‘Hybrid’ collective remedies in the EU social legal order

Betül Kas

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

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European University Institute
Department of Law

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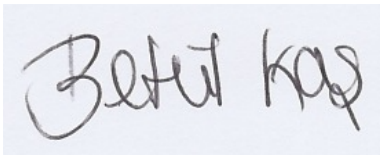

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Abstract

The aim of this thesis is to illustrate, on the basis of a socio-legal study presented in three qualitative case studies, the role of *hybrid* collective remedies in enforcing European socially-oriented regulation, in particular environmental law, anti-discrimination law and consumer law, for the creation of a European social legal order, which is able to gradually counter its perceived internal market bias. The *hybrid* collective remedies at stake in the three case studies – each case study constituted by a preliminary reference to the CJEU – are symptomatic of the three legal-political fields at stake. With the EU taking a leading role in the three fields for the purpose of complementing the creation of an internal market, the EU has decoupled the fields from their national social welfare origin and re-established a policy which is not so much based on ensuring social justice, but more based on procedural mechanisms to ensure access justice. Likewise, the EU left the creation of collective remedies fostering a genuine protective purpose to the Member States. The national and European models of justice underlying the three legal-political fields and their remedies are of a complementary, i.e., of a *hybrid* nature, and are moving towards the creation of an integrated European social order. The creation of the European social order via national actors using the preliminary reference procedure to implement the three policies at stake goes hand in hand with the creation of a European society.

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CHAPTER 1: INTRODUCTION

1. THE EUROPEAN REGULATORY PRIVATE LAW (ERPL-) PROJECT

The aim of this thesis is to illustrate, on the basis of a socio-legal study presented in three qualitative case studies, the role of *hybrid* collective remedies in enforcing European socially-oriented regulation, in particular environmental law, anti-discrimination law and consumer law, for the creation of a European social legal order, which is able to gradually counter its perceived internal market bias.

The thesis constitutes an integral part of the research project entitled "The Visible Hand of European Regulatory Private Law (ERPL) - The Transformation from Autonomy to Functionalism in Competition and Regulation", which was hosted by the European University Institute since September 2011 under the scientific guidance of Prof. Hans-W. Micklitz. This introduction will therefore firstly set out the essential hypotheses and context of the ERPL project, and locate this self-standing doctoral thesis within that project.

1.1. THE HYPOTHESIS OF THE ERPL-PROJECT

The ERPL-project aims to study the emergence of a European regulatory private law order and to examine its relationship with the national private legal orders of the EU Member States. The leading hypothesis of the project is that the EU is establishing its own private legal order, referred to as 'a self-sufficient legal order', which is largely distinct from national private legal orders. Private law is understood by the project as regulatory law. In that regard, the focus is placed on the regulations and directives the EU has adopted in seemingly remote areas of private law, such as "for example consumer and anti-discrimination law, regulated markets, private competition law, state aids, public procurement, property rights and unfair commercial practices, risk regulation and standardisation of services".[1] Here, it is argued, that the European Union is building its own legal orders, being sectorial orders, separated from national private law.

[1] Hans-W. Micklitz, "Self-Sufficient European Private Law: A Viable Concept?," in *Self-Sufficient European Private Law: A Viable Concept?*, ed. Yane Svetiev and Hans-W. Micklitz, EUI Working Papers LAW 2012/31, 2012, 6.

This process takes some kind of hidden form. The academic and political debates over the previous decades about the relationship between the EU and private law have been dominated by discussions about the codification of private law at the European level. Academic attempts have been made to identify and develop a common set of private law principles, which could subsequently lead to the adoption of a European Civil Code. Most of them were comparative law exercises, which focussed on traditional areas of national private law, such as contract law and tort law. The work on a European Civil Code was effectively part of the project of creating a European Constitution, which both eventually failed.[2] The ERPL-project aims to distinguish itself from those endeavours by claiming that, outside the political and academic debates, the creation of a European constitution and the construction of European private law is steadily pushed forward via secondary law making with the support of the Member States and via the co-operation between the CJEU and national courts.[3]

Therefore, the starting point of the ERPL-project is, instead, that concepts, which follow the logic of nation-state building, such as a 'constitution' or a 'civil code', do not fit within the logic of the European Union, whose aim has always been to build an internal market. Indeed, in order to establish a reference point against which the transformation of private law by EU intervention can be measured, the ERPL-project relies on the transformation from the nation-state to the market state. While national private legal orders have developed in the context of nation-state building in the 19th and 20th century, the European Union is understood as a market state, which employs private law as a tool to construct and complete the internal market. This not only includes the traditional areas of private law such as contract law and tort law, but also others areas of law in which the EU has exercised influence on private law through the adoption of secondary EU law. European private law is therefore different from national private legal orders which are based on private autonomy and free will – its form, procedure and content are shaped by its instrumentalization for the building and shaping of markets, yielding its own pattern of justice, enshrined in the concept of access to justice.[4]

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[2] Hans-W. Micklitz, "Monistic Ideology versus Pluralistic Relaity: Towards a Normative Design for European Private Law," in *Pluralism and European Private Law*, ed. Leone Niglia (Oxford; Portland, OR: Hart Publishing, 2013), 29–51. See also Hans-W. Micklitz, "The Visible Hand of European Regulatory Private Law—The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation," *Yearbook of European Law* 28, no. 1 (2009): 3–59.

[3] Micklitz, "Self-Sufficient European Private Law: A Viable Concept?," 16.

[4] Hans-W. Micklitz and Dennis Patterson, "From the Nation State to the Market: The Evolution of EU Private Law as Regulation of the Economy Beyond the Boundaries of the Union?," in *The EU's Role in Global Governance: The Legal Dimension*, ed. Bart Van Vooren, Steven Blockmans, and Jan Wouters (Oxford: Oxford University Press, 2013), 59–78.

All in all, the ERPL- project aims to identify and analyse the transformation from the traditional national concept of autonomy to functionalism in competition and regulation within the internal market. It is based on the understanding of ERPL as a self-standing legal order, which consists of (i) the substance of ERPL, (ii) the general principles of ERPL and (iii) common principles of civil law. The interactions between ERPL and national private law orders are tested by using four parameters: intrusion and substitution, conflict and resistance, hybridization and convergence.[5] The ERPL-project foresaw that the four models constitute the areas in which socio-legal research needs to be undertaken in order to reveal the societal dimension underlying ERPL.

1.2. THE PARAMETER OF HYBRIDIZATION

The four models of interaction between national and European law should serve as descriptive and analytical tools to assess the material collected by socio-legal research projects. This thesis determines the degree to which the interaction between national and European law can be caught within the hybridization parameter.

Hybridization was suggested as being a model "of a composite legal order, within which the European and the national legal orders both play their part in some sort of a merged European-national private legal order".[6] It means that the legal character of the rules of the merged legal order is neither European nor national, but "bears elements of both legal orders and is therefore supposed to be hybrid".[7] The parameter of hybridization was, from the beginning, linked to the area of "remedies (…) developed out European regulatory private law and national private law, thereby leading to a truly integrated legal device".[8]

It is necessary to distinguish the terms 'hybridization' and 'hybridity'. While hybridization refers to a dynamic process of change, meaning the process of merging national and European elements; hybridity refers to a rather static identification of European and national elements in

[5] Micklitz, "Self-Sufficient European Private Law: A Viable Concept?," 6.
[6] Ibid., 7.
[7] Ibid., 7.
[8] Ibid., p. 8. The parameter of hybridization has been spelled out in the following literature: Thomas Duve, "An Early Globalization of Justice? Historical Observations on Mechanisms of Creating Normative Coherence in the Age of Discovery," Paper Presented at the University of Helsinki, September 2011, n.d.; Inger-Johanne Sand, "Hybrid Law: Law in a Global Society of Differentiation and Change," in *Soziologische Jurisprudenz: Festschrift für Gunther Teubner zum 65. Geburtstag*, ed. Gralf-Peter Calliess et al. (Berlin: de Gruyter Recht, 2009).

a conceptual phenomenon. The former allows us to ask questions about the drivers behind the process. The latter helps us to understand what hybrids are and whether we can find new conceptual tools that allow us to categorize and define them.[9]

2. THE CONCEPTUAL BASIS: THE FOUR LEVELS OF *HYBRIDITY*

The meaning of hybridity, for the purposes of the ERPL-project, has been identified by *Kaarlo Tuori*. The underlying idea of hybridity has been summarized as the following:

> *What we call today legal hybridity is a sign of our conceptual confusion: new conceptual and systemizing grids are needed, but our legal mind-set is still in many respects attached to the state-sovereigntism of the black-box model and the distinctions of traditional systematization.*[10]

Accordingly, legal hybrids break with the traditional mapping and basic systematization of the law, which was originally conceived from a nation-state perspective. *Tuori* proposes distinguishing four levels of hybrids, whose applicability to the interaction between European and national law is tested in this thesis: the legal phenomenon, the legal field, the legal order/legal system and the legal space. The identification of hybridity involves a constant comparison between the historical conceptualizations and traditions that the levels derived from the nation-state context and the divergences introduced by transnational law, being European law.[11]

2.1. THE *HYBRID* INDIVIDUAL PHENOMENON

The individual phenomenon is the lowest level of hybridity, meaning that it provides for hybridity at the smallest scale. *Tuori* does not provide for a specific definition of this individual phenomenon. Its characteristic is that it is an encapsulated manifestation, like a single concept or an individual case. Its hybrid nature derives from our inability to capture the legal phenomenon in our inherited conceptual framework and to put it in a determinate

[9] Hans-W. Micklitz, "Rethinking the Public/Private Divide," in *Transnational Law: Rethinking European Law and Legal Thinking*, ed. Miguel Poiares Maduro, Kaarlo Tuori, and Suvi Sankari (Cambridge, UK; New York: Cambridge University Press, 2014), 274.

[10] Kaarlo Tuori, "On Legal Hybrids," in *Self-Sufficient European Private Law: A Viable Concept?*, ed. Yane Svetiev and Hans-W. Micklitz, EUI Working Papers LAW 2012/31, 2012, 73.

[11] According to *Kaarlo Tuori*, EU law as such, as transnational law, constitutes the epitome of legal hybridization "in the sense that is constitutes law beyond the dichotomy of nation-state law and international law which has emerged as a reaction to the spatial and temporal shortcomings of the black-box model in front of the cultural and social changes often enough examined under the notion of *globalization* or – to use a less pretentious expression – *denationalisation*". Ibid.

conceptual box.[12]

At the level of the individual phenomenon, this thesis will apply the analytical framework of hybridity to examine the nature of collective remedies for the enforcement of EU law. The European legal order is formally built on a distinction between substantive law and remedial and procedural law. It is for the Member States to define the appropriate remedies to secure the uniform application of EU substantive law. However, the formal distinction between EU and Member State competence is not adhered to by the case law of the CJEU.[13] The procedural autonomy of the Member States is restricted by the principles of equivalence and effectiveness,[14] if not also by the principle of adequate legal protection contained in Article 47 of the EU Charter of Fundamental Rights.[15] Remedies are therefore principally a prominent example of the merger between European and national elements.

Describing the interplay between European and national elements in the shaping of remedies as hybrid is, however, nothing new. *Norbert Reich* has shaped the notion of the hybridization of remedies in cases where directly applicable EU provisions were violated. His hybridization approach attempts to integrate the direct effect of EU rights with the corresponding obligations of wrongdoers, which is determined under national rules on compensation (in general with regard to tort law, but also possible with regard to contract law) as interpreted and applied in conformity with EU law. On that basis, *Reich* establishes the tasks of the national court handling the case on liability between private parties: the national court must evaluate the applicable national remedial rules, in light of EU law principles, in order to ensure that those minimum standards are achieved and, where necessary, to correct and 'upgrade' the applicable Member State law under the principles of supremacy and direct

[12] Micklitz, "Rethinking the Public/Private Divide," 279.
[13] Constantinos Kakouris, "Do the Member States Possess Judicial Procedural Autonomy," *Common Market Law Review* 34, no. 6 (1997): 1389–1412; Michael Bobek, "Why there is no principle of 'procedural autonomy' of the Member States," in *The European Court of Justice and the Autonomy of the Member States*, by Bruno de Witte and Hans-W. Micklitz (Cambridge; Antwerp: Intersentia, 2012), 305–23.
[14] The classic statement of the procedural autonomy of the Member States can be found in the *Rewe* and *Comet* cases: "[…] in the absence of Community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law, it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature […] the position would be different only if the conditions and time-limits made it impossible in practice to exercise the rights which the national courts are obliged to protect". Case 33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland*, ECLI:EU:C:1976:188, para. 5; Case 45/76, *Comet*, ECLI:EU:C:1976:191, para. 13.
[15] The notion 'adequate' legal protection was shaped by *Walter van Gerven*, see Walter van Gerven, "Of Rights, Remedies and Procedures," *Common Market Law Review* 37, no. 3 (2000): 501–36.

effect of EU law. The task of the national court has to be completed, on the one hand, within the EU framework of giving 'rights' to citizens and, on the other, within the principle of procedural autonomy, restricted by the principles of equivalence and effectiveness. He claims that the result will be a reshaping of existing national remedies or the establishment of new remedies.[16] In his own research, *Reich* applied his hybridization approach to the substantive elements of the remedies for compensation, where they are based on national law (*Anspruchsgrundlage*), but must be reshaped under the influence of EU law.

The aim of this research is to build on *Reich's* approach of examining the interplay between EU and national law. That means that *Reich*'s approach has been taken as a starting point, but further developed and differentiated with the help of the empirical evidence collected. Collective remedies are conducive to offering new insights into the relationship between national and European law as they have a different nature to those discussed by *Reich*. *Reich* looks at compensation for violations of the market freedoms and thereby focuses on remedies to redress the infringement of individual rights, which have been granted by EU law. By way of comparison, the remedies discussed in this thesis protect collective interests and aim to prevent harm from occurring in the first place.

2.2. THE *HYBRID* LEGAL FIELD

The second level of hybridity is constituted by the legal field. *Kaarlo Tuori* characterizes hybrid legal fields as the amalgamation of normative material which, within the traditional divisions of the law as developed within the nation-state, would fall into several compartments.

In the traditional legal systematization conceived from a nation-state perspective, we find the classical division between public law, referring to the relationship between citizens and the state, and private law, concerned with the relationship between citizens. This basic division between public and private law is derived from Justinian's *Institutiones* and was brought into perfection in Continental Europe in the 19th century by the German *Begriffsjurisprudenz*.[17]

[16] Norbert Reich, "Horizontal Liability in EC Law: Hybridization of Remedies for Compensation in Case of Breaches of EC Rights," *Common Market Law Review* 44, no. 3 (2007): 705–42; Ulf Bernitz and Norbert Reich, "Case No. A 268/04, The Labour Court, Sweden (Arbetsdomstolen) Judgment No. 89/09 of 2 December 2009," *Common Market Law Review* 48, no. 2 (2011): 615–16.

[17] Kaarlo Tuori, "Transnational Law. On Legal Hybrids and Perspectivism," in *Transnational Law: Rethinking European Law and Legal Thinking*, ed. Miguel Poiares Maduro, Kaarlo Tuori, and Suvi Sankari (Cambridge,

The two major branches of law are in turn divided in various sub-fields. Classical private law has been traditionally divided in the law of obligations, property law, family law and the law of inheritance. Within public law, we find the differentiation of state law into constitutional and administrative law. Each branch of law was ordered through its specific general doctrines with their general legal concepts, which are vital for its very identity. According to *Tuori*, examples of hybrid legal fields are, for example, social law, medical and bio-law and sports law. They are hybrid as they cut across the traditional division of legal branches and, therefore, constitute a challenge for the *total coherence* of the law, meaning a gapless compartmentalization of all legal phenomena. *Tuori* proposes that, instead, we should strive for a *local coherence* within the new legal field.[18]

The emergence of hybrid legal fields, however, is not a new phenomenon, which occurred under the auspice of European law. The intertwinement between public and private law leading to new legal fields, as for example labour and consumer law, "constituted one of the major battlefields in national private/public law during the debate on the rise of the welfare state in Europe in the 1970s and after".[19] The case studies illustrate that the three areas - environmental law, consumer law and anti-discrimination law - developed into separate legal fields within the context of the welfare nation-state and have challenged the traditional division between private and public law. Consequently, it cannot be presumed that their hybrid nature is the result of EU intervention - they were established in the Member States before the EU took influence on them. However, at that time, they were still attached to "the monocentric perspective of the nation state legislator".[20] Today, they are no longer tied to the nation state legislator - alongside norms issued by the domestic legislature, EU norms have subsequently been introduced. Therefore, the discussion will be given a novel turn by asking to what extent the EU influences the nature of hybridity within the three legal fields mentioned.

2.3. THE *HYBRID* LEGAL ORDER

The third level of hybridity is constituted by the hybrid legal order or hybrid legal system. In

UK; New York: Cambridge University Press, 2014), 12; Duncan Kennedy, "Three Globalizations of Law and Legal Thought: 1850-2000," in *The New Law and Economic Development - A Critical Appraisal*, ed. David M. Trubek and Alvaro Santos (Cambridge; New York: Cambridge University Press, 2006), 19–73.

[18] Tuori, "Transnational Law. On Legal Hybrids and Perspectivism," 14 ff.

[19] Micklitz, "Rethinking the Public/Private Divide," 272.

[20] Tuori, "Transnational Law. On Legal Hybrids and Perspectivism," 16.

order to examine this level, it is first necessary to set out the conceptual distinction between 'legal order' and 'legal system'. A legal order constitutes a symbolic-normative phenomenon. A distinct legal order presupposes rules of recognition, which are complemented by other types of secondary rules. The rules of recognition constitute a normative doctrine of legal sources, which determine membership in the order. A legal system combines the legal order with institutionally framed legal practice, in which the legal order is produced and reproduced, as for instance in the institutional setting of law-making in parliament and adjudication in courts. Therefore, for the existence of a distinct legal system, in addition to a distinct legal order, institutional independence, like the establishment of court-like dispute resolving or sanctioning bodies for the enforcement of the legal order, are also required.[21]

Before turning to the nature of the third level of hybridity, it has to be determined whether the nature of EU law can be understood in terms of a 'legal order' or a 'legal system'. It appears that the *sui generis* character of the EU, the distinctive way in which EU and national norms and institutions interact, mean that the concept of a legal system, which developed in the context of the nation-state, is not a helpful analytical tool when discussing the EU. Instead, the EU can be understood as a legal order, which claims to independently determine the existence, force, and effect of its norms and the relation between its norms and the norms of other normative orders. The existence of EU norms is determined by the principle of conferral, the EU's law-making procedures and by the CJEU's power of judicial review as set out in the Treaty. In addition, the CJEU claims authority to determine the force and effects of EU norms vis-à-vis other legal norms. However, the EU is missing an independent institutionally framed legal practice. The national courts of the EU Member States are mainly responsible for the actual application and enforcement of EU law in the light of the preliminary reference procedure in Article 267 TFEU, the doctrines of supremacy and direct effect, the duty of consistent interpretation and the principle of Member State liability. While fulfilling important functions as the EU's "ordinary" courts,[22] they are, however, not institutionally independent from their Member States.[23] Therefore, in principle, we have to depart from the 'EU legal order'.

[21] Ibid., 25.
[22] Opinion 1/09 *European and Community Patent Court* [2011] ECR I-1137, para. 80.
[23] Regarding the question whether the EU can be understood as a 'legal order' or a 'legal system, see the discussions between Julie Dickson, "Towards a Theory of European Union Legal Systems," in *Philosophical Foundations of European Union Law*, ed. Julie Dickson and Paulos Z. Eleftheriadis (Oxford: Oxford University Press, 2012), 25–53; and Keith Culver and Michael Giudice, "Not a System but an Order. An Inter-Institutional View of European Union Law," in *Philosophical Foundations of European Union Law*, ed. Julie Dickson and Paulos Z. Eleftheriadis (Oxford: Oxford University Press, 2012), 54–76.

The establishment of a distinct legal order implies a claim of normative autonomy. Through the claim of normative autonomy, a legal order asserts exclusive power to identify the norms it comprises, and to determine their legal effects and relations to other normative orders. According to *Tuori*, since these are claims of a constitutional nature, normative autonomy implies that the autonomous legal order possesses a material constitution.[24] Although neither *van Gend en Loos* nor *Costa v. Enel* mentioned the term 'constitution',[25] the CJEU approached the Treaty as a material constitution and thereby achieved autonomy from national and international law. By asserting the direct effect and supremacy of EU law, the CJEU broke with the established doctrine on the relationship between international law and state law.[26] Looking at the EU material constitution, *Tuori* observes that the EU legal order is enabled through Treaty provisions on legislative and juridical competences. Moreover, general principles, which the CJEU has itself articulated, have a constitutional status and, therefore, form part of primary EU law.[27]

However, the EU legal order does not entail a formal and hierarchical order between its various sources. Instead, substantive order is produced through policy-based coherence and principles. The EU's claim to normative autonomy is substantively (functionally) delineated according to the European competences. The principle of conferral requires that Union legislative competences be grounded in express Treaty authorizations, whereas use of these competences is governed by the principles of subsidiarity and proportionality. The result is that the European legal order possesses multiple dimensions. The substantive order is produced through policies ('policy-based coherence') and legal principles permeating the norm material.[28] This implies that, compared to the territorially delimited national legal order, the European legal order is not comprehensive.[29]

For the purpose of examining hybridity at the level of the legal order, it is essential that, in establishing the European legal order, the CJEU had recourse to two principles which are not

[24] Tuori, "Transnational Law. On Legal Hybrids and Perspectivism," 46.
[25] Case 26/62 *Van Gend en Loos v Administratie der Belastingen*, ECLI:EU:C:1963:1; Case 6/64 *Costa v. E.N.E.L.*, ECLI:EU:C:1964:66. In *Les Verts*, the CJEU called the Treaty a constitutional charter; see Case 294/83 *Les Verts v Parliament*, ECLI:EU:C:1986:166.
[26] Tuori, "Transnational Law. On Legal Hybrids and Perspectivism," 53 ff.
[27] Ibid., 46.
[28] Kaarlo Tuori, *European Constitutionalism* (Cambridge: Cambridge University Press, 2015), 28 ff.
[29] Ibid., 22.

easily reconcilable, namely *independence*[30] and *integration*.[31] The question is whether EU law and national law should be treated as distinct legal orders or one integrated order. The latter would point towards a *hybrid* legal order. There is no unequivocal answer to this question.[32] There may be fields in which EU and national law are strongly interrelated, but there might also be areas where the European legal order is distinct as it embarks on new areas that have not yet arisen in a purely national environment.[33]

In the light of the case studies, the questions therefore arise as to whether the three legal fields at stake, being environmental law, consumer law and anti-discrimination law, developed into differentiated European legal orders and whether their interaction with the national legal orders gives rise to an integrated/hybrid legal order.

2.4. THE *HYBRID* LEGAL SPACE

The last level of hybridity as identified by *Kaarlo Tuori* is that of the hybrid legal space. *Tuori* defines the hybrid legal space in the following way:

> *The rise of transnational law entails that municipal law has lost its monopoly of jurisdiction within the territorial confines of the nation-state. We have arrived at a situation where we have rival legal orders or even legal systems competing for authority in the same territorial and social space; this has led some observers to talk of hybrid legal spaces.*[34]

Tuori alludes to a situation whereby more than one legal order claims authority within the same geographically delineated social space.[35] In concrete terms, in the EU context, that means that before the national courts, national actors can avail themselves of the opportunities offered by the European legal order. By instrumentalizing the preliminary reference procedure, they are able to use the social space that has been opened up by European regulation in order to liberate themselves of national constraints. Insofar it could be determined whether the preliminary reference procedure enables the CJEU to contribute to the

[30] Case C-26/62 *Van Gend en Loos v Administratie der Belastingen*, ECLI:EU:C:1963:1.
[31] Case C-6/64 *Costa v. E.N.E.L.*, ECLI:EU:C:1964:66. In *Kadi*, the CJEU referred to the 'integrated but separated legal orders'; see Joined cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v. Council and Commission*, ECLI:EU:C:2008:461.
[32] Tuori, *European Constitutionalism*, 71.
[33] Hans-W. Micklitz, "The ECJ Between the Individual Citizen and the Member States – A Plea for a Judge-Made European Law on Remedies," in *The European Court of Justice and the Autonomy of the Member States*, by Bruno de Witte and Hans-W. Micklitz (Cambridge; Antwerp: Intersentia, 2012), 355, 356.
[34] Tuori, "On Legal Hybrids," 72.
[35] Tuori, "Transnational Law. On Legal Hybrids and Perspectivism," 27 ff.

building of a genuine European society through law and through private actors.[36]

3. THE PARADIGMATIC IMPORTANCE OF THE THREE CASE STUDIES FOR *HYBRIDITY*

This thesis is built on the socio-legal reconstruction of three case studies, which deal with three preliminary references of national courts to the CJEU. In order to examine to what extent hybridity serves as an analytical model to determine the interaction between national and European law, the analysis is divided into two parts. In the vertical reconstructions of the three case studies, hybridity – both in its conceptual form as well as a dynamic process – is addressed holistically. Following that, the findings of the three case studies are evaluated horizontally for the four levels of hybridity. As the conceptual basis for the four levels of hybridity has been set out in **section 2** of this introductory Chapter, this section will point out the paradigmatic importance of the three case studies for the four levels of hybridity.

3.1. THE THREE COLLECTIVE REMEDIES OF THE CASE STUDIES

The thesis is built on the reconstruction of three case studies, which deal with three preliminary references of national courts to the CJEU. The following three case studies have been chosen: 1) The *Janecek* case arose out of the legal action, by an individual against the national authorities, for an order requiring the latter to draw up an air quality action plan for the city of Munich, where the applicant lived, and to include the measures to be taken in the short term to ensure compliance with the EU law-based air quality limit values for pollutants.[37] 2) The *Feryn* case dealt with the action by the Belgian equality body against a company, following the remarks of one of its directors whom publicly stated that his company did not wish to employ 'Moroccans' due to his customers' preferences.[38] 3) The *Invitel* case concerned the public-interest action brought by the Hungarian consumer protection authority against a telecom provider, concerning the latter's use of an allegedly unfair unilateral price amendment clause in its contracts concluded with consumers.[39]

[36] Richard Münch, "Constructing a European Society by Jurisdiction," *European Law Journal* 14, no. 5 (2008): 519–41.
[37] Case C-237/07 *Janecek*, ECLI:EU:C:2008:447.
[38] Case C-54/07 *Feryn*, ECLI:EU:C:2008:397.
[39] Case C-472/10 *Invitel*, ECLI:EU:C:2012:242.

At the core of the three preliminary references lay the collective nature of the disputes at stake. In *Janecek*, the individual was eventually accorded with the remedy to oblige the Member State authorities to set up action plans to improve air quality. While the case concerned an individual action, it is clear that this type of action produces collective effects for all EU citizens living in the area that the respective action plan covers. In the *Feryn* case, at stake was an action for an injunction against discrimination. The central question of the case was whether there could be a finding of direct discrimination when there was no individual complainant of the employer's discriminatory public statement. In the *Invitel* case, the matter was about the legal effects that an action for an injunction in the public interest against the use of alleged unfair terms could have beyond the parties to the case extending to the individual consumer.

The three case studies constitute an interesting testing ground for the four levels of hybridity. The CJEU was faced, in the three case studies, with diverse regulatory frameworks regarding collective remedies, which in turn are symptomatic of the three legal fields at stake. In the area of environmental law (the *Janecek* case study), the EU did not succeed in fostering collective remedies against infringements of environmental standards.[40] In the area of anti-discrimination law (the *Feryn* case study), the EU legislator did not go further than facilitating legal protection of individual-complainants.[41] That means that in the area of environmental and anti-discrimination law, the making and shaping of collective remedies was a matter left to the Member States. The situation is different in the area of consumer law (the *Invitel* case study), where the Unfair Terms Directive,[42] as complemented by the Injunction Directive,[43]

[40] The 'Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters' presented by the Commission on 24 October 2003 did not proceed further, and was officially revoked in 2013. See on this, COM(2003) 624 and COM(2013) 685 final.

[41] See the enforcement provisions of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Articles 7-9); Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (Articles 9-11); Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (Articles 8-10); Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (Articles 17-19); Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC (Articles 8-10).

[42] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21.4.1993, p. 29.

[43] Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, OJ L 166, 11.6.1998, p. 51, which was replaced by Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests, OJ L 110, 1.5.2009, p. 30.

ensured that consumer protection authorities and consumer organizations were entitled to put an end to practices that infringe EU consumer law. The question therefore arises as to what influence the diverse regulatory framework of collective remedies in the three legal fields has on the four levels of hybridity.

3.2. COLLECTIVE REMEDIES WITHIN THREE LEGAL FIELDS WITH A SOCIAL DIMENSION

The three legal fields at stake in the case studies have a social dimension. They have in common the fact that they developed at EU level after the adoption of the Single European Act in 1986. The Single European Act heralded a paradigm change for the future development of the European Union, considering that the European Economic Community was originally conceived on a two-fold structure: at the supranational level, it was committed to economic rationality and a system of undistorted competition, while the Member States were to engage in social matters. The European level was thereby not burdened with political tasks that require the legitimation provided by the institutions of constitutional democracies. This two-fold structure was eroded with the adoption of the Single European Act as it led to the entanglement of the EU in more policy fields and the development of a sophisticated regulatory machinery. The EU has thereby gradually assumed a social outlook.[44]

The rise of the "EU Social" did, however, not concern the working class and workers rights, which was the core of the "Social" at the level of the Member States in the early 20th century.[45] The "EU Social" embraces different policy fields with a social dimension, such as environmental law, anti-discrimination law and consumer law.[46] During the 20th century, the Member States developed their models of social justice, which, although shaped by national culture and tradition, were reflected in the common use of law as a means to social ends, namely the protection of weaker societal interests.[47] The national 'protective' ambition as developed in the context of the welfare state also influenced the development of environmental law, anti-discrimination law and consumer law at the national level. However, when Europe assumed a leading role, the three legal-political fields at stake, contrary to labour law, were not yet settled in the Member States. Anti-discrimination law was the least

[44] Hans-W. Micklitz, ed., *The Many Concepts of Social Justice in European Private Law* (Cheltenham: Edward Elgar, 2011), 4.
[45] Ibid., 3–6; Kennedy, "Three Globalizations of Law and Legal Thought: 1850-2000."
[46] Hans-W. Micklitz, "The Legal Subject, Social Class and Identity-Based Rights," in *Constructing the Person in EU Law: Rights, Roles, Identities*, ed. Loïc Azoulai, Ségolène Barbou des Places, and Etienne Pataut (Oxford; Portland, Oregon: Hart Publishing, 2016), 307.
[47] Kennedy, "Three Globalizations of Law and Legal Thought: 1850-2000," 21.

developed at national level, and EU intervention reached far beyond the national concepts of equal treatment. With the EU taking a leading role in the three fields, with the purpose of complementing the creation of an internal market, the EU decoupled the fields from their national social welfare origin and re-established a policy which was less so based on social substance and much more based on procedure, as termed by *Micklitz* as "access justice" (i.e., establishing justice through access to the market).[48]

Collective remedies are strongly interlinked with the three legal-political fields at stake. Where weak and vulnerable societal interests are at stake, enforcement by individuals is considered insufficient to further social justice goals. Instead, enforcement has to be put in the hands of public and collective bodies representing the weaker societal interests at stake.[49] The absence of collective remedies in EU environmental and anti-discrimination law has been related to the insufficient protective nature pursued by EU intervention in the respective legal fields and, particularly the EU's internal market bias.[50] While the situation in consumer law appears more promising, as the EU provides for collective injunctive relief for clearing the market of unfair terms; the EU does not, however, provide for an interlinked mechanism to grant protection to the actually harmed individual consumers.[51]

Those concerned by the alleged bias towards an economic rationale by the EU, put their trust in the CJEU to act as a 'social engineer' and to strengthen the 'EU Social' by increasingly invoking human and fundamental rights understood as constitutional rights.[52] The danger of this approach lies in an ever stronger juristocracy, meaning courts are turned into the forum to discuss political controversies over conflicting values, at the expense of democratic procedures.[53] The rise of fundamental and human rights gives further concern regarding the

[48] Micklitz, *The Many Concepts of Social Justice in European Private Law*, 5.
[49] Chris Willett, "Social Justice in the Office of Fair Trading versus Commutative Justice in the Supreme Court," in *The Many Concepts of Social Justice in European Private Law*, ed. Hans-W. Micklitz (Cheltenham: Edward Elgar, 2011), 365, 366.
[50] Mark Bell, *Anti-Discrimination Law and the European Union* (Oxford; New York: Oxford University Press, 2002), 78, 79; Hans-W. Micklitz, "Collective Action of Non-Governmental Organisations in European Consumer and Environmental Law. A Mutual Learning Process?," in *Reflections on 30 Years of EU Environmental Law: A High Level of Protection?*, ed. Richard Macrory (Groningen: Europa Law Publishing, 2006), 451–73.
[51] Hans-W. Micklitz, "Reforming European Unfair Terms Legislation in Consumer Contracts," *European Review of Contract Law* 6, no. 4 (2010): 356.
[52] Hugh Collins, "The Constitutionalization of European Private Law as a Path to Social Justice?," in *The Many Concepts of Social Justice in European Private Law*, ed. Hans-W. Micklitz (Cheltenham: Edward Elgar, 2011), 133–66.
[53] Ran Hirschel, *Towards Juristocracy : The Origins and Consequences of the New Constitutionalism* (Cambridge (Mass.): Harvard University Press, 2004); see also R. Daniel Kelemen, *Eurolegalism : The*

strong resulting individualization – the 'EU Social' is allegedly put "in the hands of 'elite' individuals who have the resources to improve not necessarily the public good but at least their personal situation".[54] In that regard, therefore, the question arises as to what extent the case studies could give an indication as to whether human and fundamental rights are also able to strengthen the protection of collective interests at EU level.

3.3. THE ROLE OF COLLECTIVE REMEDIES WITHIN THE EU LEGAL ORDERS

The European legal order possesses multiple dimensions.[55] Historically, European integration has primarily been an economic project, and in spite of the expansion of EU activities into new policy domains, economic integration retains a dominant position within this process. The impetus for the proclamation of an EU legal order in *Van Gend en Loos* resulted from its economic dimension. The main rationale was to secure effective implementation of the provisions serving the main objective of the Treaty, namely the establishment of a common market. *Van Gend en Loos* justified direct effect by reference to complementing public enforcement of Treaty law through monitoring by the Commission and other Member States, with the vigilance of private parties. Subsequent steps in enlarging the scope and effect of direct effect and granting all European legal instruments primacy over national law were also motivated by the effective implementation of economic primary and secondary law. The EU's economic legal order is constituted by the four freedoms and the competition law rules, which should protect businesses against national regulatory measures in the market order by which non-market related policies could be promoted. In the context of the preliminary reference procedure, the CJEU deduced directly applicable rights from the Treaty, which were turned into a tool for eliminating national measures regarded as unduly and illegitimately hindering the free flow of goods and services.[56]

The ordoliberal understanding of the European economic legal order in terms of a constitutional *Gesamtentscheidung* in favour of a free market economy relying on performance based competition subsequently came under pressure. In the aftermath of the Single European Act, the extension of EU's social competences changed the outlook of the

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Transformation of Law and Regulation in the European Union (Cambridge (Mass.): Harvard University Press, 2011).

[54] Hans-W. Micklitz, *Constitutionalization of European Private Law* (Oxford: Oxford University Press, 2014), 3, 4.

[55] See **section 2.3.**

[56] Tuori, *European Constitutionalism*, 127 ff.

European legal order. *Tuori* considers that the adoption of the Maastricht Treaty in 1991 signified the defeat of ordoliberal thinking, because of the additional non-economic objectives and increased policy competences introduced.[57] The Lisbon Treaty went one step further by including the Charter of Fundamental Rights within the European legal order and introducing the new paradigm of a 'social market economy'.[58]

With the extension of EU competences, the character of the European legal order changed. Next to the European economic order, the European social order emerged. This raises two principal questions, namely whether the European social order could be regarded as a distinct legal order separate from the European economic order and from the national social orders. Regarding the former, it can be already noted that the Treaty does not establish self-executing social rights, but merely formulates policy objectives which can be achieved by way of secondary community measures.[59] Regarding the latter, the question arises as to whether distinct European collective remedies point towards a distinct European legal order or whether the reliance on national collective remedies signifies the existence of an integrated/*hybrid* legal order.

3.4. THE BUILDING OF A BALANCED EUROPEAN SOCIETY BY COLLECTIVE REMEDIES

The preliminary reference procedure allows individuals or groups who benefit from European law to push forward European integration and to strategically instigate change in national law and practice by relying on European law. *Münch* has described Europe's building of a European society by judicially construing a European society of autonomous individuals superimposing themselves upon the traditionally existing Europe of nation-states:

> *Individualisation as promoted by the European rights revolution is the vehicle of overcoming Europe's segmentary differentiation into nations and of producing a new transnational European society composed of empowered individuals and a plurality of self-organising associations of autonomous individuals. This does not mean that the family of nations will be completely replaced by the European society of empowered individuals, however the latter is increasingly superimposing itself upon the former.*[60]

Münch gives this development a negative connotation since he considers that the CJEU has

[57] Ibid., 153.
[58] Micklitz, "The ECJ Between the Individual Citizen and the Member States – A Plea for a Judge-Made European Law on Remedies," 357.
[59] Ibid.
[60] Münch, "Constructing a European Society by Jurisdiction," 541.

contributed to the shift of power in favour of competitive companies and single individuals seeking the advantage of a European market without national barriers. However, collective remedies for the enforcement of European socially-oriented legislation could contribute towards the creation of a more balanced European society, which also involves more vulnerable and weaker citizens within its scope.

4. METHODOLOGY: A SOCIO-LEGAL RESEARCH PROJECT

This socio-legal research project is structured around the reconstruction of three case studies, which are each constituted by a preliminary reference of a national court to the CJEU. *Micklitz* used this method in "The Politics of Judicial Co-operation in the EU".[61] Although his research dealt with a different theoretical frame, this approach sits comfortably with examining the hypothesis of hybridity between European and national law at the four levels of the individual phenomenon, legal field, legal order and legal space. *Micklitz* reconstructed his three case studies to "the fullest extent possible, that is, in their national and European legal contexts": "It means in essence that the legal material had to be as complete as possible, including the judgments of the courts and the comments of academics, in order to define the arguments of the parties in the litigation, to give shape to the role of solicitors and barristers in the cases and to take a hard look at how national judges, the Advocates-General and the ECJ shape their arguments".[62] This method has to be distinguished from a mere compilation of empirical data, as, in addition, it seeks to decipher the structure of meaning in the on-going process of argumentation and decision-making.[63]

4.1. THE VALUE OF QUALITATIVE CASE STUDIES

As it has been already pointed out in **section 3**, the representativeness of the results of this research have been ensured by the choice of case studies with a view to preliminary references, which reflect the whole policy enshrined in the selected field of research. The reconstruction of the case studies involved not only the analysis of written documents, but has relied on qualitative interviews with the key actors involved in the litigation at the national and European level. Qualitative interviews provide for rich descriptive data on the perspectives of the actors involved in the litigation and thereby allow us to broaden the

[61] H.W. Micklitz, The politics of judicial co-operation in the EU: Sunday Trading, Equal Treatment and Good Faith (Cambridge: Cambridge University Press, 2005).
[62] Ibid., p. 39.
[63] Ibid.

research scope towards the societal dimension of the case studies. Moreover, they allow us to approach a phenomenon from various national and European perspectives, which is essential for the identification of hybridity. The findings provide answers to the presence or absence of hybridity at the four levels and reveal the strategic drivers behind the process of hybridization. It is presumed that the qualitative empirical research approach is able to produce outcomes that allow drawing conclusions for the nature of hybridity that reach beyond the individual case studies.[64]

4.2. QUALITATIVE SEMI-STRUCTURED INTERVIEWS

The interviews have been semi-structured and open, meaning that the interview has not been guided by a set of pre-determined questions. Instead, the framework of themes to be explored during the interview were prepared in advance. The interview was conducted like a conversation and therefore allowed for new ideas to be brought up during the interview as a result of the responses given by the interviewee. The advantage of this approach is that it allowed exploration of the main topics and concerns related to the case from the perspective of the interviewee, instead of imposing pre-determined questions about what the significant issues of the case were supposed to be. However, since the framework of themes was prepared beforehand, the interview could be gently guided towards those broader themes.[65]

The choice of interviews derives from the institutional framework chosen, namely the national and European actors involved in the preliminary reference procedure. That means that, for each case study, the applicants, defendants, their lawyers, the national judges, the Advocate-Generals and some of the CJEU judges have been contacted. Not all actors were available for an interview. Some interviews were easily scheduled, others required an official request in the language of the country, as was the case with regard to the Hungarian consumer protection authority (the applicant in the *Invitel* case), and others never responded, as was the case for example regarding the defendant in the *Feryn* case. All of the interviews were conducted in person and, with the exception of one interview, all interviews were recorded. The table of interviews in Annex I provides detailed information about the interviews that were conducted. This table sets out the date, place and language of the interviews as well as

[64] Lisa Webley, "Qualitative Approaches to Empirical Legal Research," in *The Oxford Handbook of Empirical Legal Research*, ed. Peter Cane and Herbert Kritzer (New York: Oxford University Press, 2010), 927–32.
[65] Steinar Kvale and Svend Brinkmann, *InterViews: Learning the Craft of Qualitative Research Interviewing*, Second edition (Los Angeles: Sage Publications, 2009).

whether, and by whom, they were translated. The interviewees were, as far as possible, anonymized. This was only possible, however, to a limited extent, considering that the CJEU judgments, which are publicly available, provide for the names of the parties, and, at times, the names of their lawyers, as well as the identity of the Advocate General. Guidance about the method of interviewing, as well as the analysis of the interviews was received by the sociologist *Thomas Roethe*.[66]

4.3. THE CHALLENGE OF THE APPROACH: CONSISTENCY & COMPLETENESS

While the structure and method behind the reconstruction of each of the three cases is the same, it became impossible to stick too rigidly to a consistent common structure. This was due to various reasons: firstly, not all actors, whom were contacted, agreed to be interviewed. Secondly, the approach of semi-structured and open interviews implies that the interviews are not standardized – not all interviews offer the same insights. That means that the data collection for each case study is not strictly equal. Therefore, as a researcher, from time to time, one has to deal with a sense of incompleteness in the case studies – some gaps will therefore always remain.

5. THE STRUCTURE OF THE THESIS

After this introductory Chapter, which intends to set out the theoretical framework and the methodology, the following three Chapters each present one of the case studies: **Chapter 2** sets out the *Janecek* case study, **Chapter 3** is dedicated to the *Feryn* case study, and **Chapter 4** deals with the *Invitel* case study. These three Chapters will follow the same order and method. While the vertical reconstructions of the three case studies address hybridity holistically, the final **Chapter 5** will combine theory and facts by analysing the case studies horizontally with regards to the four levels of hybridity: the hybrid individual phenomenon, the hybrid legal field, the hybrid legal order and the hybrid legal space. The strict separation between the case studies and their theoretical analysis ensures neutrality in the presentation of the narratives of the case studies and an unbiased separate analysis.

[66] Thomas Roethe uses the method of objective hermeneutics. As explained by Thomas Roethe, the method of objective hermeneutics is a *Kunstlehre*. Instead to collect the subjective meaning of the interviewees, the emphasis is on the reconstruction of the latent structural meaning of human acting with the method of objective hermeneutics. This method is further based on the idea that every human act is based on social structures, which are, however, unrevealed and invisible. While these structures guide the actions of people, they nevertheless have their own existence, which is real and timeless, but not static. This latent structure can be examined only by using the framework of a multi-step scientific procedure of interpretation. The research has benefited from the insights gained by the use of this method.

5.1. THE STRUCTURE OF THE CASE STUDIES (CHAPTERS 2 - 4)

After an introduction, the first two sections of the **Chapters 2 - 4** will contextualize the case studies within their European (**section 2**) and national legal-political context (**section 3**). **Section 2** will describe the history of the policy field and the main legal instruments developed at the European level, with a focus on the specific directive at stake in the preliminary reference procedure. In concrete terms, that means, in the *Janecek* case study, that the development of a European environmental policy and regulation of air quality will be described and the legislative history and main legal features of the Air Quality Framework Directive 96/62/EC will be explored. In the *Feryn* case study, the development of a European equality policy and anti-discrimination legislation will be portrayed, while the legal characteristics of the Race Equality Directive 2000/43/EC will be looked at in detail. In the *Invitel* case study, the development of a European consumer policy and the regulation of unfair terms, particularly the Unfair Terms Directive 93/13/EEC will be explored. Finally, the section will conclude by pointing out the perceived importance of the judgment of the CJEU in European academic literature for the respective legal-political field and locate the judgment within the wider case law of the CJEU. The resources of this section consist mainly of European policy and legislative documents, the case law of the CJEU and European academic literature.

Section 3 of each Chapter will approach the legal-political field from the perspective of the Member State before and after the European Union took action in the field and will show how the specific directive at stake has been implemented in the respective Member State. In concrete terms, taking a historical approach, the regulation of air quality in Germany will be explored in the *Janecek* case study, the approach to anti-discrimination legislation in Belgium captured in the *Feryn* case study will be looked at, and the regulation of unfair terms in Hungary will be traced in the *Invitel* case study, with a particular emphasis on the remedial solutions adopted by the respective Member States. This will be followed by looking at the implementation of the specific directives and the resulting changes in the respective Member State. The resources of this section consist mainly of legislative documents, academic literature taking a comparative approach or dealing particularly with that Member State and also pure legal information gained from the interviews.

The following **sections 4 – 7** are constituted by the "socio-legal reconstruction" of the case studies. Along the lines of the format followed by *Micklitz* in "The Politics of Judicial Co-

operation in the EU",[67] the sections will be divided in the following way: "The reconstructions set out the history of each case from the beginning, starting with the factual legal-political background to the litigation [**section 4**, entitled "The conflict at the national level"], the way in which the case first reached the national courts, the arguments brought forward and the efforts made to bring the case to the ECJ [**section 5**, entitled "The proceedings before the national court"], the handling of the case before the ECJ [**section 6**, entitled "The proceedings before the Court of Justice of the European Union"], its reception in the national and/or European academic environment, and whether and to what extent the ECJ's ruling was or was not implemented by the national courts [**section 7**, entitled "The follow-up at the national level"]".[68] Sections 4 and 7 are the sections, which rely most intensively on the interviews with the national actors involved in the litigation.

Section 4 will trace the socio-political conflict at the national level. The aim of this section is to determine the underlying broader socio-political conflict of the case, in addition to the question of how the specific dispute between the parties arose, to retrieve background information on the applicant and defendant, to determine their motives to engage in the conflict, to set out the steps undertaken before reverting to the national courts, to determine their reasons for taking judicial action and their legal strategy developed in co-operation with their lawyers. Alongside the information resulting from the interviews with the various actors, this section relies on newspaper articles and information retrieved from the official websites of the parties involved in the litigation.

Section 5 will deal with the proceedings before the national courts. This implies setting out of the reasoning of the national courts in the various instances until the case was referred to the CJEU. Regarding the decision for a preliminary reference, the focus will be on the reasoning of the national court on the necessity of a reference, its doubts about the interpretation of European law and the particular questions posed. Next to this rather pure legalistic exercise, which will draw on the decisions of the national courts, this section will embed this legal information with the perceptions of the various actors on the national proceedings and the decision to refer the case to the CJEU, which will be retrieved from the interviews.

Section 6 will change perspective to the European level by describing the handling of the preliminary reference of the national court from a procedural and substantive perspective by

[67] H.W. Micklitz, The politics of judicial co-operation in the EU: Sunday Trading, Equal Treatment and Good Faith (Cambridge: Cambridge University Press, 2005).
[68] Ibid., p. 40.

the CJEU. This implies not only the description of the reasoning adopted by the opinion of the Advocate General (the *Janecek* case study constitutes an exception as the CJEU decided to proceed with a judgment without an opinion) and by the judgment rendered by the CJEU, but also looking at the submissions of the parties to the proceedings before the CJEU. The resources of his section will principally rely on the information provided by the opinion of the Advocate General and the judgment of the CJEU, and, in addition, on the formal and informal interviews conducted with the actors involved. Regarding the procedural handling of preliminary references at the CJEU, this section also profited from the author's six-month internship with an Advocate General at the CJEU.

Section 7 will turn the perspective back to the national level again, in order to set out the perceptions of the various actors on the interpretation rendered by the CJEU and to determine the legal and "real" effects of the CJEU judgment. While in the *Janecek* and *Feryn* case studies, the follow-up judgments of the national courts, which made the preliminary reference, will be examined, in the *Invitel* case study, the parties reached an out-of-court settlement, which will be reconstructed. This section has, however, a dual-purpose: alongside the question of the incorporation of the interpretations of the CJEU into the national legal system, the aim is to discern from the interviews with the various actors their observations on the real consequences and effects of the CJEU judgment and its implementation by the national courts on the specific conflict at the national level. The *Janecek* case study will contain an additional **section 9** dealing with the *ClientEarth* case, which reveals the cross-border effect of the German litigation. The resources of these sections are principally based on legal documents, mainly the judgments of the national courts, and on the interviews with the various national actors involved in the litigation. In that regard, a further peculiarity of the *Janecek* case study is that the author of the thesis was able to attend the first instance court proceedings in Germany dealing with the follow-up action to the initial *Janecek* litigation.

5.2. THE STRUCTURE OF THE HORIZONTAL ANALYSIS (CHAPTER 5)

On the basis of the empirical evidence collected in the three case studies, **Chapter 5** will determine the role of collective remedies provided by the Member States in order to enforce European socially-oriented regulation for the building of a more balanced European legal order, which is able to gradually counter its perceived internal market bias. Compared to Chapters 2 – 4, each dealing with one case study in a vertical manner, the structure of the analysis of hybridity in Chapter 5 is horizontal. The argument will be developed in three basic

steps: firstly, regarding the *hybrid* individual phenomenon, the nature of the collective remedies in the three legal fields at stake will be examined in detail by determining the EU's influence on their constitutive procedural and substantive elements (**section 2**). Secondly, in view of the *hybrid* legal field, the three collective remedies at stake will be contextualized within their national legal-political fields and in terms of European re-regulation and constitutionalization (**section 3**). Thirdly, regarding the *hybrid* legal order, on the basis of the conclusions reached in the previous two steps, it will be argued that national collective remedies, which aim to protect vulnerable societal interests, have the potential to gradually develop the European legal order from an internal market-driven legal order into a legal order with a social outlook (**section 4**). Fourthly, in view of the *hybrid* legal space, it will be explored how the preliminary reference procedure enables the CJEU to contribute to the building of a European society through law and through national actors (**section 5**).

CHAPTER 2: THE *JANECEK* CASE STUDY

1. INTRODUCTION

The *Janecek* case arose out of the legal action by Mr Janecek against the Bavarian State Ministry of the Environment and Consumer Protection, which was initiated before the German administrative courts for an order requiring the latter to draw up an air quality action plan for the Landshuter Allee district in Munich, where Mr Janecek lived. Mr Janecek based his claim on the Air Quality Framework Directive 96/62/EC,[69] which obliges national authorities to draw up action plans indicating the measures to be taken in the short term, where there is a risk of the air quality limit values, set by the EU, being exceeded. Indeed, Mr Janecek lived approximately 900 metres from an air quality measuring station, which showed that the EU law based limit value for particulate matter PM_{10} in ambient air was exceeded in 2005 and 2006 on more than the permitted number of calendar days.

While an individual, Mr. Janecek, formally constituted the applicant in the proceedings before the national courts and the CJEU, the *Janecek* case was strategically constructed on the basis of a co-operation between a German lawyer and environmental NGO. By initiative of the lawyer, the NGO's political ambitions were turned into legal actions. However, although the applicable regulatory framework for air quality is based on EU law, in order to initiate an action before the German administrative courts, the German administrative procedural law rules must be observed. Accordingly, private parties are prevented from litigating in the collective public interest. The restrictive German doctrine, which can be traced back to the beginning of the 19th century, curtails access to the administrative courts to those whose individual subjective-public rights have been infringed. In light of the CJEU's case law, which strengthened the position of the individual to rely on mandatory rules in order to be able to assert their rights in cases where the exceeding of environmental limit values could endanger human health, the restrictive German legal standing rules have been subject to various criticisms. On that basis, the environmental NGO relied on individual litigants, living as close as possible to an air quality measuring station, in order to claim that they were directly affected by the exceedances of the air quality limit values.

[69] Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management, OJ L 296, 21.11.1996, p. 55.

Nevertheless, the German administrative courts struggled with Mr Janecek's claim. The 'action plan' introduced by the Air Quality Framework Directive could not be readily categorized under the concepts that are found in German administrative law. The implementation of the European air quality framework resulted in a paradigmatic change in German environmental law, namely from the regulation of the sources of pollution to the management of air quality by the development of air quality plans anticipating compliance with the EU law based limit values for various pollutants. The legal actions available under German administrative law did not coincide with the European approach to the regulation of air quality. The German administrative courts, clinging to their traditional conceptualizations, denied Mr Janecek's action for an order requiring the Bavarian authorities to develop an action plan for Munich, which included the measures to be taken in order to achieve compliance with the air quality limit values.

With the preliminary reference of the Federal Administrative Court, the *Janecek* case eventually reached the CJEU, which readily upheld Mr Janecek's claim for an action plan to be adopted on the basis of the doctrine of direct effect. Without invoking the procedural autonomy of the Member States, the CJEU established a remedy – novel to both German and European law - namely a representative action, which allows natural and legal persons to require the national competent authorities to draw up an air quality plan where there is a risk that the limit values for pollutants set by EU law might be exceeded. However, while the CJEU's ruling was celebrated by the environmental NGO's as the confirmation of the European citizen's right to clean air, the remedy's effectiveness to achieve actual compliance with the limit values for clean air was cast into doubt by the national courts resistance to entering into a substantive evaluation of the measures set out in the air quality plans.

The *Janecek* case study will proceed the following manner. Firstly, the historical development of the European environmental policy and of the Air Quality Framework Directive 96/62/EC will be set out. In this context, the legal structure with which the Directive aims to achieve clean air will be examined and the significance of the *Janecek* case for its development will be determined (**section 2**). Following this, the development of environmental protection in Germany and its approach to clean air will be examined. Moreover, the historical roots of the system for legal protection in German administrative procedural law will be set out in order to provide background information, which is essential for understanding the reasoning of the German courts in *Janecek* (**section 3**). Then, the conflict between the parties will be

reconstructed within its national context on the basis of the interviews with the parties involved in the litigation (**section 4**). Next, the rulings of the German lower court and the Federal Administrative Court's reasons for submitting a preliminary reference to the CJEU will be set out (**section 5**). Thereafter, the proceedings before the CJEU will be reconstructed by looking at the submissions of the parties involved in the European proceedings, particularly of the European Commission, the opinion of the Advocate General, and the judgment of the CJEU (**section 6**). Thereafter, the follow-up at the national level will be examined, which is constituted by a new round of strategic law enforcement by the environmental NGO standing behind the *Janecek* proceedings, however, this time, initiated in their own name and on the basis of the new Ambient Air Quality Directive 2008/50/EC (**section 7**). The following section will then reconstruct the view of the Bavarian State Ministry of the Environment and Consumer Protection, which was the defendant in the *Janecek* proceedings, as well as in the second round of strategic law enforcement proceedings, and will determine the role of the European Commission as the 'guardian of the Treaties', taking into account the Member States' poor compliance with the air quality limit values (**section 8**). Finally, the cross-border effect of the *Janecek* proceedings will be illustrated by contextualizing the preliminary reference of the UK Supreme Court in the *ClientEarth* case (**section 9**). The case study will conclude with some remarks about some striking issues raised by the reconstruction of the *Janecek* case (**section 10**). However, the horizontal analysis according to the four levels of hybridity will be left to the final Chapter (**Chapter 5**) of this thesis.

2. EUROPEAN ENVIRONMENTAL LAW AND THE REGULATION OF AIR QUALITY

In Europe, environmental policies first developed at the national level. Before the 1970s, environment-related policy was concerned with technical measures involving public health concerns, such as water quality control and clean-air measures in notorious smog areas. From around the 1970s, the environment was established as a political category in Western European societies. Many European countries adopted their first environmental programmes in anticipation of the UN conference, 'Man and the Biosphere', which was held in Stockholm in 1972. The conference concluded with a declaration, which established 'the environment' as an issue of profound political importance. This is considered to be a historic date in the development of environmental law. The grassroots movements of the mid-1970s, which were motivated by ecological disputes concerning infrastructure projects (for instance nuclear

power plants, international airports, highways), evolved during the late 1980s into new political parties which have altered the party-political spectrum in most western European countries. Although the national approaches to establishing systematic environmental legislation diverged, as well as their pace of development, by the late 1980s the status of national environmental legislation in OECD countries had more or less reached a common level.[70]

Also the EU became involved in environmental matters during the 1970s, however, not for concerns over the protection of the environment or as a response to a threatening environmental disaster, but rather the primary motivation for environmental regulation at the European level was economic—environmental regulation was accepted as a way to ensure harmonization and prevent unfair competition. In line with the economic-orientation of EU environmental legislation, the environment was formally included in the Treaties by the Single European Act and an increasing amount of legislation was adopted from 1986 onwards, to ensure a level playing field between Member States and to ensure that countries with weaker environmental regulations did not gain a competitive advantage over those with more stringent rules. This economic rationale can be also identified as underlying the European approach to regulating the sources of pollution, like motor vehicles, products and industrial facilities. However, as will be illustrated, the European approach to setting quality standards for ambient air departs from the economic rationale and embodies a strong rationale for the protection of European citizens' health.

This section will examine the genesis and development of EU environmental policy (**section 2.1.**), focusing particularly on the regulation of air quality (**section 2.2.**). Following this, the main features of the Air Quality Framework Directive 96/62/EC[71] will be set out, which constituted the European legal basis for the *Janecek* proceedings (**section 2.3.**). Finally, on that basis, the significance of the questions raised in the *Janecek* case will be revealed (**section 2.4.**).

[70] Peter Knoepfel, "Environmental Policy," in *Encyclopedia of Government and Politics*, ed. M. E. Hawkesworth and Maurice Kogan, Second edition (London; New York: Routledge, 2004), 698 ff.
[71] Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management OJ L 296, 21.11.1996, p. 55.

2.1. THE DEVELOPMENT OF A EUROPEAN ENVIRONMENTAL POLICY

The original 1957 Treaty of Rome did not contain any provision on environmental protection. Environmental questions were not pertinent at that time as the EU was established primarily to promote economic cooperation.[72] In the mid-1960s, various environmental disasters resulted in a greater politicization of environmental problems, which increased the pressure to take steps at Community level.[73] In February 1971, the Council and the Governments of the Member States described the limits of the pursuit of the combined goals of growth and stability in the Third-Medium-Term Economic Policy Programme as being "meaningful to the extent that it contributes to improving living conditions".[74] Subsequently, the Commission became active and submitted its first communication on EU environmental policy in July 1971,[75] and presented a proposal for an environmental action programme in March 1972.[76]

In October 1972, at the summit meeting in Paris, the Heads of State and Government agreed on the need to take environmental action and assigned the Commission the task of elaborating an environmental action programme. As the EC Treaty did not contain an explicit legal basis on the environment, the adopted programme was agreed in the form of a joint declaration.[77] The Declaration of 22 November 1973 stated that "the task of the European Economic Community […] to promote throughout the Community a harmonious development of economic activities and a continuous and balanced expansion […] cannot now be imagined in the absence of an effective campaign to combat pollution and nuisances or of an improvement in the quality of life and the protection of the environment". [78] It made clear that "the quality of life and the protection of the natural environment are among the fundamental tasks of the

[72] Nicolas de Sadeleer, *EU Environmental Law and the Internal Market* (Oxford: Oxford University Press, 2014), 8.
[73] Adrienne Héritier, Christoph Knill, and Susanne Mingers, *Ringing the Changes in Europe: Regulatory Competition and the Transformation of the State: Britain, France, Germany* (Berlin; New York: W. de Gruyter, 1996), 156.
[74] Third medium-term economic policy programme, II/38/71-E, 9 February 1971.
[75] First communication of the Commission about the Community's policy on the environment, SEC (71) 2616 final, 22 July 1971.
[76] Commission proposal, OJ C 52/1, 26 May 1972; See also, Ludwig Krämer, *EU Environmental Law*, seventh edition (London: Sweet & Maxwell, 2011), 4.
[77] Ibid.
[78] Declaration of the Council of the European Communities and of the representatives of the Governments of the Member States meeting in the Council of 22 November 1973 on the programme of action of the European Communities on the environment, OJ C 112, 20.12.1973, p. 1–53.

Community", and thereby marked the beginning of the EU environmental policy.[79]

Mainly due to the lack of legal basis, the EU environmental policy developed via the use of action programmes, which set out, for a period of four to five years, the priority objectives and principles of EU action.[80] The legal basis usually taken for Community instruments on environmental issues was Article 100 EEC (now Article 113 TFEU)[81] and Article 235 EEC (Article 352 TFEU).[82] This created obstacles for the expansion of this policy area, since, on the one hand, the provisions were originally intended to grant the EU institutions the necessary powers to achieve and secure economic integration and not the protection of the environment in itself, and, on the other hand, they also required unanimity in the Council of Ministers. However, the CJEU encouraged EU environmental policy by putting an end to the doubts over the legality of the competence on environmental matters[83] and by recognizing environmental protection as "one of the Community's essential objectives".[84]

With the amendment of the EC Treaty, by the Single European Act in 1987, to complete the internal market before 1992, environmental policy was recognized for the first time as a new Community policy in the Treaty. Pursuant to former Article 3 EEC, the protection of the environment was established as an EEC objective. Environmental policy was considered to be not only a specific element in the completion of the internal market (Article 100a(3) EEC, now Article 114(3) TFEU), but also as a legitimate objective in itself (Article 130r EEC, now Article 191 TFEU). However, while qualified majority voting according to cooperation procedure was introduced for internal market measures, the unanimity rule in the Council remained for environmental policy.[85]

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[79] Declaration on the programme of action of the European Communities on the environment; See also, Sadeleer, *EU Environmental Law and the Internal Market*, 8.

[80] Between 1973 and 2015, seven environmental action programmes were agreed at EU level. According to Article 192(3) TFEU, environmental action programmes have to be adopted pursuant to the ordinary legislative procedure. For further information on this instrument, see Krämer, *EU Environmental Law*, 54, 55.

[81] See for example, Council Directive 73/404/EEC relating to the approximation of the laws of the Member States relating to the detergents, OJ L 347, 17 December 1973, p. 51-52; Council Directive 76/769/EEC of 27 July 1976 on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations, OJ L 262, 27.9.1976, p. 201–203.

[82] See for example, Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, OJ L 103, 25.4.1979, p. 1-18.

[83] Case 91 & 92/79 *Commission v. Italy*, ECLI:EU:C:1980:86.

[84] Case 240/83 *Procureur de la République v. Association de défense des brûleurs d'huiles usagées (ADBHU),* ECLI:EU:C:1985:59, para. 13; See on this matter, Sadeleer, *EU Environmental Law and the Internal Market*, 9, 10; Héritier, Knill, and Mingers, *Ringing the Changes in Europe*, 156, 157.

[85] Sadeleer, *EU Environmental Law and the Internal Market*, 10, 11.

In 1992, the Maastricht Treaty replaced the unanimity rule with qualified majority voting according to cooperation procedure, although some environmental matters were still governed by the unanimity requirement. In addition, the Maastricht Treaty introduced the general subsidiarity principle, which is considered to have diminished the Union's involvement in environmental matters in the long run.[86]

In 1997, the Treaty of Amsterdam introduced the co-decision procedure for environmental matters and further aligned this provision towards the internal market policy (Article 192(1)), though the unanimity clause remained in place for some areas (Article 192(2)). The Treaty of Nice and the Lisbon Treaty did not introduce any significant changes to these arrangements.[87] Article 3(3) TEU establishes the objective of "a high level of protection and improvement of the quality of the environment" for the EU, which is complemented by the specific environmental objectives set out in Article 191 TFEU.

2.2. THE EU REGULATION OF AIR QUALITY

Air pollution results from almost all economic and societal activities. Road transport, industry, power plants, household and agricultural activities all emit significant amounts of pollutants, which in turn contribute towards air pollution. The decline in air quality is the result of intensifying industrial production and increasing population sizes, which causes increase in the demand for energy, the number of vehicles and the size of towns and cities throughout Europe.[88] In recent decade, Europe has significantly cut the emission of several pollutants, such as sulphur dioxide (SO_2), carbon monoxide (CO), benzene (C_6H_6) and lead (Pb).[89] However, air quality continues to be an important issue for the environment and public health, as evaluated by the European Environmental Agency (EEA):

> *Despite considerable improvements in the past decades, Europe is still far from achieving levels of air quality that do not pose unacceptable risks to humans and the environment. Air pollution is the top environmental risk factor of premature death in Europe; it increases the incidence of a wide range of diseases and has several environmental impacts, damaging vegetation and ecosystems. This constitutes a substantial loss for Europe: for its natural systems, its agriculture, its economy, the productivity of its workforce, and the health of Europeans. The*

[86] Héritier, Knill, and Mingers, *Ringing the Changes in Europe*, 160, 161.
[86] Sadeleer, *EU Environmental Law and the Internal Market*, 12.
[87] Sadeleer, *EU Environmental Law and the Internal Market*, 12, 13; Krämer, *EU Environmental Law*, 5.
[88] John McCormick, *Environmental Policy in the European Union* (Basingstoke; New York: Palgrave Macmillan, 2001), 181.
[89] European Environmental Agency, Air quality in Europe – 2013 report, EEA Report No 9/2013, p. 6.

> *effects of poor air quality have been felt most strongly in two main areas. Firstly, inhabitants in urban areas have experienced significant health problems. Secondly, air pollution had led to impaired vegetation growth in ecosystems and agriculture, as well as to biodiversity loss, for example in grassland ecosystems, due to eutrophication.*[90]

As further stated in the 2014 EEA report, at present, the most problematic pollutants in terms of harm to human health are particulate matter (PM) and ground-level ozone (O_3), followed by benzo(a)pyrene (BaP) (an indicator for polycylic aromatic hydrocarbons (PAHs)) and nitrogen dioxide (NO_2). The most harmful air pollutants for the ecosystem are ground-level ozone (O_3), ammonia (NH_3) and nitrogen oxides (NO_x).[91]

The EU is committed to an environmental policy aimed at reducing pollution and to this end, has adopted numerous measures to limit emissions in order to improve air quality. The various sources of pollution illustrate that air pollution cannot be addressed in a vacuum, but is dependent on other EU policies, such as those on industry, energy, agriculture and transport. Therefore, the regulation of air quality by the European Union cannot be reduced to one legislative instrument. In general, two approaches to regulating air quality in the European Union can be distinguished: either legislation that aims for the abatement of pollution at the source articulated in emission limit values (examples being: stationary sources, mobile sources or products), or the reduction of pollution in the medium, which is effectuated by air quality standards for specific substances in the ambient air (examples being: lead, sulphur, particulate matters or nitrogen dioxide).[92]

It has been claimed that the EU's air quality legislation follows a cyclical approach: from addressing the sources of pollution, particularly motor vehicles and fuels in the 1970s, to the setting of air quality standards in the early 1980s, back to the (industrial) sources of pollution in the late 1980s and to air quality standards in the 1990s. Although this division into phases reflects general trends, once an approach has been established, it has continued and many of the developments eventually took place in parallel.[93] Therefore, while each approach emerged within its particular historical and institutional context, some developments, like for example the discovery of the long-range transport of air pollution and, therefore, the trans-boundary

[90] European Environmental Agency, Air quality in Europe – 2014 report, EEA Report No 5/2014, p. 8.
[91] European Environmental Agency, Air quality in Europe – 2014 report, EEA Report No 5/2014, p. 8.
[92] Elli Louka, *Conflicting Integration: The Environmental Law of the European Union* (Antwerp ; Oxford: Intersentia, 2004), 132, 133.
[93] Ibid., 132.

dimension of the acidification problem in the late 1970s, and awareness for its repercussions on European forest areas in the mid-1980s, had a lasting effect on all approaches.

