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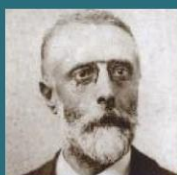
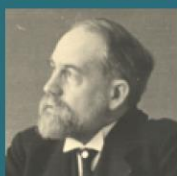
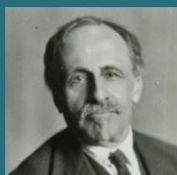
**From Strasbourg to  
Luxembourg?  
Transposing the margin of  
appreciation concept into EU  
law**

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*“Unité et diversité, et jamais l’une sans l’autre,  
n’est-ce pas la formule même de notre Europe ?”*

Albert Camus, *Le pari de notre génération [L’artiste et son temps]*  
*Articles, préface, conférences (1957-1959)*,  
Bibliothèque de la Pléiade, Albert Camus  
Œuvres complètes (vol. IV). Gallimard, 2008

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Abstract: This paper analyses the transposition into EU law of the well-known margin of appreciation concept as a tool to accommodate diversity. From the example provided by the European Court of Human Rights case law, the use of this technique by the Court of Justice of the European Union in the field of fundamental rights protection is discussed. The analysis is conducted by exploring the different legal context in which the Luxembourg court operates, as illustrated by the functions that it performs, both as a supreme and a federal constitutional court. Beyond some common elements, the different perspective of the Luxembourg court is reflected in some distinct features in the use of the margin of appreciation, as for instance the impact on the scope of the margin of appreciation of factors such as the existence or absence of a European consensus in the field, or the degree of harmonisation provided by EU law on the level at which Member States must protect the fundamental right concerned. Despite these differences, there is a similar approach as compared to the use of margin of appreciation concept by the Strasbourg court, by the interconnection of the notions of consensus, harmonisation and subsidiarity in EU law. Given this background, this paper argues that the use of the margin of appreciation by the Court of Justice of the European Union can also be considered as a tool to accommodate diversity, in that sense that its use provides a balance between the respect of the EU constituent and legislator choices and those of the national authorities.

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## I. Introduction

Preserving diversity while securing a uniform and effective observance of fundamental rights is a key challenge in the multi-layered architecture of European human rights law, both at the European Union (EU) level, and in the system established by the European Convention on Human Rights (ECHR). On the one hand, it is highly significant that the motto of the European Union is “United in diversity”. More specifically, the preamble of the Charter of Fundamental Rights of the European Union also refers to the importance of “respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States”<sup>2</sup>. On the other hand, while there is no explicit mention of respect for diversity in the text of the Convention, the tensions between uniformity and diversity are at the very heart of the ECHR system, which was precisely designed to accommodate diverse human rights regimes within a single framework.<sup>3</sup>

In this context, the margin of appreciation constitutes the main European Court of Human Rights’ (ECtHR) tool to accommodate diversity.<sup>4</sup> This technique (of a jurisprudential origin and recently confirmed in Article 1 of Protocol No. 15 amending the Convention, which adds a new recital at the end of the preamble mentioning it, as well as the principle of subsidiarity), has been defined as the “deference to national bodies in the examination of whether a restriction of a convention right is acceptable or not”.<sup>5</sup> It is submitted that the margin of appreciation concept has to be understood within the context of the ECtHR’s position somewhere in between an international court of human rights and a constitutional court, as well as of the subsidiary nature of the Convention.<sup>6</sup>

Indeed, the margin of appreciation is a manifestation of the material aspect of the subsidiary nature of the Convention.<sup>7</sup> According to this principle, which derives from the ECtHR’s role as an international court,<sup>8</sup> national authorities are not only the first but also the best placed to deal with complaints regarding the Convention rights and provide remedies.<sup>9</sup> The principle of subsidiarity consequently refers to a chronological or procedural priority, as well as a normative priority of domestic control over international control.<sup>10</sup> Insofar as the primary role to secure the rights enshrined in the Convention corresponds to the national authorities, the task of the ECtHR is thus limited to intervene only when it is clear that they have failed in doing so.<sup>11</sup> In this context, the function of the margin of appreciation is to adjust the intensity of the review by the Strasbourg court on the conformity of the measures

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<sup>2</sup> Charter of Fundamental Rights of the European Union [2012] OJ C326/02.

<sup>3</sup> M. Varju, “European human rights law as a multi-layered human rights regime. Preserving diversity and promoting human rights” in J. E. Wetzel (ed), *The EU as a “Global Player” in Human Rights?* (Routledge 2011) 59.

<sup>4</sup> E. Brems, “The Margin of Appreciation Doctrine of the European Court of Human Rights: Accommodating Diversity Within Europe” in D. P. Forsythe and P. C. McMahon (eds), *Human Rights and Diversity: Area Studies Revisited* (University of Nebraska Press, 2003) 82.

<sup>5</sup> *Ibid.*

<sup>6</sup> See more largely in this regard F. J. Mena Parras, “Democracy, diversity and the margin of appreciation: a theoretical analysis from the perspective of the international and constitutional functions of the European Court of Human Rights” (2015) 29 *Revista Electrónica de Estudios Internacionales*, DOI: 10.17103/reei.29.10, <<http://www.reei.org/index.php/revista/num29/notas/democracy-diversity-and-the-margin-of-appreciation-theoretical-analysis-from-the-perspective-of-the-international-and-constitutional-functions-of-the-european-court-of-human-rights>> accessed 25 June 2015.

<sup>7</sup> V. Berger, Principle of subsidiarity. Note by the Jurisconsult (European Court of Human Rights. Interlaken follow-up, 8 July 2010), <[http://www.echr.coe.int/Documents/2010\\_Interlaken\\_Follow-up\\_ENG.pdf](http://www.echr.coe.int/Documents/2010_Interlaken_Follow-up_ENG.pdf)> accessed 25 June 2015, 4.

<sup>8</sup> J. Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Martinus Nijhoff Publishers, 2009) 229.

<sup>9</sup> G. Letsas, “Two Concepts of the Margin of Appreciation” (2006) 26 (4) *Oxford Journal of Legal Studies* 705, 722.

<sup>10</sup> *Ibid.*

<sup>11</sup> J. Gerards, “Pluralism, Deference and the Margin of Appreciation Doctrine” (2011) 17 (1) *European Law Journal* 80, 104.

adopted by the national authorities with the requirements of the Convention.<sup>12</sup> In this regard, while exercising its supervisory jurisdiction, “it is in no way the Court’s task to take the place of the competent national courts but rather to review under Article [...] the decisions they delivered *in the exercise of their power of appreciation*”.<sup>13</sup>

The extent of this margin of appreciation can vary for various reasons, as the provision invoked, the aim pursued by the impugned interference and the context of the latter, the existence of a European consensus in the field or the comprehensive analysis by superior national courts.<sup>14</sup> Among these factors, the existence or lack of common ground between the laws of the Contracting States on the question at stake is probably the most relevant factor when considering how the ECtHR accommodates diversity. As results from the Strasbourg court case law, in those situations where the Court finds that there is no consensus among Contracting States on a matter touching upon a non-absolute human right, it usually concludes that national authorities enjoy a wide margin of appreciation, while this margin will be decisively narrowed if the Court finds a consensus on the question at stake.<sup>15</sup>

By widening the margin of appreciation that national authorities in principle enjoy in situations where there is no European consensus and, consequently, exercising a less strict European supervision, the ECtHR takes into account the existing diversity among Contracting States and “refrains from playing its harmonising role, preferring not to become the first European body to “legislate” on a matter still undecided at European level”.<sup>16</sup> Differently from the European Union, the Convention, as Eva Brems has observed, “is not considered to be a superstructure imposed on the contracting states from above, but a system of rules which are part of the common European heritage” and derived from the national systems of the European states, which explains the capital role that the European common ground factor plays in the ECtHR case law.<sup>17</sup> Also, as employed by the Court, the concept of European consensus has to be considered as a legitimising tool, echoing the international nature of the Court.<sup>18</sup> On the contrary, where there is a European consensus, the Strasbourg court can develop its harmonising role, which is linked to its position as a (quasi-) constitutional court with regard to the protection of human rights at the European level, in that sense that the Convention constitutes a catalogue of human rights similar to those at the national level,<sup>19</sup> as well as the fact that the Strasbourg court does not grant any jurisdictional immunity to national constitutional law on its control of the respect of the rights enshrined in the Convention.<sup>20</sup>

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<sup>12</sup> O. M. Arnardóttir, *Equality and Non-Discrimination under the European Convention on Human Rights* (Martinus Nijhoff Publishers, 2003) 60.

<sup>13</sup> ECtHR (Plenary), *Handyside v The United Kingdom* Appl. No. 5493/72 <<http://www.echr.coe.int>> accessed 25 June 2015, para. 50 (emphasis added).

<sup>14</sup> D. Spielmann, “Allowing the Right Margin: The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?” (2012) 14 Cambridge Yearbook of European Legal Studies (2011-2012) 381, 392-411.

<sup>15</sup> See the joint partly dissenting opinion of Judges Rozakis, Tulkens, Fura, Hirvelä, Malinverni and Poalelungid in *A, B and C v. Ireland*, ECtHR (GC) 16 December 2010, Appl. No. 25579/05, <<http://www.echr.coe.int>> accessed 25 June 2015), para. 5.

<sup>16</sup> *Ibid.*

<sup>17</sup> E. Brems, “The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights” (1996) 56 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 240, 276-277.

<sup>18</sup> See K. Dzehtsiarou, “Does consensus matter? Legitimacy of European consensus in the case law of the European Court of Human Rights” (2011) (3) *Public Law* 534.

<sup>19</sup> In the Court’s view, the Convention is a “constitutional instrument of European public order” in the field of human rights, see the judgements delivered by the Grand Chamber of the Court of 23 March 1995, *Loizidou v. Turkey* (preliminary objections), Appl. No. 15318/89), para. 75, 30 June 2005, *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland*, Appl. No. 45036/98, para. 156 and 7 July 2011 *Al-Skeini and others v. The United Kingdom*, Appl. No. 55721/07, para. 141 (emphasis added) <<http://www.echr.coe.int>> accessed 25 June 2015.

<sup>20</sup> D. Maus, “La Cour européenne des droits de l’homme est-elle une cour constitutionnelle supranationale?” in P. Martens, M. Bossuyt, M.-F. Rigaux and B. Renaud (eds.), *Liège, Strasbourg, Bruxelles: parcours des droits de l’homme: Liber amicorum Michel Melchior* (Anthemis, 2013) 477.

Following the ECtHR's perspective on the use of the margin of appreciation concept, a capital question is to what extent this technique is transposed into EU law, as a tool to accommodate diversity in the field of fundamental rights. This is a particularly interesting exercise considering the *a priori* normative difficulties of transposing the concept into EU law due to the different position of both courts and the different contexts in which they operate. In this regard, let alone the greater complexity of the balance act that the Court of Justice of the European Union (CJEU) has to practice,<sup>21</sup> some of the main difficulties have been observed by several commentators.

Indeed, it has been claimed that the margin of appreciation is “a concept designed by an international court with plenary jurisdiction over human rights issues to take account of highly diverse situations, and has no role within a legal order with the different objectives characterised by limited competences and the goal of approximating the legislation and policy of its Member States in those areas”.<sup>22</sup> In that regard, there exists indeed a major difference between the two courts, as the Luxembourg court possesses an EU law all ranging jurisdiction and has to ensure the respect of this legislative approximation of its Member States, as opposed to the human rights specific jurisdiction of the Strasbourg court, which is limited to guarantee the observation of the minimal standards of protection of the rights enshrined in the Convention.

