department, 5-29, or Norbert Reich, 'The Principle of Effectiveness', Chapter 4 in '*General Principles of EU Civil Law'* (Intersentia, 2013), 89-130.

[42] Case C-274/21, *EPIC Financial Consulting Ges.m.b.H. v Republik Österreich and Bundesbeschaffung GmbH* [2022] Judgment of the Court (Eighth Chamber) of 14 July 2022, paras. 81-84.

[43] In this sense, see for example Stelios Tsevas, Kathrin Hornbanger, 'Greece: Revisiting the Public Procurement Directives After the Pandemic' [2022] 17(4) European Procurement & Public Private Partnership Law Review, 258 – 261.

were brought for the annulment of the decision to open the said tender procedures, and the request for the interim relief measures – namely suspending the operation of the contested framework contracts - was made.[44]

While assessing *urgency* as one of the criteria for granting interim measures within this specific context, the CJEU's judges turned to the key principle of effective legal protection stemming from Art. 47 CFREU, as interpreted by its own previous *Vanbreda Risk & Benefits* precedent.[45] In public procurement matters, it could allow for relaxing the urgency requirement – i.e. if there is a particularly serious *prima facie* case established, there is no separate need to demonstrate the irreparable harm, which can derive from the rejection of the application for the interim relief measures.[46] However, these derogations from the general requirements apply only on the pre-contractual phase, if the application for the interim measures was made during the standstill period before the public procurement contract is concluded.[47] Even though this condition was not met by the applicants, the appeal was submitted under the second paragraph of Art. 57 of the CJEU's Statute.[48] It was dismissed with a very similar legal reasoning based on Art. 47 CFREU,[49] so the *Inivos* line of reasoning arguably demonstrates the viability of the *Vanbreda Risk & Benefits* formula - even within the COVID-19-related emergency context.[50]

1.3. T-448/18, *Ryanair and Others v Commission*

In *Ryanair*, the applicants sough the partial annulment of the Commission decision No. 2018/628 on the State aid granted within the meaning of Art. 107(1) TFEU by, *inter alia,* the province of Carinthia, the city of Klagenfurt and the Klagenfurt airport [KLU] in Austria through several marketing agreements concluded during 2002-2006.[51] A reply and a rejoinder were submitted respectively on 7 January and 25 February 2019,[52] but the applicants also attempted to lodge two additional documents on 25 September 2020 (comprising the table provided by KLU) - following the closure of the written part of the procedure.[53] In order to justify the later submission of the case file components, Ryanair referred to (1) the earlier Commission's refusal to grant them access to the case file, (2) the asymmetry of information which existed between the applicants and the (3) their dependence on the KLU's goodwill and cooperation in providing the documents.[54]

In particular, it was underlined that the measures applied by the Austrian authorities from February 2020 restricting freedom of movement due to the Coronavirus pandemic and hence the reduction in KLU's operations in the spring and summer of 2020 became main obstacles in obtaining archived documents from the airport, and made it difficult and time-consuming.[55] The CJEU's judges concluded that the applicants failed to justify the

[44] Case T-38/21 R, *Inivos and Inivos v Commission*, Order of the President of the General Court from 21 May 2021, paras. 1-15.

[45] Paul Lasok, 'Lasok's European Court Practice and Procedure' (Bloomsbury Publishing, 2022) 688.

[46] Case T-38/21 R, *Inivos and Inivos v Commission*, Order of the President of the General Court from 21 May 2021, para. 29.

[47] *Ibid*., paras. 30-31.

[48] Case C-471/21 P(R), *Inivos Ltd and Inivos BV v European Commission*. Order of the Vice-President of the Court of 1 December 2021.

[49] *Ibid*., paras. 70-85.

[50] This conclusion could also be supported by the outcome of the case, namely the dismissal of the action as a whole and ordering Inivos Ltd and Inivos BV to pay the costs, including those relating to the interim proceedings. See: Case T-38/21, *Inivos Ltd and Inivos BV v European Commission* [2024] Judgment of the General Court (First Chamber, Extended Composition) from 21 February 2024, para. 105.

[51] Case T-448/18, *Ryanair DAC and Others v European Commission,* Judgment of the General Court (Fifth Chamber) of 29 September 2021, ECLI:EU:T:2021:626, paras. 11-39.

[52] *Ibid*., para. 43

[53] *Ibid*., paras. 51-55.

[54] *Ibid*., para. 55.

[55] *Ibid*., para. 60.

late submission of the additional evidence filed on 25 September 2020 as they became aware of the table in question after its mention in the Commission rejoinder (i.e. in February 2019), that is, well before the crisis linked to COVID-19.[56]

At the same time, the emphasis was made on assessment of the alleged infringement of the principle of good administration enshrined in Art. 41(1) and (2) CFREU, and in particular the applicants' *rights of the defence* – due to the Commission's refusal to provide an access to the administrative file.[57] The Luxembourg Court underlined that the procedure for reviewing State aid of Art. 108 TFEU is a procedure opened *only against the Member State* responsible for granting the aid. So, it is the EU Member State, as the addressee of the future Commission decision, may rely on actual rights of the defence, such as the right of access the file (41(2)(b)) or the right to be heard (Art. 41(2)(a) of the EU Charter).[58] By contrast, the recipient undertakings of aid and their competitors are considered only to be parties concerned which have essentially the role of information sources for the Commission in the procedure for reviewing State aid.[59] Therefore, also in accordance with the earlier CJEU's case-law (*Commission v Technische Glaswerke Ilmenau*), the parties concerned in the procedure for the purpose of Art. 108(2) TFEU - unlike the EU Member State responsible for granting the aid - do not have a right under the procedure for reviewing State aid to consult the documents of the Commission's administrative file.[60]

2. The EU's Economic Policy Governance

Predictably, the Coronavirus pandemic affected strongly the system of the EU's economic policy governance, leading to the first activation of the **'**general escape clause**'** of Stability and Growth Pact in March 2020,[61] to enable (1) the Commission and the Council to depart from the budgetary requirements that would apply under normal circumstances and (2) the EU Member States to adopt necessary fiscal measures to handle the crisis.[62] The said mechanism allows to derogate from the so-called '*preventive'* and '*corrective'* arms of the of the Stability and Growth Pact to deal with the situation of the severe economic downturn for the euro area or the Union as a whole.[63]

In accordance with Arts. 5(1) and 9(1) of the Economic Surveillance Regulation (EC) 1466/97, in periods of severe economic downturn for the euro area or the Union as a whole the EU Member States may be allowed temporarily to depart from the adjustment path towards the medium-term budgetary objective, provided that this does not endanger fiscal sustainability in the medium term ('*preventive'* mechanism).[64] In addition, Arts. 3(5) and 5(2) of the Excessive Deficit Procedure Regulation (EC) No. 1467/97 stipulate that in the case of a severe economic downturn in the euro area or in the Union as a whole, the Council may also

[56] *Ibid*., para. 61.
[57] *Ibid*., paras. 64, 87-135.
[58] *Ibid*., para. 100.
[59] *Ibid*., paras. 101-102.
[60] *Ibid*., paras. 115-121.
[61] Communication from the Commission to the Council on the activation of the general escape clause of the Stability and Growth Pact, COM (2020) 123 final.
[62] European Parliament, 'Implementation of the Stability and Growth Pact under pandemic times' (In-Depth Analysis). *European Parliament Official Website*, available at: https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/699510/IPOL_IDA(2022)699510_EN.pdf, accessed on 26 June 2024, 1.
[63] European Parliament, 'The 'general escape clause' within the Stability and Growth Pact Fiscal flexibility for severe economic shocks' (Briefing). *European Parliament Official Website*, available at: https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/649351/EPRS_BRI(2020)649351_EN.pdf, accessed on 26 June 2024, 2.
[64] In this sense, see for example Beate Sjåfjell, Charlotte Villiers, Georgina Tsagas, '*Sustainable Value Creation in the European Union: Towards Pathways to a Sustainable Future Through Crises'* (Cambridge University Press, 2022) 109.

decide, on a recommendation from the European Commission, to adopt a revised fiscal trajectory ('*corrective'* mechanism).[65]

On 3 March 2021, the European Commission adopted a Communication providing EU Member States with a broad guidance on the conduct of their fiscal policies in the medium time to support economic recovery, '*taking to the next phase the concerted approach of addressing the pandemic'*.[66] The Commission underlined that the national fiscal policies shall be implemented in view of the entry into force of the Recovery and Resilience Facility Regulation (EU) 2021/241 (RRF),[67] emphasised the need in the continuous fiscal support and effective coordination of the fiscal measures to boost economic recovery,[68] and encouraged the EU Member States to develop their Recovery and Resilience Plans[69] - so that all instruments would be applied coherently for a sustainable, green and digital post-COVID recovery of the Union economy.[70]

On 19 October 2021, the European Commission also released a Communication relaunching the public consultation on the EU's economic governance framework, put on hold in March 2020 due to the COVID-19 outbreak.[71] Again, the emphasis was made on ensuring the post-pandemic economic and social resilience through the Recovery and Resilience Facility (RRF), and meeting the goals of the twin transitions enshrined in the 'EU Green Deal' and the EU digital strategy.[72] Moreover, it was suggested to focus on the overall review of the Union's system of economic governance, in view of the challenges highlighted by the COVID-19 crisis. For instance, the Commission emphasized the importance of reinforcing coordinated discretionary fiscal policy on the European Union and the Member States levels, complemented by the effective monetary policy actions taken by the European Central Bank and national central banks.[73] Such lines of the CJEU's reasoning as *Comune di Camerota* and *Ferrovienord* reflect on these premises within the post-COVID context, primarily from the perspective of the Art. 47 CFREU guarantees.

2.1. Case C-161/21, *Comune di Camerota*

In *Comune di Camerota,* the Luxembourg Court was asked to respond to the reference for a preliminary ruling submitted by the Regional Control Section of the Court of Auditors for the Campania Region (*Corte dei conti – Sezione regionale di controllo per la Campania*) as a part of the multi-year financial rebalancing procedure initiated by the Municipality of Camerota. The issue arose from the application of Art. 53 of the legislative decree No. 104/2020 (later converted into law No. 126/2020) which provided that, given the health emergency resulting from the spread of the COVID-19 virus, the enforcement of the multi-year financial rebalancing plans (approved by the Regional Control Sections of the Court of Auditors) by the Italian municipal authorities were suspended until 30 June 2021.[74] In view of these factors, the referring body asked to clarify whether the systemic interpretation of Arts. 2 and 19 TEU, Art. 47 CFREU, in conjunction with the EU Law principles of *proportionality,*

[65] In this sense, see for instance Simon Hix, Bjørn Høyland, '*The Political System of the European Union'* (Bloomsbury Publishing, 2022) 280.

[66] Communication from the Commission to the Council, 'One year since the outbreak of COVID-19: fiscal policy response', COM(2021) 105 final, 1.

[67] *Ibid*., 1.

[68] *Ibid*., 3.

[69] *Ibid*., 10.

[70] *Ibid*., 12.

[71] Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee, the Committee of the Regions, 'The EU economy after COVID-19: implications for economic governance', COM (2021) 662 final.

[72] *Ibid*., 5.

[73] *Ibid*., 10.