In the 1970s, the first European measures on air pollution, namely emission limits for motor vehicles[94] and products, particularly fuels,[95] were adopted. The approach was, however, piecemeal and motivated by the Commission's concern for the functioning of the common market, which it perceived to be endangered by trade barriers resulting from national initiatives for the regulation of motor vehicles and fuels rather than for the protection of the state of the environment.[96]

As anticipated, following the first two environmental action programmes of 1973 and 1977,[97] in the early 1980s, the focus shifted to air quality standards. The first air quality standards adopted in the early 1980s set limit values for sulphur dioxide and suspended particulates.[98] They were followed by standards on lead[99] and nitrogen dioxide.[100] It is considered that in its efforts to establish Community-wide standards for air quality, the Commission followed a general international trend, derived particularly from the work of the WHO, as well as other countries, like Japan and the USA, rather than impulses from the Member States. The Commission's proposals for sulphur dioxide and lead were almost exclusively motivated by the wish to protect public health, particularly in urban areas.[101] However, the formulation of

[94] The first legislative measure by the EU was Council Directive 70/220/EEC of 20 March 1970 on the approximation of the laws of the Member States relating to measures to be taken against air pollution by gases from positive-ignition engines of motor vehicles, OJ L 76, 6.4.1970, p. 1.
[95] One of the first substances to be regulated was the lead content of petrol, see Council Directive 78/611/EEC of 29 June 1978 on the approximation of the laws of the Member States concerning the lead content of petrol, OJ L 197, 22.7.1978, p. 19.
[96] Jan Duncan Liefferink, *Environmental Policy on the Way to Brussels: The Issue of Acidicification between the Netherlands and the European Community*, PhD Thesis Landbouw Universiteit Wageningen (1995, n.d.), 79 ff.
[97] Declaration of the Council of the European Communities and of the representatives of the Governments of the Member States meeting in the Council of 22 November 1973 on the programme of action of the European Communities on the environment, OJ C 112, 20.12.1973, p. 1; Resolution of the Council of the European Communities and of the Representatives of the Governments of the Member States meeting within the Council of 17 May 1977 on the continuation and implementation of a European Community policy and action programme on the environment, OJ C 139, 13.6.1977, p. 1.
[98] Council Directive 80/779/EEC of 15 July 1980 on air quality limit values and guide values for sulphur dioxide and suspended particulates, OJ L 229, 30.8.1980, p. 30.
[99] Council Directive 82/884/EEC of 3 December 1982 on a limit value for lead in the air, OJ L 378, 31.12.1982, p. 15.
[100] Council Directive 85/203/EEC of 7 March 1985 on air quality standards for nitrogen dioxide, OJ L 87, 27.03.1985, p. 1.
[101] Both drafts (COM(76)48 and COM(75)166) were based exclusively on Article 235 of the EEC Treaty (now Article 352 TFEU). This was retained in the final version of the directive on lead. In the final version of the directive for sulphur dioxide/particulates, Article 100 EEC (now Article 114 TFEU) was added as legal basis and the risk of unequal conditions of competition as a result of diverging standards in the Member States was added to the preamble.

scientific criteria for air quality soon appeared unfeasible, as the resulting levels were considered too strict by most Member States in light of economic and financial consequences, and therefore became subject to political decision-making. As a result, the WHO recommendations were included as advisory guide values, together with considerably looser, but obligatory limit values.[102]

Alongside the scientific basis of the standards, discussions among the Member States related to the method to be applied to measure concentrations of pollutants in the air, and the date of compliance with the requirements.[103] Eventually, the air quality limit values were to be fulfilled within three years of their entry into force. Next to the continuous reporting requirements to the Commission, the Member States were required to indicate the zones in which they were not expected to attain the limit values within the time specified and were to prepare plans for the progressive improvement of these zones, so that the limit values may be met in an additional seven-year period. Sampling and analysis methods were prescribed, in addition to measures to be taken to set up monitoring stations. The following problems became salient during the implementation of the air quality policy:

> *i) the process of defining air quality standards was much more time-consuming than expected;*
>
> *ii) the simple principle 'achievement of compliance with the limit values can be obtained by tackling well-defined sources' did not work for all primary air pollutants and was even less successful for secondary pollutants and also did not work at all levels of action (national, local);*
>
> *iii) the degradation of the total environment could not be remedied by an approach which focused mainly on the protection of human health;*
>
> *iv) practical difficulties hampered the harmonised application of the air quality Directives.*[104]

The late 1980s were characterized by a shift from air quality standards to an emissions reduction policy, targeting stationary sources of pollution. With the regulation of motor vehicles and the establishment of air quality standards, the EU primarily addressed the health effects of local, particularly urban, air pollution. In the mid-1980s the EU changed its

[102] Liefferink, *Environmental Policy on the Way to Brussels: The Issue of Acidicification between the Netherlands and the European Community*, 92.
[103] Ibid., 92, 93.
[104] Proposal for a Council Directive on ambient air quality assessment and management, 4.7.1994, COM(94) 109 final, p. 11.

approach to addressing pollution at source, by tackling emissions from industrial plants and mandating the adoption of the best available control technology to curb emissions. The change of approach was induced by the discovery of the long-range transport of air pollution, problematized as acidification or acid rain. Particularly, the domestic policy developments in Germany – as a result of its emergent Green movement that had been mobilized by evidence of a threatening ecological disaster to the forests as a result of acid rain (in Germany referred to as '*Waldsterben*', i.e., forest death) in many areas of the country – influenced the EU's re-orientation. With the emerging prominence of the acidification problem at both international and national level, the EU's orientation towards air quality standards, the implementation of which was left to the discretion of the Member States, became subject to increasing criticism. Directives 84/360/EEC on the combating of air pollution from industrial plants and 88/609/EEC on the limitation of emissions of certain pollutants into the air from large combustion plants reflected this new approach and constituted the EU's first significant reaction to the problem of acid rain and the damage it caused to forests.[105]

Eventually, in the 1990s, the emphasis shifted back to air pollution standards, however, a more integrated approach was anticipated. The various policy approaches that the EU took towards air quality in the 1970s and 1980s developed independently and therefore different levels of progress were made as a result. Since the mid-1990s the EU has taken a more holistic and planned approach to regulating pollution. The more broad-ranging strategy with regard to air pollution is reflected, for example, in the adoption of Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control and Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management (hereafter referred to as the "Air Quality Framework Directive", which will be set out in more detail in **section 2.3.**).

The rationale behind the Air Quality Framework Directive was to create a coherent and effective foundation for the control of air pollution. Moreover, the Directive must be seen in the context of, on the one hand, broader institutional changes at EU level, and, on the other hand, the EU's experience gained from previous approaches. Therefore, in line with the subsidiarity principle incorporated in the Single European Act and the Maastricht Treaty, and by way of contrast to the emission reduction policy, air quality standards give the Member

[105] Kenneth Hanf, "Air Pollution Policy in the European Union," in *Environmental Law and Policy in the European Union and the United States*, ed. Randall Baker (Westport, Conn.: Praeger, 1997), 137–44.

States more freedom to choose among various measures.

Moreover, in line with the emphasis on transparency and public information in the fourth and fifth environmental action programmes,[106] according to *Héritier et al.*, the major difference to the air quality approach of the early 1980s was highlighted by the introduction of information rights for the public, which are intend to generate "pressure from below" to ensure the proper implementation of the air quality standards. It thereby addressed the Member States' poor implementation of the previous air quality standards.[107] Furthermore, the return to air quality standards also addressed the problems related to the emission related-strategy. Not only did the subsidiarity principle make legitimation difficult, but "since such an approach demanded high investment in control technology industries for many countries, and benefitted the environmental control technologies of individual states, it proved extremely difficult to reach decisions and agreement in the Council of Ministers".[108]

2.3. THE AIR QUALITY FRAMEWORK DIRECTIVE 96/62/EC

As illustrated, the European Union has adopted a twofold strategy for combatting atmospheric pollution, namely the reduction of pollution emissions at source and the establishment of air quality standards. The parallel development of both strategies is accepted by the EU as the "best way of safeguarding air quality"[109] and was not altered by the Air Quality Framework Directive 96/62/EC. The Air Quality Framework Directive complements the existing strategy by harmonizing the assessment and management tools of air quality. In addition, it contains rules on the provision of information to the public and comprehensive reporting requirements for the Member States. The data on ambient air quality made available through the Directive linked with data on emissions by models that should, in the long run, "help to improve emission inventories, air quality surveillance and the design of control measures".[110]

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[106] Resolution of the Council of the European Communities and of the representatives of the Governments of the Member States, meeting within the Council of 19 October 1987 on the continuation and implementation of a European Community policy and action programme on the environment (1987-1992), OJ C 328, 7.12.1987, p. 1; Resolution of the Council and the Representatives of the Governments of the Member States, meeting within the Council of 1 February 1993 on a Community programme of policy and action in relation to the environment and sustainable development - A European Community programme of policy and action in relation to the environment and sustainable development, OJ C 138, 17.5.1993, p. 1.
[107] Héritier, Knill, and Mingers, *Ringing the Changes in Europe*, 161.
[108] Ibid., 162.
[109] Proposal for a Council Directive on ambient air quality assessment and management. COM (94) 109 final, 4 July 1994, p. 2.
[110] Ibid., p. 2.

On 4 July 1994, the Commission submitted the 'Proposal for a Council Directive on Ambient Air Quality Assessment and Management', based on Article 130s of the EC Treaty (now Article 192 TFEU).[111] According to the explanatory memorandum, the scientific and technical basis for the proposal was constituted by the problems experienced in the light of the implementation of the directives setting air quality standards, particularly those on sulphur dioxide and suspended particulate matter[112] and on lead.[113] The most important difficulties identified were:

> *the measures taken by the Member States did not achieve compliance with the limit values in the shortest time possible;*
>
> *long term air quality objectives have not been considered to be very important by the majority of the Member States;*
>
> *there are large differences in monitoring strategies in comparable situations between and within Member States;*
>
> *the harmonisation of measuring methods is only partially reached due to national practices;*
>
> *the quality of the measurements also depends very much on calibration and quality assurance procedures. There are obvious differences in these among, and within Member States;*
>
> *the information forwarded by Member States about the results of the survey and the measures taken is seldom complete and is difficult for the Commission's services to assess. In the past, mainly due to the extremely limited resources available for this task, only an administrative treatment of the information provided by countries has been carried out.*[114]

The proposal for the Air Quality Framework Directive aimed to eliminate the disadvantages of the old system. The high degree of harmonization in the assessment strategy should allow the identification of areas where specific action is needed, highlight the need for Community-wide legislation in other areas and provide a direct way of measuring the impact of the measures implemented in order to reduce the emissions of atmospheric pollutants.[115]

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[111] Proposal for a Council Directive on ambient air quality assessment and management. COM (94) 109 final, 4 July 1994.
[112] Council Directive 80/779/EEC of 15 July 1980 on air quality limit values and guide values for sulphur dioxide and suspended particulates, OJ L 229, 30.8.1980, p. 30.
[113] Council Directive 82/884/EEC of 3 December 1982 on a limit value for lead in the air, OJ L 378 , 31.12.1982, p. 15.
[114] Proposal for a Council Directive on ambient air quality assessment and management. COM (94) 109 final, 4 July 1994, p. 2. The Commission examined the problems inherent in the existing air pollution directives as part of a review of air quality instruments, see also: Report from the Commission on the state of implementation of ambient air quality directives. COM (95) 372 final, 26 July 1995.
[115] Ibid., p. 2.

Regarding the management, "the aim is to maintain the quality of air and when necessary, to improve it. To meet that aim requirements are fixed and in cases where there is need for improvement, measures and plans have to be designed and implemented by the Member States to improve the situation".[116]

As a result of the Economic and Social Committee's opinion[117] and the first parliamentary reading,[118] on 6 July 1995 the Commission submitted an amended proposal, which included 24 of the 37 proposed amendments.[119] On the basis of this proposal, the Council adopted a common position on 30 November 1995.[120] The second reading of the proposal by the European Parliament, whereby 23 amendments were proposed, took place on 22 May 1996.[121] The Commission adopted seven amendments,[122] out of which five were adopted in the common position of the Council. This amended version of the common position was endorsed at the Council meeting of 27 September 1996.

The Air Quality Framework Directive 96/62/EC only became operational through the adoption of 'Daughter Directives', which established the air quality standards for individual pollutants. The existing Directives on air quality were therefore replaced by the new Daughter Directives with a view to simplifying, consolidating and updating them, in light of new technological processes and knowledge. The framework is characterized by long-term applicability, as compliance with the limit values must be achieved by the Member States in periods between 10 to 15 years. While the measuring and monitoring procedures are harmonized at the European level, the Member States must translate the air quality standards into practical measures. The Air Quality Framework Directive is therefore seen to be a "near model application of the subsidiarity principle" as the Member States have discretion about the way in which they wish to achieve these objectives, as long as they inform the Commission thereof.[123] The Member States had to implement the provisions of the Directive before 21 May 1998.

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[116] Ibid., p 3.
[117] Opinion of the Economic and Social Committee on the Proposal for a Council Directive on ambient air quality assessment and management, OJ C 110, 2.5.1995, p. 5.
[118] OJ C 166/167, A4-0116/95.
[119] COM 95 (312) final.
[120] OJ 28.2.96 C 59/24.
[121] OJ C 166/63.
[122] COM 96 (311) final.
[123] Jürgen G J Lefevere, "The New Directive on Ambient Air Quality Assessment and Management," *European Energy and Environmental Law Review* 6, no. 7 (1997): 213.

2.3.1. THE PURPOSE OF THE DIRECTIVE

According to Article 1 of the Air Quality Framework Directive, the general aim of defining " the basic principles of a common strategy" is to:

> *- define and establish objectives for ambient air quality in the Community designed to avoid, prevent or reduce harmful effects on human health and the environment as a whole,*
>
> *- assess the ambient air quality in Member States on the basis of common methods and criteria,*
>
> *- obtain adequate information on ambient air quality and ensure that it is made available to the public, inter alia by means of alert thresholds,*
>
> *- maintain ambient air quality where it is good and improve it in other cases.*

The procedures under the Directive are based on the idea that "a wide and comprehensive policy of ambient air quality assessment and management needs to be based on strong technical and scientific grounds and permanent exchange of views between the Member States".[124]

2.3.2. THE LEVEL OF POLLUTANTS IN AMBIENT AIR

The Air Quality Framework Directive contains the procedures to regulate thirteen pollutants[125] of ambient air[126] for which the so-called 'Daughter Directives' must be developed. The discussions between the Commission, the Member States and the European Parliament during the Directive's drafting and adoption phase focused largely on the substances to be listed, and the period of time within which the Daughter Directives must be adopted.[127]

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[124] See the Recitals of the Preamble to the Air Quality Framework Directive 96/62/EC.
[125] According to Article 2 point 2 of the Air Quality Framework Directive 96/62/EC, "'pollutant' shall mean any substance introduced directly or indirectly by man into the ambient air and likely to have harmful effects on human health and/or the environment as a whole". Annex I sets out the different pollutants: "1. Sulphur dioxide, 2. Nitrogen dioxide, 3. Fine particulate matter such as soot, 4. Suspended particulate matter, 5. Lead, 6. Ozone, 7. Benzene, 8. Carbon monoxide, 9. Poly-aromatic hydrocarbons, 10. Cadmium, 11. Arsenic, 12. Nickel, 13. Mercury".
[126] According to Article 2 point 1 of the Air Quality Framework Directive 96/62/EC, "'ambient air' shall mean outdoor air in the troposphere, excluding work places".
[127] For instance, while the original proposal contained fourteen substances, fluoride was deleted from the list due to the UK's insistence. For further information, see Lefevere, "The New Directive on Ambient Air Quality Assessment and Management," 212.

The Daughter Directives establish the specific limit values and alert thresholds and determine the criteria and techniques for measurement and assessment which are specific to the individual substances covered. According to the Air Quality Framework Directive, the numerical values for the limit values and alert thresholds should be based "on the findings of work carried out by international scientific groups active in the field".[128] In addition, according to Annex II, the factors that may be taken into account when setting limit values and alert thresholds are the "degree of exposure of sectors of the population, and in particular sensitive sub-groups, climatic conditions, sensitivity of flora and fauna and their habitats, historic heritage exposed to pollutants, economic and technical feasibility (and) long-range transmission of pollutants". Those elements are subject to re-examination by the Commission on the basis of "the most recent scientific-research data in the epidemiological and environmental fields […] and of most recent advances in metrology".[129] Further pollutants may be added "if on the basis of scientific progress […] it appears necessary to avoid, prevent or reduce the harmful effects of such pollutants on human health and/or the environment as a whole within the Community".[130]

Limit values constitute "fixed concentration(s) of a pollutant in ambient air" determined "on the basis of scientific knowledge, with the aim of avoiding, preventing or reducing harmful effects on human health and/or the environment as a whole, to be attained within a given period and not to be exceeded once attained".[131] Target values are "level(s) fixed with the aim of avoiding more long-term harmful effects on human health and/or the environment as a whole, to be attained where possible over a given period". [132] Consequently, limit values are compulsory, while target values must be attained, only insofar as it is possible to do so. Since measures to improve air quality require time to be implemented and become effective, margins of tolerance can set out the "percentage of the limit value by which this value may be exceeded".[133] Margins of tolerance are of a temporary nature and have to be gradually

[128] See, the Recitals of the Preamble to the Air Quality Framework Directive 96/62/EC.
[129] See Article 4(1) of the Air Quality Framework Directive 96/62/EC.
[130] See Article 4(1) of the Air Quality Framework Directive 96/62/EC. Annex III determines the guidelines for including additional air pollutants for consideration. Among others, the possibility, severity and frequency of effects with regard to human health and the environment, the environmental transformations or metabolic alterations, the ubiquity and high concentration of the pollutant in the atmosphere and persistence in the environment have to be taken into account.
[131] As defined in Article 2 point 5 of the Air Quality Framework Directive 96/62/EC.
[132] As defined in Article 2 point 6 of the Air Quality Framework Directive 96/62/EC.
[133] As defined in Article 2 point 8 of the Air Quality Framework Directive 96/62/EC.

reduced in order to attain the level of the limit value.[134] Finally, the Directive provides for alert thresholds, which constitute "a level beyond which there is a risk to human health from brief exposure and at which immediate steps shall be taken by the Member States".[135] The Commission has to be informed by the Member State if it takes more stringent measures for the pollutants regulated by Community provisions as well as if it intends to regulate pollutants not covered by Community provisions concerning ambient air quality.[136]

2.3.3. THE NATIONAL AUTHORITIES

For the implementation of the tasks under the Directive, the Member States must designate, at the appropriate level, authorities which are particularly responsible for: [137]

> *— assessment of ambient air quality,*
>
> *— approval of the measuring devices (methods, equipment, networks, laboratories),*
>
> *— ensuring accuracy of measurement by measuring devices and checking the maintenance of such accuracy by those devices, in particular by internal quality controls carried out in accordance, inter alia, with the requirements of European quality assurance standards,*
>
> *— analysis of assessment methods,*
>
> *— coordination on their territory of Community-wide quality assurance programmes organized by the Commission.*

Regarding the information that the authorities supply to the Commission, the Member States must also make this information available to the public. This public information requirement has its roots in a European Parliament amendment which was adopted during the second reading, and which was subsequently affirmed and adopted by both the Commission and the Council.[138]

2.3.4. ASSESSMENT OF AIR QUALITY

The Air Quality Framework Directive requires the Member States to divide their territory into zones and agglomerations. An agglomeration is defined as a zone with a population of more

[134] See Article 4(4) of the Air Quality Framework Directive 96/62/EC.
[135] As defined in Article 2 point 7 of the Air Quality Framework Directive 96/62/EC.
[136] See Article 4(6) and (7) of the Air Quality Framework Directive 96/62/EC.
[137] See Article 3 of the Air Quality Framework Directive 96/62/EC.
[138] Lefevere, "The New Directive on Ambient Air Quality Assessment and Management," 213.

than 250.000 inhabitants or, with less than 250 000 inhabitants, if the population density justifies the need for ambient air quality to be assessed and managed.[139] Air quality has to be assessed within the agglomerations as well as in some defined zones by using measurement, modelling or objective estimation techniques.[140] The Daughter Directives determine criteria and techniques for measurement and assessment specific to the individual substances covered.[141]

2.3.5. General requirements of the Member States

The Air Quality Framework Directive sets out the general obligation of the Member States to "take the necessary measures to ensure compliance with the limit values".[142] The measures taken have to ensure an integrated approach to the protection of air, water and soil[143] and may not cause any significant negative effects on the environment in other Member States.[144] Where there is a risk of the limit values and/or alert thresholds being exceeded, the Member States must "draw up action plans indicating the measures to be taken in the short term, in order to reduce that risk and to limit the duration of such an occurrence".[145] As proposed by the European Parliament in its first reading,[146] depending on the circumstances at hand, those action plans may include "measures to control and, where necessary, suspend activities, including motor-vehicle traffic, which contribute to the limit values being exceeded".[147] Moreover, when the alert thresholds are exceeded, Member States have to inform the public via radio, television and the press.[148]

2.3.6. Requirements for the different categories of zones and agglomerations

For the category of zones and agglomerations where the levels of pollutants are higher than the limit values plus the margin of tolerance, Member States must prepare plans and programs to reach the limit values within the specific timeframe as set out in the Daughter Directives. Those plans and programs must be made available to the public and specific information

[139] As defined in Article 2 point 10 of the Air Quality Framework Directive 96/62/EC.
[140] See Article 6 of the Air Quality Framework Directive 96/62/EC.
[141] See Article 4(3) of the Air Quality Framework Directive 96/62/EC.
[142] See Article 7(1) of the Air Quality Framework Directive 96/62/EC.
[143] See Article 7(2)(a) of the Air Quality Framework Directive 96/62/EC.
[144] See Article 7(2)(c) of the Air Quality Framework Directive 96/62/EC.
[145] See Article 7(3) of the Air Quality Framework Directive 96/62/EC.
[146] OJ C 166/167, A4-0116/95, Amendment 14.
[147] See Article 7(3) of the Air Quality Framework Directive 96/62/EC.
[148] See Article 10 of the Air Quality Framework Directive 96/62/EC.

requirements are prescribed.[149] The Commission has oversight over their implementation.[150] In case of the exceedance of the limit value plus the margin of tolerance or where the alert threshold is caused by significant pollution originating in another Member State, the Member State concerned must liaise with the other Member State to find a solution. The consultation is subject to the possible attendance of the Commission.[151]

For the category of zones and agglomerations where the levels of pollutants are between the limit value and the limit value plus the margin of tolerance, the Member States must take action to achieve compliance with the limit value within the specified timeframe.

Finally, for the category of zones and agglomerations where the levels of pollutants are lower than the limit values, the Member States must maintain that level and "shall endeavour to preserve the best ambient air quality, compatible with sustainable development".[152] The removal of the standstill clause, which did not allow a noticeable deterioration in zones with good air quality, which existed in the previous air quality Directives has been criticized. It is considered that the southern Member States, led by Spain, succeeded in undermining the standstill clause, which they saw as an unfair restriction to industrial development in areas with good air quality.[153] Similarly, ECOSOC opined against setting uniform quality objectives for the whole Community, but proposed different objectives for industrial areas and 'clean air areas'.[154]

The monitoring of the compliance with the requirements is conducted by the Member States and is reported to the Commission on a regular basis.[155] Due to the European Parliament's insistence, the Recitals of the Preamble to the Directive set out that the information gathered by the Commission pursuant to the implementation of the Directive may be transmitted to the European Environmental Agency. To promote the reciprocal exchange of information

[149] See Article 8(1) and (3) of the Air Quality Framework Directive 96/62/EC. The information requirements are set out in Annex IV and can be summarized as follows: the localization of excess pollution, general information on the type of zone, the responsible authorities, the nature and assessment of pollution, the origin of pollution, the analysis of the situation and the measures that have been taken prior to the Directive and that will be taken following the entry into force of the Directive.
[150] See Article 8(5) of the Air Quality Framework Directive 96/62/EC.
[151] See Article 8(6) of the Air Quality Framework Directive 96/62/EC.
[152] See Article 9 of the Air Quality Framework Directive 96/62/EC.
[153] Lefevere, "The New Directive on Ambient Air Quality Assessment and Management," 213.
[154] Opinion of the Economic and Social Committee on the Proposal for a Council Directive on ambient air quality assessment and management, OJ C 110, 2.5.1995, p. 5, see point 4.3.2.
[155] See Article 11 of the Air Quality Framework Directive 96/62/EC.

between the Member States and the Agency, the Commission together with the latter will publish a report on ambient air quality in the Community every three years.

2.3.7. OTHER FEATURES

In order to facilitate the implementation of the Directive, Article 12 sets up a procedure to establish close cooperation between the Member States and the Commission within a committee. The committee, composed of the representatives of the Member States, must deliver an opinion if the Commission expresses an intention to re-examine the elements on which the limit values and alert thresholds are based or to adapt the criteria and techniques used for the assessment of ambient air quality to scientific and technical progress and the arrangements needed to exchange information pursuant to the Directive. However, such changes may not, either directly or indirectly, modify the limit values or alert thresholds.

2.3.8. THE NEW AIR QUALITY DIRECTIVE 2008/50/EC

Under the Sixth Environmental Action Programme,[156] in 2005 the Commission submitted a Thematic Strategy of air pollution, which intended to provide a long-term integrated air policy strategy.[157] The non-binding strategy established targets on the reduction of air pollution for sulphur dioxide (82%), nitrogen oxides (60%), volatile organic compounds (51%), ammonia (27%) and fine particulate matters ($PM_{2,5}$ – 59%) until 2020, compared to the year 2000. The new Directive 2008/50/EC on ambient air quality is one of the key measures outlined in the 2005 Thematic Strategy on air pollution.[158]

Directive 2008/50/EC entered into force on 11 June 2008. The rationale behind the Directive is to streamline, clarify and simplify the European air quality legislation to facilitate better implementation by the Member States.[159] The Directive merged the Air Quality Framework Directive 96/62/EC, the first three daughter Directives 1999/30/EC,[160] 2000/69/EC,[161]

[156] Sixth Environmental Action Programme [2002] OJ L242, p. 1.
[157] Communication of 21 September 2005 from the Commission to the Council and the European Parliament - Thematic Strategy on Air Pollution COM(2005) 446.
[158] Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe, OJ L 152, 11.6.2008, p. 1.
[159] Recital 3 of the Preamble to Directive 2008/50/EC.
[160] Council Directive 1999/30/EC of 22 April 1999 relating to limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air, OJ L 163, 29.6.1999, p. 41–60.
[161] Directive 2000/69/EC of the European Parliament and of the Council of 16 November 2000 relating to limit values for benzene and carbon monoxide in ambient air, OJ L 313, 13.12.2000, p. 12–21.

2002/3/EC,[162] and the Decision on Exchange of Information 97/101/EC[163] into one single Directive.[164] The existing air quality standards for the pollutants already subject to legislation were not changed. However, new air quality standards and target dates were introduced for $PM_{2.5}$ (fine particles).

In addition, Member States were given greater flexibility in meeting some of the standards in areas where they had difficulty complying therewith. The deadlines for complying with the PM_{10} standards can be postponed for three years after the Directive's entry into force (i.e., compliance by June 2011) or by a maximum period of five years for nitrogen dioxide and benzene (i.e., compliance by January 2015) provided that an air quality plan is established for the zone or agglomeration to which the postponement would apply. Such air quality plans are subject to specific information requirements and have to demonstrate how conformity will be achieved with the limit values before the new deadline.[165]

2.4. PLACING *JANECEK* WITHIN THE CASE-LAW OF THE CJEU

The *Janecek* case deals with the enforcement of EU environmental law by a private party before the national courts in the situation where a Member State failed to comply with its planning obligations under the Air Quality Framework Directive 96/62/EC. In principle, the enforcement of EU environmental law follows the same principles as the other areas of EU law. The Treaty foresees, in Article 258 TFEU, that the Commission may bring infringement proceedings against the Member State and describes, in Article 259 TFEU, that a Member State may bring infringement proceedings against another Member State for breaches of EU law. While the latter is rarely used, the former is suffers from limitations regarding its duration and the impossibility of the European Commission to be aware of and pursue all

[162] Directive 2002/3/EC of the European Parliament and of the Council of 12 February 2002 relating to ozone in ambient air, OJ L 67, 9.3.2002, p. 14–30.
[163] Council Decision of 27 January 1997 establishing a reciprocal exchange of information and data from networks and individual stations measuring ambient air pollution within the Member States, OJ L 35, 5.2.1997, p. 14–22.
[164] The Directive thereby merged most of the existing legislation on air quality, except for the Fourth Daughter Directive 2004/107/EC of the European Parliament and of the Council of 15 December 2004 relating to arsenic, cadmium, mercury, nickel and polycyclic aromatic hydrocarbons in ambient air, OJ L 23, 26.1.2005, p. 3–16. However, Recital 4 of the Preamble to Directive 2008/50/EC sets out the possibility of merging the provisions of the Fourth Daughter Directive with those of that Directive once sufficient experience has been gained in relation to the implementation of the Fourth Daughter Directive.
[165] See Article 22(1) of Directive 2008/50/EC.

failures of the Member States to correctly implement and apply EU environmental law.[166] Alongside the centralized enforcement instruments under the Treaty, the CJEU enables private parties to enforce EU law before the national courts in three ways: the doctrine of direct effect, the principle of consistent interpretation and the principle of state liability.[167]

Those instruments are complemented by some specific measures of secondary environmental law, which have been adopted in the context of the Aarhus Convention.[168] The aims of the Aarhus Convention are set out in three pillars, dealing with (1) citizen's access to information, (2) public participation in decision-making, and (3) access to justice in environmental matters. While in 2003, Directives concerning the first and second pillars of the Aarhus Convention were transposed into EU law,[169] regarding the third pillar, the 'Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters' presented by the Commission on 24 October 2003 did not proceed further, and was officially revoked in 2013.[170] Considering the mixed nature of the international agreement, compliance with the access to justice pillar of the Aarhus Convention therefore remains principally within the responsibility of the Member States, until such times as the EU intervenes.

The Aarhus Convention did not play an explicit role in the *Janecek* proceedings. The question of whether an individual can require the national administration to set up an action plan in compliance with the requirements under Article 7(3) of the Air Quality Framework Directive 96/62/EC was confirmed by the CJEU on the basis of the doctrine of direct effect. This section will therefore set out the basic features of the doctrine of direct effect and set out the significance of the question raised in the *Janecek* proceedings for the doctrine of direct effect and the enforcement of EU law.

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[166] Astrid Epiney, "EU Environmental Law: Sources, Instruments and Enforcement: Reflections on Major Developments over the Last 20 Years," *Maastricht Journal of European and Comparative Law* 20, no. 3 (2013): 418.

[167] Koen Lenaerts and José A. Gutiérrez-Fons, "The General System of EU Environmental Law Enforcement," *Yearbook of European Law* 30, no. 1 (2011): 3 ff.

[168] The EU has been a party to the Convention since May 2005; The decision on the conclusion of the Aarhus Convention by the EC was adopted on 17 February 2005 [Decision 2005/370/EC].

[169] Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC and Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC. Provisions for public participation in environmental decision-making are furthermore to be found in a number of other environmental directives, such as Directive 2001/42/EC of 27 June 2001 on the assessment of certain plans and programmes on the environment and Directive 2000/60/EC of 23 October 2000 establishing a framework for Community action in the field of water policy.

[170] COM(2003) 624; COM(2013) 685 final.

2.4.1. THE DOCTRINE OF DIRECT EFFECT

With the doctrine of direct effect, the CJEU legitimized the private enforcement of EU law as "an effective addition to the supervision entrusted (by the Treaty) to the diligence of the Commission and of the Member States".[171] Broadly speaking, the doctrine of direct effect means that provisions of binding EU law can be invoked and relied on by individuals before national courts. The CJEU first articulated its doctrine of direct effect in 1963 in its ruling in *Van Gend en Loos*:

> *[T]he Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited field, and the subject of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.*[172]

The doctrine of direct effect has, however, been loosened over the years following this judgment. In the 1970s, the doctrine of direct effect was extended by the CJEU to cover Directives in the cases of *van Duyn*[173] and *Ratti.*[174] Even though Directives are only addressed to the Member States, the CJEU endowed them direct effect under certain conditions, since, "[t]o assume otherwise would be incompatible with the binding effect of directives". By not transposing a directive into national law, Member States could otherwise avoid its effect.

Directives do not only confer obligations on the Member States, but aim to achieve a legal result, whose effectiveness can be enhanced through direct effect. National provisions, which contradict directly effective provisions must be set aside and cannot be applied. Finally, directly effective provisions of EU Directives can be invoked only against the state, and not against another private party.[175]

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[171] Case 26/62 *Van Gend en Loos v. Administratie der Belastingen*, ECLI:EU:C:1963:1.
[172] Case 26/62 *Van Gend en Loos v. Administratie der Belastingen*, ECLI:EU:C:1963:1.
[173] Case 26/62 *Van Gend en Loos v. Administratie der Belastingen*, ECLI:EU:C:1963:1.
[174] Case 148/78 *Ratti*, ECLI:EU:C:1979:110.
[175] Ludwig Krämer, *Focus on European Environmental Law*, second edition (London: Sweet & Maxwell, 1997), 103.

However, the exact meaning of the term 'direct effect' is subject to academic and judicial uncertainty. On the one hand, according to a broad definition, direct effect is constituted by the capacity of a provision of EU law to be invoked before national courts. Accordingly, the conferral of a legal right is not an essential component of the notion of direct effect. On the other hand, according to the narrower definition, it is constituted by the capacity of a provision of EU law to confer rights on individuals, which they may enforce before national courts. This distinction ultimately depends on the definition of 'rights'.[176] This issue is particularly relevant in the area of environmental law. In general, environmental protection does not correspond to a specific individual interest (that is, of an economic nature) but rather accords to diffuse (general) interests.[177]

2.4.2. THE OBLIGATION OF THE ADMINISTRATION TO SET UP AN AIR QUALITY PLAN

Since the 1990s, in the area of environmental law Member States are increasingly obliged by the EU to take planning measures, such as for instance clean-up programmes where pollutant levels are exceeded, or management plans for waste. The Member States are regularly obliged to send such plans and programmes to the Commission, which aligns them and occasionally compares them in order to establish greater coherence. However, it is evaluated that "the planning experience in conjunction with EU environmental matters is anything but a success story". This is due to the "Commission occasionally attack[ing] Member States in court for not having drawn or submitted plans or programmes" and "hardly ever evaluat[ing] the national plans, compar[ing] them, try[ing] to promote planning according to similar criteria or giv[ing] an overall assessment to the planning instruments, and in particular their monitoring, implementation and enforcement". Therefore, plans would give "the wrong impression that they improve the protection of the environment whereas this is often not the case".[178]

In the *Janecek* case, the CJEU held, on the basis of the doctrine of direct effect, that an individual could compel the national administration to adopt planning measures. However, as confirmed by this statement by *Ludwig Krämer* in 1997, this was not obvious:

> *Normally, however, provisions, which provide for an obligation for administrative bodies to act are not of direct effect: they regularly lack the fifth condition, i.e. giving a 'right', a*

[176] Paul Craig and Gráinne De Búrca, *EU Law: Text, Cases, and Materials*, fifth edition (Oxford: Oxford University Press, 2015), 269, 270.
[177] Epiney, "EU Environmental Law," 418.
[178] Krämer, *EU Environmental Law*, 36, 37.

> *favourable position to individuals. Therefore, where an administrative body is obliged, under a Community directive, to draw up a clean-up programme for waste, air or soil, or a monitoring programme for waste, this kind of obligation is not essentially improving the individual's position vis-à-vis the administrative body. […] Most of these provisions are unconditional and sufficiently precise, yet they generally concern normal administrative activity which does not reflect on the protected position of individuals.*[179]

On the other hand, according to *Krämer,* provisions, which contain a limitation of emissions, or concentrations of pollutants expressed numerically, are of direct effect. An example would be the limit values for air pollution, as they have been set in order to protect human health and may not be exceeded throughout the territory of the Member State. The reference to the interests of individuals in having their health protected would be the relevant criterion for the existence of a 'right', which is understood as "any favourable position, any legal interest, which the legal system intends to protect or effectively does protect".[180]

3. ENVIRONMENTAL LAW, AIR QUALITY REGULATION AND LEGAL PROTECTION IN GERMANY

The *Janecek* case resulted from the preliminary reference of a German court. To understand the national background of the case, the development of German environmental protection policy and particularly of the control of air quality will be set out in more detail (**section 3.1.**). In addition, the historical roots of the system for legal protection in the German administrative procedural law will be set out in order to provide the necessary background for understanding the legal strategy as developed by the applicant's side and the reasoning of the German courts in *Janecek* (**section 3.2.**).

3.1. ENVIRONMENTAL POLICY AND AIR QUALITY REGULATION

As air pollution became more serious in the mid-19th century, the Prussian state empowered local authorities to restrict heavily polluting industrial facilities through the establishment of a permit system. At that time, the main emphasis was on protecting health and property in the vicinity of the emitting facilities. The principles of these regulations were later adopted by the German Reich. Air pollution regulations were expanded with the adoption of the 1895 Technical Guidelines for Air Purity, which gave local authorities the power to use licences to

[179] Krämer, *Focus on European Environmental Law*, 97, 98.
[180] Ibid., 89.

control polluting industries.[181]

The focus on the sources of pollution remained Germany's approach to regulating air quality. In North Rhine-Westphalia, Germany's industrial heartland in view of the concentration of power stations and coal mines, the first efforts at strengthening pollution control began. Although North Rhine-Westphalia and the federal government reported in 1957 that air pollution was a serious problem in specific locales, attempts to strengthen pollution monitoring and control measures failed. Willy Brandt's campaign announcing in 1961 that the "skies over the Ruhr territory must become blue again" had important ramifications in North Rhine-Westphalia – it eventually became the first Land to adopt comprehensive air pollution control law in 1962. In the next two years, four other Länder followed suit.[182]

At the federal level, the enactment of the Technical Guidelines for Air Purity (*Technische Anleitung zur Reinhaltung der Luft*) on the basis of the Industrial Code were blocked by the Federal Ministry for the economy and opposed by the Federal association of German industry (*Bundesverband Deutschen Industrie*, hereafter 'BDI'). It was not until 1964 that the Federal Ministry of Health succeeded in issuing the Technical Guidelines for maintaining clean air. Further efforts to introduce a comprehensive federal air pollution control law, however, failed.[183]

3.1.1. THE ESTABLISHMENT PHASE

The first comprehensive environmental programme of the federal government was adopted in 1971. The programme already embraced the principles, according to which the federal environmental policy adhered to: the principle of precautionary protection of the environment, the principle of the polluter pays (the principle of causal responsibility) and the principle of co-operation. The literature refers to a combination of factors that resulted in this development. The federal elections in 1969 brought about a turning point in German political history. The Christian Democrats, which ruled since the establishment of the Federal Republic, were voted out of government, and a new coalition of social democrats and liberals formed a government. The 'Ostpolitik' of the SPD raised international acclaim. Fittingly, in

[181] Miranda Alice Schreurs, *Environmental Politics in Japan, Germany, and the United States* (Cambridge, UK; New York: Cambridge University Press, 2002), 48.
[182] Ibid., 50–52.
[183] Ibid., 52, 53.

the political climate of rendering Germany more modern and democratic, environmental issues were addressed as well.

In the same year, the Department of Water Industry, Air Pollution Control and Noise Abatement, which was previously part of the Federal Ministry of Health, was transferred to the Federal Ministry of the Interior.[184] The development of a federal environmental policy was led by Hans-Dietrich Genscher of the FDP, the new Federal Minister of the Interior, whom in 1971 declared that it was necessary to turn away from an environmental protection that responds merely on a case-by-case basis to a comprehensive environmental policy. In 1971, the Expert Council for Environmental Issues was founded alongside the founding of the Federal Environmental Agency in 1974. Decisive influence also came from international sphere. In 1968, the UN organized an international symposium entitled 'Man and the Biosphere' and the Council of Europe declared 1970 the Year of Nature Conversation. In anticipation of the first international conference entitled 'Conference on the Environment of Man' organized by the UN and to be held in 1972, the German government already presented an initial 'immediate action programme' in 1970.[185]

In 1972, the Basic Law was amended to allow the federal government to become more active in the area of environmental policy. As a result, waste disposal, air pollution control and noise abatement became fields of concurring legislation.[186] On that basis, the government was able to adopt various special environmental laws within a relatively short period of time, including the Act against Noise from Air Traffic (1971), the leaded Petrol Act (1972), the Waste Removal Act (1972), the DDT Act (1972) and the Federal Emission Control Act (1974). The Federal Emission Control Act[187] was modelled entirely on a North Rhine-Westphalian law of 1962, which in turn was based on the principles of the 19th century Prussian Industrial Code.

[184] Due to widespread public criticism for its mismanagement of the consequences of the nuclear reactor accident in Chernobyl, the Ministry of Interior's competence for environmental policy was revoked with the establishment of the Federal Ministry for the Environment, Nature Conversation and Nuclear Safety on 5 June 1986.

[185] Heinrich Pehle, "Germany: Domestic Obstacles to an International Forerunner," in *European Environmental Policy: The Pioneers*, ed. Mikael Skou-Andersen and Duncan Liefferink (Manchester; New York: Manchester University Press, 1997), 161, 162; Schreurs, *Environmental Politics in Japan, Germany, and the United States*, 53–55.

[186] According to Article 72 of the Basic Law, the *Länder* are entitled to legislative power 'as long as and to the extent that' the federal government does not make use of its legislative competences. The federal government may enact laws in such an area only if the establishment of equal living conditions or the maintenance of legal or economic unity calls for nation-wide solution. Pehle, "Germany: Domestic Obstacles to an International Forerunner," 162; Schreurs, *Environmental Politics in Japan, Germany, and the United States*, 57.

[187] Gesetz zum Schutz vor schädlichen Umwelteinwirkungen durch Luftverunreinigungen, Geräusche, Erschütterungen und ähnliche Vorgänge (Bundes-Immissionsschutzgesetz) (Law on protection against the harmful effects of air pollution, noise, vibrations and other types of nuisance on the environment (Federal Emission Control Act)).

This was considered to be problematic in the light of the principle of precautionary environmental protection as exemplified by this statement by *Hucke*:

> *By taking recourse to the legal traditions of environmental policy, the basic patterns of which were conceived in the early phases of industrialization towards the end of the nineteenth century and which focused particularly on protecting private property against intervention of the state and third parties, significant obstacles and delays with respect to the further development and implementation of environmental policy were generated. It cannot be ignored that comprehensive protection of property basically contradicts the concept of new environmental policy that environmental pollution be reduced as much as possible on the basis of the latest knowledge in pollution abatement technology.*[188]

As summarized by *Pehle*:

> *In other words: the principle of precautionary protection of the environment proclaimed in the environmental programme of the federal government was not taken into consideration as adequately as it could have been, if one had not taken the traditional industrial codes as the model-even at the cost of somewhat delayed legislation – but the instruments already developed in the United States at the time with respect to environmental protection (e.g. environmental impact assessment). But now the implementation deficits of the 1970s, as they were revealed by implementation research projects, were to a certain extent pre-programmed by the legislation.*[189]

Particularly, the obligation of industry to use "state of the art technology" led to negotiations about the exact meaning thereof. By reference to technical difficulties or excessive economic costs, facilities could avoid measures aimed at reducing emissions in existing plants. Limited measures were adopted to force existing plants to adopt measures to reduce emissions. The legislation was primarily targeted at assuring that "state of the art technology" was employed in new facilities and not that improvements be made to existing equipment.[190]

3.1.2. THE STAGNATION PHASE

Due to the oil crisis, economic recession and developments in political priorities in favour of promoting economic revival, environmental policy experienced a stagnation phase. Environmental protection was perceived by trade associations and labour unions and their lobbyists in politics and public administration as an obstacle to economic growth and

[188] Jochen Hucke, "Umweltpolitik: Die Entwicklung eines neuen Politikfeldes," ed. Klaus von Beyme and Manfred G. Schmidt (Opladen: VS Verlag für Sozialwissenschaften, 1990), 382–98. The citation derives from Pehle, "Germany: Domestic Obstacles to an International Forerunner," 163.
[189] Pehle, "Germany: Domestic Obstacles to an International Forerunner," 163.
[190] Schreurs, *Environmental Politics in Japan, Germany, and the United States*, 81.

employment. As a decisive turning point, the conference in the castle of Gymnich in 1975 was pivotal, during which Chancellor Schmidt and leading representatives of the trade associations and labour unions "agreed on a kind of 'breather' in environmental policy and on reducing the investment-blocking effects of environmental obligations of environmental obligations imposed on enterprises".[191] While some new environmental acts were passed between 1975 and 1976 with considerable concessions, between 1975 and 1978 no new legislative plans were initiated.[192]

3.1.3. THE CONSOLIDATION PHASE

The consolidation phase began around 1978 and "was characterised by a wide network of citizens' initiatives and environmental groups, which were called into life as a result of the dissatisfaction that politically active and ecology-minded members of the population felt towards the omission of governmental environmental policy".[193] Particularly, the SPD's and FDP's support of the nuclear industry dominated the environmental debate and were spurred by demonstrations by citizens' initiatives, which were behind an emergent sympathy for ecological parties.[194] Therefore, alongside the foundation of new environmental associations, the national Green Party was established in 1980, which was elected to the Bundestag for the first time in 1983 with 5,6% of the votes, which also prompted the established parties to revive environmental protection as part of their political manifestoes. Moreover, a wide social consensus about the necessity of effective pollution control measures was reached as a result of the increasing pressure of ecological problems, particularly illustrated by the intensive public discussion around forest death (*Waldsterben*) as a result of acid rain. On that basis, a thorough reform of German environmental law took place as was reflected in the Ordinance on Large Combustion Plants of 1984. The significance thereof has been illustrated by *Hucke*:

> *In the past, the legal situation and a broad interpretation of the protection of property made it extremely difficult to enforce upgrading requirements for plants polluting the environment and, hence, such enforcement was limited to individual cases, but within the framework of the new regulations [...] binding time limits requiring the observance of considerably more stringent air-pollution control measures were set the first time for all plants falling under the ordinance.*[195]

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[191] Pehle, "Germany: Domestic Obstacles to an International Forerunner," 164.
[192] Ibid.
[193] Ibid.
[194] Schreurs, *Environmental Politics in Japan, Germany, and the United States*, 84, 85.
[195] Hucke, "Umweltpolitik: Die Entwicklung eines neuen Politikfeldes." The citation derives from Pehle, "Germany: Domestic Obstacles to an International Forerunner," 165.

The same conceptual foundation was gradually introduced into other areas of environmental protection. In the area of air pollution, this reorientation brought medium-term success as shown by the emissions of SO_2 responsible for 'acid rain' and the associated *Waldsterben*, which was reduced by 72% between 1970 and 1989.

3.1.4. THE ACID RAIN DEBATE AT INTERNATIONAL LEVEL

One of the first international atmospheric pollution concerns to gain scientific and political attention was acid rain. In the first half of the 20th century, one of the preferred ways of achieving clean air in the immediate area without hindering production was through the 'high smoke-stack policy'. Since discharge into the air dissolved quickly, air pollution was for a long time only considered to be a local problem. The first serious concern about the international dimension of the acidification problem arose in Sweden and Norway in the 1960s, when scientists demonstrated the link between sulphur emissions in continental Europe and the acidification of Scandinavian lakes. The problem reached the international arena with the 1972 United Nations Conference on the Human Environment in Stockholm. However, the resulting Stockholm Declaration failed to lay down any specific provisions on how to combat air pollution.[196]

The need for multilateral action was subsequently confirmed by various studies that were conducted between 1972 and 1977, which proved that air pollutants could travel thousands of kilometres before deposition and damage occurred to the atmosphere as a result. As a response, the Geneva Convention on Long-range Transboundary Air Pollution (LRTAP) was signed in 1979 and came into force in 1983. The international cooperation under the Convention aims to limit, gradually reduce and prevent air pollution, including long-range transboundary air pollution, through on-going exchanges of information, consultation, research and monitoring. On that basis, each Contracting Party is required "to develop the best policies and strategies including air quality management systems and, as part of them, control measures compatible with balanced development, in particular by using the best available technology which is economically feasible and low- and non-waste technology".[197] Thereafter, the framework for cooperation provided by the Convention was appended by

[196] Declaration of the United Nations Conference on the Human Environment, 21st plenary meeting, 16 June 1972.
[197] Article 6, which is entitled "Air Quality Management", of the 1979 Convention on Long-range transboundary air pollution.

eight protocols containing legally binding targets for emission reductions of particular pollutants.[198]

While the Scandinavian countries initialized the efforts to combat air pollution at the international level, in the mid-1980s, Germany joined the driving forces at the supranational level, not only within the context of the emerging LRTAP regime, but also within the EU (see also **section 2.2.**). Before the adoption of the 1985 Helsinki Protocol[199] on the reduction of sulphur emissions by at least 30%, in 1982, Sweden organized a conference in Stockholm on the acidification of the environment. Unexpectedly, Germany, which was considered not only to be a major industrial nation, but also a major polluter, and who previously evaluated the scientific evidence and concluded that it was not sufficient to warrant control action, joined the Scandinavian side, and called for all states to reduce pollution and emissions, and proposed that Germany would cut its SO_2 emissions by 50% by 1995. The German government's change of position was grounded in the appeasement of the energy crisis and the simultaneous emergent Green movement that was mobilized by evidence of a threatening ecological disaster to the forests in many areas of the country.[200] To comply with its promises, Germany modernized its air pollution legislation with the adoption of the above-mentioned Ordinance on Large Combustion Plants of 1984.[201]

3.1.5. The implementation of the European Air Quality Approach

As has been illustrated, Germany traditionally focused on a technical protection of the environment, meaning that it was based primarily on pollutant emissions and technological capabilities. While the Federal Emission Control Act covers both emission-based and emission-related measures, the emphasis is clearly on emissions. The Federal government

[198] The 1984 Geneva Protocol on Long-term Financing of the Cooperative Programme for Monitoring and Evaluation of the Long-range Transmission of Air Pollutants in Europe (EMEP) (entered into force, 28 January 1988); The 1985 Helsinki Protocol on the Reduction of Sulphur Emissions or their Transboundary Fluxes by at least 30 per cent (entered into force, 2 September 1987); The 1988 Sofia Protocol concerning the Control of Emissions of Nitrogen Oxides or their Transboundary Fluxes (entered into force, 14 February 1991); The 1991 Geneva Protocol concerning the Control of Emissions of Volatile Organic Compounds or their Transboundary Fluxes (entered into force, 29 September 1997); The 1994 Oslo Protocol on Further Reduction of Sulphur Emissions (entered into force, 5 August 1998); The 1998 Aarhus Protocol on Heavy Metals, amended in 2012 (entered into force, 29 December 2003); The 1998 Aarhus Protocol on Persistent Organic Pollutants (POPs), amended in 2009 (entered into force, 23 October 2003); The 1999 Gothenburg Protocol to Abate Acidification, Eutrophication and Ground-level Ozone, amended in 2012 (entered into force, 17 May 2005).

[199] The 1985 Helsinki Protocol on the Reduction of Sulphur Emissions or their Transboundary Fluxes by at least 30 per cent (entered into force, 2 September 1987).

[200] The cover story of the German journal "Spiegel" of 16 November 1981 entitled "Saurer Regen über Deutschland. Der Wald stirbt" which marked the public breakthrough of this topic in the public debate; see: http://www.spiegel.de/spiegel/print/d-14347006.html .

[201] Dreizehnte Verordnung zur Durchführung des Bundes-Immissionsschutzgesetzes (Verordnung über Großfeuerungs-, Gasturbinen- und Verbrennungsmotoranlagen - 13. BImSchV).

considers the ambient quality approach, "which takes as its point of departure the load capacity of the environment […], to be inadequate as a priority criterion, especially in view of the frequently still unknown repercussions for the environment of human activity".[202] Accordingly, the precautionary principle and polluter-pays principle underpin the Federal Emission Control Act. The former requires that "harmful environmental impacts are to be prevented, and that environmentally friendly variants are to be given preference already at the construction and production levels".[203] According to the Federal Emission Control Act, plants requiring a permit need to utilize the best available technology. By way of contrast to an air quality approach, that means that plants operating in less polluted areas must also meet the best available technology requirement. However, it also means that in areas of industrial development density, even where the best available techniques are employed, air pollution can still be considerable. The polluter-pays principle implies a focus on the emission source since "protective measures are in principle to be taken vis-à-vis the polluter".[204]

While Germany has taken the lead in shaping the source-approach to pollution at EU-level (see **section 2.2.**), the implementation of the European air-quality approach has been problematic from the beginning as illustrated by two infringement proceedings commenced by the European Commission. In Cases C-361/88 and C-50/89 the Commission accused Germany of not fulfilling the obligation, arising from Directives 80/779 and 82/884/EEC, fixing the limit values for concentrations of sulphur dioxide and lead in ambient air, to adopt a mandatory rule, accompanied by effective sanctions, with a view to expressly prohibiting, throughout the national territory, the exceeding of the fixed limit values. It also charged the Federal Republic of Germany with not taking the appropriate measures to ensure that the limit values were actually observed. Germany considered that the Federal Emission Control Act already offered sufficient protection and that the concrete results which it has achieved regarding pollution amply satisfied the Directive's requirements. The CJEU upheld the complaint that Germany failed to secure implementation of the Directives and pointed out that implementation requires Member States to establish a specific legal framework to enable

[202] BMU, 1990, 17 as cited by Héritier, Knill, and Mingers, *Ringing the Changes in Europe*, 40. This view was, however, not shared by the Advisory Council on Environmental Questions, which emphasized the need for environmental quality standards to be defined explicitly. The environmental quality sought by the government not understood positively, but "as the inverse of pollutant potential to be eliminated". "Although there is no uniform, accepted research framework within which environmental quality can be analysed, the Advisory Council asserted that it was nevertheless necessary to arrive at a political definition of quality objectives for environmental media and individual components". (SRU 1988, 55), see on this also, Ibid., 163.
[203] Héritier, Knill, and Mingers, *Ringing the Changes in Europe*, 40.
[204] Ibid., 41.

individuals to recognize their rights and obligations under the Directive.[205]

3.2. LEGAL PROTECTION IN THE GERMAN ADMINISTRATIVE PROCESS

The paradigm change in German air quality law from the tackling of emissions from particular sources to the setting of air quality standards by the EU also had consequences for the possibilities of legal protection provided by the German Administrative Process. This is well-illustrated by the judgments of the German courts leading to the preliminary reference of the Federal Administrative Court to the CJEU in the *Janecek* case (see **section 5**). Indeed, the longstanding tradition of the doctrine of subjective-public rights and its underlying conception of the relationship between state and citizen are of importance for understanding the reasoning of the German courts in the *Janecek* proceedings. Therefore, in that regard, the historical roots of the German doctrine of subjective-public rights will firstly be explained (**section 3.2.1.**). Secondly, its significance for the enforcement of environmental law in general, and for the source-approach in air quality law in particular, will be set out (**section 3.2.2.**). Thirdly, the discussions in Germany regarding the existence of a constitutional right to a clean and healthy environment will be illustrated (**section 3.2.3.**).

3.2.1. HISTORICAL ROOTS OF THE DOCTRINE OF THE SUBJECTIVE PUBLIC RIGHTS

Legal protection under German administrative procedural law is confined to the doctrine of subjective-public rights, which can be traced back to the beginning of the 19th century. The 19th century was the time of the constitutional monarchy, which was characterized by the differentiation between the royal responsibility towards both state and public welfare and the individual interest of the citizen. While the doctrine of the subjective rights, being the legally protected right of an individual to demand something from others, was identified with the claim under civil law protected by the regular courts, in its relationship with the state, the citizen was regarded as the recipient of the state power's command and therefore as a subject of authority.

[205] Case C-361/88 *Commission v. Germany*, ECLI:EU:C:1991:224; Case C-59/89 *Commission v. Germany*, ECLI:EU:C:19991:225; Case C-58/89 *Commission v. Germany*, ECLI:EU:C:1991:391; and Case C-298/95 *Commission v. Germany*, ECLI:EU:C:1996:501.

Following the failure of the March Revolution in 1848, the struggle of the bourgeoisie to assume state power was lost. However, the state approved a sphere for the pursuit of civil interests, such as the freedom of property. A historical constitutional compromise between the bourgeoisie and the monarchy was struck: while on a constitutional level, parliamentary involvement should reserve statutory powers for interventions into freedom and property, the newly created administrative courts were to restrict themselves to safeguarding individual rights. The recognition of the protection of subjective-public rights was also invoked by the gradual development of the idea of the state under the rule of law and, latterly, the awareness that the discretion of the administration could not be equated with arbitrariness. To summarize, the system did not foresee that the courts were permitted to interfere with the state's sovereign authoritative political-decision making and centralized executive control over the bureaucracy. Judicial review had to be strictly confined to the protection of individual rights.[206]

Confining legal protection to cover individual legal rights was consolidated until the Nazi regime gained power in Germany, which celebrated the end of the subjective-public right as the victory of its ideology of the absolute priority of the community over the interests of the individual. Nazi jurists denounced "the subjective rights model as a liberal-bourgeois monstrosity": "An administrative judiciary under the state's tutelage and a roving commission to ensure strict legality would see to it that the *Führer*'s purposes would not be lost or misdirected in the vast hallways of the *Reich'*s bureaucracy".[207] The German Basic Law expressed its answer to the experienced terror towards the individual in the guarantee for the protection of individual rights set down in Article 19(4) of the German Basic Law, which allowed recourse to legal action where someone's rights were violated by a public power or authority. With the re-establishment of the state under the rule of law after the end of the Nazi regime, the legal traditions developed in the 19th century have been revitalized, and so too has the protective norm theory (*Schnutznormtheorie*), which is used to identify the existence of subjective-public rights to be granted legal protection under German administrative procedural law.[208] Accordingly, individual rights can only be established by those norms, which do not merely serve to protect the general public, but intend to protect individual

[206] Bernhard W. Wegener, "Subjective public right – Historical Roots versus European and Democratic Challenge," in *Debates in German Public Law*, ed. Hermann Pünder and Christian Waldhoff (Oxford: Hart Publishing Ltd, 2014), 219–38.
[207] Michael Greve, "The Non-Reformation of Administrative Law: Standing to Sue and Public Interest Litigation in West German Environmental Law," *Cornell International Law Journal* 22, no. 2 (1989): 238.
[208] Wegener, "Subjective public right – Historical Roots versus European and Democratic Challenge," 228–30.

interests as well.[209]

3.2.2. Enforcement of environmental law

As has been clarified, the existence of a subjective-public right enables the individual to pursue his interests before the German administrative courts. The protective norm theory constitutes a hurdle in the sense that a norm can only confer rights on the individual under certain circumstances. It is concerned with the question of whether the legislator has intended to confer individual rights on citizens. As has been pointed out by *Greve*:

> *To this day, the highly doctrinaire, systematized body of public law is the core and pride of German jurisprudence. For almost a century, German public law has proven highly resistant to democratic demands raised in the name of substantive values, such as social equality and welfare or a clean environment. To put it bluntly, the doctrinal baggage of more than a century does not go overboard because people get upset about carcinogens or acid rain.*[210]

Three conditions have been developed to determine whether a statute confers a subjective-public right on the individual. First, it has to contain a particular duty to act on the side of the administration. Secondly, the statute must have been partly enacted to satisfy, at least, some individual interest. Thirdly, the applicant must be granted the legal power to exercise such rights. The protective norm theory influences not only the rules of legal standing before the administrative courts but also the different types of actions available in German administrative law.[211] The German doctrine therefore prevents private parties from litigating on behalf of collective or public interests. The *actio popularis* is therefore not permitted and judicial review of the actions of the administration is limited to the protection of individual rights. That means that an objective control of administrative acts is excluded as well as actions against the lack of administrative action. Consequently, many administrative decisions on environmental matters are completely excluded from judicial control.[212]

Until the 1950s, actions against administrative decisions in someone's else favour were also inadmissible under German administrative law. Only the addressee of the administrative

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[209] Ottmar Bühler, *Die subjektiven öffentlichen Rechte und ihr Schutz in der deutschen Verwaltungsrechtsprechung* (Berlin: Kohlhammer, 1914).
[210] Greve, "The Non-Reformation of Administrative Law: Standing to Sue and Public Interest Litigation in West German Environmental Law," 234.
[211] Martina Künnecke, *Tradition and Change in Administrative Law: An Anglo-German Comparison* (Berlin; New York: Springer, 2007), 42.
[212] Greve, "The Non-Reformation of Administrative Law: Standing to Sue and Public Interest Litigation in West German Environmental Law," 202. With reference to BVerwG, 1975, Die öffentliche Verwaltung 605.

action had standing to challenge it. In the mid-1950s, however, the Federal Administrative Court admitted neighbourhood actions in the context of industrial emissions. Plaintiffs are granted standing if they are 'neighbours' of the beneficiary of administrative action, and if they can invoke a rule that intends to protect their interests.[213] Those actions have a tripartite structure: private parties may challenge an administrative licence, building or operation permit granted to another private party by a public authority. Nevertheless, even applicants who live within the 'neighbourhood' must establish an individual relationship between themselves and the dangers allegedly emanating from a particular facility. There must be some evidence of potential individual damage, i.e., for example general objections to the use of nuclear energy do not confer standing. Environmental organizations have developed various strategies in order to circumvent the restrictive standing requirements by searching for qualified individual applicants or by buying small patches of land near construction sites and in ecologically vulnerable areas.[214] In the 1970s, the administrative courts expanded individual rights and facilitated those neighbourhood litigations.[215] However, in the 1980s, the approach of the courts changed and they returned to a more traditional approach:

> *But whatever the motives and the precise extent of these doctrinal shifts may have been, they can by no stretch of the imagination be interpreted as a general tendency towards collective, public interest forms of litigation. The trends towards the acceptance of de facto public interest cases and towards judicial control of administrative decision-making even in the absence of clearly discernible individual rights has been partially reversed. Beginning in the early 1980s, the judiciary stopped the expansion of private environmental rights and limited environmental litigants' access to court by imposing very substantial pleading requirements upon plaintiffs seeking to obtain standing. The Federal Administrative Court ruled that substantial provisions of nuclear power law and of the BImSchG [Federal Emission Control Act], held to be "protective" by many lower courts, served no such purpose.[216] The Federal Constitutional Court also explained that the legislature's decision to promote nuclear power was constitutionally permitted, and that the existing legal provisions sufficed to protect the populace.[217] This decision proved extremely influential; the administrative*

[213] BVerwG, 24.10.1967 - I C 64.65. See also, Ulrich G. Berger, *Grundfragen umweltrechtlicher Nachbarklagen: zum verwaltungsrechtlichen Drittschutz im Bauplanungsrecht, Immissionsschutzrecht und Kernenergierecht* (Köln: Heymann, 1982); Gregor Kirchhof, "Der rechtliche Schutz vor Feinstaub – subjektive öffentliche Rechte zu Lasten Vierter? Der Wechsel vom Emissions- zum Immissionsprinzip im Luftqualitätsrecht und die Folgen für das subjektive öffentliche Recht und die Verhältnismäßigkeitsprüfung," *Archiv des öffentlichen Rechts* 135, no. 1 (2010): 32, 33.

[214] Greve, "The Non-Reformation of Administrative Law: Standing to Sue and Public Interest Litigation in West German Environmental Law," 209–10.

[215] Ibid., 210, 211. As a result, the judiciary has been subject to harsh scholarly and legislative criticism, particularly concerning its approach to nuclear power litigation.

[216] BVerwG, 22.12.1980 - 7 C 84.78; BVerwG, 18.05.1982 - 7 C 42.80; BVerwG, 17.02.1984 - 7 C 8.82.

[217] BVerfG, 08.08.1978 - 2 BvL 8/77.

> *courts took it as a signal to further limit the scope of individual legal protection in cases brought against nuclear reactors.*[218]

While proposals for legislative authorizations of public interest litigation have shaped the German debate surrounding environmental law and policy ever since the early 1970s, none of the reform proposals have hitherto been successful.

3.2.3. A CONSTITUTIONAL RIGHT TO A CLEAN ENVIRONMENT?

In terms of a general constitutional debate, it was questioned to what extent the federal government had the authority to act in the field of environmental policy. Since the 1970s, the prevailing opinion in public law was "that the protection of the natural basis of existence of man is a matter-of-course responsibility of the state which among others, can be deduced from Article 2 of the Basic Law, which guarantees every person's right to freedom of physical injury".[219] However, the extent of this authority has been disputed. On the one hand, in legal literature, the opinion could be found that the state was only obliged to safeguard a 'minimum ecological standard'.[220] On the other hand, we can find the claim that the state has a general and comprehensive duty to undertake environmental protection as illustrated by the statement of *Hans-Peter Bull*:

> *If the state has any tasks at all, then one of them is to protect the natural ('biological') basis of existence of human life. This does not require any further constitutional reasoning; one must only refer to the fundamental rights, in particular article 2 of the Basic Law […] and the principle of social justice and the welfare state.*[221]

Linked to the constitutional debate about the extent of duties of Germany is the question of whether environmental rights and the role of the judiciary in environmental protection could be expanded with the constitutionalization of claims to a clean and healthful environment. Several legal scholars derived, by implication, the existence of such a constitutional right from other provisions of the Basic Law.[222] The German Chancellor Brandt referred to a right to environmental protection in a governmental address of 1973, without reference to the Basic

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[218] Greve, "The Non-Reformation of Administrative Law: Standing to Sue and Public Interest Litigation in West German Environmental Law," 212.
[219] Pehle, "Germany: Domestic Obstacles to an International Forerunner," 171.
[220] Ibid., 172. With reference to Bettina Bock, *Umweltschutz im Spiegel von Verfassungsrecht und Verfassungspolitik* (Berlin: Duncker & Humblot, 1990).
[221] Hans-Peter Bull, *Die Staatsaufgaben nach dem Grundgesetz* (Frankfurt a.M.: Athenäum Verlag, 1973). The citation derives from Pehle, "Germany: Domestic Obstacles to an International Forerunner," 171.
[222] Lutz H. Michel, *Staatszwecke, Staatsziele und Grundrechtsinterpretation unter besonderer Berücksichtigung der Positivierung des Umweltschutzes im Grundgesetz* (Frankfurt am Main: Lang, 1986).