Furthermore, it has been suggested that this doctrine cannot be easily transposed into EU law considering the subsidiary character of the ECHR system compared to the supranational and highly integrated nature of the European Union legal order, in which a transfer of sovereignty has taken place.<sup>23</sup> Indeed, one of the main obstacles suggested on the transposition of the margin of appreciation concept into EU law is the less intense presence of the principle of subsidiarity, as understood in the ECHR system, in the EU legal order.<sup>24</sup> Also in that regard, it has been observed that the discretion left to national authorities might be difficult to transpose into EU law, considering that, differently from the ECtHR, the intervention of the Luxembourg court does not take place after all domestic remedies have been exhausted.<sup>25</sup>

These considerations notwithstanding, it must be observed that the margin of appreciation constitutes also an important tool to accommodate diversity within the EU architecture of fundamental rights, although it presents some different features compared to its use by the ECtHR, and despite of the fact that the CJEU has not applied this technique as extensively or systematically as the Strasbourg court.<sup>26</sup> Given this background, this paper analyses the transposition of the margin of appreciation concept as a tool to accommodate diversity into EU fundamental rights law. The analysis is conducted by exploring the different legal context in which the Luxembourg court operates, as illustrated by its

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<sup>21</sup> As pointed out by Niamh Nic Shuibhne, the CJEU not only has to look to different versions of a given fundamental right (national, ECHR, EU), but also different fields of responsibility for its safeguarding, as well as other competing interests and concerns (“right A “versus” right B versus interest C versus freedom D, and so on”), “Margins of appreciation: National values, fundamental rights and EC free movement law” (2009) 34 (2) *European Law Review* 230, 234.

<sup>22</sup> S. Peers, “Taking Rights Away? Limitations and Derogations” in S. Peers and A. Ward (eds.), *The EU Charter of Fundamental Rights: Politics, Law and Policy, Essays in European Law* (Hart Publishing, 2004) 141, 169.

<sup>23</sup> M. Forowicz, “The Ricochets of Convergence in EU Law and the ECHR: Much Ado about the Margins of Appreciation?” in S. Besson, N. Levrat and E. Clerc (eds), *Interprétation en droit européen / Interpretation in European Law* (Schulthess, 2011) 101, 103.

<sup>24</sup> J. García Roca, “Soberanía estatal *versus* integración europea mediante unos derechos fundamentales communes: ¿cuál es el margen de apreciación nacional?” in J. García Roca and P. A. Fernández Sánchez (eds), *Integración europea a través de derechos fundamentales: de un sistema binario a otro integrado* (Centro de Estudios Políticos y Constitucionales, 2009) 15, 46.

<sup>25</sup> M. Díaz Crego, “El margen de apreciación nacional en la jurisprudencia del Tribunal de justicia de las Comunidades europeas referida a los derechos fundamentales” in García Roca and Fernández Sánchez (eds), *supra* note 24, 55 56.

<sup>26</sup> N.-L. Arold Lorenz, X. Groussot and G. Thor Petursson, *The European Human Rights Culture – A Paradox of Human Rights Protection in Europe?* (Martinus Nijhoff Publishers, 2013) 70.



position as a “hybrid court performing both the functions of a supreme and a [federal] constitutional court”.<sup>27</sup>

The structure of this paper is as follows. In section II, the functions performed by the CJEU as a supreme and a federal constitutional court, as well as their reflection upon the EU fundamental rights architecture within the integrated legal nature of EU law are discussed. Section III presents the margin of appreciation concept as developed by the Luxembourg court and how the functions that the CJEU performs are reflected in its use of this technique. It is submitted that while some important differences in the use of the margin of appreciation concept by the CJEU, as compared to the ECtHR case law, can be observed, a similar approach to the margin of appreciation concept as a tool to accommodate diversity is to be identified, by the interconnection of the notions of consensus, harmonisation and subsidiarity in EU law.

## **II. The Court of Justice of the European Union as a hybrid court performing the functions of a federal constitutional court and a supreme court**

As it is the case for the ECtHR, the role of the Court of Justice of the European Union cannot be described with a formal analysis that focuses only on its character as an international court. It is true that, as the ECHR, the EU legal order was originally conceived as a sub-system of international law (although “with a marked potential for impinging on the sovereignty of Member States”).<sup>28</sup> Most importantly, from a technical point of view, there is no doubt that the Court of Justice of the European Union still remains an international court. Indeed, it has been established by an international treaty, which provides procedures, such as that found in Article 259 TFEU - allowing a Member State to bring a complaint to the Court against another Member State, although it has been rarely used - comparable to the inter-State disputes which are common to the activity of judicial international bodies.<sup>29</sup> Also, the CJEU cannot annul national laws but only declare that a Member State has breached its European obligations, being up to the Member State concerned “to draw the necessary legislative consequences”.<sup>30</sup>

However, in accordance with the *sui generis* nature of the EU legal order *vis-à-vis* classic international law and the constitutionalization process of EU law, the CJEU has to be primarily considered as a hybrid court performing the (closely interrelated) functions of a federal constitutional court (A) and a supreme court (B).<sup>31</sup> After a discussion of these combined roles of the Luxembourg court, the current section finishes by presenting how the functions it performs are reflected upon the EU system of protection of fundamental rights, from the perspective of the relationship between EU law and national law (C).

### **A. The CJEU as a federal constitutional court**

The role of the Court of Justice as a federal constitutional court cannot be decoupled from the transformation of the European Union (at its genesis, the European Communities) from an

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<sup>27</sup> V. Skouris, “The Position of the European Court of Justice in the EU Legal Order and its Relationship with National Constitutional Court” <<http://www.us-rs.si/webroot/o-sodiscu/3666/contributions/presentation-by-dr-vassilios-skouris-president-of-the-european-court-of-justice>> accessed 25 June 2015.

<sup>28</sup> O. Pollicino, “A Further Argument in Favour of the Construction of a General Theory of the Domestic Impact of Jurisprudential Supranational Law. The Genesis and the First Steps of ECHR and EU Legal Orders” (2012) 3 (2) Comparative Law Review 1, 13.

<sup>29</sup> M. Claes and M. de Visser, “The Court of Justice as a Federal Constitutional Court: A Comparative Perspective” in E. Cloots, G. De Baere and S. Sottiaux (eds.), *Federalism in the European Union* (Hart Publishing, 2012) 83, 102.

<sup>30</sup> *Ibid.*

<sup>31</sup> As observed by Gráinne de Búrca, the Luxembourg court “may have no conception of itself as an international court”, “After the EU Charter of Fundamental Rights: the Court of Justice as a Human Rights Adjudicator?” (2013) 20 (2) MJ 168, 182.

international organization into a “*quasi* [federal] constitutional legal order”, as described by the current President of the Court, Vassilios Skouris.<sup>32</sup> Although the original constituent Treaties already provided some of the features of the *sui generis* nature of the EU, the departure of the EU legal order from its original foundations on international law has been led by the CJEU itself, as a result of its “creative jurisprudence”.<sup>33</sup>

Already at the beginning of the European integration process, in its landmark judgment *Van Gend en Loos*, the Court of Justice described the European Economic Community as “a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the Member States, but also their nationals”.<sup>34</sup> With this judgement, together with its decision rendered one year later in the case *Costa v. ENEL*,<sup>35</sup> the Court of Justice laid down the foundations of the constitutionalization of an integrated legal order, whose essential characteristics are the transfer of sovereignty from Member States to the European Union as well as the principles of direct effect and of the primacy of EU law over the law of the Member States<sup>36</sup> – elements which cannot be found as such within the ECHR system.<sup>37</sup>

These features constitute the foundations of the (quasi-) federal nature of the European legal order, in that sense, as Joseph Weiler has observed, that “a set of constitutional norms regulating the relationship between the Union and its Member States, or the Member States and their Union, has emerged which is very much like similar sets of norms in most federal states. There is an allocation of powers [...]; there is the principle of the law of the land, in the EU called Direct Effect; and there is the grand principle of supremacy every bit as egregious as that which is found in the American federal constitution itself”.<sup>38</sup>

The Court explicitly declared the constitutional nature of the European Economic Treaty in its landmark judgement *Les Verts*, when it stated that “the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty”.<sup>39</sup> By placing the principle of the rule of law at the heart of the constitutionalised EU legal order, the Court fully corresponds with its own role, according to article 19 TEU, of ensuring that “in the interpretation and application of the Treaties the law is observed”.<sup>40</sup> Five years after delivering its judgement in *Les Verts*, the Court confirmed its position in the *Opinion 1/91* by declaring “the EEC Treaty, *albeit concluded in the form of an international agreement, nonetheless constitutes the constitutional charter of a Community based on the rule of law*”.<sup>41</sup>

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<sup>32</sup> Skouris, *supra* note 27. In a similar vein, see, among others, P. Craig, “Constitutions, Constitutionalism and the European Union” (2001) 7 (2) European Law Journal 125.

<sup>33</sup> Pollicino, *supra* note 28, 12-13.

<sup>34</sup> CJ, Judgement in *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, C-26/62, ECLI:EU:C:1963:1 (emphasis added).

<sup>35</sup> CJ, Judgement in *Flaminio Costa v E.N.E.L.*, C-6/64, ECLI:EU:C:1964:66.

<sup>36</sup> See CJ, *Opinion 1/91 on the draft agreement relating to the creation of the European Economic Area*, ECLI:EU:C:1991:490, para. 21.

<sup>37</sup> Gerards, *supra* note 11, 102.

<sup>38</sup> J. H. H. Weiler, “Federalism Without Constitutionalism: Europe’s *Sonderweg*” in K. Nicolaidis and R. Howse (eds.), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (OUP, 2001) 54, 56. This does not entail that the European Union can be entirely considered as a federation insofar as, like Armin Cuyvers suggests it, the current EU should be rather described as the result of a combination of its confederal foundation and some federate reinforcements introduced in its constitutional superstructure, “The Confederal Comeback: Rediscovering the Confederal Form for a Transnational World” (2013) 19 (6) European Law Journal 711.

<sup>39</sup> CJ, Judgement in *Parti écologiste “Les Verts” v European Parliament*, C-294/83, ECLI:EU:C:1986:166, para. 23.

<sup>40</sup> Consolidated Version of the Treaty on European Union [2012] OJ C326/01.

<sup>41</sup> CJ, *Opinion 1/91*, *supra* note 36, para. 21 (emphasis added).

As regards more concretely the role of the protection of fundamental rights in the constitutionalization process of the EU legal order and its link with the principle of the rule of law, the Court of Justice considered in its famous judgement in *Kadi* of 2008 that the protection of fundamental rights forms part of the “very foundations of the Community legal order”,<sup>42</sup> and that “*the review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement*”.<sup>43</sup>

The *Kadi* judgement is not only, as it has been observed, “a new vocal demonstration of the ECJ’s constitutional maturity in the protection of the autonomy of the Community legal order”,<sup>44</sup> but also an excellent example of the differences between the roles of the Court of Justice and the ECtHR. As suggested by Advocate General Poiares Maduro in its Opinion in this case, while the duty of the ECtHR is to “ensure the observance of the commitments entered into by the Contracting States” under an instrument which is designed to “operate primarily as an interstate agreement which creates obligations between the Contracting Parties at the international level”, the task of the CJUE is “to act as *the constitutional court of the municipal legal order that is the Community*”, “an autonomous legal order, within which States as well as individuals have immediate rights and obligations”.<sup>45</sup>

More recently, the Court’s recent decision in the *Pringle* case,<sup>46</sup> which addresses several central issues in EU constitutional law, has to be considered as the most recent of a series of landmark judgements revealing the constitutionalization process of the EU legal order, as well as the first illustration of the new pivotal function of the Court in interpreting the principles guiding the EU “constitution-making” in the post-Lisbon era.<sup>47</sup>

Finally, in December 2014, the Court reaffirmed the constitutional character of the EU legal order in the *Opinion 2/13*, on the compatibility of the draft agreement of the EU accession to the ECHR with the Treaties.<sup>48</sup> Indeed, in its Opinion, the Court insisted on the “*constitutional structure of the Union*”, as reflected in “the principle of conferral of powers [...] and in the [EU] institutional framework”, as well as in “the specific characteristics arising from the very nature of EU law”, in particular, the fact that “EU law is characterised by the fact that it stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States [...] and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves”.<sup>49</sup> Considering that “[f]undamental rights, as recognised in particular by the Charter, must [...] be interpreted and applied within the EU in accordance with [its] constitutional framework”,<sup>50</sup> the Court concluded that the accession agreement envisaged was not compatible with EU law as it was liable to affect for various reasons the specific characteristics and the autonomy of the EU legal order.