[74] Case C-161/21, *Comune di Camerota,* Order of the Court (Ninth Chamber) of 4 October 2021, ECLI:EU:C:2021:833, paras. 3-28.

sincere cooperation and *direct effect* (Arts. 4 and 5 TEU), preclude the application of national emergency legislation - which prevents temporarily effective and timely judicial control over compliance with the budgetary rules by an independent court specialized in accounting matters (such as the Court of Auditors).[75]

Interestingly, the CJEU's judges decided to focus on the admissibility of the reference for a preliminary ruling and to establish whether the submitting body could be considered a 'court' or 'tribunal' within the autonomous meaning of Art. 267 TFEU.[76] The Regional Control Section notably attempted to put forward the arguments on its role as the guardian of compliance with the obligations that the Italian Republic had taken towards the European Union regarding budgetary policies.[77] However, the Luxembourg Court made a recourse to its own previous jurisprudence to determine whether the body enabled to refer as a 'court' or 'tribunal' for the purposes of Art. 267 TFEU: i.e. whether the body is established by law; whether it is permanent; whether its procedures are *inter partes*; whether its jurisdiction is compulsory; whether it applies rules of law; whether it is independent; whether it impartial; whether it considers a case pending before it, aimed at the release of the binding decision of a judicial nature (*Vaassen-Göbbels, RAI, ANAS*).[78]

Further, the CJEU analysed the functions of the Regional Control Sections under the pertinent Italian legislation in the said rebalancing procedure, comprising the investigative ('*istruttoria'*) and the decision-making phases ('*decisionale'*).[79] It was underlined that the Regional Control Sections were entrusted with the responsibility for the decision-making phase of the procedure for examining a rebalancing plan. In particular, they fulfill a two-fold task of (1) ruling on the approval or rejection of such a plan and of (2) finalizing a preliminary procedural control before the approval of the local authority's decision to resort to the multi-year financial rebalancing procedure – which shall be considered an administrative function and not a judicial one.[80] Moreover, the factual and legal context of the main proceedings did not allow to identify a dispute, which required the decision on merits in the pending national judicial proceedings (*inter partes* element).[81] Given this background, the request for a preliminary ruling submitted by the Regional Control Section of the Court of Auditors for the Campania Region was declared manifestly inadmissible.[82]

2.2. Joined Cases C-363/21, C-364/21, *Ferrovienord*

In *Ferrovienord,* the CJEU's judges dealt with the request for a preliminary ruling from the Italian Court of Auditors - which arose from the enforcement of Art. 23 of Decree-law No. 137/2020 '*Other urgent measures on health protection, aid to workers and businesses, justice and security in connection with the COVID-19 epidemiological emergency*'.[83] This provision presumably prevented judicial review of implementation of the European system of national and regional accounts in the European Union (ESA 2010) by the National Statistical Institute (ISTAT) – making this assessment possible only in cases of application of '*national legislation on controlling public expenditure'*.[84] The Luxembourg Court preferred to combine and reformulate three questions submitted, and assessed whether the systemic reading of Regulations No. 473/2013 ('*Surveillance of budgetary policies in euro area countries'*) and *No. 549/2013* ('*European System of Accounts - ESA 2010'*), Directive 2011/85 ('*Budgetary*

[75] *Ibid*., para. 27.
[76] *Ibid*., paras. 29-34.
[77] *Ibid*., paras. 35-39.
[78] *Ibid*., paras. 30-34, 40-42.
[79] *Ibid*., paras. 36-37.
[80] *Ibid*., para. 37.
[81] *Ibid*., para. 39.
[82] *Ibid*., para. 41.
[83] Joined Cases C-363/21 and C-364/21, *Ferrovienord,* CJEU, Judgment from 13 July 2023, ECLI:EU:C:2023:563.
[84] *Ibid*., paras. 25, 30-32, 39.

frameworks of the Member States') and the second subparagraph of Art. 19(1) TEU, read in light of Art. 47 CFREU and the principles of *equivalence* and *effectiveness*, must be interpreted as precluding national legislation which limits the jurisdiction of the audit court to rule on the merits of the inclusion of an entity in the list of government units.[85]

While assessing the compatibility of this barrier to access to a court within the meaning of EU Law, the CJEU (1) focused on the effectiveness of the monitoring system established by Regulation 549/2013[86] and by Directive 2011/85[87] and (2) examined whether Art. 23 of Decree-law No. 137/2020, as interpreted by the defendants in the main proceedings, complies with the requirement of effective judicial protection. Firstly, the Luxembourg judges underlined that Regulation No. 549/2013 ('*European System of Accounts - ESA 2010'*) aims at securing such European Union's interests as formulation and monitoring of its economic and social policies, through the establishment of a reference framework intended for drawing up the accounts of the Member States (ESA 2010). Hence, those accounts should be drawn up on the basis of a single set of principles, so that comparable results could be obtained.[88] In order to ensure that - when classifying a 'government' entity for the purposes of Regulation No. 549/2013 - the competent national authority complies with the relevant definition of EU law, its decision must be open to challenge and be subject to judicial review.[89]

Secondly, the CJEU emphasized that Directive 2011/85 ('*Budgetary frameworks of the Member States'*) lays down detailed rules relating to the characteristics of the budgetary frameworks of the Member States – which are necessary to ensure that the national authorities comply with their obligations under the TFEU with regard to avoiding excessive government deficits.[90] The effective judicial review is a precondition for the regular availability of timely and reliable fiscal data – and therefore to proper and well-timed monitoring, which in turn allows prompt action in the event of unexpected budgetary developments.[91] At the same time, the Luxembourg judges then switched to the analysis of *procedural autonomy* of the EU Member States, in particular the principles of *effectiveness* and *equivalence* of national remedies within the given context, i.e. the fiscal matters.[92]

Following the AG Campos Sánchez-Bordona Opinion, they also noted that the EU Member States remained free to limit the scope of the judicial review of their courts of auditors as regards the application of Regulation No. 549/2013.[93] In this sense, the possibility of subsequent direct review by the administrative court of the inclusion of an entity on the ISTAT list (with a possibility of the annulment of this decision) and the indirect review by the audit court makes the national remedies compliant with the requirements of Art. 19 TEU, read in conjunction with Art. 47 CFREU.[94] Given this background, the CJEU concluded that these provisions must be interpreted as not precluding national legislation such as Art. 23 of Decree-law No. 137/2020, provided that the effectiveness of Regulations No. 473/2013 and No. 549/2013, as well as of Directive 2011/85 and the effective judicial protection required by EU law are guaranteed.[95]

3. The EU's Area of Freedom Security & Justice

[85] *Ibid*., para. 60.
[86] *Ibid*., paras. 64-70.
[87] *Ibid*., paras. 71-78.
[88] *Ibid*., para. 64.
[89] *Ibid*., paras. 67-69.
[90] *Ibid*., para. 71.
[91] *Ibid*., para. 76.
[92] *Ibid*., paras. 79-83.
[93] *Ibid*., para. 83.
[94] *Ibid*., paras. 95-98.
[95] *Ibid*., paras. 99-100.

In accordance with Title V TFEU, the European Union shall constitute an Area of Freedom, Security and Justice (AFSJ) with respect for fundamental rights and the different legal systems and traditions of the Member States,[96] comprising the absence of internal border controls for persons, a common policy on asylum, immigration and external border control, [97] police cooperation[98] – as well as access to justice, in particular *'through the principle of mutual recognition of judicial and extrajudicial decisions'* in civil and criminal matters.[99] Due to the '*pro-free-movement'* objectives of the EU's AFSJ, the COVID-19 severe restrictions on the transnational mobility aimed at preventing the spread of virus required immediate responses from the Union's legislator, as well as from the Luxembourg Court.

On 16 March 2020, the European Commission published a Communication on the application of the temporary restrictions on non-essential travel to the European Union. [100] It was suggested to the European Council to act with a view to the rapid adoption, by the Heads of State or Government of the Schengen EU Member States together with their counterparts of the Schengen Associated States, of a coordinated decision to apply a temporary restriction of non-essential travel from third countries into the '*EU+ area'* zone.[101] On 30 June 2020, the Council followed the Commission's suggestion and issued Recommendation (EU) 2020/912 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction. Firstly, the Recommendation included the list of the third countries whose residents should not be affected by temporary external borders restriction on non-essential travel into the European Union.[102] Secondly, this exception was extended to the specific categories of travelers with an essential function or need, such as healthcare professionals, frontier workers, seafarers etc.[103] Both lists shall be subject to the periodic review by the Council, in close consultation with the Commission, depending on overall assessment of the evolution of the epidemiological situation.[104]

In response to the Coronavirus crisis, the European Commission was also forced to address multiple urgent issues in enforcement of the EU's asylum *acquis* through the adoption of the 'Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement'.[105] As regards *asylum procedures*, considering that a situation such as the one resulting from the COVID-19 pandemic has not been foreseen in the '*Asylum Procedures Directive'* Directive 2013/32/EU, the application of derogatory rules such as those set in the Directive in case of a large number of simultaneous applications should be considered.[106] The EU Member States were advised to make use of Art. 14(2)(b) of the '*Asylum Procedures Directive'* Directive and omit the *personal interview*s, depending of the circumstances of the cases, particularly if there are reasonable indications suggesting an applicant(-s) might have contracted COVID-19.[107]

Aiming at the effective enforcement of '*Dublin'* Regulation (EU) No. 604/2013, the Commission underlined the importance of the close interstate cooperation in times of pandemic, and encouraged all EU Member States to resume transfers as soon as practically

[96] Art. 67(1) TFEU.
[97] Art. 67(2) TFEU.
[98] Art. 87(1) TFEU.
[99] Art. 67(4) TFEU.
[100] Communication from the Commission to the European Parliament, the European Council and the Council, COVID-19: Temporary Restriction on Non-Essential Travel to the EU, COM(2020) 115 final.
[101] *Ibid*., Sections '*Scope'* and '*Conclusion'*.
[102] Annex I.
[103] Annex II.
[104] *Ibid*., para. 4-5.
[105] Communication from the Commission COVID-19: Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement 2020/C 126/02, OJ C 126.
[106] *Ibid*., 2.
[107] *Ibid*., 3.

possible in view of the evolving circumstances.[108] The emphasis was also made on the possibility to conduct the medical screening of applicants for international protection on public health grounds provided by Art. 13 of the '*Reception Conditions'* Directive 2013/33/EU, while respecting fundamental rights and the principle of proportionality, necessity and non-discrimination.[109] Moreover, the applicants shall receive the necessary health care under Art. 19 of the '*Reception Conditions'* Directive, comprising the emergency care, essential treatment of illnesses and of serious mental disorders, as well as the COVID-19 treatment.[110]

The *return* of irregular migrants who have made the choice to leave the EU territory voluntarily should continue to be actively supported and promoted, while taking all necessary sanitary precautions.[111] In cases where the returns cannot be carried out due of the measures taken to cope with the COVID-19 pandemic, the EU Member States enjoy broad discretion to grant a residence permit or another authorisation offering a right to stay to irregular migrants for compassionate, humanitarian or other reasons, as provided for by Art. 6(4) of '*Return'* Directive 2008/115/EC.[112]

Importantly, well before the Coronavirus pandemic, the EU has continuously demonstrated its commitment to further improving access to justice in the AFSJ through the digitalization of the judicial procedures across the Union by continuing to develop European e-Justice policy, comprising various secondary laws aimed at facilitating interconnection and interoperability between the national e-justice systems.[113] However, such challenges brought by the COVID pandemic, as the need in the physical distancing and hence the lack of possibility to organize the traditional courtroom hearings, have attracted additional attention of the EU's legislatory.[114] For instance, the European Commission underlined that that the digital transformation of the justice sector is one of the domains in which Member States '*are strongly encouraged to focus reforms and investments'*, which require '*close coordination at EU level, in order to ensure mutual trust, interoperability and security*'.[115] Importantly, the use of videoconferencing in judicial proceedings throughout the Union '*should not infringe the right to a fair trial and the rights of defense, such as the rights to attend one's trial, to communicate confidentially with the lawyer, to put questions to witnesses and to challenge evidence'*.[116]