Law. The FDP was strongly committed to such a right and the Minister of the Interior Hans-Dietrich Genscher proclaimed a right to "undisturbed sleep, clean water, and pure air".[223] The debate was revived with the success of the Green Party and the debate surrounding the *Waldsterben*. In 1984, the Green Party submitted to the Bundestag a proposal for a constitutional amendment to guarantee a basic environmental right.[224] However, with the exception of the Green Party, which favoured the introduction of a basic right to a clean and healthful environment, all other parties preferred enshrining environmental protection in the constitution as a state goal.

In 1993, the Joint Constitutional Commission of the Bundestag and Bundesrat eventually discussed a proposal by a commission of experts set up by the federal government. The controversy between SPD and CDU centred around the question of "whether decisions made by administrative authorities and court decisions should be subjected directly to the public/national objective of environmental protection or only to the framework of the 'simple' laws effective at the time".[225] The proposition of the CDU/CSU, which finally carried through the basic elements of their position, provided the following:

> *The national objective of environmental protection can […] only be reconciled with other responsibilities of the state, the public interest and the rights of the individual by political decisions of the legislator, and not on a case-by-case basis through the administrative authorities or the courts. Environmental protection must not become a primary or even decisive issue, but must always be viewed in its relation to other objectives such as economic growth or the creation of jobs; and this could not be ensured if the executive and judicial branches were directly bound to the national objective of environmental protection in individual cases.*[226]

In 1994, Article 20a was introduced into the Basic Law, which states: "The state shall protect, also as part of its responsibility for future generations, the natural basis of existence within the framework of constitutional order by means of legislation and in compliance with the laws through executive power and legal decisions".[227] On that basis, under the constitution, the

[223] Greve, "The Non-Reformation of Administrative Law: Standing to Sue and Public Interest Litigation in West German Environmental Law," 217.
[224] Bundestag Drucksache 10/990 (1984).
[225] Pehle, "Germany: Domestic Obstacles to an International Forerunner," 172.
[226] Joint Constitutional Commission (Gemeinsame Verfassungskommission, 1993). The citation derives from Ibid.
[227] In 2002, the protection of animals was added.

legislator is endowed with the responsibility to protect the 'natural basis of existence', subject to its political will as to how and when the function will be fulfilled.[228]

4. THE CONFLICT AT THE NATIONAL LEVEL

This part aims to set out the conflict and the evolution of the *Janecek* case at the national level. The reference for a preliminary ruling to the CJEU in the *Janecek* case arose out of the course of proceedings between Mr Janecek (the applicant) and the Bavarian authorities (the defendant) concerning an application for an order requiring the latter to draw up an air quality action plan comprising the Landshuter Allee district in Munich, where Mr Janecek lived. The plan in question was to include the short-term measures to be taken to ensure compliance with the limit value set by Community legislation in respect of ambient air emissions of particulate matter PM_{10}. The Bavarian authority's obligation to establish an action plan was based on Section 47(2) of the Federal Emission Control Act,[229] which was the German domestic implementing legislation for Article 7(3) of the Air Quality Framework Directive 96/62/EC. After setting out shortly the factual background of the case, this part will reconstruct the views of the applicant (**section 4.1.**) and of the defendant (**section 4.2.**) on the basis of the interviews conducted with the parties.

There was no dispute between the parties that in the area in which Mr Janecek lived, the limit value for particulate matter PM_{10} laid down under national law and meeting the requirements of Directive 1999/30[230] was exceeded in the years 2005 and 2006 on more than the permitted number of calendar days. The 24-hour limit value for PM_{10}, which is determined at 50 $\mu g/m^3$ must not be exceeded for more than 35 days in a calendar year, and this requirement had to be met by the Member States by 2005. According to the results of the measuring station at the Landshuter Allee, the limit value for particulate matter PM_{10} of 50 $\mu g/m^3$ was exceeded for the 36th time on 27 March 2005. 75 exceedances were measured by 1 October 2005 and by 13 December 2005 there were 105 recorded exceedances. For the year 2003, the Land Office for

[228] Pehle, "Germany: Domestic Obstacles to an International Forerunner," 173. See on this also, Greve, "The Non-Reformation of Administrative Law: Standing to Sue and Public Interest Litigation in West German Environmental Law," 219.

[229] Gesetz zum Schutz vor schädlichen Umwelteinwirkungen durch Luftverunreinigungen, Geräusche, Erschütterungen und ähnliche Vorgänge (Bundes-Immissionsschutzgesetz) (Law on protection against the harmful effects of air pollution, noise, vibrations and other types of nuisance on the environment (Federal Emission Control Act)).

[230] Council Directive 1999/30/EC of 22 April 1999 relating to limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air, OJ L 163, 29.6.1999, p. 41.

Environmental Protection broke down the pollution exposure as recorded by the measuring station, as follows: 43% was attributed to the large-scale background (i.e. from outside of the city), 36% to the motor vehicle traffic, 5% to the installations (which require a licence according to the Federal Emission Control Act) and 16% to other influences (i.e. for example installations, which do not require a licence and chimneys and fireplaces of houses).[231]

4.1. THE VIEW OF THE APPLICANT

While an individual, Mr. Janecek, was the applicant in the proceedings before the national courts and the CJEU. The case was constructed on the basis of the strategic co-operation between a German environmental NGO and a lawyer, whom specialized in administrative law. The NGO decided to take strategic legal action against air pollution in Germany as it considered that its influence on politics, the administration and the market place via lobbying and public information campaigns was too limited to achieve its ultimate goal of pressuring the automobile industry to use ecological filters. However, the restrictive legal standing rules in the German Administrative Process made it impossible for the NGO to initiate legal action in its own name. Therefore, individuals were identified, who could act as 'stalking horse' for the NGO to enforce its interests before the German courts.

This part will firstly give some background information on the interests pursued by the respective environmental NGO (**section 4.1.1.**). On the basis of the interview with the applicant's lawyer, his role in this case and the legal strategy developed by him will be reconstructed (**section 4.1.2.**). Finally, the legal arguments pleaded before the courts will be shortly summarized (**section 4.1.3.**).

4.1.1. THE AIM BEHIND THE CASE

In November 2002, under the co-ordination of the environmental organization behind the *Janecek* case, various environmental organizations formed an alliance called 'No diesels without a filter' ('*Kein Diesel ohne Filter*'). The aim of this grouping was to establish a campaign to pressure the automobile industry to introduce diesel particulate filters and to inform consumers about the health risks of diesel particulates and about different filter technologies. Particularly, the goal was, starting from summer 2003, to force the automobile

[231] VGH Bayern, 18.05.2006 - 22 BV 05.2462, para. 1.

industry in to only selling diesel vehicles fitted with particulate filters. At the political level, the campaign lobbied for the introduction of tax incentives in favour of using diesel particulate filters. In order to support its mission, the alliance drew on the scientific evidence produced by the World Health Organization, which estimated that around 80 000 adult deaths per year are related to long-term exposure to traffic-related air pollution in European cities.[232] Moreover, the initiative purportedly received technical guidance from the biggest German automobile club, which together with the German Federal Environmental Agency, conducted a long-term test of the durability of particulate filters. The study confirmed that the new diesel filter technology reduced particulate emissions to practically zero, while functionality remained intact after a driving distance of 80 000 km and no significant increase in fuel consumption was found.[233] Moreover, a further study commissioned by the Federal Environmental Agency revealed that in Germany, around 10 000-19 000 deaths per year were caused by emissions of diesel vehicles. While around 8 000-17 000 are caused by respiratory and cardiac diseases, around 1 100-2 200 were caused by lung cancer. In other words, the study concluded that diesel particulate filters could increase the life expectancy of all German residents by 1-3 months.[234]

The figures regarding the functionality of the diesel particulate filter allowed the environmental alliance to considerably increase public pressure on the German car industry to introduce diesel particulate filter, and thereby close ranks with foreign manufacturers, particularly the French automobile Group PSA Peugeot Citroen. PSA's filter technology, developed in 1991, allowed for the reduction of particulate emissions to 0.001g/km, which is significantly below the ceiling of 0.025g/km as stipulated by the Euro 4 emission standard applicable as of 2005.[235] The German car industry found itself in the uncomfortable position

[232] World Health Organization, 'Charter on Transport, Environment and Health', Third Ministerial Conference on Environment and Health, London, United Kingdom, 16 June 1999, available at: http://www.euro.who.int/__data/assets/pdf_file/0006/88575/E69044.pdf?ua=1 , p. 16.

[233] 'Future Diesel Abgasgesetzgebung Pkw, leichte Nfz und Lkw – Fortschreibung der Grenzwerte bei Dieselfahrzeugen', Umlwetbundesamt Berlin, July 2003, available at: http://www.umweltbundesamt.de/sites/default/files/medien/publikation/long/2353.pdf .

[234] 'Abschätzung positiver gesundheitlicher Auswirkungen durch den Einsatz von Partikelfiltern bei Dieselfahrzeugen in Deutschland', conducted by Prof. Dr. med. Dr. rer .nat. H. - Erich Wichmann (Direktor des Instituts für Epidemiologie der GSF, Neuherberg) for the Umweltbundesamtes Berlin,7 June 2003, available at: http://www.umweltbundesamt.de/sites/default/files/medien/publikation/long/2352.pdf .

[235] The Euro 4 standard has been established with Commission Directive 2003/76/EC of 11 August 2003 amending Council Directive 70/220/EEC relating to measures to be taken against air pollution by emissions from motor vehicles, OJ L 206, 15.8.2003, p. 29.

of having to defend their own strategy by simply relying on engine modifications.[236] In 1999, when the German Federal Minister for the Environment Jürgen Trittin called on the automobile industry to introduce a particulate filter system on to the market by way of self-initiative, this was rejected by the German Automobile Industry (*Verband der Automobilindustrie*, hereafter 'VDA') on the grounds that it constituted a construction regulation which was unacceptable in principle, given that such a regulation served to distort competition.[237] In its yearly report of 2003, the VDA questioned the validity of studies on the effects of diesel particulates on human health.[238] Moreover, while the automobile industry complied with the Euro 3 emission standards,[239] it was argued that engine modifications would also make it possible to comply with the Euro 4 emission standards in case of small and medium-sized engines. If this was not applicable to heavy vehicles, the VDA stated optimized filters would be installed.[240] Consequently, the Euro 4 emission standards did not provide an incentive for the German automobile industry to install a diesel particulate filter as a standard procedure in the production-series.

4.1.2. THE LEGAL STRATEGY

Until 2004, this alliance of German environmental NGOs was active by lobbying and negotiating with the automobile industry. In 2004, the situation changed because, as of 2005, the limit value for PM_{10} in Directive 1999/30 became legally binding. While the limit value was already adopted in 1999, the aim behind the Directive was to allow the Member States to achieve gradual compliance with the help of the procedural instruments contained in the Air Quality Framework Directive 96/62/EC. The fact that the limit value became legally binding meant that the situation changed.

By the initiative of a lawyer, with whom the respective environmental NGO behind the *Janecek* case already cooperated on other matters, a strategy was developed to build cases against the *Länder* of Germany in order to oblige them to adopt measures to comply with the binding limit values. The lawyer explained the strategy as the following:

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[236] Jahresbericht 2001, VDA, p. 143, stating, in particular: "It is the goal of engineers to prevent emissions being produced, rather than filtering them out later".
[237] Jahresbericht 2000, VDA, p. 69 and 159.
[238] Jahresbericht 2003, VDA, p. 92, 93.
[239] The Euro 3 standard was established with Directive 98/69/EC of the European Parliament and of the Council of 13 October 1998 relating to measures to be taken against air pollution by emissions from motor vehicles and amending Council Directive 70/220/EEC, OJ L 350, 28.12.1998, p. 1.
[240] Jahresbericht 2003, VDA, p. 162, 166.

> *In 2003/2004, I represented a coalition of environmental organizations calling themselves 'No diesel without filter'. So, this was a coalition of environmental organizations that wanted diesel particulate filters to be used and who had met at an evening event with members of the Bundestag and discussed, very intensely and very hotly, the question of how much particulate matter would be allowed to emerge from such a particle filter. Can it be 0.001 micrograms or 0.0001 micrograms? That was the question of the evening and then, I said: it ultimately does not matter. You're talking about the wrong topic here. We have, you must imagine the situation in 2004, and we have had from 1 January 2005, for the first time, fixed limit values for particulate matter PM_{10} in the air. I do a lot of pollution control law. And the limit values are exceeded in almost all major German cities and the parishes will exceed it as well. Let's just turn the tables. Let's build or create lawsuits with which we complain against the parishes and complain against the Länder by saying to those, the limit value is exceeded, you have to do this and that, for my sake, also block the road temporarily, to comply with the limit value. And then the German car manufacturers will pretty quickly introduce strict limits for their filters because otherwise the selling points for these vehicles would no longer exist. And if one goes into a car house, in to a BMW's car house and sees a beautiful car and says it's a wonderful car. The seller says, but to the Stachus in Munich, you will not be able to drive, because it is no longer admitted there, because in the city centre such vehicles are no longer allowed. Then the technology will be established fast. That was the background. Then they [the environmental NGOs] were relatively enthusiastic of the idea to turn it around. And then the question was, how do you build such complaints? Who is actually the one who can complain and against and what can one actually complain?*[241]

The role of the lawyer was crucial for the development of the case. It was due to his initiative that the issue was brought before the German courts, and eventually before the CJEU:

> *I was ultimately the initiator and had the idea and then I went and said, let's do it! And then the response came from the associations who said: 'Good idea! Make something of it! Tell us how to do it best.' Then I had talks with several environmental associations. […] The largest environmental association in Germany, which were very cumbersome and are also always very difficult in decisions. Who was very fast and were quickly involved in the matter was the [relevant NGO of the case], which organized and oversaw everything in the background.*[242]

The lawyer confirmed at various times during the interview that he appreciated, notwithstanding the fact that the NGO was rather small and did not have many members, that it was quick in its decision-making and more flexible in its approach. The lawyer described his own approach as the following:

[241] Interview with the lawyer of Mr. Janecek (applicant), 8 October 2012.
[242] Interview with the lawyer of Mr. Janecek (applicant).

> *I've been a lawyer since 1999 and already from the beginning in environmental law and in the law firm of the well-known [name anonymized], who already decades earlier in Germany, one can say, used environmental law in a manner as other lawyers often do not. It was often an attempt to continually find new ways, to break new ground to enforce the goals that one has. And to see there in which direction the developments could go and then maybe also eventually create cases with which one can apply these means and methods - because we see so often, we see a lot of what professors nicely write in essays and write in journals, only that this interests absolutely no one further, if it is not used somewhere in the application of the law, namely in the judgments. And this is common among us, or me, the thought to find there somehow a turn how to render certain aspects of the legal literature fruitful in the development of the law.* [243]

Consequently, it became clear that the lawyer was actively looking for cases, or as he said, "to create cases" whereby he could put the methods and means theoretically discussed in legal literature into legal practice and thereby structurally influence legal change. The lawyer also stressed the importance of creating cases, which would be successful, since unfavourable judgments could create obstacles in later legal actions. He was ambitious and passionate about legal technicalities and very aware of the legal developments taking place at the European level. Moreover, he was aware that he was pursuing legal-political work with his strategic law-enforcement mission. Consequently, the applicant's side was constituted by a strong co-operation between an active and professionalised public interest group, providing funding for the litigation, and a sharp-minded lawyer, providing his legal knowledge to the relationship. The strategy was described by the lawyer in the following way:

> *And then I said: point 1 […] we need cases from several cities. We need 3-4 cases and 3-4 cities. We chose firstly Berlin, Dortmund, Stuttgart and Munich. These four cases. Then we said, we need the places where the measuring stations are located. We need to know where they are and we need residents there who quasi live at the measuring station. The must quasi sleep on the measuring station. I do not want a problem, according to which the opponent then intervenes: yes, but [where he lives] the limit is not exceeded.*
>
> *Wherever a person is personally affected and directly affected, he can complain in accordance with German law, even if this has a direct positive effect on the general public. So, I have very frequent cases, where I take care of citizen initiatives or where we make a claim against airport planning and there we always look for the two/three best plaintiffs who are the ones that are as much as possible affected, and these are often not the ones that are the most active, but are the ones who are more likely to be a pensioner or a person who is sympathetic to the idea, but who is not really committed, but still the most affected person of all. […] And*

[243] Interview with the lawyer of Mr. Janecek (applicant).

> *that is what we are looking for and we really just need him to sign the power of attorney. And I tell you, he no longer has much more to do with it.*[244]

Since the environmental NGO itself was excluded from bringing a claim for the preparation of an action plan, the strategy was developed to create four cases in different German cities in which individuals would initiate those actions. The reliance on a limited number of cases was done to reduce the NGO's financial risk. While the individuals who formally initiated the proceedings were necessary for this strategy, their role remained passive. This dependence created certain difficulties as was shown by a prematurely terminated case in which the individual decided to move home three weeks before the oral proceedings began. The lawyer further explained the role of Mr Janecek, the applicant in the *Janecek* case, who is now member of the Bundestag:

> *The financing is done by the associations in the background. The Janecek case was also financed entirely by the [relevant NGO of the case]. Dieter Janecek did not have to pay himself, regardless of the fact that Dieter Janecek's career has now changed. He has become the chairman of the Bavarian Greens and is now in the regional election campaign and wants to become the environment minister in Bavaria next year. But this was pure coincidence. Pure coincidence. […] It could have been Klaus Meier, his neighbour. It was simply so, because one already had contact with him, because one knew he lived there, directly in the proximity of the measuring station and the associations knew him already. It was easier to approach him, but it had nothing to do with his position at all. He did not have it at the time.*[245]

Mr Janecek confirmed that he was approached by the NGO, and since he was active in the area of environmental policy and was convinced of the initiative, he agreed to cooperate and initiate a legal action in his name. Ultimately, he then took over the press work of the case. Mr Janecek reported that the process was quite exhausting and that he was subject to criticism by the industry and others (such as other local residents), who were opposed to any initiative against restricting the traffic. He never thought that the whole procedure would take so much time and after the judgment was rendered in 2008, he moved away from the Landshuter Allee with his family in 2009.[246]

The second legal question concerned what they could claim before the German courts in order to effectively further their interests:

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[244] Interview with the lawyer of Mr. Janecek (applicant).
[245] Interview with the lawyer of Mr. Janecek (applicant).
[246] Interview with Mr Janecek (applicant), 9 October 2012.

> *This was an idea that I had from the knowledge of the jurisprudence of the European Court of Justice. […] Normally, one requires in Germany traffic-limiting measures, if such a limit value is crossed [so that] here in the street there is less traffic. These complaints are however […] very difficult to manage, because one can always only demand concrete measures on the one street, which is directly at the own flat. Here, however, it was a problem for the whole city. You really needed a much bigger [area] to get the air pollution problem under control. The single street is of no use. I would then have needed, again, a plaintiff who makes the same complain three streets further, without knowing whether the limit value was exceeded there, because there was no measuring station. So claiming for a traffic-restricting measure on a street would have been somehow a nice success, but it would not have been much effective in practice, because they would have done something on one street but not more. […] That's why I was thinking about what is actually the means of choice. And there it is written in the EU directive, that air pollution plans or action plans must be drawn up. And there was the difficulty that German law did not recognize a legal claim on a plan, that is, on a piece of paper, on something that is only done by the authorities.*[247]

For the lawyer, it was clear that the CJEU would need to be involved in the litigation, as the CJEU would be favourable to such a claim on the basis of previous judgments, which arose out of infringements proceedings against Germany:[248]

> *And if I ask the European Court of Justice at the end of the instances about this question, I know what it will reply. And this was laid out in two old decisions of the CJEU from the 1980s. It said there something regarding similar problems, which were more in the area of water policy and lead values in the air. It was also there a question of whether these limits should be respected, and the ECJ has said that, in fact, every citizen who is affected by it can demand from his Member State that the appropriate measures be taken irrespective of the legal form, so irrespective of whether it is now a plan or an individual measure.*[249]

The intention was clearly to proceed with one of the four cases to the highest courts, if not the CJEU, in order to clarify the legal situation once for all and to facilitate subsequent actions in other cities. Therefore, the lawyer was not unhappy about a resilient 'opponent', which does not give in easily.

4.1.3. THE LEGAL ARGUMENTATION BEFORE COURT

[247] Interview with the lawyer of Mr. Janecek (applicant).
[248] Case C-361/88 *Commission v. Germany*, ECLI:EU:C:19991:224, para. 16 (regarding Council Directive 80/779/EEC of 15 July 1980 on air quality limit values and guide values for sulphur dioxide and suspended particulates); Case C-58/89 *Commission v. Germany*, ECLI:EU:C:1991:391, para. 14 (regarding Council Directive 75/440/EEC of 16 June 1975 concerning the quality required of surface water intended for the abstraction of drinking water in the Member States and Council Directive 79/869/EEC of 9 October 1979 concerning the methods of measurement and frequencies of sampling and analysis of surface water intended for the abstraction of drinking water in the Member States).
[249] Interview with the lawyer of Mr. Janecek (applicant).

Before the courts, the claimant's side argued that the pollution, which was largely caused by local motor vehicle traffic, posed a significant threat to human health. Mr Janecek's action would be admissible since the limit values are designed to protect human health and give rise to subjective rights. All persons who are permanently or repeatedly in the area of influence of the source of emission are protected. Community law does not know the administrative procedural restrictions on the protection of third parties in the German Administrative Process; on the contrary, it is based on a general action to norm enforcement which the individual can enforce, if the norm only affects him indirectly. Therefore, the rules of legal standing have to be extended and subjective rights recognized. Since Section 47(2) of the Federal Emission Control Act transposed Article 7(3) of the Air Quality Framework Directive into Germany law, a consistent interpretation with Community law was thus necessary. The obligation to draw up an action plan also contributed to the protection of the applicant, since such an action would at least indirectly favour him. According to the case law of the CJEU, the individual can rely on the rights conferred to him by Directives. National law must enable him to enforce his legal position. Procedural rules of the Member States should not render the enforcement of Community law practically impossible or excessively difficult.[250]

While there was an air pollution plan for the territory of the state capital Munich, which was declared binding on 28 December 2004,[251] that plan did not constitute an action plan because it contained no short-term effective measures and was not designated by the Bavarian authorities as such. If the limit is exceeded, an action plan should be drawn up. The limit values are binding and have to be adhered to. The principle of proportionality is not applicable. The discretion of the authority is limited to choosing the measures to be included in the action plan. The action plan has to reduce the risk of an exceedance of the limit values – once there has been an exceedance, the plans have to ensure compliance with the limit values. Therefore, the applicant requested the Bavarian authorities to set up a plan within two months, which included the measures, which would immediately result in compliance with the limit values. In the alternative, the action plan had to ensure that exceedances would be reduced gradually to 70 days in 2007 and 35 days in 2008. Failing this, a preliminary reference to the CJEU was sought.[252]

[250] VG München, 26.07.2005 - M 1 K 05.1114, para. 5.
[251] The plan stated that more than 60% of the total emissions of particulate matter in the area of the city of Munich resulted from road traffic emissions.
[252] VGH Bayern, 18.05.2006 - 22 BV 05.2462, para. 6.

4.2. THE VIEW OF THE DEFENDANT

Since the interview conducted with the three representatives of the Bavarian State Ministry of the Environment and Consumer Protection, which was the responsible authority for the preparation of the action plan, did not provide much information about their general or legal strategy, this section will summarize their legal arguments as was presented before the German courts. Their perception of the problems related to the compliance with the air quality limit values will be reconstructed in (**section 8.1)**. In the judicial proceedings, the Bavarian State Ministry of the Environment and Consumer Protection was represented by the federal state of Bavaria.

According to the state of Bavaria, firstly, the limit values had a legally objective nature and therefore did not give rise to a subjective-public right, and secondly, no infringement of objective law could be established. Section 47(2) of the Federal Emission Control Act, which transposed Article 7(3) of Air Quality Framework Directive 96/62/EC, was addressed to the authority and the public administration. The limit values did not aim to protect the health of the individual. The measures in the action plan had to be enforced by different public administration bodies, without any recognizable reference to individual subjective-public rights. An action plan constitutes an action program for a complex project, which was binding only on the administration.

The state of Bavaria claimed that in the short-term, a plan for the Landshuter Allee district was being set up. Regarding the measures to be included, the state considered that only traffic restricting measures would be relevant, particularly the re-routing of lorries over 3.5 tonnes and the introduction of an environmental zone. Regarding the latter, the spatial demarcation lines of the zone and the list of which vehicles would be excluded from the zone was still to be determined. However, even if these measures were taken, the Bavarian state admitted that compliance with the limit value for PM_{10} at the measuring station of the Landshuter Allee could not be expected. The EU Directives would be 'too ambitious' to apply in the main traffic areas. More far-reaching measures had to be expected from Germany or the European Union.[253]

[253] VGH Bayern, 18.05.2006 - 22 BV 05.2462, paras. 10-13; BVerwG, Vorlagebeschluss vom 29.3.2007 – 7 C 9/06, para. 11.

5. THE PROCEEDINGS BEFORE THE GERMAN COURTS

Mr Janecek applied firstly to the Bavarian State Ministry of the Environment and Consumer Protection and requested the creation of an action plan for controlling air pollution in Munich, particularly in the area in which he lived, to be prepared without delay. The Bavarian State Ministry took the view that the existing plan for controlling air pollution in the territory of the *Land* capital, Munich, already incorporated such an action plan. Moreover, the authorities were already in the process of discussing a diversion of lorry transit. Thereupon, Mr Janecek brought an action before the Administrative Court of Munich, and requested that the defendant be required to prepare an action plan for controlling air pollution in the area concerned, laying down the measures to be taken in the short term to ensure compliance with the permitted limit of particulate matter PM_{10}.

While the German courts agreed that the existing plan for controlling air pollution in Munich did not constitute an action plan, they took diverging views regarding whether Mr Janecek was legally entitled to have an action plan drawn up so as to safeguard prompt compliance with the relevant limit value. In this part, the proceedings before the German courts until the preliminary reference to the CJEU will be summarized. The Administrative Court of Munich (*Verwaltungsgericht München*) dismissed the action as unfounded (**section 5.1.**). Following Mr Janecek's appeal, the Bavarian Higher Administrative Court (*Bayerischer Verwaltungsgerichtshof*) agreed that the Mr Janecek was legally entitled to have an action plan for controlling air pollution to safeguard compliance with the relevant limit value prepared, insofar as it was actually possible and proportionate to do so (**section 5.2.**). The Bavarian authorities and Mr Janecek appealed, on a point of law, to the Federal Administrative Court (*Bundesverwaltungsgericht*), which decided to submit a preliminary reference to the CJEU (**section 5.3.**). Unlike the parallel section in the *Feryn* and *Invitel* case studies (Chapter 2 and Chapter 4), this section will not reconstruct the views of the parties as to the proceedings before the national courts. This is due to the lack of empirical evidence from the interviews on that issue.

5.1. THE JUDGMENT OF THE ADMINISTRATIVE COURT OF MUNICH

The Administrative Court of Munich held that Mr Janecek's action was admissible, but dismissed the action as unfounded. The court pointed first to the *sui generis* nature of an action plan, which could not be easily categorized under the instruments of German

administrative law. On the one hand, it could be classified as an administrative act, which constitutes the basis for the obligations of various other authorities (like for example the road traffic authority). If that were the case then the action plan would not have a direct binding effect on citizens, but would rather enable the competent authorities to take certain measures as set out in the action plan. On the other hand, the action plan could, if one considers its integrated approach, also contain elements of a legal standard. It not only provides the legal basis for certain measures, but it also comprehensively regulates all the measures which must be taken to reduce the risk of exceeding the limit values for air pollution. To this extent, an indefinite - albeit determinable - circle is addressed to which the various duties are imposed.[254]

In order for the individual to be entitled to the preparation of an action plan, Section 47(2) of the Federal Emission Control Act had to substantiate a subjective right, which is determined according to the protective norm theory (*Schutznormtheorie*).[255] However, by examining the wording, the position in law, purpose and the history of Section 47(2) of the Federal Emission Control Act, the national court found that it was not possible to demarcate a specifically protected group of persons that can be distinguished from the general public and consequently, no subjective right could be derived from this provision.[256] Typically, according to the court, this would be the case when the term 'neighbourhood' is used in a provision. But in contrast to, for example, the claim of an owner of a property within the area of a statutory development plan against its foreign use, the action plan was missing a neighbourly relationship.[257] Furthermore:

> *[The plans] are complex structures which, in order to be able to work, relate to a larger area, embrace a considerable timeframe and include a variety of appropriate measures. This complexity prohibits the identification of a particularly protected group of persons as beneficiaries. This is also shown by the regulation of Section 47(4) [Federal Emission Control Act], which states that the necessary measures must be taken against all emitters on the basis of a pro-rata allocation of their contribution to the pollution and in accordance with the principle of proportionality. Through the plans and their implementation an indefinite number of natural and legal persons are affected. It would be also alien to German procedural law to establish a legal right of an individual, whose enforcement leads to a favourable treatment for him, but for an indefinite and hardly determinable circle of third parties would lead to an encumbrance, without allowing them to be*

[254] VG München, 26.07.2005 - M 1 K 05.1114, para. 11.
[255] VG München, 26.07.2005 - M 1 K 05.1114, para. 18.
[256] VG München, 26.07.2005 - M 1 K 05.1114, paras.19, 10.
[257] VG München, 26.07.2005 - M 1 K 05.1114, paras. 18, 23.

> *heard; an additional invitation to attend the proceedings for an undetermined number of affected persons is ruled out. In addition, this group would, according to the view in the literature, not have an opportunity to review the action plan before court.*[258]

In order to examine the claim under European law, the court referred to the case law of the CJEU, according to which, whenever the exceedance of a limit value could endanger the health of the persons concerned, they must be in a position to rely on mandatory rules in order to be able to assert their rights.[259] While the limit values in Directive 1999/30/EC aim to protect human health, it was not determined at what stage of the procedure, legal protection has to be accorded. Moreover, it appeared from Directive 1999/30/EC that action plans are not the only measure to reduce pollution.[260] This view was confirmed by the general formulation of Article 7(3) of Air Quality Framework Directive 96/62/EC, which demonstrated that action plans are not the only measures that could be taken, but that the Member States have discretion to choose from a variety of measures to control and reduce pollution. As a result, the national court pointed out that the European provision is not sufficiently specific to confer a subjective right to a third party to the preparation of an action plan.[261] The court rejected a preliminary reference to the CJEU as the matter was considered to be sufficiently clear:

> *The conditions under which European Community law establishes a legally enforceable claim to compliance with air pollution limits are sufficiently clarified in the case-law of the European Court of Justice. The suspension of the procedure and the conduct of a preliminary ruling procedure pursuant to Article 234(2) EC, as suggested by the applicant, was therefore not necessary.*[262]

Furthermore, an interpretation of Section 47(2) of the Federal Emission Control Act in light of Article 19(4) of the German Basic Law did not lead to a different conclusion.[263] Even although the individual had no right to the preparation of an action plan, there would be still other possibilities for legal protection. When an air quality plan is prepared, but the authority fails to take the measures therein, then the individual has the right to order the authority of enforce those measures:

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[258] VG München, 26.07.2005 - M 1 K 05.1114, para. 21.
[259] VG München, 26.07.2005 - M 1 K 05.1114, para. 25. Regarding the CJEU case-law, see Case C-361/88 *Commission v. Germany*, ECLI:EU:C:1991:224; Case C-59/89 *Commission v. Germany*, ECLI:EU:C:1991:225; Case C-58/89 *Commission v. Germany*, ECLI:EU:C:1991:391; and Case C -298/95 *Commission v. Germany,* ECLI:EU:C:1996:501.
[260] VG München, 26.07.2005 - M 1 K 05.1114, para. 26.
[261] VG München, 26.07.2005 - M 1 K 05.1114, para. 27.
[262] VG München, 26.07.2005 - M 1 K 05.1114, para. 28.
[263] Article 19(4) of the Basic Law provides that should any person's rights be violated by public authority, he or she may have recourse to the courts.

> *The city was commissioned by the government to develop a concept for the updating of the air quality plan.*[264] *This concept has been created in the meantime, so that the update of the plan is imminent. This will then lead to concrete obligations on the authorities entrusted with its implementation. The applicant is thus not without legal protection, since at this second stage there is room for individual legal protection. In view of the complexity of the matter, a certain time frame must be granted to the authorities responsible for the preparation; on the other hand, the applicant's interest in prior legal protection must be rejected. If, for example, an action plan provides that traffic restrictions or traffic bans are to be enacted in certain areas, but they are not implemented by the relevant road transport authority, those concerned have a right to corresponding traffic control measures in their respective local area. At that stage of the procedure, the individual concern can be established, which is the prerequisite for the granting of a subjective right.*[265]

5.2. THE JUDGMENT OF THE BAVARIAN HIGHER ADMINISTRATIVE COURT

Mr Janecek appealed to the Bavarian Higher Administrative Court, which rendered its decision on 18 May 2006. On 27 March 2006, the measuring station at Landshuter Allee reported already a total of 43 exceedances. The assessment of Mr Janecek's claim by the Higher Administrative Court can be divided in three parts: 1) The obligation to prepare an action plan (**section 5.2.1.**); 2) The content of the action (**section 5.2.2.**); 3) The right to the preparation of an action plan (**section 5.2.3.**).

5.2.1. THE OBLIGATION TO PREPARE AN ACTION PLAN

The Higher Administrative Court determined whether the Bavarian authorities were obliged to prepare an action plan according to Section 47(2) of the Federal Emission Control Act and Article 7(3) of Air Quality Framework Directive 96/62/EC. The court confirmed that question.

Firstly, the court found that a danger of the exceedance of the limit values exists when there is an overwhelming probability that this will happen. There was no need to prove that there was an exceedance. The court confirmed that this danger exists in the Landshuter Allee area, since it is not apparent that the development in 2006 will be different from that in 2005, unless additional measures were taken. The Bavarian authorities did not raise any objections in this

[264] It has to be remarked that the court speaks here not about an air quality action plan under Article 7(3), but under Article 8(3) of Directive 96/62/EC.
[265] VG München, 26.07.2005 - M 1 K 05.1114, para. 30.

respect.[266]

Secondly, the court had to determine whether or not there was an action plan already in existence. Whether the term 'action plan' has been used by the authorities was not decisive. Instead, the material requirements had to be met. While the action plan (Article 7(3) Directive 96/62/EC) can be part of the air quality plan (Article 8(3) Directive 96/62/EC), the air quality plan for the area of the state capital of Munich of September 2004 was not sufficient in this respect. There was also no dispute between the parties in that regard. The fact that the defendant had merely declared that it intended to draw up an action plan was insufficient. Even at the hearing on 11 May 2006, the defendant was not in a position to give a guarantee in that regard.[267]

Thirdly, the authorities already had sufficient time to react. It was held to be unlawful that 16 months after the entry into force of the limit value of PM_{10}, even although there was from the beginning an evident risk of exceeding the limit values, there was still no action plan. Such an action plan could and should have been readily available, if the authorities dealt with the complex matter earlier. This would have been legally required. An action plan was an instrument to remedy or reduce an existing or imminent exceedance of the limit values in the short term. The competent authority was then consequently ordered to rectify this situation.[268]

5.2.2. THE CONTENT OF THE ACTION PLAN

Next, the Higher Administrative Court determined the content of the required action plan. The obligation of the authorities was in principle laid down by law, namely Article 7(1) of the Air Quality Framework Directive 96/62/EC, which obliges the Member States to take the necessary measures to ensure compliance with the limit values. However, while this was the 'normal case', contrary to Mr Janecek's view, an action plan did not necessarily have to guarantee the compliance with the limit values.[269] This was based on two arguments, which will be set out respectively.

Firstly, the court held that compliance with the required conditions normally applicable would

[266] VGH Bayern, 18.05.2006 - 22 BV 05.2462, paras. 16-18.
[267] VGH Bayern, 18.05.2006 - 22 BV 05.2462, paras. 19-20.
[268] VGH Bayern, 18.05.2006 - 22 BV 05.2462, para. 21.
[269] VGH Bayern, 18.05.2006 - 22 BV 05.2462, paras. 22, 23.

actually be impossible and therefore not legally required in line with the '*ultra posse nemo obligatur*' principle. The national court recognized that the action plan would hardly be able to address the pollution of the large-scale background, of which 43% contributed to the exceedance of the limit values. Moreover, the Bavarian authorities lacked the competences to adopt various eligible measures. Some measures had to be adopted by the federal government, like for example a tightening of the requirements for small firing plants, tax incentives for diesel vehicles with soot particle filters or more favourable congestion charges for low-emission vehicles. The competences for other measures were vested in the European Union, as was the case for the adoption of admission requirements for vehicles and industrial installations. The court referred in that regard to the proposal of the Commission for Directive 1999/30/EC relating to limit values for sulphur dioxide, oxides of nitrogen, particulate matter and lead in ambient air, which stated: "If limit values are to be met throughout the Community further measures will be necessary at EC and local level".[270] Therefore, in many hotspots, compliance with the limit values can only be achieved when there are measures adopted at the local level, and when restrictions on emissions are adopted at the federal or EU level.[271] The law recognized the limits of the effectiveness of action plans, since they only have to reduce the risk and to limit the duration of such an occurrence. Therefore, medium-term effective measures would be sufficient.[272]

Secondly, the court held that guaranteeing compliance with the limit value of PM_{10} violated the principle of proportionality. In that regard, the court referred to third parties affected by the measures introduced, such as traders and road users, who were not involved in the present dispute, but who might, in some cases, be able to defend themselves against the individual measures as set out in the plan. In its case law, the CJEU requires that measures for the protection of the environment are appropriate, necessary and proportionate to their objective. The protection of the environment is but one of the recognized essential objectives of the Community,[273] which also includes the free movement of goods, including the freedom of transit of goods, for the functioning of the internal market. The CJEU recognized that the protection of the environment and public health constituted a legitimate objective in the public interest capable of justifying a restriction of the fundamental freedoms guaranteed by

[270] European Commission, COM(97) 500 final, 8.10.1997, p. 81.
[271] The court refers for this finding also to the 29. Environmental Law Expert Meeting of the Society for Environmental Law in Berlin from 3.-5. November 2005 (Stüer, Report, DVBl 2005, 1566/1568).
[272] VGH Bayern, 18.05.2006 - 22 BV 05.2462, para. 25.
[273] Case C-176/03 *Commission v. Council*, ECLI:EU:C:2005:542, para. 41.

the Treaty, provided they are appropriate, necessary and proportionate.[274] On that basis, it was generally concluded that the rights of those affected by air pollution measures should be taken into account in accordance with the principle of proportionality. 'Radical' measures have to be taken within the framework of an action plan, only if their consequences for economic life are carefully examined and adequately balanced.[275] However, a generous benchmark does not need to be applied. The assumption that compliance with the limit values is not possible has to be justified. Such reasons can arise mainly from unusual local conditions (for example, central traffic points, a large number of emitters). Regarding the case at hand, the court held that the well-founded prediction of the defendant showed that the additional measures which were prepared (the diversion of the transit-traffic of lorries of more than 3.5 tonnes and the setting up of a low-emission zone) in addition with other realistic and proportionate measures were unable to ensure compliance with the limits.[276]

To sum up, the defendant was obliged to immediately ensure compliance with the limit values as far as possible and legally proportionate in the action plan. The measures that the defendant had included in the action plan were not determined by the law. The choice of measures and their addressees fell under the discretion of the authorities. However, that did not imply random outcomes. In terms of content, action plans are concerned with the monitoring and restriction of activities which contribute to an exceedance of the emission limit values, including restrictions on motor vehicle traffic. The measures must be taken against all emitters on the basis of a pro-rata allocation of their contribution to the pollution, and in accordance with the principle of proportionality.

Since the authorities had the discretion to choose the measures which they considered possible and proportionate, they were not obliged to include a specific measure that would guarantee strict short-term compliance with the limit values. While the applicant, therefore, could not claim for specific measures to be included in the plan, by not including salient measures, despite the fact that the limit values are continuously exceeded, the authorities would, however, not comply with their legal requirements.[277]

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[274] The VHG referred to Case 8/74 *Dassonville*, ECLI:EU:C:1974:82 and Case 120/78 *Rewe/Bundesmonopolverwaltung für Branntwein*, ECLI:EU:C:1979:42.
[275] VGH Bayern, 18.05.2006 - 22 BV 05.2462, para. 27.
[276] VGH Bayern, 18.05.2006 - 22 BV 05.2462, para. 29.
[277] VGH Bayern, 18.05.2006 - 22 BV 05.2462, paras. 30-32.

5.2.3. THE RIGHT TO THE PREPARATION OF AN ACTION PLAN

The Higher Administrative Court further held that the objective infringement of the obligation to set up an action plan violated Mr Janecek's subjective rights. This was due to the objective of Article 7(3) of the Air Quality Framework Directive as well as Section 47(2) of the Federal Emission Control Act which was to protect the residents, that are affected by the exceedance of the limit values. The court firstly confirmed that Mr Janecek belonged to the group of affected residents. While it was not possible to determine the extent to which the limit values were exceeded in the area of his home, the extent of exceedances at the air quality measurement station, which was located 900m away, led to the conclusion that relevant exceedances could be also found there. The defendant did not raise any objections on this issue.[278] Regarding the recognition of a right for the preparation of an action plan, the court resorted to a systematic legal and teleological interpretation of Section 47(2) of the Federal Emission Control Act. The court made three principal arguments, which will be discussed respectively.

Firstly, the objective of the action plan was to protect the health of the affected residents. In that regard, the court pointed out as irrelevant the debates about whether human health was already seriously endangered, whether protection could be fully ensured by the limit values or whether they merely achieved a statistical-epidemiological improvement. It was also irrelevant whether there exists a definition of a threshold to health-based threats or a socio-economic consensus about an appropriate response to a statistical correlation. The means of achieving the objective of protecting human health was through compliance with the limit values. The health of the affected residents was legally protected under Article 2(2) of the Basic Law and, in addition, also by European law. In similar cases, the European Court of Justice left no doubt that in all cases where the exceedance of the limit values could endanger human health, the persons concerned must be able to rely on mandatory rules to assert their rights.[279] The third-party protective nature of the limit values, therefore, could not be doubted.[280]

Secondly, the action plan was not just one of several possible measures, but had a special

[278] VGH Bayern, 18.05.2006 - 22 BV 05.2462, para. 34.
[279] With reference to cases C-361/88 *Commission v. Germany*, ECLI:EU:C:1991:224; Case C-59/89 *Commission v. Germany*, ECLI:EU:C:1991:225; Case C-58/89 *Commission v. Germany*, ECLI:EU:C:1991:391; and Case C - 298/95 *Commission v. Germany*, ECLI:EU:C:1996:501.
[280] VGH Bayern, 18.05.2006 - 22 BV 05.2462, paras. 37, 38.

position (*Sonderstellung*) in the legal framework. The air quality plans and action plans are the general instruments foreseen in the law to ensure compliance with the limit values – they allow for the preparation of coordinated measures, which are geared towards effectiveness, synergy effects and a balance of interests. To refer the concerned residents to claim for specific individual measures, independent of a plan, did not constitute an adequate substitution for relying directly on the action plans. The action plans constituted the link between the general goal to protect human health and the concerned residents' legal entitlement to enforce specific measures. This link may not result in a refusal of a legal entitlement: by not setting up an action plan, the administration could otherwise avoid any legal entitlements of the concerned residents.[281]

Thirdly, the court pointed out that this result was supported by a conforming interpretation of national law with the Air Quality Framework Directive 96/62/EC. Contrary to the view of the administrative court of first instance, it held that Article 7(3) of the Directive would be unconditional and sufficiently precise and therefore, could be considered as directly effective. However, in view of the national implementing provisions, this would not be necessary.[282]

5.3. THE PRELIMINARY REFERENCE OF THE FEDERAL ADMINISTRATIVE COURT

Mr Janecek and the Bavarian authorities appealed to the Federal Administrative Court. On the one side, Mr Janecek claimed in relation to the content of the action plan, that, while the Bavarian authorities had discretion in respect of the choice of appropriate measures, the action plan had to ensure prompt compliance with the limit values. On the other side, according to the Bavarian authorities, neither Section 47(2) of the Federal Emission Control Act, nor Article 7(3) of the Air Quality Framework Directive 96/62 provided a legal basis for Mr Janecek's claim to have an action plan drawn up.

On 29 March 2007, the German Federal Administrative Court decided to submit a preliminary reference ruling to the CJEU. The structure of this section will follow the court's request by firstly setting out the assessment of Mr. Janecek's claim under German law (**section 5.3.1.**) and then under European law (**section 5.3.2.**).

[281] VGH Bayern, 18.05.2006 - 22 BV 05.2462, para. 39.
[282] VGH Bayern, 18.05.2006 - 22 BV 05.2462, para. 40.

5.3.1. ASSESSMENT OF JANECEK'S CLAIM UNDER GERMAN LAW

The German Federal Administrative Court acknowledged that an action plan for the area in which Mr Janecek lived should have been drawn up, at the latest, by the beginning of 2005. However, at that time, there was still no action plan that satisfied the statutory requirements under Section 47(2) of the Federal Emission Control Act. The plan for controlling air pollution in the territory of Munich did not constitute such an action plan, as it did not include any measures to be taken in the short term that could reduce the risk of exceeding the limit value or limit the duration of such an occurrence. The defendant could not claim that the timely adoption of an action plan was actually and legally impossible. It was not clear why the defendant did not include appropriate measures in the area of road traffic in an action plan, as for example, detours of lorry transit, traffic bans on motor vehicles or transit prohibitions for heavy goods vehicles. A diversion of the truck transit traffic to the motorway ring would have reduced the number of exceedances by 8 to 15.[283]

However, Janecek's rights were not infringed as a result of the unlawful failure to draw up an action plan. The opposing view of the Higher Administrative Court would deny the legal status of an action plan. The wording of the Federal Law itself indicated that action plans are to be drawn up by the authority in the public interest and not to protect the subjective rights of third parties. This became clear through the two-step procedure provided in the legal framework: in the first step, air quality plans and action plans were to be set up, which establish the particular measures to be taken (Sections 47(1) and (2) of the Federal Emission Control Act) and it is only in the second step that concrete measures need to be enforced by the competent national authorities (Section 47(6) of the Federal Emission Control Act). The action plan is only binding on the administration and does not affect the subjective rights of third parties. Therefore, in line with the prevailing view of the German case law and literature, a third party affected by pollution had no right to have an action plan drawn up.[284]

The German Higher Administrative Court – who reached the conclusion as to the effect in terms of protecting third parties within Section 47(2) of the Federal Emission Control Act, benefiting residents affected by the limit value being exceeded, derives from the fact that the purpose of complying with the limit values is the protection of their health – mistook the

[283] BVerwG, Vorlagebeschluss vom 29.3.2007 – 7 C 9/06, paras. 15-19.
[284] BVerwG, Vorlagebeschluss vom 29.3.2007 – 7 C 9/06, para. 21.

consequences of protecting third parties for its prerequisites. Contrary to the view of the defendant, it was not doubted that the limit values aim to protect health. However, drawing up an action plan would not directly result either in an improvement in ambient air quality or compliance with limit values. The air quality at the home of Mr Janecek would not be improved by the setting up of an action plan, which foresees measures to comply with the limit values. Compliance with the limit values could only be achieved through the enforcement of the measures laid out in the action plan. Those measures require specific legal authorizations if they affect the rights of third parties. Accordingly, neither rights nor obligations for private individuals or operators can arise from action plans or plans for controlling air pollution. The protective effect is merely the product of measures laid down in an action plan to ensure compliance with the limit values.

The Federal Administrative Court even considered it counterproductive to accord this provision protective effect because that would lead to several claims of third parties, which would interfere and delay the setting up of the action plan and disturb the goal of achieving a balance of interests. The public authorities had some discretion as to the choice of measures, which, as a rule, precluded anyone affected by a limit value being exceeded from being entitled to require a particular measure to be taken. For so long as no action plan was drawn up, the protection of health from the effects of particulate matter PM_{10} can and must therefore be secured by other measures, such as the authorities intervening to counter pollution from installations or the competent highway authority introducing traffic restrictions.[285]

5.3.2. Assessment of Janecek's claim under European law

The Federal Administrative Court took the view that Janecek's entitlement to the preparation of an action plan encompassing the area in which he lived could not be based on Article 7(3) of the Air Quality Framework Directive 96/62. Article 7(3) of Directive 96/62 does not include an express obligation to grant a third party affected by pollution the right to have an action plan drawn up. However, since that issue was not unequivocally resolved by Community law or by the case law of the Court of Justice, a reference to the Court for a preliminary ruling was required.[286]

[285] BVerwG, Vorlagebeschluss vom 29.3.2007 – 7 C 9/06, paras. 20-28.
[286] BVerwG, Vorlagebeschluss vom 29.3.2007 – 7 C 9/06, para. 34.

Article 7(3) of the Air Quality Framework Directive 96/62 does not include an express obligation to grant a third party affected by particulate matter pollution the right to have an action plan drawn up. The fact that the purpose of the limit values is the protection of health does not entitle a person affected to require the public authority to draw up an action plan. While the Federal Administrative Court acknowledged that in the case law of the CJEU, whenever the exceeding of the limit value could endanger the health of the persons concerned, they must be in a position to rely on mandatory rules in order to be able to assert their rights, that case-law relates to the direct effect of Directives where they have been inadequately transposed by the Member State.[287] Such a situation would not be at issue here since Article 7(3) was transposed, almost verbatim, by Section 47(2) of the Federal Emission Control Act and was consistent with its purpose.[288]

However, according to the Federal Administrative Court, the case law of the CJEU was predominantly understood to mean that limit values which are intended to protect health do provide a legal basis under Community law for an entitlement on the part of persons concerned. The legal basis for that proposition was the principle of effectiveness which derived from Article 10 TEC [now Article 4(3) TEU].[289] Still the Federal Administrative Court took the view that the purpose of the limit value did not, however, inevitably lead to the conclusion that the person concerned is, to that end, to be granted a right to have an action plan drawn up. In the absence of relevant Community legislation, it is for the Member States to lay down detailed procedural rules to ensure that the rights granted to citizens under Community law are protected. The Community law requirements are satisfied if the detailed procedural rules comply with the requirements of equivalence and effectiveness.[290] Those requirements of legal protection are met in this case. The person concerned would be entitled to the intervention of the competent authorities if limit values are exceeded. If those authorities do not take measures that are necessary and proportionate in order to comply with the limit values, the person concerned has a right of action before the administrative courts, which provides him with effective legal protection. Even if the enforcement of measures,

[287] Case C-361/88 *Commission v. Germany*, ECLI:EU:C:1991:224; Case C-59/89 *Commission v. Germany*, ECLI:EU:C:19991:225; Case C-58/89 *Commission v. Germany*, ECLI:EU:C:1991:391; and Case C -298/95 *Commission v. Germany*, ECLI:EU:C:1996:501.
[288] BVerwG, Vorlagebeschluss vom 29.3.2007 – 7 C 9/06, para. 35.
[289] Case C-265/95 *Commission v. France*, ECLI:EU:C:1997:595, para. 56, and Case C-201/02 *Wells*, ECLI:EU:C:2004:12.
[290] Case C-234/04 *Kapferer*, ECLI:EU:C:2006:178, para. 22; Case C-13/01 *Safalero*, ECLI:EU:C:2003:447, para. 49 and Case C-432/05 *Unibet*, ECLI:EU:C:2007:163, para. 37 et seq., in particular, para. 44, and the case law cited therein.

which are independent of a plan, require more efforts from the person concerned, than in case of the existence of a plan, it cannot be concluded that the prevention of health effects through the exceedance of the limit values is rendered practically impossible or exceedingly difficult.[291]

After expressing its view on the matter in a lengthy discussion of national and European law, the Federal Administrative Court decided to submit a preliminary reference to the CJEU. In this regard, it referred to some of the academic literature, which expressed that where there is Community legislation laying down limit values for the purpose of protecting human health, persons affected have a legally enforceable right to compliance with the obligations intended for that purpose.[292] The judgment of the CJEU in Case C-59/89 *Commission v. Germany* would support a similar conclusion. Combining the limit value protecting third parties with the obligation of the Member States to draw up action plans could accordingly be interpreted as meaning that Article 7(3) of the Air Quality Framework Directive 96/62 gives a person affected by the limit value being exceeded the right to have an action plan drawn up.[293]

5.3.3. THE PRELIMINARY QUESTIONS

On the basis of the foregoing considerations, the Federal Administrative Court submitted the following three questions to the CJEU:

> *Is Article 7(3) of Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management to be interpreted as meaning that a third party whose health is impaired is entitled to the preparation of an action plan even if, irrespective of any action plan, he is in a position to enforce his right to avoid any detriment to his health as a result of the nuisance limit value for particulate matter PM_{10} being exceeded, by bringing an action for intervention by the public authority?*
>
> *If so, is a third party who is affected by such concentrations of particulate matter PM10 as could be detrimental to health entitled to have an action plan drawn up*

[291] BVerwG, Vorlagebeschluss vom 29.3.2007 – 7 C 9/06, para. 36.
[292] *Inter alia* Reinhard Sparwasser, "Luftqualitätsplanung zur Einhaltung der EU-Grenzwerte - Vollzugsdefizite und ihre Rechtsfolgen," *Neue Zeitschrift für Verwaltungsrecht*, 2005, 369–77; Christian Calliess, "Feinstaub im Rechtsschutz deutscher Verwaltungsgerichte - Europarechtliche Vorgaben für die Klagebefugnis vor deutschen Gerichten und ihre dogmatische Verarbeitung," *Neue Zeitschrift für Verwaltungsrecht*, no. 1 (2006): 1–7; Hans D. Jarass, "Rechtsfragen des neuen Luftqualitätsrechts," *Verwaltungsarchiv* 97 (2006): 429–49; Remo Klinger and Florian Löwenberg, "Rechtsanspruch auf saubere Luft? Die rechtliche Durchsetzung der Luftqualitätsstandards der 22. Verordnung zum Bundes-Immissionsschutzgesetz am Beispiel der Grenzwerte für Feinstaub," *Zeitschrift für Umweltrecht*, no. 4 (2005): 169–76; Eckard Rehbinder, "Zur Entwicklung des Luftqualitätsrechts," *Natur und Recht*, no. 8 (2005): 493–98.
[293] BVerwG, 29.03.2007 - 7 C 9.06, para. 37.

laying down the measures to be taken in the short term to ensure strict compliance with the nuisance limit value for particulate matter PM_{10}?

If the answer to Question 2 is in the negative, to what extent must the measures included in an action plan serve to reduce the risk of exceeding the limit value and to limit the duration of such an occurrence? Can an action plan be limited, on the principle of 'one step at a time', to measures which, while not guaranteeing compliance with the limit value, nevertheless contribute in the short term to improvements in ambient air quality?

6. THE PROCEEDINGS BEFORE THE COURT OF JUSTICE OF THE EUROPEAN UNION

The CJEU rendered its judgment in the *Janecek* case on 25 July 2008, after the written procedure with submissions from Mr Janecek, the European Commission, the Netherlands and Austria and a hearing in June 2008. There was no written opinion by Advocate General Mazák. After some preliminary remarks regarding the preliminary reference, this part will set out the written observations of the European Commission (**section 6.1.**), the judgment of the Court (**section 6.2.**) and finally, the insights gained on the basis of the interview with one of the CJEU judges, who sat on the chamber deciding this case (**section 6.3.**).

In view of the extensive and forcefully argued opposition by the Federal Administrative Court as to granting third parties the right to an action plan, whose view was supported by the governments of Austria and the Netherlands in its written submissions,[294] the questions of the preliminary reference must not have posed particular difficulties for the CJEU, considering that it decided to proceed to its judgment without an opinion of the Advocate General. It remains uncertain why neither the German government nor the Bavarian authorities submitted any written observations – it might be that their position has been already fully endorsed by the Federal Administrative Court.

The European Commission and the CJEU dealt with the questions of the national court in two parts: i) the right to the preparation of an action plan; and ii) the content of the action plan. The same division will be followed here.

6.1. THE WRITTEN OBSERVATIONS OF THE EUROPEAN COMMISSION

6.1.1. THE PREPARATION OF ACTION PLANS

[294] They have been summarized by the CJEU in Case C-237/07 *Janecek*, ECLI:EU:C:2008:447, para. 25-30.

According to the view of the European Commission, Article 7(3) of Directive 96/62 provided a subjective right for third parties, which are affected by the exceedance of the limit values, to the drawing up of an action plan.[295] According to Article 288 TFEU (at that time Article 249(3) TEC), a Directive requires the Member States to attain a certain result, but leaves them freedom in determining how to do so. However, the Member States have to choose the most appropriate forms and methods to ensure the effectiveness of the Directive with a view to the Directive's aims. In that context, the European Commission posed the question of whether Article 7(3) of Directive 96/62 has to be implemented by the Member States so as to ensure that individuals are accorded a subjective right to an action plan.[296]

The Commission submitted that it was apparent from the wording of Directive 96/62, in particular the combined provisions of Articles 7(3) and 2(5) and the 12th Recital of the Preamble to the Directive, that the fixing of limit values in respect of particulate matter PM_{10} serves to protect human health. The Court established in relation to similar provisions that, whenever the exceeding of limit values was capable of endangering human health, the persons concerned were in a position to rely on those rules in order to assert their rights.[297] Contrary to the view of the Federal Administrative Court, the fact that these judgments relate to the direct effect of Directives in case of an inadequate transposition did not mean that they were not applicable to the case at hand. The principles identified in those judgments concerned the content of national implementation measures, and were also applicable to the preparation of an action plan.[298]

According to the European Commission, it could not be doubted that the obligation to prepare an action plan under Article 7(3) of Directive 96/62 was designed to protect human health. The action plan had to provide the measures to be taken in the short term where there was a risk of an exceedance in order to reduce that risk and to limit the duration of such an occurrence. Consequently, the obligation to prepare an action plan was not dependent on whether the health of a third party has been already affected. Therefore, the Commission proposed adapting the question for a preliminary reference from "a third party whose health is

[295] European Commission, Written Observations in case C-237/07 *Janecek*, 4 September 2007, para. 41.
[296] European Commission, Written Observations in case C-237/07 *Janecek*, 4 September 2007, paras. 21-23.
[297] Case C-361/88 *Commission v. Germany*, ECLI:EU:C:1991:224, para. 16, Case C-59/89 *Commission v. Germany*, ECLI:EU:C:1991:225, para. 19, and Case C‑58/89 *Commission v. Germany*, ECLI:EU:C:1991:391, para. 14.
[298] European Commission, Written Observations in Case C-237/07 *Janecek*, 4 September 2007, paras. 24-26.

impaired" to "a third party affected by an exceedance of the limit values".[299]

The purpose of the action plans was to ensure that, in a situation where there is immediate danger to human health, a comprehensive approach is followed; meaning that the possible reductions of all polluters responsible for the air pollution are examined. The aim of the action plan is to determine the various measures, which can be taken effectively and in the short term to reduce the duration of the exceedance. The action plan thereby allows for a coordinated approach, which predetermines the necessary measures, which have to be subsequently taken by the various authorities. The Federal Administrative Court pointed out that the preparation of an action plan does not necessarily result in an improvement of the air quality or the compliance with the limit values. However, that finding does not refute the idea that the obligation to prepare an action plan aims to protect human health and that the affected persons have to be able to require the preparation of the plan. The Commission claimed that the preparation of an action plan, while not being a sufficient step, was nevertheless a necessary step for the effective protection of human health against dangerous air pollution. Moreover, the wording of Article 7(3) was clear and precise as to the obligation to prepare an action plan in case of the exceedance of the limit values. [300]

According to the European Commission, the Federal Administrative Court admitted itself that the enforcement of measures independent of an action plan require more effort. The German literature[301] and case law[302] cited by the Federal Administrative Court illustrated that the possibility of affected parties to receive legal protection is much easier, quicker and more effective in cases where an action plan exists. Without a plan, the affected parties would not be able to identify which authority has to take which measures in order to achieve compliance with the limit values. According to national law, it appears that only the issuing of an action plan guarantees effective legal protection. [303] The categorization of the nature of the action plan under national administrative law is irrelevant.[304]

Finally, contrary to the view of Federal Administrative Court, enabling the affected party to

[299] European Commission, Written Observations in Case C-237/07 *Janecek*, 4 September 2007, para. 28.
[300] European Commission, Written Observations in Case C-237/07 *Janecek*, 4 September 2007, paras. 29-33.
[301] Jarass, "Rechtsfragen des neuen Luftqualitätsrechts"; Sparwasser, "Luftqualitätsplanung zur Einhaltung der EU-Grenzwerte - Vollzugsdefizite und ihre Rechtsfolgen"; Michael Steenbuck, "Anspruch auf Verkehrsbeschränkungen zum Schutz vor Feinstaub?," *Neue Zeitschrift für Verwaltungsrecht*, 2005, 770–72.
[302] VGH Bayern, 18.05.2006 - 22 BV 05.2462 (see **section 5.2.**), VG Stuttgart, 22.05.2005 - 16 K 1120/05.
[303] European Commission, Written Observations in case C-237/07 *Janecek*, 4 September 2007, paras. 34-35.
[304] European Commission, Written Observations in case C-237/07 *Janecek*, 4 September 2007, paras. 38, 39.

rely on mandatory rules in order to enforce its rights does not constitute a procedural rule encompassed by the principle of national procedural autonomy, subject to the principles of effectiveness and equivalence. Rather, it is a provision of substantive law, which has to be interpreted autonomously with regard to Community law. Only the administrative procedural rules, which enable the affected party to claim its subjective right, are subject to the principle of national procedural autonomy.[305]

6.1.2. THE CONTENT OF ACTION PLANS

With regard to the content of the action plans, the Commission's response was based on the wording of Article 7(3) of Directive 96/62, according to which action plans must provide for measures 'to be taken in the short term […] in order to reduce [the risk of the limit values being exceeded] and to limit the duration of such an occurrence'. The Commission took the view that the competent authority has discretion to take the measures which it considers to be the most appropriate, provided that those measures are designed in the light of what is actually possible and legally proportionate, and which enable levels to drop back below the prescribed limit values within the shortest possible time. Depending on the situation, the discretion of the authority may be greater or more limited. Therefore, the claim of the affected party can only encompass that the authority has not exceeded its discretion in the preparation of the action plan.[306]

6.2. THE JUDGMENT OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

6.2.1. THE PREPARATION OF ACTION PLANS

According to the CJEU, Article 7(3) of Directive 96/62 obliges Member States to draw up action plans where there is a risk that the limit values or alert thresholds may be exceeded.[307] In reaching this conclusion, despite relying on the wording of the provision, the Court referred to:

- The 12th Recital in the Preamble to the Directive, stating that "in order to protect the environment as a whole and human health, it is necessary that Member States take action when limit values are exceeded in order to comply with these values within

[305] European Commission, Written Observations in case C-237/07 *Janecek*, 4 September 2007, para. 40.
[306] European Commission, Written Observations in Case C-237/07 *Janecek*, 4 September 2007, paras. 43-45.
[307] Case C-237/07 *Janecek*, ECLI:EU:C:2008:447, para. 35.

the time fixed".

- The definition of alert thresholds in Article 2(7) of the Directive, providing that it "shall mean a level beyond which there is a risk to human health from brief exposure and at which immediate steps shall be taken by the Member States as laid down in this Directive".