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<sup>42</sup> CJ (GC), Judgement in *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, joined cases C-402/05 P and C-415/05 P, ECLI:EU:C:2008:461, paras. 303 and 304.

<sup>43</sup> *Ibid.*, para. 316 (emphasis added).

<sup>44</sup> S. Adam, “Overcoming Dissonance to Reshape Coherence. The European Court of Justice, Terrorist Lists and the Rule of Law” in F. Fontanelli, G. Martinico and P. Carrozza (eds.), *Shaping Rule of Law Through Dialogue. International and Supranational Experiences* (Europa Law Publishing, 2010) 191, 208.

<sup>45</sup> Opinion of Advocate General Poiares Maduro in *Kadi*, *supra* note 42, para. 37 (emphasis added).

<sup>46</sup> CJ (Full Court), Judgement in *Thomas Pringle v. Government of Ireland, Ireland and The Attorney General*, C-370/12, ECLI:EU:C:2012:756.

<sup>47</sup> See S. Adam, F. J. Mena Parras, “The European Stability Mechanism through the legal meanderings of the Union’s constitutionalism: Comment on *Pringle*” (2013) 38 (6) E.L.Rev. 848.

<sup>48</sup> CJ (Full Court), *Opinion 2/13*, ECLI:EU:C:2014:2454.

<sup>49</sup> *Ibid.*, paras. 165-166 (emphasis added).

<sup>50</sup> *Ibid.*, para. 177.



In this context, and as it has been observed by the Vice-President of the Court, Koen Lenaerts, “the Treaty performs the classical functions of a constitution by preserving the balance of powers both horizontally between the institutions and vertically between the Community and the Member States and by ensuring respect for fundamental rights”.<sup>51</sup> In that sense - and besides its functions as a supreme court and a guarantor of respect for fundamental rights (see sections II.B and C below)- the Court of Justice, ultimate interpreter and guarantor of the Treaties and charged of building up a coherent legal system,<sup>52</sup> performs the functions corresponding to a federal constitutional court.

On the one hand, the Court is charged to maintain an “institutional balance” in the allocation of powers between the European institutions.<sup>53</sup> On the other hand - and most importantly for our research purposes – according to its role as a federal constitutional court, the CJEU acts as “the judicial empire of the vertical separation of powers” between the Union and its Member States.<sup>54</sup>

In that way, the Court of Justice is therefore accorded, as observed by Koen Lenaerts, the constitutional function of ensuring the balance of powers between the Union and the Member States and, more particularly, that the Union “does not transgress the limits of the competences conferred upon it and encroach upon the competences of the Member States”, which is one of the main constitutional functions of the Court.<sup>55</sup> This is consistent with function of the principle of conferral –enshrined in article 5 (2) TEU and implying that the Union only has the competences that the Member States have explicitly or impliedly conferred on it in the Treaties - as a safeguard of the Member States’ competences.<sup>56</sup>

## **B. The CJEU as a supreme court**

Yet, its constitutional functions do not constitute the only task of the Court, which further has the duty, as a supreme court, of “ensuring the uniform interpretation and application of Union law across the Member States”.<sup>57</sup> Indeed, in its role of “promoting the unity and the consistency of the law”, the Luxembourg court has to be identified as a supreme court.<sup>58</sup> As the Court itself has observed, it “carries out tasks which, in the legal systems of the Member States are those of the constitutional courts, the courts of general jurisdiction or the administrative tribunals as the case may be”.<sup>59</sup> This is different from the situation in federal states within the European Union, but the performance by the CJEU of both a constitutional and a supreme court echoes nonetheless the combined roles of the US Supreme Court.<sup>60</sup>

Both functions cannot, however, be completely separated within the tasks of the CJEU, insofar as a

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<sup>51</sup> K. Lenaerts, “The Basic Constitutional Charter of a Community Based on the Rule of Law” in M. Poiras Maduro and L. Azoulai (eds.), *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50<sup>th</sup> Anniversary of the Rome Treaty* (Hart Publishing, 2010) 295, 302.

<sup>52</sup> A. Hinarejos, *Judicial Control in the European Union: Reforming Jurisdiction in the Intergovernmental Pillars* (OUP, 2009) 1-4.

<sup>53</sup> Lenaerts, *supra* note 51, 298.

<sup>54</sup> Claes and de Visser, *supra* note 29, 99.

<sup>55</sup> Lenaerts, *supra* note 51, 299-300.

<sup>56</sup> E. Sharpston and G. de Baere, “The Court of Justice as a Constitutional Adjudicator” in A. Arnall, C. Barnard, M. Dougan and E. Spaventa (eds.), *A Constitutional order of States? Essays in EU Law in Honour of Alan Dashwood* 129 (Hart Publishing, 2011) 123, 129.

<sup>57</sup> Claes and de Visser, *supra* note 29, 100.

<sup>58</sup> B. Vesterdorf, “A constitutional court for the EU?” (2006) 4 (4) *Int’l J Con Law* 610-611.

<sup>59</sup> Report of the Court of Justice on certain Aspects of the Application of the treaty on European Union, May 1995.

<sup>60</sup> Claes and de Visser, *supra* note 29, 100. In a similar vein see F. G. Jacobs, “Is the Court of Justice of the European Communities a Constitutional Court?” in D. Curtin and D. O’Keeffe (eds.), *Constitutional Adjudication in European Community and National Law: Essays for the Hon. Mr. Justice T. F. O’Higgins* (Butterworth: Dublin, 1992) 25.

divergent application of EU law would deviate from the objectives set out in the Treaties.<sup>61</sup> More concretely, Monica Claes and Maartje de Visser observe that a link between both functions exists in those situations where the uniformity of the EU constitutional law is at stake or, in other words, touching issues that could be considered as forming part of constitutional and not “ordinary” cases (according to what in national settings would be considered constitutional).<sup>62</sup> Also, and inherently linked with the federal character of the Court, even in those “ordinary” non-constitutional EU law cases, by giving its interpretation of EU law, the Court “may generate a centralising effect, and thus effectively impact on the division of powers between the centre and the parts”.<sup>63</sup>

Beyond its interrelationship with the functions performed by the CJEU as a federal constitutional court, the position of the Court as a supreme court should not be underestimated, considering the role that the principle of uniform application of EU law plays in the supranational integrated nature of the EU legal order. In the Court’s own words, the principle of uniform application is “a fundamental requirement of the Community legal order”.<sup>64</sup> There are two mechanisms provided by the TFEU in order to ensure compatibility of national acts with EU law: the direct assessment through the infringement procedure, and an indirect one through the references made by national courts on the interpretation of EU law under the preliminary ruling procedure.<sup>65</sup>

As shown by the amount and the importance of this procedure in the jurisprudence of the CJEU, the latter constitutes the main instrument in the hands of the Court to assess the compatibility of national law with EU law. It is true that from a technical point of view, the Court is not competent within this procedure to “rule on the compatibility of national law with provisions of Community law” but only to “give a ruling on the interpretation of Community law in order to enable the national court to assess the compatibility of those rules with the Community provisions”.<sup>66</sup> However, the rulings given by the CJEU - which have also “*erga omnes*” effect - will in practice determine the outcome of such assessment at the national level.<sup>67</sup>

In the Court’s own words, this procedure is “essential for the preservation of the Community character of the law established by the Treaty and has the object of ensuring that in all circumstances this law is the same in all States of the Community”, thus avoiding “divergences in the interpretation of Community law which the national courts have to apply”.<sup>68</sup> Again, on the links between the different functions performed by the Luxembourg court, by indirectly reviewing the compatibility of national law, the Court has the last word in the interpretation of all the law of the “federation” (that is, EU and

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<sup>61</sup> K. Lenaerts, “The Rule of Law and the Coherence of the Judicial System of the European Union” (2007) 44 CMLRev. 1625, 1651-1652.

<sup>62</sup> Claes and de Visser, *supra* note 29, 100.

<sup>63</sup> *Ibid.*, 100-101.

<sup>64</sup> CJ, Judgement in *Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH v Hauptzollamt Paderborn*, joined cases C-143/88 and C-92/89, ECLI:EU:C:1991:65, para. 26.

<sup>65</sup> Lenaerts, *supra* note 61, 1635-1636.

<sup>66</sup> CJ, Judgement in *Lamire NV v Nationale Dienst voor Afzet van Land- en Tuinbouwprodukten*, C-130/93, ECLI:EU:C:1994:281, para. 10.

<sup>67</sup> Lenaerts, *supra* note 61, 1641-1642. In this regard, the advisory opinion procedure that the recently adopted Protocol No. 16 amending the Convention aims to introduce within the ECHR system cannot be assimilated to the preliminary ruling procedure in EU law, insofar as the advisory opinions of the Strasbourg court shall not be binding. Also, it should not be missed the fact that for those courts or tribunals which can request that the ECtHR gives an advisory opinion (that is, only the highest courts or tribunals, as designated by the Contracting State), this request is merely optional, whereas in the EU legal order, according to article 267 TFEU, it is mandatory to national courts to refer a question to the Luxembourg court “[w]here any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law” (the request remaining optional for any other national court of tribunal), Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/01.

<sup>68</sup> CJ, Judgement in *Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, C-166/73, ECLI:EU:C:1974:3, para. 2.

national law), which turns the CJEU into a genuine constitutional court.<sup>69</sup>

### C. The reflection of the CJEU's roles upon the EU fundamental rights architecture

While absent at the beginning of the European integration process, respect for human rights is currently one of the values in which the European Union is founded, as provided by article 2 TEU, and constitutes for the CJEU (as already mentioned above) one of the “very foundations of the Community legal order”. Fundamental rights are protected at the EU level in a double dimension, as provided by paragraphs 1 and 3 of article 6 TEU. On the one hand, the Union recognises the rights, freedoms and principles set out in the Charter, which has the same legal value as the Treaties. On the other hand, fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, constitute general principles of the Union's law.