Similar reasoning appears in the Commission proposal,[117] and then in the recently adopted Regulation (EU) 2023/2844 on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters.[118] This pioneering EU Law act aims to '*achieve a fully functional area of freedom, security and justice',*[119] while ensuring that the fundamental rights and freedoms of all individuals concerned by the electronic exchange

---

[108] *Ibid*., 4.
[109] *Ibid*., 6.
[110] *Ibid*., 6.
[111] *Ibid*., 11.
[112] *Ibid*., 11.
[113] *'The European e-Justice Portal'*, available at: https://e-justice.europa.eu/home?action=home&plang=en, accessed on 26 June 2024.
[114] In this sense, see for example Marco Fabri, 'Will COVID-19 Accelerate Implementation of ICT in Courts?' [2021] 12(2) International Journal for Court Administration, 5-6.
[115] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, 'Digitalisation of justice in the European Union: A toolbox of opportunities' (2 December 2020) COM (2020) 710 final, p. 6.
[116] *Ibid*., p. 14.
[117] Proposal for a Regulation of the European Parliament and of the Council on the digitalization of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation, COM(2021) 759 final, 1, 23.
[118] Regulation (EU) 2023/2844 of the European Parliament and of the Council of 13 December 2023 on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation [2023] PE/50/2023/REV/1, OJ L, 2023/2844.
[119] *Ibid*., Recs.1, 2.

of data pursuant to this Regulation, in particular '*the right to effective access to justice, the right to a fair trial, the principle of non-discrimination, the right to respect for private and family life and the right to the protection of personal data'* are fully respected in accordance with Union law.[120] This new set of rules comprises four main groups: a) the use of videoconferencing or other telematic communication technology for purposes other than the taking of evidence under Regulation (EU) 2020/1783; b) the application of electronic signatures and electronic seals; c) the legal effects of electronic documents; and d) electronic payment of fees. Even though Regulation (EU) 2023/2844 is applicable only from 1 May 2025, the enforcement of this new piece of EU legislation is likely to have rather far-reaching consequences within the Member States' legal systems. It will be argued that the abovementioned legislative developments defined the development of the CJEU's post-COVID jurisprudence in the AFSJ matters, demonstrating the Luxembourg's Court's role of the main authority in interpreting EU legislation on the cross-border judicial cooperation or the asylum matters (*Uniqa Versicherungen, Landkreis Gifhorn, Nordic Info BV, OO*).

3.1. C-220/20, *OO (Suspension de l'activité judiciaire)*

In *OO (Suspension de l'activité judiciaire),* the Italian judge submitted a request for a preliminary ruling concerning, among other provisions of European Law, the interpretation of Arts. 81-82 TFEU, read in conjunction with Art. 47 CFREU – which derived from the proceedings between XX and OO concerning a claim for compensation for the damage allegedly caused by OO in a traffic accident.[121] In particular, question arose on the compatibility of the Italian legislation declaring a state of national health emergency for COVID-19 with the said provisions, as they have arguably led to the paralysis of civil and criminal justice and of the administrative work of Italian courts until 31 January 2021, hence undermining the independence of the referring court and infringing the principle of due process.[122] The referring judge also attempted to connect the legal issue with Arts. 2 and 6 TEU and made references to the recent '*Rule of Law Backsliding'* jurisprudence (*LM, Commission v Poland, M.A.S.*), presumably to underline the importance of the matter and make a connection to the growing body of the CJEU's case-law on the notion of judicial independence within the meaning of EU Law.[123]

The Luxembourg Court started with the factual background of the application and discussed *the absence of available IT equipment* and of the *overall digitalization of the judicial proceedings* in Italy which prevented judges from *switching to the remote hearings' mode*, as well as impossibility of holding trial behind closed door due to the scarcity of sufficient health protection devices – which led to the inevitable postponement of hearings (to a date after 31 July 2020).[124] The CJEU's judges responded to the national judge by making corresponding references to *Miasto Łowicz* – one of the key '*Backsliding'* precedents, finding – however – the application manifestly inadmissible, presumably due to the sensitivity of the issues and hence the lack of intention to intervene into the traditional area of the EU Member States' procedural autonomy.[125] The focus was made on the issue of the connection between the CFREU provisions and the national legislation invoked in the case (Art. 51(1)), which made

[120] *Ibid*., Rec. 5.

[121] Case C-220/20, *XX v OO*. Order of the Court (Tenth Chamber) of 10 December 2020, request for a preliminary ruling from the Ufficio del Giudice di Pace di Lancia, ECLI:EU:C:2020:1022, paras. 1-2, 10-15.

[122] *Ibid*., paras. 3-9, 16-20.

[123] Italy, Justice of the Peace for Lanciano, no. 803/2019/ Case C-220/20, *XX v OO*, request for a preliminary ruling from the Ufficio del Giudice di Pace di Lancia (28 May 2020), available at: http://www.unionegiudicipace.it/wordpress/wp-content/uploads/2020/05/Pregiudiziale-Gdp-Lanciano.pdf, paras. 98-101.

[124] Case C-220/20, *XX v OO*. Order of the Court (Tenth Chamber) of 10 December 2020, request for a preliminary ruling from the Ufficio del Giudice di Pace di Lancia, ECLI:EU:C:2020:1022, paras. 12-15.

[125] *Ibid*., paras. 23-26, 43-45.

the Luxembourg judges conclude that the preliminary ruling sought was not objectively necessary for the resolution of that dispute but was of a general nature.[126]

3.2. C-519/20, *Landkreis Gifhorn*

In *Landkreis Gifhorn*, the Luxembourg Court assessed the possibility of using regular prisons for detention due to an '*emergency situation'*, in light of Arts. 16 ('*Conditions of detention*') and 18 *('Emergency situations'*) of the '*Return'* Directive 2008/115/EC in conjunction with Art. 47 of the EU Charter of Fundamental Rights.[127] The preliminary reference was submitted by the Hanover Local Court (*Amtsgericht Hannover*) in the proceedings brought by the Landkreis Gifhorn against K., a Pakistani national, who was detained for three months (August-October 2020, i.e. during the COVID-19 pandemic) in the Langenhagen section of the Hanover Prison after the rejection of his application for asylum.[128]

Even though the detention department was physically separate from the rest of the prison, that division also accommodated ordinary prisoners, and it was not guaranteed that those two groups of persons would be accommodated separately there from a geographical and organisational point of view. For instance, the buildings in that division are located in each other's immediate vicinity and are accessible to the personnel through a common entrance area, and the same prison staff was involved in taking care of both convicted persons and persons detained for the purpose of removal.[129]

Importantly, the German legislation applicable at that time allowed for the detention in such cases in the prison accommodation, if there is no specialised detention facility in the Federal territory - or if the foreign national poses a serious threat to the life and limb of others, or if significant internal security interests so require.[130] One of the main points of the referring court's concern was that - even if specialized detention facilities were faced with a heavy burden because of the distancing requirements related to the COVID-19 pandemic, that burden was not necessarily connected with the presence of an exceptionally high number of third-country nationals, as required by Art. 18(1) of Directive 2008/115 – since the German legislature did not provide either information regarding the occupancy rate of detention facilities, or regarding the estimated number of third-country nationals subject to an enforceable obligation to leave the territory.[131]

Given this background, the questions were focused on the notions of the *'specialised detention facility*' and *'emergency situation'* within the meaning of the '*Return'* Directive 2008/115/EC, where the national legislature, on the basis of Art. 18(1) of that Directive, has derogated from the conditions laid down in Art. 16(1) thereof in national law.[132] While providing an answer to the first question, the CJEU's judges analysed whether EU law, and in particular Art. 18 *('Emergency situations'*) of Directive 2008/115 imposed on the national courts an obligation to verify compliance with the conditions laid down in the said provision, while making a decision on the detention or an extension of the detention, in a prison facility, of a third-country national for the purpose of removal.[133]

The CJEU's judges started the analysis from stressing the importance of the EU Member State's general obligation to take all appropriate measures to ensure fulfilment of their obligations under the '*Return'* Directive.[134] In order to provide an additional backing to this argument, the emphasis was also made on the guarantees enshrined in Art. 6 CFREU, since the

---

[126] *Ibid*., paras. 38-44.
[127] Case C-519/20, *Landkreis Gifhorn*. The CJEU's judgement of the 10 March 2022, ECLI:EU:C:2022:178.
[128] *Ibid*., para. 13-18.
[129] *Ibid*., para. 19-24.
[130] *Ibid*., para. 10.
[131] *Ibid*., para. 26.
[132] *Ibid*., para. 30.
[133] *Ibid*., para. 58.
[134] *Ibid*., para. 60.

detention can potentially infringe the right to liberty of the third-country national concerned, a decision ordering his or her detention shall be subject to compliance with strict safeguards, namely – *inter alia* – protection against arbitrariness, which can be achieved only through the compliance with the general and abstract rules laying down the conditions and detailed rules governing the ordering or extension of detention.[135]

With a reference to Art. 47 CFREU and its own previous jurisprudence (*Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*), the Luxembourg Court underlined that the principle of effective judicial protection requires the national court's assessment, in order to examine whether a decision ordering detention made under Directive 2008/115, is in compliance with the rights and freedoms guaranteed by EU Law to third-country nationals staying illegally on the territory of a Member State.[136] Moreover, while such an assessment of (1) the detention of a third-country national (2) for the purpose of removal (3) to be carried out in a prison facility is taking place, that national tribunal shall be able to examine the compatibility of the national legislation with Art. 18 of Directive 2008/115 and, therefore, to review whether these domestic laws consistent with what is permissible under that EU Law provision.[137] The simple notification of '*resorting to [...] exceptional measures'* to the European Commission by the EU Member State under Art. 18(2) of the '*Return'* Directive is not sufficient as such, since it does not amount to a judicial examination of the lawfulness of detention measures which may be ordered on the basis of that provision.[138]

3.3. C-18/21, *Uniqa Versicherungen*

In *Uniqa Versicherungen,* the CJEU dealt with the request for the preliminary ruling submitted by the Austrian Supreme Court on the interpretation of the '*European Order for Payment'* Regulation No. 1896/2006, in light of the national COVID legislation postponing procedural deadlines in civil proceedings.[139] On 6 March 2020, the District Court for Commercial Matters (Vienna) issued, following the application of an Austrian insurance company Uniqa Versicherungen, a European order for payment, which was served on VU, a natural person resident in Germany, on 4 April 2020. That court rejected VU's statement of opposition on the ground that it had not been lodged within the 30-day time limit laid down in Art. 16(2) of the '*European Order for Payment'* Regulation. [140]

The defendant appealed the decision to the Commercial Court (Vienna), which set aside that order on the basis of para. 1(1) of the Austrian '*Federal law on accompanying measures for COVID-19 in the administration of justice'*, suspending procedural deadlines for five weeks (from March 21 to 30 April 2020).[141] Uniqa Versicherungen brought an appeal on a point of law against this decision before the Supreme Court, which considered Art. 20 *('Review in exceptional cases'*) of Regulation No. 1896/2006 another possible legal basis for solving the case - i.e. perceiving the COVID-19 pandemic as '*force majeure'* or '*extraordinary circumstances'*, which would make a recourse to national law impermissible since the matter is exhaustively governed by EU Law.[142] This dilemma instigated Austrian judges to ask CJEU to clarify whether Arts. 20 and 26 of Regulation No. 1896/2006 must be interpreted as precluding the application of national legislation (1) adopted due to the COVID-19 pandemic and (2) suspending the procedural deadlines in civil matters for approximately five weeks, to