Relying on its ruling in *Ratti*[308] concerning the direct effect of Directives, the Court of Justice pointed out that individuals are entitled to rely on the provisions of a Directive against public bodies if they are unconditional and sufficiently precise.[309] The Court stressed that the national courts are obliged to interpret national law as far as possible in conformity with the purpose of the relevant Directive and if this is not possible, the incompatible national provisions must be set aside.[310] It confirmed that it would be incompatible with the binding effect of Directives, to exclude the possibility of concerned persons to rely on that directive. This would be particularly the case "in respect of a directive which is intended to control and reduce atmospheric pollution and which is designed, therefore, to protect public health".[311]

Contrary to the view of the referring German Federal Administrative Court, the CJEU found that its case law relating to the direct effect of Directives where these have been inadequately transposed by the Member State to be applicable to the case in hand. The CJEU already established in three infringement proceedings initiated by the Commission against Germany, that "whenever the failure to observe the measures required by the directives which relate to air quality and drinking water, and which are designed to protect public health, could endanger human health, the persons concerned must be in a position to rely on the mandatory rules included in those directives".[312]

Consequently, the CJEU concluded that "natural or legal persons directly concerned by a risk that the limit value or alert threshold may be exceeded must be in a position to require the competent authorities to draw up an action plan where such a risk exists, if necessary by

[308] Case 148/78 *Ratti*, ECLI:EU:C:1979:110, para. 20.
[309] Case C-237/07 *Janecek* ECLI:EU:C:2008:447, para. 36.
[310] Case C-237/07 *Janecek* ECLI:EU:C:2008:447, para. 36, see to that effect, Case C-106/89 *Marleasing*, ECLI:EU:C:1990:395, para. 8.
[311] Case C-237/07 *Janecek,* ECLI:EU:C:2008:447, para. 37, see in that regard Case C‑361/88 *Commission v. Germany*, ECLI:EU:C:1991:224, Case C‑59/89 *Commission v. Germany*, ECLI:EU:C:1991:225, and Case C‑58/89 *Commission v. Germany*, ECLI:EU:C:1991:391.
[312] Case C-237/07 *Janecek*, ECLI:EU:C:2008:447, para. 38.

bringing an action before the competent courts".[313] It was irrelevant that those persons may have other courses of actions available under national law.[314] The Directive did not restrict the measures which may be adopted according to other provisions of national law, but its wording was specific with regard to planning for the purposes of protecting the environment 'as a whole'. [315]

6.2.2. THE CONTENT OF ACTION PLANS

The Court of Justice answered the second question in the negative. By relying on the wording of Article 7 (3) of the Air Quality Framework Directive, stating that the "Member States shall draw up action plans […] in order to reduce that risk and to limit the duration of such an occurrence", the Court of Justice held that "the Member States are not obliged to take measures to ensure that those limit values and/or alert threshold are never exceeded".[316] Following this, the Court stated:

> *On the contrary, it is apparent from the broad logic of the directive – which seeks an integrated reduction of pollution – that it is for the Member States to take measures capable of reducing to a minimum the risk of the limit values and/or alert thresholds being exceeded and the duration of such an occurrence, taking into account all the material circumstances and opposing interests.*[317]

However, the Member States' discretion does not preclude judicial review by the national courts to determine whether they exceeded their discretion. Article 7(3) of the Directive limits the exercise of the national discretion, "relating to the adequacy of the measures which must be included in the action plan with the aim of reducing the risk of the limit values and/or alert thresholds being exceeded and the duration of such an occurrence, taking into account the balance which must be maintained between that objective and the various opposing public and private interests".[318]

6.3. THE INTERVIEW WITH THE CJEU JUDGE

According to the judge, who was sitting on the chamber of the CJEU dealing with the *Janecek* case, the reason why there was no Advocate General's opinion was due to the fact that the

[313] Case C-237/07 *Janecek*, ECLI:EU:C:2008:447, para. 39.
[314] Case C-237/07 *Janecek*, ECLI:EU:C:2008:447, para. 40.
[315] Case C-237/07 *Janecek*, ECLI:EU:C:2008:447, para. 41.
[316] Case C-237/07 *Janecek*, ECLI:EU:C:2008:447, para. 44.
[317] Case C-237/07 *Janecek*, ECLI:EU:C:2008:447, para. 45.
[318] Case C-237/07 *Janecek,* ECLI:EU:C:2008:447, paras. 43-47.

decision was firmly based on earlier case law in terms of individuals being able to invoke environmental directives in the national courts to the extent that they have direct effect. This "*quite protective case-law*" was based on the purpose of the Directives to protect public health. However, the judge recognised that the issue might involve wider implications:

> *There is of course a question here, a more general horizontal question, to what extent national rules on standing could exclude. For instance, whether the Schutznormtheorie could be used as a kind of obstacle. But that does not play a role here.*[319]

However, regarding the possibility that the issue might fall under the national procedural autonomy principle – an issue which has been addressed in the preliminary reference of the Federal Administrative Court - the judge pointed out:

> *I don't think that it was necessary in this case. The question was whether there was direct effect. Whether the rule of the directive could be invoked, the answer is, yes. No real discussion whether this interest of Janecek could be qualified as a subjective right. I remember another case where there was a real discussion on that. But not in this case. It is true that direct effect implies necessarily that you can invoke. Having said that, there might be debate as to what extent the available remedies are sufficient, allow you really to invoke when there is a limitation. Then you really enter into discussions of procedural autonomy. But in this case, that was not really [discussed].*
>
> *I would not say that this is a remedy. The judgment says that it must be possible to invoke the application and respect of this rule. And that was the question of the referring court. Having answered that, you could imagine that, in applying the answer, there could be a discussion on the remedy, whether in the framework of the remedy, this should be possible, but there has been no problem apparently. No discussion about remedies.*
>
> *The question was what exactly what the obligation of the competent authority should be. According to this rule, it was explained what should be done. It is the content of the rule. And first of all the question, whether it could be considered to have direct effect and being able to be applied by a court. And the answer is yes, and the court interprets the rule and says what should be done in this particular case, I would say that this is fairly traditional/normal, but there is no real problem of remedy there.*[320]

Confronting the judge with the difficulties faced by the national courts in ordering the authorities to set up an action plan (for Germany, see **section 7.2.1**.; for the UK, see **section 9.1.1.**), as the Member States can nevertheless not achieve compliance with the limit values,

[319] Interview with judge of the CJEU, who was sitting on the chamber dealing with *Feryn* and *Janecek* (16 March 2013).
[320] Interview with judge of the CJEU.

he pointed out that "*you have to clearly strive for announcing the measures to respect the limits, but even as to the text of the Directive, exceptions are possible […] The rule is not very stringent or strict*". While there must be a plan, regarding the content of the plan, it would be more an "*obligation to make an effort than an obligation of result*". [321]

Regarding the question what is meant by 'legal persons' which are entitled to ask for a plan, and whether it could constitute, for example, an NGO (see on this also **section 7.1.**), the judge replied that it constituted a "*general reference to all persons having legal personality*". [322]

7. THE FOLLOW-UP AT THE NATIONAL LEVEL

From the claimant's perspective, the Court of Justice's ruling was considered to be a success. Although the CJEU did not confirm that the action plan had to achieve strict compliance with the limit values, the individual was given a 'right to clean air' as it was referred to in the media.[323] After the CJEU's judgment, Mr Janecek and the Bavarian authorities withdrew their appeals against the judgment of the Higher Administrative Court, which thus became final. The Bavarian authorities were ordered to draw up an action plan that pursued the air quality limit values to the extent that was possible and proportionate. As the representatives of the Bavarian State Ministry of the Environment and Consumer Protection stated during the interview, the *Janecek* case had a positive development on their operations: although already anticipated before the CJEU ruling, they speeded up the process of adopting measures, namely the introduction of low-emission zone, and trucks were prohibited from driving through the city centre of Munich.[324]

In 2011, the German environmental NGO that was standing behind the *Janecek* litigation commenced new legal proceedings The limit values for particulate matters as well as nitrogen

[321] Interview with judge of the CJEU.
[322] Interview with judge of the CJEU.
[323] Interview with the lawyer of Mr. Janecek (applicant), 8 October 2012.
[324] Interview with three representatives of the legal and scientific departments of the Bavarian State Ministry of the Environment and Consumer Protection (defendant), 9 October 2012. In general, no distinction will be made between the three representatives when referring to the interview. The views and evaluations expressed by the three representatives will be considered constitutive for those of the Bavarian State Ministry of the Environment and Consumer Protection in the *Janecek* case.

dioxide were still not complied with in many German cities. This part will therefore proceed by setting out shortly the strategy behind the second round of legal actions (**section 7.1.**). The litigation for clean air reached again the Administrative Court of Munich as well as the Federal Administrative Court, which will be both set out in order to examine how the CJEU's ruling in *Janecek* was incorporated (**section 7.2.**).

7.1. A NEW ROUND OF STRATEGIC LEGAL ACTIONS

In 2011, the German environmental NGO supporting the *Janecek* litigation initiated a new round of strategic legal actions. The lawyer, which was already standing behind the *Janecek* litigation, inspired by the judgment of the CJEU in the *Lesoochranárske zoskupenie* case, was again the main initiator of the case. In that case, although the CJEU held that Article 9(3) of the Aarhus Convention did not have direct effect in European Union law, it imposed the obligation on the national courts to interpret their national procedural law in order to enable an environmental protection organization to challenge an administrative decision liable to be contrary to EU environmental law before the courts.[325] The lawyer explained:

> *And then came this judgment, the Slovak brown bear [case]. Eventually, it was said only in the maxim as obiter dictum, that the national courts have such a duty, only remarked relatively on the edge […], so not the crux of the matter and it was not necessary, that the CJEU said that, but this is what has made me suspicious, that the CJEU rises this to a maxim, even though it did not really need to take a position on that. That is not was the CJEU usually does.*
>
> *I asked the [NGO] again, don't we want to do something there, don't we want to initiate test-cases, because if that works out, just from the perspective of the law enforcement, that the associations could eventually enforce the entire EU environmental law by initiating legal actions, that would be an incredible expansion of the legal standing of German environmental organizations. I believe that in other Member States that does not play a role. They do not have problems in this way. But this is a specifically German problem.*[326]

Next to that, the further aim pursued by the legal actions was to clarify the substance of the action plan. The CJEU held in *Janecek* that the Member States have to find appropriate measures to gradually comply with the limit values. However, according to the lawyer, the CJEU did not answer the question as to whether there is a fixed deadline by which compliance must be ensured. According to the lawyer, compliance must be ensured as soon as

[325] In that case, an environmental NGO was refused permission to become a party to administrative proceedings in which various hunting groups were applying to a government ministry for permits to hunt brown bears. The NGO appealed against this decision.
[326] Interview with the lawyer of Mr. Janecek (applicant), 8 October 2012.

possible as the limit values are binding and fixed. Although the new Ambient Air Quality Directive 2008/50 weakened the provisions regarding short-term action plans (at stake in the *Janecek* proceedings) by rendering them optional in some cases of exceedance of the limit-values,[327] it rendered the concept of an air quality plan more demanding. The second subparagraph of Article 23 of Directive 2008/50 provides that "in the event of exceedances of those limit values for which the attainment deadline is already expired, the air quality plans shall set out appropriate measures, so that the exceedance period can be kept as short as possible". Once both legal questions were solved, the respective NGO planned to initiate legal actions against every German city which was not compliant with the limit values.[328]

The lawyer presumed that the German courts would block these actions. This was no hindrance, however, since the aim was to obtain a favourable judgment from the last instance court, or from the CJEU. In this sense, the opponents were also chosen strategically. On 11 July 2011, the NGO initiated a legal action against the Land Hessen to amend the ambient air quality plan for Wiesbaden to comply with the limit value for nitrogen dioxide. On 14 February 2012, the legal action against the same defendant for the city of Darmstadt followed. The lawyer of
explained:

> *First point, I knew that there was the Minister of Transport of Hessen, who was a member of the FDP, and thus strictly against low-emission zones. He saw that as evil stuff. So we knew he would fight against it. That is a good opponent for now. And the second was, I knew it would arrive at a court in Wiesbaden, which I knew well from previous proceedings and where I knew, that I was in good hands […] and I will receive there a quick judgment and maybe also a good one. The next proceedings, I initiated in Darmstadt, again because it was the Land of Hessen and because I would be able to quickly get a victory, because again the Administrative Court in Wiesbaden was responsible.*[329]

On 1 March 2012, the environmental NGO initiated an action against the Freistaat Bayern to amend the air quality plan for the city of Munich to ensure compliance with the limit values for particulate matters and nitrogen dioxide. The case was dealt with by the same judge that decided the *Janecek* case at first instance. Much resistance against this action was expected,

[327] Now, Article 24 of Directive 2008/50 provides: "Where, in a given zone or agglomeration, there is a risk that the levels of pollutants will exceed one or more of the alert thresholds specified in Annex XII, Member States shall draw up action plans indicating the measures to be taken in the short term in order to reduce the risk or duration of such an exceedance. Where this risk applies to one or more limit values or target values specified in Annexes VII, XI and XIV, Member States *may*, where appropriate, draw up such short-term action plans."
[328] Interview with the lawyer of Mr. Janecek (applicant).
[329] Interview with the lawyer of Mr. Janecek (applicant).

not only from the defendants, but also from the judge. The hook of the case was that the Landshuter Allee, which was the subject of the first test-case as Mr. Janecek lived there, was not made part of the low-emission zone. The lawyer explained:

> *Because the road still did not become part of the low-emission zone and this is the absurdity that we find here […] This road surely must be in the zone and not just at the border of the zone. […] Mr. Janecek no longer lives there. Then 2 years ago we tried with another citizen of the street, who moved three weeks before the oral hearing. And so it was difficult to find directly concerned citizens who would also remain living there for five years until the final judgment. And that has always been a difficulty in enforcing such questions - to find these citizens.*[330]

7.2. THE PROCEEDINGS BEFORE THE GERMAN COURTS

The German environmental NGO in cooperation with its lawyer eventually initiated actions against sixteen German cities.[331] This section will set out the judgments of the Administrative Court in Munich (**section 7.2.1.**) and of the Federal Administrative Court (**section 7.2.2.**). As these two courts already dealt with the *Janecek* litigation and were opposed to recognising Mr Janecek's right for the preparation of an action plan (see **sections 5.1. and 5.3.**), they were chosen to determine how and to what extent the CJEU's ruling has been incorporated in their reasoning.

7.2.1. THE JUDGMENT OF THE ADMINISTRATIVE COURT OF MUNICH

This part will shortly summarise the judgment of the Administrative Court of Munich (**section 7.2.1.1.**). Since the author of the thesis has been able to attend the legal proceedings in Munich, the views of the national judge will be reconstructed on the basis of that experience, which offers a more differentiated picture in comparison to the judgment rendered (**section 7.2.1.2.**).

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[330] Interview with the lawyer of Mr. Janecek (applicant).

[331] Berlin, Gelsenkirchen, Essen, Düsseldorf, Köln, Aachen, Bonn, Limburg, Frankfurt, Wiesbaden, Mainz, Offenbach, Darmstadt, Stuttgart, Reutlingen and München. See on this, Deutsche Umwelthilfe, Clean Air Litigation – Klagen für saubere Luft, November 2016, availabe at: http://www.duh.de/fileadmin/user_upload/download/Projektinformation/Verkehr/Feinstaub/Hintergrundpapier_Klagen_fuer_saubere_Luft_2016-11-11.pdf.

7.2.1.1. The Judgment of the Court

In its judgment of 9 October 2012, the Administrative Court of Munich granted the action of the NGO and placed the Bavarian authorities under an obligation to amend the ambient air quality plan applicable to Munich so that it contained the necessary measures to ensure compliance with the ambient air quality limit values for particulate matters and nitrogen dioxide as quickly as possible. The Administrative Court confirmed the legal standing of the NGO: The German Administrative Process, particularly section 42(2) of the German Code of Administrative Court Procedure,[332] had to be interpreted in the light of the CJEU ruling of 8 March 2011 in Case C-240/09 *Lesoochranárske zoskupenie*.[333] The action of the applicant was also well-founded on the basis of Article 23(1) of Ambient Air Quality Directive 2008/50, which was implemented by Section 47(1) of the Federal Emission Control Act. The current action plan did not include measures which would be able to achieve compliance with the limit values. While the defendant had discretion to choose the specific measures, in case of exceedances of the limit values, the necessary measures had to ensure compliance as quickly as possible. It did not appear that further measures would be actually impossible and legally disproportionate. On the contrary, there would be further measures available, one of them being the extension of the low-emission zone.[334]

7.2.1.2. The proceedings before the Court

The legal proceedings in Munich revealed that the national judge did not see any real practical solution to the problem, but instead rendered a formalistic judgment:

> *Problem recognized. Problem not solved. Then we will have to act. I do not think that any of the two sides, the city of Munich in the middle as a buffer, will arrive at a wonderful solution. I also don't know any. I am of course aware that any such measure whatsoever, which will lead to a restriction of traffic and nitrogen dioxide, will result in an outcry – that's no question.*[335]

He clearly described the problem as being an EU level problem and also considered that the problem had to be solved at the political level:

[332] It provides regarding the legal standing before the administrative courts: "Applications may be made by any natural person or body corporate claiming to have been aggrieved by the legal provision or its application, or that he/she will be aggrieved within the foreseeable future, or by any public authority within one year of announcement of the legal provision […]."
[333] VG München, 9.10.2012 – ZUR 2012, 699, section 1.
[334] VG München, 9.10.2012 – ZUR 2012, 699, section 2.
[335] Proceedings before the Administrative Court of Munich (VG München), 9 October 2012.

> *The question is who will hear the outcry? We must not hear it, because we have neither made the legal provisions, nor are we here to implement or order any measure. The outcry must go to Brussels, where these regulations have been made. If it turns out that, what I could summarize as a resume from the different positions, it does not work in the foreseeable future or only with measures that are viewed from this side as disproportionate, then there is a possibility to say, then we change the Directive. And then we do not have a value of 40 but 80 - whatever - or 75.*
>
> *What has been set here as law at the European level has nothing to do with reality. I think that the outcry must go where this, the whole reason for this misery has begun, simply in Brussels. If the vehicles are permitted, only think in terms of trucks, always bigger, and heavier [...] everyone knows about the damage of increasingly heavier vehicles - however these vehicles were permitted at the European level. And if that is not harmonized, what one side does, namely, permission of vehicles, and the other side, air pollution control, as long as it is not harmonized, we will have this conflict until it is solved.* [336]

However, he reiterated that his role as a judge is to enforce the existing legal provisions:

> *As long as the legal provisions are there, they must be enforced in some way. That's not our task. We hold back in that regard. But if someone makes a claim in front of us, then we need to declare based on the last calendar year […] whether there are currently any exceedances - and are there currently measures, which can in the short term […] eliminate those exceedances? We must say, no. Whether any are existing, which ones are proportionate, we do not have to decide about that. This is then the responsibility of the Ministry, which has to do this under certain circumstances and the plaintiff to say, that's enough or not enough. We do not have to decide on this.*
>
> *You rightly say, here are the values that must be respected, and you say at least as much rightly, I see the values but I do not know how to comply with them. We know that – we're not entirely stupid. And we know that very well. However, this is not about whether we realize something or not, as long as the law is so that a legal action exists, that appropriate measures have to be taken, we have no other option than to oblige those responsible to take such appropriate measures. And we will possibly see them again in the context of the enforcement […] if this claim with this application would become final, and we come to enforcement stage, then I would probably say this judgment is not enforceable because it has no enforceable content. Because determining the appropriateness of the measures is not for the enforcement procedure but for the actual proceedings. So […] what we do here is a showcase. I know all that. And we will actually in the concrete form that we will achieve PM_{10} and nitrogen dioxide next year, the year after next, we will not reach that. You know that and you know it and we know it as well. That all that has also quite a declaratory character, I know. As long as I'm in duty here, we will not reach that values are observed here in Munich. That is very clear.* [337]

[336] Proceedings before the Administrative Court of Munich (VG München), 9 October 2012.
[337] Proceedings before the Administrative Court of Munich (VG München), 9 October 2012.

Both parties appeared not only with their lawyers but also with their scientific experts before the court, prepared to discuss the substantive content of the action plan. However, the Administrative Court in Munich did not engage in any substantive evaluation of the content of the air quality action plan. The public authority was disappointed: according to them, the court should step back from its control function and decide only on serious mistakes in the planning process, if it cannot render a substantive decision (see also **section 8.1.**).[338]

The Bavarian authorities first appealed to the Higher Administrative Court of Bavaria. However, it withdrew its appeal on 8 April 2014 shortly before the date of the court hearing. The judgment of the Administrative Court of Munich became therefore final. The fifth update of the air quality plan for Munich entered into force on 20 May 2014. However, the plan does not foresee to ensure compliance with the limit values – instead compliance with the limit values for nitrogen dioxide could be achieved only in 2030.[339] Therefore, the NGO applied for the enforcement of the judgment of the Administrative Court, which thereupon ordered the Bavarian authorities to update their air quality plan within a year by including effective measures. Failing this, the court threatened with a fine of 10 000 Euro.[340] The Bavarian Higher Administrative Court upheld that order.[341]

7.2.2. The Judgment of the Federal Administrative Court

The action of the NGO against the ambient air quality plan of the city of Darmstadt eventually reached the Federal Administrative Court. The Land Hessen decided to appeal the judgment of the Administrative Court of Wiesbaden as it considered the action to be inadmissible and ill-founded.[342] However, in its judgment of 5 September 2013, the German Federal Administrative Court rejected the leap-frog appeal (*Sprungrevision*) of the state of Hessen and upheld the judgment by the Administrative Court of Wiesbaden in its judgment of 16 August 2012.[343] The judgment of the Federal Administrative Court will be set out regarding the right for the preparation of an air quality plan (**section 7.2.2.1.**) and the content of the plan (**section**

[338] Interview with three representatives of the legal and scientific departments of the Bavarian State Ministry of the Environment and Consumer Protection (defendant).
[339] Deutsche Umwelthilfe, Clean Air Litigation – Klagen für saubere Luft, November 2016, availabe at: http://www.duh.de/fileadmin/user_upload/download/Projektinformation/Verkehr/Feinstaub/Hintergrundpapier_Klagen_fuer_saubere_Luft_2016-11-11.pdf, p. 16.
[340] VG München, 21.06.2016 – M 1 V 15.5230.
[341] VGH Bayern, 3.03.2017 – 22C 16.1427.
[342] VG Wiesbaden, 16.08.2012 - 4 K 165/12.WI.
[343] BVerwG, 5.09.2013 - 7 C 21.12.

7.2.2.2.).

7.2.2.1. The right for the preparation of an air quality plan

Firstly, the Court based the legal standing of the environmental organization on Section 42(2) of the Code of Administrative Court Procedure. According to this, the environmental organization can claim that its rights were violated by the refusal to establish an ambient air quality plan in compliance with the requirements of Section 47(1) of the Federal Emission Control Act. Section 47(1) of the Federal Emission Control Act affords the right to demand the establishment of an ambient air quality plan meeting the imperative provisions of the law on ambient air quality not only to natural persons who are directly affected, but also to environmental protection organizations that are recognized in accordance with Section 3 of the Act on Supplementary Provisions on Appeals in Environmental Matters in accordance with Directive 2003/35/EC.[344] [345]

The Federal Administrative Court reasoned that EU law would require a broader interpretation of subjective rights following from the law on ambient air quality than the traditional understanding of the term subjective right. On the basis of the ruling of the CJEU in *Janecek*, the Court held that directly-affected legal entities are entitled to file actions in the same way as natural persons. The legal power which is thus awarded by EU law is to be recognized as a subjective right in the interest of the principle of effectiveness following from Article 4(3) TEU. The expansion of the concept of 'subjective right' does justice to the development of EU law, which was determined from the outset by the tendency, through generous recognition of subjective rights, to mobilize citizens for the decentralized assertion of EU law. The citizen then simultaneously has 'procuratory' legal status, related to the objective interest in ensuring the practical effectiveness and unity of EU law.[346]

An interpretation of Section 47(1) of the Federal Emission Control Act such that, in addition to directly-affected natural persons, environmental protection organizations also have the right to demand compliance with the imperative provisions of the law on ambient air quality,

[344] Act Concerning Supplemental Provisions on Appeals in Environmental Matters Pursuant to EC Directive 2003/35/EC (Environmental Appeals Act) of 7 December 2006 (Federal Law Gazette I p. 2816); Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, OJ L 156, 25.6.2003, p. 17.
[345] BVerwG, 5.09.2013 - 7 C 21.12, para. 38.
[346] BVerwG, 5.09.2013 - 7 C 21.12, paras. 41-46.

is required by Article 23 of Directive 2008/50/EC and Article 9(3) of the Aarhus Convention. Moreover, with regard to circumstances which are subject to EU law, the CJEU demanded in its judgment of 8 March 2011 in Case C-240/09 *Lesoochranárske zoskupenie* broad access to justice for environmental protection organizations. Furthermore, a fundamental negation of such rights of environmental protection organizations would be incompatible with the Aarhus Compliance Committee's case law on Article 9(3) of the Aarhus Convention.[347]

Secondly, the Court dealt with the Land Hessen's complaint that the motion was not adequately certain. Accordingly, the nature and the scope of the requested legal protection are to be designated in a specific motion, which must be comprehensible *per se*. This defines the subject-matter of the dispute and outlines the framework of the court's power to hand down a ruling. What is more, it allows the defendant to make a detailed defence. Finally, a judgment which grants the motion should be expected to lead to coercive enforcement which does not overburden the enforcement proceedings with factual questions by continuing the dispute. The Court held that lodging of the motion satisfied the clarity requirement. The designation of the goal that can be achieved by amending the ambient air quality plan reflected the margin of discretion which is afforded to the authority with regard to planning. The judgment may impose binding requirements which are to be taken into account in the enforcement proceedings.[348]

7.2.2.2. The content of the air quality plan

Finally, the Federal Administrative Court also took a position regarding the content of the action to be adopted under Article 23(1) of Directive 2008/50 (Section 47(1) of the German Federal Emission Control Act).[349] To ensure effective health protection, it was required that the air pollution emission standards were reduced as quickly as possible to the level that is still regarded as acceptable by the limit value. The decision of the authority must be orientated in line with this minimization imperative, which is at the same time the legal standard for judicial review, which is restricted in view of the margin of discretion granted to the authority. The requirement to terminate the exceedance of the ambient air quality limit values as quickly as possible requires an evaluation of the measures that are suitable and proportionate to reduce emissions, particularly in the interests of promptly meeting the

[347] BVerwG, 5.09.2013 - 7 C 21.12, paras. 47-50.
[348] BVerwG, 5.09.2013 - 7 C 21.12, paras. 52-56.
[349] „Die Maßnahmen eines Luftreinhalteplans müssen geeignet sein, den Zeitraum einer Überschreitung von bereits einzuhaltenden Immissionsgrenzwerten so kurz wie möglich zu halten".

ambient air quality goals. This may lead to a restriction of the discretion for planning if solely the selection of a specific measure could achieve adherence to the limit values.[350] Also in this regard, however, it is not required that the measures that are to be taken immediately lead to achieving the goal; rather – in accordance with the principle of proportionality– action in several stages can also be foreseen here.[351]

The Land Hessen invoked the ruling of the CJEU in *Janecek* in support of its legal view, according to which it was sufficient for an ambient air quality plan to gradually aim at complying with the limit values. The Federal Administrative Court distinguished the legal situation at stake. The *Janecek* case referred to action plans in accordance with Article 7(3) of Directive 96/62/EC. Ambient air quality plans and action plans pursue different goals. Moreover, unlike the second subparagraph of Article 23(1) of Directive 2008/50/EC, Article 7(3) of Directive 96/62/EC does not contain an explicit reference to the suitability of the measures that are to be taken in order to comply with the limit value as soon as possible. The measures under Article 7(3) of Directive 96/62/EC only serve to reduce the danger of exceedance and restrict its duration. The CJEU concluded in *Janecek* that the Member States are obliged to take measures capable of reducing to a minimum the duration of the exceedance of the limit values, taking into account all the circumstances. It cannot be concluded from the decision that the possibility to gradually achieve the limit values is to be granted without conditions. Rather, the measure must also be justifiable, taking the time factor into account as well.[352]

8. THE POSITION OF THE NATIONAL AUTHORITIES AND THE EUROPEAN COMMISSION

This section will reconstruct the view of the Bavarian State Ministry of the Environment and Consumer Protection (*Bayerisches Staatsministerium für Umwelt und Verbraucherschutz*, hereafter the 'Ministry'), which was the defendant in the *Janecek* proceedings, as well as in the follow-up proceedings before the administrative court in Munich (see **section 7.2.1.**), on the basis of the interview conducted with three representatives of the Ministry (**section 8.1.**). Moreover, this section aims to shed some light on the role of the European Commission as the

[350] Also, it would be unobjectionable that the Administrative Court has ordered the establishment of a low-emission zone as a measure which is to be taken into account when drawing up the ambient air quality maintenance plan. The Administrative Court does not establish any incorrect legal standards when examining whether the establishment of a low-emission zone is disproportionate. It rightly compared and weighed up the legally-protected interests concerned see BVerwG, 5.09.2013 - 7 C 21.12, para. 61-63.
[351] BVerwG, 5.09.2013 - 7 C 21.12, paras. 58-59.
[352] BVerwG, 5.09.2013 - 7 C 21.12, para. 60.

'guardian of the Treaties', considering the unsatisfactory compliance of the Member States with the air quality limit values (**section 8.2.**).

8.1. THE VIEW OF THE BAVARIAN STATE MINISTRY OF THE ENVIRONMENT AND CONSUMER PROTECTION

The interview at the Bavarian State Ministry of the Environment and Consumer Protection was conducted one day after the follow-up proceedings before the administrative court of Munich (see **section 7.2.1.**). The interview did not therefore focus primarily on the *Janecek* case as such but on its further consequences for the Ministry in the specific context of the follow-up proceedings.

Inquiring about the perception of the previous day's legal proceedings, the representatives of the Ministry clarified that they did not have "any big problem" with the recognition of legal standing of environmental NGOs. However, the representatives expressed their dissatisfaction of the course of the previous day's proceedings before the administrative court for its "formalistic" and "simplistic" approach. They assumed that the legal action would have been declared inadmissible for various reasons.[353]

The Ministry took the view that in line with the *Janecek* case, there was no individual entitlement to require compliance with the limit values. Therefore, they expected the legal action to be declared inadmissible. The only legal consequence known in German law in case the limit values for air quality are exceeded, is the setting up of an action plan. Since a plan was already in existence, they considered that they could not be ordered to do something which they were already doing. The plan was designed to ensure compliance with the limit values – the time-limit for ensuring compliance was not strict but subject to the principle of proportionality. If the administrative court of Munich wanted to add a substantive point, in line with the *Janecek* judgment, the Ministry would only be required to take all steps to ensure compliance with the limit values as far as they were proportionate in view of the different interests at stake. One of the lawyers of the Ministry pointed out that the principle of

[353] Interview with three representatives of the legal and scientific departments of the Bavarian State Ministry of the Environment and Consumer Protection (defendant), 9 October 2012. The views and evaluations expressed by the three representatives will be considered constitutive for those of the Bavarian State Ministry of the Environment and Consumer Protection in the *Janecek* case.

proportionality was a German constitutional principle, as well as a European principal.[354]

Moreover, the Ministry complained that the administrative court did not take into account the fact that the city of Munich was compliant with the limit values for PM_{10} for three years (2010 – 2012), considering that the conurbation of Munich received an extension via a regulatory decision of the European Commission (see **section 2.3.8**). Particularly, Germany notified the Commission at the end of 2008 of an exemption, under Article 22(2) of the Ambient Air Quality Directive 2008/50/EC, from the obligation to apply the daily limit value for PM_{10} in ten air quality zones, including the conurbation of Munich. According to Article 22(2) of Directive 2008/50/EC, a Member State may be exempt from obligations to apply the limit values for PM_{10} if all appropriate abatement measures have been taken by the deadlines in Directive 1999/30/EC, being 1 January 2005 for PM_{10}; and *inter alia*, that an air quality plan demonstrating conformity with the limit values is established and will be achieved before the new deadline. No objections were raised by the Commission against Germany's notification of an exemption in the zone of the conurbation of Munich.[355] According to the Ministry, Munich complied with the extended limit value for PM_{10} which was applicable until 10 June 2011. For the year 2012, where the normal limit value applied, the Ministry predicted that there would be compliance. The Ministry took the view that it could not be required by the court to comply with the limit values, if it is already doing so.[356]

However, for nitrogen dioxide, the situation was different as it would be impossible to comply with the limit values at that moment. According to the Ministry, two measures could be taken in order to comply with the limit values for nitrogen dioxide, which is a pollutant resulting almost exclusively from vehicle motors. Firstly, one could set emission limits for vehicles with respect to nitrogen dioxides. While the European Union had done so through the Euro 6 Norm, those standards became binding for cars and light commercial vehicles only after 1 September 2014[357] and for the registration and sale of new types of cars and vans as of 1

[354] Interview with three representatives of the legal and scientific departments of the Bavarian State Ministry of the Environment and Consumer Protection (defendant).
[355] Entscheidung der Kommission vom 2.7.2009 über die von Deutschland eingereichte Mitteilung einer Ausnahme von der vorgeschriebenen Anwendung der PM_{10}-Grenzwerte, K(2009) 5240 endgültig.
[356] Interview with three representatives of the legal and scientific departments of the Bavarian State Ministry of the Environment and Consumer Protection (defendant).
[357] Regulation (EC) n° 692/2008 implementing and amending Regulation (EC) n° 715/2007 on type-approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information.

September 2015.[358] Therefore, those measures were taken much too late and not in harmony with the limit values for ambient air. Secondly, one could reduce traffic in order to comply with the limit values of nitrogen dioxide. According to the Ministry, in the case of Munich, this would mean reducing traffic by 80%. However, this would require a disproportional social redirection of living conditions.[359]

According to the Ministry, the reduction of traffic is not something which is discussed a lot in European politics. In addition, the Ministry justified that in the EU, eventually, the free movement of goods would prevail over environmental protection. In that regard, the representatives refer to the CJEU judgments in Cases C-320/03 and C-28/09, both infringement proceedings by the Commission against Austria, where the CJEU held that by prohibiting lorries with a total weight of more than 7.5 tonnes from being driven on a section of the A12 motorway, the Republic of Austria has failed to fulfil its obligations under Articles 34 and 35 TFEU. In both cases, the justification on environmental grounds failed because the measure's aim had not, the Court held, been pursued by proportionate means.[360]

Also, with regard to nitrogen dioxide, Germany notified the Commission at the end of 2008 of an exemption under Article 22(2) of Directive 2008/50/EC. However, the Commission did not take any decision in that regard. According to the Ministry, the Commission was aware that it was impossible to comply with the limit values for nitrogen dioxide throughout the whole of Europe. Therefore, it was suspected that the Commission might "act politically" and either not act upon the notifications or not object against the notification even though the conditions required under the Directive for an exemption were not met.[361] In that regard, the Ministry did not consider it to be "correct" for the administrative court of Munich to require the Ministry to comply with the limit values, considering that they might be changed via a regulatory act of

[358] Regulation (EC) n° 715/2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance.
[359] Interview with three representatives of the legal and scientific departments of the Bavarian State Ministry of the Environment and Consumer Protection (defendant).
[360] Case C-320/03 *Commission v. Austria*, ECLI:EU:C:2005:684 and Case C-28/09 *Commission v. Austria*, ECLI:EU:C:2011:854.
[361] It has to be pointed out that in 2013, the European Commission decided on the German notifications for a time extension. While several zones were granted a time extension until 1 January 2015 for the compliance with the limit values for nitrogen dioxide, Munich was not granted an extension. The Commission reasoned that the air quality plan for Munich does not contain sufficient measures to ensure compliance by 1 January 2015 (the maximum time extension possible). See on this, Beschluss der Kommission vom 20.2.2013 betreffend die Mitteilung der Bundesrepublik Deutschland über die Verlängerung der Frist für das Erreichen der NO2-Grenzwerte in 57 Luftqualitätsgebieten, 20.2.2013, C(2013) 900 final.

the Commission at a later date.[362]

According to the Ministry, the process of reducing emissions is complex, slow and requires experimentation. It is a slow process considering that the plan has to be made available to the public for six weeks. Then the different positions submitted by various interest groups have to be integrated and evaluated in the air quality plan. Frequently the measures involve high costs. Particularly, the interviewed natural scientist of the Ministry was disappointed that the national administrative court of Munich did not engage into a substantive examination/evaluation of the air quality plan, which included 70 different air quality measures. While the claimant accused the Ministry of not taking various measures, which in the view of the Ministry were already existent, disproportional or ineffective, the administrative court of Munich did not examine the plan substantively. Regarding the introduction of a congestion charge for the city of Munich, as proposed by the claimants, in view of the separation of powers, the Ministry took the view that such a political measure cannot be introduced via the judiciary but had to be decided by the legislature. According to the lawyers of the Ministry, the national court would have been obliged to gather evidence and undertake an examination *ex officio* before ordering them to comply. If the matter is too complex for the court or requires too much expert knowledge, then it has to lower its level of control. Since it cannot take over the planning, it has to consider solely whether the planning process took place or whether there were any mistakes.[363]

All in all, the underlying question of the interview was whether the Ministry really undertook all efforts in order to comply with the limit values. The interviewees expressed doubts regarding the scientific foundation of the limit values, how particulate matters could lead to so many deaths, especially given that the life expectancy of society is increasing. However, even although the scientific foundation of the limit values was questioned and it was "impossible" to ensure compliance, the Ministry stressed that it would do "its best" to reach that goal. The Ministry saw itself facing an impossible task as it did not possess the tools required to comply with the limit values. While it could include soft measures into the air quality plan like building a new bicycle path, hard measures need to come from another level, that is the

[362] Interview with three representatives of the legal and scientific departments of the Bavarian State Ministry of the Environment and Consumer Protection (defendant).
[363] Interview with three representatives of the legal and scientific departments of the Bavarian State Ministry of the Environment and Consumer Protection (defendant).

federal level or the European level.[364]

8.2. THE ROLE OF THE EUROPEAN COMMISSION

As became clear, the new Ambient Air Quality Directive 2008/50/EC opened up a new communication channel between the national authorities and the European Commission. Article 22 of Directive 2008/50 allows the Member States to apply to the European Commission for a postponement of the deadline to comply with the limit values for PM_{10} (max. 1 June 2011) and nitrogen dioxide and benzene (max. 1 January 2015). That new procedure allows the European Commission to assess the air quality plans of the Member States and give feedback regarding their measures implemented. The Commission may require Member States to adjust the air quality plan or to provide new air quality plans. The air quality plans, which have to be submitted within that procedure, have to fulfil two conditions.

Firstly, they have to set out the measures undertaken to achieve compliance by the initial attainment date:

> *21. Article 22(1) of the new Directive provides that the deadlines for attainment of the limit values for nitrogen dioxide and benzene may be postponed where conformity with the limit values cannot be achieved by the attainment date, i.e. 1 January 2010. In order to determine whether compliance cannot be achieved by that date, Member States are requested to indicate the measures taken before 2010 in accordance with Article 4(1) of Directive 1999/30/EC and Article 3(1) of Directive 2000/69/EC and explain the reasons why those measures do not bring about compliance [8]. It follows from the objectives of the air quality legislation in general that appropriate action must be taken in the period preceding the date on which the limit values become mandatory. Only if it can be shown that efforts have been made to achieve compliance, Member States can claim, in accordance with Article 22(1), that conformity with the limit values cannot be achieved by the deadlines.*

> *22. For PM_{10}, Member States must, according to Article 22(2), demonstrate that all appropriate measures have been taken at national, regional and local level to achieve compliance with the limit values by the initial deadline set for attainment, i.e. 1 January 2005. Information must therefore be given of the measures taken with a view to achieving compliance by that date. To enable the Commission to determine whether those measures were appropriate, Member States must identify*

[364] Interview with three representatives of the legal and scientific departments of the Bavarian State Ministry of the Environment and Consumer Protection (defendant).

> *the pollution sources that those measures were intended to address and explain the extent to which those measures actually contributed to reducing concentrations. Explanations must be given of any remaining exceedance of the limit values[9]. Those explanations must include information on whether the exceedance can be attributed to any of the specific conditions for the exemption, i.e. site-specific dispersion characteristics, adverse climatic conditions or transboundary contributions.*[365]

Secondly, they have to set out the measures to achieve compliance before the new deadline:

> *24. Member States must provide realistic and reliable predictions of how concentrations are likely to decline with a view to achieving compliance with the limit values before the new deadline. Those predictions should also indicate that exceedances during the extension will remain below the limit value plus the maximum margin of tolerance provided for in Annex XI to the Directive.*
>
> *25. The predictions must be based on a comparison between the limit values to be achieved and projected baseline levels for the exceedance situation in a zone or agglomeration. The baseline must indicate the estimated concentrations by the new deadline if no additional abatement measures are taken, apart from those taken to achieve compliance by the initial deadline and the existing and planned Community measures. The gap between the applicable limit value and the baseline will serve as an indicator for the expected impact and timing of the additional measures required in order to close that gap by the new deadline[12].* [366]

The procedure in Article 22 of Directive 2008/50/EC does not foresee participation by environmental NGOs. In 2009, two Dutch environmental organisations applied for annulment of a Commission decision rejecting as inadmissible their request for review by the Commission of a decision granting the Netherlands a temporary exemption from the obligations laid down by Directive 2008/50/EC.[367] The Council, European Parliament and European Commission appealed against the judgment of the general Court in Case T-396/09, which annulled the respective Commission decision to reject the requests of the environmental NGOs for review of the Commission decision granting the Netherlands a temporary exemption.[368] The CJEU quashed the judgment of the General Court, which made

[365] Communication from the Commission on notifications of postponements of attainment deadlines and exemptions from the obligation to apply certain limit values pursuant to Article 22 of Directive 2008/50/EC on ambient air quality and cleaner air for Europe, COM/2008/0403 final.
[366] Communication from the Commission on notifications of postponements of attainment deadlines and exemptions from the obligation to apply certain limit values pursuant to Article 22 of Directive 2008/50/EC on ambient air quality and cleaner air for Europe, COM/2008/0403 final.
[367] C(2009) 2560 final of 7 April 2009, OJ 2008 L 152, p. 1.
[368] Case T-396/09 *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht v. European Commission*, ECLI:EU:T:2012:301.

an error of law in holding that Article 9(3) of the Aarhus Convention could be relied on in order to assess the legality of Article 10(1) of Regulation No 1367/2006,[369] and dismissed the applications for annulment without referring the cases back to the General Court.[370]

Next to the specific instruments under the European air quality framework, according to Article 258 TFEU, the European Commission can initiate infringement proceedings against a Member State that has failed to fulfil its obligations. Infringement proceedings can be initiated in case of a failure to transpose a Directive in time, a failure to correctly transpose the Directive or a failure to ensure that the provisions of the Directive are actually implemented in practice. Unfortunately, there is no database were the documents relating to infringement proceedings are made publicly available. Rare information can be found via the press releases of the Commission. Regarding the compliance with the European limit values for particulate matters (PM_{10}), the Commission has successfully taken Slovenia,[371] Sweden,[372] Portugal[373] and Italy[374] to the CJEU. In these cases, the CJEU declared that the Member State failed to comply with the limit values as laid out in earlier Directives. Since the judgments that resulted only covered the failure to comply with air quality limit values in the past, they did not provide much incentive for the Member States to act on future exceedances. Also, the judgments did not give the Commission the opportunity to bring round-two proceedings in order enforce compliance with those judgments. Therefore, new infringement proceedings had to be started against those countries for non-compliance with the limit values for PM_{10}.

As a result of this obstacle, with the initiation of the EU's "Year of Air", in January 2013, the European Commission announced its "fresh legal approach to improving air quality in Member States". It was claimed that "the situation is so serious that the Commission is currently taking action against 17 States with a consistent record of poor air quality".[375] The limit values for PM_{10}, which entered into force 2005 were not respected in Austria, Belgium,

[369] Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ L 264, 25.9.2006, p. 13.
[370] Joined Cases C-401/12 P to C-403/12 P *Council of the European Union and Others v Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht* ECLI:EU:C:2015:4.
[371] Judgment of 24 March 2011 in Case C-365/10 *Commission v. Slovenia*, ECLI:EU:C:2011:183.
[372] Judgment of 10 May 2011 in Case C-479/10 *Commission v. Sweden*, ECLI:EU:C:2011:287.
[373] Judgment of 5 November 2012 in Case C-34/11 *Commission v. Portugal*, ECLI:EU:C:2012:712.
[374] Judgment of 19 December 2012 in Case C-68/11 *Commission v. Italy*, ECLI:EU:C:2012:815.
[375] European Commission, Environment: a fresh legal approach to improving air quality in Member States, 24 January 2013, http://europa.eu/rapid/press-release_IP-13-47_en.htm.

Bulgaria, Czech Republic, Denmark, Germany, Greece, Spain, France, Hungary, Italy, Latvia, Portugal, Poland, Romania, Sweden, Slovenia and Slovakia. The Commission's aim was to focus on Member States that did not ask for a time-extension or where the request was fully or partially refused. The new approach enlarged the scope of legal action from the failure to comply with the limit values *in the past* to Article 23 of the Directive, challenging the failure of many Member States to establish specific air quality plans which should set out appropriate measures, so that the exceedance period could be kept as short as possible.[376] The aim of these actions was "to urge Member States with on-going air quality problems to take forward-looking, speedy and effective action to keep the period of non-compliance as short as possible". [377]

The Commission's actions in view of nitrogen dioxide exceedances were initially hesitant. The first Member State addressed by the European Commission for its non-compliance with nitrogen dioxide levels has been the UK. After the UK Supreme Court declared the failure of the UK to comply with nitrogen dioxide and that the "way is open to immediate enforcement action at national or European level"[378] in its preliminary reference to the CJEU in *ClientEarth* (see on this **section 9**), the Commission decided to issue a letter of formal notice against the UK. The Commission's infringement actions were contingent on the outcome of the *ClientEarth* case, since it expected an interpretation as to the requirement that plans must include "appropriate measures to keep the exceedance period as short as possible" as laid down in Article 23.[379] In February 2017, the Commission announced that it send final warnings to Germany, France, Spain, Italy and the UK for failing to address repeated breaches of air pollution limits for nitrogen dioxide.[380]

9. A CROSS-BORDER EFFECT: THE *CLIENTEARTH* CASE

[376] The European Commission succeeded against Bulgaria before the CJEU in Case C-488/15 *European Commission v. Bulgaria* EU:C:2017:267. The CJEU held, on the one hand, that Bulgaria failed to comply with its obligations by exceeding the limit value for PM_{10} between 2007 until 2014, but also, on the other hand, regarding its air quality plan, in particular regarding the second subparagraph of Article 23(1) of Directive 2008/50/EC and the obligation to keep the exceedance period as short as possible.
[377] European Commission, Environment: a fresh legal approach to improving air quality in Member States, 24 January 2013, http://europa.eu/rapid/press-release_IP-13-47_en.htm.
[378] *R (on the application of ClientEarth) v. Secretary of State for the Environment, Food and Rural Affairs*, [2013] UKSC 25.
[379] European Commission, Environment: Commission takes action against UK for persistent air pollution problems, 20 February 2014, http://europa.eu/rapid/press-release_IP-14-154_en.htm .
[380] European Commission, Commission warns Germany, France, Spain, Italy and the United Kingdom of continued air pollution breaches, 15 February 2017, http://europa.eu/rapid/press-release_IP-17-238_en.htm.

The initiative of the German NGO showed its potential to spread to other environmental organizations in other Member States. In co-operation with the leading environmental organizations in various Member States, the German environmental organizations received funding of 1 686 635 Euro by an 'EU Life Project' from the Commission.[381] The German environmental organizations initiated the application. The project, called 'Clean Air' (running from 1 September 2012 until 30 November 2015), aimed *inter alia* "to give NGOs the competence through capacity building to use justice as an instrument for supporting the implementation of the Air Quality Directive". The aim was to "force administrations to really use effective instruments for the reduction of emissions".[382] In order to achieve that goal, the project organized eleven legal workshops in order to inform the NGOs and specialized lawyers about the EU air quality legislation and the possibilities of taking legal action to promote better implementation. The legal actions, which were successful in other countries, were presented and their adaptability to other countries discussed. The legal workshops resulted in 'The Clean Air Handbook', which included an Annex of some further useful test-cases for the enforcement of the European air quality legislation.[383] The project's website provides an overview of the legal situations in various Member States and the legal actions that have been initiated so far.[384]

The initiative received further funding of 521 834 Euro for the duration of 1 August 2016 until 30 November 2019 under the 'LIFE Legal Actions - Legal Actions on Clean Air' Programme. This time, the project does not envisage a cross-border element, but focuses on the situation in Germany, and in particular on the right to participation in the setting up of air quality plans. The objectives of the project are set out as the following:

> *The LIFE Legal Actions project aims to empower NGOs and citizens to take part in public participation processes on the development or revision of air quality plans, to improve their access to justice by supporting their demand for air quality measures or as a last resort to initiate legal action. The project also aims to improve the relationship between citizens and government as well as government accountability, transparency and responsiveness. […]*

[381] The EU LIFE Programme is the EU's financial instrument supporting environmental, nature conservation and climate action projects throughout the EU. See on this: http://ec.europa.eu/environment/life/ .
[382] For details on the project, see: http://ec.europa.eu/environment/life/project/Projects/index.cfm?fuseaction=search.dspPage&n_proj_id=4265; see also: http://www.cleanair-europe.org/en/home/.
[383] A. Andrews, The Clean Air Handbook – a practical guide to EU air quality law, Version 1.0 – April 2014, available at: https://www.clientearth.org/reports/20140515-clientearth-air-pollution-clean-air-handbook.pdf.
[384] http://legal.cleanair-europe.org/legal/eu/ .

> *NGOs and/or citizens will participate in at least 15 decision-making processes leading to a revision of air quality plans, and - if their requests are ignored by authorities - to legal action. Those "model cases" will have an effect on other regions since responsible authorities will provide information and allow public participation to avoid the risk of being sued.*[385]

The UK environmental organization ClientEarth, an active participant within the 'Clear Air' project, was successful in bringing a further test-case before the CJEU. The legal proceedings will be set out shortly in this section. Firstly, the proceedings before the UK courts leading to the preliminary reference to the CJEU in *ClientEarth* will be examined (**section 9.1.**). Then, the judgment of the CJEU (**section 9.2.**) and the follow-up judgment of the UK Supreme Court will be shortly set out (**section 9.3.**). The reconstruction will, however, not be as comprehensive as the *Janecek* reconstruction as we can discern a similar pattern.

9.1. THE PROCEEDINGS BEFORE THE UK COURTS

On 28 July 2011, ClientEarth commenced judicial review proceedings in respect of the UK Government's failure to comply with the limit values set for nitrogen dioxide for 1 January 2010. ClientEarth is a non-governmental organization promoting environmental protection and describing itself on its website as a group of "activist lawyers committed to securing a healthy planet" and "to protect the environment through advocacy, litigation and research".[386] In its action before the administrative courts, ClientEarth sought a declaration that the UK was in breach of its obligations to comply with the nitrogen dioxide limits provided for in Article 13 of Directive 2008/50 and, in addition, sought a mandatory order to revise the air quality plans to ensure that they all demonstrate how conformity with the nitrogen dioxide limit values will be achieved as soon as possible and by 1 January 2015 at the latest.

The substance at stake, nitrogen dioxide, is a gas formed by combustion at high temperatures, which is caused mainly by road traffic and domestic heating in the UK's urban areas.[387] In order to assess and measure air quality, the UK was divided into 43 zones and

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[385] For details on the project, see: http://ec.europa.eu/environment/life/project/Projects/index.cfm?fuseaction=search.dspPage&n_proj_id=5820&docType=pdf .

[386] http://www.clientearth.org/ .

[387] *R (on the application of ClientEarth) v. Secretary of State for the Environment, Food and Rural Affairs*, [2013] UKSC 25, para. 2.

agglomerations.[388] In 2010, only three of these zones and agglomerations complied with the limit values for nitrogen dioxide. On 9 June 2011, draft air quality plans were published for public consultation. They foresaw that in 17 zones and agglomerations, including Greater London, compliance was expected to be achieved after 2015.[389] On 22 September, the final plans were submitted to the Commission. The UK applied, under Article 22 of Directive 2008/50, for time extensions for 24 of the 40 zones or agglomerations, which were in breach of the limit values. In this regard, as required by Article 22, the UK showed in the respective plans how the limit values would be met by 1 January 2015 at the latest. However, for the remaining 16 zones or agglomerations, the UK did not make any application for a time extension under Article 22. Instead, the UK submitted air quality plans to the Commission under Article 23, which forecasted compliance with the limit values between 2015 and 2025. In a decision of 25 June 2012, the European Commission unconditionally approved 9 applications for time extensions, approved 3 others subject to certain conditions being fulfilled and raised objections to 12 of the 24 applications for time extensions. It did not comment on the 16 zones or agglomerations for which compliance by 2015 had not been shown.[390]

9.1.1. THE RULINGS OF THE COURTS

Although the UK Government accepted that is breached its obligation to ensure compliance with the limit value for nitrogen dioxide, the first instance and appeal courts denied ClientEarth any remedy and subsequently dismissed the action. Mitting J, who heard the case on 13 December 2011 held that the application for a time extension under Article 22 was discretionary, but declined in any event to grant a mandatory order: [391]

> *[…] such a mandatory order, like the imposition of an obligation on the Government to submit a plan under Article 22 to bring the United Kingdom within limit values by 1 January 2015, would raise serious political and economic questions which are not for this court. It is clear from all I have seen that any practical requirement on the United Kingdom to achieve limit values in its major agglomerations, in particular in London, would impose upon taxpayers and individuals a heavy burden of expenditure which would require difficult political choices to be made. It would be likely to have a*

[388] *R (on the application of ClientEarth) v. Secretary of State for the Environment, Food and Rural Affairs*, [2013] UKSC 25, para. 17.
[389] *R (on the application of ClientEarth) v. Secretary of State for the Environment, Food and Rural Affairs*, [2013] UKSC 25, para. 18.
[390] *R (on the application of ClientEarth) v. Secretary of State for the Environment, Food and Rural Affairs*, [2013] UKSC 25, para. 22.
[391] *R (ClientEarth) v. Secretary of State for the Environment, Food and Rural Affairs*, [2011] EWHC 3623 (Admin), para. 14.

> *significant economic impact. The courts have traditionally been wary of entering this area of political debate for good reason. I would, without hesitation, conclude that it is not just or expedient under section 31(2) of the Supreme Court Act 1991 to grant a mandatory order or injunction in respect of either matter.*[392]

Mitting J also declined to make a declaration:

> *More difficulty arises in relation to the declaration. It is now common ground that the United Kingdom is in breach of its obligations under Article 13. It is not necessary for me to declare that that is so. This judgment records the Secretary of State's concession and my view about the correctness of that concession. A declaration will serve no purpose other than to make clear that which is already conceded. The means of enforcing Article 13 lie elsewhere in the hands of the Commission under article 258 of the Treaty on the Functioning of the European Union, and if referred to it, the Court of Justice of the European Union under Article 260. Those remedies are sufficient to deal with the mischief at which the 2008 Directive is aimed.*[393]

The appeal was dismissed by the Court of Appeal (England and Wales) (Civil Division) on 30 May 2012. However, permission was granted for ClientEarth to appeal to the UK Supreme Court.[394] Laws LJ, who was the only judge that gave a substantive judgment, agreed with the lower court that Article 22 was discretionary. Regarding the declaration, he stated:

> *[…] It seems to me that he was, with respect, plainly right and the contrary is not contended. His judgment speaks as a declaration. No substantive issue of effective judicial protection arises from his refusal to grant a formal declaration.*[395]

On 1 May 2013, the Supreme Court declared that the UK was in breach of its obligations under Article 13 of the Directive with regard to the nitrogen dioxide limit value in 16 zones, including London. The UK Supreme Court explained: "*Such an order is appropriate both as a formal statement of the legal position, and also to make clear that, regardless of arguments about the effect of articles 22 and 23, the way is open to immediate enforcement at national or European level*".[396] Regarding the extent of any other relief, which depended on the interpretation of Directive 2008/50, the UK Supreme Court decided to refer several questions to the CJEU. The preliminary reference concerned the interpretation of Articles 22 and 23 of Directive 2008/50/EC, and, in particular, the legal consequences for the relevant authorities

[392] *R (ClientEarth) v. Secretary of State for the Environment, Food and Rural Affairs*, [2011] EWHC 3623 (Admin), para. 15.
[393] *R (ClientEarth) v. Secretary of State for the Environment, Food and Rural Affairs*, [2011] EWHC 3623 (Admin), para. 16.
[394] *R (on the application of ClientEarth) v. Secretary of State for the Environment, Food and Rural Affairs*, [2012] EWCA Civ. 897.
[395] *R (on the application of ClientEarth) v. Secretary of State for the Environment, Food and Rural Affairs*, [2012] EWCA Civ. 897, para. 22.
[396] *R (on the application of ClientEarth) v. Secretary of State for the Environment, Food and Rural Affairs*, [2013] UKSC 25, para. 37.

and for the national courts of a breach of Article 13 of that Directive by the Member State.

9.1.2. THE PRELIMINARY QUESTIONS SUBMITTED TO THE CJEU

The UK Supreme Court submitted the following questions to the CJEU:

> *1) Where, under the Air Quality Directive (2008/50/EC)1 ("the Directive"), in a given zone or agglomeration conformity with the limit values for nitrogen dioxide was not achieved by the deadline of 1 January 2010 specified in annex XI of the Directive, is a Member State obliged pursuant to the Directive and/or article 4 TEU to seek postponement of the deadline in accordance with article 22 of the Directive?*
>
> *(2) If so, in what circumstances (if any) may a Member State be relieved of that obligation?*
>
> *(3) To what extent (if at all) are the obligations of a Member State which has failed to comply with article 13 affected by article 23 (in particular its second paragraph)?*
>
> *(4) In the event of non-compliance with articles 13 or 22, what (if any) remedies must a national court provide as a matter of European law in order to comply with article 30 of the Directive and/or article 4 or 19 TEU?*

9.1.3. THE ARGUMENTS OF THE PARTIES

The judgment of the UK Supreme Court sets out the arguments of the parties, which will be shortly summarized:

ClientEarth argued against the UK's claim that it considered or put in place all practical measures to ensure compliance by 2015.[397] In any case, it considered that Article 22 provided for a mandatory procedure for postponement of the deadline, which was applicable to all Member States which could not achieve compliance by 1 January 2010.[398] Article 23 cannot be considered as an "*alternative procedure*", nor a means by which it can avoid the more stringent controls under Article 22.[399] Finally, the national courts must provide for effective remedies for the admitted breach of Article 13 – practical difficulties or the expenses of

[397] *R (on the application of ClientEarth) v. Secretary of State for the Environment, Food and Rural Affairs*, [2013] UKSC 25, para. 29.
[398] *R (on the application of ClientEarth) v. Secretary of State for the Environment, Food and Rural Affairs*, [2013] UKSC 25, para. 30.
[399] *R (on the application of ClientEarth) v. Secretary of State for the Environment, Food and Rural Affairs*, [2013] UKSC 25, para. 31.

compliance cannot be relied on as a defence.[400]

According to the Secretary of State, for the zones for which it had not produced plans showing conformity by 2015, conformity within that timetable was "*not realistically possible, due to circumstances out of its control and unforeseen in 2008*".[401] An air quality plan showing compliance by 1 January 2015 would be only required if an application for postponement of the deadline under Article 22 was made. However, the application is not mandatory and can be only properly sought if it is possible to demonstrate how conformity will be achieved by the new deadline.[402] Where the Member States decided not to apply for postponement, the Member State would be at "*immediate risk*" of Commission infringement proceedings, but remains subject to the obligation to maintain plans setting out "*appropriate measures so that the exceedance period can be kept as short as possible*" under the second subparagraph of Article 23.[403] Finally, the refusal of discretionary relief was consistent with the principle of national procedural autonomy and the principle of sincere co-operation, considering the impossibility to carry out the obligations imposed by Community law.[404]

9.2. THE JUDGMENT OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

On 19 November 2014, the CJEU rendered its judgment in the *ClientEarth* case. The Court proceeded with the case, without the opinion of Advocate General N. Jääskinen. As in the *Janecek* case, the second chamber of the CJEU dealt with the case. While the composition of the chamber changed entirely from the time of the *Janecek* proceedings, the case was dealt with by the same Judge-Rapporteur: J.-C. Bonichot.

The UK Supreme Court asked the CJEU to expedite the proceedings according to Article 105

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[400] *R (on the application of ClientEarth) v. Secretary of State for the Environment, Food and Rural Affairs*, [2013] UKSC 25, para. 32.
[401] *R (on the application of ClientEarth) v. Secretary of State for the Environment, Food and Rural Affairs*, [2013] UKSC 25, para. 33. The UK is also referring to the failure of EU emission standards for road vehicles to reduce emissions of NO_x under 'real world' driving conditions which has substantially contributed to the UK's and other Member States' failure to meet the emission limit values for NO_2. See also: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions — CARS 2020: Action Plan for a competitive and sustainable automotive industry in Europe', COM(2012) 636 final.
[402] *R (on the application of ClientEarth) v. Secretary of State for the Environment, Food and Rural Affairs*, [2013] UKSC 25, para. 34.
[403] *R (on the application of ClientEarth) v. Secretary of State for the Environment, Food and Rural Affairs*, [2013] UKSC 25, para. 35.
[404] *R (on the application of ClientEarth) v. Secretary of State for the Environment, Food and Rural Affairs*, [2013] UKSC 25, para. 36.

of the Court's Rules of Procedure since the time-limit for compliance with the limit values fixed by Directive 2008/50 for nitrogen dioxide had expired.[405] The CJEU declined that request, however. Firstly, while the normal time-limit for nitrogen dioxide expired on 1 January 2010, it did not appear, given the period which has elapsed since that date, that the request for interpretation of the EU provisions needed to be dealt with quickly.[406] Secondly, if a new time-limit expiring on 1 January 2015 was set for compliance, there was no reason to suppose that the UK authorities would not have fulfilled their obligations on that date or that the CJEU could not rule on the request in good time before that date by following the ordinary procedure.[407]

The CJEU's judgment will be set out in three parts: 1) The obligation to apply for a time extension (**section 9.2.1.**); 2) The obligation to draw up an action plan (**section 9.2.2.**); 3) The remedies available for national actors (**section 9.2.3.**).

9.2.1. THE OBLIGATION TO APPLY FOR A TIME EXTENSION

The CJEU reformulated the first two questions of the UK Supreme Court as asking the following:

> *By its first and second questions, which it is appropriate to consider together, the referring court asks, in essence, (i) whether Article 22 of Directive 2008/50 must be interpreted as meaning that, where conformity with the limit values for nitrogen dioxide laid down in Annex XI to that directive cannot be achieved in a given zone or agglomeration of a Member State by 1 January 2010, the date specified in Annex XI, that State is,* ***in order to be able to postpone that deadline for a maximum of five years****, obliged to make an application for postponement in accordance with Article 22(1) of Directive 2008/50 and (ii) whether, if that is the case, the State may nevertheless be relieved of that obligation in certain circumstances.*[408]

The CJEU firstly clarified the regulatory framework: according to the second subparagraph of Article 13(1) of Directive 2008/50, the Member States were obliged to comply with the limit

[405] Article 105(1) of the Rules of Procedure of the Court of Justice, OJ 2012 L 265/1, provides: "At the request of the referring court or tribunal or, exceptionally, of his own motion, the President of the Court may, where the nature of the case requires that it be dealt with within a short time, after hearing the Judge-Rapporteur and the Advocate General, decide that a reference for a preliminary ruling is to be determined pursuant to an expedited procedure derogating from the provisions of these Rules".
[406] Order in Case C-404/13 *ClientEarth*, ECLI:EU:C:2013:805, para. 15.
[407] Order in Case C-404/13 *ClientEarth*, ECLI:EU:C:2013:805, para. 16.
[408] Judgment in Case C-404/13 *ClientEarth*, ECLI:EU:C:2014:2382, para. 24.

values for nitrogen dioxide by 1 January 2010.[409] However, Article 22(1) provided for the possibility of postponing the deadline by a maximum of five years where conformity with the limit values cannot be achieved by the initial deadline, on the condition that an air quality plan for the zone or agglomeration to which the postponement would apply is established. The air quality action plan must comply with the requirements in Article 23, contain the information in Section B of Annex XV and demonstrate how conformity will be achieved before the new deadline. Under Article 22(4), the air quality plans are subject to approval by the Commission.[410]

According to the CJEU, Article 22(1) constituted an obligation for the Member State concerned, which was non-derogable:[411]

> *[I]n order to be able to postpone by a maximum of five years the deadline specified by the directive […], a Member State is required to make an application for postponement when it is objectively apparent, having regard to existing data, and notwithstanding the implementation by that Member State of appropriate pollution abatement measures, that conformity with those values cannot be achieved in a given zone or agglomeration by the specified deadline.*[412]

Since the wording of the provision did not give clear indications, the CJEU reached that conclusion on the basis of the context of Article 22(1) and the aim pursued by the EU legislature.[413] In line with the European aim of ensuring better air quality, the obligation for an application of postponement required the Member State "*to anticipate that conformity with the limit values will not be achieved by the deadline specified and to formulate an air quality plan giving details of measures that are capable of remedying that pollution by a later deadline*".[414] Moreover, regarding the wording of Article 13(1), the CJEU noted that, as regards sulphur dioxide, PM_{10}, lead and carbon monoxide, Member States are to 'ensure' that the limit values are not exceeded, while, as regards nitrogen dioxide and benzene, the limit values 'may not be exceeded' after the specified deadline, amounting to an obligation to achieve a certain result.[415] Therefore, the Member States are obliged to take all the measures necessary to secure compliance with that requirement and the power to postpone the deadline under Article 22(1) may not allow them to defer, as they wish, implementation of those

[409] Judgment in Case C-404/13 *ClientEarth*, ECLI:EU:C:2014:2382, para. 25.
[410] Judgment in Case C-404/13 *ClientEarth*, ECLI:EU:C:2014:2382, para. 25.
[411] Judgment in Case C-404/13 *ClientEarth*, ECLI:EU:C:2014:2382, para. 34.
[412] Judgment in Case C-404/13 *ClientEarth*, ECLI:EU:C:2014:2382, para. 33.
[413] Judgment in Case C-404/13 *ClientEarth*, ECLI:EU:C:2014:2382, para. 27.
[414] Judgment in Case C-404/13 *ClientEarth*, ECLI:EU:C:2014:2382, para. 29.
[415] Judgment in Case C-404/13 *ClientEarth*, ECLI:EU:C:2014:2382, para. 30.

measures.[416]

9.2.2. THE OBLIGATION TO DRAW UP AN ACTION PLAN

The CJEU clarified that where a Member State breached its obligation to make an application for postponement of the deadline under Article 22(1) of Directive 2008/50, "*the fact that an air quality plan which complies with the second subparagraph of Article 23(1) of the directive has been drawn up does not, in itself, permit the view to be taken that that Member State has nevertheless met its obligations under Article 13 of the directive*".[417]

Under subparagraph 2 of Article 23(1), the Member States have to ensure that air quality plans are established in the event of exceedances of the limit values for which the attainment deadline has already expired – which was the case for nitrogen dioxide.[418] The plan must set out appropriate measures so that the period during which the limit values are exceeded can be kept as short as possible and may also include specific measures aimed at protecting sensitive population groups, including children. The plan has to incorporate, at least, the information listed in Section A of Annex XV to the Directive, and may also include measures pursuant to Article 24 of the Directive and must be communicated to the Commission without delay, and no later than two years after the end of the year in which the first breach of the limit values was observed.[419] As regards nitrogen dioxide, the application of Article 23(1) is not made conditional on the Member State having previously attempted to obtain postponement of the deadline under Article 22(1) of Directive 2008/50.[420]

However, the CJEU clarified that "*an analysis which proposes that a Member State would […] have entirely satisfied its obligations under […] Article 13(1) of Directive 2008/50 merely because such a plan has been established, cannot be accepted*".[421] According to the Court, "*such an analysis would be liable to impair the effectiveness of Articles 13 and 22 of Directive 2008/50 because it would allow a Member State to disregard the deadline imposed by Article 13 under less stringent conditions than those imposed by Article 22*".[422]

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[416] Judgment in Case C-404/13 *ClientEarth*, ECLI:EU:C:2014:2382, para. 31.
[417] Judgment in Case C-404/13 *ClientEarth*, ECLI:EU:C:2014:2382, para. 49.
[418] Judgment in Case C-404/13 *ClientEarth*, ECLI:EU:C:2014:2382, para. 40.
[419] Judgment in Case C-404/13 *ClientEarth*, ECLI:EU:C:2014:2382, para. 41.
[420] Judgment in Case C-404/13 *ClientEarth,* ECLI:EU:C:2014:2382, para. 38.
[421] Judgment in Case C-404/13 *ClientEarth*, ECLI:EU:C:2014:2382, para. 43.
[422] Judgment in Case C-404/13 *ClientEarth*, ECLI:EU:C:2014:2382, para. 44.