The obligation by Member States to respect fundamental rights at the EU level is translated into their duty not to violate fundamental rights when their measures or actions fall within the scope of EU law,<sup>70</sup> as well as into the legislative developments achieved by the exercise of the competences that the European Union has in this field. In this regard however, it should not be overlooked that the EU institutions lack a “general power to enact rules on human rights”<sup>71</sup>, and that - as provided by article 51 (2) of the Charter - “[t]he Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties”.<sup>72</sup>

The above, however, does not preclude the reality that the EU is progressively developing a genuine human rights policy, in the sense that the EU involvement in fundamental rights protection goes along with the expansion of EU law into more sensitive areas with regard to fundamental rights, such as criminal law, and immigration and asylum law.<sup>73</sup> This is reflected in the rise of fundamental rights implications in EU secondary legislation<sup>74</sup>, as well as of the amount of fundamental rights cases before the Court of Justice in recent years.<sup>75</sup>

However important the role of fundamental rights in the EU legal order might be, it should not be missed that they only play a part in the EU, which prevents to consider the Court of Justice as a human rights court, in contrast to the ECtHR.<sup>76</sup> Indeed, the duties of the CJEU differs from those of a purely human rights court and have a definite impact on its position, the main function of which in this context is “to interpret the role, the meaning and the scope of human rights in light of the overall structure and functions of the treaties as a whole”, within a system of economic and political governance.<sup>77</sup>

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<sup>69</sup> D. Sarmiento, *Poder judicial e integración europea. La construcción de un modelo jurisdiccional para la Unión*, (Thomson Civitas, 2004) 68.

<sup>70</sup> EU fundamental rights bind the Member States whenever they enact measures to implement EU law or adopt measures that constitute derogations from provisions of EU law, see more largely in this regard X. Groussot, L. Pech and G. T. Petursson, “The Reach of EU Fundamental Rights on Member State Action after Lisbon” in S. de Vries, U. Bernitz and S. Weatherill (eds.), *The Protection of Fundamental Rights in the EU After Lisbon* (Hart Publishing, 2013) 97.

<sup>71</sup> CJ, *Opinion 2/94, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, ECLI:EU:C:1996:140, par. 27.

<sup>72</sup> Charter of Fundamental Rights of the European Union [2012] OJ C326/02.

<sup>73</sup> Claes and de Visser, *supra* note 29, 103.

<sup>74</sup> See E. Muir, “The fundamental rights implications of EU legislation: Some constitutional challenges” (2014) 51 (1) *CMLRev.* 219, 223-229.

<sup>75</sup> Arold Lorenz, Groussot and Petursson, *supra* note 25, 152.

<sup>76</sup> C. McCrudden, “Using Comparative Reasoning in Human Rights Adjudication: The Court of Justice of the European Union and the European Court of Human Rights Compared” (2013) 15 (2012-13) *Cambridge Yearbook of European Legal Studies* (2012-2013) 383, 406-407.

<sup>77</sup> *Ibid.*, 407.

This is closely linked with the role of the CJEU as a supreme court. Indeed, this element can be clearly seen in what a judge from the Luxembourg court considered when declaring that “[w]e are not a human rights court [...]. This is not our main task, this is a very important task for Europe [...] and we do it but we do it as [*sic*] supreme court normally would do it and not as a human rights court would do it. Because a human rights court has exclusive competence to develop and to apply human rights. For us, we do it in the framework of our normal function; [which] is to guarantee the uniform application of Community law, and this is the more important task of our Court”.<sup>78</sup> Also in that sense, and as the Court itself has put it in a recent judgement, the rationale behind the objective of protection by Member States of fundamental rights in EU law is “*the need to avoid a situation in which the level of protection of fundamental rights varies according to the national law involved in such a way as to undermine the unity, primacy and effectiveness of EU law*”.<sup>79</sup>

From the perspective of the functions performed by the CJEU as a federal constitutional court, the fact that the Charter of Fundamental Rights was given a binding nature with the entry into force of the Lisbon treaty further strengthens the characterisation of the Court as a constitutional court, insofar as the fundamental rights protection is one of the core functions of national constitutional courts.<sup>80</sup> The EU catalogue of fundamental rights (from which the Charter constitutes “the reference text and the starting point for the CJEU’s assessment of the fundamental rights which that legal instrument recognises”<sup>81</sup>) is not doomed to act in a complementary manner *vis-à-vis* national catalogues of human rights (as it is the case for the ECHR), but as the main applicable catalogue in those situations when Member States are implementing or derogating from EU law.<sup>82</sup> In that sense, the Charter can be understood as a federal constitutional element of EU law, by establishing standards of protection of fundamental rights opposable not only to the Union institutions, but also to Member States when acting within the field of application of EU law (see Section III.B below).

In this context, the EU system of protection of fundamental rights faces similar challenges as those at the heart of the US federal system, on the balance between centripetal and centrifugal forces and the tensions between uniformity and diversity.<sup>83</sup> Indeed, as Eleanor Spaventa suggests, the EU’s constitutional process in the field of fundamental rights protection is translated into the tensions between federalisation and centralisation and the conflicting centripetal and centrifugal forces, the former being the reflect of the development of the EU into a more comprehensive constitutional system and the latter of the desire to maintain a diversified and multifaceted constitutional one.<sup>84</sup>

### III. The margin of appreciation under the perspective of the CJEU

As compared to the ECtHR, the Luxembourg court has a relatively different perspective on the margin of appreciation concept. While it is possible to find some common elements on the use of the same technique by both courts, the CJEU case law reveals the existence of some distinct features on the margin of appreciation concept in EU law, for example the impact on the scope of the margin of appreciation of factors such as the existence or absence of a European consensus in the field, or the

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<sup>78</sup> Arold Lorenz, Groussot and Petursson, *supra* note 26, p. 156.

<sup>79</sup> CJ, Judgement in *Cruciano Siragusa v Regione Sicilia - Soprintendenza Beni Culturali e Ambientali di Palermo*, ECLI:EU:C:2014:126, C-206/13, para. 32 (emphasis added).

<sup>80</sup> Claes and de Visser, *supra* note 29, 104.

<sup>81</sup> Joint Communication from Presidents Costa and Skouris of 24 January 2011, available at <[http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-02/cedh\\_cjue\\_english.pdf](http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-02/cedh_cjue_english.pdf)> accessed 25 June 2015, par. 1.

<sup>82</sup> Díaz Crego, *supra* note 25, 56.

<sup>83</sup> See F. Fabbrini, *Fundamental Rights in Europe: Challenges and Transformations in Comparative Perspective* (OUP, 2014) 29-44 and A. Torres Pérez, *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication* (OUP, 2009) 70-93.

<sup>84</sup> E. Spaventa, “Federalisation Versus Centralisation: Tensions in Fundamental Rights Discourse in the EU” in M. Dougan and S. Currie (eds.), *50 Years of the European Treaties. Looking Back and Thinking Forward* (Hart Publishing, 2009) 343, 344.

degree of harmonisation provided by EU law on the level at which Member States must protect the fundamental right concerned (A).

However, and although these different elements are in accordance with the different perspective of the CJEU and the functions it performs, it is submitted that the CJEU case law presents nonetheless a similar approach as compared to the margin of appreciation doctrine in the ECtHR case law, by the interconnection of the notions of consensus, harmonisation and subsidiarity in EU law. Given this background, it is argued that the use of the margin of appreciation by the Court of Justice of the European Union can also be considered as a tool to accommodate diversity, in the sense that its use provides a balance between the respect of the EU constituent and legislator choices and those which can be made at the national level (B).

### A. Mapping the margin of appreciation concept in the CJEU case law

Beyond what it has been suggested as a tacit use of the margin of appreciation when looking at those situations when the Luxembourg court, within the preliminary ruling procedure, defers the conclusion of the fundamental rights dispute referred to it by the national courts back to them,<sup>85</sup> the notion of margin of appreciation has a wider meaning in the CJEU case law when compared to its use by the ECtHR. Indeed, it covers not only the extent to which States may derogate from fundamental rights, but also the leeway that they might be accorded when implementing their own policies, as exceptions to EU law.<sup>86</sup> From a terminological point of view, while the term “margin of appreciation” is also used in the CJEU case law, the Court usually rather refers to the “discretion” or “margin of discretion” of national authorities, although these terms appear to be used interchangeably by the Court.<sup>87</sup>

On the use of the notion of margin of appreciation or (of) discretion in the CJEU case law when reviewing the measures adopted by national authorities, consideration must first be given to the fact that, despite the normative differences between the ECHR and the EU legal order, it is actually possible to find some similar situations in which this technique has been employed by the CJEU, in comparison to the ECtHR case law. Indeed, this has been, for instance, the case when looking at the Luxembourg court internal market case law on the national derogations to fundamental freedoms,<sup>88</sup> essentially within the context of the preliminary ruling procedure, as the privileged instrument in the hands of the Court to assess *de facto* the compatibility of national law with EU law.<sup>89</sup>

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<sup>85</sup> J. García Roca, *supra* note 24, 47. On this deference to the national courts, which can be seen as an illustration of the judicial subsidiarity which characterises the EU system of jurisdiction, see Takis Tridimas, “Constitutional review of member state action: The virtues and vices of an incomplete jurisdiction” (2011) 9 (3-4) I-CON 737, and D. Sarmiento, “The Silent Lamb and the Deaf Wolves: Constitutional Pluralism, Preliminary References and the Role of Silent Judgements in EU Law” in M. Avbelj and J. Komárek (eds.), *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing, 2012) 285, 298-302.

<sup>86</sup> M. Fichera and E. Herlin-Karnell, “The Margin of Appreciation Test and Balancing in the Area of Freedom Security and Justice: A Proportionate Answer for a Europe of Rights?” (2013) 19 (4) European Public Law 778.

<sup>87</sup> This conclusion can be drawn by the fact that the notion of “*marge d’appréciation*” in French (the working language of the Court) is indistinctly translated by both “margin of appreciation” and “(margin of) discretion” in the English versions of the CJEU judgements. See however the theoretical distinction between the notions of “margin of appreciation” and “margin of discretion”, which recognition Magdalena Forowicz claims to be reflected in an isolated judgement of the General Court (the *BP Chemical* case, GC, Judgement in *BP Chemicals Ltd v Commission of the European Communities*, T-184/97, ECLI:EU:T:2000:217), “State Discretion as a Paradox of EU Evolution”, EUI Working Papers MWP2011/27, <<http://cadmus.eui.eu>> accessed 25 June 2015, 25-26, as well as more largely on this question, A. Bouveresse, *Le pouvoir discrétionnaire dans l’ordre juridique communautaire* (Bruylant, 2010) 50-66.

<sup>88</sup> Some of the fundamental freedoms have been included in the catalogue provided by the Charter of Fundamental Rights, see articles 15 (2), on the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State, and 45 (1), on the freedom of movement and of residence of every EU citizen, although this has not necessarily entailed a different treatment by the CJEU - compared its case law previous to the entry into force of the Lisbon treaty -, which continues to refer to the treaty provisions that consecrates the fundamental freedoms.