[135] *Ibid*., para. 62.
[136] *Ibid*., para. 63.
[137] *Ibid*., para. 64.
[138] *Ibid*., para. 66.
[139] Case C-18/21 - *Uniqa Versicherungen*. The CJEU's Judgment from 15 September 2022, ECLI:EU:C:2022:682.
[140] *Ibid*., para. 11.
[141] *Ibid*., para. 12.
[142] *Ibid*., paras. 16-17.

the 30-day time limit laid down by Art. 16(2) of that Regulation for the defendant to lodge a statement of opposition to a European order for payment.[143]

In order to provide an answer to the question, the Luxembourg Court turned to the concept of '*extraordinary circumstances'* within the meaning of Art. 20 of the '*European Order for Payment'* Regulation. This notion - by its nature - shall be interpreted narrowly,[144] therefore these circumstances shall be *'specific to the individual situation of the defendant concerned'* – for instance, the hospitalization of VU due to the Coronavirus infection which would have prevented him from exercising his right to opposition.[145] Further, the CJEU's judges switched to the interpretation of Art. 26 ('*Relationship with national procedural law'*) of Regulation No. 1896/2006, underlining that the said act (1) did not fully harmonise all aspects of the European order for payment procedure, hence (2) making the procedural law of the EU Member States applicable to all procedural issues not covered by this Regulation.[146]

Given these premises, the CJEU underlined the importance of the principle of procedural autonomy of the EU Member States, which allows - in the absence of EU rules on the matter - the national legal order of each Member State to establish them. However, those procedural rules should be not less favourable than those governing similar domestic situations (*principle of equivalence*) and should not make it impossible in practice or excessively difficult to exercise the rights conferred by EU law (*principle of effectiveness*).[147] Therefore, the compliance with the *principle of equivalence* would mean that the Austrian COVID-19 legislation applies equally to the order for payment procedures under national law and similar procedures under the '*European Order for Payment'* Regulation.[148] The compliance with the *principle of effectiveness* would require that the national procedural rules do not undermine the balance which Regulation No. 1896/2006 created between the respective rights of the claimant and the defendant in a European order for payment procedure, and the interval of time for which the procedural deadline is postponed must be limited to what is strictly necessary.[149]

In light of these factors, the national procedural rules which deferred the recovery of claims by the reasonable period of time (only several weeks), while effectively preserving the right to lodge a statement of opposition laid down in Art. 16 of Regulation No. 1896/2006 (a balance sought by the EU legislature) – were considered by the Luxembourg judges to be in compliance with requirements of Arts. 16, 20 and 26 of the '*European Order for Payment'* Regulation No. 1896/2006.[150]

3.4. *C-128/22, Nordic Info BV*

The *Nordic Info BV* case concerned certain travel restrictions applied by the EU Member States during the COVID-19 pandemic, in light of provisions of the '*Citizens' Rights'* Directive 2004/38/EC and of the '*Schengen Borders Code'* Regulation (EU) 2016/399. The reference for the CJEU's preliminary ruling was made in proceedings between Nordic Info BV ('Nordic Info'), a travel agency specializing in travel in Scandinavia, and the Belgian State concerning compensation for the damage allegedly suffered by that company as a result of national measures restricting freedom of movement taken during the health crisis linked to the COVID-19 pandemic.[151]

In particular, the Kingdom of Belgium adopted the Ministerial Decree (10 July 2020) to prohibit non-essential travel between Belgium, on the one hand, and the countries of the

[143] *Ibid*., paras. 18-19.
[144] *Ibid*., para. 25.
[145] *Ibid*., paras. 32-33.
[146] *Ibid*., para. 34.
[147] *Ibid*., para. 36.
[148] *Ibid*., para. 37.
[149] *Ibid*., para. 38.
[150] *Ibid*., paras. 39-41.
[151] Case C-128/22, *Nordic Info BV*. The CJEU's Judgment from 5 December 2023, ECLI:EU:C:2023:951.

Schengen area and the United Kingdom, on the other, provided that those countries were designated as 'red zones' in the light of their epidemiological situation – having included Sweden in this list. In order to comply with the requirements of the national legislation, Nordic Info canceled all trips there for the entire summer season – however, Sweden was transferred to the states in the 'orange zone', to and from which travel was only inadvisable already on 15 July 2020.[152] Taking the view that the Belgian State had acted wrongly in drawing up the amended Ministerial Decree, Nordic Info brought an action before the Brussels Court of First Instance, claiming, *inter alia,* that the Belgian State infringed (i) Directive 2004/38 and the national provisions transposing Arts. 27 ('*General principles'*) and 29 ('*Public health'*) of that Directive and (ii) Arts. 1 ('*Subject matter and principles'*), 3 ('*Scope*') and 22 ('*Crossing internal borders'*) of the Schengen Borders Code.[153]

While assessing whether the contested travel restrictions go beyond what was required to achieve the 'public health' objective pursued, Advocate General Emiliou suggested to the referring court to verify whether the procedural safeguards laid down in Arts. 30 ('*Notification of decisions'*) and 31 ('*Procedural safeguards'*) of the '*Citizens' Rights'* Directive were available, as they constitute a specific expression of the principle of effective judicial protection guaranteed in Art. 47 CFREU.[154] The national courts could arguably comply with these requirements during the pandemic by making any action by, for example, the police authorities precluding a person from travelling on the basis of the contested travel restrictions, or imposing a penalty for attempting to do so, open to judicial review as a '*decision'* under Art. 31(1) of that Directive, even in the context of a claim for damages against the State.[155]

Interestingly, the Grand Chamber judges directly referred to the AG Emiliou Opinion, in order to underline that the conditions and safeguards laid down in Arts. 30 - 32 of Directive 2004/38 shall be applied properly in the case of the restrictive measures of this type adopted in the form of an act of general application.[156] Moreover, the CJEU develops the suggested proportionality test even further, having referred to Art. 47 of the EU Charter and its own previous jurisprudence, as well as the EU Law principles of legal certainty, of good administration and the right to an effective judicial remedy.[157] Firstly, where a Member State lays down measures restricting freedom of movement on grounds of public health by implementing an EU measure such as the '*Citizens' Rights'* Directive, the said legal rules shall be clear and precise and that their application be foreseeable by the individuals (*Unareti/Avicarvil Farms*). Secondly, that Member State must comply with the general principle of EU law relating to good administration, in particular the obligation to state reasons for acts and decisions adopted by national authorities (*Klaipėdos regiono atliekų tvarkymo centras*). Thirdly, the right of access to a court or tribunal shall be guaranteed, in order to assess the legality and proportionality of the restrictive measures – therefore ensuring respect for the rights guaranteed by EU Law (*État luxembourgeois*).[158]

These conclusions definitely make *Nordic Info BV* a landmark case, relevant not only within the context of the COVID-19 crisis but also for the regulation of the pandemics in the future. The Luxembourg Court took this opportunity to clarify that a public health emergency such as the Coronavirus pandemic can be invoked as the ground to restrict the freedom of movement of persons under the '*Citizens' Rights'* Directive 2004/38/EC and, consequently,

[152] *Ibid*., paras. 32-33.

[153] *Ibid*., paras. 36-45.

[154] Case C-128/22, *Nordic Info BV*. Opinion of Advocate General Emiliou delivered on 7 September 2023, ECLI:EU:C:2023:645, paras. 115-117.

[155] *Ibid*., paras. 118-119.

[156] Case C-128/22, *Nordic Info BV*. The CJEU's Judgment from 5 December 2023, ECLI:EU:C:2023:951, para. 67.

[157] *Ibid*., paras. 69-70.

[158] *Ibid*., paras. 69.

Regulation (EU) 2016/399 (*'Schengen Borders Code'*).[159] In addition, *Nordic Info BV* judgement develops significantly the CJEU's previous case-law suggesting the two-step assessment of the exceptions from free movement rule on the grounds of protection of public health and public order (*Criminal proceedings against Jan-Erik Anders Ahokainen and Mati Leppik*).[160] At the same time, it could also be argued that the Luxembourg judges applied the EU-specific principle of effective judicial protection (Art. 47 CFREU) to emphasize the role of the EU Member States national courts in assessing the legality and proportionality of the pandemic-related restrictions on free movement under '*Citizens' Rights'* Directive and the '*Schengen Borders Code'*, hence providing the Member States with the considerable discretion over how they implement and apply EU Law during the health emergencies.

4. The EU's Environmental Laws and Policies

The European Union's competencies in this area primarily cover protecting the environment and combating climate change.[161] The Union's environmental laws suggest only minimum standards, not precluding Member States from requiring more stringent protective measures, provided these are (1) compatible with the EU Treaty framework and (2) notified properly to the European Commission.[162] The EU's legislative intervention should pursue such objectives as preserving, protecting and improving the quality of the environment, protecting human health, prudent and rational utilisation of natural resources, and promoting measures at international level to deal with regional or worldwide environmental problems, such as combating climate change.[163] The EU environmental policies must be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should be rectified at source and that the polluter should pay.[164]

While the COVID-19 outbreak definitely led to a decrease in CO-2 emissions due to the sharp decrease in commuting,[165] the European Union had to handle such new pandemic-related issues as the need in speeding the authorization process for the treatment or prevention

[159] Herman Nys, 'European Court of Justice: ECJ 2024/2 Nordic Info BV v Belgische Staat, 5 December 2023 (Case C-128/22)' [2024] 31(2) European Journal of Health Law, 209-233, 224-225.

[160] While assessing the restrictions to the free movement within the EU's internal market, the Luxembourg Court normally assesses whether the restrictive measure truly contributes to achieving the aim pursued ('*suitability'*), whether the desired aim could be reached by a less restrictive measure ('*necessity'*) and whether the measure is reasonable, considering other competing interests and the degree of interference to free movement of persons (proportionality '*stricto sensu'*) - however, only two first steps are normally applied in the CJEU's public health-related jurisprudence. In this sense, see for example, Case C-434/04, *Criminal proceedings against Jan-Erik Anders Ahokainen and Mati Leppik*. Opinion of Advocate General Poiares Maduro delivered on 13 July 2006, ECLI:EU:C:2006:462, paras. 23-26; Iris Goldner Lang, "Laws of Fear' in the EU: Precautionary Principle and Public Health Restrictions to Free Movement of Persons in the Time of COVID-19', Chapter in Andreas Kellerhals, Tobias Baumgartner, Corinne Reber (eds), '*European Integration Perspectives in Times of Global Crises'* (EIZ Publishing, 2023), 64 or Danaja Fabcic Povse, 'So long and see you in the next pandemic? The Court's one-and-done approach on permissible reasons to restrict freedom of movement for public health reasons in the Nordic Info case (C-128/22) of 5 December 2023'. *European Law Blog* (19 December 2023), available at: https://europeanlawblog.eu/2023/12/19/so-long-and-see-you-in-the-next-pandemic-the-courts-one-and-done-approach-on-permissible-reasons-to-restrict-freedom-of-movement-for-public-health-reasons-in-the-nordic-info-case-c-128-22, accessed on 26 June 2024.