Despite imposing different requirements on the action plan,[423] in addition, Articles 22 and 23 of Directive 2008/50 are to apply in different situations and are different in scope:[424]

> *Article 22(1) of the directive applies where conformity with the limit values of certain pollutants 'cannot' be achieved by the deadline initially laid down by Directive 2008/50, account being taken, as is clear from recital 16 in the preamble to the directive, of a particularly high level of pollution. Moreover, that provision allows the deadline to be postponed only where the Member State is able to demonstrate that it will be able to comply with the limit values within a further period of a maximum of five years. Article 22(1) has, therefore, only limited temporal scope.*[425]
>
> *By contrast, Article 23(1) of Directive 2008/50 has a more general scope because it applies, without being limited in time, to breaches of any pollutant limit value established by that directive, after the deadline fixed for its application, whether that deadline is fixed by Directive 2008/50 or by the Commission under Article 22(1) of the directive.*[426]

9.2.3. THE REMEDIES AVAILABLE FOR NATIONAL ACTORS

Firstly, the CJEU ruled out the applicability of Article 30 of Directive 2008/50.[427] Instead, the CJEU relied on Article 4 TEU and its ruling in *Unibet*[428] to find that is for the Member States to ensure judicial protection of an individual's rights under EU law. The Court further referred to Article 19(1) TEU which requires the Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law.[429]

By analogy with *Janecek*,[430] the Court clarified that the second subparagraph of Article 23(1) imposed a clear obligation on the Member State to establish an air quality plan that complies with certain requirements, which is applicable in case the limit values for nitrogen dioxide are exceeded after 1 January 2010 in a Member State that has not applied for a postponement of that deadline under Article 22(1) of Directive 2008/50.[431] In addition, as pointed out in *Janecek*,[432] individuals are entitled, in actions against public bodies, to rely on the provisions

[423] The action plan under Article 22(1) has to comply with the requirements under Article 23(1) plus further information.
[424] Judgment in Case C-404/13 *ClientEarth*, ECLI:EU:C:2014:2382, paras. 45-46.
[425] Judgment in Case C-404/13 *ClientEarth,* ECLI:EU:C:2014:2382, para. 47.
[426] Judgment in Case C-404/13 *ClientEarth*, ECLI:EU:C:2014:2382, para. 48.
[427] Judgment in Case C-404/13 *ClientEarth*, ECLI:EU:C:2014:2382, para. 51.
[428] Judgment in Case C-404/13 *Unibet*, ECLI:EU:C:2007:163, para. 38.
[429] Judgment in Case C-404/13 *ClientEarth*, ECLI:EU:C:2014:2382, para. 52.
[430] Judgment in Case C-237/07 *Janecek*, EU:C:2008:447, para. 35.
[431] Judgment in Case C-404/13 *ClientEarth*, ECLI:EU:C:2014:2382, para. 53.
[432] Judgment in Case C-237/07 *Janecek*, ECLI:EU:C:2008:447, para. 36 and the case-law cited therein.

of a Directive which are unconditional and sufficiently precise. The competent national authorities and courts have to interpret national law in a way that is compatible with the purpose of the Directive. If that is not possible, then the incompatible national rules must be set aside.[433] Finally, the CJEU pointed out that it was incompatible with the binding effect of Directives under Article 288 TFEU to exclude the possibility of persons concerned to rely on the obligation imposed by that directive, particularly if the aim of the Directive is to protect public health.[434]

On that basis, the CJEU concluded that:

> *[The] natural or legal persons directly concerned by the limit values being exceeded after 1 January 2010 must be in a position to require the competent authorities, if necessary by bringing an action before the courts having jurisdiction, to establish an air quality plan which complies with the second subparagraph of Article 23(1) of Directive 2008/50, where a Member State has failed to secure compliance with the requirements of the second subparagraph of Article 13(1) of Directive 2008/50 and has not applied for a postponement of the deadline as provided for by Article 22 of the directive (see, by analogy, judgment in Janecek, EU:C:2008:447, paragraph 39).*[435]
>
> *As regards the content of the plan, it follows from the second subparagraph of Article 23(1) of Directive 2008/50 that, while Member States have a degree of discretion in deciding which measures to adopt, those measures must, in any event, ensure that the period during which the limit values are exceeded is as short as possible.*[436]

9.3. THE FOLLOW-UP RULING OF THE UK SUPREME COURT

In its follow-up ruling of 29 April 2015, the UK Supreme Court ordered the government to submit new air quality plans to the European Commission no later than 31 December 2015. Lord Carnwath rendered the judgment, with which the other members of the Court unanimously agreed.[437] The criticism of the CJEU's judgment is striking:

> *There was no Advocate General's opinion in this case to provide background to the court's characteristically sparse reasoning. However, the European*

[433] Judgment in Case C-404/13 *ClientEarth*, ECLI:EU:C:2014:2382, para. 54.
[434] Judgment in Case C-404/13 *ClientEarth*, ECLI:EU:C:2014:2382, para. 55. Also in that regard, the CJEU relied on its ruling in Case C-237/07 *Janecek*, ECLI:EU:C:2008:447, para. 37.
[435] Judgment in Case C-404/13 *ClientEarth*, ECLI:EU:C:2014:2382, para. 56.
[436] Judgment in Case C-404/13 *ClientEarth*, ECLI:EU:C:2014:2382, para. 57.
[437] *R (on the application of ClientEarth) v Secretary of State for the Environment Food and Rural Affairs* [2015] UKSC 28.

> *Commission had presented detailed Observations, which help to fill the gap. Their submission contains a valuable discussion of the legal and factual background to the relevant provisions of the Directive and their objectives, before giving the Commission's proposed responses to the referred questions. They give a much clearer answer to the first two questions than the court […].*[438]

In particular, the Supreme Court criticized the reformulation of the first two questions by the CJEU. While the UK Supreme Court asked whether the application for postponement of the deadline under Article 22(1) was mandatory, the CJEU dealt with the question of whether "in order to be able to postpone that deadline", the Member State was obliged to make an application for postponement and to establish an air quality plan in accordance with Article 22(1) of Directive 2008/50. According to the UK Supreme Court, the CJEU thereby introduced in its reasoning an ambiguity, which enabled each party to claim success on the issue of whether the Secretary of State had breached Article 22 by not applying to extend the deadline. ClientEarth argued that the procedure was mandatory and that the Secretary of State should be ordered to produce, within three months, a new air quality plan under Article 23(1) demonstrating how the exceedance period will be kept "as short as possible", and complying with the additional and stricter requirements of Annex XV section B. On the other hand, the Secretary of State argued that the Article 22 procedure was not mandatory, and that, given the intention to prepare updated plans by the end of the year, no further relief was required. Lord Carnwath saw force in the Commission's reasoning, which treated Article 22 as an optional derogation, but made it clear that failure to apply for a postponement, far from strengthening the position of the state, rather reinforces its essential obligation to act urgently under Article 23(1) in order to remedy the danger to public health as soon as possible.[439]

However, eventually, the UK Supreme Court considered it unnecessary to make a final ruling on the meaning of the CJEU's judgment on that matter. The proceedings took so much time that the application to extend the deadline under Article 22 lost its practical significance. However, the question remained as to the applicability of the requirements of Annex XV section B, which apply to a plan produced under Article 22, but not to a plan under Article 23. The UK Supreme Court relied in that regard on the observations of the Commission to the CJEU, which explained that the requirements of Article 23(1) are no less onerous than those under Article 22. The court is able, where necessary, to impose requirements which are

[438] *R (on the application of ClientEarth) v Secretary of State for the Environment Food and Rural Affairs* [2015] UKSC 28, para. 10.
[439] *R (on the application of ClientEarth) v Secretary of State for the Environment Food and Rural Affairs* [2015] UKSC 28, paras. 6, 26, 27.

appropriate to secure effective compliance at the earliest possible opportunity. The 'checklist' of measures under paragraph 3 of section B must be considered in order to demonstrate compliance with either Article 22 or 23. However, Lord Carnwath concluded: "I agree with that approach, but do not regard it as necessary to spell it out in an order of the court".[440]

The Supreme Court rejected the Secretary of State's argument that there was no basis for an order quashing the 2011 plans, nor a mandatory order to replace them. The critical breach was of Article 13, not of Articles 22 or 23. The CJEU judgment left no doubt as the seriousness of the breach, which continued for more than five years, nor as to the responsibility on the national court to secure compliance. Further, during those five years the prospects of early compliance became worse. The new projections of 2014 predicted non-compliance in some zones after 2030. The Secretary of State eventually accepted that a new plan had to be prepared. However, the Court held that the new government should be left in no doubt as to the need for immediate action, which is achieved by an order that new plans in compliance with Article 23(1) of the Directive must be delivered to the Commission no later than 31 December 2015.[441]

Eventually, regarding the requirements of the air quality plans, it was pointed out:

> *33. Finally, I should mention a further important issue which we have not been called upon to determine as part of these proceedings, but which may well arise in connection with the new plans. This concerns the interpretation of the words "as short as possible" in article 23(1). The judgments of the European court noted by the Commission (para 17 above),[442] in particular the Italian case (relating to the precursor of article 13 itself) indicate that the scope for arguing "impossibility" on practical or economic grounds is very limited. Miss Smith sought to distinguish the Italian case, on the grounds that it related to article 13, not article 23. Mr Jaffey objects that this argument takes insufficient account of the direct relationship between the two articles, as underlined by both the Commission and the CJEU. If this remains an issue in relation to the new air quality plans, when*

[440] *R (on the application of ClientEarth) v Secretary of State for the Environment Food and Rural Affairs* [2015] UKSC 28, paras. 24-25.
[441] *R (on the application of ClientEarth) v Secretary of State for the Environment Food and Rural Affairs* [2015] UKSC 28, paras. 28-35.
[442] Para. 17 states: "*The Commission also noted ClientEarth's concerns that the plans submitted by the United Kingdom "were simply not ambitious enough" to address the problem in as short a time as possible (para 65). This view seemed to be confirmed by Mitting J's observation in the High Court that a mandatory order would "impose upon taxpayers and individuals a heavy burden of expenditure which would require difficult political choices to be made". The Commission noted the European court's rejection of similar arguments of "impossibility" in a line of cases under the air quality Directives, beginning with (Case C-68/11) Commission v Italy (19 December 2012); and, by analogy, in an earlier series of cases relating to the bathing water Directive, beginning with (Case C-56/90) Commission v United Kingdom [1993] ECR I-4109 […].*"

> *they are published for consultation, it may call for resolution by the court at an early stage to avoid further delay in the completion of compliant plans.*
>
> *34. That is a further factor which makes it desirable that the new plans should be prepared under a timetable approved by the court, with liberty to apply for the determination of such issues as and when they arise in the course of the production of the plan, without the need for the expense and delay of new proceedings.*
>
> *35. For these reasons, I would allow the appeal. In addition to the declaration already made, I would make a mandatory order requiring the Secretary of State to prepare new air quality plans under article 23(1), in accordance with a defined timetable, to end with delivery of the revised plans to the Commission not later than 31 December 2015. There should be provision for liberty to apply to the Administrative Court for variation of the timetable, or for determination of any other legal issues which may arise between the present parties in the course of preparation of the plans. The parties should seek to agree the terms of the order, or submit proposed drafts with supporting submissions within two weeks of the handing-down of this judgment.*[443]

10. CONCLUDING REMARKS

The case study embeds the *Janecek* case in the historical development of the European and German approach to environmental policy and the regulation of air quality. Germany traditionally addressed air pollution by regulating the sources of pollution, particularly industrial facilities. While Germany has taken the lead in shaping the source-approach to pollution also at EU-level, the implementation of the European air-quality approach has been problematic from the beginning. Its implementation lead to a paradigmatic change in German environmental law from regulating the sources of pollution to the setting of air quality limit values. This change goes hand in hand with a change of the regulatory technique – namely from command and control regulation to the management of air quality.

The *Janecek* case illustrated how the change in approach and regulatory technique affects also the traditional conceptions of legal protection. Legal protection under the German Administrative Process has been built on the longstanding tradition to restrict judicial review to the defence of individual rights and its underlying conception that the public interest subject to political decision-making has to be protected by the state and its administration. Legal protection under the German Administrative Process has been to some extent aligned to Germany's source approach to address environmental pollution, since the German courts

[443] *R (on the application of ClientEarth) v Secretary of State for the Environment Food and Rural Affairs* [2015] UKSC 28.

began to admit neighbourhood actions in the context of industrial emissions. During the 1970s, environmental organisations have developed various strategies to use that more favourable case-law by searching qualified individual applicants or by buying small patches of land near construction sites and in ecologically vulnerable areas.

The same happened 30 years later in the *Janecek* case, however, reinforced by EU law and the case law of the CJEU – the respective environmental organisation and its lawyer were searching for individuals, one of them was Mr Janecek, living as closely as possible to an air quality measuring station in order to claim that they were directly affected by the exceeding limit values. However, the German administrative courts were nevertheless struggling with Mr Janecek's claim. Air quality plans are drawn up by the administration in the public interest and not to protect the subjective rights of third parties. However, the preliminary ruling of the CJEU – anticipated by the applicants from the very start – readily confirmed Mr Janecek's action for an action plan on the basis of the doctrine of direct effect and in order to ensure the *effet utile* of the European Air Quality Framework Directive. The German courts *formally* incorporated the CJEU's judgment without further difficulties.

In view of the German environmental organisation's ambition to initiate legal actions against any German city exceeding the limit values set by the EU, we might presuppose that Germany now largely complies with the European air quality limit values in urban areas. However, that is not the case – as it appears from the CJEU's judgment, air quality plans do not have to anticipate strict compliance with the limit values. In addition, the national courts are wary of engaging into a too extensive substantive judicial review of the action plan as they do not want to step into the shoes of the administration in view of the highly technical as well as politically-sensitive matter of choosing the appropriate measures. The remedy remains mainly of a procedural nature if the national courts are unwilling to engage into a substantive review of the action plan.

CHAPTER 3: THE *FERYN* CASE STUDY

1. INTRODUCTION

The genesis of the *Feryn* case began with an article published on 28 April 2005 in a Belgian newspaper, reporting about the medium-sized company Feryn NV, that specializes in the sale and installation of up-and-over and sectional doors, which faced problems in finding the necessary workforce to install its doors in its customer's homes. The newspaper article reported that, according to Feryn's director, the reason for this difficulty was due to the fact that the company's customers would refuse Moroccans entering their private homes. After lengthy legal proceedings, which involved a preliminary reference to the CJEU, in August 2009, the Belgian Higher Labour Court imposed a prohibitive injunction against Feryn's discriminatory employment practice and ordered the company to publish its full judgment on the front page of four Belgian newspapers.

The fact patterns of the *Feryn* case are astonishing, but also obscure – what has been said or what has not been said and done by Feryn's director was built up by the Belgian media for four years, with various clarifications, and was fuelled by various public statements from politicians, trade unions and ethnic and cultural minority organizations. The *Feryn* case indeed caused broad societal turmoil as it raised not only legal questions, but challenged political and moral views. From a legal perspective, the crux of the matter was that there was never any person identified, whose job application was refused by Feryn NV on the basis of his or her racial or ethnic origin. The applicant in the *Feryn* case was instead the Belgian Centre for equal opportunities and combating racism (hereafter the 'Centre'), which is responsible for the promotion of equal opportunities and combating all forms of discrimination on the grounds of race, descent, origin and nationality in Belgium. The public attention, which Feryn's statements caused, and the need to strengthen its role in the fight against racial discrimination in Belgian society was the driving force behind the Centre's actions in initiating this case.

Contrary to the situation in many other EU Member States, the Belgian Centre was not established as a result of the implementation of Article 13 of the European Race Equality

Directive 2000/43/EC,[444] but instead can claim to have a longer history dating back to the establishment of the Belgian Royal Commissariat for Migrant Policy in 1989. On a proposal from the Royal Commissariat in 1993, the Centre was established as its permanent follow-up institution vested with enforcement powers under the Belgian Federal Act of 30 July 1981 criminalizing certain acts inspired by racism or xenophobia (hereafter 'Anti-Racism Act'). Accordingly, in order for the Centre to take action, the approval of the victims of the alleged discriminatory act was only required if the discrimination was perpetrated against individually identified natural persons.

With the implementation of the Race Equality Directive 2000/43/EC into Belgian law, civil law provisions protecting against race discrimination were introduced and the enforcement powers of the Centre were transferred. Here, the frictions between the Belgian enforcement model and the European Race Equality Directive 2000/43/EC appear, whose enforcement provisions rely on complaints by "persons who consider themselves wronged by failure to apply the principle of equal treatment to them".[445] With the preliminary reference of the Belgian Higher Labour Court in the *Feryn* case, the CJEU, in interpreting the EU concept of direct discrimination, was faced with the delicate issue of how to reconcile, on the one hand, the broad aim of the EU to foster conditions for a socially inclusive labour market by combatting racial discrimination,[446] and, on the other hand, the restrictive enforcement provisions of the Race Equality Directive 2000/43/EC.

The case study on the *Feryn* case will proceed in the following way. Firstly, the historical development of the European policy on race equality and of the Race Equality Directive 200/43/EC will be set out. In this context, the legal structure with which the Directive aims to achieve equal treatment between persons irrespective of racial or ethnic origin will be examined and the significance of the *Feryn* case for its development will be determined (**section 2**). Following this, the Belgian approach to racial discrimination will be described starting with the enactment of its criminal legislation in 1981 up until the implementation of the Race Equality Directive in 2003, focusing particularly on the development of the role and

[444] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.07.2000, p. 22. Article 13(1) of the Directive provides the following: "1. Member States shall designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals' rights".
[445] Article 7(1) of the Race Equality Directive 2000/43/EC.
[446] Recitals 8 and 12 of the Preamble to the Race Equality Directive 2000/43/EC.

powers of the Centre (**section 3**). Then, the conflict between the parties will be reconstructed within its national context on the basis of the interviews with the parties involved in the litigation (**section 4**). Next, the rulings of the Belgian courts and their reasons for a preliminary reference to the CJEU will be set out and contextualized on the basis of the interviews conducted with the Belgian judges and the parties to the case (**section 5**). Thereafter, the proceedings before the European Court of Justice will be reconstructed by looking at the submissions of the parties involved in the European proceedings, particularly of the European Commission, the opinion of the Advocate General and the judgment of the Court, and these will be place in a broader context with reference to the interviews conducted with some of the participating European actors (**section 6**). Finally, the follow-up at the national level will be examined by looking at the follow-up judgment of the Belgian Higher Labour Court and the final perceptions of the parties as to the development and outcome of the *Feryn* case (**section 7**). The case study will conclude with some remarks about some striking issues raised by the reconstruction of the *Feryn* case (**section 8**). However, the horizontal analysis according to the four levels of hybridity will be left to the final Chapter (**Chapter 5**) of this thesis.

2. EUROPEAN ANTI-DISCRIMINATION LAW AND RACE EQUALITY POLICY

After the adoption of anti-discrimination legislation based on Article 19 TFEU (ex Article 13 TEC),[447] EU anti-discrimination law has been acknowledged as a field in its own right.[448] However, EU anti-discrimination law is fragmented in its approach to the different 'grounds' of discrimination. Its legal provisions are scattered in different Directives.[449] While we find

[447] Article 19(1) TFEU provides: "1. Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation".

[448] Dagmar Schiek, "From European Union Non-Discrimination Law towards Multidimensional Equality Law for Europe," in *European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law*, ed. Dagmar Schiek and Victoria Chege (London; New York: Routledge-Cavendish, 2009), 3; Bell, *Anti-Discrimination Law and the European Union*.

[449] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.07.2000, p. 22; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, p. 16; Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373, 21.12.2004, p. 37; Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26.7.2006, p. 23; Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC, OJ L 180, 15.7.2010, p.

overlaps in the concepts used in the various Directives, it is argued that they do not provide for a uniform standard of protection. Indeed, this fragmented approach has led legal scholars to speak of an 'equality hierarchy' created by the European Union with race equality enjoying a 'privileged' position.[450] The different degree of protection accorded to the discrimination grounds can be explained by reference to the diverse contexts in which they have developed. However, although the European approach to each discrimination ground has developed in its unique historical, social and political context; cross-fertilization between the discrimination grounds can nevertheless be observed.

In view of the legal base of the *Feryn* case, that is the Race Equality Directive, this section will provide an overview of the historical development of the European race equality policy (**section 2.1.**). Following this, the Race Equality Directive will be introduced by examining its legal provisions in more detail (**section 2.2.**). Finally, on that basis, the significance of the questions raised in the *Feryn* case, the first case in which the CJEU was asked to interpret the Race Equality Directive, will be revealed (**section 2.3.**).

2.1. THE DEVELOPMENT OF A EUROPEAN RACE EQUALITY POLICY

The development of an EU policy against racism was originally tied to the legal situation of third country nationals. As third country nationals were excluded from the scope of free movement rights, there was no market integration justification for the Community to become involved in matters relating to third country nationals, including racial discrimination. That not only explains the Council's resistance to the early attempts of the Commission to carve out a role for the Community in immigration policy, but also to the initial efforts to tackle racism and racial discrimination at the Community level.[451]

The debate surrounding an EU policy on racism began in the mid-1980s in the European Parliament. As response to the progress made by the parties of the extreme right in the 1984 European parliamentary elections,[452] the European Parliament created a Parliamentary

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1. See also Schiek, "From European Union Non-Discrimination Law towards Multidimensional Equality Law for Europe," 6.

[450] Lisa Waddington and Mark Bell, "More Equal than Others: Distinguishing European Union Equality Directives," *Common Market Law Review* 38 (2011): 587–611.

[451] Bell, *Anti-Discrimination Law and the European Union*, 55–58.

[452] 16 members of radical right political parties were elected to the European Parliament. The Front National sent ten members, including Jean-Marie Le Pen; five belonged to Italy's neo-fascist Movimento Sociale Italiano, and one to Greece's Ethniki Politiki Enossis. As a result, the radical right was able to establish the

Enquiry Committee into the rise of fascism and racism in Europe, which was requested "to report urgently on the growth and size of fascist, racialist and related groups within Europe, both inside and outside the Community".[453] In 1985, the Committee presented the *Evrigenis* report, which reported serious problems of racism and xenophobia in the Member States and recommended action by the Community to supplement national measures. In that regard, the report suggested that "effort must be made to define more broadly Community powers and responsibilities in the area of race relations by applying a teleological interpretation of the Treaties, on the basis, inter alia, of seeking the useful effect of the relevant provisions and of the European Community's implicit powers; by recourse to the procedure under Article 235 of the EEC Treaty [now Article 352 TFEU]; and, if necessary, by revision of the Treaties".[454]

As a consequence of the results presented in the *Evrigenis* report, in 1986 the Commission, Council and the European Parliament adopted a joint declaration against racism and xenophobia which, *inter alia*, condemned "all forms of intolerance, hostility and use of force against persons or groups of persons on the grounds of racial, religious, cultural, social or national differences" and stressed "the importance of adequate and objective information and of making all citizens aware of the dangers of racism and xenophobia, and the need to ensure that acts or forms of discrimination are prevented or curbed".[455] However, while it constituted "the first high-level acknowledgment that racism was a matter of EC concern", it remained of symbolic importance. The Council resisted taking concrete actions by relying on the lack of the Community's legal competence on racism.[456]

From the mid-1980s and throughout the 1990s, the European Parliament continued to

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Group of the European Right in the European Parliament. See on this Terri E. Givens and Rhonda Evans Case, *Legislating Equality: The Politics of Antidiscrimination Policy in Europe* (Oxford: Oxford University Press, 2014), 51.

[453] European Parliament, Committee of Inquiry into the Rise of Fascism and Racism in Europe, report of the findings of the inquiry, December 1985, p. 11.The Group of the European Right challenged, before the CJEU, the decision of the European Parliament to set up a committee of inquiry into the rise of fascism and racism in Europe on the grounds that, inter alia, the subject matter of inquiry did not fall within the scope of acitivites of the EC and the aim of the committee of inquiry is discriminatory in relation to a minority group of the European Parliament. In the order of 4.6.1986 in Case 78/85 *Groupe de droites européennes*, ECLI:EU:C:1986:227 the CJEU dismissed the application as inadmissible. See also, Iyiola Solanke, *Making Anti-Racial Discrimination Law. A Comparative History of Social Action and Anti-Racism Law* (London, New York: Routledge, 2009), 71.

[454] European Parliament, Committee of Inquiry into the Rise of Fascism and Racism in Europe, report of the findings of the inquiry, December 1985, p. 105. See also Bell, *Anti-Discrimination Law and the European Union*, 61; Givens and Case, *Legislating Equality*, 54.

[455] Joint Declaration by the European Parliament, the Council and the Commission against racism and xenophobia, 11 June 1986, OJ C 158, 25.6.1986, p. 1.

[456] Bell, *Anti-Discrimination Law and the European Union*, 61, 63.

campaign in favour of legislative action at the European level.[457] *Bell* reports how the controversy between the Council and the European Parliament was revealed by the adoption of the Community Charter of Fundamental Social Rights. The Parliament threatened to reject the Charter because of, amongst other things, its weakness with regard to racism. A compromise was reached by setting out in the preamble, on the one hand, the importance of combatting every form of discrimination including, *inter alia*, racism, and, on the other hand, a statement reaffirming that the treatment of third country nationals was a matter reserved for the Member States.[458] This occurrence was subsequently reflected in the Commission's reluctance to submit any legislative proposals on racism.[459]

Instead, in 1988, the Commission submitted a proposal to the Council for a resolution on racism and xenophobia which urged the Member States to adopt anti-racism legislation and enhance the effectiveness of existing legislation by revising definitions of discrimination and improving access to justice.[460] Moreover, the Commission advocated "the introduction of a preventive education and information policy to promote intercultural understanding and a clear and objective appreciation of the situation of migrant workers" by adopting measures at the national and Community level.[461] It took the Council two years to reach agreement on a considerably watered down version of the Commission's proposal.[462] While the Council recognized that racism and xenophobia should be countered, there was a significant divergence of opinion on the appropriate contribution that the Community should make. In

[457] For a detailed account of all the resolutions on the fight against racism and xenophobia adopted by the European Parliament, see Erica Howard, *The EU Race Directive: Developing the Protection against Racial Discrimination within the EU* (New York; London: Routledge, 2010), 7 ff.
[458] European Commission, Charter of the Fundamental Social Rights of Workers (Luxembourg: Office of Official Publications of the European Communities, 1990).
[459] Bell, *Anti-Discrimination Law and the European Union*, 61–62.
[460] Proposal for a Council resolution on the fight against racism and xenophobia, COM (88) 318 final, OJ C 214, 16.8.1988, p. 32, at pp. 35, 36. In particular, it proposed the Council to recognize the following measures: "— ratification, by those States which have not yet done so, of international instruments contributing directly or indirectly to the fight against all forms of racial discrimination,— recognition, by those Member States which have not yet done so, of the individual applications referred to in Article 25 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 14 of the International Convention on the elimination of all forms of racial discrimination; ratification of the optional protocol relating to the International Covenant on civil and political rights,— the preparation, by States which have not yet done so, and rigorous application of laws aimed at preventing or punishing discrimination or xenophobic acts,— the setting-up of bodies responsible for coordinating at national, regional or local level efforts to harmonize relations between the different communities, protect victims and prevent instances of racial discrimination,— the establishment of conciliation procedures before specialist bodies for the settlement of racial or xenophobic conflicts,— the granting to the bodies concerned of the right to bring civil proceedings,— the development, in conjunction with migrants' associations, of free legal aid to enable migrants to defend their rights".
[461] Proposal for a Council resolution on the fight against racism and xenophobia, COM (88) 318 final, OJ C 214, 16.8.1988, p. 32, at p. 36.
[462] Council resolution on the fight against racism and xenophobia, OJ C 157, 27.6.1990, p. 1.

particular, the Council deleted the final recital in the preamble to the Commission's proposal, which proved controversial regarding the Community's competence towards third country nationals.[463]

The European Parliament re-assessed the issue with a second Parliamentary Enquiry Committee in 1990, which published the *Ford* report.[464] The Ford report confirmed the need for action, in light of evidence of rising racism and electoral advances for the extreme right-wing. In particular, it contained, *inter alia*, a recommendation for a Community framework of legislation against any discrimination connected with belonging or not belonging to an ethnic group, nation, region, race or religion, covering all Community residents.[465] Ultimately, the *Ford* report was similarly unsuccessful in persuading the Council to take further action.[466] Instead, the Council remained unwilling to move beyond symbolic declarations on the seriousness of the issue,[467] although some more detailed recommendations to the Member States were issued on a number of occasions.[468]

Alongside the efforts of the European Parliament, the literature consistently recognizes the contribution of an effective NGO lobby against racism to the development of a European policy on race equality. Since the 1980s, various NGOs had been lobbying on behalf of migrants and racial and ethnic minorities, spurred by the fear of the construction of a "Fortress Europe", i.e., a bulwark of European policies to the detriment of immigrants and

[463] The proposal stated at p. 35: "Whereas any measure taken in this connection must protect all persons on Community territory, whether they are nationals of Member States or of non-member countries, foreigners in a Member State or nationals who are perceived or who perceive themselves as belonging to a foreign minority". See on this Bell, *Anti-Discrimination Law and the European Union*, 62.
[464] European Parliament, Report of the Committee of Inquiry into Racism and Xenophobia, Luxembourg, 1991.
[465] Recommendation 31, Report of the Committee of Inquiry into Racism and Xenophobia, Luxembourg, 1991, p. 158-159.
[466] Bell, *Anti-Discrimination Law and the European Union*, 62.
[467] The European Council has regularly referred to racism in the conclusions issued after the meetings of the Heads of States and Government of the Member States (Maastricht Summit 1991, Edinburgh Summit 1992 and Copenhagen Summit 1993).
[468] For instance, in 1995, the Council agreed two resolutions on the fight against racism, one regarding discrimination in employment (Resolution on the fight against racism and xenophobia in the fields of employment and social affairs, OJ 1995 C 296, p.13), and the other relating to the contribution which can be made through educational policies (Resolution on the response of Educational Systems to the problems of Racism and Xenophobia, OJ 1995 C 312, p.1). In 1997, a further declaration on the fight against racism in the educational field was agreed (Declaration by the Council and the Representatives of the Governments of the Member States, meeting within the Council of 24 November on the fight against racism, xenophobia, and anti-semitism in the youth field, OJ C 368, 5.12.1997, p. 1.

asylum seekers.[469] This fear was aggrieved by the concern that the project of the completion of the internal market by 1992 might lead to further exclusion and disempowerment of non-EU nationals. It was considered that "the restrictive trend of EU immigration policies acted as a catalyst for EU policy on combating racism" and "galvanised national and European civil society into transnational action for anti-racism measures at the EU level, so as to ameliorate the effects of immigration policies".[470] Indeed, the "failure to establish a pan-European front by NGOs on the question of migration of non-EU nationals led some of the proponents of the failed scheme to create, as a substitute, a more politically manageable pan-European effort on the part of race".[471]

Crucially, in 1991, based on an initiative from the UK Commission for Racial Equality, the Dutch National Bureau against Racism and the Brussels-based Churches Committee on Migrants in Europe, the 'Starting Line Group' was created. They were subsequently joined by further bodies, like the Belgian Centre for Equal Opportunities and against Racism. The purpose of the Starting Line Group was to lobby, both at the European and the national level, for the creation of an EC anti-racial discrimination Directive. To that end, the Starting Line Group convened a number of legal experts from across the Member States and in 1993 produced a draft Directive, which proposed the prohibition of discrimination based on race, colour, descent, nationality, or national or ethnic origin across a wide range of fields. The proposal for a Directive received the endorsement of more than 250 NGOs and the explicit approval of the European Parliament.[472] The proposal grounded action on the Community's own acknowledged respect for human rights and the general principles of law as well as the proper functioning of the internal market. The group argued that the legal basis for such a measure was contained in Article 235 EC (now Article 352 TFEU).[473] However, in view of the Community's continuing resistance, the Starting Line Group followed up rapidly in 1994 by the submission of the "Starting Point", a proposal for an amendment of the Treaty to

[469] Bell, *Anti-Discrimination Law and the European Union*, 68; Givens and Case, *Legislating Equality*, 57; Ann Dummett, "Racial Equality and 1992," *Feminist Review*, no. 39 (1991): 85–90. For the notion of "Fortress Europe", see also Bob Hepple, "Race and Law in Fortress Europe," *Modern Law Review* 67, no. 1 (2004): 1–15.
[470] Bell, *Anti-Discrimination Law and the European Union*, 67.
[471] Damian Chalmers, "The Mistakes of the Good European?," in *Discrimination and Human Rights: The Case of Racism*, ed. Sandra Fredman (Oxford: Oxford University Press, 2001), 207.
[472] European Parliament, Resolution on racism and xenophobia, C 342, 20.12.1993, p. 19; Resolution C 323, 20.11.1994, p. 154.
[473] "The Starting Line: A Proposal for a Draft Council Directive Concerning the Elimination of Racial Discrimination," *Journal of Ethnic and Migration Studies* 20, no. 3 (1994): 530–38.

provide the EU with competence to enact the Starting Line Directive.[474]

A discernible shift in the Council's approach became noticeable from the 1994 decision at the Corfu European Council to establish a Consultative Commission on Racism and Xenophobia "to formulate recommendations, geared to national and local circumstances, on cooperation between governments and the various social players to promote tolerance, understanding and harmony in relations with foreigners" and "to develop a global strategy at the Union level aimed at combating acts of racist and xenophobic violence".[475] This initiative was rooted in a proposal from the German and French governments, which at that time were both facing serious domestic electoral pressure from the extreme right. The so-called *Kahn* Commission consisted of a representative from each of the Member States, two members of the European Parliament, a representative from the Commission and an observer from the Council of Europe. The 1995 report of the *Kahn* Commission recommended "the amendment of the Treaty to provide explicitly for Community competence must be regarded as an essential element in any serious European strategy aimed at combating racism and xenophobia".[476] Moreover, the *Kahn* Commission recommended the need to adopt binding legislation combatting racial discrimination at EU level: "The Community has already shown how effective it can be in combating discrimination on the basis of sex; it is appropriate that it should given a similar mandate, and that it should adopt similar measures, to combating discrimination on the grounds of race, religion or ethnic or national origins".[477]

These developments coincided with a change in the Commission's attitude. In 1994, in its White Paper on Social Policy, the Commission announced its intention to "press for specific powers to combat racial discrimination to be included in the Treaty".[478] It stated particularly:

> *A number of contributions to the Green Paper - including the European Parliament, the Economic and Social Committee and the ETUC - called on the Commission to take further concrete action to combat discrimination on the grounds of race, religion, age and disability. While the Treaties as they stand do not provide any specific competence for legislation in this area, this is an omission*

[474] Starting Line Group, The Starting Point: A Proposal for Amendment to the European Community Treaty, (1994).
[475] Bulletin of the European Union (6-1994) point I.29.
[476] European Council Consultative Commission on Racism and Xenophobia (1995) "Final report" ref. 6906/1/95 Rev 1 Limite Raxen 24 (Brussels: General Secretariat of the Council of the European Union), p. 57.
[477] European Council Consultative Commission on Racism and Xenophobia (1995) "Final report" ref. 6906/1/95 Rev 1 Limite Raxen 24 (Brussels: General Secretariat of the Council of the European Union), p. 59.
[478] European Commission, European Social Policy - A Way Forward for the Union. A White Paper. Part A. COM (94) 333 final, 27 July 1994, p. 30.

> *that is becoming increasingly difficult to justify in today's Europe. The Union must act to provide a guarantee for all people against the fear of discrimination if it is to make a reality of free movement within the single market.*[479]

As response to the release of the *Kahn* report, in 1995 the European Commission published a Communication on racism, xenophobia and anti-Semitism and proposal for a Council Decision designating 1997 as the European Year against racism.[480] The Commission stated:

> *The need to build the foundations of a wider and deeper community between peoples who had too often opposed each other in violent conflict was central to the ideals that inspired the founders of the Community. The defence of human rights and fundamental freedoms, core values of the European integration project, cannot be separated from the rejection of racism. Indeed, the struggle against racism is a constituent element of the European identity.*[481]

The Commission further stressed its belief that the Treaties should be amended at the 1996 intergovernmental conference (IGC) to provide competence for the Community in this ambit. Furthermore, it indicated that this amendment should be adopted with a view to the subsequent enactment of EC legislation on racial discrimination.[482] In 1996, as advocated in previous years by the European Parliament and as recommended by the *Kahn* Commission, the European Commission proposed the creation of a European Monitoring Centre on Racism.[483] The proposals for designating 1997 as European Year against racism and for establishing a European Monitoring Centre on Racism were subsequently approved by the Council of Ministers.[484] The Monitoring Centre was established with the objective of supplying the "the Community and its Member States […] with objective, reliable and comparable data at European level on the phenomena of racism, xenophobia and anti-Semitism in order to help them when they take measures or formulate courses of action within their respective spheres of competence".[485]

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[479] European Commission, European Social Policy - A Way Forward for the Union. A White Paper. Part A. COM (94) 333 final, 27 July 1994, p. 39, 40.
[480] European Commission, Communication from the Commission on racism, xenophobia and anti-semitism and proposal for a Council Decision designating 1997 as European Year against racism, COM (95) 653, 13.12.1995.
[481] European Commission, Communication from the Commission on racism, xenophobia and anti-semitism and proposal for a Council Decision designating 1997 as European Year against racism, COM (95) 653, 13.12.1995, p. 4.
[482] European Commission, Communication from the Commission on racism, xenophobia and anti-semitism and proposal for a Council Decision designating 1997 as European Year against racism, COM (95) 653, 13.12.1995, p. 19.
[483] Proposal for a Council Regulation (EC) establishing a European Monitoring Centre for Racism and Xenophobia, COM/96/0615 final.
[484] Resolution of the Council and the representatives of the government of the Member States meeting within the Council concerning the European Year against racism (1997) OJ 1996, C 237/1, 23.7.1996; Regulation 1035/97 establishing a European Monitoring Centre for Racism and Xenophobia, OJ 1997 L 151, 10.6.1997.
[485] European Commission, European Social Policy - A Way Forward for the Union. A White Paper. Part A. COM (94) 333 final, 27 July 1994, p. 39, 40.

In 1995, the Council's intergovernmental conference reflection group noted the majority support for the inclusion of a general prohibition on discrimination in the EC Treaty, including discrimination based on race or religion. The Irish government, which held the Council Presidency in the second half of 1996, prepared an outline for a draft revision of the Treaties as the basis for negotiations at the Dublin Summit of December 1996. The main opponent against a general prohibition on discrimination was the UK, which argued that those matters would be best dealt with through national legislation. This obstacle was removed with the election of a Labour Government in the UK in 1997, shortly before the conclusion of the Amsterdam Treaty.[486] The Amsterdam Treaty introduced two specific provisions to combat racism:

> *Article 13 EC [now Article 19 TFEU]*
>
> *Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.*
>
> *Article 29 TEU [replaced by Article 67(2) TFEU]*
>
> *Without prejudice to the powers of the European Community, the Union's objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia.*

The latter provision was mainly an affirmation, as the Justice and Home Affairs Council already adopted measures on racism without this amendment. In particular, in July 1996, the Council already adopted Joint Action 69/443/JHA concerning action to combat racism and xenophobia,[487] providing for co-operation in criminal matters, aiming to ensure effective judicial cooperation to avoid the scenario whereby people who perpetrated racist or xenophobic offences can escape prosecution by travelling from one Member State to another.

The introduction of Article 13 TEC has been recognized as a monumentally important step in the fight against discrimination and has been subject to lively academic debate. Despite discussions on the meaning of "without prejudice to the other provisions of the Treaty" and

[486] Bell, *Anti-Discrimination Law and the European Union*, 71, 72.
[487] OJ 1996, L 185/5, see Annex 4.

"within the limits of the power conferred by it upon the Community",[488] disappointment was expressed regarding a number of aspects of the new article, which can be summarized as the following. Firstly, Article 13 required unanimity in the Council for the adoption of legislation and no obligation to take action was enshrined. Secondly, although the main proponent of EU measures on racial discrimination, the European Parliament was accorded only a marginal role in the decision-making process, with only the right to consultation. Thirdly, contrary to the wish of the European Parliament, the provision lacked direct effect. Fourthly, the article contained a closed list of grounds rather than an open-ended, non-exhaustive list.[489]

2.2. THE RACE EQUALITY DIRECTIVE 2000/43/EC

As the description of the development of a European policy on race equality reveals, we can discern a notable shift in the discourse at EU level from 'fascism, racism and anti-Semitism', focusing primarily on hate speech and hate crimes, to 'racial discrimination' as advocated by the European Parliament, the Starting-Line Group and latterly the European Commission. The *Kahn* Commission ultimately paved the way for the introduction of Article 13 TEC. After the Treaty of Amsterdam entered into force on 1 May 1999, in November of the same year the European Commission published a Communication introducing three proposals based on Article 13 TEC. It proposed a Directive to combat discrimination in the labour market on all grounds referred to in Article 1, except sex, which had already been covered in other EC legislation, a further Directive to combat discrimination on grounds of racial and ethnic origin which went beyond the labour market and an action programme to combat discrimination for the years 2001-2006, which was designed to complement and support the two legislative proposals.[490] In its explanatory memorandum to the proposed Race Equality Directive, the European Commission stated:

> *It is widely acknowledged that legal measures are of paramount importance for combating racism and intolerance. The law not only protects victims and gives them a remedy, but also demonstrates society's firm opposition to racism and the genuine commitment of the authorities to curb discrimination. The enforcement of anti-racist laws can have a significant effect on the shaping of attitudes.*[491]

[488] Bell, *Anti-Discrimination Law and the European Union*, 128–34 with further references.
[489] Howard, *The EU Race Directive*, 17, 18 with further references.
[490] Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on certain Community measures to combat discrimination (COM/99/564 final).
[491] Commission's proposal, COM(1999) 566 final, p. 2.

> *The adoption of a Directive at Community level will constitute an unequivocal statement of public policy towards discrimination. It will lay down common protections against racial discrimination to be enjoyed by citizens all over the Union, reinforcing and supplementing the protections which currently exist in the Member States, either by widening the material scope of such protections or by providing or strengthening access to redress. In doing so, it will reinforce the fundamental values on which the Union is founded – liberty, democracy, the respect for human rights and fundamental freedoms and the rule of law – and contribute to the development of the Union as an area of freedom, security and justice. And it will help to strengthen economic and social cohesion by ensuring that people in all Member States enjoy a basic level of protection against discrimination, with comparable rights to redress, while taking account of the cultural diversity of Member States.*[492]

After the opinions of the Committee of the Regions, the Economic and Social Committee and the European Parliament on the proposed Race Equality Directive, the Commission published an amended proposal on 31 May 2000,[493] which was adopted by the Council on 29 June 2000. The speedy adoption of a Directive on race discrimination might be regarded a surprise considering the initial resistance of the Council to broaden the EU's competences in this field. The literature identifies several factors, which contributed, at that time, to the strong political will in favour of the adoption of the Race Equality Directive.

Firstly, it was considered that the Member States adopted the Race Equality Directive in reaction to the success of Jörg Haider's far right Freedom Party in Austria's 1999 parliamentary election and its entry into a coalition government in February 2000. Secondly, a shift in the political make-up of the Council, with elections in the UK, Germany, and France leading to centre-left governments. Thirdly, the Austrian elections reinforced the coordination of lobbying activities at the national level by the Starting Line Group. Fourthly, in view of the future enlargement of the EU, the Member States perceived that some of the states in central and eastern Europe aspiring to enter the EU posed problems in relation to racial and ethnic discrimination, especially as far as Roma were concerned. Therefore, the Commission and the Member States considered it vital to ensure that the EU acquis contained racial and ethnic anti-discrimination legislation. This factor is reflected also in the Commission's explanations:

[492] Commission's proposal, COM(1999) 566 final, p. 4.
[493] Amended proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin - (presented by the Commission pursuant to Article 250(2) of the EC Treaty) (COM/2000/0328 final).

> *Finally, the directive will provide a solid basis for the enlargement of the European Union, which must be founded on the full and effective respect of human rights. The process of enlargement will bring into the EU new and different cultures and ethnic minorities. To avoid social strains in both existing and new Member States and to create a common Community of respect and tolerance for racial and ethnic diversity, it is essential to put in place a common European framework for the fight against racism.*[494]

Another factor that might have played a role in the speedy adoption, was the 2000 UN World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance. The preparations for the conference were underway when the Directive was negotiated.[495]

The Race Equality Directive is considered to mark a dramatic step forward within the EU anti-discrimination field as it established a relatively high benchmark for national legislation and, in view of its provisions to facilitate enforcement, genuinely addresses the need to turn law into action. The Directive draws on the experience gained in fighting discrimination on grounds of sex embodied in the Equal Treatment Directive 76/207/EEC[496] and the Burden of Proof Directive 97/80/EC[497] to build a more advanced model of EU anti-discrimination law.[498]

2.2.1. THE PURPOSE OF THE DIRECTIVE

Article 1 of the Race Equality Directive states, in general terms, that the purpose of the Directive is "to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment". The historical development of European anti-discrimination law reveals that the field is torn between, on the one hand, the EU's original aim of market integration and, on the other hand, a more socially inclined rationale.[499] While it can be questioned to what extent the field is able to liberate itself from its internal market rationale, the Recitals of the Preamble to the Race Equality Directive appear to speak another language. Notably, the

[494] Commission's proposal, COM(1999) 566 final, p. 4.
[495] Howard, *The EU Race Directive*, 22, 23; Solanke, *Making Anti-Racial Discrimination Law. A Comparative History of Social Action and Anti-Racism Law*, 181–83.
[496] Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L 39, 14.2.1976, p. 40.
[497] Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, OJ L 14, 20.1.1998, p. 6.
[498] Bell, *Anti-Discrimination Law and the European Union*, 79.
[499] Ibid., 6 ff.

Recitals primarily relate the protection against discrimination to the protection of human rights and fundamental freedoms as set out in various international instruments:

> *(2) In accordance with Article 6 of the Treaty on European Union, the European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States, and should respect fundamental rights as guaranteed by the European Convention for the protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, as general principles of Community Law.*
>
> *(3) The right to equality before the law and protection against discrimination for all persons constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of all forms of Discrimination Against Women, the International Convention on the Elimination of all forms of Racial Discrimination and the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories.*
>
> *(4) It is important to respect such fundamental rights and freedoms, including the right to freedom of association. It is also important, in the context of the access to and provision of goods and services, to respect the protection of private and family life and transactions carried out in this context.*

In addition, the Recitals point towards, on the one hand, the EU's aim "to foster conditions for a socially inclusive labour market by formulating a coherent set of policies aimed at combating discrimination against groups such as ethnic minorities",[500] but also to the broader goal to develop "democratic and tolerant societies".[501]

> *(9) Discrimination based on racial or ethnic origin may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and of social protection, the raising of the standard of living and quality of life, economic and social cohesion and solidarity. It may also undermine the objective of developing the European Union as an area of freedom, security and justice.*
>
> *(12) To ensure the development of democratic and tolerant societies which allow the participation of all persons irrespective of racial or ethnic origin, specific action in the field of discrimination based on racial or ethnic origin should go beyond access to employed and self-employed activities and cover areas such as education, social protection including social security and healthcare, social advantages and access to and supply of goods and services.*

[500] Recital 8 of the Preamble to the Race Equality Directive, with reference to the Employment Guidelines 2000 agreed by the European Council in Helsinki, on 10 and 11 December 1999.
[501] Recital 12 of the Preamble to the Race Equality Directive.

2.2.2. THE CONCEPT OF DISCRIMINATION

The Race Equality Directive forbids four forms of discrimination on grounds of racial or ethnic origin: direct discrimination, indirect discrimination, harassment and instructions to discriminate. According to Article 2(1), direct discrimination "shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin".[502] As there were no EU legislative measures containing a definition of direct discrimination before the adoption of the Race Equality Directive, the case law of the CJEU on sex discrimination, which requires a comparison to be made between a man and a woman in the same situation, served as a guideline.[503] It appears that the definition of direct discrimination did not cause particular difficulties in the negotiations preceding the adoption of the Directive.[504] The explicit inclusion of possible recourse to a hypothetical comparator is considered to be a step forward from the area of sex discrimination.[505]

According to Article 2(2), indirect discrimination arises where "an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary".[506] The provision thereby diverged from the definition on sex discrimination, which requires a disadvantage for a substantially higher proportion of the members of one sex. The revised wording takes account of the CJEU judgment in relation to the free movement of persons in the *O'Flynn* case[507] and seeks to ensure that problems of statistical proof do not arise unnecessarily as there is no requirement to show that a practice affects a

[502] Article 2(2)(a) of the Race Equality Directive.
[503] Case 43/75 *Defrenne v. SABENA*, ECLI:EU:C:1976:56; Case 129/79 *Macarthys v. Smith*, ECLI:EU:C:1980:103.
[504] Adam Tyson, "The Negotiation of the European Community Directive on Racial Discrimination," *European Journal of Migration and Law*, no. 3 (2001): 202.
[505] Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L 039, 14.02.1976, p. 40. See on this Howard, *The EU Race Directive*, 140; Bell, *Anti-Discrimination Law and the European Union*, 75.
[506] Article 2(2)(b) of the Race Equality Directive.
[507] Case C-237/94 *O'Flynn*, ECLI:EU:C:1996:206, para. 20.

significantly higher proportion of persons of a particular racial or ethnic origin.[508] According to *Bell*, "this is likely to be especially valuable in places where the ethnic minority population is small and/or there is little statistical information on ethnic minorities".[509] According to its definition, indirect discrimination is not unlawful if it is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

Article 2(3) introduces the notion of harassment, which constitutes discrimination, "when an unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment". The Commission's proposal reasoned that harassment seriously undermines people's rights in professional, economic and social spheres.[510]

Upon a proposal by the European Parliament, Article 2(4) added instruction to discriminate against persons on grounds of racial or ethnic origin that have to be deemed discrimination as well.[511] The Commission was initially against including incitement as a category, as according to *Tyson*:

> *In the Commission's view, this was not possible for two reasons: first, wider questions of racism and xenophobia (as opposed to racial and ethnic discrimination) fall more properly under Article 29 of the Treaty on European Union rather than under Article 13 of the Treaty establishing the European Community; second, to be consistent with the definition of discrimination in the Directive, it is necessary to prove that an individual has suffered a particular disadvantage as a result of the discriminatory act, which is not always so in cases of incitement. The Commission accepted, however, that it should be possible to cover incitement or instructions to discriminate where a potential victim would be put at a disadvantage if the incitement or instruction were to lead to a discriminatory act. It therefore amended its original proposal following the European Parliament's opinion to the effect that incitement or instructions to discriminate (for example by an employer to his or her personnel manager or to an employment agency) should be deemed to be discrimination for the purposes of the directive and should therefore lead to the same protection for victims. Though some Member States were uneasy with this notion, others argued that it was essential to provide protection against such pressure to discriminate and so the point was included. However, to avoid possible confusion with incitement to racial*

[508] European Parliament, Report on the proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Amendment 27, p. 16.
[509] Bell, *Anti-Discrimination Law and the European Union*, 75.
[510] Commission's proposal, COM(1999) 566 final, p. 7.
[511] European Parliament, Report on the proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Amendment 28, p. 17.

> *violence or hatred, the Council limited the reference in the text to instructions. This should clearly cover implicit as well as explicit instructions.*[512]

2.2.3. THE MATERIAL SCOPE

The Race Equality Directive is particularly noted for its wide material scope, which was advocated particularly by the European Parliament. The Commission's explanatory memorandum clarifies that "these areas are covered in so far as they fall within the limits of the powers conferred by the Treaty upon the Community".[513] The Commission specifically explained:

> *The Commission agrees that a comprehensive coverage is necessary to make a serious contribution to curbing racism and xenophobia in Europe. The European Union has recognised, not least in the context of the coordinated strategy for employment, that participation in economic life is often a pre-requisite for successful social integration more widely. Equally, social protection systems play a fundamental role in ensuring social cohesion, and in maintaining political stability and economic progress across the Union. Discrimination in access to benefits and other forms of support from the social protection system contributes to and compounds the marginalization of individuals from ethnic minority and immigrant backgrounds. The same is true of social advantages, which are often discretionary, with a character or purpose similar to social protection.*[514]

In line with that view, Article 3 covers the following areas: subparagraphs (a) to (c) define the scope of application to the employment field and these are identical to the Equal Treatment Directive 76/207/EEC.[515] Subparagraph (d) deals with membership of and involvement in an organization of workers or employers, or any organization whose members carry on a particular profession, including the benefits provided for by such organizations. While the design and delivery of social protection and social security are the responsibility of the Member States, subparagraph (e) requires Member States to ensure that there is no discrimination based on racial or ethnic origin when implementing that responsibility. Subparagraph (f) requires that, where a social advantage is granted, it must be done without discrimination on grounds of racial or ethnic origin.

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[512] Tyson, "The Negotiation of the European Community Directive on Racial Discrimination," 206, 207.
[513] Commission's proposal, COM(1999) 566 final, p. 7.
[514] Commission's proposal, COM(1999) 566 final, p. 5.
[515] In particular, the Race Equality Directive applies to "a) conditions for access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion; (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience; (c) employment and working conditions, including dismissals and pay".

The Commission's explanatory memorandum further states:

> *Other areas are more indirectly linked to the world of work but nevertheless contribute significantly to social and economic integration. High quality education is, for example, a pre-requisite for successful integration into society. Therefore attention must be paid to equal treatment in selection procedures, taking account of different cultural backgrounds.*
>
> *Discrimination in access to goods and services also limits social and economic integration, especially in access to finance, but also more widely. Decisions on loans to small companies, for example, or on mortgages to individuals, which are based on or influenced by the real or presumed racial or ethnic origin of the applicant are not only contrary to the basic principles of human rights, but are in practice extremely damaging to the ability of large sections of society to provide for themselves and for others. Equally, the exclusion of individuals from access to the goods or services of their choice is at best damaging to their self-esteem and may lead in the worst cases to compounding social exclusion.*[516]

In line with that, subparagraph (g) requires Member States to ensure that there is no discrimination on grounds of racial or ethnic origin in the field of education and subparagraph (h) relates to decisions about providing access to goods and services, or about the supply of goods and services. The explicit references to "healthcare" and "housing" go back to the European Parliament's proposals for amendment.[517]

2.2.4. EXCEPTIONS

Article 3(2) of the Race Equality Directive excludes difference of treatment based on nationality and clarifies that it does not affect the provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons, and to any treatment which arises from the legal status thereof. The impact of the Directive on third country nationals was one of the most sensitive issues discussed in the Council as several Member States, particularly Denmark, Germany, Luxembourg and the UK, were concerned with the relationship between existing work permit schemes and the Directive. Recital 13 further clarifies that the "prohibition of discrimination should also apply to nationals of third countries, but does not cover differences of treatment based on nationality and is without prejudice to provisions governing the entry and residence of third-country nationals and their access to employment and to occupation". The exclusion of nationality discrimination from the scope of the Race Equality Directive was a source of regret not only by the European

[516] Commission's proposal, COM(1999) 566 final, p. 5.
[517] European Parliament, Report on the proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Amendments 34, 36, p. 19.

Parliament and civil society, but also criticized in the literature as one of its major weaknesses, on the basis that nationality and racial discrimination are difficult to distinguish in practice.[518]

Article 4 allows the Member States to provide for an exception where, by reason of the nature of the particular occupational activities or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate. The Commission's proposal clarified that this provision is based on similar exception contained in national legislation (Denmark, Ireland, the Netherlands and the UK) and in the Equal Treatment Directive 76/207/EEC.[519]

Finally, a further exception is set out in Article 5, entitled "positive action", which, with a view to ensuring full equality in practice, allows the Member States to maintain or adopt specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin. Article 5 thereby facilitates positive actions, without placing any obligation on Member States to avail this possibility.

2.2.5. ENFORCEMENT

Chapter II of the Race Equality Directive entitled 'Remedies and Enforcement', contains a variety of measures to facilitate its practical use. According to the Commission's proposal, it entails two main conditions: "the right of victims to a personal remedy against the person or body who has perpetrated the discrimination; and the existence of an appropriate mechanism in each Member State to ensure adequate levels of enforcement".[520] Accordingly, Article 7 (1) requires the Member States to ensure that "judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them". The reference to "conciliation procedures" was added upon a proposal from the European Parliament, as a means to make a

[518] Bell, *Anti-Discrimination Law and the European Union*, 77.
[519] Commission's proposal, COM(1999) 566 final, p. 8.
[520] 25.11.1999, COM(1999) 566 final, p. 9.

"positive contribution to resolving a conflict".[521] The right to legal protection is reinforced by the possibility of allowing organizations with a 'legitimate interest' to exercise such rights on behalf or in support of the complainant, with his or her approval (Article 7(2)).[522] National time-limits for initiating action are not affected by Article 7 (Article 7(3)).

The European Parliament proposed various measures to facilitate access to legal redress, which, however, were not taken over. The European Parliament specifically proposed that the recourse to a judicial remedy has to be "in accordance with the most effective national procedures" and the Member States have to provide "support in respect of legal costs in accordance with the most favourable provisions of national law". Moreover, organizations should be able to bring a case without the approval of a victim, in particular where the discrimination affects a group of persons and it may not be feasible to obtain approval of each individual affected. It considered that the right to collective action offers the possibility of dealing with joint sets of cases even though the individual victims have not brought them to court. The European Parliament referred in that regard also to the Distance Selling Directive 97/7/EC, which allows for collective actions in consumer law matters.[523]

An important element to facilitate litigation is the shift of the burden of proof from the complainant to the respondent in case "facts from which it may be presumed that there has been direct or indirect discrimination" are established (Article 8). While normally the legal burden of proving rests on the applicant, Article 8 takes account of the fact that "obtaining evidence in discrimination cases, where the relevant information is often in the hands of the defendant, can be very problematic".[524] The wording of Article 8 was based on Articles 3 and 4 of the Council Directive 97/80/EC on the burden of proof in cases of discrimination based on sex.[525]

The sanctions which are imposed in case of discrimination are discretionary for the Member States and "may comprise the payment of compensation to the victim", but must in any case

[521] European Parliament, Report on the proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Amendment 42, p. 22.
[522] According to the Commission's proposal, this provision was inspired by UN Model law against racial discrimination (Third Decade Action Program).
[523] European Parliament, Report on the proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Amendment 18, 41, p. 12, 22.
[524] 25.11.1999, COM(1999) 566 final, p. 9.
[525] OJ L 14, 20.1.1998, p. 6.

comply with the requirements of effectiveness, proportionality and dissuasiveness (Article 15). The inclusion of the possibility of "payment of compensation to the victim" goes back to the proposal for amendment by the European Parliament, which stressed the "feasible and effective" nature of this penalty, which "must be paid to the victim, to ensure that legal entities do not profit from appearing on victim's behalf in the context of collective right of action".[526]

In order to ensure that victims are not deterred from exercising their rights due to the risk of retaliation, according to Article 9, the Member States have to introduce measures to protect individuals from any adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment.[527] Moreover, Article 10 requires that the provisions adopted pursuant to the Directive are brought to the attention of the persons concerned by all appropriate means. According to the Commission's proposal, "the more effective the system of public information and prevention, the less need for individual remedies".[528]

2.2.6. EQUALITY BODIES

Finally, according to Article 13, Member States are obliged to designate a body or bodies for the promotion of equal treatment irrespective of racial or ethnic origin with the mandate to "provide independent assistance to victims of discrimination in pursuing their complaints", "conducting independent surveys" and "publishing independent reports and making recommendations" on discrimination matters. According to the Commission's proposal, the Member States are free to decide on the structure and functioning of such bodies in accordance with their legal traditions and policy choices. Moreover, the independent bodies may be specialized agencies or may form part of wider human rights bodies, regardless of whether they are pre-existing or newly established. It is considered that the establishment of equality bodies is one of the most innovative elements of the Race Equality Directive as it was the first Directive which set out such a requirement in anti-discrimination matters. Also, for the majority of European countries, this was a new institution, which did not exist before.[529]

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[526] European Parliament, Report on the proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Amendment 57, pp. 29, 30.
[527] See on this also the Commission's proposal, COM(1999) 566 final, p. 9.
[528] 25.11.1999, COM(1999) 566 final, p. 9.
[529] Bruno de Witte, "New Institutions for Promoting Equality in Europe: Legal Transfers, National Bricolage and European Governance," *American Journal of Comparative Law* 60, no. 1 (2012): 61.

The European Parliament made more far-reaching proposals regarding the role of the equality bodies. Accordingly, the independent bodies must have the power to investigate victims' complaints.[530] In order to be able to carry out detailed investigations into a complaint, and possibly to give an opinion or a ruling, the equality bodies must be permitted to inspect confidential information such as pay and personnel data.[531] Moreover, in order to fulfil its duties, the Member States have to guarantee sufficient financial resources and, as a minimum, must guarantee the treatment of complaints free of charge to those who are not in a position to make their own financial contribution.[532] However, none of these proposals for amendment have been adopted.

2.2.7. RELATIONSHIP WITH NATIONAL LAW

Article 6 allows the Member State to introduce or maintain legislation providing for a higher level of protection than that guaranteed by the Directive. It provides that there should be no lowering of the level of protection against discrimination that is already afforded by Member States when implementing the Directive.

Article 14 concerns the compliance with the Directive by Member States. That involves the elimination of discrimination arising from any legal or administrative provisions as well as from collective agreements or individual contracts. Without questioning the general freedom of both sides of industry to negotiate contracts, it is clear that any provisions of a contract or agreement which are contrary to the principle of equality of treatment must be rendered null and void, or be amended.[533]

2.2.8. IMPLEMENTATION

Article 11 involves the social partners in the fight against race discrimination. In this regard, the Member States should promote and encourage the social dialogue "with a view to fostering equal treatment, including through the monitoring of workplace practices, collective

[530] European Parliament, Report on the proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Amendment 53, pp. 27, 28.
[531] European Parliament, Report on the proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Amendment 55, p. 28.
[532] European Parliament, Report on the proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Amendment 54, p. 28.
[533] Commission's proposal, COM(1999) 566 final, p. 10.

agreements, codes of conduct, research or exchange of experiences and good practices"[534] and "to conclude, at the appropriate level, agreements laying down anti-discrimination rules".[535] The role of social partners in combatting discrimination has already been embodied at EU level in the Social Partners' Joint Declaration on Racism and Xenophobia in the Workplace, adopted in Florence in 1995. Moreover, as pointed out in the Commission's proposal, in some Member States, Social Partners have adopted framework agreements (Belgium, France) and codes of conduct on combatting racial discrimination in companies (the UK, the Netherlands).[536] Finally, the Member States must also promote dialogue with NGOs according to Article 12. This provision has its roots in a proposal for amendment by the European Parliament.[537]

Finally, every five years Member States are required to submit evidence to the Commission, which by taking into account information from NGOs and the EU Monitoring centre, will compile a report on the application of the Directive (Article 17).

2.3. PLACING *FERYN* WITHIN THE CASE-LAW OF THE CJEU

The *Feryn* case was not only the first case in which the CJEU was asked to interpret the Race Equality Directive 2000/43/EC, but it also asked a novel question in the context of the EU anti-discrimination field in general. The central issue of the Belgian court's preliminary reference was whether or not public statements of an employer that he will not recruit employees of a certain ethnic or racial origin can constitute direct discrimination, even if there is no identifiable complainant. That question involved a substantive dimension about the scope of the concept of direct discrimination, but also a remedial dimension about the right of associations to bring an autonomous action in the absence of an identifiable complainant.

From a substantive perspective, the *Feryn* case raises the question of whether abstract discrimination falls within the scope of the Race Equality Directives.[538] The CJEU has, until now, only dealt with discriminatory job advertisements, but never with public statements

[534] Article 11(1) of the Race Equality Directive.
[535] Article 11(2) of the Race Equality Directive.
[536] 25.11.1999, COM(1999) 566 final, p. 10.
[537] European Parliament, Report on the proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Amendment 51, pp. 26, 27.
[538] Norbert Reich, "Kurzbesprechung der Schlussanträge des Generalanwalts Poiares-Maduro vom 12.3.2008 in der Rechtssache C-54/07 Feryn," *Europäische Zeitschrift für Wirtschaftsrecht*, no. 8 (2008): 229–30.

made by an employer. In *Commission v Germany*,[539] the Commission brought infringement proceedings against Germany for its failure to correctly implement the Equal Treatment Directive 76/207/EEC,[540] because it failed to make Article 611 of the German Civil Code, which states that an employer may not advertise offers of employment, which are not 'impartial' as regards the sex of the employees, binding. The Commission considered that the choice of the contested provision, which had no legal effect, did not satisfy the requirement laid down in the Directive to the effect that persons who consider themselves wronged by the failure to apply the principle of equal treatment to them must be able to pursue their claims by judicial process. Germany argued, however, that offers of employment merely precede access to employment, and therefore do not come within the scope of the Directive. The CJEU held that offers of employment cannot be excluded *a priori* from the scope of Directive 76/207, insofar as they are closely connected with access to employment and can have a restrictive effect thereon. However, the CJEU recognized that the Directive imposed no obligation on the Member States to enact general legislation concerning offers of employment.[541] In *Draehmpaehl*, which dealt with, *inter alia*, a job advertisement referring specifically to the search for a female secretary, the CJEU did not question whether an offer of employment falls within the scope of the Directive 76/207, but dealt directly with the available remedies.[542]

From a remedial perspective, the *Feryn* case implicitly questioned the right of associations to bring an autonomous action to enforce compliance with the Race Equality Directive. The possibilities for collective actions are essential in case of abstract infringements where there is no identifiable complainant like in the case of public statements, but also in the case of institutional forms of discrimination that do not lend themselves to individual complainants.[543] However, as has been clear from the examination of the provisions of the Race Equality Directive (see **section 2.2.5.**), the Race Equality Directive has been only

[539] Case 248/83 *Commission v. Germany*, ECLI:EU:C:1985:214.
[540] Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L 39, 14.2.1976, p. 40.
[541] Case 248/83 *Commission v. Germany*, ECLU:EU:C:1985:214, para. 43.
[542] Case C-180/95 *Nils Draehmpaehl v. Urania Immobilienservice OHG*, ECLI:EU:C:1997:208.
[543] Regarding institutional discrimination, *Bell* explains with the following example: "For example, if an employer has a predominantly white workforce and recruits through 'word of mouth' – for example, via friends and family of the existing workforce – this is likely to disadvantage non-white workers who may never have an opportunity to learn of vacancies. Such practices tend to perpetuate ethnic inequality in the workforce, but the subtle nature of the discrimination poses barriers to individual litigation". Bell, *Anti-Discrimination Law and the European Union*, 78–79.

directed towards individual complainants. Related to this are the questions of whether the shift of the burden of proof is equally applicable to collective actions[544] as to individual actions and what could be considered as an appropriate sanction in such a case.[545]

3. ANTI-DISCRIMINATION LAW AND RACE EQUALITY POLICY IN BELGIUM

Before the adoption of the Race Equality Directive 2000/43/EC, the EU Member States' development of legislation on racial discrimination was shaped by the national and international context.[546] Looking at the national level, each country experienced immigration in a specific historical, political and economic context, which, in turn, also greatly influenced the development of national legal frameworks for integration and anti-discrimination. There are some countries with a history of colonial immigration (like the UK, France and the Netherlands), where a large part of the minority population stems from their former colonies; others which actively started to recruit workers in the 1950s in order to secure post-war economic recovery (like Austria, Belgium, Denmark, Germany, Luxembourg and Sweden) and those, which began to experience significant immigration only from the 1980s or 1990s onwards (like Greece, Italy, Spain, Portugal, Finland and Ireland).[547]

Belgium falls in the second group of countries, which after World War II, in order to strengthen its economy, adopted an active labour immigration policy by concluding bilateral agreements, starting with some European countries and continuing with Morocco (1964), Turkey (1964), Tunisia (1969), Algeria (1970), and Yugoslavia (1970). At that time, it was considered that those so-called 'guest workers' would, in time, return to their home countries. The oil crises in 1973 lead to a severe economic recession and high unemployment, and consequently resulted in a weakening of the position of foreigners in society and caused the development of xenophobic political attitudes. In 1974, the Belgian government decided to halt its active labour immigration programme. The entry of third-country nationals was

[544] In that regard, it should be noted that Rectial 22 of the Race Equality Directive provides the following: "*Member States need not apply the rules on the burden of proof to proceedings in which it is for the court or other competent body to investigate the facts of the case. The procedures thus referred to are those in which the plaintiff is not required to prove the facts, which it is for the court or competent body to investigate*".