<sup>89</sup> This also applies to the CJEU case law in those cases where the margin of appreciation concept is mobilised by the Court regarding Member States’ implementing measures of EU secondary law. However, some few exceptions are contained in

Already in 1974, in the *Van Duyn* case concerning a national measure derogating the freedom of movement for workers on the grounds of public policy, and although declaring that the concept of public policy had to be “interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without being subject to control by the institutions of the Community”, the Court considered that “the particular circumstances justifying recourse to the concept of public policy may vary from one country to another and from one period to another, and it is therefore necessary in this matter to allow the competent national authorities an *area of discretion* within the limits imposed by the Treaty”.<sup>90</sup>

This notion of discretion, which plays the same role as the reference to a “margin of appreciation” in the ECtHR case law,<sup>91</sup> has since then been used in other cases, on derogations of fundamental freedoms, including those on the grounds of the protection of fundamental rights. Indeed, in *Schmidberger*, the Court affirmed that the competent national authorities enjoyed a “wide margin of discretion” in regard to the balance to be struck between the protection of the fundamental rights to freedom of expression and freedom of assembly, on the one side, and the principle of free movement of goods, on the other side.<sup>92</sup> Just to mention another (important) example in that regard, one year later, in the *Omega* case, the Court allowed for a “margin of discretion” concerning a measure derogating the freedom to provide services adopted on the basis of the protection of human dignity as a fundamental value laid down in the German constitution, within the public policy clause of the Treaty.<sup>93</sup>

This approach has also been adopted in more recent cases involving the national identity clause of article 4 (2) TEU introduced by the Lisbon treaty as, for instance, in the Court’s decision in *Sayn-Wittgenstein*, a case involving a national measure restricting the freedom of movement and residence enjoyed by citizens of the Union (as well as the fundamental right of respect for private and family life), on the grounds of the Law on the abolition of the nobility (considered as implementing the principle of equal treatment that is enshrined in article 20 of the Charter), which has constitutional status in Austria.<sup>94</sup>

When comparing the CJEU internal market case law to the use by the ECtHR of the margin of appreciation doctrine, it must be observed that the common ground factor plays a relatively different role. As it is the case in the Strasbourg case law, the CJEU has also explicitly considered the lack of consensus among Member States as implying the grant of a domestic margin of appreciation regarding the conception on the protection of the interest concerned justifying a restrictive measure to a fundamental freedom. In that regard, as its ruling in *Dynamic Medien* indicates in relation to the level of protection and the detailed rules on the protection of the rights of the child, the Court considered that “[a]s that conception may vary from one Member State to another on the basis of, *inter alia*, moral or cultural views, Member States must be recognised as having a definite margin of discretion”.<sup>95</sup>

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the account of the Court case law in the current section, both regarding national derogations from fundamental freedoms and implementing measures of EU secondary law.

<sup>90</sup> CJ, Judgement in *Yvonne van Duyn v Home Office*, C-41/74, ECLI:EU:C:1974:133, para. 18 (emphasis added).

<sup>91</sup> J. A. Sweeney, “A “Margin of Appreciation” in the Internal Market: Lessons from the European Court of Human Rights” (2007) 34 (1) *Legal Issues of Economic Integration* 27, 33

<sup>92</sup> CJ, Judgement in *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich*, C-112/00, ECLI:EU:C:2003:333, para. 82.

<sup>93</sup> CJ, Judgement in *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, C-36/02, ECLI:EU:C:2004:614, para. 31.

<sup>94</sup> See CJ, Judgement in *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*, C-208/09, ECLI:EU:C:2010:806, para. 87.

<sup>95</sup> CJ, Judgement in *Dynamic Medien Vertriebs GmbH v Avides Media AG*, ECLI:EU:C:2008:85, C-244/06, par. 44 (emphasis added). Also, in its gambling case law, where the Court has admitted that “the legislation on games of chance is one of the areas in which there are significant moral, religious and cultural differences between the Member States” (CJ (GC), Judgement in *Liga Portuguesa de Futebol Profissional and Bwin International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa*, C-42/07, ECLI:EU:C:2009:519, para. 57), the CJEU has considered that these



However, in the Court's view "[i]t is not indispensable [...] for the restrictive measure [of the fundamental freedom at stake] issued by the authorities of a Member State to correspond to a *conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected*".<sup>96</sup> Therefore, compared to the ECtHR, while the mobilization of the margin of appreciation and the adoption of a deferential approach by the CJEU might also be based on the idea of a lack of minimum consensus within the EU on political or ideological questions particularly sensitive to Member States,<sup>97</sup> the CJEU approach to consensus is more flexible.<sup>98</sup>

In that respect, and according to the different perspective of the CJEU, the existence of harmonisation measures at the EU level, as well as the concrete distribution of competences between the EU and its Member States, seem to play a role as important as the heterogeneity of values among Member States in the recognition and determination of the extent of a margin of discretion for the national authorities. In that regard, the CJEU case law can be considered as revealing a double dimension in the structure of the margin of appreciation.

Indeed, it can be observed, on the one hand, that the Court considers the need for granting a margin of appreciation to the national authorities (and its extent) taking into account similar factors as those relevant in the ECtHR case law. For example, and apart from the references to the existence or lack of a European consensus mentioned above, another relevant aspect is the impact of the aim pursued by the national authorities when adopting the restrictive measure on the margin of appreciation granted by the CJEU, as exemplified in its case law on the right of the freedom of expression.<sup>99</sup> However, on the other hand, the CJEU examines at the same time whether there are any EU harmonisation measures that might limit or suppress the Member States discretion.

An example of this approach to the margin of appreciation is provided by the CJEU case law in the field of gambling. As Advocate General Mengozzi argued in its Opinion to *Stoß*, the CJEU case law in this field "pays attention to the particular nature of gaming, a sector in which it is not possible to disregard 'moral, religious or cultural considerations' and which entails 'a high risk of crime or fraud' and constitutes 'an incitement to spend which may have damaging individual and social consequences'".<sup>100</sup> As he continued in reasoning, "[i]n view of those factors, and in default of

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"moral, religious and cultural factors, and the morally and financially harmful consequences for the individual and society associated with gaming and betting, could serve to justify the existence on the part of the national authorities of a margin of appreciation sufficient to enable them to determine what consumer protection and the preservation of public order require", CJ, Judgement in *Criminal proceedings against Piergiorgio Gambelli and Others*, C-243/01, ECLI:EU:C:2003:597, para. 63 (emphasis added). This passage of *Gambelli* has been often used by the Court since then, while replacing the mention to a "margin of appreciation" by "margin of discretion".

<sup>96</sup> See, among others, CJ, Judgement in *Omega*, *supra* note 93, para. 37 (emphasis added).

<sup>97</sup> See A. Bailleux, "La marge d'appréciation dans le contentieux des libertés de circulation. Quelle flexibilité au-delà du slogan?" in D. Kaminski (dir.), *La flexibilité des sanctions – XXIèmes journées juridiques Jean Dabin* (Bruylant, 2012) 519, 527-528.

<sup>98</sup> Sweeney, *supra* note 91, 47-48.

<sup>99</sup> See, for example, what the Court considered in *Karner*: "It is common ground that the discretion enjoyed by the national authorities in determining the balance to be struck between freedom of expression and the abovementioned objectives varies for each of the goals justifying restrictions on that freedom and depends on the nature of the activities in question", CJ, Judgement in *Herbert Karner Industrie-Auktionen GmbH v Troostwijk GmbH*, C-71/02, ECLI:EU:C:2004:181, par. 51 (emphasis added). Also, in *United Pan-Europe*, the Court noted that "the maintenance of pluralism, through a cultural policy, is connected with the fundamental right of freedom of expression and, accordingly, [...] the national authorities have a wide margin of discretion in that regard", CJ, Judgement in *United Pan-Europe Communications Belgium SA and Others v Belgian State*, C-250/06, ECLI:EU:C:2007:783, par. 44 (emphasis added).

<sup>100</sup> Opinion of Advocate General Mengozzi in *Markus Stoß, Avalon Service-Online-Dienste GmbH and Olaf Amadeus Wilhelm Happel v Wetteraukreis and Kulpa Automaten-Service Asperg GmbH, SOBO Sport & Entertainment GmbH and Andreas Kunert v Land Baden-Württemberg*, joined cases C-316/07, C-358/07, C-359/07, C-360/07, C-409/07 and C-410/07, ECLI:EU:C:2010:109, para. 31.

*Community harmonisation in the sector*, the Court has held that the *Member States have a sufficient margin of appreciation* to determine, according to their own scale of values, what is required to protect participants and, more generally, to maintain order in society”.<sup>101</sup>

This double dimension on the margin of appreciation’s structure in the Court’s case law might nonetheless be difficult to draw in EU law. Indeed, the absence of EU harmonisation measures on the way to protect a given fundamental right or to balance it with a determinate legitimate interest can precisely constitute the reason of the existence of heterogeneous values and of different moral, cultural, religious or social particularities among the Member States that will justify the deference allowed to national authorities.

Moving into the margin of appreciation as used by the CJEU in cases where Member States implement EU secondary law, this phenomenon can be exemplified by the *Petersen* case, on the prohibition of discrimination on grounds of age as laid down by article 6 of the Directive 2000/78/EC,<sup>102</sup> where the Court declared that because of the fact that in the field of health “*the Member States retain power to organise their social security systems*”, when assessing whether Member States have complied with their obligations under EU law, “account must be taken of the fact that a *Member State may determine the level of protection which it wishes to afford to public health and the way in which that level is to be achieved*”.<sup>103</sup> In this regard, the Court added that “[s]ince the level of protection may vary from one Member State to the other, Member States must be allowed discretion”.<sup>104</sup>

This approach cannot, however, be considered to apply only in those cases where Member States are exclusively competent in the field or in default of any harmonisation measures at the EU level. Indeed, the discretion of national authorities can result from the harmonisation measures themselves of a EU secondary law instrument. One of the situations in which this might occur can be observed in the *Promusicae* case - in which the balance to be struck between the right to respect for private life, on the one hand, and the rights to protection of property and to an effective remedy, on the other hand was at stake - where the CJEU considered that the provisions of the directives involved were “relatively general, since they have to be applied to a large number of different situations which may arise in any of the Member States”, and therefore included “rules which leave the Member States with the necessary discretion to define transposition measures which may be adapted to the various situations possible”.<sup>105</sup>

Given this background, and as Magdalena Forowicz has correctly pointed out, it must be considered that the level of harmonisation provided by the EU legislation is “directly linked to the level of discretion attributed to States by the [CJEU] and its willingness to attribute additional room for manoeuvre for States”.<sup>106</sup> In this regard, the judgement that the Court delivered in the famous case *Parliament v Council* of 2006 on the right to family reunification of minor children of third country nationals<sup>107</sup> constitutes a good illustration of the impact of the harmonisation at the EU level on the margin of appreciation left to Member States after the intervention of the European legislator, by the adoption of the Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.<sup>108</sup>

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<sup>101</sup> *Ibid.* (emphasis added).

<sup>102</sup> Council Directive 2000/78/EC, of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

<sup>103</sup> CJ, Judgement in *Domnica Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe*, C-341/08, ECLI:EU:C:2010:4, para. 51 (emphasis added).

<sup>104</sup> *Ibid.* (emphasis added).

<sup>105</sup> CJ (GC), Judgement in *Productores de Música de España (Promusicae) v Telefónica de España SAU*, C-275/06, ECLI:EU:C:2008:54, para. 67.

<sup>106</sup> Forowicz, *supra* note 87, 19.

<sup>107</sup> CJ (GC), Judgement in *European Parliament v Council of the European Union*, C-540/03, ECLI:EU:C:2006:429.

<sup>108</sup> OJ 2003 L 251, p. 12.