[161] Arts. 191-193 TFEU.

[162] Art. 193 TFEU.

[163] Art. 191(1) TFEU.

[164] Art. 191(2) TFEU.

[165] European Commission, 'Impact of Covid-19 on Carbon Emissions'. *European Commission Official Website*, available at: https://ec.europa.eu/newsroom/rtd/items/691508/en, accessed on 26 June 2024.

of Coronavirus disease,[166] or large amount of plastic waste generated due to the use of face masks, water and hand sanitizer bottles, visors, cotton buds, packaging and take-away food containers.[167] Importantly, these challenges overlapped temporarily with the implementation of Directive (EU) 2019/904 on the reduction of the impact of certain plastic products on the environment ('*Impact of plastic products'* Directive) - aiming at the prevention and reduction of the impact of certain plastic products on the environment, in particular the aquatic environment, and on human health.[168]

Moreover, the launch of the 'EU Green Deal' in December 2019 defined the development of the Union's environmental policies later on, comprising the ones adopted during the COVID-19 pandemic.[169] On 11 March 2020, the European Commission adopted a 'New Circular Economy Action Plan', mapping the initiatives along the entire life cycle of products in the European Union's internal market – for instance, it targets how products are designed, promotes circular economy processes, encourages sustainable consumption, and aims to ensure that waste is prevented and the resources used are kept in the EU economy for as long as possible.[170]

In July 2020, the '*GMO's COVID-19 medicinal products'* Regulation (EU) 2020/1043 established a temporary derogation from certain authorisation requirements of the '*Gene Technology'* Directives 2001/18/EC and 2009/41/EC - such as environmental risk assessment - for the medicines human use containing or consisting of genetically modified organisms intended for the treatment or prevention of the Coronavirus disease.[171] On 17 November 2021, the European Commission published its proposal for a Regulation on shipments of waste, with three main objectives, namely to (1) facilitate easier transport of waste within the Union's internal market, (2) to strengthen control over the transport of waste outside the European Union, and (3) to tackle illegal waste shipments.[172]

Later, in the margins of the fifth United Nations Environment Assembly, the European Union joined efforts with the United Nations to launch the Global Alliance on Circular Economy and Resource Efficiency (GACERE), aiming to provide a global impetus for initiatives related to the circular economy transition, resource efficiency and sustainable

[166] European Medicines Agency, 'COVID-19 guidance: evaluation and marketing authorisation'. *European Medicines Agency Official Website,* available at: https://www.ema.europa.eu/en/human-regulatory-overview/public-health-threats/coronavirus-disease-covid-19/covid-19-public-health-emergency-international-concern-2020-23/guidance-medicine-developers-and-other-stakeholders-covid-19/covid-19-guidance-evaluation-marketing-authorisation, accessed on 26 June 2024.

[167] European Environment Agency, 'COVID-19 in Europe: increased pollution from masks, gloves and other single-use plastics'. *European Environment Agency Official Website*, available at: https://www.eea.europa.eu/highlights/covid19-in-europe-increased-pollution, accessed on 26 June 2024.

[168] Directive (EU) 2019/904 of the European Parliament and of the Council of 5 June 2019 on the reduction of the impact of certain plastic products on the environment [2019] OJ L 155.

[169] The '*EU Green Deal'* is a set of legislative proposals to revise climate-, energy- and transport-related legislation and put in place new legislative initiatives to align EU laws with the European Union's climate goals. The package of proposals aims at providing a coherent and balanced framework for reaching the EU's climate objectives, which: (a) ensures a just and socially fair transition, (b) maintains and strengthens innovation and competitiveness of EU industry while ensuring a level playing field vis-à-vis third country economic operators, (c) underpins the EU's position as leading the way in the global fight against climate change. In this sense, see for instance 'European Green Deal', *European Council/ Council of the European Union Official Website,* available at: https://www.consilium.europa.eu/en/policies/green-deal/, accessed on 26 June 2024.

[170] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A new Circular Economy Action Plan For a cleaner and more competitive Europe', COM/2020/98 final.

[171] Regulation (EU) 2020/1043 of the European Parliament and of the Council of 15 July 2020 on the conduct of clinical trials with and supply of medicinal products for human use containing or consisting of genetically modified organisms intended to treat or prevent coronavirus disease (COVID-19) [2020] OJ L 231.

[172] Proposal for a Regulation of the European Parliament and of the Council on shipments of waste and amending Regulations (EU) No. 1257/2013 and (EU) No. 2020/1056, COM/2021/709 final.

consumption and production (22 February 2022).[173] The rules on persistent organic pollutants in waste were updated by amending Regulation (EU) 2019/1021 on persistent organic pollutants (POPs) in October 2022, in order to address the negative consequences of the presence of certain POPs in waste and in material that could be recovered from it through recycling, and to minimize emissions of this type of pollutants to air, water and soil.[174] These premises have arguably defined the corresponding developments in the post-COVID jurisprudence of the Luxembourg Court in the environmental matters, involving the substantive assessment of the CFREU's 'due process' rights (*CNMSE/ Paccor Packaging*).

4.1. T-633/20 - CNMSE and Others v Parliament and Council

In *CNMSE and Others v Parliament and Council*, the CJEU dealt with an appeal aimed at annulment of Regulation (EU) 2020/1043 on the conduct of clinical trials with and supply of medicinal products for human use containing or consisting of genetically modified organisms intended to treat or prevent Coronavirus disease ('*GMO's COVID-19 medicinal products*' Regulation).[175] In the context of the pandemic, a certain number of exemptions with respect to the normal time obligations have been allowed for these products. In particular, Regulation (EU) 2020/1043 provided for a temporary derogation from certain authorization requirements of the '*GMO's release into the environment'* Directive 2001/18/EC and '*GMO's contained use'* Directive 2009/41/EC.[176]

For instance, the applicants should not be required to include written authorization or written consent from the competent authority for the deliberate release of GMO's into the environment for research and development purposes in accordance with Directive 2001/18/EC.[177] As this type of the environmental risk assessment is '*complex and can take a significant amount of time'*,[178] it can be skipped in the situation of public health emergency - considering the major interest that safe and efficacious medicinal products intended to treat or prevent COVID-19 can be developed and be made available within the European Union's internal market as soon as possible.[179]

The Coordination nationale médicale santé – environnement (CNMSE) sought the annulment of '*GMO's COVID-19 medicinal products'* Regulation (EU) 2020/1043 on the basis of Art. 263 TFEU ('*Review of the legality of legislative acts'*). The Parliament and the Council submitted that the action before the General Court was manifestly inadmissible, since the contested regulation is a legislative act of general application – hence, the applicants have no *locus standi*, within the meaning of the fourth paragraph of Art. 263 TFEU ('*direct and individual concern'* of the said regulatory act to the natural or legal person).[180]

The applicants pointed out that – on the contrary - they are directly affected by Regulation (EU) 2020/1043, as contested legal act directly undermined the objectives of their association, such as ensuring the protection of human health, medical safety and environment

[173] United Nations, 'United Nations Environment Assembly of the United Nations Environment Programme' (Report from the Fifth Session, 24 February 2021), UNEP/EA.5/25, para. 71; European Commission, 'Concept Note for side-event at the fifth session of the UN Environment Assembly (UNEA-5) Global Alliance on Circular Economy and Resource Efficiency (GACERE)' (22 February 2021).

[174] European Parliament, 'Revision of Annexes IV and V of the Regulation on Persistent Organic Pollutants (REFIT) in 'A European Green Deal'', *European Parliament Official Website*, available at: https://www.europarl.europa.eu/legislative-train/theme-a-european-green-deal/file-pops-regulation-revision-of-annexes-iv-and-v, accessed on 26 June 2024.

[175] Regulation (EU) 2020/1043 of the European Parliament and of the Council of 15 July 2020 on the conduct of clinical trials with and supply of medicinal products for human use containing or consisting of genetically modified organisms intended to treat or prevent coronavirus disease (COVID-19) [2020] OJ L 231.

[176] *Ibid*., Arts. 2-3.

[177] *Ibid*., Art. 2(3).

[178] *Ibid*., Rec. 8.

[179] *Ibid*., Recs. 13-14.

[180] Case T-633/20, *CNMSE and Others v Parliament and Council*. Order of the General Court (Fifth Chamber) of 27 September 2021, ECLI:EU:T:2021:678, paras. 1-14.

and safeguarding the rights of the doctors, patients and citizens in the European Union.[181] The very particular and exceptional circumstances surrounding the adoption of Regulation (EU) 2020/1043 during the COVID-19 pandemic, as well as the potential dangers to public health (i.e. deriving from the suspension of the application of '*GMO's release into the environment'* Directive 2001/18/EC and '*GMO's contained use'* 2009/41/EC), shall require the higher standard of scrutiny – which would justify the broader conditions of admissibility for the EU individuals affected by these extraordinary measures.[182] In addition, CNMSE addressed the need to provide litigants with effective judicial protection of the rights they derive from EU Law under Art. 47 of the EU Charter. The contested '*GMO's COVID-19 medicinal products'* Regulation cannot be the subject of any national appeal, which makes it unreviewable if the Luxembourg Court refuses to conduct substantive assessment of the case.[183]

However, the CJEU's judges haven't supported the applicants' reasoning concerning the admissibility of the application, as the Coordination nationale médicale santé – environnement failed to prove that it was affected 'individually'. By doing this, the Luxembourg Court demonstrated the viability of the seminal *Plaumann/Inuit Tapiriit Kanatami* formulae within the Coronavirus crisis context. With the references to the said lines of reasoning, it was noted that the protection conferred by Art. 47 CFREU does not require that a litigant be able, unconditionally, bring an action for annulment, directly before the CJEU, against a EU legislative act.[184]

Firstly, any natural or legal person is likely to be affected in one way or another by the deliberate release into the environment or the placing on the market of medicines or vaccines containing GMO's under Regulation (EU) 2020/1043. Secondly, the provisions of the *'GMO's release into the environment'* and '*GMO's contained use'* Directives, the application of which was suspended by the contested Regulation, recognize rights and procedural guarantees to the public in general as well as to 'certain groups', referred to in Art. 9 of Directive 2001/18/EC – but not targeting directly those associations which make the defense of human health, medical safety and the environment their main social objective.[185]

Consequently, CNMSE failed to demonstrate that the '*GMO's COVID-19 medicinal products'* Regulation (EU) 2020/1043 specifically affected their right to information, a right to be consulted or procedural rights deriving from the suspension of application of some provisions of the '*GMO's release into the environment'* and '*GMO's contained use*' Directives, or that they played a role in the development of the contested Regulation as such – which precluded them from claiming their '*direct and individual concern'* (and hence having *locus standi* under Art. 263(4) TFEU) under the given circumstances.[186]

4.2. Case T-148/21 R, Paccor Packaging GmbH

The *Paccor Packaging GmbH* case concerned the application for suspension of the operation of Commission Implementing Regulation (EU) 2020/2151 of 17 December 2020 laying down rules on harmonised marking specifications on single-use plastic products, in order to clarify the provisions of Directive (EU) 2019/904 on the reduction of the impact of certain plastic products on the environment ('*Impact of plastic products'* Directive).[187] In accordance with Art. 7 of the '*Impact of plastic products'* Directive, the EU Member States had to comply with the marking requirements for the single-use plastic product listed further

[181] *Ibid*., para. 11.
[182] *Ibid*., paras. 12-13, 15.
[183] *Ibid*., para. 14.
[184] *Ibid*., paras. 30-33, 46.
[185] *Ibid*., paras. 36-42.
[186] *Ibid*., paras. 43-49.
[187] Case T-148/21 R, *Paccor Packaging GmbH and Others v European Commission*. Order of the President of the General Court of 8 October 2021 (Proceedings for interim measures 1), paras. 1-7.

in the Annex, Part D (such as feminine hygiene products, wet wipes, tobacco products with filters or filters for use in combination with these products, and cups for beverages).[188]

In particular, each of these products placed on the market shall bear a conspicuous, clearly legible and indelible marking on its packaging or on the product itself informing consumers of the following: (a) appropriate waste management options for the product or waste disposal means to be avoided for that product, in line with the waste hierarchy; and (b) the presence of plastics in the product and the resulting negative impact of littering or other inappropriate means of waste disposal of the product on the environment.[189] Annex IV to the contested Commission Implementing Regulation (EU) 2020/2151 laid down the harmonised marking specifications for beverage cups as regards the position, size and design of the marking, and applied from 3 July 2021.[190]

By a separate document, Paccor Packaging GmbH made the application for *interim measures*, claiming that the President of the General Court should immediately suspend the operation of the contested Regulation (EU) 2020/2151 and Art. 7 of the '*Impact of plastic products'* Directive 2019/904 as regards the marking requirements applicable to beverage cups - until the final decision in the case is delivered.[191] According to the well-established previous CJEU's case-law (*Degussa*), the interim measures can be applied if (a) such a procedural step is justified, *prima facie*, due to a probable existence of an infringement, (b) it is urgent and is made to (c) avoid serious and irreparable harm to the applicant's interests.[192] Given the extraordinary nature of the Coronavirus crisis, the applicants attempted to convince the Luxembourg judges to relax these criteria in their particular case.