[545] Rüdiger Krause, "Case C-54/07, Centrum Voor Gelijkheid van Kansen En Voor Racismebestrijding v. Firma Feryn NV, [2008] ECR I-5187," *Common Market Law Review* 47 (2010): 917–31.

[546] For an overview of the legislation of the Member States before implementation of the Race Equality Directive, see Bell, *Anti-Discrimination Law and the European Union*, 145–90.

[547] Bob Hepple, "Equality at Work," in *The Transformation of Labour Law in Europe: A Comparative Study of 15 Countries, 1945-2004*, ed. Bruno Veneziani and Bob Hepple (Oxford; Portland: Hart Publishing, 2009), 143–44.

limited to family members of those already settled in the country and to asylum seekers and refugees. While immigration therefore initially decreased, it resumed in the mid-1980s within the legal framework of family reunification and a significant increase of asylum seekers. In the second half of the 1980s, it was, therefore, realized that the presence of immigrants had become an integral part of the Belgian society and as a result an integration policy slowly developed, and in that context legislation on racial discrimination also advanced.[548]

At the international level, the fight against racism and racial discrimination came to the forefront after World War II. The United Nations was formed in 1954 and the Council of Europe in 1949. Fundamental human rights were seen as necessary to achieve greater unity between nations and, therefore, the United Nations promulgated the Universal Declaration of Human Rights (UDHR) in 1948 and the Council of Europe adopted the European Convention on Human Rights and Fundamental Freedoms (ECHR) in 1950.[549] Both instruments include a prohibition of discrimination in the enjoyment of the rights protected therein, including, *inter alia*, race, colour, religion and national origin. Specifically, in view of providing an international response to the colonial eras, the Holocaust, race theory and race practice, the International Convention on the Elimination of Racial Discrimination was adopted in 1965.[550] The UN Convention gave the European states an incentive to gradually bring their national laws in line with its requirements. New provisions and legislation on racism were subsequently introduced , for instance, in Denmark (1971), the Netherlands (1971), France (1972), Germany (1972), the UK (1976), Ireland (1977) and Italy (1977).[551]

Before the adoption of the Race Equality Directive, the Member States envisaged a mixed picture of measures to address racial discrimination. For all except of three of those Member States (Denmark, Finland and Ireland) with written constitutions, there are provisions in these constitutions prohibiting discrimination on grounds of racial or ethnic origin, which may or may not provide individuals with a right to redress. Some of those provisions are only

[548] Centre for Equal Opportunities and and Opposition to Racism, "Migrants, Minorities and Employment in Belgium," RAXEN 3 Report to the European Monitoring Centre on Racism and Xenophobia (EUMC), 2003, 6.
[549] Howard, *The EU Race Directive*, 2.
[550] Patrick Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary*, First edition. (Oxford: Oxford University Press, 2016), 19 ff; Theodor Meron, "The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination," *American Journal of International Law* 79, no. 2 (1985): 283–318; Egon Schwelb, "The International Convention on the Elimination of All Forms of Racial Discrimination," *International and Comparative Law Quarterly* 15 (1966): 996–1068.
[551] Bell, *Anti-Discrimination Law and the European Union*, 59.

applicable in the public sphere, while others also apply in the private sphere. The United Kingdom was the first European country to legislate against racial discrimination in employment. A campaign of human rights and anti-colonial groups started already in the 1950s and was inspired by the civil rights movement in the U.S. In line with that, the campaigners sought their inspiration from the North American model of administrative enforcement of anti-discrimination legislation. Racial discrimination in employment was eventually prohibited in the United Kingdom in 1968, substantially revised and strengthened in 1976 (Race Relations Act 1976) and extended to Northern Ireland in 1997. Alongside the UK, comprehensive legislation on racial discrimination was enacted in the Netherlands (Equal Treatment Act, 1994) and Ireland (Employment Equality Act, 1998).

These three Member States provided insitituional support for victims and, alongside employment, also covered other areas of everyday life such as access to goods and services and education. On the opposite site, we find Greece, where no specfic legislative protection against racial discrimination existed. Instead, theoretically, it was possible for individuals to directly rely on the Internation Convention on the Elimination of All Forms of Racial Discrimination, as as the Greek Constitution provides that international conventions adopted by law, and which have entered into force, become an integral part of Greek domestic law and prevail over any contrary provisions of law. The other Member States prohibited racial discrimination predominantly in the employment sphere in various branches of the law – we can find provisions in the national criminal codes, labour laws and immigration laws. While we can discern legislative acitivity in the Member States from the 1970s, the most active period of the adoption of new measures on racial discrimination came between 1994 and 2000.[552]

Since the *Feryn* case arose in the Belgian legal system, this section aims to give an overview of the historical development of anti-discrimination legislation in Belgium (**section 3.1.**). Belgium traditionally addressed racism and racial discrimination by criminal legislation. The development of Belgium's criminal legislation will be set in the context of the fulfilment of Belgium's international obligations, as a response to a rising xenophobic climate in the Belgian society and as an integral element of the development of a Belgian integration policy. Next, the implementation of the Race Equality Directive 2000/43/EC will be traced, which

[552] Ibid., 145–90; Hepple, "Equality at Work," 129–63.

resulted in the introduction of civil law provisions to address racial discrimination in the Belgium legal system (**section 3.2.**).

3.1. THE DEVELOPMENT OF A CRIMINAL LAW APPROACH TO RACISM

The Belgian Ant-Racism Act of 1981[553] served to comply with Belgium's obligations under the 1965 International Convention on the Elimination of All Forms of Racial Discrimination. Belgium only acceded to the Convention in 1975 and was thereby considered as a latecomer compared to its neighbouring countries France, Germany and the Netherlands, who already ratified the Convention between 1969 and 1971. Belgium, like other State Parties,[554] added a declaration regarding its obligations in Article 4 of the Convention to prohibit hate speech and racist organizations, which it considered had to be reconciled with the right to freedom of opinion and expression and the right to freedom of peaceful assembly and association proclaimed in Articles 19 and 20 of the Universal Declaration of Human Rights.[555] After its accession, it took another six years for Belgium to eventually fulfil its obligations under the Convention with the adoption of the Anti-Racism Act in 1981. The final political push for its adoption was given by the racist and anti-Semitic attacks committed in Antwerp and Brussels, leading to a demonstration against racism in Brussels. The Anti-Racism Act prohibited incitement to racial hatred, discrimination and violence and announcing an intention to those acts in public as well as cooperation or association with organizations or groups that practice or advocate discrimination in public. Moreover, it covered discrimination in the exercise of duties of civil servants and in the access to public places or to services for the public.[556]

In line with its original focus on the public sphere, the employment field was not covered by the legislation. Particularly, "it was believed that the burden of proof would be insurmountable in the context of employment, and that therefore the law would create false

[553] 30 July 1981 (*Moniteur belge* 8 August 1981).
[554] See also Austria, Bahamas, France, Ireland, Italy, Japan, Monaco, Nepal, Tonga, the UK and the USA.
[555] Centre for Equal Opportunities and and Opposition to Racism, "RAXEN National Focal Point Belgium," Analytical Report on Legislation to the European Monitoring Centre on Racism and Xenophobia (EUMC) (Vienna, 2004), 6.
[556] United Nations, Committee on the elimination of racial discrimination, tenth periodic report of State parties due in 1994, Belgium, CERD/C/260/Add.2; Ibid., 378–88.

expectations and only induce frustration".[557] Since the Anti-Racism Act constituted a piece of criminal legislation, it was prescribed that the alleged offender is innocent until proven guilty by the public prosecutor. Regarding sanctions, imprisonment and monetary fines were foreseen. The sanctions were, however, kept lenient due to the legislator's doubts about "effecting societal and behavioural changes by means of (criminal) law in matters of conscience and morality",[558] the fear of producing "counterproductive results" by excessive punishment[559] and "the communicative rather than repressive" aim of the legislation.[560]

A more energetic approach towards developing an immigration policy, as well as addressing race discrimination, became noticeable from the beginning of the 1990s. The starting point was given by the electoral success of the extreme right-wing party *Vlaams Blok* in Antwerp in 1988. It was recognized that the Anti-Racism Act was not sufficiently effective anymore: "(a) the Act was not widely known and seldom enforced; (b) prosecutors adopted a passive attitude towards offences under the Act; (c) penalties under the Act were too lenient".[561] Moreover, it was felt that "there has been an increase in the type of crime which it was intended to punish and because it is becoming more and more obvious that the Act has missed its target".[562]

As a response, in March 1989 the Belgian government established the Royal Commissariat for Migrant Policy (*Commissariat royal à la politique des immigrés*) for a period of four years (1989-1993). The Royal Commissariat was set up as a consultative institution, attached to the Prime Minister's administration, responsible for defining a federal policy on the integration of migrants and ethnic minorities into Belgian society, particularly with regard to

[557] Ibid., 379., footnote 7, with reference to Parliamentary Documents, Chamber of Representatives 1980-81, no. 214/9, 21.
[558]Ibid.. The author cites the Explanatory Memorandum, *Parliamentary Documents*, Chamber of Representatives 1979, no. 214/1, 3: "Christianity has for twenty centuries, and rationalism for two centuries, attempted to appeal to humanity's conscience by means of education and upbringing, without however having convinced it of their pleas and actions. Therefore, the community's disapproval of acts inspired by racism or xenophobia should be expressed by means of a moderate punishment".
[559] Ibid. With reference to Parliamentary Documents, Chamber of Representatives 1980-81, no. 214/9, 9; Parliamentary Documents, Chamber of Representatives 1979, no. 214/1, 3; Parliamentary Acts Senate, 18 July 1981, 2227. In that regard, as an example, the adverse effects of the prohibition in the US Constitution from 1920 until 1933 of the manufacture and sale of alcoholic beverages was repeatedly referred to.
[560] Ibid., 380. With reference to Parliamentary Documents, Chamber of Representatives 1980-81, no. 214/9, 9.
[561] United Nations, Committee on the elimination of racial discrimination, tenth periodic report of State parties due in 1994, Belgium, CERD/C/260/Add.2, para. 9; with reference to Parliamentary Documents, Chamber of Representatives 1993-94, no. 1294/3, 3.
[562] United Nations, Committee on the elimination of racial discrimination, tenth periodic report of State parties due in 1994, Belgium, CERD/C/260/Add.2, para. 9; with reference to Parliamentary Documents, Senate 1993-94, no. 117-2, 3.

employment, housing and education.[563] The Royal Commissariat proposed establishing a permanent institutional structure to combat the fight against racism and the promotion of equality and integration. Consequently, the Centre for equal opportunities and combating racism (hereafter the 'Centre') was set up by the Act of 15 February 1993. Like the Royal Commissariat, the Centre is institutionally linked to the Prime Minister of the Federal Government of Belgium, while fulfilling an independent role. Its aim is to promote equality of opportunity and to combat all forms of discrimination, exclusion, restriction or preference based on race, colour, decent, origin or nationality. Its tasks consist of preparing opinions and recommendations for the government for the improvement of regulations in the field as well as for private parties and institutions based on the research it produces.

In addition, the Act of 15 February 1993 amended the Anti-Racism Act in order to endow the Centre with the authority to take independent legal action.[564] The approval of the victims was only required if the discrimination was perpetrated against individually identified natural persons.[565] As pointed out by *Vrielink*, the "antiracist policy of the official public prosecution office was considered deficient to such a degree that it was deemed necessary to institute a specialised body to assist it in – or even take over – its responsibilities in this domain".[566]

Further amendments to the Anti-Racism Act focused on expanding its scope and improving its implementation and effectiveness. The Act of 12 April 1994 extended its substantive scope to cover discrimination in the private sphere, particularly in the provision of good or services, for example, with regard to access to housing, and in job placement, vocational training, offers of employment and dismissal.[567] In addition, amendments introduced new

[563] United Nations, Committee on the elimination of racial discrimination, tenth periodic report of State parties due in 1994, Belgium, CERD/C/260/Add.2, paras. 88, 89. The Royal Commissariat designed a concept for the integration of immigrants, which was adopted by the Belgian parliament and served for the subsequent development of a more concrete Belgian integration policy. Accordingly, the following policy principles were established: 1) Assimilation where required as a matter of public policy; 2) Encouragement for thorough integration on the basis of the fundamental principles of the culture of the host country (modernity, emancipation and pluralism); 3) Unequivocal respect for cultural diversity as a factor for mutual enrichment; 4) Promotion of the structural involvement of minorities in the activities and in the goals of public authorities.

[564] Marco Martiniello, Marc Poncelet, and Frank Caestecker, *Migrations et minorités ethniques dans l'espace européen* (Brussels: De Boeck université, 1993), 137–45. See also United Nations, Committee on the elimination of racial discrimination, tenth periodic report of State parties due in 1994, Belgium, CERD/C/260/Add.2, paras. 9, 17.

[565] Emmanuelle Bribosia, "Report on Belgium," Anti-Discrimination Legislation in EU Member States (Vienna: Centre on Racism and Xenophobia (EUMC), 2002), 35, 36.

[566] Vrielink, "First Illustration: Racism and the Limits of the (Criminal) Law, in Chapter 21 – Limits of Human Rights Protection from the Perspective of Legal Anthropology," 380.

[567] United Nations, Committee on the elimination of racial discrimination, tenth periodic report of State parties due in 1994, Belgium, CERD/C/260/Add.2, para. 10.

charges, the main sanctions were reinforced and additional ones added, such as the additional punishment of the deprivation of civil and political rights in the case of a conviction.[568]

Moreover, and more significantly, in order to ensure the effective punishment of infringements of the Anti-Racism Act committed through the press, in 1999, Belgium amended Article 150 of its Constitution to exceptionally exclude press offences motivated by racism and xenophobia from the jurisdiction of the Assize courts (jury trials). Press offences are subject to special protection that entails that they can be only tried by a jury. Jury trials are reserved for the most severe crimes and other crimes on the basis of their nature, as press offences. Particularly, "due to their subversive nature and the fact that they are often based on ideas that are virulently critical of the State, the government or generally 'the powers that be', the drafters of the Belgian Constitution had deemed it inappropriate for these criminals to be tried by a judge appointed precisely by 'the system'".[569] The result was that in practice priority was given to cases referred to jury trials due to their severity and press offences were hardly ever taken to court. Moreover, precedent interpreted press offences broadly as covering any written document – printed, reproduced or disseminated – containing the expression of an opinion regarded as criminally offensive, leading therefore to a *de facto* impunity. With the amendment of the Constitution, press offences of a racist nature were transferred to the jurisdiction of the criminal courts.[570]

It is considered that the general focus of the Anti-Racism Act has been on verbal or textual expressions of racism. This was also reflected in the application of the Act by the Centre.[571] The 2000 annual report of the Centre pointed out that there has been no conviction under the Act in the employment sphere, although discrimination in the employment market is common in Belgium. The main obstacle identified was the presumption of innocence in criminal proceedings.[572]

Criminal actions have been initiated by the Centre only in very specific situations. As a result

[568] United Nations, Committee on the Elimination of racial discrimination, thirteenth periodic report of State parties due in 2000, Belgium, CERD/C/381/Add.1, para. 19.
[569] Vrielink, "First Illustration: Racism and the Limits of the (Criminal) Law, in Chapter 21 – Limits of Human Rights Protection from the Perspective of Legal Anthropology," 380–81.
[570] United Nations, Committee on the Elimination of racial discrimination, thirteenth periodic report of State parties due in 2000, Belgium, CERD/C/381/Add.1, paras. 13-18.
[571] Vrielink, "First Illustration: Racism and the Limits of the (Criminal) Law, in Chapter 21 – Limits of Human Rights Protection from the Perspective of Legal Anthropology," 381, 382.
[572] Bribosia, "Report on Belgium," 21.

of the amendment of the Belgian Constitution, in 2000, the Centre together with a non-governmental organization, Liga voor Mensenrechten, filed a criminal complaint against three associations closely linked to the right-wing Flemish party *Vlaams Blok* (in particular, they were responsible for the funding, propaganda and training) for violating the Anti-Racism Act. The decision of the Appeal Court in Ghent, which sanctioned the three associations to pay a fine because of incitement to hate, violence and discrimination (each association had to pay a fine of 12,400 Euro), was upheld by the Belgian Cour de cassation in 2004. After this court ruling, *Vlaams Blok* dissolved itself, but was later re-established under the name *Vlaams Belang*.[573]

A further example is provided by the following situation. The Centre and *Vlaams Belang* filed a criminal complaint against the Sharia4Belgium spokesman for incited hatred, discrimination and violence against non-Muslims, threatening political members of the *Vlaams Belang*. In 2012, the spokesman was sentenced to two years' imprisonment and a fine of 550 Euro.[574] [575]

3.2. THE IMPLEMENTATION OF THE RACE EQUALITY DIRECTIVE IN BELGIUM

The implementation of the Race Equality Directive 200/43/EC in Belgium was not a straightforward process. Belgium initially implemented the Race Equality Directive 2000/43/EC and the Equality Framework Directive 2000/78/EC by the adoption of the Law of 25 February 2003 combating discrimination, which covered discrimination based on sex, a so-called race, colour, descent, national or ethnic origin, sexual orientation, marital status, birth, fortune, age, religion or belief, current and future state of health, a disability or physical characteristic. The Law of 25 February 2003 contained both criminal and civil law provisions for the protection of victims of discrimination. However, due to an action against the new Law before the Belgian Court of Arbitration (the current *Grondwettelijk Hof* (Belgian

[573] Katrien Degrauwe, "Litigation Case of the Vlaams Blok," ENAR Conference on Combating Racism and Xenophobia as a Crime, September 11, 2004, http://cms.horus.be/files/99935/MediaArchive/pdfevents/workshop2.pdf.

[574] Emmanuelle Bribosia, "Sharia4Belgium Spokesman Convicted of Incited Hatred, Discrimination and Violence against Non- Muslims," News Report (European network of legal experts in the non-discrimination field, February 20, 2012), http://www.equalitylaw.eu/downloads/1016-be-73-belgium-fr-67-sharia4belgium-spokesman-convicted-february-2012.

[575] The director of the Centre clarified during the interview that the Centre has chosen the latter case to show that they are not the "Centre for the Moroccans" or the "Centre for the minorities", but "we are there for everybody". Indeed, the director of the Centre uses these two cases as an illustration that the role of the Centre is to promote equality and to defend the interests of the 11 million people in Belgium. Interview with the director of the Centre for equal opportunities and combating racism (applicant), 18 December 2012.

Constitutional Court)) (**section 3.2.1.**), the law needed to be completely reformed in 2007 (**section 3.2.2.**).

3.2.1. THE CONSTITUTIONAL CHALLENGE

The Law of 25 February 2003 was challenged before the Belgian Court of Arbitration by two actions initiated by members of the Parliament from the extreme-right *Vlaams Blok* and an individual, notably a Belgian lawyer and Law Professor. The actions were based mainly on Articles 10 and 11 of the Belgian Constitution,[576] setting out equality before the law and the right to be not subject to discrimination, and Article 19 of the Belgian Constitution,[577] providing for the right to freedom of expression. Various criminal and civil law provisions were challenged. The Court of Arbitration annulled some of the criminal law provisions and modified others to make the law applicable to all forms of discrimination, thereby removing the original exhaustive list of grounds. The Court held that there was no reasonable justification for excluding the applicability of the civil provisions to other discrimination grounds, in particular language or political opinion.[578]

Various further provisions were also challenged, most notably (i) the civil law injunction, which could be used to prohibit the dissemination and publication of books, writings, pamphlets and other means to express an opinion, leading to an unconstitutional censorship; (ii) the reversal of the burden of proof; and (iii) the right of the Centre and other associations to initiate an action under the criminal provisions, creating a 'pseudo-office of public prosecutors' for private interests, while in a state based on the rule of law, that role should be reserved for the office of public prosecutors, acting in the public interest. Those arguments were, however, rejected.[579]

The following remarks of the Court of Arbitration should be re-stated here for their relevance to the *Feryn* case. They concern Articles 2(4) and 19 of the Law of 25 February 2003. The

[576] Article 10 provides: "No class distinctions exist in the State. Belgians are equal before the law; they alone are eligible for civil and military service, but for the exceptions that can be created by a law for particular cases. Equality between women and men is guaranteed". Article 11 provides: "Enjoyment of the rights and freedoms recognised for Belgians must be provided without discrimination. To this end, laws and federate laws guarantee among others the rights and freedoms of ideological and philosophical minorities".
[577] Article 19 provides: "Freedom of worship, its public practice and freedom to demonstrate one's opinions on all matters are guaranteed, but offences committed when this freedom is used may be punished".
[578] Grondwettelijk Hof van België, 6 October 2004, Judgment Nr. 157/2004.
[579] Grondwettelijk Hof van België, 6 October 2004, Judgment Nr. 157/2004.

former, which was annulled by the Court of Arbitration, provides that any form of direct or indirect discrimination is prohibited in the dissemination and publication of texts, notices, signs or other means to communicate discriminaotry expressions. Article 19(1) provides that at the request of the victim of discrimination or of one of the collective entities entitled to initiate an action, the president of the court of first instance or, depending on the nature of the act, the president of the labour court or the commercial court, shall rule on the existence of an act, which violates this law, and shall order the cessation thereof. The Court of Arbitration held:

> *The freedom of expression is one of the pillars of a democratic society. It applies not only to 'information' or 'ideas' that are positively received or regarded as harmless or neutral, but also for those, which state or any group of the population shock, insecure or hurt. This require the pluralism, the tolerance and the spirit of openness, without which there could be no democratic society (European Court of Human Rights, 7 December 1976, Handyside v United Kingdom, § 49, 23 September 1998, Lehideux and Isorni v. France, § 55, and 28 September 1999, Öztürk v. Turkey, § 64).*[580]
>
> *Since freedom of expression is one of the pillars of a democratic society [...] the exceptions to the freedom have to be strictly interpreted. It must be shown that the restrictions are necessary in a democratic society, that they are of compelling necessity, and proportionate to the legal objectives pursued. The fifth indent of Article 2 (4) does not relate to acts, but to expressions that involve a difference of treatment that is not objective and reasonable justified. The law does not specify how or when these discriminatory expressions exceed the in a democratic society accepted threshold of the expression of ideas, which can "shock, insecure or hurt". Thus the provision does not fulfill the strict requirements to restrict the freedom of expression.*[581]
>
> *As regards Article 19 (1), the Court noted that the action for an injunction to stop the wider dissemination of opinion is not contested principally, but rather the possibility to prevent the publication itself, by which a form of preventive censorship contrary to Articles 19 and 25 of the Constitution*[582] *is introduced. For the purposes of applying Article 19(1), the judge shall consider the in Articles 19 and 25 of the Constitution guaranteed prohibition of preventive measures in general and the prohibition of censorship in particular, which implies that judicial intervention is only possible, when there has been already a dissemination. In addition, the judge will have to examine whether the restriction of the freedom of the expression, which may result from the application of that provision, is in concreto necessary, corresponds to a compelling societal necessity and is in*

[580] Grondwettelijk Hof van België, 6 October 2004, Judgment Nr. 157/2004, paras. B.44.
[581] Grondwettelijk Hof van België, 6 October 2004, Judgment Nr. 157/2004, paras. B.73.
[582] Article 25 provides: "The press is free; censorship can never be introduced; no security can be demanded from authors, publishers or printers. When the author is known and resident in Belgium, neither the publisher, the printer nor the distributor can be prosecuted".

> *proportion to the objective pursued by that provision. The application of the contested Article 19(1) can therefore not restrict the right of citizens, even in the in the public debate sometimes characterical polemic tone to express their opinions on societal phenomena, even if these opinions "shock, insecure or hurt" the state or another population group. According to this interpretation, Article 19 (1) does not breach Articles 10, 11, 19 and 25 of the Constitution.*[583]

3.2.2. THE CURRENT SITUATION: REMEDIES AND ENFORCEMENT

As a result of the Constititutional Courts's judgment and the threat of infringement proceedings by the European Commission, in 2007, Belgium reformed its anti-discrimination legislation in order to establish a more effective federal law to combat discrimination and reduce the disparities between the various grounds of discrimination. Steps were to be taken to harmonize the concepts used, the material scope of the legislation, the criminal-law dimension and the civil and procedural aspects.[584] As a result of the reform, the major anti-discrimination legislation at federal level is now embodied in three Acts adopted on 10 May 2007:

1) Federal Act of 10 May 2007 amending the Anti-Racism Act of 30 July 1981, which aims to implement the Racial Equality Directive and the 1965 International Convention on the Elimination of All Forms of Racial Discrimination in one single legislation prohibiting discrimination on grounds of alleged race, colour, origin, national or ethnic origin and nationality.

2) Federal Act of 10 May 2007 (hereafter 'General Anti-Discrimination Federal Act') pertaining to fight certain forms of discrimination, which seeks to implement the Framework Employment Directive and provides for the prohibition of discrimination on grounds of age, sexual orientation, civil status, birth, property, religious or philosophical belief, actual or future state of health, disability, physical or genetic characteristic, political opinion, language, social origin or trade union opinion.

3) Federal Act of 10 May 2007 pertaining to the fight against discrimination between

[583] Grondwettelijk Hof van België, 6 October 2004, Judgment Nr. 157/2004, paras. B.74.
[584] United Nations, Committee on the elimination of racial discrimination, sixteenth to nineteenth periodic reports of State parties due in 2012, Belgium, CERD/C/BEL/16-19, paras. 29-31.

women and men, which relates to sex and assimilated grounds, i.e., maternity, pregnancy and transgender.[585]

The Anti-Racism Act and the General Anti-Discrimination Federal Act provide for civil and criminal provisions for the protection of victims of discrimination. The provisions are largely identical between the two instruments - some criminal offences were, however, maintained only in the Anti-Racism Act, namely regarding discrimination in the provision of goods or services and in employment. Both Acts retained criminal liability for the incitement to commit discrimination, or the incitement to hatred or violence against a group. As required by EU law, the Acts also provide for the shift of the burden of proof – except in criminal proceedings, where the presumption of innocence applies.[586]

The following remedies are available to victims of discrimination before the civil courts or labour courts (in case of an employment relationship):

- a finding that discriminatory provisions in a contract are null and void;
- reparation (damages) according to the principles of civil liability or payment of the lump sums defined in the Act;[587]
- an injunction imposing immediate cessation of the discriminatory practice, under the threat of financial penalties;
- publication of the judgment finding a discrimination, by the posting of the judicial decision on the premises where the discrimination occurred, or by the publication of the judicial decision in newspapers.[588]

The General Anti-Discrimination Federal Act and the Anti-Racism Act establish the legal standing of the Centre, of organizations with a legal interest in the protection of human rights or in combating discrimination, and of trade unions, which may initiate an action under the civil and criminal provisions. However, only if there is no identified victim, can they act on their own behalf; where the victim of the alleged discrimination is an identifiable person,

[585] Emmanuelle Bribosia and Isabella Rorive, "Country Report, Non-Discrimination, Belgium," European Network of Legal Experts in Gender Equality and Non-Discrimination (European Commission, 2016), 31–32.
[586] Ibid., 106–7.
[587] The lump sum constsitues 1300 Euro (in the field of employment, 6 months' salary), which is reduced to 650 Euro (6 months' salary) if the defendant provides evidence that the measure creating the disadvantage would have been adopted anyway, even in the absence of the discriminatory element.
[588] Bribosia and Rorive, "Country Report, Non-Discrimination, Belgium," 106–7.

their action will only be admissible if they can prove that the victim has agreed to their action being filed.[589]

As it has been indicated, the powers of the Centre have constantly expanded. With the implementation of the Race Equality Directive and the Framework Employment Directive, the Centre was enabled to initiate legal actions, not only on the basis of the criminal law provisions, but also on the basis of the newly introduced civil law provisions. Moreover, with the 2007 reforms, the Centre's competence was also extended to the discrimination grounds contained in the General Anti-Discrimination Federal Act. The Centre was further reformed in 2013 and was turned into an inter-federal Centre, competent to promote equal opportunities and fight any kind of distinction, exclusion or restriction based on the prohibited grounds contained in various anti-discrimination instruments adopted at both regional and federal levels.[590]

The new Anti-Discrimination Acts of 2007 have been challenged several times before the Belgian Constitutional Court for various reasons.[591] The Court has generally rejected these actions, but gave some interpretative guidelines on numerous provisions. The key issues addressed by the Court were:[592]

1) The application of the anti-discrimination law between private persons. It was challenged that public authorities and private citizens are treated in the same way under the anti-discrimination law, while they are in different situation. It was claimed that this would constitute a breach of Articles 10 and 11 of the Belgian Constitution. The Court, however, stressed that the fact that private persons do not have the same powers and characteristics of public authorities does not exempt them from respecting the principle of anti-discrimination, which is not linked to the exercise of public

[589] Ibid., 110 ff.
[590] For a critical evaluation of this development, see: Jogchum Vrielink, "Federalism, Equality Bodies and NHRIs: A Critical Analysis of the Belgian Debate on Equality Bodies and NHRIs," in *National Human Rights Institutions in Europe: Comparative, European and International Perspectives*, ed. Jan Wouters and Katrien Meuwissen (Cambridge: Intersentia, 2013), 105–23.
[591] Grondwettelijk Hof van België, 12 February 2009, Judgment no. 17/2009; 11 March 2009, Judgments no. 39/2009 and no. 40/2009; 2 April 2009, Judgment no. 64/2009.
[592] For a more detailed overview, see Emmanuelle Bribosia and Isabella Rorive, "Country Report, Belgium," Report on the Measures to Combat Discrimination Directives 2000/43/EC and 2000/78/EC (Brussels, Utrecht: European Network of Legal Experts in the Non-discrimination Field, 2010), 31–41.

power, but rather to the dominant factual or legal position that a person enjoys.[593]

2) The grounds of discrimination. Regarding the General Anti-Discrimination Federal Act, while the closed list of discrimination grounds was considered to be constitutional, the exclusion of the opinions of trade unions from the grounds of discrimination was considered to be discriminatory.[594] The General Anti-Discrimination Federal Act was thereupon amended on 30 December 2009. in order to include the trade unions' opinions among the discrimination grounds.
3) The civil sanctions. It was submitted that the payment of the lump sums under the Federal Anti-discrimination Acts was in breach of the constitutional principle of non-discrimination to the extent that victims of discrimination would be better protected than other victims. According to the Court, the legal provision had to be construed as prohibiting any damages to be given to a person who would not be a victim of discrimination, as well as prohibiting any condemnation of a person who would not be the author of a discrimination.[595]
4) The burden of proof. The Constitutional Court rendered some interpretation about the use of statistics in order to reverse the burden of proof, the assessment of the judge allowing the reversal of the burden of proof and the influence of civil proceedings on criminal proceedings.[596]

4. THE CONFLICT AT THE NATIONAL LEVEL

This part aims to set out the conflict and the evolution of the *Feryn* case at the national level. The reference for a preliminary ruling arose out of the national proceedings between the Belgian Centre for equal opportunities and combating racism (the applicant, hereafter the 'Centre') and Firma Feryn NV (the defendant, hereafter 'Feryn'), following the remarks of one of its directors whom publicly declared that his company did not wish to recruit 'Moroccans'. This part aims to set out the conflict and the evolution of the *Feryn* case at the national level. After setting out the factual background of the case, this part will reconstruct the views of the Centre (**section 4.1.**) and of Feryn (**section 4.2.**) on the basis of the interviews conducted with the parties.

[593] Grondwettelijk Hof van België, Judgment no. 17/2009, paras. B.10.3, B.10.4; Judgment no. 39/2009, para. B.45.2; Judgment no. 40/2009, para. B.90.2
[594] Grondwettelijk Hof van België, Judgment no. 64/2009.
[595] Grondwettelijk Hof van België, Judgment no. 17/2009, para. B.36.4
[596] Grondwettelijk Hof van België, Judgment no. 17/2009; Judgment no. 39/2009; Judgment no. 40/2009.

Feryn is a Belgian company that specializes in the sale and installation of up-and-over and sectional doors, which is directed by father and son, which employed, at the time of the case, around 20 workers in its back office and six to seven fitters. The company is considered to be a well-known family business in the Flemish part of Belgium – not only for its specialized services, but also for the organisation of various social events, like the annual bicycle race, song festival, and their participation in the Paris-Dakar Rally.[597] Since 2005 the company sought to recruit additional fitters to install its doors in its customer's homes. As its recruitment efforts were unsuccessful, Feryn placed a large vacancy sign on its premises alongside the A12 in Londerzeel (Belgium), the main road between Brussels and Antwerp.

On 28 April 2005, one day after the younger director of Feryn was contacted by telephone by a journalist of the Belgian newspaper - De Standaard - the newspaper published an article on its front page entitled "Customers do not want Moroccans". The newspaper article reported that Feryn refused 20 Moroccans, whom applied for the job within the last two weeks, and honestly informed them about the reason why they could not be employed: that his customers would not want to let them enter their homes.[598] However, that particular account given in the newspaper was contested by Feryn and, therefore, only the following reproduction was eventually considered by the courts involved in the case:

> *Apart from these Moroccans, no one else has responded to our notice in two weeks … but we aren't looking for Moroccans. Our customers don't want them. They have to install up-and-over doors in private homes, often villas, and those customers don't want them coming into their homes.*[599]

Similar articles appeared in other newspapers on the same day. The newspaper articles immediately provoked further media interest and political discussion, which proved decisive for the development of the case.[600] A further article was published the same day by De Standaard with the reactions of Frank Vandenbroucke, the Flemish Vice-Minister-President/Flemish Minister for Work, Education and Training from the Different Socialist Party (*Socialistische Partij Anders*), Inburgering Marino Keulen, Minister of Home Affairs,

[597] Interview with the lawyer of Feryn NV (defendant), 20 December 2012; Interview with the director of the Centre for equal opportunities and combating racism (applicant), 18 December 2012.
[598] "Klanten hoeven geen Marokkanen" ("Customers do not want Moroccans"), *De Standaard* [Belgium] 28/04/2005, available at: http://www.standaard.be/cnt/g2veep1s. Translation provided by the opinion of Advocate General Maduro in Case C-54/07 *Feryn*, ECLI:EU:C:2008:155, para. 3.
[599] Translation provided by the opinion of Advocate General Maduro in Case C-54/07 *Feryn*, ECLI:EU:C:2008:155, para. 3.
[600] Interview with the director of the Centre for equal opportunities and combating racism (applicant), 18 December 2012; Interview with the lawyer of the Centre for equal opportunities and combating racism (applicant), 19 December 2012.

Urban Policy, Housing and Civic Integration from the Open Flemish Liberals and Democrats (*Open Vlaamse Liberalen en Democraten*) and Karel Van Eetvelt, managing director of the Union of Self-Employed Entrepreneurs (*Unie van Zelfstandige Ondernemers*, hereafter 'UNIZO'), the largest Belgian association of self-employed and small to medium-sized enterprises. While the Flemish Ministers made it clear that they considered the refusal of applications by Moroccans unacceptable, particularly in the light of the efforts of the Flemish government to integrate immigrants in the labour market, UNIZO affirmed its support of Feryn, who was simply facing an economic reality that he could not ignore. UNIZO pointed to his opposition to nail down this one company as it would be happy to employ immigrants, but it had to take economic considerations into account. The responsibility cannot be placed on one company, but rather society as a whole has to be sensitized against racism.[601]

Keulen stated that this was an unacceptable and stupid example of how prejudices can lead to absurd results, in the sense of having open job positions, while at the same time people are desperately looking for jobs without finding any. He did not believe in the 'customer argument' as a normal customer wants to have his door installed as soon as possible and that an employer, who has more than enough work, would not refuse applicants, if he is in need of a workforce.[602] Vandenbroucke stated that this constituted a flagrant violation of the anti-racism legislation and would also violate the formal commitments of employers to not engage in discriminatory behaviour.[603] Also the Centre felt the need to make its position in the press clear: if one of the refused applicants complained to the police, Feryn could have been criminally prosecuted on the basis of the anti-racism legislation. The company would have no legal leg to stand on as it cannot refuse applicants simply on the basis that the customers do not want them. However, at the same time, the Centre pointed out that most importantly, employers must be convinced so as to not yield to their customers' discriminatory preferences.[604]

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[601] "Vlaamse regering boos op discriminerend bedrijf" ("Flemish Government is angry with discriminatory business"), *De Standaard* [Belgium] 28/04/2005, available at: http://www.standaard.be/artikel/detail.aspx?artikelid=DMF28042005_036.

[602] "Absurdistan in Londerzeel"', *De Standaard* [Belgium] 29/04/2005, available at: http://www.standaard.be/artikel/detail.aspx?artikelid=GL6EG28T .

[603] "Vlaamse regering boos op discriminerend bedrijf" ("Flemish Government is angry with discriminatory business"), *De Standaard* [Belgium] 28/04/2005, available at: http://www.standaard.be/artikel/detail.aspx?artikelid=DMF28042005_036.

[604] "Klanten hoeven geen Marokkanen" ("Customers do not want Moroccans"), *De Standaard* [Belgium] 28/04/2005, available at: http://www.standaard.be/artikel/detail.aspx?artikelid=G2VEEP1S .

In the evening of the same day, the younger Feryn gave an interview on Belgian television, saying the following:

> *[W]e have many of our representatives visiting customers … Everyone is installing alarm systems and these days everyone is obviously very scared. It is not just immigrants who break in. I won't say that, I'm not a racist. Belgians break into people's houses just as much. But people are obviously scared. So people often say: "no immigrants". … I must comply with my customers' requirements. If you say "I want a particular product or I want it like this and like that", and I say "I'm not doing it, I'll send these people", then you say "I don't need that door." Then I'm putting myself out of business. We must meet the customers' requirements. This isn't my problem. I didn't create this problem in Belgium. I want the firm to do well and I want us to achieve our turnover at the end of the year, and how do I do that? I must do it the way the customer wants it done!*[605]

4.1. THE VIEW OF THE APPLICANT

The Belgian Centre for equal opportunities and combating racism was the applicant in the proceedings against Feryn NV. On the basis of the interview with the director of the Centre,[606] this part will firstly set out the Centre's general approach regarding race discrimination as well as its handling of complaints (**section 4.1.1**.). After examining then the specific handling of the *Feryn* case in the pre-litigation phase (**section 4.1.2.**), the decision to eventually initiate a legal action against Feryn and its planning will be illuminated, in addition, on the basis of the interview with the Centre's lawyer (**section 4.1.3**).

4.1.1. THE GENERAL APPROACH OF THE CENTRE

As described by the director of the Centre, the Centre envisages a dual approach regarding discrimination, i.e., on the one hand, the fight against discrimination, and, on the other hand, the promotion of diversity:

> *We always say, it is to fight discrimination and to promote the respect for diversity […] with the hope of course that the more you do on the promotional side, the less you have to do on the repressive side, of course. If people are really convinced of the value of diversity, well, maybe they will no longer discriminate. But it's the two sides of the same coin, [as] we quite often call it. […] Here in our house also, we have the department dealing with the discriminations and the department*

[605] Translation provided by the opinion of Advocate General Maduro in Case C-54/07 *Feryn*, ECLI:EU:C:2008:155, para. 4.
[606] The views and evaluations expressed by the director of the Centre will be considered constitutive for those of the Centre in the *Feryn* case.

> *doing training, information, sensitization, publication and so on … So, we have the two working together of course on a number of issues.*[607]

The dual approach of the Centre is also reflected in its handling of complaints by individuals. Once the Centre has been approached by an alleged victim of discrimination, it will contact the other party in order to hear their views on what happened. If the Centre considers that the allegation is not ill-founded, it will first seek to encourage an amicable settlement of the dispute by ensuring that measures will be taken in order to avoid a continuation or repetition of the discrimination. In this regard, the Centre relies on soft policy mechanisms which have been developed by or in collaboration with the social partners. If there is no willingness to change the practice or the discrimination is more severe, the Centre will require the payment of compensation to the victim on a statutory determined lump sum basis from the perpetrator. If the mediation fails, the Centre will consider taking legal action. During the mediation, the possibility to initiate legal proceedings is used as a "*stick behind the door*":

> *Thanks to the fact that we can start legal proceedings, […] people want to negotiate with us. If you're discriminating and I come to see you and I say, you were discriminating and I want you to correct your practice etc. If I cannot start legal proceedings, you will tell me: "Who are you? Why should I talk with you? I don't want to lose any time with you. Come on! Shut up!" But it is thanks to this stick behind the door that we can have solutions and a number of solutions without taking the stick from behind the door.*[608]

The director stressed that the Centre is independent in choosing its cases:

> *We are independent to take up a case or not to take up a case. We can decide not to take up a case. Nobody has the right, in a certain way, an absolute right to say: and you will deal with my case. Of course, we as a public service, we should explain why we do not take up a case […] if we want to take up a case, nobody could have said to us, oh that Feryn, no, you don't deal with that, drop it. So it is quite important to have that independence and indeed, the financing to start that kind of legal proceedings.*[609]

While complaints are generally received from individual persons, in deciding which cases the Centre will deal with, the potential wider effects are of crucial importance:

> *We can start a legal proceeding but in a certain way we do it in our own name. And as a matter of principle, we say to the victim, if you want a lawyer, you take a lawyer. But the lawyer of the Centre, is the lawyer of the Centre. We are defending*

[607] Interview with the director of the Centre for equal opportunities and combating racism (applicant), 18 December 2012.
[608] Interview with the director of the Centre.
[609] Interview with the director of the Centre.

> *the public interest. For example, if you want a five million fine to the company or whatever, that's your business, that is not our business.*
>
> *Private damages, if it is above what has been foreseen [by the statutory lump sum], we say, that is up to you. To be honest, if you claim damages, you'll have money from the damages, then you can pay a lawyer. We should not be there for your individual interest. That is always our idea that in every case, we are there to defend the public interest. The public interest can be served through an individual case. When a blind person is not allowed in a restaurant because of his or her dog, it is in the public interest of all people with assistant dogs to be allowed in a restaurant and this is what the legislation is about. So, we started a case on that on an individual case with an individual person but in a certain way, yes, it is for the person but it is for more than the person. We are not private lawyers. If you want a private lawyer, fine, go for a private lawyer. We are not there to serve only a very private interest. We are a public service, financed by the authorities, by the public. So always in a case, we have the case in mind but the public service in the back, in the back of our head. Also in the way that for example, we can give a lot of publicity to a negotiated solution to make sure that this is a lesson for all the others that maybe ... could do the same.*[610]

To sum up, the Centre enjoys discretion in choosing its cases and in deciding how it will deal with a conflict. It does not act as an agent for the individual, but pursues primarily the public interest, also when dealing with complaints. The Centre uses limited public resources, and in the light of the good management of the tax-payers' money, it considers itself obliged to choose its cases strategically. Indeed, the Centre is encouraged to pursue legal proceedings, which have a principal function and in which it has good chances of success. The public interest and the wider effect that a case might have are the factors that determine how the Centre reacts to a particular infringement. Losing a case could send out a negative message to society and weaken the position of the Centre in its subsequent negotiations. The legal mandate accorded to the Centre makes it a powerful counterpart during negotiations. There might be alleged infringers which accept the conditions required by the Centre or pay the lump sum, even in situations where it may be difficult to prove that discrimination has actually occurred in judicial proceedings, simply to avoid taking the case to court.[611] As it will be shown in the following parts, the success of the *Feryn* case actually strengthened the position of the Centre further.

4.1.2. THE HANDLING OF THE *FERYN* CASE

The director of the Centre found out about the statements made by the younger Feryn by

[610] Interview with the director of the Centre.
[611] Interview with the director of the Centre.

reading the newspapers on 28 April 2005. The controversial and sensitive nature of the *Feryn* case and its handling by the Centre, which both provoked divided opinions in society, was reflected in the following statement by the Centre's director:

> *So to be very clear, people say sometimes, why did you go after Feryn? I never went after Feryn, but I read that in the newspaper as everybody did that day in Belgium. So, I didn't start the case, if you like. Even the journalist in a certain way did not start the case. He simply called to say, but what's happening, do you really find nobody to come to work with you. And he got that answer that he didn't expect at all. So, in a certain way, the initiative was with the company Feryn, and not with ... you can blame the journalist, you can blame me, you can blame everybody.*[612]

In view of the media and political attention caused by Feryn's statements, the interview with the director of the Centre revealed that there was, to some extent, insecurity about how to publicly react to this issue. Eventually, the Centre decided that it had to act and it was announced in a newspaper article on the 29 April that the Centre contacted Feryn to organize a meeting, preferably in the presence of a UNIZO representative.[613] Indeed, on that day, the Centre contacted Feryn in order to inform them that their position was considered to be unacceptable and illegal, and invited Feryn to find a negotiated solution to the issue. This decision by the Centre was not appreciated by the different NGOs representing ethnic and cultural minorities, who would have preferred the Centre to take immediate legal action.[614] However, the Centre pursued its general approach by primarily aiming to find a negotiated solution, in order to achieve a change in the perpetrator's attitude:

> *Why did we decide to start a negotiation? Because one, it's what we always propose, second, I will be very clear on that [...] I did not only want to win a legal fight but in a certain way the minds and the hearts also of employers. [...] We, as a public service, as an equality body, we are a public service, we have to act in the interest of the society as a whole. And in a certain way, I said to myself, if in this case, the employer, Feryn, [...] would accept to say, I was wrong, I made a mistake, I was wrong, that was not ok and I will change my practice from now on, that is a much stronger signal than being convicted. Somebody who is convicted can still say: and I was right. Not because you are convicted, that you have to say: I was wrong. [...] The ambition, in a certain way, was to educate the Belgian public to say, things can go wrong, people can make mistakes, but they can*

[612] Interview with the director of the Centre.
[613] Interview with the director of the Centre; There was also a complaint against Feryn before the Centre by the independent social-democratic youth organization in the Flemish Region (Animo): "Animo dient klacht in tegen Feryn (update)" ("Animo files complaint against Feryn"), *De Standaard* [Belgium] 29/04/2005, available at: http://www.standaard.be/artikel/detail.aspx?artikelid=DMF29042005_014 .
[614] "De zaak-Feryn is een non-event" ("The case Feryn is a non-event"), *De Standaard* [Belgium] 03/05/2005, available at: http://www.standaard.be/artikel/detail.aspx?artikelid=G3NEICN9 .

> *correct it. And we offer the possibility to correct it, which makes it, in my opinion, it didn't work out in the end, but which makes it much more stronger to make your point and say, it is unacceptable, it is against the law. And the point is not, it is against the law, so you should be punished. No! You should behave in accordance with the law. And it is not, I am punished and then it is over. No! The aim of the law is not to punish, the aim of the law is to set a standard and that everybody has to live up to that standard. And through negotiation you make that standard even, in my opinion, even stronger in a certain way.*[615]

Consequently, it became clear that the ambition of the Centre was to achieve reform in the mindsets of Belgian employers and society. However, according to the Centre, this aim could not be achieved through the imposition of sanctions. Instead, court proceedings would have the effect of placing the other party into a defensive position. In general, the Centre aims to educate the Belgian society and convince it of the value of diversity. Regarding the situation of immigrants in Belgium and the particular attitude in Flanders, where the extreme right-wing parties secured 52% of the votes in the election to the Flemish parliament in 2004, he pointed out:

> *The history behind this is, of course, that since 1964 we have had in this country, as a matter of fact, migration agreements with mostly Morocco and Turkey and that brought in quite some people from Morocco and Turkey, twice as much from Morocco as from Turkey […] with a population today of Moroccan and Turkish origin of around 500 000 to 600 000 in Belgium. […] In Belgium, the word migrant doesn't mean somebody from the United States, Japan or whatever, it is people from Moroccan and Turkish origin. They are the aliens, the migrants. […] There is lot of negativity about people of Moroccan and Turkish origin. So, in the mind of the people, there is a whole set of ideas on, and the very reason for him [the younger Feryn] saying that his clients didn't want is because there is a saying that people from Morocco do steal. And if they install a garage door in your house, they see your house, they know how to enter the house and, of course, they will come the next night to steal your house, to steal everything.*
>
> *In a certain way, I felt very well that in this society, a number, quite a huge number of people in Flanders said, of course, we don't want those Moroccans, and we are very happy that someone at least stated in a very clear way: I don't want them. So, in a certain way, we were there on a fragile [basis], because even if you have the law on your side, it is more interesting to have the public opinion also on your side.*[616]

There was also the fear of risking the co-operation with UNIZO, which has a clear preference for soft measures in terms of information and training, instead of imposing legal obligations on employers:

[615] Interview with the director of the Centre.
[616] Interview with the director of the Centre.

> *It was also because the reaction of, as I said, no, no Feryn is right, said the organisation of employers. How to cope with that? If for the coming years, I had that organisation against me or against the Centre, against equality, we could have lost a lot. And in a certain way it was, how to keep people on board.*[617]

The meeting between the Centre and one of the directors of Feryn (this time the older Feryn) in the presence of a UNIZO representative took place on 27 May 2005. The director of the Centre had clear intentions about the outcome of the meeting:

> *I prepared, to be honest, a press communiqué, when I went to negotiation […] I said, look, I will be very clear, I would like to leave this room with this press communiqué send out by you and by me.*
>
> *So, to show in a certain way, no, I am not here to condemn you and to start legal proceedings and whatever, whatever… this is what I want. You agree or you disagree. If you disagree, that is your decision, then there will be another communiqué of course and that will be one, that I didn't prepare that moment. […] I didn't say, you have option A and option B. Here are the two options, please … no … no… I said, no, we go for the option A.*[618]

The statements clarify that the content of the press release, i.e. also that of the 'negotiated' solution, was not a compromise, but rather an 'imposition' by the Centre. As reported in the interview with the director of the Centre, the older Feryn, who was at first hesitant to agree as he did not want any more communications in the public, eventually agreed and the same afternoon, the press communication was published. The press communication stated that Feryn acknowledged that the statements made were at least unfortunate and that it was not his intention to speak negatively about a group of persons simply because of their origin. In case the statements seemed offensive, he apologized. Moreover, regarding upcoming vacancies, he promised that there will be no exclusion of qualified candidates simply because of their origin. He announced that Feryn had already taken steps and would do everything necessary in the future to guarantee equal opportunities to each prospective candidate. To this end, the company agreed to receive support in human resources matters from the competent authorities and to actively participate in the programs established by UNIZO on this matter.[619]

In concrete terms, Feryn was eventually required to notify the regional labour market office of Flanders (*Vlaamse Dienst voor Arbeidsbemiddeling*, hereafter 'VDAB') about all future

[617] Interview with the director of the Centre.
[618] Interview with the director of the Centre.
[619] "L'entreprise Feryn opte pour l'égalité des chances", [Belgium] 27/05/2005, available at : http://www.diversite.be/index.php?action=artikel_detail&artikel=158 .

vacancies. Secondly, Feryn needed to set up a diversity plan. Diversity plans are an element of the Flemish integration policy for disadvantaged groups in the labour market, including immigrants. The objective of these plans is to achieve employment equality and diversity focusing on the recruitment, progression, training and retention of members of target groups (e.g. migrant workers, disabled persons and elderly workers). The aim is to stimulate concrete actions by private and public organisations in order to gradually raise the employment rate of those disadvantaged groups. In order implement their diversity plans, the organisations are assisted by diversity consultants. Moreover, subsidies are available to cover up to 2/3 of the plan-related costs, up to a maximum of 10 000 Euro. The diversity plans can comprise a range of measures including training and diversity programs. For the plan to be approved and consequently to receive the subsidy and support by the diversity consultants, it is evaluated by a regional socio-economic commission (*Sociaal-economische raad van de regio*, hereafter 'SERR'), consisting of representatives from the employer organizations and trade unions.[620]

However, Feryn did not comply with the requirements of the settlement. The company did not notify the VDAB about new vacancies and the diversity plan was refused by the SERR as being insufficient and too vague. No real effort was made in the proposal for a plan and it could, therefore, not sufficiently guarantee a real result. As reported by the director of the Centre further:

> *Now what happened is that indeed, months later, it was November, December, January, I received the information that the draft diversity plan was simply refused because it was so bad. With no engagement at all. The training was planned for the first weeks of January except that one of the two, it was father and son, as a matter of fact, who were in charge of the company, and as a matter of fact, technically they were two companies too, but never mind and the owner's son was driving Paris Dakar at that moment, the race with race cars and so he wants to have that planning …. that training on diversity at the very moment that he was not in the company, while he was having fun with race cars. Which for me was unacceptable because he was part of the problem. It's too easy to say, well, the diversity, it's problem for the employees and not for the employer. Because he was foolish …So, as matter of fact, we said, this is not what it is. And so, we had to recognize that our attempt to get a negotiated solution failed.*[621]

Feryn refused to amend its draft diversity plan or to submit a new proposal. Instead, the company decided to refuse further collaboration and, on 31 December 2005, published in the

[620] OECD Study, "Jobs for Immigrants (Vol. 2): Labour Market Integration in Belgium, France, the Netherlands and Portugal", (November, 2008), pp. 61 ff.
[621] Interview with the director of the Centre.

newspaper De Morgen an article entitled "Feryn seeks still fitters. Also foreigners are welcome".[622]

Regarding Feryn's decision to refuse setting up a diversity plan, the director of the Centre pointed out in an interview published in De Standaard:

> *When the first entry-level plan for diversity was rejected, the company got another chance. But it did not take it, partly on the grounds that it was too expensive. It would involve a budget of 12 500 Euro. That's not entirely true, because the 12 500 include the labour costs, which must be paid differently. To say that it is not economically justifiable, is not honest. Twelve hundred other companies in Flanders do it. Such an entry-level plan for diversity is not more than the base of the base. It requires a training of two days for the framework, and a day for the floor personnel, adaptable to the needs of the company. Even in this simple plan, Feryn did not do enough. The SERR considered the plan to be insufficient. It's not even us that have to give the training programs, but specialized persons and institutions who take sufficient account of the economic context of the company.*[623]

After the refusal to cooperate further, the Centre decided to take Feryn to court. The director of the Centre reached a special agreement with the newspaper De Standaard in order to ensure that his views on the issue would be published on the first page:[624]

> *I used the same newspaper to announce it on a Monday morning, to have my statement on the first page of the journal and not his statement at the same time. Because I wanted to win the communication fight. And I wanted my story about what was here at stake and, in a certain way, I negotiated with the newspaper and the journalist, to say, I give you first-hand information, but then it is my story and that's it and the following day, you can have his story, no problem. But if you do not agree, I will send the press communiqué to everybody. So, for him, it was of course quite interesting to have the hot shot, the only one, on the front page etc. etc. Good for the journalist, good for the newspaper. But I wanted my message to say, this is why we are doing this. He refused to make the diversity plan. We agreed to do that. He didn't. So, we go back to it.* [625]

The statements confirm the huge public attention which was generated from the moment that the first newspaper article on the 27 April 2005 was published, and which contributed to the Centre's decision to act upon Feryn's statements. Indeed, the decision to eventually take legal

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[622] "Kantelpoortenbedrijf Feryn zoekt nog altijd monteurs. Ook allochtonen zijn welkom" ("Feryn seeks still fitters. Also foreigners are welcome"), [Belgium] 31/12/2005, available at: http://www.demorgen.be/plus/kantelpoortenbedrijf-feryn-zoekt-nog-altijd-monteurs-ook-allochtonen-zijn-welkom-b-1412181700900/ .

[623] "Feryn heeft de kans niet gegrepen" ("Feryn has not seized the opportunity"), [Belgium] 21/02/2006, available at: http://www.standaard.be/cnt/g1voevdl.

[624] "Centrum naar rechter tegen Feryn" ("Centre takes legal action against Feryn") [Belgium] 20/02/2006, available at: http://www.standaard.be/cnt/gmfof0jf.

[625] Interview with the director of the Centre.

action against Feryn caused turmoil in the media.[626] The Centre, the Belgian public body who has the role of promoting diversity in the country, was put in the spotlight and felt compelled to take action. The Centre did so by trying to find a settlement with the aim of changing the discriminator's mentality. However, this failed in the case of Feryn. And in view of all the public attention, the Centre needed to show that it had 'teeth', otherwise it could have lost 'the stick behind the door' in all its subsequent negotiations with employers.[627]

4.1.3. The decision to take legal action against Feryn

The Centre decided to consult an external lawyer, whom was specialized in Belgian employment and anti-discrimination law to proceed with the legal action against Feryn. According to its director, the Centre decided to use an external lawyer as they were unsure whether to file a criminal complaint under the Anti-Racism Law of July 1981 or to initiate civil law proceedings under the Anti-Discrimination Law of February 2003, and also because they doubted the legal status of the policy commitments that were made by Feryn in the joint press release.[628] As confirmed during the interview, before being contacted by the Centre, the lawyer gave an opinion on the issue in a newspaper article entitled "Question of the week: To deny someone is to discriminate him?". He stated there that if the matter were to go to court, Feryn would – legally – have no chance of winning, as he was in breach of a basic rule of the anti-racism and anti-discrimination legislation by stating so openly that he refused to employ Moroccans. He must disregard the discriminatory preferences of his customers. If Feryn were to be condemned, the refused applicants could require compensation for the amount of a 3-6-month salary.[629]

However, the lawyer reported during the interview that once he was approached by the Centre, the case turned out to be more difficult as there was no identifiable complainant. Moreover, he presumed that Feryn's statements happened without bad intent and that Feryn did not even realize that he was crossing a line when he made the comments. Consequently,

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[626] UNIZO criticized the decision of the Centre, see "Dit is negatief signaal" ("This is a negative signal") [Belgium] 21/02/2006, available at: http://www.standaard.be/cnt/gp4ogmo8. For the positive view of the Flemish Vice-Minister-President/Flemish Minister for Work, Education and Training from the Different Socialist Party, see "Minister begrijpt klacht Centrum" ("Minister welcomes legal action by the Centre") [Belgium] 21/02/2006, available at: http://www.standaard.be/cnt/gp4ogml1.

[627] Interview with the director of the Centre.

[628] Interview with the director of the Centre.

[629] "VRAAG VAN DE WEEK. Is iemand weigeren hem discrimineren?" ("Question of the week: To deny someone is to discriminate him?"), *De Standaard* [Belgium] 30/04/2005, available at: http://www.standaard.be/artikel/detail.aspx?artikelid=G33EH1U1 .

in view of the presumption of innocence and the need to establish a motive under criminal proceedings, the lawyer recommended initiating civil law proceedings. Indeed, he pointed out that mere discrimination was never established before the Belgian criminal courts, but only cases of 'racism' were successful.[630] The Centre was also convinced by the decision to initiate civil law proceedings, although this was new terrain for the Centre, as they were used to filing criminal complaints:

> *Criminal law is, well, if I use criminal law against you, I call you a criminal of course […] How people do understand it, it's quite heavy. The disadvantage is that you have to show the bad intention of the other person, because a criminal act is always, has to be on purpose in some way. So you have to go into the mind of the people and say you were bad intentioned etc. etc. Civil law is more neutral. It's not about the intention, it's about the effect. […] And if I say, I want to hire everybody except people from Morocco, you can expect an effect that people from Moroccan origin will not apply for a function. […] There were a number of other reasons. And so, finally, we said, and I won't hide it, after discussing for hours internally and with our lawyer, we will choose the civil procedure. It was rather new at that moment, it was only introduced in Belgian law in 2003 and there were not that many cases.*
>
> *In employment […] criminal procedure is more or less like a rocket that you launch whereby people felt criminalized in a way that was not easy to accept for themselves and so, not easy to get accepted by the general public. It is kind of an intention process, […], you are a bad person […]. Under civil law, it is, you did something for which you are responsible and of which the effect is not acceptable. And I don't talk about your intention. People ask me, so Feryn is a racist? I said, I couldn't care less, I don't know. I don't want to call him a racist, because racist is about what he is, and I simply don't care about what he is. What I care about is what he does, the measures he takes and it's more neutral, you see. We are talking about the concrete act and not the intention of the person or etc. etc. That is why for a number of reasons that we chose that route, also because you have the shift of burden of proof under civil procedure.*[631]

However, even when it came to the civil law proceedings, the lawyer's assessment from the beginning was that the help of the European Court of Justice would be needed in order to convince the Belgian courts to establish discrimination: "*Because there was no victim, I was convinced that it will be hard to convince the Belgian court to have it established*".[632] However, he could not identify any particular legal hurdle under Belgian law. The reason behind this was that the anti-discrimination legislation was very new at that time and was

[630] Interview with the lawyer of the Centre for equal opportunities and combating racism (applicant), 19 December 2012.
[631] Interview with the director of the Centre.
[632] Interview with the lawyer of the Centre.

very controversial. Moreover, it would take quite some effort and time for a legal system to absorb the anti-discrimination legislation, as most discrimination is institutionalized and takes place unconsciously. Indeed, what was previously accepted practices by employers would now become legally unacceptable. Consequently, it was proposed to the first instance court to make a referral to the Court of Justice of the European Union.[633]

The lawyer briefly summarized the claims of the Centre: firstly, it was argued that there was discrimination because by making that statement, Feryn immediately excluded potential candidates for employment. It was irrelevant that Feryn never rejected an applicant because he stated formally that if a Moroccan person applied, Feryn would not hire him. The substantive scope of the EU Race Equality Directive covers not only the decision to hire someone, but the whole recruitment process, including the sending of invitations to potential candidates for open job positions. Feryn made a distinction in that regard as he did not send an invitation to people from Morocco. Secondly, it was claimed that Feryn's discriminatory practice was still continuing. [634]

4.2. THE VIEW OF THE DEFENDANT

Since Feryn did not respond to several invitations for an interview, the reconstruction of the defendant's views on the conflict and development of the case is limited to the interview conducted with Feryn's lawyer. Firstly, the lawyer's perception about the circumstances that led to the public statements by Feryn will be determined (**section 4.2.1.**). Then, Feryn's reasons for refusing the implementation of a diversity plan (**section 4.2.2.**) and his lawyer's view on the general role of the Centre and its decision to take legal action against Feryn will be examined (**section 4.2.3**.).

4.2.1. THE DEFENDANT'S FACTUAL ACCOUNT

Feryn's lawyer referred several times to the "*innocent*" nature of the facts of the case. Moreover, he pointed out that Feryn became an "*easy victim*", subject to many unfortunate circumstances:

> *I always say, if it was somebody else, if it was a trained lawyer, who had to explain the same problem, he would not have used the same words, the same way*

[633] Interview with the lawyer of the Centre.
[634] Interview with the lawyer of the Centre

> *of explaining the problem. There is no problem at all about making statements about problems in our society. But here Feryn had the problem that because he has not had that training, because he is a simple worker, no university degree, for him, it's working, that is his life. He gave the impression that he would do what clients … and on that basis what he would also want…but that is already a second presumption that he would refuse Moroccan people […] Once again, it proves that it depends. I think it is very easy to choose your victims when you take people that are not well-educated. You can always make people say something that is discriminatory. That is extremely easy. And you don't have to be a genius to arrive at that result.*[635]

According to the lawyer, the telephone conversation with the journalist of De Standaard went the following way:

> *[The journalist] said that it is a bit bizarre. You are looking for personnel and there is a high degree of unemployment in that region, why can't you find the appropriate personnel for installing these doors? And the son, […] he said, yes, it is a problem and he explained that, we need flexible people and so on and so on. And at the end of that telephone conversation there was a rather bizarre question: Have you ever tried to find…there are a lot of unemployed Moroccan people in the region. Have you ever tried these people to do that? And the son of Feryn explained once again the problem is not about what the nationality or the origin of the person is, I need somebody who is capable of installing the electricity lines, who can also install the doors, who is capable to explain himself in Dutch and so on and so on. And as far as I have experience in that field, it is extremely difficult to find … it is already extremely difficult to find this type of personnel within our French community. But for me there is not a problem. If they can do the job, they can start with me. Maybe there is another problem that, because sometimes our clients say that, you can send me someone, but certainly not a Moroccan person or … it is the client that says I have a problem, when you send me somebody because there is, of course, a justified fear that when it will be a Nigerian or Moroccan person that, how should I say, that in one way or another, there could be a danger for their security. So, he said something completely innocent. And at that moment the journalist said, the client refused to accept that? And then, maybe after a little bit of joking, he said that this is always the problem, that is not my problem, but the client says I only want a Belgian fitter and not a Moroccan fitter, then I have to do what the client asks. It was in a very … That is what the son of Feryn explained to me, it was in a very friendly way.*[636]

After the "*huge scandal*" in the media resulting from the newspaper article, Flemish television contacted Feryn for an interview conducted by the most "*indulgent reporter*":

> *And then the father said to his son, I do not know what you said to the journalist of the De Standaard newspaper, in any case, I will now reply and I will say, explain to the VRT that it was certainly not our purpose, we never said that, the only thing*

[635] Interview with the lawyer of Feryn NV (defendant), 20 December 2012.
[636] Interview with the lawyer of Feryn.

> *we said is that the problem is that the client has some difficulties with foreign people. But in the end, it was also the son that went to the VRT, the Flemish television, to explain his point of view. But then you have to know, the person there, that made the interview, is known by all politicians, it is maybe the most severe and the most, how should I say, indulgent reporter that they have at the VRT. A lot of politicians simply refuse to talk to her because they say, I need a little respect when you want to interview me and the way you put your questions in public, I can't live with that, so I refuse to get in contact with you. But here, she had, that is my personal view, really, if I may say so, an innocent person. When you are well-trained as a journalist, you can, how should I say, really incite people to give the answer that you want. And when you hear that interview and when you see that, then you see that she is really pushing to use the word 'I don't want …' or something like that '... foreigners in my company.' He never said that.*[637]

Moreover, while the director of the Centre pointed out that the skills needed to fulfil the job were very basic, as there was on the job training, Feryn's lawyer referred to the requiring skills as the reason why Feryn could not find any fitters:

> *People need to know something about electricity because it is in most cases an electrical door, something about mechanical, they have to speak in general in Belgium, Dutch and French, sometimes also a little bit English, they have to be prepared to work during the weekend, where there is an emergency, or where there is a problem with the door. So, the profile of this fitters is, maybe they must not be extremely highly educated, they do not need of course a university degree, but they must be very flexible and also have the capacity to do that job. And that was mainly the problem.*[638]

4.2.2. PROBLEMS RELATED TO THE DIVERSITY PLAN

Feryn's lawyer reproduced the company's reasons for refusing to participate in the diversity plan. Despite the fact that it was firstly unclear how much the implementation of the diversity plan would cost, after this was determined, Feryn argued that setting up the diversity plan would be too expensive and would disturb the organization of his work, particular considering the unavailability of its staff for several days during which they would have to attend the diversity training.[639] The cost of setting up an action plan was estimated to be 12 500 Euro, while the subsidy which could have been be received by Feryn amounted only to 2

[637] Interview with the lawyer of Feryn.
[638] Interview with the lawyer of Feryn.
[639] Interview with the lawyer of Feryn.