Indeed, in its decision, the Court declared that “while “[a]rticle 4 (1) of the Directive imposes *precise positive obligations, with corresponding clearly defined individual rights, on the Member States*, since it requires them, in the cases determined by the Directive, to authorise family reunification of certain members of the sponsor’s family, *without being left a margin of appreciation*”,<sup>109</sup> “[t]he final subparagraph of [that article] has the effect, in strictly defined circumstances, namely where a child aged over 12 years arrives independently from the rest of the family, of *partially preserving the margin of appreciation of the Member States* by permitting them, before authorising entry and residence of the child under the Directive, to verify whether he or she meets a condition for integration provided for by the national legislation in force on the date of implementation of the Directive”.<sup>110</sup>

In this context, this “limited margin of appreciation” which Member States enjoy “is no different from that accorded to them by the European Court of Human Rights, in its case-law relating to that right, for weighing, in each factual situation, the competing interests”.<sup>111</sup> Although the references in that sense are unusual in the CJEU fundamental rights case law, the Luxembourg court has also invoked the argument of the better place occupied by national authorities as entailing certain discretion when implementing EU law.<sup>112</sup> As this is also the case for the margin of appreciation as employed by the ECtHR, the margin for manoeuvre that Member States have recognised is not unlimited, and it cannot particularly be used in a manner which would undermine the objective and the effectiveness of the EU secondary law instrument at stake.<sup>113</sup>

The Janus-faced relationship between national discretion and level of harmonisation is manifest in two recent landmark judgements adopted by the Grand Chamber of the Court on the same day, on the interpretation of article 53 of the Charter.<sup>114</sup> As the Court declared in *Åkerberg Fransson*, “where a court of a Member State is called upon to review whether fundamental rights are complied with by a national provision or measure which, in a situation *where action of the Member States is not entirely determined by European Union law*, implements the latter [...], *national authorities and courts remain free to apply national standards of protection of fundamental rights*, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised”.<sup>115</sup>

However, in those cases where the European legislator has provided an exhaustive harmonisation regarding the relevant aspects of the way to protect a particular fundamental right, no discretion is granted to the Member States when implementing the relevant provisions of the EU secondary law instrument, as confirmed by the recent judgement of the Court in *Melloni*.<sup>116</sup> This is consistent with an

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<sup>109</sup> CJ, Judgement in *European Parliament v Council*, *supra* note 107, para. 60 (emphasis added).

<sup>110</sup> *Ibid.*, para. 61 (emphasis added).

<sup>111</sup> *Ibid.*, para. 62.

<sup>112</sup> See for example CJ (GC), Judgement in *Michaniki AE v Ethniko Symvoulío Radiotileorasis and Ypourgos Epikrateias*, C-213/07, ECLI:EU:C:2008:731, paras. 55-56, where after considering that it was appropriate to grant the Member States “a certain discretion for the purpose of adopting measures intended to safeguard the principles of equal treatment of tenderers and of transparency” (constituting the basis of the Community directives on the award of public contracts), the Court declared that “[e]ach Member State is best placed to identify, in the light of historical, legal, economic or social considerations specific to it [...], situations propitious to conduct liable to bring about breaches of those principles”.

<sup>113</sup> See *inter alia* CJ, Judgement in *Rhimou Chakroun v Minister van Buitenlandse Zaken*, C-578/08, ECLI:EU:C:2010:117, para. 43.

<sup>114</sup> Which reads in the following way: “Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States’ constitutions”, Charter of Fundamental Rights of the European Union, *supra* note 2.

<sup>115</sup> CJ (GC), Judgement in *Åklagaren v Hans Åkerberg Fransson*, C-617/10, ECLI:EU:C:2013:105, para. 29 (emphasis added).

<sup>116</sup> CJ (GC), Judgement in *Stefano Melloni v Ministerio Fiscal*, C-399/11, ECLI:EU:C:2013:107, paras. 55-64.

a *contrario* reading of what the Court considered in its judgement *Commission v Italy*, about the fact that “[i]n the absence of *fully* harmonising provisions at Community level”, Member States must enjoy a margin of appreciation on the degree of protection which they wish to apply to ensure the objective of road safety and the way in which this degree of protection is to be achieved.<sup>117</sup>

While the notion of margin of appreciation was not explicitly used by the Court in *Åkerberg Fransson*, nor in *Melloni*, it seems clear that the notion of “determination” used instead is to be understood as a concept equivalent to that of discretion.<sup>118</sup> In this regard, the level of harmonisation provided by EU law plays, therefore, a key role when analysing the existence of a margin of appreciation and measuring the extent of the discretion that Member States enjoy in the implementation of EU law.

On the impact of the margin of appreciation on the strictness of the judicial review of the national measures (and as this is also the case in the ECtHR case law), the discretion that Member States enjoy is reflected in the intensity of the review of national measures by the CJEU. Indeed, in most of the cases discussed above in the internal market case law, the grant of a margin of discretion to national authorities has been accompanied by the relaxation of the proportionality test applied by the Court.<sup>119</sup>

Similarly, as put by Advocate General Kokott quoting several judgements of the CJEU related to the implementation of the above mentioned Directive 2000/78/EC on the prohibition on discrimination on grounds of age, “[i]n light of the wide discretion enjoyed by the Member States in regard to the choice of measures for attaining their aims in the field of employment and social policy, the role of the Court is limited to ensuring that the measures taken do not appear *unreasonable*, or to put it another way, that the measures taken are *not clearly inappropriate* for attaining the aim pursued”.<sup>120</sup> Accordingly, the Court has also considered that the Commission’s power of review of national measures in a field where Member States are granted a broad discretion “*must be limited to determining whether the Member States have committed any manifest errors of assessment*”.<sup>121</sup>

## **B. Understanding the margin of appreciation concept in the CJEU case law: some reflections on the notions of consensus, harmonisation and subsidiarity in EU law**

The way that the CJEU uses the margin of appreciation concept is consistent with its role as a federal constitutional court regarding the vertical allocation of powers in the EU. This role, as suggested by Koen Lenaerts, can be explained from the perspective of federalism understood in its conception of “balance of power between the federation and its component entities”,<sup>122</sup> and which not only draws the borderline between EU and Member States competences, but also defines the relationship between

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<sup>117</sup> See CJ (GC), Judgement in *Commission of the European Communities v Italian Republic*, ECLI:EU:C:2009:66, paras. 61 and 65 (emphasis added).

<sup>118</sup> D. Sarmiento, “Who’s afraid of the Charter? The Court of Justice, national courts and the new framework of fundamental rights protection in Europe” (2013) 5 (50) CMLRev. 1267, 1289. See also, on the implicit argument of the margin of appreciation left to national authorities when implementing EU law as a distinctive feature of the two decisions, D. Ritleng, “De l’articulation des systèmes de protection des droits fondamentaux dans l’Union: Les enseignements des arrêts *Åkerberg Fransson* et *Melloni*” (2013) 49 (2) RTDeur. 267, 283-284.

<sup>119</sup> F. J. Mena Parras, “Libertés de circulation et conceptions particulières de droits fondamentaux: quelle conciliation à travers la marge nationale d’appréciation et le respect de l’identité nationale?” in S. Besson and N. Levrat (eds), (*Dés*)ordres juridiques européens / *European Legal (Dis)orders* (Schulthess, 2012) 153, 177-179.

<sup>120</sup> Opinion of Advocate General Kokott in *HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab and HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening acting on behalf of Pro Display A/S*, joined cases C-335/11 and C-337/11, ECLI:EU:C:2012:775, para. 61.

<sup>121</sup> CJ, Judgements in *Union des associations européennes de football (UEFA) v European Commission*, C-201/11 P, ECLI:EU:C:2013:519, *Fédération internationale de football association (FIFA) v European Commission*, C-204/11 P, ECLI:EU:C:2013:477 and *Fédération internationale de football association (FIFA) v European Commission*, C-205/11 P, ECLI:EU:C:2013:478, para. 19, 20 and 21 respectively (emphasis added).

<sup>122</sup> K. Lenaerts, “Constitutionalism and the Many Faces of Federalism” (1990) 38 Am. J. Comp. L. 205.

the two levels of governance when they occupy the same policy field.<sup>123</sup> In this sense, as he suggests, when measuring the degree of discretion left to the Member States by a directive, the Court is simultaneously deciding whether to allocate powers to the EU or to the Member States, and in its examination of the question as to whether national law conflicts with EU law in the absence of EU harmonisation measures, the Court is also deciding whether to limit the regulatory capacities of the Member States.<sup>124</sup>

As regards the latter, the Court's decision in *Omega* shows that the vertical allocation of powers sought by the authors of the treaties is reflected on the fact that the CJEU has to be respectful of the constitutional traditions of the Member States and that, by having recourse to the margin of appreciation without giving up the basic constitutional tenets of the Union, it strikes the right balance between "European commonality" and "national particularism", within a model based on "value diversity".<sup>125</sup> Also, in the absence of harmonisation at the EU level, discretion is allowed to Member States to safeguard national interests considered fundamental to their identity.<sup>126</sup>

The vertical allocation of powers thus implies (in due regard of the principle of conferral) that the EU legislator must respect the competences retained by the Member States, which is reflected on the discretion granted by the CJEU to Member States in light of the absence of EU harmonisation measures and the review of national measures, which will in principle be effectuated through the assessment of a manifest error or the application of a relaxed proportionality test, as the case law discussed above illustrates.<sup>127</sup> In this regard, the CJEU approach of the margin of appreciation as a federal constitutional court is consistent with the idea that the foundation of federalism consists in "presumed value and validity of combining unity and diversity and of accommodating, preserving and promoting distinct identities within a larger political union".<sup>128</sup>

However, in the presence of EU harmonisation measures, the discretion granted to national authorities is narrowed down, and Member States "must comply with the way in which the EU legislator has struck the balance between the substantive law of the Union and national measures".<sup>129</sup> As exemplified by the cases discussed above, while this does not automatically mean that Member States have no discretion and that any accommodation of diversity is possible, the presence of an exhaustive harmonisation on the way to protect a fundamental right or to balance it with a determinate legitimate interest will suppress the margin of appreciation of national authorities in the implementation of EU law. This is consistent with the fact that some EU secondary law measures adopted by the EU institutions have precisely the objective to ensure that the level of protection of a given right is equivalent in all Member States, in order to avoid the divergences which may exist between the relevant laws in the Member States undermining the objectives pursued in a particular area of EU law.<sup>130</sup>

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<sup>123</sup> K. Lenaerts, "Federalism and the Rule of Law: Perspectives from the European Court of Justice" (2011) 33 (5) *Fordham International Law Journal* 1338, 1339.

<sup>124</sup> *Ibid.*, 1339-1340.

<sup>125</sup> K. Lenaerts and J. A. Gutiérrez Fons, "The constitutional allocation of powers and general principles of EU law" (2010) 47 (6) *CMLRev.* 1629, 1667-1668.

<sup>126</sup> K. Lenaerts, "The Court's Outer and Inner Selves: Exploring the External and Internal legitimacy of the European Court of Justice" in M. Adams, H. de Waele, J. Meeusen and G. Straetmans (eds.), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart Publishing, 2013) 13, 29.

<sup>127</sup> See, in a similar vein, while referring to the CJEU case law on the definition of the concept of "services of general interest", K. Lenaerts, "Defining the Concept of "Services of General Interest" in Light of the "Checks and Balances" Set Out in the Treaties" (2012) 19 (4) *Jurisprudence* 1247, 1258-1259.

<sup>128</sup> R. L. Watts, *Comparing Federal Systems in the 1990's* 6 (McGill-Queen's University Press, 1996) 6.

<sup>129</sup> Lenaerts, *supra* note 126, 37.