Firstly, Paccor Packaging GmbH claimed that the condition relating to *urgency* must be relaxed, since it is excessively difficult to prove serious and irreparable harm under the given circumstances, and such a relaxation is justified in the present case in order to ensure effective judicial protection in the *sui generis* EU legal order and to provide a legal remedy ensuring provisional protection against an arbitrary legislative process (Art. 47 CFREU).[193] The overriding public interests which shall arguably be taken into consideration comprise the incompatibility of the contested Regulation with the objective of environmental protection laid down in Art. 3 TEU and Art. 191 TFEU in that it has a serious impact on the recyclable nature of beverage cups, and the confusion, which the Regulation causes for consumers, since it provides them with incorrect information and is detrimental to the good name and reputation of producers and suppliers of beverage cups.[194]

Secondly, the applicants submitted that that the '*serious and irreparable harm'* criterion shall be relaxed as well, since the enterprise has already suffered serious and irreparable financial harm due to the COVID-19 global crisis and that fact alone justifies the grant of the interim measures sought.[195] Thirdly, it was submitted that the serious and irreparable nature of

---

[188] Directive (EU) 2019/904 of the European Parliament and of the Council of 5 June 2019 on the reduction of the impact of certain plastic products on the environment [2019] OJ L 155, Art. 7; Commission Implementing Regulation (EU) 2020/2151 of 17 December 2020 laying down rules on harmonised marking specifications on single-use plastic products listed in Part D of the Annexto Directive (EU) 2019/904 of the European Parliament and of the Council on the reduction of the impact of certain plastic products on the environment, OJ L 428, Art. 2.

[189] Directive (EU) 2019/904 of the European Parliament and of the Council of 5 June 2019 on the reduction of the impact of certain plastic products on the environment [2019] OJ L 155, Art. 7(1).

[190] Commission Implementing Regulation (EU) 2020/2151 of 17 December 2020 laying down rules on harmonised marking specifications on single-use plastic products listed in Part D of the Annexto Directive (EU) 2019/904 of the European Parliament and of the Council on the reduction of the impact of certain plastic products on the environment, OJ L 428, Art. 4 and ANNEX IV: '*Harmonised marking specifications for beverage cups'*.

[191] Case T-148/21 R, *Paccor Packaging GmbH and Others v European Commission*. Order of the President of the General Court of 8 October 2021 (Proceedings for interim measures 1), para. 6.

[192] *Ibid*., para. 10.

[193] *Ibid*., para. 16.

[194] *Ibid*., paras. 17.

[195] *Ibid*., para. 18.

the harm caused is also demonstrated by the fact that the future of the single-use plastic beverage cups industry as such remains extremely uncertain under the given circumstances, hence the financial consequences of the markings at issue must be assessed taking into consideration those uncertainties.[196]

The Luxembourg Court preferred to disregard these arguments presented by Paccor Packaging GmbH, and turned to its own well-established case-law – presumably, to underline the stability of the criteria for the *interim measures* application even within the COVID-19 context. Firstly, the CJEU's judges underlined that – while the relative strength of a *prima facie* case is not without relevance for the assessment of urgency (*Commission v Éditions Odile Jacob*), Art. 156(4) of the Rules of Procedure clarifies that the conditions relating to a *prima facie* case and to *urgency* are still distinct and cumulative. Thus, the applicant's argument that a particularly strong *prima facie* case, which makes the application of the criterion of serious and irreparable harm irreconcilable with Art. 47 CFREU - should be disregarded.[197]

Secondly, as regards the alleged harm resulting from the global COVID-19 crisis, it is apparent from the CJEU's earlier jurisprudence that the grant of the interim measure requested is justified only where the measure at issue constitutes the decisive cause of the alleged serious and irreparable harm (*Akhras v Council*). Even though the world economy - indeed - suffered significantly as a result of this public health emergency, Paccor Packaging GmbH did not seem to demonstrate clearly the causal link between the Coronavirus pandemic and the harm suffered, which did not allow to justify a recourse to the interim measure in the present case.[198] Thirdly, as regards the uncertainties in the beverage cup sector, it must be stated that, those uncertainties are also not linked to the subject matter of the present case but rather stem from the implementation of the '*Impact of plastic products'* Directive 2019/904. Consequently, like the alleged losses associated with the COVID-19 pandemic, the financial losses deriving from those uncertainties cannot form part of the serious and irreparable harm allegedly suffered by the applicant, relied on in support of its application for interim measures.[199]

5. The 'Rule of Law Backsliding' in the European Union

The Luxembourg Court is now expected to provide legal responses to the so-called 'Rule of Law Backsliding' in some of the EU Member States, which is understood as the governmental strategy aimed at the weakening of the State's internal checks and balances system, and undermining the key '*Rule of Law'* concept components (such as the access to justice and judicial review, legal certainty, proportionality, non-discrimination and transparency).[200] The first attempts of the European Commission and Parliament to invoke Art. 7 of the Treaty on European Union[201] against Polish and Hungarian governments presumably demonstrate the EU's political willingness to claim its own authority in defending the *'core'* European values in the national legal systems.[202]

The European Commission's Rule of Law Framework (ROFL) was adopted in 2014, in an attempt to strengthen the European Union's response to these abuses, within the context of the multilevel system of Human Rights protection in the European Union (the EU, the Council of Europe, and the EU Member States). This framework is supposed to be

[196] *Ibid*., para. 20.
[197] *Ibid*., para. 22.
[198] *Ibid*., paras. 38-40.
[199] *Ibid*., paras. 41-43.
[200] Kim Lane Scheppele, Laurent Pech, 'What is Rule of Law Backsliding?' (*Verfassungsblog*, 02 March 2018), available at: https://verfassungsblog.de/what-is-rule-of-law-backsliding, accessed 26 June 2024.
[201] Stelio Mangiameli and Gabriella Saputelli, 'Commentary on Article 7 TEU [The Principles of the Federal Coercion]' in Hermann-Josef Blanke and Stelio Mangiameli (eds), '*The Treaty on European Union: A Commentary'* (2013) 349-374.
[202] In this sense, see for instance Nasiya Daminova, 'Rule of Law vs. Poland and Hungary – An inconsistent approach?' [2019] 60(3) Hungarian Journal of Legal Studies, 236-259.

complementary to Art. 7 TEU and the formal infringement procedure under Art. 258 TFEU, which the Commission can launch if a EU Member State fails to implement a solution to clarify and correct the suspected violation of EU Law.[203] The ROFL also elaborated on the institutional dimension of the Rule of Law concept by introducing the *'early warning'* mechanism aimed at addressing the systemic violations of Fundamental Rights by the EU Member States which create the *'clear risk of a serious breach'* of the EU's common values (Art. 2 TEU).[204] The *three-stage* procedure shall precede invoking Art. 7 TEU, and instigate national governments to solve the internal issues to make the application of the *'nuclear option'* unnecessary.[205]

In 2017, the first calls were made to connect the 'Rule of Law' conditionality with the control over the expenditure of the EU funds allocated to the Member States.[206] In May 2018, the Commission submitted a Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States.[207] The intention of the EU's legislator to retain the Rule of Law in the center of the European political debate and the institutional agenda was clearly demonstrated for the 2019-2024 legislative term.[208] In 2019, the plan was also announced to set up a '*Annual Rule of Law Review Cycle'*, comprising an annual 'Rule of Law Report' covering all 27 EU Member States – in order to detect the emerging rule of law problems on the early stage.[209]

The Coronavirus crisis created a window of opportunity, which was successfully utilized to put the previous proposal on the 'Rule of Law' conditionality mechanism on the agenda again.[210] Already on 21 July 2020, the European Council – while attempting to protect the health of the European citizens and prevent the collapse of the economy following the wave of the COVID-19 restrictions throughout the Union[211] - stated that the EU's financial interests should be defended in accordance with the general principles embedded in the Treaties, in

---

[203] Leonard Besselink, '*The Bite, the Bark* and *Howl: Article 7 TEU and The Rule of Law Initiatives*', Chapter 8 in András Jakab, Dimitry Kochenov (eds), *'The Enforcement of EU Law and Values: Ensuring Member States' Compliance'* (OUP, 2017).

[204] *Ibid*., 6.

[205] The first stage is the *Commission's assessment*, during which the Commission collects and examines all relevant information pertaining to the situation and assesses whether a systemic threat to the rule of law exists. In a second stage, unless the matter has already been satisfactorily resolved, the Commission shall issue a 'rule of law recommendation' addressed to the Member State, so the problems identified could within a fixed time limit. The third stage being monitoring the Member States' *follow-up on the recommendations* - if there is no satisfactory follow-up within the time limit set, the Commission can resort to one of the mechanisms set out in Art. 7 TEU. Communication from the Commission to the European Parliament and the Council: A New EU Framework to Strengthen the Rule of Law, 10 March 2014, document COM (2014) 158 final, 7-9.

[206] The European Commission summarized these calls in the 'Reflection paper on the future of the EU Finances' in June 2017, which recognizes a clear relationship between the EU budget and the rule of law - since the latter is crucial not only '*for European citizens, but also for business initiative, innovation and investment, which will flourish most where the legal and institutional framework adheres fully to the common values of the Union'*. Reflection Paper on the Future of EU Finances, COM/2017/0358 final, pp. 21-22.

[207] Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalized deficiencies as regards the rule of law in the Member States, COM/2018/324 final.

[208] In this sense, see for instance Ursula von der Leyen, 'Political Guidelines for the Next European Commission 2019-2024', *European Commission Official Website*, available at: https://commission.europa.eu/system/files/2020-04/political-guidelines-next-commission_en_0.pdf, accessed 26 June 2024, 13.

[209] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Strengthening the rule of law within the Union: A blueprint for action', COM(2019) 343 final.