500 Euro.[640] As reported by Feryn's lawyer, the company already had problems finding fitters and if these fitters had to take leave or if Feryn had to pay them for one week during which they had to attend the training, that would be impossible as the customers would be waiting for their service. Moreover, according to the lawyer, Feryn complained that the selection of the person, who would conduct the diversity training with its staff, was not conducted in an open process with competition, but would have been allegedly chosen by the Centre.[641]

4.2.3. THE DECISION OF THE CENTRE TO TAKE LEGAL ACTION

Regarding the general role of the Centre, described as a "*semi-public*" institution, the lawyer pointed out:

> *The Centre was officially created by parliament because they wanted, in a certain way, a think-tank about the problems that have to do with discrimination […] But most commentators say, that it was also a way, an abdication of power because they said it is so delicate and maybe some representatives of the nation will officially declare that they do not discriminate while in reality that is not their way of thinking […]. But little by little, because the composition of the members of that Centre, all the political parties could freely choose their representatives and it is normal that every political party, except the extreme right wing, they refused to do that, because by definition some say they are discriminatory in their program, so they refused to send somebody, but all the other, they nearly always send, if I may say so, people that are in favour of an extreme severe attitude towards every person that in one way or another has an opinion that is not, how should I say, in conformity with the standards of discrimination. It was not a think-tank with a conflict of ideas. It has really become a public prosecutor in every case where discrimination is involved. But this is a political explanation. It is officially, it is a think-tank that helps parliament and the government to take good decisions in that field.*[642]

The lawyer compared the operations of the Centre to a public prosecutor in criminal proceedings. However, it was unusual that Feryn's lawyer denied the official status of the Centre as an enforcement body in criminal and civil proceedings. This might be an expression of his resistance towards the empowerment of the Centre to act as an enforcement

[640] Order of the President of the Labour Court of Brussels (Voorzitter van de arbeidsrechtbank te Brussel), 26 June 2006.
[641] Interview with the lawyer of Feryn.
[642] Interview with the lawyer of Feryn.

body beyond its former mere consultative function for parliament (see on this development **section 3.1.**).

And regarding the decision of the Centre to initiate a legal action against Feryn:

> *It was extremely difficult to understand the reaction and in any case, for me, in this case, the most surprising thing is that when we see what sometimes happens, and then there is no reaction or a rather weak reaction of the Centre, why they took this case as, let's say, a good example that they do their job very well and that they bring cases before court because the facts of the case are so, if I may say, innocent. And in a certain way, of course that is my appreciation, there is really a danger for the free expression of ideas and thoughts on the subject when every time somebody says even that there is a problem that that is enough to bring a case before court and say if you simply explain that there is a problem, that is enough because explaining the problem means that you have a problem in solving that problem and so you act in a discriminatory way.*[643]

As will be illustrated in the next section, the tension with the freedom of expression played an important role in the considerations of the first instance labour court.

5. THE PROCEEDINGS BEFORE THE BELGIAN COURTS

Since Feryn refused to voluntarily change its practice, the Centre initiated an action for a prohibitory injunction against Feryn before the Belgian labour courts on the basis of the Law of 25 February 2003 (hereafter "the Law against discrimination"). In particular, the Centre sought a declaration that Feryn's recruitment policy was directly discriminatory in April 2005, and a finding that this discriminatory policy was still continuing, or, in any event, that Feryn had not demonstrated that this policy was adapted or amended. Alternatively, the Centre claimed that Feryn's recruitment policy constituted indirect discrimination.

As a remedy, the Centre asked the court to order Feryn to stop its discriminatory recruitment policy, to stop rejecting the development and implementation of a diversity plan (which was one of the commitments made by Feryn to redress its discriminatory policy in April 2005), and to publish the court's decision in several newspapers as well as on the website of the company. In case of doubt, the Centre asked to submit a reference for a preliminary ruling to the Court of Justice of the European Union.[644]

[643] Interview with the lawyer of Feryn.
[644] Order of the President of the Labour Court of Brussels (Voorzitter van de arbeidsrechtbank te Brussel), 26 June 2006.

The Centre based its arguments on various pieces of evidence. Firstly, regarding the claim that Feryn applied a discriminatory recruitment policy in April 2005, the Centre referred to the newspaper article which was published on 28 April 2005 in De Standaard and the statements made on TV on the same day. Secondly, in order to show that Feryn continued its discriminatory recruitment policy, the Centre referred to: a) the declarations by Feryn in April 2005, b) the fact that Feryn did not implement the measures that it had agreed with the Centre to redress the discrimination of April 2005 (i.e. notifying the VDAB about new vacancies; the preparation and implementation of a diversity plan), c) the fact that a sister company of Feryn[645] recruited only native fitters, and d) the fact that the recruitment policy of Feryn remained opaque.[646]

This part will examine the reasoning of the Labour Court of first instance (**section 5.1.**) and the decision for a preliminary reference to the CJEU by the Higher Labour Court under Article 267 TFEU (**section 5.2.**). Following this, the views of the parties, that is the Centre and Feryn, as to the proceedings before the national courts will be set out (**section 5.3.**).

5.1. THE ORDER OF THE LABOUR COURT OF BRUSSELS

On 26 June 2006, the first instance labour court held that the public statements by Feryn did not constitute acts of discrimination, but were evidence of 'potential' discrimination, in that they indicated that persons of a certain ethnic origin would not be recruited by Feryn in the event they should decide to apply. It could not be demonstrated that Feryn had ever actually turned down a job application on grounds of ethnic origin. For those reasons, the remedies sought by the Centre were denied by the court. This section will firstly set out the reasoning in the labour court's order (**section 5.1.1.**). Subsequently, on the basis of the interview with the judge of this court, the main struggles that the court faced in deciding this case will be reconstructed (**section 5.1.2.**).

5.1.1. THE REASONING IN THE LABOUR COURT'S ORDER

Firstly, the Labour Court (*Arbeidsrechtbank te Brussels*) pointed out that statements given to

[645] The sister company of Feryn NV imports doors form a German manufacturer.
[646] Order of the President of the Labour Court of Brussels (Voorzitter van de arbeidsrechtbank te Brussel), 26 June 2006.

the press or the account of statements in the press generally fell under the principles of freedom of expression and freedom of the press, which constitute one pillar of a democratic society. These principles are not only applicable to information and ideas that are positively received but also to those which shock, disturb or hurt the state or any other group of the population. Pluralism, tolerance and openness are necessary elements of a democratic society.[647] Article 19 of the Belgian Constitution and Article 10 ECHR protect, in particular, the freedom of expression. However, the court recognized that this freedom is not absolute, but can be subject to certain restrictions, provided they are in accordance with the law and necessary in order to protect the rights of others. In this regard, the court noted that Article 19(1) of the Law against discrimination constitutes one of those limitations. Article 19(1) provides that at the request of the victim of discrimination or of one of the collective entities entitled to initiate an action, the president of the court of first instance or, depending on the nature of the act, the president of the labour court or the commercial court, shall rule on the existence of an 'act', which violates this law, and shall order the cessation thereof. [648]

According to the court, in light of the wording of Article 19(1), it was not sufficient to base the discrimination merely on the public statements given by Feryn, but rather the applicant needs to show that there was also a discriminatory 'act'. In that regard, no proof or presumption could be established that a person had actually applied for a job and had not been employed because of their ethnic origin. A newspaper article is not sufficient to constitute any evidence or raise any presumption. The court found that the statements made by the director of Feryn on TV merely constituted an indication of a potential discrimination, meaning that if a foreigner would have applied, he would have had no chance of being recruited.[649]

The court stated, however, that in line with Article 2(2)(a) of the Race Equality Directive, the definition of direct discrimination also includes potential discrimination. The Law against discrimination must be interpreted in compliance with the Directive, and, consequently, to

[647] The court referred in that regard to the following case-law of the European Court of Human Rights: *Handyside v United Kingdom*, 7 December 1976, 5493/72; *Lehideux and Isorni v France*, 23 September 1998, 55/1997/839/1045, 24662/94; *Özturk v. Turkey*, 28 September 1999, 22479/93; *Müslüm Gündüz v. Turkey*, 4 December 2003, 35071/97. The national court referred, in that regard, also to the decision of the Belgian Constitutional Court (discussed above in **section 3.2.1.**): Grondwettelijk Hof van België, 6 October 2004, Judgment Nr. 157/2004, paras. B.44.
[648] Order of the President of the Labour Court of Brussels, paras. 2.2, 2.3.
[649] Order of the President of the Labour Court of Brussels, paras. 2.3, 2.4.

also cover potential discrimination. Accordingly, the court pointed out that Feryn's statements constituted not merely expressions of opinion, but had a direct and immediate impact on others as an 'act'. Serving the discriminatory preferences of the customers did not constitute a legitimate objective to justify such discrimination. It held that the courts were created to apply the law and not to let any moral views prevail, even if they are shared by a large part of the population.[650]

As the discrimination by Feryn could be presumed, the defendant then had to prove that there was no discrimination. The court noted that after the discriminatory statements were made, the applicant tried to seek a solution through dialogue and mediation. Consequently, regarding the rebuttal of the presumption, it was necessary to examine whether Feryn acted in a discriminatory manner after the mediation, in order to ascertain whether a prohibitory injunction was still necessary.

After April 2005, Feryn expressly distanced himself from the earlier statements through the joint press release on 27 May 2005 published under the title "Feryn is for equal opportunities" and through the newspaper article published on the 31 of December 2005, entitled "Feryn is still looking for fitters - Also foreigners are welcome". As Feryn's discriminatory practice was established in the media, those subsequent press releases, which were completely opposite, also constituted a sufficient remedy. It would be no longer necessary to fear discrimination since no discriminatory act was found.[651] The fact that the defendant renounced the plans to take part in the diversity plan on financial grounds, to which he was not legally obliged to undertake, did not constitute a discriminatory act or indicate the continuation of a discriminatory recruitment policy. The same applied to the fact that Feryn did not notify the VDAB about new vacancies as this was not legally obligatory and since the defendant did not formally committed himself to it.[652] Consequently, the prohibitory injunction and the publication of the court's decision was rejected, as such a measure would not contribute to the cessation of any discrimination.[653]

5.1.2. The interview with the Judge of the Labour Court

[650] Order of the President of the Labour Court of Brussels, para. 2.4-2.6.
[651] Order of the President of the Labour Court of Brussels, para. 2.7.
[652] Order of the President of the Labour Court of Brussels, para. 2.8.
[653] Order of the President of the Labour Court of Brussels, para. 3.

According to the interview with the judge of the Labour Court, in the *Feryn* case, he faced the problem that the facts in the case were derived from a declaration in the media, which falls under the freedom of speech: "*Can nobody say what they want? Is this a reason to have a claim about discrimination only on the basis of this declarations?"*. [654] While the newspaper article stated that Moroccans applied for the jobs and were rejected by Feryn because they were of foreign origin, Feryn did not agree with how the newspaper reproduced the content of the "*provocative*" telephone call. The judge basically referred to the impossibility to determine what was actually said during the telephone call and that "*if you [i.e. as an interviewee] don't have the possibility to correct some things, the journalist can say what he wants*". [655] More strongly, he stated:

> *I was shocked to get this information by a phone call. This is no basis for a discrimination claim. You need an example of somebody who was rejected.*
>
> *Everybody can answer and not be aware of the consequences, [this is the] reason why I evaluated the discrimination in terms of freedom of speech. A declaration to the media is not a basis for a violation. Otherwise, you can never say anything. There was no evidence that somebody was rejected because of his origin. I found it insufficient.*[656]

The statements which Feryn made on TV were, according to the judge, "not so clear to say that they would never engage somebody from foreign origin. … [Feryn said there was] a difficulty. He did not say that he will never engage foreigners. [There was] no evidence that somebody was rejected".[657]

Moreover, although the national judge recognized in its judgment that 'potential discrimination' fell within the concept of 'direct discrimination' in accordance with the meaning contained in the Race Equality Directive; since the discrimination was proved through the media, he considered that it can be also rebutted through the media: "One declaration in this sense, one in another sense, there is a compensation".[658] Regarding the diversity plan, the judge referred to its voluntary basis and recognized the limited financial possibilities of small enterprises. Asking the judge about the effects of the proceedings, he stated that there would be even "more [of a] right[-wing] movement in Flanders": "I don't

[654] Interview with the judge of the Labour Court of Brussels (*Arbeidsrechtbank te Brussel*), 10 December 2013.
[655] Interview with the judge of the Labour Court of Brussels (*Arbeidsrechtbank te Brussel*).
[656] Interview with the judge of the Labour Court of Brussels (*Arbeidsrechtbank te Brussel*).
[657] Interview with the judge of the Labour Court of Brussels (*Arbeidsrechtbank te Brussel*).
[658] Interview with the judge of the Labour Court of Brussels (*Arbeidsrechtbank te Brussel*).

know if you get a solution if you go radically against the opinions of the people".[659]

To sum up, in addition to the difficulties in applying the legal construction of the burden of proof in accordance with the Race Equality Directive (see on this the next **section 5.2.**), the judge struggled with the evidence of the case, which he considered as being not sufficiently strong enough. Particularly, the evidence was based only on statements made by Feryn in the media, which, despite constituting an opinion and, therefore, falling under the freedom of expression, could lead to doubts regarding their validity.

5.2. THE PRELIMINARY REFERENCE OF THE HIGHER LABOUR COURT OF BRUSSELS

The Centre appealed to the Belgian Higher Labour Court of Brussels (*Arbeidshof te Brussel*). The chamber sitting on the case consisted of a professional judge, one representative from the employer's organization and one representative of the trade unions. The court decided to submit a preliminary reference to the CJEU. The decision for a preliminary reference did not provide for an interpretation of the relevant provisions of the Race Equality Directive. It set out the factual context of the case, the judgment of the first instance labour court, the Centre's reasons for appealing the decision and its questions.

In the interview, the judge of the Higher Labour Court reported that the parties submitted some questions to her, and she took some over and added her own.[660] However, from the reconstruction of the interviews with the parties (**section 5.3.**), it appears probable that the Centre played a role in shaping the questions. The detailed and numerous questions of the court are interwoven with the factual situation of the case, the arguments of the parties and the uncertainties resulting from the judgment of the first instance labour court.[661] Therefore, on the basis of the reconstruction of the case until now, this section aims to give some explanatory indications about the significance of the questions for the national proceedings.

The first two preliminary questions related to the concept of direct discrimination and the substantive scope of application of the Race Equality Directive. The questions related to the judgment of the first instance labour court, which categorized the statements made by Feryn

[659] Interview with the judge of the Labour Court of Brussels (*Arbeidsrechtbank te Brussel*).
[660] Interview with the judge of the of the Higher Labour Court of Brussels (*Arbeidshof te Brussel*), 20 December 2013.
[661] Decision for a reference for a preliminary ruling from the Arbeidshof te Brussel (Belgium), 24 January 2007.

as potential discrimination or presumption of discrimination. In that regard, relating to the concept of "conditions for access to employment" in Article 3(1)(a) of the Race Equality Directive, it appeared that the first instance labour court limited the substantive scope of application to the recruitment decision itself, excluding the recruitment and selection procedure, which preceded the decision, and which would, consequently, not be sanctioned as they give, at most, rise to potential discrimination in the recruitment decision.

> *(1) Is there direct discrimination within the meaning of Article 2(2)(a) of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin where an employer, after putting up a conspicuous job vacancy notice, publicly states:*
>
> *'I must comply with my customers' requirements. If you say "I want that particular product or I want it like this and like that", and I say "I'm not doing it, I'll send those people", then you say "I don't need that door". Then I'm putting myself out of business. We must meet the customers' requirements. This isn't my problem. I didn't create this problem in Belgium. I want the firm to do well and I want us to achieve our turnover at the end of the year, and how do I do that? – I must do it the way the customer wants it done!'?*
>
> *(2) Is it sufficient for a finding of direct discrimination in the conditions for access to paid employment to establish that the employer applies directly discriminatory selection criteria?*

While the first two questions related to the public statements made by Feryn in April 2005, the third and fourth questions dealt with the period after April 2005. In particular, they sought to determine how the presumption could be raised that Feryn continued its discriminatory recruitment policy after April 2005. These questions are closely interrelated with the factual claims of the Centre. Despite the public statements by Feryn, the Centre claimed that the presumption could be raised by the fact that a) Feryn did not respect the corrective measures that it committed to with the Centre, b) the recruitment policy of Feryn remained opaque, c) Feryn still did not engage any foreign fitter, even although the company was looking for workers in a region where there are many non-native jobseekers, and d) the fact that a sister company of Feryn recruited only native fitters:

> *(3) For the purpose of establishing that there is direct discrimination within the meaning of Article 2(2)(a) of Council Directive 2000/43/EC …, may account be taken of the recruitment of exclusively indigenous fitters by an affiliated company of the employer in assessing whether that employer's recruitment policy is discriminatory?*
>
> *(4) What is to be understood by 'facts from which it may be presumed that there has been direct or indirect discrimination' within the terms of Article 8(1) of*

Directive 2004/43? How strict must a national court be in assessing facts which give rise to a presumption of discrimination?

(a) To what extent do earlier acts of discrimination (public announcement of directly discriminatory selection criteria in April 2005) constitute 'facts from which it may be presumed that there has been direct or indirect discrimination' within the terms of Article 8(1) of the Directive?

(b) Does an established act of discrimination in April 2005 (public announcement in April 2005) subsequently give rise to a presumption of the continuation of a directly discriminatory recruitment policy? Having regard to the facts in the main proceedings, is it sufficient, in order to raise the presumption (that an employer operates and continues to pursue a discriminatory recruitment policy) that, in April 2005, in answer to the question whether, as an employer, he did not treat people from foreign and indigenous backgrounds in the same manner and was thus actually a bit racist, he publicly stated: 'I must comply with my customers' requirements. If you say "I want that particular product or I want it like this and like that", and I say "I'm not doing it, I'll send those people", then you say "I don't need that door". Then I'm putting myself out of business. We must meet the customers' requirements. This isn't my problem. I didn't create this problem in Belgium. I want the firm to do well and I want us to achieve our turnover at the end of the year, and how do I do that? – I must do it the way the customer wants it done!'?

(c) Having regard to the facts in the main proceedings, can a joint press release issued by an employer and the national body for combating discrimination, in which acts of discrimination are at least implicitly confirmed by the employer, give rise to such a presumption?

(d) Does the fact that an employer does not employ any fitters from ethnic minorities give rise to a presumption of indirect discrimination when that same employer some time previously had experienced great difficulty in recruiting fitters and, moreover, had also stated publicly that his customers did not like working with fitters who were immigrants?

(e) Is one fact sufficient in order to raise a presumption of discrimination?

(f) Having regard to the facts in the main proceedings, can a presumption of discrimination on the part of the employer be inferred from the recruitment of exclusively indigenous fitters by an affiliated company of that employer?

The fifth question then dealt with the question of how this presumption could be rebutted. The labour court of first instance mixed the question of the rebuttal of the presumption of discrimination arising from the statements made in April 2005 with the question about the existence of a discrimination after April 2005. The national court considered that in order to examine whether the presumption of the first discrimination could be rebutted, it was necessary to determine whether the discrimination took place afterwards. Eventually, to rebut

the presumption, the labour court considered it sufficient that Feryn publicly distanced itself from its discriminatory statements.

> *(5) How strict must the national court be in assessing the evidence in rebuttal which must be produced when a presumption of discrimination within the meaning of Article 8(1) of Directive 2000/43 has been raised? Can a presumption of discrimination within the meaning of Article 8(1) of Directive 2000/43 … be rebutted by a simple and unilateral statement by the employer in the press that he does not or does not any longer discriminate and that fitters from ethnic minorities are welcome; and/or by a simple declaration by the employer that his company, excluding the sister company, has filled all vacancies for fitters and/or by the statement that a Tunisian cleaning lady has been taken on and/or, having regard to the facts in the main proceedings, can the presumption be rebutted only by actual recruitment of fitters from ethnic minorities and/or by fulfilling commitments given in the joint press release?*

The last preliminary question related to the appropriate sanctions. The prohibitory injunction requested by the Centre was not admitted by the first instance labour court. According to the labour court, it was only ever demonstrated that Feryn had discriminated in April 2005 and the following public statements (the joint press release "Feryn is for equal opportunities" and the newspaper article "Feryn is still looking for fitters - Also foreigners are welcome") had sufficiently repaired this discrimination. The first instance labour court therefore decided that the prohibitory injunction had no purpose if it had not been demonstrated that Feryn had discriminated after April 2005. In principle, consequently, despite finding the potential discrimination by Feryn in April 2005, the labour court did not impose any further sanctions:

> *(6) What is to be understood by an 'effective, proportionate and dissuasive' sanction, as provided for in Article 15 of Directive 2000/43 …? Having regard to the facts in the main proceedings, does the abovementioned requirement of Article 15 of Directive 2000/43 permit the national court merely to declare that there has been direct discrimination? Or does it, on the contrary, also require the national court to grant a prohibitory injunction, as provided for in national law? Having regard to the facts in the main proceedings, to what extent is the national court further required to order the publication of the forthcoming judgment as an effective, proportionate and dissuasive sanction?* [662]

All in all, the questions were related to the absence of an identifiable victim, that is someone who has been rejected by Feryn on the basis of his or her origin. As confirmed by the judge of the Higher Labour Court, usually, the Centre is not acting on its own, but on behalf of or with the support of a victim. Furthermore, while discrimination was already prohibited under

[662] Decision for a reference for a preliminary ruling from the Arbeidshof te Brussel (Belgium), 24 January 2007.

criminal law, there was "no example of this case before the criminal courts".[663]

5.3. THE VIEWS OF THE PARTIES

This section will firstly set out the views of the Centre (**section 5.3.1.**) and then of Feryn's lawyer (**section 5.3.2.**) as to the proceedings before the Belgian courts.

5.3.1. THE VIEW OF THE APPLICANT

The evaluation of the Centre's lawyer was that the first instance labour court made "*all typical errors that you would expect in discrimination cases*".[664] The lawyer of the Centre elaborated further:

> *I said there is discrimination because Feryn excludes potential candidates for employment. [There was] no evidence that Feryn ever rejected somebody. But this is normal, because he formally stated, that if you apply, I would not hire you. Under the EU Directive not only the decision to hire someone, but it covers the full process of hiring, including making an announcement with respect to open job decisions. The material scope of application covers the full hiring process. Feryn did not send an invitation to potential candidates of Moroccan origin. It was bad reasoning from the court.*[665]

Regarding the question of whether the first instance labour court judge lacked knowledge about the correct application of the anti-discrimination laws, he responded:

> *No, it's not a lack of knowledge. In general, discrimination laws are counter-intuitive, meaning that you. … For example, you don't find in a legal system discrimination on the basis of the colour of your eyes? And why don't you have this type of discrimination laws? Because people don't do it. However, you have discrimination laws based on sex and race and why is it introduced? Because people actually do it. And people actually do it because they think at the moment, when the discrimination laws are introduced, that it is lawful to do so. Much of the discrimination is institutional. Even with race and ethnicity, even if there is no bad intention, it is unfortunate, there is a lot of unconsciousness support. […] This makes discrimination law very controversial when it is introduced.*[666]

The view of the director of the Centre was that the first instance judge wanted to "*keep peace in society*", in the sense of having a pluralistic society, where different views are accepted.[667]

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[663] Interview with the judge of the of the Higher Labour Court of Brussels.
[664] Interview with the lawyer of the Centre for equal opportunities and combating racism (applicant), 19 December 2012.
[665] Interview with the lawyer of the Centre.
[666] Interview with the lawyer of the Centre.
[667] Interview with the director of the Centre.

However, for the lawyer, whose ambition it was in the first place to bring the case before the CJEU, and for the Centre, the position of the first instance labour court was not acceptable. The director of the Centre stated:

> *We did want to know for sure, can you have a statement in public that you will not hire people from Moroccan origin and the next day that you won't hire any woman and old people above 50, and disabled people and whatever, homosexuals, or whatever. […]. But how can you fight against discrimination, if you have still the right to say, but for me, it is quite clear, no Moroccans in my business. So, we said, no, we cannot live with that. And we said, we have to appeal. We have to do that. There is no way around this.*[668]

Before the Higher Labour Court of Brussels, the Centre was successful in convincing the court to initiate the preliminary reference procedure:

> *So, we managed in a certain way, and our lawyer did, to have a number of questions [referred] to the court in Luxembourg.*
>
> *And then, we said, we knew that in a certain way, anti-discrimination legislation is very recent, it is very new. People do not know it. Judges do not know it. And until today, we have some judgments, where you say this is simply not possible. This guy, he doesn't know the law at all. And if they do know it, they feel uncertain. How do you comfort the judge when he feels uncertain? And then we said, well, maybe if he has advice from the Court in Luxembourg, that will make him less uncertain, of course. Maybe we should accept that he is not quite sure about how he has to look at that EU Directive, how he has to look at Belgian legislation in this specific situation because there is no victim. There is no victim around. Was there one Moroccan person saying, I was discriminated? No! So, no victim, no crime? Or is that different in discrimination cases? To say that you will discriminate, is that a potential discrimination or is it discrimination?*[669]

As stated by the lawyer of the Centre further:

> *When we went to the Court of Appeal, we said, you should, we made it much more stronger, then we said, well, you should go to the European Court of Justice first without ruling yourself and at the level of the Court of Appeal, the judge was much more open to it and then we ended up before the European Court of Justice and then the game was played.*[670]

5.3.2. THE VIEW OF THE DEFENDANT

[668] Interview with the director of the Centre.
[669] Interview with the director of the Centre.
[670] Interview with the lawyer of the Centre.

Feryn's lawyer considered it "*bizarre*" that the labour courts were responsible for those kinds of proceedings:

> *In most cases it has to do with discrimination in relation to employer and employee. Because the victim in such a case is always the employee. And therefore it is submitted to this type of court. But here, it has nothing to do…there was no victim. And therefore, it is bizarre, but that is the competent court.*[671]

As there was no individual complainant and no employment relationship at stake, Feryn's lawyer considered it unusual that the labour courts were competent to decide the case. Indeed, the competence of the labour courts is a result of the implementation of the Race Equality Directive into Belgian law, which allows the Centre to initiate an action, depending on the nature of the alleged discriminatory act, before the civil courts, labour courts or commercial courts. Before that, the criminal courts were competent according to the Belgian Anti-Racism Law of 1981 (see on this also **section 3.1.**).

Feryn's lawyer summarized its strategy before the Belgian courts, which he also related to the reason for not participating in the proceedings before the CJEU by submitting observations, in the following way:

> *The defence strategy was to reduce the facts to what they were and then you have to admit that there was only a spontaneous statement to the journalist of De Standaard that statistically speaking a Moroccan fitter is more difficult to find than a Belgian fitter, even Belgian fitters are extremely difficult to find. And then the declaration before the Flemish television that there was indeed a problem that the clients sometimes refuse foreign fitters. And that's it! There was no trace at all that Feryn said, I intend to or in the past I have sometimes refused candidates because they are Moroccan. There is no trace at all. The only thing you can say is then, of course, you can, it's a presumption and not a fact. That by saying that there is a problem with your clients, that you suggest that if ever you had to make a choice between two candidates, that you would refuse a Moroccan fitter […] A presumption on the basis of that declaration. That's what we said. We also never discussed that, if Feryn said, I have the intention of refusing Moroccan people, that would not be a fact of discrimination but indirectly he was announcing that he should set up a discriminatory personnel system. Under these circumstances, we never discussed the, how should I say, the effect of the European Directive that even indirect discrimination is forbidden, but we simply said, these rules do not apply to what happened here. That was our strategy. That is also what the first instance judge accepted. […] There is no act that is direct or indirect discrimination. There is only the statement: there is a problem with our clients […] That is also why the client [Feryn] said we will not pay you for going to*

[671] Interview with the lawyer of Feryn NV (defendant), 20 December 2012.

> *Luxembourg to defend the case because, from the start, I said we do not discuss that.*[672]

According to Feryn's lawyer, the preliminary reference made by the Higher Labour Court of Brussels to the CJEU was one of the most "*absurd*" aspects of the case, as to him, the interpretation of the Directive was not subject to any discussion:

> *The problem was not how far reaching is this European Directive. The problem was: what are the facts? […] There was no discussion between lawyers about the interpretation of the legal text. That is so absurd. That is also why it is so absurd that the judge submitted that question to the European court. Because there was no discussion about that.*
>
> *The interpretation that was defended by the Centre before court, we said, we agree with that. You don't have to submit that to the Court of Justice. We accept that but you cannot … what happened here has nothing to do with discrimination. […] When you make a statement that you will discriminate, that you will set up a filtering system, that you do not conclude contracts with foreign people, of course, saying that you will do that is not the evidence that you have … but in any case, that is a presumption and then you have to prove the contrary. But the only thing that happened is: I have a problem with my clients.*
>
> *It was useless. We didn't discuss on the impact of the European Directive. We simply said, it's not the case here.*[673]

Feryn's lawyer argued that the European Race Equality Directive was not be applicable to the factual circumstances of the case. By refusing that there could be a case of direct discrimination as there was no refusal of a Moroccan candidate, the lawyers argued that there could have been only indirect discrimination, if Feryn actually said that he would refuse Moroccans. Only from such a statement, one could have presumed that it will adopt a discriminatory recruitment practice. However, such a statement was never made.

To conclude, it became clear that Feryn's defence was to not engage substantively with the concept of discrimination under the Race Equality Directive. Despite the factual claims, the defence rather tried to contravene the newly established enforcement system for race discrimination matters established as a result of the implementation of the Race Equality Directive. This is reflected in how the official role of the Centre was described by the lawyer (**section 4.2.3.**),[674] by their claim that the labour courts were not the competent courts,[675] by

[672] Interview with the lawyer of Feryn.
[673] Interview with the lawyer of Feryn NV (defendant), 20 December 2012.
[674] In addition, Feryn claimed that the Centre failed to publish its internal statutes. The Court of Cassation, however, rejected Feryn's petition on 16 June 2008 (Judgment Nr. S.07.0101.N/1).

focusing on the 'intention' of Feryn and moreover, as will be addressed later on, their claim that the reversal of the burden of proof conflicted with various constitutional principles (see section **7.1.1.**).

6. THE PROCEEDINGS BEFORE THE COURT OF JUSTICE OF THE EUROPEAN UNION

The CJEU rendered its judgment in the *Feryn* case on 10 July 2008, after the written procedure with submissions from the European Commission, Belgium, Ireland and the UK, a hearing in November 2007, and following the delivery of Advocate General Maduro's opinion on 12 March 2008. After some preliminary remarks regarding the preliminary reference, this part will set out the written observations of the European Commission (**section 6.1.**), the opinion of Advocate General Maduro (**section 6.2.**), the judgment of the Court (**section 6.3.**) and finally, the insights gained on the basis of the interviews with some of the European actors, who were involved in the procedure (**section 6.4.**).

The detailed and numerous questions of the Belgian court to the CJEU are deeply interwoven with the specific factual situation of the case – they rather aim to resolve various specific issues than seeking a principled interpretation of the law. The CJEU and Advocate General reminded, therefore, at the outset, that Article 267 TFEU (at that time Article 234 EC Treaty) does not empower the Court to apply the rules of EU law to the particular case, but only to interpret the Treaty and the acts adopted by the EU institutions.[676] However, in the framework of the judicial cooperation set up under the preliminary reference procedure, the CJEU may, on the basis of the material presented to it, provide the national court with an interpretation of EU law which may be useful to it in assessing the effects of a provision of national law.[677]

Consequently, the CJEU and the Advocate General abstracted the questions from the specific circumstances of the proceedings and divided them into three parts. Firstly, the assessment of

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[675] The judge of the Higher Labour Court confirmed that Feryn challenged the competence of the labour courts as there was no employment contract between the parties. Interview with the judge of the of the Higher Labour Court of Brussels (*Arbeidshof te Brussel*), 20 December 2013.

[676] Case C-54/07 *Feryn*, ECLI:EU:C:2008:397, para. 19, with reference to Case 100/63 *van der Veen*, ECLI:EU:C:1964:65 and Case C-203/99 *Veedfald*, ECLI:EU:C:2001:258, para. 31; Opinion of Advocate General Maduro in Case C-54/07 *Feryn*, ECLI:EU:C:2008:155, para. 7.

[677] Case C-54/07 *Feryn*, ECLI:EU:C:2008:397, para. 19, with reference to Case 20/87 *Gauchard*, ECLI:EU:C:1978:532, para. 5, and Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99 *Reisch and Others*, ECLI:EU:C:2002:135, para. 22; Opinion of Advocate General Maduro in Case C-54/07 *Feryn*, ECLI:EU:C:2008:155, para. 7.

the scope of the concept of direct discrimination in the light of public statements made by an employer in the course of a recruitment procedure (the first and second question of the national court). Secondly, the conditions under which the rule of the reversal of the burden of proof can be applied (the third to fifth question of the national court). And thirdly, the appropriate remedies and sanctions (the sixth question of the national court).[678] The written observations of the European Commission contained the same considerations as to the division of competences between the CJEU and the national courts and dealt with the questions of the national court in the same division and order. Regarding the parties to the national proceedings, written observations were submitted only by the Belgian Centre for equal opportunities and combating racism, but, as already mentioned, not by Feryn (see **section 5.3.2.**).

6.1. THE WRITTEN OBSERVATIONS OF THE EUROPEAN COMMISSION

6.1.1. THE NOTION OF DIRECT DISCRIMINATION

The European Commission firstly made reference to Article 3(2) of the Race Equality Directive 2000/43/EC according to which the Directive does not cover difference of treatment based on nationality. The Commission clarified, therefore, that if, as the national court seemed to indicate, that the emphasis was not on the nationality of the job candidates, but on their racial and ethnic origin, then the national court's questions would fall under the scope of the Race Equality Directive.[679] Neither the Advocate General nor the Court subsequently made any reference to that question.

According to the Commission, the situation in which a general recruitment procedure is restricted by the words of the employer to the detriment of persons of a specific origin falls within the definition of direct discrimination in Article 2(2)(a) of the Race Equality Directive.[680] As was clear from the definition of direct discrimination, such discrimination occurs not only where a person has been or is treated less favourably than another in a comparable situation, but also applies in circumstances where a person would be treated less favourably. The definition therefore refers not only to situations in which less favourable

[678] Case C-54/07 *Feryn*, ECLI:EU:C:2008:397, para. 20; Opinion of Advocate General Maduro in Case C-54/07 *Feryn*, ECLI:EU:C:2008:155, para. 7.
[679] European Commission, Written Observations in case C-54/07 *Feryn*, 29 May 2007, para. 22.
[680] European Commission, Written Observations in case C-54/07 *Feryn*, 29 May 2007, para. 24.

treatment actually takes place or took place, but also to hypothetical situations.[681]
In the present case, the matter whether an application of a person of a specific racial or ethnic origin has actually been received by the employer was irrelevant to determining the existence of direct discrimination.[682] The mere fact that the comments made by the employer in April 2005 made it possible to establish that such applications would be treated less favourably if they would have been made, was therefore sufficient to establish the existence of direct discrimination. Therefore, the mere fact that a particular group is excluded from the recruitment procedure on grounds of its race or ethnic origin is sufficient to infringe the prohibition of discrimination contained in Article 2 of the Directive. Consequently, the Commission proposed that if the judge responsible for assessing the facts reaches the same conclusion, the judge must also take the view that there is in the present case direct discrimination within the meaning of that article.[683]

Finally, the Commission referred to Article 4 of the Directive, which allows the Member States to regard a difference of treatment as non-discriminatory where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate. However, according to the Commission, this was clearly not applicable in this case and the issue of whether customers are hostile towards workers of another skin colour was irrelevant to answering the national court's questions.[684]

6.1.2. THE BURDEN OF PROOF

According to the Commission, in principle, in case of a presumption of discrimination on grounds of racial or ethnic origin, it is for the employer to prove the contrary.[685] In view of the division of tasks between the national courts and the CJEU, the national court has to assess on the basis of all the relevant elements raised in the national proceedings whether there exists a prima facie case of discrimination.[686] However, in the Commission's view, regarding the information available in the *Feryn* case - namely the comments made in April

[681] European Commission, Written Observations in case C-54/07 *Feryn*, 29 May 2007, para. 25.
[682] European Commission, Written Observations in case C-54/07 *Feryn*, 29 May 2007, para. 26.
[683] European Commission, Written Observations in case C-54/07 *Feryn*, 29 May 2007, para. 27.
[684] European Commission, Written Observations in case C-54/07 *Feryn*, 29 May 2007, para. 30.
[685] European Commission, Written Observations in case C-54/07 *Feryn*, 29 May 2007, para. 39.
[686] European Commission, Written Observations in case C-54/07 *Feryn*, 29 May 2007, para. 36.

2005 by the employer in the context of a recruitment procedure, the lack of transparency of its real hiring policy and the fact that no fitter of that specific socio-cultural origin has been engaged - there were sufficient grounds for finding and, a fortiori, presuming direct discrimination. Therefore, it is for the employer to prove that there was absolutely no reason for such a presumption.[687] As regards the way in which the national court must assess the various elements put forward by the employer to prove the contrary, the Commission merely observed that the national court must make that assessment in the light of the applicable national provisions on evidence, subject to the principles of equivalence and effectiveness.[688]

6.1.3. APPROPRIATE SANCTIONS

According to the observations of the European Commission, where a national court finds discrimination on grounds of race or ethnic origin, it must take all the necessary measures to achieve the result sought in the light of the wording and purpose of the Race Equality Directive. According to Article 15, such measures must include effective, proportionate and dissuasive penalties provided for by national law. In the light of the judgment of the CJEU in *Van Colson and Kamann*,[689] purely symbolic sanctions are not regarded as sufficiently effective and dissuasive.[690] Therefore, the national court cannot limit itself to the mere finding of discrimination, without imposing any other consequences. The national court must take further measures in order to ensure that the penalties are effective, proportionate and dissuasive.[691]

6.2. THE OPINION OF ADVOCATE GENERAL MADURO

6.2.1. THE NOTION OF DIRECT DISCRIMINATION

Advocate General Maduro proposed that a public statement made by an employer in the context of a recruitment drive, to the effect that applications from persons of a certain ethnic origin will be turned down, constituted direct discrimination within the meaning of Article 2(2)(a) of the Race Equality Directive.[692] In order to reach that conclusion, the Advocate General relied on the purpose of the Directive as well as the broader values of the

[687] European Commission, Written Observations in case C-54/07 *Feryn*, 29 May 2007, para. 37.
[688] European Commission, Written Observations in case C-54/07 *Feryn*, 29 May 2007, para. 38.
[689] Case 14/83 *Von Colson and Kamann*, ECLI:EU:C:1984:153, paras. 24 and 28.
[690] European Commission, Written Observations in case C-54/07 *Feryn*, 29 May 2007, paras. 41-44.
[691] European Commission, Written Observations in case C-54/07 *Feryn*, 29 May 2007, para. 45.
[692] Opinion of Advocate General Maduro in Case C-54/07 *Feryn*, ECLI:EU:C:2008:155,para. 30.

Community as construed on the basis of Article 13 of the EC Treaty (now Article 19 TFEU).

The Advocate General firstly gave an insight into the interventions by the parties to the proceedings before the CJEU. The UK and Ireland made submissions arguing that the Race Equality Directive does not apply in the absence of an identifiable complainant who is a victim of the alleged discrimination. The Race Equality Directive would seek to protect those who suffer from discrimination, and is not concerned with potential discrimination. Moreover, in the same vein, the national equality bodies would not be entitled to initiate legal proceedings alleging direct discrimination within the meaning of the Directive in such a case. Therefore, as the applicability of the Directive was ruled out, the situation at stake has to be resolved as a matter of national law. However, according to the Centre, the substantive scope of the Directive has to be determined independently from the question of *locus standi*. The European Commission and the Belgian Government shared the view of the Centre.[693]

Advocate General Maduro resolved the 'confusion' regarding the relationship between the concept of direct discrimination and the legal standing of public interest bodies. He agreed with the UK and Ireland that in light of its wording in Article 7, the Race Equality Directive did not introduce an *actio popularis* for public interest bodies.[694] However, the Directive allows the Member States to provide for more favourable protection of the principle of equal treatment and requires that the Directive's implementation results in no reduction in the level of protection against discrimination already granted by national law.[695]

After having stressed the freedom of the Member States to decide whether an equal treatment body may bring legal action if it is not acting on behalf of a specific complainant, the Advocate General, however, refused to infer from that conclusion that the scope of the Directive is limited to cases in which there are identifiable victim-complainants. He clearly stated: "The range of discriminatory behaviour prohibited by the Directive is one thing; the range of enforcement mechanisms and remedies which the Directive specifically imposes is

[693] Opinion of Advocate General Maduro in Case C-54/07 *Feryn*, ECLI:EU:C:2008:155, paras. 10, 11.
[694] Opinion of Advocate General Maduro in Case C-54/07 *Feryn*, ECLI:EU:C:2008:155, para. 12. The Race Equality Directive requires the Member States to ensure that judicial procedures are available "to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them" (Article 7(1)) and to public interest bodies acting "on behalf or in support of the complainant" (Article 7(2)).
[695] Opinion of Advocate General Maduro in Case C-54/07 *Feryn*, ECLI:EU:C:2008:155, para. 13, see on this Article 6 (1) and (2) of the Race Equality Directive.

quite another".[696]

Instead, in order to construe its scope, the Advocate General relied on the purpose of the Race Equality Directive as well as the broader values of the Community as derived from Article 13 of the EC Treaty (now Article 19 TFEU). According to its 8th and 12th Recitals, the purpose of the Directive is to contribute to a wider policy of fostering a socially inclusive labour market and ensuring the development of democratic and tolerant societies, which allow the participation of all persons irrespective of race or ethnicity. While the Directive lays down minimum standards, that would not mean that its level of protection must to be the lowest conceivable, but, instead, has to reflect the underlying Community values as derived from the aims and spirit of Article 13 of the EC Treaty, which were elaborated on by the Advocate General in his opinion in *Coleman*.[697] [698]

In that decision, the Advocate General read Article 13 TEC as an expression of the commitment of the Community legal order to the fundamental principle of equality, which is based on the values of human dignity and personal autonomy. The essential considerations of the Advocate General in *Coleman* will be repeated here:

> *The aim of Article 13 EC and of the Directive is to protect the dignity and autonomy of persons belonging to those suspect classifications. The most obvious way in which such a person's dignity and autonomy may be affected is when one is directly targeted because one has a suspect characteristic. Treating someone less well on the basis of reasons such as religious belief, age, disability and sexual orientation undermines this special and unique value that people have by virtue of being human. Recognising the equal worth of every human being means that we should be blind to considerations of this type when we impose a burden on someone or deprive someone of a benefit. Put differently, these are characteristics which should not play any role in any assessment as to whether it is right or not to treat someone less favourably.*

[696] Opinion of Advocate General Maduro in Case C-54/07 *Feryn*, ECLI:EU:C:2008:155, para. 14.
[697] Case C-303/06 *Coleman*, ECLI:EU:C:2008:415. The CJEU had to determine whether the prohibition of direct discrimination contained in the Framework Equality Directive 2000/78/EC covers cases where an employee is treated less favourably than her colleagues because, although not herself disabled, she is associated with a disabled person (being, in that particular case, her child). In line with the opinion of Advocate General Maduro, the CJEU held that where an employer treats an employee who is not himself disabled less favourably than another employee based on the disability of his child, whose care is provided primarily by that employee, such treatment is contrary to the prohibition of direct discrimination.
[698] Opinion of Advocate General Maduro in Case C-54/07 *Feryn*, ECLI:EU:C:2008:155, para. 14. In *Coleman*, the Advocate General advocated to place equal treatment and non-discrimination as guaranteed by the Directive within a broader human rights context (see footnote 4 of the opinion of Advocate General Maduro in Case C-303/06 *Coleman*, ECLI:EU:C:2008:61).

> *Similarly, a commitment to autonomy means that people must not be deprived of valuable options in areas of fundamental importance for their lives by reference to suspect classifications. Access to employment and professional development are of fundamental significance for every individual, not merely as a means of earning one's living but also as an important way of self-fulfilment and realisation of one's potential. The discriminator who discriminates against an individual belonging to a suspect classification unjustly deprives her of valuable options. As a consequence, that person's ability to lead an autonomous life is seriously compromised since an important aspect of her life is shaped not by her own choices but by the prejudice of someone else. By treating people belonging to these groups less well because of their characteristic, the discriminator prevents them from exercising their autonomy. At this point, it is fair and reasonable for anti-discrimination law to intervene. In essence, by valuing equality and committing ourselves to realising equality through the law, we aim at sustaining for every person the conditions for an autonomous life.*[699]

Returning to the specificities of the *Feryn* case, after having set out the purpose and standard of protection contained in the Race Equality Directive, the Advocate General argued that limiting the scope of the Directive to identifiable complainants who have applied for a particular job would undermine the effectiveness of the principle of equal treatment. In the social reality, such statements have a humiliating and demoralizing impact on persons of that origin, not only to work for that particular employer at issue, but also to participate in the labour market more generally.[700] Rejecting the characterization of the discrimination as being hypothetical by the Belgian labour court, the Advocate General pointed to the real effects of the employer's statement: "By publicly stating his intention not to hire persons of a certain racial or ethnic origin, the employer is, in fact, excluding those persons from the application process and from his work floor. He is not merely talking about discriminating, he is discriminating. He is not simply uttering words, he is performing a 'speech act'".[701]

The Advocate General also rejected, in that context, the proposal of the UK and Ireland that the notion of victim should be restricted to persons who would be interested in applying and

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[699] Opinion of Advocate General Maduro in Case C-303/06 *Coleman*, ECLI:EU:C:2008:61, paras. 9 and 10. Regarding the Community principle of equality, the Advocate General referred to Joined Cases C-27/00 and C-122/00 *Omega Air and Others*, ECLI:EU:C:2002:161 and Takis Tridimas, *The General Principles of EU Law*, Second edition (Oxford; New York: Oxford University Press, 2006); Alan Dashwood and Síofra O'Leary, *The Principle of Equal Treatment in EC Law* (London: Sweet & Maxwell, 1997). To define the values of human dignity and personal autonomy, the Advocate General relied on Ronald Dworkin, *Is Democracy Possible Here?: Principles for a New Political Debate* (Princeton, N.J.: Princeton University Press, 2006), Chapter 1; Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986).

[700] Opinion of Advocate General Maduro in Case C-54/07 *Feryn*, ECLI:EU:C:2008:155, para. 15.

[701] Opinion of Advocate General Maduro in Case C-54/07 *Feryn*, ECLI:EU:C:2008:155, para. 16, with reference to John R. Searle, *Speech Acts: An Essay in the Philosophy of Language* (London: Cambridge University Press, 1969); John Langshaw Austin, *How to Do Things with Words* (Cambridge (Mass.), 1962).

are qualified for the job, since "that hardly solves the problem, given the difficulties in identifying such persons individually and the low incentive for them to come forward."[702] Finally, Advocate General Maduro stressed again that excluding such public statements by an employer in the context of a recruitment drive from the concept of discrimination would undermine the conditions for a socially inclusive labour market. It would allow employers to differentiate very effectively between candidates on grounds of racial or ethnic origin, simply by publicizing the discriminatory character of their recruitment policy as overtly as possible beforehand.[703]

Eventually, Advocate General Maduro addressed the public assertion of Mr Feryn that his customers would be unfavourably disposed towards employees of a Moroccan origin. While this contention was "wholly irrelevant" for determining the scope of the Directive, if it were true, "it would only illustrate that 'markets will not cure discrimination' and that regulatory intervention is essential".[704] Particularly, the Advocate General reasoned that regulatory measures at Community level contribute to solving this collective action problem for employers by preventing the distortion of competition arising from different national standards of protection.[705]

To sum up, Advocate General Maduro proposed that a public statement made by an employer in the context of a recruitment drive, to the effect that applications from persons of a certain ethnic origin would be turned down, constituted direct discrimination within the meaning of Article 2(2)(a) of the Race Equality Directive.[706]

6.2.2. THE BURDEN OF PROOF

In order to interpret Article 8 of the Race Equality Directive, Advocate General Maduro referred to the case law of the CJEU on sex discrimination, as the wording of Article 4 of Directive 97/80/EC on the burden of proof in cases of sex discrimination[707] is identical.

[702] Opinion of Advocate General Maduro in Case C-54/07 *Feryn*, ECLI:EU:C:2008:155, para. 16.
[703] Opinion of Advocate General Maduro in Case C-54/07 *Feryn*, ECLI:EU:C:2008:155, para. 17.
[704] Opinion of Advocate General Maduro in Case C-54/07 *Feryn*, ECLI:EU:C:2008:155, para. 18, with reference to Cass R. Sunstein, "Why Markets Don't Stop Discrimination," in *Free Markets and Social Justice* (New York, Oxford: Oxford University Press, 1997), 165.
[705] Opinion of Advocate General Maduro in Case C-54/07 *Feryn*, ECLI:EU:C:2008:155, para. 18.
[706] Opinion of Advocate General Maduro in Case C-54/07 *Feryn*, ECLI:EU:C:2008:155, para. 30.
[707] Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, OJ L 14, 20.1.1998, p. 6–8.

Accordingly, where there is a prima facie case of discrimination, it is for the employer to prove that that principle has not been infringed.[708] Although it is the task of the national court to apply the rules on the burden of proof to the specific circumstances of the case, the Advocate General proposed that "in circumstances where it is established that an employer has made the kind of public statements about its own recruitment policy that are at issue in the main proceedings, and where, moreover, the actual recruitment practice applied by the employer remains opaque and no persons with the ethnic background in question have been recruited, there will be a presumption of discrimination within the meaning of Article 8 of the Directive".[709]

However, regarding the detailed and numerous questions of the national court as to how to evaluate the evidence in rebuttal provided by the employer, the Advocate General simply referred to the national procedural rules subject to the principles of equivalence and effectiveness.[710] In his final summary, the Advocate General concluded that "[o]nce a prima facie case of discrimination based on racial or ethnic origin has been established, it is for the respondent to prove that the principle of equal treatment has not been infringed".[711]

6.2.3. APPROPRIATE REMEDIES

Different to the views of the European Commission and the CJEU, Advocate General Maduro did not refer to "sanctions", but principally to "remedies" in order to answer the last question raised by the national court. The Advocate General firstly referred to the rules of domestic law to determine the appropriate remedies for the present case. Nonetheless, as the CJEU held in *Von Colson and Kamann*,[712] national courts are under a duty to take all appropriate measures to ensure the fulfilment of the Member States' obligation to achieve the result envisaged by the Directive.[713] Therefore, as "purely token sanctions are not sufficiently dissuasive to enforce the prohibition of discrimination", "a court order prohibiting such

[708] Opinion of Advocate General Maduro in Case C-54/07 *Feryn*, ECLI:EU:C:2008:155, paras. 21 and 22, with reference to the following case-law of the CJEU: Case C-236/98 *JämO*, ECLI:EU:C:2000:173, para. 53, and Case C-196/02 *Nikoloudi*, ECLI:EU:C:2005:141, para. 74.
[709] Opinion of Advocate General Maduro in Case C-54/07 *Feryn*, ECLI:EU:C:2008:155, para. 23.
[710] Opinion of Advocate General Maduro in Case C-54/07 *Feryn*, ECLI:EU:C:2008:155, para. 24, with reference to the following case-law of the CJEU: Case 33/76 *Rewe*, ECLI:EU:C:1976:188, Joined Cases C-430/93 and C-431/93 *Van Schijndel and van Veen*, ECLI:EU:C:1995:441, para. 17, and Joined Cases C-222/05 to C-225/05 *Van der Weerd and Others*, ECLI:EU:C:2007:318, para. 28.
[711] Opinion of Advocate General Maduro in Case C-54/07 *Feryn*, ECLI:EU:C:2008:155, para. 30.
[712] Case 14/83 *Von Colson and Kamann*, ECLI:EU:C:1984:153, paras. 23, 24 and 26.
[713] Opinion of Advocate General Maduro in Case C-54/07 *Feryn*, ECLI:EU:C:2008:155, para. 27.

behaviour would constitute a more appropriate remedy".[714] The Advocate General thereby referred to the question of the national court as to whether a declaratory judgment or a prohibitory injunction would be more appropriate under Article 15 of the Race Equality Directive. Advocate General Maduro, however, did not answer the question of whether an order to publish the national judgment would constitute an additional effective, proportionate and dissuasive sanction. In his tenor, the Advocate General eventually referred to the effective, proportionate and dissuasive nature of the remedies required.[715]

6.3. THE JUDGMENT OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

6.3.1. THE NOTION OF DIRECT DISCRIMINATION

Although the wording of Article 2(2) and Article 7 of the Race Equality Directive point to the need for an identifiable complainant that has been the victim of the alleged discrimination, the Directive's objective of fostering conditions for a socially inclusive labour market would be hard to achieve if its scope were to be limited only to those cases in which an unsuccessful candidate for a post, considering himself to be the victim of direct discrimination, brought legal proceedings against the employer.[716] Therefore, "[t]he fact that an employer declares publicly that it will not recruit employees of a certain ethnic or racial origin, something which is clearly likely to strongly dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market, constitutes direct discrimination in respect of recruitment within the meaning of Directive 2000/43".[717]

The Court thereby followed the opinion of Advocate General Maduro, who proposed to read the Directive in the light of its aim of creating a socially inclusive labour market, without, however, referring to Article 13 of the EC Treaty. The Court and the Advocate General did not follow the suggestion of the Commission, which although reached the same conclusion, based its reasoning on the wording of Article 2(2), which would cover also 'hypothetical' situations. Instead, the Court and the Advocate General stressed the directly discriminatory nature of the statements *as such*, since they strongly dissuaded certain candidates from submitting their candidature.

[714] Opinion of Advocate General Maduro in Case C-54/07 *Feryn*, ECLI:EU:C:2008:155, para. 28.
[715] Opinion of Advocate General Maduro in Case C-54/07 *Feryn*, ECLI:EU:C:2008:155, para. 30.
[716] Case C-54/07 *Feryn*, ECLI:EU:C:2008:397, para. 31.
[717] Case C-54/07 *Feryn*, ECLI:EU:C:2008:397, paras. 22-24.

Finally, as proposed by the Advocate General, according to the CJEU, the scope of direct discrimination must be distinguished from the minimum requirements as to the legal procedures that have to be made available by the Member States to persons who consider that they have suffered discrimination. The Member States are free to provide for the right of associations with a legitimate interest, or for the equality body, to bring legal or administrative proceedings to enforce the obligations resulting therefrom, without acting in the name of a specific complainant or in the absence of an identifiable complainant.[718]

6.3.2. THE BURDEN OF PROOF

The CJEU held that public statements by which an employer declares that, under its recruitment policy, it will not recruit any employees of a certain ethnic or racial origin may constitute facts, which give rise to a presumption of a discriminatory recruitment policy.[719] The burden of proof then shifts to the employer to present evidence that it has not breached the principle of equal treatment, which it can do by showing that the actual recruitment practice of the undertaking does not correspond to those statements.[720] Finally, the Court of Justice referred to the role of the national court to verify that the facts alleged against that employer are established and to assess the sufficiency of the evidence which the employer provides in support of its assertions that it has not breached the principle of equal treatment.[721]

The CJEU therefore clarified that the public statements alone are sufficient to raise the presumption of a discriminatory practice. The Advocate General and the European Commission did not arrive at such a straightforward conclusion, but in their proposed tenor referred to a prima facie case of discrimination. In their reasoning, they carefully set out that the statements made by the employer, the employer's opaque recruitment policy, and the fact that no persons with the ethnic background in question have been recruited, are together sufficient to raise the presumption of direct discrimination.

6.3.3. APPROPRIATE SANCTIONS

The Court of Justice pointed out that it is for the Member States to introduce measures which

[718] Case C-54/07 *Feryn*, ECLI:EU:C:2008:397, paras. 26 and 27.
[719] Case C-54/07 *Feryn*, ECLI:EU:C:2008:397, para. 31.
[720] Case C-54/07 *Feryn*, ECLI:EU:C:2008:397, para. 32.
[721] Case C-54/07 *Feryn*, ECLI:EU:C:2008:397, para. 33.

are sufficiently effective to achieve the aim of the Directive and to ensure that they may be effectively relied upon before the national courts in order to ensure that judicial protection will be real and effective.[722] The sanctions which are required by Article 15 of the Directive must be, however, effective, proportionate and dissuasive, even where there is no identifiable victim.[723]

In particular, the CJEU held:

> *[T]hose sanctions may, where necessary, include a finding of discrimination by the court or the competent administrative authority in conjunction with an adequate level of publicity, the cost of which is to be borne by the defendant. They may also take the form of a prohibitory injunction, in accordance with the rules of national law, ordering the employer to cease the discriminatory practice, and, where appropriate, a fine. They may, moreover, take the form of the award of damages to the body bringing the proceedings.*[724]

The CJEU thereby provided the national court with a list of various possible sanctions. The Advocate General and the European Commission limited themselves to indicating that a declaration would not be sufficient, but that a prohibitory injunction would be more appropriate.

6.4. THE INTERVIEWS WITH THE EUROPEAN ACTORS

This section will firstly address the interview with Advocate General Maduro (**section 6.4.1.**) and subsequently the interview with one of the CJEU judges, who was sitting on the chamber of the CJEU dealing with the *Feryn* case (**section 6.4.2.**).

6.4.1. THE INTERVIEW WITH ADVOCATE GENERAL MADURO

During the interview with Advocate General Maduro, any discussions relating to the nature of the statements made by Mr. Feryn in the sense of questioning whether he was pointing out only a problem that he was facing or whether he was really discriminating (see **section 5.3.2.** on Feryn's lawyer's arguments) was not considered by the Advocate General. According to the Advocate General, this would be a factual assessment, which is not for the CJEU to decide: "*If the national court decides that those statements constitute discrimination,*

[722] Case C-54/07 *Feryn*, ECLI:EU:C:2008:397, para. 37.
[723] Case C-54/07 *Feryn*, ECLI:EU:C:2008:397, para. 38.
[724] Case C-54/07 *Feryn*, ECLI:EU:C:2008:397, para. 39.

constitute in fact statements by which they are declaring that they are not hiring somebody from a certain ethnicity, that factual assessment is by the national court".[725] However, from his personal point of view, it seemed that the company said that "*we are going to discriminate, but it is not our fault because of the customers/client*".[726]

Regarding the 'customer-argument' of Feryn as justification for its discriminatory practice, the Advocate General clarified:

> *First, that could have been relevant as a matter of justification, but it has not been really argued like that. Second, I find it very problematic if we would entitle companies to discriminate because of the clients. Are we ready to take that step? I understand the issues, complexity, the position of the company, but does not justify it all. It is precisely because of that social reality that the law imposes on any company not to discriminate. Otherwise, how are you to overcome that? The law will impose on any company whatsoever that it cannot discriminate. Because then the worse is, if you have some, who do not discriminate, and therefore they lose clients, those who discriminate get rewarded by more clients. The law cannot be complicit with that. That is precisely the role of the law - to put everybody in equality and at the same time imposing the standard of non-discrimination.*[727]

Asking the Advocate-General about the relation of the case with the right to freedom of expression - a consideration actually raised by the lawyer of Feryn during the interview (**section 4.2.3.**) and by the national court of first instance in its judgment (**section 5.1.**) - he pointed out that he also thought that the tension with the freedom of expression was "*an important question*", but it was not raised by the parties and consequently, he did not engage with the question more deeply. He explained, however, that it was implicit in his reasoning:

> *That you should ask to the lawyers. I thought that that was an important question. I see that there was a difference. Because one thing is freedom of speech and something else is a contractual offer. They were talking in the context of an offer of employment. I will admit that a company saying: 'We are non-discriminatory. We have a problem because our foreign employees....' They said: 'We were not hiring'. The law does not authorize companies to say that. There is no justification for statements like that.*
>
> *The lawyers did not raise the freedom of speech. I was aware of the connection. I did not engage in it because the issue was not raised. But I do make the point that this speech is relevant because it is a speech that is linked to a contractual announcement. Let's assume you don't talk in television. The same offer in a journal: 'Company X is looking for employees, we would not accept Muslims.'*

[725] Interview with Advocate General Maduro, 26 March 2013.
[726] Interview with Advocate General Maduro.
[727] Interview with Advocate General Maduro.

> *That would be the same thing. Here there would be no question of free speech. That is how I constructed those statements. As an advertisement for positions.*
>
> *I discussed it like... Well... In principle, the case is framed by the parties, they are the ones to be... if I thought there was a real problem of free speech, I would have raised it more deeply. But I didn't. But I framed the opinion to make clear why I did not get into it: it is not speech in general, this is a contractual offer, an announcement. From the moment, I constructed it like this, it is outside the freedom of speech. If the parties would have tried to convince me that indeed this was part of normal speech and not a contractual offer, it would be a different thing. But from the moment that we framed the facts in a certain way, then I am limiting what I am discussing.* [728]

More general questions about the effectiveness of prohibiting public statements by employers, which have the potential to trigger a societal debate about an existing problem, which might be only silenced by a prohibition, but not resolved, have been understood by the Advocate General as questioning in general the relevance of a legal prohibition of discrimination. In his view, that would be, however, a "*political question*" as to whether the Union should intervene in this area, and not be a function of the Advocate General or the CJEU to decide. While he personally considered the social engineering function of the law to be limited, he pointed out that the "*CJEU cannot say that this is irrelevant, this is the fault of society, so we cannot impose the principle of non-discrimination*". In any case, according to him, the case might have an impact, even if it is a symbolic one or triggers or changes the debate or raises the awareness of people.[729]

Regarding the question of why his reasoning established a distinction between the substance (i.e. the concept of direct discrimination) and the procedure (i.e. the possibility of equality bodies to initiate legal actions without individual complainant) - the response was equivocal. On the one hand, he recognized the difficulty of relying on individual complaints in those kind of situations, on the other hand, that question was not relevant for the Belgian legal system.

> *Where the discrimination happens at the offer of employment, it is very difficult that you will have a specific victim.*
>
> *If a specific question is not relevant to the case, courts will not decide. The court is not writing an article. They decide only the issues that are brought to them in*

[728] Interview with Advocate General Maduro.
[729] Interview with Advocate General Maduro.

> *the case. If this is not among the questions raised by the national courts, CJEU will not respond to it.*[730]

6.4.2. THE INTERVIEW WITH THE JUDGE OF THE CJEU

Regarding the general opening question as to whether there was further research about the national background of the case, the judge responded:

> *If the information in the decision referring the case is sufficiently clear, that is it. The CJEU is interested in whether the question is sufficiently clear. Is it sufficiently clear what the problem is about and also the factual context is important, but in this case, it was not particularly complex. This was quite clear. The quote [of Feryn's public statements] was also in the question.*
>
> *This was a real problem of interpretation of the Directive. Does it come within the scope, this kind of general indication of a racial discriminatory treatment without a person being there, who can demonstrate that they have been the victim of that. That was the issue and the answer was clear.*[731]

Regarding the question of why there was no consideration of the freedom of speech, the judge pointed out:

> *If the argument has not been made by anyone in the case, the situation must be very clear for the court that there is a real issue there, because then the court normally will raise that by its own motion, to ask a question, if it really sees a problem. If not, the parties have the possibility to argue, if they don't, and none of the intervening parties are discussing that, the CJEU will not deal with it, if it does not see a problem.*[732]

However, it would be "*quite self-evident that you cannot invoke freedom of speech to justify this clearly discriminatory statement, which falls within the scope of this Directive*". He explained further:

> *Mr Feryn was not saying this in order to express his opinion as a citizen on this problem, because there might be a problem. It was simply for economic reasons that he was saying, well, in order to work, to function as a company, I am not prepared to hire these people, because I get difficulties with my clients. It's a bit artificial then to argue in this context freedom of speech. It is different if it would be a politician.*[733]

Regarding the effectiveness of the remedies at stake and, in particular, the CJEU's distinction

[730] Interview with Advocate General Maduro.
[731] Interview with judge of the CJEU, who was sitting on the chamber dealing with the *Feryn* and *Janecek* cases (16 March 2013).
[732] Interview with judge of the CJEU.
[733] Interview with judge of the CJEU.

between the notion of direct discrimination and the available remedies, the judge stated:

> *I found that a bit strange where the court states that this is not covered. In re-reading the judgment, I find that first saying, it is covered, this is discriminatory treatment, but interpreting Article 7, in such a way, that it does not cover this particular situation because there is no victim. The remedy is limited to those that are victims. You could perhaps say that this is not very consequential. It is a bit contradictory to say, it covers this situation and then that the remedy prescribed by the Directive is not available and that it is for the Member State if it wants to make a remedy available as Belgian law does it. On re-reading the judgment, that struck me as perhaps not being very logical.*[734]

Asking whether this relates to the procedural autonomy of the Member States, he answered:

> *It would perhaps have been better, but the question was asked, because in this case, there was this public body. Well, then it would have been easy to say, this public body must have the possibility to bring such cases. Full stop. Instead of saying that Article 7 does not cover this situation and leave it to subsequent cases. Because you could imagine that someone, one of these people, potentially damaged, concerned, affected by this statement goes to court, stimulated by one of these organisations, and the factual situation does not exclude that he could have approached the entrepreneur for being hired, that he was qualified as a fitter. That there was a possibility that they have been affected, therefore, there should be also the remedy to be able to stop that behaviour.*[735]

Regarding the subsequent question, as to why this was then not decided differently, the judge responded on the basis of time constraints and the need to do "*justice in time*":

> *There is one thing about judicial decision-making, which is in academia is quite often forgotten: Time. Normally, you get the draft judgment [by the Judge Rapporteur] a week before the deliberation and you have seven or eight cases. Time investment for each case is limited.*[736]

7. THE FOLLOW-UP AT THE NATIONAL LEVEL

On 28 August 2009, the Higher Labour Court rendered its judgment on the basis of the interpretation received from the CJEU. The court held that Feryn adopted a discriminatory recruitment practice, and consequently, imposed a prohibitory injunction and required the publication of its judgment in various newspapers. This part will set out the reasoning of the Higher Labour Court's judgment and the insights gained from the interview with that court's judge sitting on that case (**section 7.1.**) as well as the views of the parties as to the final

[734] Interview with judge of the CJEU.
[735] Interview with judge of the CJEU.
[736] Interview with judge of the CJEU.

outcome of their dispute and the effects of the case in general terms (**section 7.2.**).

7.1. THE JUDGMENT OF THE HIGHER LABOUR COURT OF BRUSSELS

The reasoning of the Higher Labour Court will be reconstructed on the basis of the judgment (**section 7.1.1.**) as well as the interview conducted with the judge sitting on that case (**section 7.1.2.**).