<sup>130</sup> See, for instance, recitals 7 and 8 in the preamble to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31), and the interpretation given by the Court in that regard and the question of the margin of discretion of domestic authorities, CJ, Judgement in *Asociación Nacional de Establecimientos Financieros de Crédito*

Although the existence and degree of EU harmonisation in a given field might be criticised as being an irrelevant factor on the variation of the intensity of judicial review by the national measures within the conception of the margin of appreciation as a tool to respect pluralism (considering that this harmonisation purely corresponds to the political will of Member States and their intentions to unify their legislations in certain fields)<sup>131</sup>, it is submitted that the level of harmonisation provided by the EU legislative instrument constitutes already a reflection of the consensus among Member States<sup>132</sup>, and that this “legislative consensus”<sup>133</sup> will impact the accommodation of diversity at the EU level in a similar manner as it does in the ECHR system. As the Court observed in *Melloni* regarding the common definition of the right at stake and the balance with the relevant competing interests, “the Framework Decision 2009/299 [...] effects a *harmonisation* of the conditions of execution of a European arrest warrant in the event of a conviction rendered in absentia, *which reflects the consensus reached by all the Member States regarding the scope to be given under EU law to the procedural rights enjoyed by persons convicted in absentia who are the subject of a European arrest warrant*”.<sup>134</sup>

As observed by Advocate General Bot in its Opinion in *Melloni* on the question of the scope for manoeuvre enjoyed by the Member States in fixing the level of protection for the fundamental rights which they wish to guarantee in the implementation of European Union law, “it is necessary to differentiate between situations in which there is a definition at European Union level of the degree of protection which must be afforded to a fundamental right in the implementation of an action by the European Union and those in which that level of protection has not been the subject of a common definition”.<sup>135</sup> While in the first case, “[t]hat consensus between the Member States leaves no room for the application of divergent national levels of protection”.<sup>136</sup> in the second case, *the Member States have more room for manoeuvre in applying, within the scope of European Union law, the level of protection for fundamental rights which they wish to guarantee within the national legal order, provided that that level of protection may be reconciled with the proper implementation of European Union law and does not infringe other fundamental rights protected under European Union law*”.<sup>137</sup>

In this regard, the approach of the Court is in accordance with the functions it performs as a supreme court. Indeed, as the case law discussed above illustrates, the role of the Court in the presence of a European harmonisation is to ensure the uniform application of EU law, while finding a balance between the respect of the choices made by the EU legislator, on the one hand, and the choices that can be made at the national level, on the other hand. This explains why the degree of harmonisation and the fact that a situation is completely or only partially determined by EU law will directly affect the variability of the margin of appreciation left to the national authorities and, thus, the accommodation of diversity among Member States by the CJEU. As it has been suggested, the CJEU

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(*ASNEF*) and *Federación de Comercio Electrónico y Marketing Directo (FECEMD) v Administración del Estado*, joined cases C-468/10 and C-469/10, ECLI:EU:C:2011:777, paras. 27 to 49.

<sup>131</sup> C. Nivard, “Marge nationale d’appréciation et pluralisme dans la jurisprudence de la Cour de justice de Luxembourg” in M. Levinet (dir.), *Pluralisme et juges européens des droits de l’homme* (Bruylant, 2010) 169, 186-187.

<sup>132</sup> See in a similar vein, K. Lenaerts, “Upholding Union values in times of societal changes: the role of the Court of Justice of the European Union”, Durham European Law Institute Annual Lecture (2014), <[https://www.dur.ac.uk/resources/deli/events/annual%20lecture%202014/Lenaerts\\_2014\\_Durham.pdf](https://www.dur.ac.uk/resources/deli/events/annual%20lecture%202014/Lenaerts_2014_Durham.pdf)> accessed 25 June 2015, p. 6, as well as S. Haverkort-Speekenbrink, *European Non-Discrimination Law. A Comparison of EU Law and the ECHR in the Field of Non-Discrimination and Freedom of Religion in Public Employment with an Emphasis on the Islamic Headscarf Issue* (Intersentia, 2012) 262.

<sup>133</sup> Lenaerts, *supra* note 132, 6, as compared to the “constitutional consensus” reflected in the content of EU primary law norms.

<sup>134</sup> CJ, Judgement in *Melloni*, *supra* note 116, para. 62.

<sup>135</sup> Opinion of Advocate General Bot in *Melloni*, *supra* note 116, para. 124.

<sup>136</sup> *Ibid.*, para. 126

<sup>137</sup> *Ibid.*, para. 127 (emphasis added).



can respect the policy choices made at the national level as long as they act within their margin of discretion.<sup>138</sup>

As a corollary of the role of the Court as a supreme court and the logic of integration of the EU, it is therefore consistent that in those cases where the protection of a fundamental right has already been given a common definition at the supranational level, the CJEU does not grant any discretion to Member States in the implementation of EU law and precludes them to apply a divergent level of protection than the one fixed by the European legislator. In this regard, in a context where EU law has completely determined the way in which Member States must act (as was the case in *Melloni*), the Charter displaces national fundamental rights.<sup>139</sup> In this sense, the consensus provided by a given EU harmonisation measure not only defines the contours of the protection of a fundamental right in its balance with other competing legitimate interests, but also delimits the variations that this regime of protection can tolerate by the national particularities that may still exist in this field. As already mentioned above, the functions of the CJEU as a supreme and a federal constitutional court are however closely interrelated. Indeed, and in a similar vein of what Antoine Bailleux has observed on the Luxembourg court's decisions in *Åkerberg Fransson* and *Melloni*,<sup>140</sup> the approach of the CJEU reflects its preference for a constitutional reading of the Charter of Fundamental Rights within the integration logic of the EU legal order, as opposed to the Strasbourg court's approach, which is rather in accordance with its role as a human rights court within the subsidiary nature of the Convention.

However, in the absence of a full harmonisation and where the situation at stake is only partially determined by EU law (as in the *Åkerberg Fransson* case), Member States keep a margin of action in which the leading role is played by their internal legal system, in the sense that they are free to choose the regulatory means in order to attain the goals set by the European rule.<sup>141</sup> Indeed, in the absence of a European "legislative consensus" as to the precise level of protection of a fundamental right, this determination has to be done at the national level, an approach which thus leaves room for diversity at the EU level.<sup>142</sup> In this context, as observed by Daniel Sarmiento, according to the principle of subsidiarity it is considered that the facts will be governed by national standards of fundamental rights, provided that the Charter does not provide a superior protection of the fundamental rights concerned.<sup>143</sup> In that regard, a parallelism can be drawn with the ECtHR case law, in the sense that a normative priority is given to the national level as a manifestation of the principle of subsidiarity.

As it has been observed, however, because of the different logics of each legal order, the principle of subsidiarity in the EU context implies a kind of "competitive subsidiarity", referring to the competing powers of the Union and the Member States, while in the ECHR context it rather refers to a "complementary subsidiarity", according to which the ECtHR's powers of intervention are limited to those cases where the domestic institutions are incapable of ensuring effective protection of the Convention rights.<sup>144</sup>

At the EU level, subsidiarity plays a role in the formal distribution of competences, as well as a regulating concept conceptualized both as a justification of the EU action and a limit to it.<sup>145</sup> Subsidiarity can be used to further either integration (if Member States cannot achieve the objectives pursued by the proposed action) or, reversely, disintegration, depending on the context.<sup>146</sup> In this

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<sup>138</sup> Gerards, *supra* note 11, 85.

<sup>139</sup> Sarmiento, *supra* note 118, 1289.

<sup>140</sup> A. Bailleux, "Entre droits fondamentaux et intégration européenne, la Charte des droits fondamentaux de l'Union européenne face à son destin" (2013) 97 RTDH 215.

<sup>141</sup> Sarmiento, *supra* note 118, 1294.

<sup>142</sup> Lenaerts, *supra* note 132, 13.

<sup>143</sup> Sarmiento, *supra* note 118, 1294-1295.

<sup>144</sup> Berger, *supra* note 7, 2.

<sup>145</sup> M. Delmas-Marty, *Les forces imaginantes du droit (Vol. II): Le pluralisme ordonné* 268-269 (Seuil, 2006) 268-269.

<sup>146</sup> *Ibid.*, 269.

context, the principle of subsidiarity can be defined as a “mediator between supranational harmonisation and unity, on the one hand, and local pluralism and difference, on the other”.<sup>147</sup>

The principle of subsidiarity is also present in EU fundamental rights law. Indeed, subsidiarity is tacitly present in the CJUE case law in the field, both concerning the sources of law that the CJUE uses to protect fundamental rights at the EU level (the Charter also insists in its preamble that it “reaffirms, with due regard for the powers and tasks of the Union and for the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States”<sup>148</sup>), as well as regarding the scope of the CJUE review of Member States’ acts alleged to violate EU fundamental rights.<sup>149</sup> But beyond these elements, it has been claimed that the principle of subsidiarity fails to provide sufficient guidance as to the scope and the extent of latitude granted to Member States when they implement EU law, merely regulating the exercise of competence without defining the margin of manoeuvre left within the given area of competence.<sup>150</sup>

However, it is argued that the margin of discretion that Member States enjoy when they implement EU law has to be understood as a manifestation of the principle of subsidiarity in its conception of “federal proportionality”, that is, not asking whether the EU should exercise its competences in the field of fundamental rights, but rather “*whether* the European legislator has *unnecessarily* restricted national autonomy”.<sup>151</sup> In this sense, the margin of discretion granted to national authorities and the consequently limited judicial review applied by the Court can be read as a reflection of this conception of subsidiarity. This commitment to subsidiarity by the CJEU can be exemplified by its decision in *Omega*,<sup>152</sup> as well as, more widely, by the margin of appreciation granted to Member States and the complementary role of the Charter to the national catalogues of fundamental rights within the normative priority given to the national level when the regulatory framework of a case is not totally determined by EU law.<sup>153</sup> Given this background, and as pointed out by Eleanor Spaventa, “centralisation and federalisation appear balanced: subject to the supervisory role of the [CJEU] (centralisation), the standard of fundamental rights protection is that chosen by the Member State (federalisation)”.<sup>154</sup>

In this sense, when the concrete division of competences between the two spheres of power in the EU is not translated into a total determination by EU law of the regulatory framework of a given case, the margin of appreciation, as a manifestation of the principle of subsidiarity, plays a similar role that the one performed in the ECtHR system as a tool to accommodate diversity. While the normative differences between the ECHR and the EU legal order –as illustrated by the different functions performed by the Strasbourg and Luxembourg courts respectively- are certainly important, the

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<sup>147</sup> P. G. Carozza, “Subsidiarity as a Structural Principle of International Human Rights Law” (2003) 97 (1) *American Journal of International Law* 38, 39-40.

<sup>148</sup> Charter of Fundamental Rights of the European Union, *supra* note 2.

<sup>149</sup> Carozza, *supra* note 147, 54-56.

<sup>150</sup> Forowicz, *supra* note 87, 32. See also, more largely, on the inadequacies of the EU principle of subsidiarity to rationalize fundamental rights decision-making at the EU level, Muir, *supra* note 74, 238-244.

<sup>151</sup> R. Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (OUP, 2009) 263. In a similar vein, on the place of the proportionality analysis in the principle of subsidiarity, see G. Davies, “Subsidiarity: The Wrong Idea, in the Wrong Place at the Wrong Time” (2006) 43 (1) *CMLRev.* 63. See however, the critical remarks addressed by Paul Craig to Davies’ vision in “Subsidiarity: A Political and Legal Analysis” (2012) 50 (1) *JCMS* 72, 82-84.

<sup>152</sup> *Lenaerts and Gutiérrez-Fons*, *supra* note 125, 1664.

<sup>153</sup> A more complete example of the links between subsidiarity, the concrete allocation of competences among Member States and the EU institutions, the margin for manoeuvre granted to the Member States in the implementation of EU law and the judicial review to be applied to the measures adopted by the national authorities can be found in *GC, Judgement in Republic of Estonia v Commission of the European Communities, T-263/07, ECLI:EU:T:2009:351*, paras. 50-75.