[210] Ellen Bos, Kristina Kurze, 'On the Adoption of the EU's New Rule of Law Conditionality Mechanism: The COVID-19 Crisis as a Window of Opportunity' [2021] 1(392) L'Europe en Formation, 87-108, 87, 89, 98-103.

[211] Special meeting of the European Council (17, 18, 19, 20 and 21 July 2020) – Conclusions (21 July 2020), EUCO 10/20, p. 1.

particular the values set out in Art. 2 TEU.[212] The approach chosen became one of the decisive factors in the rapid adoption of the so-called '*Rule of Law Conditionality'* Regulation 2020/2092 on 16 December 2020, which entered into force on 1 January 2021.[213] It shall also be mentioned here that Regulation 2020/2092 was developed and issued simultaneously with the multi-annual EU budget (2021-2027)[214] and the post-COVID *'European Union Recovery Instrument'* Regulation (EU) 2020/2094.[215]

The '*Rule of Law Conditionality'* Regulation was adopted on the basis of Art. 322(1) TFEU ('financial rules' for implementing the EU budget) and allows for the suspension of payments and the financial corrections when breaches of the rule of law principles affect or seriously risk affecting the Union's budget or the EU's financial interests. Importantly, the EU's legislator attempts to incorporate the '*formal'* definition of the 'Rule of Law', transposing its components developed in the earlier CJEU's jurisprudence: this concept '*…refers to the Union value enshrined in Article 2 TEU… [and] includes the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law'*.[216]

For the purposes of Regulation 2020/2092, the following negative developments could be an indication of breaches of the rule of law principle: (a) endangering the *independence of the judiciary*; (b) failing to prevent, correct or sanction *arbitrary or unlawful decisions by public authorities*; (c) limiting the availability and effectiveness of *legal remedies* in the EU Member State.[217] In order to invoke the '*Rule of Law Conditionality'* Regulation sanctioning mechanism, these forms of the '*Backsliding'* shall concern, for instance, the proper functioning of the authorities implementing the Union budget/ carrying out financial control, the investigation and public prosecution services in relation to the investigation and prosecution of fraud, as well as the effective judicial review by independent courts of actions or omissions by the abovementioned authorities.[218] At the same time, the provisions on the scope of application seem to be rather broadly formulated as the EU's legislator included the situations or conduct of authorities '*that are relevant to the sound financial management of the Union budget or the protection of the financial interests of the Union'*.[219]

The possible sanctions for these breaches of the rule of law principle affecting the EU's budget could be realized in such ways as the suspension of payments and of commitments, the suspension of disbursement of instalments or the early repayment of loans, the reduction in funding under existing commitments, the prohibition from concluding new commitments with recipients or from entering into new agreements on loans or other instruments guaranteed by the Union budget - in cases, where a government entity is the recipient of these EU funds in either direct or indirect form.[220]

The sanctioning mechanism of the '*Rule of Law Conditionality'* Regulation shall follow the *four-stage process*: (1) Commission, after establishing the existence of such a breach, sends a written notification to the EU Member State concerned and informs the European Parliament and the Council of such notification and its contents; (2) the State

[212] *Ibid*., p. 7.

[213] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 433I.

[214] Council Regulation (EU, Euratom) 2020/2093 of 17 December 2020 laying down the multiannual financial framework for the years 2021 to 2027, OJ L 433I.

[215] Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis, OJ L 433I.

[216] *Ibid*., Rec. 3, Art. 2(a).

[217] *Ibid*., Art. 3.

[218] *Ibid*., Art. 4(2).

[219] *Ibid*., Art. 4(h).

[220] *Ibid*., Art. 5(1).

concerned shall provide the required information and may make observations on the findings set out in the notification; (3) if the Commission considers that the remedial measures, suggested by the Member State (if any) do not adequately address the findings in the Commission's notification, it shall propose triggering the conditionality mechanism against a Member State government, (4) the Council will then have to adopt the proposed measures by a qualified majority.[221]

The previous research already demonstrated that – apart from the Art. 7 TEU '*nuclear option'* which can lead to the suspension of the State's right to vote in the Council - Art. 47 *('Right to an effective remedy and to a fair trial'*) CFREU was chosen as another important tool to cope with these issues. In particular, the earlier CJEU lines of reasoning on the European Arrest Warrant *(LM/ML),* Asylum Procedures Directive *(Torubarov),* and the reform of the Polish Supreme Court (*C-619/18*) and Ordinary Courts (C-192/18) have already indicated the great potential of the EU-specific principle of *effective judicial review* within the '*Rule of Law Backsliding'* context to challenge the concept of mutual trust in the AFSJ, and to defend the independence of the national judiciary.[222] Following the adoption of the '*Conditionality'* Regulation 2020/2092, the COVID-19 pandemic added a new dimension to this discussion – while forcing the Luxembourg Court to provide responses to the actions for annulment submitted by the Hungarian and Polish Governments in two 'twin' cases (*Hungary v Parliament and Council/ Poland v Parliament and Council*).

5(i). C-156/21, Hungary v Parliament and Council/ C-157/21, Poland v Parliament and Council

Even though the cases were assessed separately by the Luxembourg Court, it will be suggested to analyze them in conjunction due to the similarity of the legal claims of the Member States and the CJEU's legal reasoning. Predictably, the Hungarian and the Polish governments have challenged the legal basis for the adoption of the '*Rule of Law Conditionality'* Regulation, arguing that Art. 322(1)(a) TFEU empowers the EU legislature to adopt financial rules for implementing the EU budget, hence the regulation issued under this provision cannot establish either the definition of the '*Rule of Law'* concept, or the conditions under which infringement of its constituent components is indicated.[223]

In addition, the concepts used in the contested regulation (comprising the 'Rule of Law' principle as such) are arguably either not defined clearly or cannot be the subject of a uniform definition and, for that reason, are not a suitable basis for the assessment of their legal systems or the functioning of their authorities. Thus, the enforcement of the '*Rule of Law Conditionality'* Regulation could potentially infringe such general principle of EU Law as legal certainty.[224] Moreover, the application of the sanctioning mechanism of Regulation 2020/2092 presumably equals to putting into effect Art. 7 TEU ('*suspension clause'/ 'nuclear option'*) – without complying with the procedure and preconditions laid down in the latter provision.[225]

Two corresponding Opinions of AG Sánchez-Bordona suggested to dismiss the said actions for annulment brought by Poland and Hungary, upholding its validity of the '*Rule of*

[221] *Ibid*., Art. 6.

[222] In this sense, see for example Nasiya Daminova, 'Rule of Law vs. Poland and Hungary – An inconsistent approach?' [2019] 60(3) Hungarian Journal of Legal Studies, 236-259.

[223] C-156/21, *Hungary v European Parliament and Council of the European Union*, Judgment of the Court (Full Court) of 16 February 2022, ECLI:EU:C:2022:97, paras. 67-75; Case C-157/21, *Republic of Poland v European Parliament and Council of the European Union*, Judgment of the Court (Full Court) of 16 February 2022, ECLI:EU:C:2022:98, paras. 63-71. Further, the references are made to the Hungarian judgment to allow for easier reading.

[224] C-156/21, *Hungary v European Parliament and Council of the European Union*, Judgment of the Court (Full Court) of 16 February 2022, ECLI:EU:C:2022:97, paras. 199-213.

[225] *Ibid*., paras. 80-95.

Law Conditionality' Regulation.[226] While paving the way to the analysis of the governments' submissions, Advocate General underlined the role of the COVID-19 pandemic in the development and the implementation of the financial conditionality mechanisms in EU Law. In particular, he underlined the '*constitutional'* importance of the EU multiannual budget as an instrument translating the principle of solidarity into financial terms. He also mentioned the importance of adherence to the current multiannual financial framework 2021-2027, applied in conjunction with Regulation (EU) 2020/2094 establishing a European Union Recovery Instrument to support economic resilience in the aftermath of the Coronavirus crisis.[227]

The legal basis (Art. 322(1)(a)) was considered to be correctly chosen, as the '*Rule of Law Conditionality'* Regulation contains 'financial rules', requiring a *sufficiently direct link* between the breach of the rule of law and the implementation of the budget.[228] With a reference to the second paragraph of Art. 47 of the EU Charter, the Advocate General underlined that Art. 7 TEU is not an exclusive tool to protect the values enshrined in Art. 2 TEU, as is has already been indicated by the CJEU's '*Backsliding'* case-law on the European arrest warrant (*LM, Openbaar Ministerie*) and the independence of the judiciary (*Disciplinary regime for judges/ Repubblika*).[229] Finally, it was argued that the definition of the '*Rule of Law'* concept provided by Regulation 2020/2092 satisfies the minimum requirements for clarity, precision and foreseeability required by the principle of legal certainty as (a) the components of this concept are already defined in the previous CJEU's jurisprudence and (b) the Regulation provisions suggest the indicative list of breaches of the said principle that may give rise to the adoption of the conditionality measures - such as attacks on the independence of the judiciary, failing to sanction unlawful or arbitrary decisions by public authorities, or limiting the availability and effectiveness of legal remedies (Arts. 3, 4(2) of Regulation 2020/2092).[230]

The pandemic-related reasoning definitely paved the way to the Luxembourg Court's assessment of the 'twin' cases on the merits. For instance, the recourse to the legislative history of the '*Rule of Law Conditionality'* Regulation through the references to Rec. 7, presumably to indicate the interconnection with the Council Regulation 2020/2094 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis.[231] In the same vein, the CJEU's judges reflected on the arguments revealed by the intervening European Parliament which requested to assess the cases under expedited procedure. In support of that request, the Parliament submitted that the adoption of the contested regulation was an essential political condition for its approval of Council Regulation (EU, Euratom) 2020/2093 of 17 December 2020 laying down the multiannual financial framework for the years 2021 to 2027 and that, in view of the economic urgency, the funds available under the COVID-19 recovery plan entitled '*Next Generation EU'* should be made available to Member States within an extremely short period of time.[232] The CJEU's President decided to approve the Parliament's request, having mentioned that this decision was based on the fundamental importance of the present case for the EU's legal order, in particular in so far as it concerns the Union's powers to protect its budget and financial interests against effects that may result from breaches of the values contained in Art. 2 TEU.[233]

---

[226] C-156/21, *Hungary v European Parliament and Council of the European Union*, Opinion of Advocate General Campos Sánchez-Bordona delivered on 2 December 2021, ECLI:EU:C:2021:974; Case C-157/21, *Republic of Poland v European Parliament and Council of the European Union*, Opinion of Advocate General Campos Sánchez-Bordona delivered on 2 December 2021, ECLI:EU:C:2021:978. Further, the references are made to the Hungarian AG Opinion to allow for easier reading.

[227] *Ibid*., paras. 97, 107.

[228] *Ibid*., paras. 149-150.

[229] *Ibid*., paras. 210-215.

[230] *Ibid*., paras. 271-299.

[231] C-156/21, *Hungary v European Parliament and Council of the European Union*, Judgment of the Court (Full Court) of 16 February 2022, ECLI:EU:C:2022:97, para. 18.

[232] *Ibid*., paras. 29-30.

[233] *Ibid*., paras. 30-31.