<sup>154</sup> Spaventa, *supra* note 84, 360.

existence of heterogeneous values and the cultural diversity at the European level justifies the use of the margin of appreciation in both European regimes.<sup>155</sup>

The use by the CJEU of the margin of appreciation concept is, however, not without flaws and inconsistencies.<sup>156</sup> In this regard, the CJEU seems often to use the notion of the margin of appreciation or (of) discretion to simply justify the freedom of a Member State to determine the level of protection of a fundamental right or a legitimate interest in the absence of harmonisation of European legislation in the field.<sup>157</sup> In the line of what has been observed by Antoine Bailleux in his analysis of the internal market case law, this approach is regrettable taking into account – let alone the incoherence of the Court in its application - that the Member States’ freedom to determine the level of protection of the interest restricting a fundamental freedom, a fundamental right or another principle of EU law is in principle inherent to their sovereignty and can only be restrained by a EU measure harmonising the different national legislations in the field.<sup>158</sup> Therefore the simple fact that a question has not been harmonised at the EU level should not, in addition, automatically entail the grant of a margin of appreciation to the national authorities.<sup>159</sup>

Also, the mobilisation by the Court of the notion of margin of appreciation or (of) discretion regarding Member States’ implementing actions of EU secondary law provisions of an abstract nature can lead to certain confusion as regards the meaning of this concept in the EU legal order, which might be interpreted as an assimilation of this notion to the certain freedom that Member States may enjoy to define transposition measures, specifically of directives or framework decisions (the latter have nonetheless been abolished after the entry into force of the Lisbon treaty).<sup>160</sup>

More inconsistencies can also be found regarding the impact of the discretion enjoyed by the national authorities in the intensity of the judicial review applied by the CJEU in the assessment of whether the relevant national measures are compatible with EU law.<sup>161</sup> For instance, as it has been observed in the field of non-discrimination law, the CJEU does not always seem to use the margin of discretion left to Member States as an argument in the assessment of proportionality of the national measures implementing EU law, and even when it does so, the Court may proceed to carefully assessing the different elements of the proportionality test.<sup>162</sup>

While the unsystematic and incoherent use by the CJEU of the tool of the margin of appreciation might be explained by the fact, as observed by Sionaidh Douglas-Scott, that, compared to the ECtHR, the

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<sup>155</sup> Díaz-Crego, *supra* note 25, 75-65. In a similar vein, see Forowicz, *supra* note 87, 10.

<sup>156</sup> Whilst the use of the expression “doctrine” to refer to the concept of the margin of appreciation within the ECHR system is very common in academia, some important inconsistencies can also be observed when analysing the ECtHR case law, see, among others, J. Kratochvíl, “The Inflation of the Margin of Appreciation by the European Court of Human Rights” (2011) 29 (3) *Netherlands Quarterly of Human Rights* 324.

<sup>157</sup> See for instance, on the question of the condition of residence in the territory of a State awarding a benefit to civilian war victims at the time when the application for the benefit is submitted as a restriction of the right of free movement and residence of citizens of the European Union, see the CJEU decision in *Tas-Hagen and Tas*, where it considered that “[w]ith regard to benefits that are *not covered by Community law, Member States enjoy a wide margin of appreciation in deciding which criteria are to be used when assessing the degree of connection to society, while at the same time complying with the limits imposed by Community law*”, CJ, Judgement in *K. Tas-Hagen and R. A. Tas v Raadskamer WUBO van de Pensioen- en Uitkeringsraad*, C-192/05, ECLI:EU:C:2006:676, para. 36 (emphasis added). Also in the same vein, see what the Court declared in *Nolte*: “[t]he Court observes that, in the current state of Community law, *social policy is a matter for the Member States [...]. Consequently, it is for the Member States to choose the measures capable of achieving the aim of their social and employment policy. In exercising that competence, the Member States have a broad margin of discretion*”, CJ, Judgement in *Inge Nolte v Landesversicherungsanstalt Hannover*, C-317/93, ECLI:EU:C:1995:438, para. 33 (emphasis added).

<sup>158</sup> Bailleux, *supra* note 97, 537.

<sup>159</sup> *Ibid.*, 529.

<sup>160</sup> See the example provided by the *Promusicae* case mentioned above, *supra* note 104.

<sup>161</sup> Bailleux, *supra* note 97, 536-538.

<sup>162</sup> Haverkort-Speekenbrink, *supra* note 132, 247-248.

Luxembourg court has been more concerned with the unification and primacy of EU law - the scope for States for diverse application of EU law being therefore narrowed down -,<sup>163</sup> it is submitted that the CJEU should develop a more consistent use of the margin of appreciation as a tool to preserve diversity within the constant balance which the European construction process entails between EU integration and respect for national particularities.<sup>164</sup> This is particularly relevant considering the growing expansion of the EU competences to areas of law more sensitive towards fundamental rights, as well as the obligation of the EU, after the entry into force of the Lisbon treaty, to respect the national constitutional identity of the Member States, as provided by article 4 (2) TEU.<sup>165</sup>

Also, after the enlargement of the past decade, the EU cannot be considered as homogeneous as it used to be, and more cultural and political variations have been introduced into the EU special regime, partly altering the general coherence and unity of EU law.<sup>166</sup> In this context, the transposition of the margin appreciation concept into the EU legal system can improve its functioning, by creating a level playing field among the 28 Member States and mitigating to a certain degree the difficulties experienced in harmonising certain areas of EU law.<sup>167</sup> In this sense, national discretion has to be seen as a “normal development in the EU’s constitutionalization process”, in the framework of an increasing pluralist legal order with various legal traditions in its heart.<sup>168</sup>

#### IV. Conclusion

By addressing the question of the transposition of the margin of appreciation concept as a tool to accommodate diversity into EU law, through the analysis of the CJEU case law and the different legal context in which the Luxembourg court operates, as illustrated by the functions that it performs as a supreme and a federal constitutional court within the EU municipal legal order, this article has provided a new reflection on the use of this technique in EU fundamental rights law.

It has been argued that, whilst some shared features exist between the use of the margin of appreciation concept between the ECtHR and the Luxembourg court, there remains some difference of perspective by the CJEU as reflected upon some distinct aspects, for example the impact on the scope of the margin of appreciation of factors such as the existence or absence of a European consensus in the question at stake, or the degree of harmonisation provided by EU law on the level at which Member States must protect the relevant fundamental right. Despite these differences, a similar approach as compared to the use of this notion in the ECtHR case law can be identified by the interconnection of the notions of consensus, harmonisation and subsidiarity in EU law.

Indeed, the level of harmonisation provided by EU law constitutes an expression of the consensus reached among Member States. Also, it has been submitted that the principle of subsidiarity, in which the margin of appreciation concept is rooted, can be understood in the EU legal order as “federal proportionality”, determining the degree of restriction of national autonomy by EU law. In this context, the use by the CJEU of the margin of appreciation concept provides a balance between the respect of

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<sup>163</sup> S. Douglas-Scott, “A tale of two courts: Luxembourg, Strasbourg and the growing European human rights *acquis*” (2006) 43 (3) CMLRev. 650.

<sup>164</sup> See in a similar vein, referring to the need of developing a “doctrine of deference”, Gerards, *supra* note 11, 115-120, and Torres Pérez, *supra* note 83, 168-177.

<sup>165</sup> Also, as suggested by Oreste Pollicino, the national constitutional identity clause of Article 4 (2) TEU can provide “the appropriate judicial mechanism to prevent the occurrence of the most frequent constitutional conflict between the EC and national levels”, “The New Relationship between National and the European Courts after the Enlargement of Europe: Towards a Unitary Theory of Jurisprudential Supranational Law?”, (2010) YEL 96. While granting an excessive deference to Member States authorities when invoking the national constitutional identity clause of article 4 (2) TEU would regrettably undermine the uniform application of EU law, this provision should not be read in any case as a limitation of the principle of primacy of EU law, see Mena Parras, *supra* note 119, 176-182.

<sup>166</sup> Forowicz, *supra* note 87, 10.

<sup>167</sup> *Ibid.*,

<sup>168</sup> *Ibid.*, 32.

the EU constituent and legislator choices and those to be made at the national level. The margin of appreciation is therefore considered as a tool to accommodate diversity in a context characterized by the heterogeneity of values and the cultural diversity at the European level, a feature that is common to both European legal regimes.

However, the use of the margin of appreciation by the Luxembourg court is far from being consistent, either in regard to the type of situations in which this technique is used, or concerning the necessary impact that its grant must have on the judicial review of the measures adopted by national authorities. It has been submitted that the CJEU should develop a more consistent use of the margin of appreciation as a tool to preserve diversity within the constant balance which the European construction process entails between EU integration and respect for national particularities. Contrary to the *a priori* concerns that building up a doctrine of the margin of appreciation might imply as regards the unity and coherence of EU law, the use of this technique by the CJEU should rather be considered as a reflection of the constitutional maturity of the increasingly pluralist EU legal order. In this context, a more coherent mobilisation of the margin of appreciation concept is especially relevant considering not only the expansion of the EU competences to areas of law more sensitive towards fundamental rights and the obligation for the EU to respect the national constitutional identity of the Member States, but also the importance of taking into account the other sources of protection of fundamental rights at the European level.

Indeed, the EU system of fundamental rights protection coexists with (and it is inspired in) the international system of rights protection provided by the ECHR, as well as the national catalogues of Member States. This indicates the legal complexity in which the protection of fundamental rights takes place in Europe, which has been described with the metaphor of “the crowded house”,<sup>169</sup> and which will become even more complex after the EU accession to the ECHR. Given this background, the use of the margin of appreciation must not only be used in a consistent way to allow a coherence in the room left for political choices which can be made at the national level, but also from the perspective of a holistic approach, which takes into account the protection of human rights guaranteed by other international instruments. Indeed, it must be remembered that the margin of discretion of any Member State should still remain circumscribed by its other human rights obligations.<sup>170</sup>

This dimension is particularly (but not only) relevant considering the coherence to be guaranteed at the European level between both the Luxembourg and the Strasbourg courts, in which the use of the margin of appreciation plays a key role. As provided by article 52 (3) of the Charter of Fundamental Rights, “[i]n so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, *the meaning and scope of those rights shall be the same as those laid down by the said Convention*” (while not preventing EU law to provide “more extensive protection”).<sup>171</sup>

However, after the entry into force of the Lisbon treaty, the CJEU has tended to interpret the Charter as an autonomous EU instrument, with fewer references to the Convention and the ECtHR jurisprudence as in its previous case law.<sup>172</sup> While this is consistent with its role as a constitutional court of developing the EU constitutional catalogue of fundamental rights provided by the Charter, the risk remains that this autonomous interpretation of fundamental rights at the EU level entails a disparity

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<sup>169</sup> P. Cruz Villalón, “Rights in Europe: The Crowded House” in J. Díez-Hochleitner Rodríguez, C. Martínez Capdevila, I. Blázquez Navarro, J. Frutos Miranda (eds), *Últimas tendencias en la jurisprudencia del Tribunal de Justicia de la Unión Europea (2008-2011)* (La Ley, 2012) 1135.

<sup>170</sup> E. Brems, “Towards an Integrated View on Multilayered Human Rights” (2014) *Journal européen des droits de l’homme / European Journal of Human Rights* (4), forthcoming, referring to the margin of discretion in the ECHR system, which is completely transposable to the case of EU law.

<sup>171</sup> Charter of Fundamental Rights of the European Union, *supra* note 2.

<sup>172</sup> de Búrca, *supra* note 31, 171-176.

between the approaches of the two courts to the detriment of human rights protection.<sup>173</sup> This can also be particularly problematic regarding the new era of accommodation of pluralism in Europe that the future envisaged EU accession to the ECHR will open.

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<sup>173</sup> *Ibid.*, 172.