The CJEU's Full Court judgment generally followed the Advocate General's Opinion and focused on the analysis of the '*Rule of Law Conditionality'* Regulation objectives, having referred to Arts. 1 ('*Subject matter'*), 4 ('*Conditions for the adoption of measures'*) and 6 ('*Procedure*').[234] The systemic reading of these provisions allowed to conclude that Regulation 2020/2092 aimed not at detecting the breaches of the 'Rule of Law' principle in general, but only if those breaches (potentially) affected the sound financial management of the EU's budget or the protection of the financial interests of the Union. Thus, the final rationale is not a penalizing the '*systemic deficiencies*' in the EU's Member State, but to safeguard the legitimate interests of final recipients or beneficiaries of the Union's funds on the national level.[235]

With the references to the previous Luxembourg case-law, it was underlined that the EU budget is one of the key (legal) instruments for giving practical effect to Art. 2 TEU values - comprising *the principle of solidarity (Germany v Poland)*, and that the implementation of that principle, through the Union's budget enforcement, is based on *mutual trust between the Member States* (*Opinion 2/13, ASJP, Repubblika*) – comprising the one in the responsible use of their common financial resources.[236] Therefore, the rule of law – as a value common to the European Union and the Member States – is a relevant basis of a conditionality mechanism covered by the concept of '*financial rules'* within the meaning of Art. 322(1)(a) TFEU.[237]

Further, the comparison with the mechanism and objectives of Art. 7 TEU was made: firstly, the Luxembourg judges recourse to the combined reading of Art. 19 TEU and Art. 47 CFREU which guarantee the right to an effective remedy and the right to an independent and impartial tribunal, to safeguard the EU values, the substantive rights and freedoms guaranteed by EU Law in the national legal systems.[238] Importantly, the Title VI 'Justice' of the EU Charter was also mentioned as an integral part of a system of legal remedies ensuring that the right of individuals to *effective judicial protection* is observed in the fields covered by EU Law.[239] These premises, complimented by the previous CJEU's '*Rule-of Law-Backsliding'* remedial jurisprudence (*Commission* v *Poland/ A.B. and Others*) illustrate the non-exclusivity of Art. 7 TEU mechanism as a tool to cope with the '*systemic deficiencies'* in the European Union.[240]

Secondly, Art. 7 TEU comprises all values of Art. 2, while Regulation 2020/2092 concerns only to the '*Rule of Law'* breaches, if there are reasonable grounds to consider that those violations have budgetary implications.[241] It was also mentioned that the aims of the Art. 7 TEU '*nuclear option*' is to allow the Council to penalize serious and persistent breaches of the values (Art. 2 TEU), with a view to compelling the EU Member State concerned to put an end to those breaches. On the contrary, the aim of the '*Rule of Law Conditionality'* Regulation is to guarantee the protection of the EU budget and its beneficiaries in the event of a breach of the principles of the rule of law in a Member State, in accordance with the principle of sound financial management (Arts. 310(5), 317(1) TFEU).[242]

Finally, the CJEU addressed the legality and legal certainty claims made by the Hungarian and the Polish governments. The Luxembourg judges underlined that the definition of the *'Rule of Law'* concept provided by Regulation 2020/2092 shall be seen as '*not a merely a statement of policy guidelines or intentions'*, but describes '*values which ... are an integral part of the very identity of the European Union as a common legal order'* and those values were already '*given concrete expression in principles containing legally binding obligations*

[234] *Ibid*., paras. 110-111.
[235] *Ibid*., paras. 112-114.
[236] *Ibid*., paras. 127-129.
[237] *Ibid*., para. 128.
[238] *Ibid*., paras. 155-159.
[239] *Ibid*., para. 160.
[240] *Ibid*., paras. 161-163.
[241] *Ibid*., paras. 173 – 174.
[242] *Ibid*., paras. 175-180.

for the Member States', developed by the CJEU's own previous case-law.[243] Even though the clause of Art. 4(2) TEU grants the EU Member States some degree of discretion in defining and implementing the rule of law, the national governments still shall always respect the 'core' of the latter principle – as the key EU 'value' captured by Art. 2 TEU.[244]

Moreover, the CJEU's Full Court also confirmed the applicability of the '*Rule of Law Conditionality'* Regulation not only to the actual breaches with the budgetary implications, but also to the infringements of the rule of law '*seriously risk affecting'* the EU budget (Art. 4(1)) – as the other reading would compromise the purposes of the Regulation.[245] It was reminded that first, the Regulation establishes sufficient safeguards to prevent the arbitrary application of its sanctioning mechanism: firstly, it requires that the potential infringements of the 'Rule of Law' principle seriously risk affecting the EU budget (a *'high probability of occurring'*), and, secondly, a '*genuine'* link between the breach and the serious risk shall always be proven.[246]

Conclusion

In this paper, an attempt was made to shed some light on the influence of the COVID-19 crisis on the practice of the Court of Justice of the European Union in the field of 'due process' rights (Arts. 47-50 CFREU). The author analysed the Court's usage of the EU's legislative acts adopted during the pandemic, such as the Commission's Communications on State Aid and the Public Procurement, the Recovery and Resilience Facility Regulation (EU) 2021/241, Communication on the temporary restriction on non-essential travel to the European Union, or the '*Rule of Law Conditionality'* Regulation and discussed the deriving claims raised by the Member States, requiring the interpretation of the Title VI 'Justice' of the EU Charter of Fundamental Rights.

The main argument presented was that this body of the CJEU's jurisprudence can be conventionally divided into five groups: (1) 'EU's Competition, Public Procurement and State Aid', (2) 'EU's Economic Policy Governance', (3) 'AFSJ', (4) 'EU's Environmental Laws and Policies' and the (5) 'Rule of Law Backsliding'. The interpretation of the EU Charter's provisions capturing 'due process' rights - obviously - became a difficult task for the Luxembourg Court within the given context, due to the various challenges brought by the Coronavirus pandemic – such as, for instance, the (potential) shortage of supply of the essential products and services during the COVID-19 outbreak, restrictions on the freedom of movement or the deriving need in the digitalization of the cross-border judicial proceedings. While the post-COVID case-law seem to mirror the recent trends in the Luxembourg Court's jurisprudence - such as the rise of the principle of effective judicial protection and of the good administration, in particular the applicants' *rights of the defence* or the systemic interpretation of Arts. 47-50 CFREU - it also adds novelty to the existing CJEU's proportionality tests, which could be very relevant in regulating the EU-wide emergencies or crises in the years to come.

Firstly, the Luxembourg judges invoked the principle of effective judicial review (and the deriving principle of the *Rewe* effectiveness) to provide an interpretation of the '*Procurement review procedures'* Directive 89/665 to underline that the public procurement shall remain transparent and 'reviewable' (*EPIC Financial Consulting*). The CJEU also referred to the principle of good administration enshrined in Art. 41(1) and (2) CFREU - and in particular the applicants' rights of the defence – in order to emphasize the exclusive right of the EU Member State responsible for granting the aid to consult the documents of the Commission's administrative file in proceedings under Art. 108(2) TFEU (*Ryanair and Others v Commission*) even during the COVID-19 emergency conditions.

[243] *Ibid*., para. 232.
[244] *Ibid*., paras. 233-238.
[245] *Ibid*., paras. 262-263.
[246] *Ibid*., paras. 264-267.

Secondly, a very cautionary attitude was demonstrated in *Comune di Camerota*, where the CJEU preferred to find inadmissible a request for a preliminary ruling on the application of national emergency legislation - which prevented temporarily effective and timely judicial control over compliance with the budgetary rules by an independent court specialized in accounting matters - in light of the systemic reading of Arts. 2 ('*EU Values'*) and 19 ('*EU Courts'*) TEU and Art. 47 ('*Right to an effective remedy and to a fair trial'*) CFREU. In the similar manner, the CJEU avoided direct scrutiny of the national emergency legislation limiting the scope of the judicial review of the ESA 2010 application, having solved the case on the basis of Directive 2011/85 ('*Budgetary frameworks of the Member States'*) and Art. 19 (1) TEU, in conjunction with Art. 47 of the EU Charter and the deriving principles of *equivalence* and *effectiveness* (*Ferrovienord*).

Thirdly, the Luxembourg judges preferred to find the questions on the compatibility of the Italian emergency decrees with the requirements of Arts. 81-82 TFEU, read in conjunction with Art. 47 CFREU, on the absence of available IT equipment and of the overall digitalization of the judicial proceedings in Italy which prevented judges from switching to the remote hearings' mode inadmissible (*XX/OO*) - which presumably demonstrates the lack of intention to intervene directly into this problematic sector of the EU's Area of Freedom, Security and Justice. However, a greater degree of the judicial activism was demonstrated in *Landkreis Gifhorn* where the possibility of using regular prisons for the detention of asylum seekers was investigated: in this case, the CJEU stated that even the COVID-19 emergency context still requires the compliance with the requirements of *effective judicial review* provided for in Art. 18 of the '*Return'* Directive 2008/115/EC in conjunction with Art. 47 of the EU Charter of Fundamental Rights. Moreover, in the landmark *Nordic Info BV*, the CJEU's Grand Chamber confirmed the validity of pandemic restrictions on free movement due to testing requirements and quarantine obligations imposed on the basis of '*Citizens' Rights'* Directive 2004/38/EC, given that the national restrictive rules are clear, precise, non-discriminatory and proportionate, and are subject to appeal – hence respecting the right to an effective judicial remedy enshrined in Art. 47(1) CFREU ('*access to a court'*).

Fourthly, the CJEU's judges demonstrated the viability of well-established *Plaumann* '*direct and individual concern*' formula for the purposes of Art. 263(4) TFEU within the pandemic context, declaring inadmissible an action for annulment of the '*GMO's COVID-19 medicinal products'* Regulation (EU) 2020/1043 (*CNMSE*). One can indicate the same approach in *Paccor Packaging GmbH*: the Luxembourg Court refused to relax the *Degussa* criteria for granting *interim measures* even given the extraordinary nature of the Coronavirus crisis, while assessing application for the suspension of Commission Implementing Regulation (EU) 2020/2151 on harmonised marking specifications for the single-use plastic products through the prism of the Art. 47 CFREU guarantees.

Finally, the groundbreaking '*Rule of Law Backsliding'* judgments allowed for the enforcement of the '*Rule of Law Conditionality'* Regulation 2020/2092 – a part of the post-COVID-19 recovery package (also including the Next Generation EU Recovery Plan and the new Multiannual Financial Framework), which was *de facto* suspended until the CJEU's decision.[247] Two judgments definitely develop the recent CJEU's '*Backsliding'* case-law by (a) confirming the 'formal' definition of the '*Rule of Law'* as one of the core EU values captured by Art. 2 TEU, comprising (b) a system of legal remedies ensuring that the right of individuals to effective judicial protection is observed in the fields covered by EU Law (Title VI 'Justice' of the EU Charter as a whole). Moreover, the Luxembourg Court also used the principles of legal certainty and legality as the tools to limit the national discretion in application of the Art. 4(2) TEU 'national identity' clause in implementing the '*Rule of Law'* concept – as defined in the '*Rule of Law Conditionality'* Regulation.

[247] European Council Conclusions EUCO 22/20 of 11 December 2020 on the MFF and Next Generation EU, COVID-19, climate change, security and external relations.

© Daminova, Nasiya

MTA Law Working Papers

Kiadó: Társadalomtudományi Kutatóközpont (MTA Kiválósági Kutatóhely

Székhely: 1097 Budapest, Tóth Kálmán utca 4.

Felelős kiadó: Boda Zsolt főigazgató

Felelős szerkesztő: Kecskés Gábor

Szerkesztőség: Hoffmann Tamás, Lux Ágnes, Mezei Kitti

Honlap: http://jog.tk.mta.hu/mtalwp

E-mail: mta.law-wp@tk.mta.hu

ISSN 2064-4515