7.1.1. THE REASONING IN THE HIGHER LABOUR COURT'S JUDGMENT

On the basis of Belgian rules on evidence and looking at the evidence collectively - meaning the newspaper article in De Standaard, the interview of Pascal Feryn on TV and the press release published by Feryn and the Centre - the Higher Labour Court concluded that there was sufficiently consistent and convincing evidence to establish the fact that the company (Feryn) publicly declared in April 2005 that it would not recruit fitters of a certain ethnic origin because his customers do not want foreigners to install doors in their homes. On the basis of the ruling of the CJEU, the court concluded that the statements made by Feryn constituted direct discrimination in respect of recruitment on the basis of race and ethnic origin.[737]

Following this, the court dealt with the question whether the fact of April 2005 and the subsequent events gave rise to the presumption that Feryn continued its discriminatory recruitment policy. The court repeated that the CJEU held that such public statements constitute sufficient facts, which give rise to a presumption of a discriminatory recruitment policy. The court referred to Feryn's non-constructive attitude towards the diversity plan and the VDAB, which would be sufficient to presume the existence of a continuing directly discriminatory recruitment policy after April 2005.[738]

Next, the Belgian court found that the evidence submitted by Feryn could not rebut the presumption of direct discrimination as they did not show that Feryn's actual recruitment practice did not correspond to those statements. In that regard, Feryn argued that the shift of the burden of proof, in case the plaintiff is the Centre and not an individual victim, would contravene the constitutionally protected principles of equality, presumption of innocence

[737] Arbeidshof te Brussel, 28 Augustus 2009, Judgment Nr. 09/1729.
[738] Arbeidshof te Brussel, 28 Augustus 2009, Judgment Nr. 09/1729.

and the right to a fair trial. According to Feryn, this question should have been referred to the Belgian constitutional court. However, the court rejected this claim on the basis of two previous decisions of the constitutional court in 2004 and 2009, where it found no inequality, manifest unreasonableness or violation of a fundamental right by the provisions on the burden of proof in the law against discrimination, provided that civil and not criminal proceedings are at stake, and even if the applicant is the Centre.[739] Moreover, the court referred to the social importance and relevance of the Centre's tasks to counter discrimination.

In addition, the court pointed out that Feryn wrongly submitted that it can only provide this evidence, if the company would recruit immigrants (even though there are no more free vacancies) or dismiss other employees. In line with the Centre's view, the court clarified that this evidence can be submitted in various ways by showing: firstly, that the hiring process was profoundly and effectively adapted and that this adaptation of the process was also controlled in practice; secondly, that external advice was obtained and also implemented through adjustment of the recruitment policy; thirdly, by showing that the employees involved in the recruitment process received training (according to the court, the management also needs to be involved in the training as they function as a role-model for the whole company); fourthly, that the company follows a policy of diversity; fifthly, that recruitment and selection channels are used, which provide all candidates, regardless their of their race or ethnicity, the opportunity to apply; sixthly, that transparent and objective selection criteria and procedures were used. However, Feryn could not submit any evidence to that effect. Instead, Feryn claimed that it was only a small company and that its recruitment activities do not operate continuously. However, the court pointed out that the principle of equal treatment has to be respected by all companies, irrespective of their size. Every employer, large or small, who respects himself and wants to be respected, also has in addition to the pure profit-making objective a social role, and social integration is achieved through work and employment.[740]

Belgian law allowed the court to order the publication or dissemination of the judgment at the expense of the infringer, if this measure can contribute to the cessation of the act or its

[739] Grondwettelijk Hof van België, 6 October 2004, Judgment Nr. 157/2004, paras. B.83 (see also **section 3.2.1**) and 12 February 2009, Judgment Nr. 17/2009, paras. B.93.3, B.93.4 (see **also section 3.2.2.**).
[740] Arbeidshof te Brussel, 28 Augustus 2009, Judgment Nr. 09/1729.

effects. Indeed, the court considered the publication of the judgment useful for various reasons. The court underlined that the multicultural society is a reality and that the community must learn to deal with this reality with mutual respect for each other, as well as with the opportunity for everyone to work for remuneration. The publication of this judgment would be important for every citizen, to ensure that they know their rights and can enforce compliance with the law. The publication was also necessary due to the fact that it can reach customers, which can ultimately have an influence on Feryn's attitude and its recruitment policy. Finally, a deterrent effect could also be achieved, so that every citizen understands that the anti-discrimination law and anti-racism law does not become a dead letter.

Consequently, the court ordered Feryn to publish, at its own expense, the judgment in four newspapers (De Morgen, De Standaard, Het Laatste Nieuws and De Tijd) in the same letter type and size as used for editorial articles. Finally, Feryn needed to bear the costs of the proceedings and was consequently required to pay 10 000 Euro to the Centre. The Belgian court declined the claim for damages by Feryn against the Centre, as the Centre, even if they partially cooperated with the media, was not responsible for all the media attention, which Feryn caused by its own statements.[741]

7.1.2. THE INTERVIEW WITH THE JUDGE OF THE HIGHER LABOUR COURT

The judge of the Higher Labour Court explained at the beginning of the interview that the appeal was the entire re-making of the process, meaning that the evidence had to be re-considered and it had to be determined which facts were proven according to the Belgian rules on evidence. The judge explained that Feryn contested the content of the telephone conversation with the journalist. However, while Feryn was much more careful about how he expressed himself during the television interview, taking all the circumstances together, the court considered it proven that Feryn publicly declared in April 2005 that it would not recruit fitters of a certain ethnic origin because his customers do not want foreigners to install doors in their homes.[742]

Regarding the interpretation by the CJEU, while the judge noted, on the one hand, that she could resolve the case with the answers that she received, some difficult points were left open. The judge noted: "*They gave some clear answers, but I have asked more questions to*

[741] Arbeidshof te Brussel, 28 Augustus 2009, Judgment Nr. 09/1729.
[742] Interview with the judge of the of the Higher Labour Court of Brussels (*Arbeidshof te Brussel*), 20 December 2013.

clear the whole situation, also for the future, but […] they have answered what they want to answer". The first answer would have been sufficiently clear to demonstrate that the concept of direct discrimination was also applicable to the period before the actual recruitment decision was taken and does not presuppose an identifiable victim. However, she hoped for more guidelines regarding the reversal of the burden of proof. While for the *Feryn* case it would have been clear that the presumption of discrimination could be raised, the general guidelines would have been rather limited and the answer of the court nevertheless too short. She explained: "*I considered that the facts give rise to a presumption. I deduced from the answer of the EU court that the presumption […] could persist and stay if the employer cannot show for the period the counter-proof. He could not prove the contrary*".[743]

Contrary to the first instance labour court, the judge considered it "*not enough that he said again that foreigners are welcome. He had to prove it, saying is not enough. His acts in concreto did not confirm what he said*". Indeed, the judge stressed that Feryn's behaviour regarding the VDAB and the diversity plan showed that "*everything they said they will do, they did not do*", and that the reason for this would be that "*he really did not want people from Morocco*". While the client-argument might be true, the judge did not consider it relevant: "*they did not want it themselves, that was the problem*".[744]

The judge of the Higher Labour Court did not consider the argument of Feryn based on the freedom of expression. Feryn did not raise this argument anymore, as stated by the judge: "*it was only in the first degree and it seems evident that the freedom of opinion has limits, a counterpart*".[745]

Regarding Feryn's obligations to publish the judgment in various newspapers, the judge pointed out:

> *We found that the violation was grave/important, and all the process, they did not want to change their attitude. It happens very rarely, generally the victim can hardly prove discrimination. Here he said it to the journalist and the TV, it had to be an example for employers to be more careful for discrimination.*
>
> *They were some phrases in the judgment that were meant for all employers. […] Because all three of us wanted [i.e. also the representatives of the employer*

[743] Interview with the judge of the of the Higher Labour Court of Brussels.
[744] Interview with the judge of the of the Higher Labour Court of Brussels.
[745] Interview with the judge of the of the Higher Labour Court of Brussels.

> *organisation and the labour union] [to show] that an employer knows that he does not only have to do money, but he also has to see for work. […] Because work is still the most important way to integration. Work is for me the key for integration. That was behind [our reasoning]. That was in the deliberation, we said, that we will publish it all.*
>
> *It is expensive. I don't know exactly. There was also the evaluation of the costs of the process, they also had to pay a higher cost because of the procedure. In each stage, they could have still said to the Centre, we will do the diversity plan. But until the end, they did not want it. In this case, it also cost the Centre a lot of money. The costs were evaluated not like a punishment, but the real evaluation of the process.*[746]

Finally, the judge clarified that if Feryn failed to comply with the injunction, the Centre could take enforcement action before the criminal courts and Feryn would risk facing criminal penalties.[747]

7.2. THE VIEWS OF THE PARTIES

7.2.1. THE VIEW OF THE APPLICANT

The director of the Centre described his experience of the proceedings before the CJEU and the Higher Labour Court in the following way:

> *We were very happy that the judge decided to say, yes, I will ask for advice from the European Court of Justice. And then we were waiting of course for what the European Court of Justice would say. But to be honest, we were rather confident. But to be also honest, we were surprised by the clarity of first the advice of the Advocate General and then after the judgment. That was so clear, so detailed, even using the free competition argument […] it will be illegal competition between France and Belgium, if in Belgium it is allowed to say, I will not hire Moroccans, and in France, it would not be allowed. So even purely economic arguments, well we are in the EU, and the EU is about the economy […] some people say it is about human rights, but I am not always that sure about it […]. So, with that ruling for us, we slept very well and we just waited for the final ruling by the Court of Appeal […] The Court did as we had hoped for, to ask for the advice and to use the advice and […] said, this is discrimination to say that you will discriminate. It is discrimination. You cannot say because there is no individual victim, there is no discrimination. Precisely in these kind of cases, it is up to an equality body, set up due to a European Directive, to take up the case, because who else would take up that case, if there is no individual victim? So, you*

[746] Interview with the judge of the of the Higher Labour Court of Brussels.
[747] Interview with the judge of the of the Higher Labour Court of Brussels.

> *don't have to blame the Centre for picking, taking up that cases. It is a legal role, it's a duty in a certain way, so you cannot blame them for all.*[748]

The Centre's lawyer pointed to the significance of the *Feryn* case for the Belgian legal system, which took a further step in "*absorbing*" the nature of the anti-discrimination legislation:

> *It was one of the first successful discrimination cases in Belgium, even though we have had legislation since the 1980s. Under the criminal law, this is not possible. Proving discrimination under criminal is difficult. Feryn was a premiere in the Belgian legal landscape.*[749]

According to the director of the Centre, the impact on the practices on Feryn remain, however, uncertain: "*Some people decided to go to Feryn because he was discriminating. Others refused to go to Feryn because he was discriminating*". While he did not think that Feryn changed its practices, which were, however, not supervised by the Centre, he justified the Centre's actions against the company for the principled function of the case:

> *But we are not here to tackle only the practice of one company, having 40/45 collaborators, we are here acting in the [interests of] Belgian society. And so, in a certain way, we could not not deal with this case, because if we would have done nothing, then the message would be there for everybody in this country, you can state that you will discriminate without any problem. So, for me, the impact is not only about the 40/45 persons working there in that company. It doesn't matter. Well, I can't say that because if there is discriminatory practice, we should tackle it. Of course. But the target, for me, was never only Feryn. It was on the principles, it was on what is this society about. Can you state in this society that you won't hire a number of persons due to, well, just for a discrimination ground … that's, sometimes I say, we don't deal with those here, we dare to change the world. And in a certain way, we knew very well that this was about principles, not only applying to Feryn but to everybody.*[750]

In general, for the practice of the Centre, it was very important that they countered the 'customer argument', which is often relied on by companies to justify their discriminatory practices. And furthermore, to make it clear that a public statement can amount to discrimination, if certain conditions are fulfilled. Moreover, he perceived that the *Feryn* case strengthened the position of the Centre in negotiating with employers.[751]

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[748] Interview with the director of the Centre for equal opportunities and combating racism (applicant), 18 December 2012.
[749] Interview with the lawyer of the Centre for equal opportunities and combating racism (applicant), 19 December 2012.
[750] Interview with the director of the Centre.
[751] Interview with the director of the Centre.

7.2.2. THE VIEW OF THE DEFENDANT

Feryn's lawyer was not able to evaluate whether the proceedings had an economic impact on Feryn (despite the payment of the publication) [752] as the company might have also gained clients for having a discriminatory attitude. However, as reported by Feryn's lawyer, the proceedings also had other negative consequences:

> *After the trial, then of course, we had at least 10 Moroccan people, they called Feryn saying: I'll work for you! I'll work for you! Because you say you want foreigners. And Feryn said, ok you can come, but of course there is for all people, Belgians and foreigners, the same test, your knowledge of electricity, your knowledge of ... that you are capable to do ... install these doors and then you can come. And some people tried to blackmail him, saying, I called you and you said on the phone this and you said on the phone that. So the consequences after this trial, after these two or three years of trial, certainly the father Feryn, he was so, really tired of something completely innocent, something that everybody would say.*[753]

Regarding the publication of the judgment, Feryn's lawyer reported:

> *He had to pay a fortune for the publication of the judgment and it was completely useless, completely useless because nobody could read it. It was ... the text of the judgment is so small printed because one page that was already [....] I think he spend about half a million euro [....] it was even so, for the editors of the newspapers, so completely, they couldn't understand that. It was the first time. Of course, very often they have to publish a judgment but only the final decision of the judge and not all the considerations. And most of them, they said, you don't have to pay in full because you will go bankrupt if you have to pay that. So, as I say, I am a lawyer, I have been a lawyer for 35 years and this is one of these cases where you say, how is this possible? It has nothing to do with legality, it has nothing to do with moral standards! I don't ... I think I can presume what in reality happened but for me it is, sometimes the system goes too far.*[754]

Eventually, Feryn's lawyer reported on the incomprehension of the father Feryn about what was happening:

> *He couldn't understand that I have to pay taxes for a legal system that makes an investment in legal proceedings against my son, who simply said I have some*

[752] Although the concrete costs of the publications could not be verified, all national actors interviewed confirmed that it must have been very expensive. Feryn's lawyer referred to approximately 500 000 Euro. The director of the Centre spoke about a fine of 50 000 Euro, but what was meant exactly by him remains unclear, as there was actually no fine imposed by the court. The Higher Court of Appeal required in its judgment to use the normal letter size for editorial articles. However, as stated by Feryn's lawyer and confirmed by the director of the Centre, the publication due to the length of the judgment and the need to put it all on the front page was printed in such a small letter size, that it was ultimately unreadable.

[753] Interview with the lawyer of Feryn NV (defendant), 20 December 2012.

[754] Interview with the lawyer of Feryn.

> *problems with some of my clients. For him, that is, he couldn't understand that. This was for him the biggest problem. If that is why we have a legal system and why we have judges in order to be busy with this kind of non-events, that was for him more shocking than everything else.*[755]

8. CONCLUDING REMARKS

The *Feryn* case has not been only the first judgment of the CJEU on the Race Equality Directive 2000/43/EC, but also the first successful racial discrimination case in Belgium. The case study embeds the *Feryn* case in the historical development of the European and the Belgian approach to racism and race discrimination. When Belgium enacted its Federal Act criminalizing certain acts inspired by racism or xenophobia in 1981, the debate about a European policy on race equality only began. From then on it took 20 years until the adoption of the Race Equality Directive 2000/43/EC. In these years, the development of a European policy on race equality has been pushed forward by the European Parliament, the European Commission and a strong transnational NGO lobby. This time-period stands in contrast with the seven month, which it took for the Commission to present the proposal for the Directive after the entry into force of the Amsterdam Treaty, and the seven additional month for the Council to unanimously adopt the Directive. The Race Equality Directive did not only reveal exceptionalism in this speedy adoption process after a cumbersome period of lobbying, but also suggests to distinguish itself from a pure market integration rationale, which was the dominant underlying concern of the EU approach to anti-discrimination legislation until the adoption of the Treaty of Amsterdam. The Race Equality Directive embraces elements of a human rights instrument, but also includes elements constitutive for the creation of a European social policy.

The implementation of the Race Equality Directive in Belgium added a new layer to the Belgium approach to racism, which until then has been predominantly shaped by national and international influences. Next to the traditional criminal law approach to racism, with the adoption of the Directive, racial discrimination became also a matter of civil law. Belgium extended the role that the Centre for equal opportunities and combating racism developed under its criminal law provisions to the newly introduced civil law provisions. Belgium thereby exceeded the level of protection as foreseen by the Directive, which relies on an

[755] Interview with the lawyer of Feryn.

individual-complaint system. Without such a broad competence, the *Feryn* case would have never reached the Belgian labour courts nor the CJEU – the crux of the case was that there was no identifiable complainant. Indeed, the reconstruction of the *Feryn* case suggests that the substantive concept of direct discrimination under EU law has been shaped by the traditional enforcement mechanisms available under Belgian law.

The implementation of the Race Equality Directive into the Belgian legal system has been, however, neither unproblematic, nor uncontroversial. The former was revealed by the difficulties encountered by the first instance labour court in applying the burden of proof, an issue where the guidance of the CJEU was ultimately rather weak, as well as the nature of the very detailed and numerous questions of the Higher Labour Court to the CJEU. The latter was revealed, on the one hand, by the constitutional challenges of the Belgian implementation of the Race Equality Directive, and, on the other hand, by the interview with the lawyer of Feryn NV, which exposed strong resistance to the newly introduced approach to race discrimination, without engaging substantively with the Race Equality Directive.

The *Feryn* case involves a strong constitutional dimension, whose explicity became somehow lost with the preliminary reference of the Higher Labour Court to the CJEU. Indeed, arguably, the strongest legal argument of Feryn would have been Feryn's right of freedom of expression, which has been, however, only explicitly addressed by the first instance labour court. The tension between legislation on racial discrimination and the freedom of expression has been a matter in the Belgium legal system since its accession to the International Convention on the Elimination of All Forms of Racial Discrimination. This issue was, however, not raised at EU level – neither during the adoption process of the Race Equality Directive were possible tensions with other human or fundamental rights discussed, nor was the freedom of expression a matter in the proceedings before the CJEU in *Feryn*. Advocate General Maduro argued that this matter has been implicitly addressed as the public statements of Feryn were construed in the context of an offer of employment. However, it should not be forgotten that, as the facts suggest, Feryn did not contact the newspapers in order to advertise its current vacancies, but Feryn has been contacted by a journalist for an interview.

In the follow-up judgment to the CJEU's preliminary ruling, the Belgian Higher Labour Court set the standard much higher than the first instance labour court did and it became clear

that Feryn could have rebutted the presumption of direct discrimination only by complying with the conditions which have been set by the Centre. Indeed, the Higher Labour Court accords those soft policy mechanisms a quasi-legal force, which the first instance court completely denied. Looking at the court's reasoning in favour of a publication in several newspapers, the aim to inform and to some extent educate the Belgian society comes to the forefront. While there are uncertainties about the exact publication costs bared by Feryn, it is clear that it involved considerable costs. It can be questioned whether such a sanction could be considered proportional or not even closer to a criminal sanction, which comes, however, with the presumption of innocence. Confronting the European actors involved in the litigation with the final outcome of the *Feryn* case, it was revealed that such a 'harsh' sanction came also as a surprise to them.[756]

[756] Interview with Advocate General Maduro, 26 March 2013; Interview with judge of the CJEU, who was sitting on the chamber dealing with the *Feryn* and *Janecek* cases (16 March 2013).

CHAPTER 4: THE *INVITEL* CASE STUDY

1. INTRODUCTION

The *Invitel* case arose out of an *actio popularis* brought by the Hungarian Authority for Consumer Protection against Invitel Zrt., a fixed-line telephone network operator, concerning the latter's use of an allegedly unfair unilateral price amendment clause in its consumer contracts. The Hungarian Authority for Consumer Protection became acquainted with Invitel's allegedly unfair practices as a result of a large volume of complaints made by consumers. Afraid that Invitel's practice might spread to other service providers and in the presence of indications that, to some extent, similar practices were already being adopted by other service providers, the Authority decided to take legal action before the courts against Invitel. The action against Invitel had the clear ambition to establish justice for consumers: not only should Invitel be prohibited from using the unfair term, but it should also automatically be obliged to refund all affected consumer-customers.

However, in the absence of specific civil procedural provisions on the *actio popularis*, not only did the claim for an automatic refund cause troubles for the Hungarian judge, but the whole *actio popularis*, with its *erga omnes* effect reaching beyond the parties to the case, was cast into doubt. Although the creation of a modern system of consumer protection in Hungary has largely resulted from its accession to the EU, the administrative control of contractual terms is characterized by its socialist legacy. In its preliminary reference, the Hungarian judge contrasted the national *actio popularis* with the case law of the CJEU on the Unfair Terms Directive 93/13/EEC,[757] which hitherto departed from the individual consumer. Alongside that, the national judge approached the CJEU in search of formal authority to disregard the Law on electronic communications, which the judge perceived as being irreconcilable with the civil law requirements of good faith and fair practices.

The *Invitel* case was indeed the first case in which the CJEU examined the compatibility of a national collective remedy with Directive 93/13/EC. In that regard, it gave the CJEU the opportunity to clarify the broad and unspecific requirements of collective actions under the Unfair Terms Directive. The CJEU confirmed the effectiveness of the Hungarian system.

[757] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21.4.1993, p. 29.

However, it appears that the remedial aspects of the CJEU's judgment were of little relevance for the dispute at hand. In comparison to the Advocate General, the CJEU did not, at least explicitly, take a stance on the individual consumer's right to receive a refund on the basis of the findings in the collective action. While the substantive assessment of the unfair term by the CJEU would have given the Hungarian court the authority to disregard the Hungarian Law on electronic communications, and, arguably, to establish the unfair nature of the term at stake, the parties eventually, and somewhat unexpectedly, decided to settle their dispute in view of Invitel's offer to begin a campaign in order to heighten awareness of consumer protection.

The case study on the *Invitel* case will proceed the following manner. Firstly, the historical development of a European consumer policy and of the Unfair Terms Directive 93/13/EEC will be set out. In this context, the legal structure with which the Directive aims to clear the market of unfair terms will be examined and the significance of the *Invitel* case for its development will be determined (**section 2**). Following this, by contrasting the development of consumer protection policies in the Western European Member States, the specificities of the development of the Hungarian system of consumer protection will be examined. In describing the developments in Hungary, the focus will be on the control of unfair terms, particularly setting out the roots of the *actio popularis* with its *erga omnes* effect (**section 3**). Then, the conflict between the parties will be reconstructed within its national context on the basis of the interviews with the parties involved in the litigation (**section 4**). Next, the ruling of the Hungarian court and its reasons for submitting a preliminary reference to the CJEU will be set out and contextualized on the basis of the interviews conducted with the parties to the case (**section 5**). Thereafter, the proceedings before the European Court of Justice will be reconstructed by looking at the submissions of the parties involved in the European proceedings, particularly of the European Commission, the opinion of the Advocate General and the judgment of the CJEU (**section 6**). Finally, the follow-up at the national level will be examined. On the one hand, this section will examine the views of the national judge and the parties regarding the proceedings before the CJEU. On the other hand, as the parties settled their dispute out of court, this section will draw on the interviews with the parties to reconstruct the settlement's terms and the views of the parties thereon. (**section 7**). The case study will conclude with some remarks about some striking issues raised by the reconstruction of the *Invitel* case (**section 8**). However, the horizontal analysis according to the four levels of hybridity will be left to the final Chapter (**Chapter 5**) of this thesis.

2. EUROPEAN CONSUMER LAW AND THE CONTROL OF UNFAIR TERMS

During the 19th century, there was no effort to protect the consumer as a particular group within the market. It was assumed that the market could sufficiently ensure consumer welfare on its own and the focus on contractual autonomy was predominant. Consumer law developed into a coherent body of law only after World War II. In the 1960s, the political awareness of consumers increased because of mass production and health scandals, which resulted in civil movements for consumer protection, in what has been called the "consumption society". In the United Kingdom, the Molony Report[758] was published in 1962 and in the same year, in the USA, President Kennedy rendered a famous Message to Congress setting out the fundamental consumer rights.[759] [760]

The heyday of national consumer law came in the 1970s. The 1970s is described as "the decade when the development of a consumer movement infrastructure, with large private organizations, state-subsidised research institutes, national consumer councils, government ministries for consumer affairs, special journals, etc. began to bear fruit".[761] Although the EU Member States revealed a common movement towards consumer protection at that time, the approaches of the Member States varied considerably, as they were influenced by diverse cultural backgrounds.[762] Once consumer protection gained momentum in the Member States, the European dimension entered on to the scene. Nationally embedded concepts of the consumer and the national regulatory programmes were exposed to the demand that all barriers to trade within the Community be dismantled. The evolution of EU consumer law reached its highpoint in 1986 with the enactment of the Single European Act, which resulted in consumer law becoming an integral part of the policy for the completion of the Single

[758] Final report of the Committee on Consumer Protection, 1962; the Molony Report was produced by a government Committee charged in 1959 with examining whether measures to improve consumer protection were desirable and, if so, which reform proposals should be made.
[759] John F. Kennedy's speech, Public Papers of the United States, Public Messages, Speeches and Statements of the President, 1 January to 31 December, 1962, pp. 235-243.
[760] For a more detailed account of the development of consumer protection law, see Iris Benöhr, *EU Consumer Law and Human Rights* (Oxford; New York: Oxford University Press, 2013), 9–14; Michelle Everson and Christian Joerges, "Consumer Citizenship in Postnational Constellations?," *EUI Working Papers Law*, no. 47 (2006): 4–13.
[761] Ewoud Hondius, "The Legal Control of Unfair Terms in Consumer Contracts: Some Comparative Observations," in *Unfair Terms in Consumer Contracts: Legal Treatment, Effective Implementation and Final Impact on the Consumer*, ed. Thierry Bourgoignie (Louvain-la-Neuve, Brussels: Cabay, Bruyland, 1983).
[762] Hans-W. Micklitz and Norbert Reich, *Consumer Legislation in the EC Countries: A Comparative Analysis* (New York: Van Nostrand Reinhold, 1980). For a summary of the four different models (the common law, the Mediterranean, the German and the Scandinavian), see Benöhr, *EU Consumer Law and Human Rights*, 15, 16.

European Market. In reference to the Sutherland report of 1992,[763] the European Commission developed the "the 'confident consumer' as a *political* tool to convince Member States that mandatory standards in contract law were needed to strengthen consumer confidence in the internal market".[764] The internal market programme thereby acted as an indirect consumer policy.[765]

The Unfair Terms Directive 93/13 was described as the "first incursion of Community law into the heartland of national contract law thinking".[766] Before the Directive was adopted, starting in the 1970s, the Member States had already collected extensive experience with regard to the regulation of unfair contractual terms. Additional impetus was given at that time by the international level. In 1973, the Consultative Assembly of the Council of Europe called, in a resolution on a Consumer Protection Charter, for the better protection of consumers against one-sided standard contracts.[767] Three years later, the Committee of Ministers adopted a resolution on "Unfair Terms in Consumer Contracts and Appropriate Method of Control", which provided recommendations for its member states.[768]

This section will provide an overview of the historical development of a European consumer policy (**section 2.1.**). Following this, the Unfair Terms Directive 93/13/EEC, the legal base of the *Invitel* case, will be introduced by setting out the Directive's legislative history and legal provisions (**section 2.2.**). Finally, on that basis, the significance of the questions raised by the *Invitel* case, the first case in which the CJEU was asked to examine the compatibility of a national collective remedy with Directive 93/13/EC, will be revealed (**section 2.3.**).

[763] Peter Sutherland, "The Internal Market after 1992: Meeting the Challenge. Report Presented to the Commission by the High Level Group on the Functioning of the Internal Market," 1992.
[764] Micklitz, "The Visible Hand of European Regulatory Private Law—The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation," 10 ff.
[765] Hans-W. Micklitz and Norbert Reich, "Economic Law, Consumer Interests, and EU Integration," in *European Consumer Law*, ed. Norbert Reich et al., 2nd ed. (Cambridge; Antwerp; Portland: Intersentia, 2014), 12. See also, Everson and Joerges, "Consumer Citizenship in Postnational Constellations?," 14, 15.
[766] Stephen Weatherill, *EU Consumer Law and Policy*, 2nd ed. (Cheltenham: Edward Elgar Pub. Ltd., 2013), 115.
[767] Council of Europe, Consultative Assembly, Resolution 543 (1973) on a Consumer Protection Charter, Nr. A. (b)(i).
[768] Council of Europe, Committee of Ministers, Resolution (76) 47 on Unfair Terms in Consumer Contracts and an Appropriate Method of Control.

2.1. THE DEVELOPMENT OF A EUROPEAN CONSUMER POLICY

When the Treaty of Rome was signed in 1957, which established the European Economic Community, there existed no explicit legal basis for adopting legislation in the area of consumer protection. At that time, priority was given to the improvement of the common market through the implementation of the fundamental freedoms in favour of the "active market participant".[769] It was assumed that "the consumer will benefit from the process of integration through the enjoyment of a more efficient market, which will yield more competition allowing wider choice, lower prices and higher-quality products and services".[770]

However, prompted by international developments and by increasing market integration, which revealed the need for common national regulatory standards; by the 1970s, the political commitment to the establishment of a EU consumer protection programme had grown. At the Paris Summit in October 1972, the call was made for the submission of a programme of consumer protection policy. In 1975 and 1981, the European Council of Ministers adopted two resolutions on programmes for consumer protection and information policy at EU level. The programmes contained five basic consumer rights: 1) the right to protection of health and safety, 2) the right to protection of economic interests, 3) the right of redress, 4) the right to information and education, 5) the right of representation (the right to be heard). A catalogue of measures was to accompany the implementation of these rights.[771]

As the Community lacked an explicit competence in the field of consumer law, legislative measures were based on the internal market legal basis, which required unanimity voting in the Council. Consequently, legislative consumer protection measures were necessarily presented as means of overcoming distortions to competition and a means of reducing obstacles within the internal market.[772] Consumer protection also gained importance in an

[769] Micklitz and Reich, "Economic Law, Consumer Interests, and EU Integration," 9.
[770] Weatherill, *EU Consumer Law and Policy*, 4; Benöhr, *EU Consumer Law and Human Rights*, 18.
[771] Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy, OJ C 92, 25.4.1975, p. 1 and Council Resolution of 19 May 1981 on a second programme of the European Economic Community for a consumer protection and information policy, OJ 1981 C 133/1; see also Weatherill, *EU Consumer Law and Policy*, 6, 7; Benöhr, *EU Consumer Law and Human Rights*, 18, 19.
[772] See for instance, Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer, OJ L 33, 8.2.1979, p. 1, Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising, OJ L 250, 19.9.1984, p. 17, and Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability

indirect manner through the case law of the CJEU, which developed consumer protection as an independent reason of justification against national restrictions to free movement, provided they were proportionate and non-discriminatory.[773]

From the mid-1980s, the EU's objective was the completion of the internal market by the end of 1992,[774] which was given constitutional impetus following the entry into force of the Single European Act in 1987. The newly drafted internal market legal base introduced a majority vote in the Council of Ministers, combined with a qualified Parliamentary veto right by means of the cooperation procedure. Moreover, it was required that measures proposed by the Commission to enhance the functioning of the internal market must proceed from a high level of consumer protection. Since the SEA did not provide a specific legal basis for secondary consumer legislation, consumer Directives were still adopted under the general motivation of establishing and developing the internal market.[775] The Council resolution of 23 June 1986 concerning the future orientation of the policy for the protection and promotion of consumer interests was expressed within the context of internal market policy.[776] The most striking and overt change between the Council resolutions is considered to be the shift from consumer 'rights' to consumer choice as the dominant theme.[777]

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for defective products, OJ L 210, 7.8.1985, p. 29, Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, OJ L 372 , 31.12.1985, p. 31, Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, OJ L 042, 12.02.1987, p. 48. See also Benöhr, *EU Consumer Law and Human Rights*, 19, 20.

[773] Micklitz and Reich, "Economic Law, Consumer Interests, and EU Integration," 10.

[774] Commission's White Paper on Completing the Internal Market, COM (85) 310.

[775] See for instance, Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, OJ L 158, 23.06.1990, p. 59, Council Directive 92/59/EEC of 29 June 1992 on general product safety, OJ L 228 , 11.08.1992, p. 24, Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 095, 21.04.1993, p. 29, Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis, OJ L 280, 29.10.1994, p. 83, Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ L 144, 4.6.1997, p. 19, Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, OJ L 166, 11.6.1998, p. 51, Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ L 171 , 07.07.1999, p. 12, Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, OJ L 271, 9.10.2002, p. 16, Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, OJ L 149, 11.6.2005, p. 22, Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws , OJ L 364, 9.12.2004, p. 1.

[776] Council Resolution of 23 June 1986 concerning the future orientation of the policy of the European Economic Community for the protection and promotion of consumer interests, OJ C 167, 5.7.1986, p. 1.

[777] Weatherill, *EU Consumer Law and Policy*, 9.

A stronger commitment beyond market goals became apparent with the entry into force of the Treaty of Maastricht in 1993. Consumer protection was expressly listed as an activity of the Community and a new Chapter XI on Consumer Protection was inserted into the EC Treaty. The Community thereby received a formal competence to legislate on consumer issues. Next to adopting measures on the basis of the internal market legal basis, it could take specific action to support and supplement the policies pursued by the Member States in relation to the health, safety and economic interests of consumers and to provide adequate information. Both types of measures had to be adopted by the co-decision procedure. However, in practice, the new legal basis had a low significance and the majority of Directives continued to be adopted on the internal market legal basis.[778] Furthermore, the Maastricht Treaty formally institutionalized the minimum harmonization approach for actions to support and supplement national policies, as well as the principle of subsidiarity.[779]

The Treaty of Amsterdam enlarged the Union's competence in the area of consumer law: a high level of consumer protection had to be ensured by protecting the health, safety and economic interests of consumers and promoting their right to information, education and to organise themselves in order to safeguard their interests. The Amsterdam Treaty thereby added new consumer rights (information, education and organization). Moreover, consumer protection interests had to be taken into account by the European institutions in the definition and implementation of other EU policies. The two legislative competences, which were already set out in the Maastricht Treaty, remained the same. However, consumer protection legislation continued to be based primarily on the internal market legal basis.[780]

With the entry in to force of the Treaty of Lisbon in 2009, consumer protection was expressly included in the field of shared competences between the EU and the Member States. Moreover, in 2000, the Charter of Fundamental Rights of the European Union was adopted

[778] Jules Stuyck, "The Transformation of Consumer Law in the EU in the Last 20 Years," *Maastricht Journal of European and Comparative Law* 20, no. 3 (2013): 380. An example for the consumer legal basis is constituted by Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers, OJ L 80, 18.3.1998, p. 27.
[779] Benöhr, *EU Consumer Law and Human Rights*, 24, 25.
[780] Ibid., 27–30. The growing harmonization by the EU caused some Member States to fear their national powers, as reflected in the *Tobacco Advertising* case (Case C-376/98 *Germany v Parliament and Council* [2000] I-08419). See on this also Weatherill, *EU Consumer Law and Policy*, 14, 15. For a more detailed analysis of the changes introduced by the Amsterdam Treaty, see Jules Stuyck, "European Consumer Law after the Treaty of Amsterdam: Consumer Policy in or beyond the Internal Market," *Common Market Law Review* 37, no. 2 (2000): 367–400.

and with the Treaty of Lisbon it became legally binding. The Charter contains, in Article 38, the principle of consumer protection: "Union policies shall ensure a high level of consumer protection". A further important change occurred in 2000, when the Commission changed its approach in the area of consumer law from minimum to maximum harmonization.[781] The move towards maximum harmonization, it was stated, would foster economic integration by further promoting consumer's interest in cross-border purchases and by encouraging companies to access cross-border markets. [782]

2.2. THE UNFAIR TERMS DIRECTIVE 93/13/EC

The adoption of the Unfair Terms Directive 93/13/EEC took almost 20 years to complete. Since the preliminary programme for consumer protection and information policy, which goes back to the meeting of the Heads of State or of Government in 1972, unfair terms have been on the agenda of the European Community.[783] In order to protect the economic interests of consumers, it requires that "(p)urchasers of goods or services should be protected against the abuse of power by the seller, in particular against one-sided standard contracts".[784] Following this, the Commission initiated a comparative study on the national laws on unfair contract terms,[785] on the basis of which a memorandum and a set of Articles for a Directive

[781] For further aspects of the more recent development of consumer law, see Stuyck, "The Transformation of Consumer Law in the EU in the Last 20 Years."

[782] 'Consumer Policy Strategy 2002-2006' (COM(2002) 208 final). As confirmed by 'Consumer Policy Strategy' 2007-2013, (COM(2007) 99 final). See to that effect, Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance, OJ L 304, 22.11.2011, p. 64; for a critique of the new approach: Peter Rott, "Minimum Harmonization for the Completion of the Internal Market? The Example of Consumer Sales Law," *Common Market Law Review* 40, no. 5 (2003): 1107; Geraint Howells, "The Rise of European Consumer Law — Wither National Consumer Law?," *Sydney Law Review* 28, no. 1 (2006): 63; Peter Rott and Evelyne Terryn, "The Proposal for a Directive on Consumer Rights: No Single Set of Rules," *Zeitschrift Für Europäisches Privatrecht*, no. 3 (2009): 456; Jan Smits, "Full Harmonization of Consumer Law? A Critique of the Draft Directive on Consumer Rights," *European Review of Private Law* 18, no. 1 (2010): 5; Hans-W. Micklitz and Norbert Reich, "Crónica de Una Muerte Anunciada: The Commission Proposal for a 'Directive on Consumer Rights,'" *Common Market Law Review* 46, no. 2 (April 1, 2009): 471.

[783] Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy, OJ C 92, 25.4.1975, p. 1.

[784] Ibid., para. 19.

[785] Eike v. Hippel, "Der Schutz Des Verbrauchers Vor Unlauteren Allgemeinen Geschäftsbedingungen in Den EG-Staaten," *Rabels Zeitschrift Für Ausländisches Und Internationales Privatrecht* 41, no. 1 (1977): 237 ff. In 1977, E. Hondius published a study on the mechanism of abstract control in the Member States: Administrative and Judicial Control of Unfair Terms in Consumer Transactions regarding Goods and Services, ENV/223/74, November 1977, see also a summary in Ewoud Hondius, "Unfair Contract Terms: New Control Systems," *American Journal of Comparative Law* 26, no. 4 (1978): 525 ff.. In this first study by Hondius, he came to the conclusion that as far as control procedures are concerned, legislation in various countries was still relatively new and there was too little experience for an ideal control system to become apparent.

were presented and discussed with government experts.[786] However, in view of the "intense burst of legislative activity on the part of the Member States" employing diverse regulatory techniques, the Commission eventually postponed further work on the Directive.[787]

While the European Parliament in 1980 called for a Directive on unfair terms[788] and in 1981 the Commission announced in its second programme for consumer protection to continue its work on unfair terms,[789] it was not until 1984 that the Commission issued a discussion paper on the subject.[790] In its Green Paper, the Commission suggested two possibilities for action: first, on the basis of the German approach, the enactment of a Directive on unfair terms which would contain a general definition of unfair terms alongside a so-called 'black list' of terms, which would be prohibited throughout the Community. The second option concerned negotiations between trade and consumer associations, which were conducted under the supervision of a governmental authority. In that regard, the proposal made reference to the UK's Office of Fair Trading, which negotiated Codes of Practices with supplier associations. While the Green Paper was opposed by the business sector, the European Parliament expressed a much more positive attitude.[791] In 1986, the Commission forwarded to the Council a communication entitled "A New Impetus for Consumer Policy", upon which the Council adopted a resolution calling proposals from the Commission under that programme, which included a proposed directive on unfair terms of contract.[792]

In the meantime, most Member States adopted legislation to regulate unfair terms. In order to ascertain a basis for legitimate Community-wide action, the Commission commissioned a further comparative law analysis. *Ewoud Hondius* concluded that there was now sufficient experience with national control systems to enable the Commission to make a choice of the

[786] ENV/381/76 and ENV/384/76.
[787] Proposal for a Council Directive on unfair terms in consumer contracts. COM (90) 322 final, 3 and 14 September 1990, COM (90) 322 final/2, 19 September 1990, pp. 10, 11.
[788] OJ 1980 C291/35.
[789] Council Resolution of 19 May 1981 on a second programme of the European Economic Community for a consumer protection and information policy, OJ 1981 C 133/1, para. 30.
[790] Unfair terms in contracts concluded with consumers. Commission communication to the Council. COM (84) 55 final, 14 February 1984.
[791] Proposal for a Council Directive on unfair terms in consumer contracts. COM (90) 322 final, 3 and 14 September 1990, COM (90) 322 final/2, 19 September 1990, pp. 10, 11.
[792] Council Resolution of 23 June 1986 concerning the future orientation of the policy of the European Economic Community for the protection and promotion of consumer interests, OJ C 167, 5.7.1986, p. 1. This was confirmed in Council Resolution of 9 November 1989 on future priorities for relaunching consumer protection policy, OJ C 294, 22.11.1989, p. 1.

best elements of these systems.[793] However, the "internal negotiations in the Commission were characterised by conflicts on the legal basis, its competences, the extent and intensity of the Community initiatives, which had not been overcome until the presentation of the first proposal of a Directive on 14 September 1990".[794] Amendments to the proposal came as a result of the critical assessment by the Economic and Social Committee[795] and the European Parliament.[796] The negotiations within the Commission were further influenced by the scientific, legal and policy discussions.[797]

The new proposal of the European Commission was presented on 5 March 1992. As with the previous proposal, it was based on the internal market legal basis, ex Article 100a EEC (now Article 114 TFEU). The deliberations on the proposal in the Council of Ministers led to discussions on the Directive's scope of application and the extent of review of contractual clauses.[798] The Council tried to ensure that the Directive did not affect some traditional issues of national contract law. As per Article 8, the compromise prescribed the minimum harmonization character of the Directive 93/13/EEC, as required by the Economic and Social Committee[799] and the European Parliament.[800]

All in all, as evaluated by *H.W. Micklitz*: "Overall the common position is characterised by a significant reduction in scope of protection, protective purpose and enforcement of protection which makes it more difficult to achieve the actual purpose of the Directive, i.e. to provide consumers and sellers or suppliers with minimum standards for the drafting of B2C contracts within the internal market".[801] While the Commission expressed its regrets about this

[793] Ewoud Hondius, *Unfair Terms in Consumer Contracts* (Utrecht: Juridische Bibliotheek R.U. Utrecht, 1987).
[794] Hans-W. Micklitz, "Unfair Terms in Consumer Contracts," in *European Consumer Law*, ed. Norbert Reich et al., 2nd ed. (Cambridge; Antwerp; Portland: Intersentia, 2014), 129. Proposal for a Council Directive on unfair terms in consumer contracts. COM (90) 322 final, 3 and 14 September 1990, COM (90) 322 final/2, 19 September 1990.
[795] Opinion on the proposal for a Council Directive on unfair terms in consumer contracts of 24 April 1991 ('the 1991 opinion'), OJ 1991 C 159.
[796] Opinion of 20 November 1991, OJ C 326, 16 December 1991, 108.
[797] Micklitz, "Unfair Terms in Consumer Contracts," 129. With references to European Consumer Law Group, "Opinion on the Proposal for a Council Directive on Unfair Terms in Consumer Contracts," *Journal of Consumer Policy* 14, no. 1 (1991): 107; Hans Erich Brandner and Peter Ulmer, "The Community Directive on Unfair Terms in Consumer Contracts: Some Critical Remarks on the Proposal Submitted by the EC Commission," *Common Market Law Review* 28, no. 3 (1991): 647; Thomas Wilhelmsson, "The Proposal for an Unfair Contracts Directive - A Nordic Perspective," *European Consumer Law Journal*, 1992, 77.
[798] Council document 8406 January 1992, JCP 1992, 469.
[799] Opinion on the proposal for a Council Directive on unfair terms in consumer contracts of 24 April 1991 ('the 1991 opinion'), OJ 1991 C 159,
[800] Opinion of 20 November 1991, OJ C 326, 16 December 1991, 108.
[801] Micklitz, "Unfair Terms in Consumer Contracts," 132.

reduction in scope, eventually, it did not succeed in putting forward its proposal before the Council and Parliament.[802] The final text was adopted on 3 April 1993 and was to be implemented by the Member States by 31 December 1994.

More recently, the Commission tried to integrate Directive 93/13 into a coherent consumer law approach. In 2008, its proposal for a Directive on Consumer Rights would have transformed Directive 93/13 into a measure of maximum harmonization.[803] However, with the exception of the notification duty under Article 8(a) of the amended Directive 93/13,[804] these efforts ultimately failed due to the resistance from the Member States and consumer lawyers. Directive 2011/83/EU[805] changed only the substance of the regulation of off-premise and distance contracts.[806]

2.2.1. THE PURPOSE OF THE DIRECTIVE

The purpose of the regulation of unfair contract terms is to protect consumers against disadvantages arising from their typically weaker bargaining position vis-à-vis sellers and suppliers, who use their economic strength to take advantage of consumers by drawing up standard-form contracts and shifting risks to consumers, on the basis of the freedom of contract. The contracts are drawn up in advance by undertakings and imposed unilaterally on the consumer, who is given no opportunity to individually negotiate the contract terms. A fundamental problem of private law then appears: the conflict between the freedom of the parties to arrange their own affairs; and the protection of the weaker contracting party, the consumer. However, the freedom of the parties to arrange their own affairs is no longer guaranteed if the consumer has no influence over the content of the contract. The situation is, for example, different in the field of employment, where the interests of employees are

[802] Ibid.
[803] Proposal for a Directive of the European Parliament and of the Council on consumer rights, COM (2008) 614.
[804] Article 8a provides: 1. Where a Member State adopts provisions in accordance with Article 8, it shall inform the Commission thereof, as well as of any subsequent changes, in particular where those provisions: - extend the unfairness assessment to individually negotiated contractual terms or to the adequacy of the price or remuneration; or, - contain lists of contractual terms which shall be considered as unfair, 2. The Commission shall ensure that the information referred to in paragraph 1 is easily accessible to consumers and traders, inter alia, on a dedicated website. 3. The Commission shall forward the information referred to in paragraph 1to the other Member States and the European Parliament. The Commission shall consult stake holders on that information.
[805] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance, OJ L 304, 22.11.2011, p. 64–88.
[806] Micklitz, "Unfair Terms in Consumer Contracts," 164.

collectivized in the form of a special representation that participates in contractual negotiations.[807]

When Directive 93/13/EC was drafted, the European Commission advocated a strict consumer protection policy, which was considerably watered down during the legislative process. The Directive appears to be a compromise between the consumer rights approach and a market-based approach required in order to justify the Directive in the light of its legal basis.[808] The double purpose of Directive 93/13/EEC can be discerned from its Recitals.

One the one hand, the Directive aims to contribute to the enhancement of the internal market. The divergences in the national laws relating to unfair terms in consumer contracts are said to result in differing national markets for the sale of goods and services and distortions of competition, particularly in the case of cross-border sales or supply of goods and services. Therefore, through the minimum protection of the Directive, it is hoped that cross-border transactions will be enhanced:

> *Whereas, generally speaking, consumers do not know the rules of law which, in Member States other than their own, govern contracts for the sale of goods or services; whereas this lack of awareness may deter them from direct transactions for the purchase of goods or services in another Member State;* [809]

> *Whereas sellers of goods and suppliers of services will thereby be helped in their task of selling goods and supplying services, both at home and throughout the internal market; whereas competition will thus be stimulated, so contributing to increased choice for Community citizens as consumers;* [810]

On the other hand, the Directive also aims "to safeguard the citizen in his role as consumer".[811]

> *Whereas the two Community programmes for a consumer protection and information policy (4) underlined the importance of safeguarding consumers in the matter of unfair terms of contract; whereas this protection ought to be provided by laws and regulations which are either harmonized at Community level or adopted directly at that level; Whereas in accordance with the principle laid down under the heading 'Protection of the economic interests of the*

[807] Ibid., 127, 128.
[808] Michael Schillig, "European Contract-Law Making and Development: Lessons from the Unfair Contract Terms Directive's Price Term Exemption," in *European Consumer Protection: Theory and Practice*, ed. James Devenney and Mel Kenny (Cambridge; New York: Cambridge University Press, 2012), 258–60.
[809] 5th Recitals to the Preamble of the Directive 93/13/EEC.
[810] 7th Recitals to the Preamble of the Directive 93/13/EEC.
[811] 6th Recitals to the Preamble of the Directive 93/13/EEC.

> *consumers', as stated in those programmes: 'acquirers of goods and services should be protected against the abuse of power by the seller or supplier, in particular against one-sided standard contracts and the unfair exclusion of essential rights in contracts'.*[812]

2.2.2. THE TYPE OF CONTRACTS FALLING WITHIN THE SCOPE OF THE DIRECTIVE

The scope of Directive 93/13 is laid down in Article 1. Article 1(1) states that the Directive relates only to terms in contracts between sellers or suppliers and consumers. Therefore, contracts between consumers, and contracts between sellers or suppliers are excluded from its scope. Article 2(b) defines the term 'consumer' as "any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession". [813] The terms 'seller or supplier' are defined in Article 2(c) as "any natural or legal person who, in contracts covered by this Directive, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned".[814] According to the Recitals to the Directive, it is irrelevant whether the contract has been concluded in written or oral form, and in case of the former, whether the contract consists of several documents.[815]

2.2.3. THE TYPE OF CONTRACTUAL TERMS FALLING WITHIN THE DIRECTIVE

According to Article 3(1), read in conjunction with Article 2(a) of Directive 93/13, the terms, which are to be controlled, are only those contractual terms which have not been individually negotiated. The early proposals of the Commission did not contain any distinction between individually negotiated and non-individually negotiated terms, but rather applied to both. The Council of Ministers required a reduction in the scope of the Directive to cover only pre-formulated terms.

In view of Article 3(2), a term is regarded as being non-individually negotiated "where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract". Therefore, while so-called standard contracts, i.e. pre-formulated standard business

[812] 8th Recitals to the Preamble of the Directive 93/13/EEC.
[813] As exemplified in Case C-541/99 *Cape and Idealservice MN RE*, ECLI:EU:C:2001:625, the CJEU applies a strict interpretation to the notion of 'consumer' by focusing on the protective purpose of the Directive.
[814] In Case C-488/11 *Asbeek,* ECLI:EU:C:2013:341, the CJEU clarified that the Directive applies also to residential tenancy agreements.
[815] Weatherill, *EU Consumer Law and Policy*, 147.

conditions, are subject to the Directive, the category of 'pre-formulated (individual) terms', which fall between genuine individual contracts and standard business conditions, also fall within its scope.[816] If certain aspects of a term, or one particular term, have been individually negotiated, the Directive applies to the rest of the contract if the overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract. It rests with the seller or supplier who claims that a standard term has been individually negotiated to prove this.

Two types of terms are expressly excluded from the scope of the Directive 93/13. According to Article 1(2), the Directive excludes "contractual terms which reflect mandatory statutory or regulatory provisions and the provisions or principles of international conventions to which the Member States or the Community are party" from its scope. The Recitals to the Directive also provide that rules "which, according to the law, shall apply between the contracting parties provided that no other arrangements have been established" are covered. However, the question about the scope of "mandatory statutory or regulatory provisions" remains equivocal.[817] Finally, Article 4(2) excludes terms, which relate to the definition of the main subject matter of the contract or to the adequacy of the price and remuneration, provided these terms are in plain and intelligible language. Both exceptions were included as a result of the discussions in the Council.[818]

2.2.4. The concept of unfairness under the Directive

Articles 3 to 5 of the Directive concretize the notion of unfairness. Also, the notion of unfairness was narrowed down by the Council. According to Article 3(1), a contractual term is to be regarded as unfair "if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of

[816] Micklitz, "Unfair Terms in Consumer Contracts," 135, 136. Micklitz proposes on pp. 146-147 to interpret the Directive as reaching beyond standardized terms to individually negotiated terms by applying the idea of "abuse of power", which is found in the Recitals to the Preamble of the Directive. Also Weatherill criticizes the narrow scope of the Directive, see Weatherill, *EU Consumer Law and Policy*, 148.

[817] Micklitz, "Unfair Terms in Consumer Contracts," 136, 137. Case C-92/11 *RWE*, ECLI:EU:C:2013:180 allowed the CJEU, for the first time, the opportunity to explicitly discuss the scope of Article 1(2) of Directive 93/13.

[818] Article 4(2) has not yet been concretized by CJEU case law. However, indications were present in Case C-473/00 *Cofidis*, ECLI:EU:C:2002:705 and C-484/08 *Caja de Ahorros y Monte de Piedad de Madrid*, ECLI:EU:C:2010:309.

the consumer".[819]

An Annex to the Directive contains an indicative and non-exhaustive list of 17 terms, which may be regarded as unfair. While the Commission initially foresaw a black list of terms, the discussions in the Council downgraded the list to a grey indication list.[820]

Article 5 sets out the principle of transparency, which can be categorized as a sub-category of good faith through the principle of legitimate expectations:[821] "In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail".[822]

Article 4(1) requires that in the assessment of unfairness of a contractual term, account has to be taken of the nature of the goods or services for which the contract was concluded, all the circumstances attending the conclusion of the contract and all the other terms of the contract or of another contract on which it is dependent.

2.2.5. THE CONSEQUENCES OF UNFAIR TERMS

The legal consequence of an unfair term is provided for in Article 6(1): "(U)nfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer". The concept of 'not binding' can, in itself, have a variety of meanings and takes account of the fact that the further consequences of the finding of an unfair term are ultimately determined by national law. The contract continues to bind the parties without the unfair terms, provided that it is capable of continuing

[819] The notion of good faith was considered as likely to prove difficult to handle, which is much more developed in the civil law than the common law traditions. The Recitals to the Directive refer to the strength of the bargaining power of the parties and whether the consumer was induced to agree. See on this, Weatherill, *EU Consumer Law and Policy*, 151.

[820] The current discussions turn on the question of the legal effect of the indicative list and the resulting question of the division of competences between the CJEU and the national courts. In its recent case-law, the CJEU upgraded the importance of the indicative list considerably. See to that effect, the cases C-137/08 *VB Pénzügyi Lízing*, ECLI:EU:C:2010:659, C-472/10 *Invitel*, ECLI:EU:C:2012:242, C-92/11 *RWE Vertrieb*, ECLI:EU:C:2013:180 and C-415/11 *Aziz*, ECLI:EU:C:2013:164. See also Micklitz, "Unfair Terms in Consumer Contracts," 155–59.

[821] Ibid., 143; Weatherill, *EU Consumer Law and Policy*, 153.

[822] The significance of the principle of transparency has been established by the CJEU in Case C-144/99 *Commission v Netherlands*, ECLI:EU:C:2001:527 and confirmed in case C-92/11 *RWE Vertrieb*, ECLI:EU:C:2013:180.

in existence without the unfair terms.[823]

2.2.6. ENFORCEMENT

Article 7(1) requires the Member States to introduce adequate and effective means to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.[824] In that regard, as laid out in Article 7(2), a person or organization(s), having a legitimate interest under national law in protecting consumers, must be able to take action before the courts or before public authorities for a decision as to whether contractual terms drawn up for general use are unfair.[825] According to Article 7(3), these actions may be "directed separately or jointly against a number of sellers or suppliers from the same economic sector or their associations which use or recommend the use of the same general contractual terms or similar terms". The rule of interpretation contained in Article 5 is not applicable to the collective actions in Article 7(2).[826]

2.3. PLACING *INVITEL* WITHIN THE CASE-LAW OF THE CJEU

Reich and *Micklitz* evaluated the Directive as originally having a limited impact on Member State contract law and procedure and entailing a rather "symbolic" character. However, the influence of the Directive has been so substantially extended by the case law of the Court of Justice of the European Union, that *Reich/Micklitz* use the metaphor of a 'Sleeping Beauty' that has been kissed awake by the Court.[827] In order to reveal the significance of the judgment of the CJEU in *Invitel*, that case will be located within the relevant case law of the CJEU relating to remedies under Directive 93/13/EC.

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[823] The content of the unfair term may not be adapted by the national court in order to rescue the term, see to that effect, Case C-618/10 *Banco Español de Crédito*, ECLI:EU:C:2012:349 and C-488/11 *Asbeek*, ECLI:EU:C:2013:341.

[824] The requirements of the means of collective enforcement have been clarified by the CJEU in Case C-472/10 *Invitel*, ECLI:EU:C:2012:242.

[825] The role of consumer protection organisations under the Directive has been dealt with by the CJEU in the Case C-413/12 *Asociación de Consumidores Independientes de Castilla y León*, ECLI:EU:C:2013:800 and Case C-470/12 *Pohotovosť*, ECLI:EU:C:2014:101.

[826] In Case C-70/03 *Commission v. Spain*, ECLI:EU:C:2004:505, the CJEU explained that the effectiveness of the enforcement procedure would otherwise be reduced. Weatherill explains further that the objective interpretation ensures that an ambiguous term does not escape prohibition because it is capable of being interpreted in a fair manner, even although in practice it may be applied in an unfair manner, see Weatherill, *EU Consumer Law and Policy*, 159. Micklitz, on the other hand, considers the distinction between individual and collective litigation, in general no, longer appropriate, see Micklitz, "Unfair Terms in Consumer Contracts," 152.

[827] Hans-W. Micklitz and Norbert Reich, "The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)," *Common Market Law Review* 51, no. 3 (2014): 771.

2.3.1. THE *EX OFFICIO* OBLIGATION OF THE NATIONAL JUDGE

In its early case law regarding individual proceedings, the CJEU introduced a procedural remedy into the Directive 93/13: the obligation of national courts to examine, of their own motion, the unfair character of a contract term in a consumer contract. Establishing this new remedy, the CJEU relied on the underlying idea of the system of protection of Directive 93/13, namely that the consumer is in a weak position vis-à-vis the seller or supplier, regarding his bargaining power and level of knowledge. The consumer agrees to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms.[828] Therefore, Article 6(1) of Directive 93/13 provides that unfair terms are not binding on the consumer. The CJEU sees in Article 6(1) a mandatory provision, which aims to replace the formal balance between the rights and obligations of the parties with an effective balance which re-establishes equality between them.[829] On the basis of this reasoning, the CJEU held that the imbalance, which exists between the consumer and the seller or supplier may only be corrected by positive action unconnected with the actual parties to the contract.[830]

Therefore, in *Océano Grupo,* the CJEU established that the protection provided for consumers by the Directive entails the national court being able to determine of its own motion whether a term of a contract before it is unfair. The national court's power to determine, of its own motion, whether a term is unfair constitutes a means of preventing an individual consumer from being bound by an unfair term in accordance with Article 6(1). In addition, in line with Article 7, the national court's examination may act as a deterrent and contribute to preventing unfair terms in contracts concluded between consumers and sellers or suppliers.[831] The CJEU held that the power of the national court is necessary for ensuring that "the consumer enjoys effective protection, in view in particular of the real risk that he is

[828] Case C-240/98 *Océano Grupo Editorial and Salvat Editores*, ECLI:EU:C:2000:346, para. 25 and Case C-168/05 *Mostaza Claro*, ECLI:EU:C:675, para. 25.
[829] Case C-168/05 *Mostaza Claro*, ECLI:EU:C:675, para. 36 and Case C-243/08 *Pannon GSM*, ECLI:EU:C:2009:350, para. 25.
[830] Cases C-240/98 *Océano Grupo Editorial and Salvat Editores*, ECLI:EU:C:2000:346, para. 27, C-168/05 *Mostaza Claro*, ECLI:EU:C:675, para. 26, and C-40/08 *Asturcom Telecomunicaciones*, ECLI:EU:C:2009:615, para. 31.
[831] Cases C-473/00 *Cofidis*, ECLI:EU:C:2002:705, para. 32, and C-168/05 *Mostaza Claro*, ECLI:EU:C:675, para. 27.

unaware of his rights or encounters difficulties in enforcing them".[832]

Pannon provided an important clarification, in so far as the CJEU held that the task of the national court is "not limited to a mere power to rule on the possible unfairness of a contractual term", but also consists of an obligation to do so "where it has available to it the legal and factual elements necessary for that task".[833] It already became clear, albeit slowly, that the CJEU assumed the existence of an obligation to undertake an examination since *Cofidis* and even more clearly in *Mostaza Claro*. According to *Pannon*, the national court has the possibility of applying the term in question, if the consumer, after having been informed of it by that court, does not intend to assert its unfair status. In *Pénzügyi*, the CJEU clarified further that the national court "must investigate of its own motion whether a term conferring exclusive territorial jurisdiction in a contract concluded between a seller or supplier and a consumer, which is the subject of a dispute before it, falls within the scope of Directive 93/13 and, if it does, assess of its own motion whether such a term is unfair".[834]

2.3.2. INTERLINKING INDIVIDUAL AND COLLECTIVE REMEDIES

Invitel is the first case, in which the CJEU examined the compatibility of a national collective remedy with Directive 93/13/EC. The Directive does not only aim to provide consumers with appropriate protection in their individual disputes with sellers and suppliers through individual actions, but also generally intends to prohibit the use of unfair terms more widely. In that regard, *Invitel* gave the CJEU the opportunity to clarify the broad and unspecific requirements of collective actions under the Directive, as well as the interrelationship between individual and collective proceedings.

Legislative action on consumer redress has come to a halt since the adoption of the Injunctions Directive 2009/22/EC.[835] The Commission has examined the possibilities to introduce European legislation on collective redress for consumers since 2006.[836] In 2011 the

[832] Cases C-473/00 *Cofidis*, ECLI:EU:C:2002:705, para. 33, and C-168/05 *Mostaza Claro*, ECLI:EU:C:675, para. 28.
[833] Case C-243/08 *Pannon GSM*, ECLI:EU:C:2009:350, para. 35.
[834] Case C-137/08 *Pénzügyi Lízing*, ECLI:EU:C:2010:659, para. 56.
[835] Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests, OJ L 110, 1.5.2009, p. 30.
[836] Green Paper on consumer collective redress, COM(2008) 794, 27.11.2008. Previously, the European Commission adopted a Green Paper on antitrust damages actions in 2005 (COM(2005) 672, 19.12.2005) and a White Paper in 2008, which included policy suggestions on antitrust-specific collective redress mechanisms (COM(2008) 165, 2.4.2008).

Commission carried out a public consultation 'Towards a more coherent European approach to collective redress'[837] and in February 2012 the European Parliament adopted the resolution 'Towards a Coherent European Approach to Collective Redress', in which it called for any proposal in the field of collective redress to take the form of a horizontal framework including a common set of principles.[838] In 2013, the Commission followed this up with a Communication 'Towards a European Horizontal Framework for Collective Redress', which took stock of the actions to date and the opinions of both stakeholders and the European Parliament.[839] Until now, this resulted only in a Commission recommendation on common principles for injunctive and compensatory collective redress mechanisms, which was published in 2013.[840] However, while the recommendation was published after the judgment of the *Invitel* case, it does not cover the questions, which were at stake in that case.

Specifically, the *Invitel* case concerned the effects of abstract injunctive proceedings on individual consumer contracts concluded with the same supplier, where the unfair nature of an identical term has been recognized in that action for an injunction. In most Member States, a ruling on a collective action for an injunction is only mandatory with respect to the case and the parties in question (i.e. *inter partes*), and has no *erga omnes* effect affecting third parties. Article 6(1) of Directive 93/13 had a decisive role in this preliminary reference and the further question was posed as to whether its interpretation in favour of an *ex officio* obligation of the national judge in individual proceedings, also extends to collective proceedings. As a result, although not subject of the proceedings, one may also ask the interlinked substantive question as to whether a common standard of control applies to individual and collective proceedings, or whether a concrete-individual and abstract-general one is applicable respectively. This is particularly relevant with regard to Article 4(1), which requires that in the assessment of unfairness of a contractual term in the light of the circumstances of the cases.

[837] Commission Staff Working Document, Public Consultation: Towards a Coherent European Approach to Collective Redress, SEC(2011)173 final, 4.02.2011.
[838] Towards a coherent European approach to collective redress European Parliament resolution of 2 February 2012 on 'Towards a Coherent European Approach to Collective Redress' (2011/2089(INI)), OJ C 239E , 20.8.2013, p. 32.
[839] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2013) 401 final, 11.6.2013.
[840] Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, OJ L 201, 26.7.2013, p. 60–65.

3. CONSUMER LAW AND THE CONTROL OF UNFAIR TERMS IN HUNGARY

Before the adoption of Directive 93/13/EEC on 5 April 1993, the Member States had already collected extensive experience with regard to the regulation of unfair contractual terms. Starting in the 1970s, a wave of unfair contract terms legislation swept over Western Europe. This legislative wave started in 1971 by Sweden and was followed by Denmark (1974), Germany (1976), the United Kingdom (1977), France (1978), Finland (1978), Austria (1979), Ireland (1980), Luxembourg (1983), Spain (1984), Portugal (1985) and the Netherlands (1987), while Belgium and Greece followed in 1991. While the technique of standardizing contract terms was in use well before the 1970s, the consumer movement gave rise to the 1970s legislative wave, and formed part of a more comprehensive consumer-oriented regulation.[841]

Since the *Invitel* case arose out of the Hungarian legal system, this section aims to give an overview of the historical development of the Hungarian consumer protection system, particularly regarding the control of unfair terms (**section 3.1.**). However, the development of consumer protection in the Central European countries that joined the European Union in 2004 is not comparable to that of the Western European Member States. The history of the development of the Hungarian legal system is closely linked to the political development of Hungary, which is particularly marked by a communist era, its return to capitalism and its accession to the European Union. The creation of a modern system of consumer protection consisting of developed legal regulation and institutional structure started only after Hungary signed the Europe Agreement on 16 December 1991 (**section 3.2.**).

3.1. THE DEVELOPMENT OF THE HUNGARIAN CONSUMER PROTECTION POLICY

3.1.1. SOCIALISM AND THE ABSENCE OF CONSUMER PROTECTION

Following the fall of Germany at the end of the Second World War, Soviet troops occupied the entire country of Hungary with the goal of forming Hungary into a communist satellite state of the Soviet Union. The communist regime stayed in Hungary for 44 years. The political change entailed the abandonment of the market economy and its replacement by a centrally directed system of planning. The socialist economy was based on a completely different concept of property and the legal relations emerging out of it compared to a market

[841] Hondius, "The Legal Control of Unfair Terms in Consumer Contracts: Some Comparative Observations."

economy. In order to overcome the unjust distribution of economic resources, instead of a prevalence of private property over land and the means of production, a mechanism of socialist property was established, under which the state becomes the main owner of property which is allocated to economic unities only for their management. The legal system as well as the court system quickly underwent changes accordingly:

> *In general, there was no place for commercial law under the new conditions. The role of contracts became partly minimal, partly different from the previous one, serving tasks imposed by the system of planning. A separate body of contract rules containing many elements of administrative law was established for state enterprises.*[842]

Therefore, there is no autonomous contract regime on the use and transfer of socialist property as it subject to the supervision and disposal by the state. As stated by *Reich*, "contract law is not governed by the principles of autonomy, but by discretionary regulation and a rather restrictive licencing system, depending on the type of economic activity subjected to socialist planning."[843] The main enterprise form in the economy were state-owned organizations, which were established and directed mostly by ministries. As summarized by *Sárközy*:

> *Although the state-owned company had its legal entity, it did not have its own property, as it was only the 'manager' or 'operative conductor' of the assets ensured to it. The company was nothing more than just the producing-servicing unit standing at the end of the administrative hierarchical chain (government – sectoral ministries – middle-level governing organs); the legal rules settled the obligations of the guiding three persons – the director, chief engineer and chief accountant – all functioning as state commissioners.*[844]

> *The guidance of the economy basically occurred not by legal rules but by administrative norms (government regulation, ministerial decrees, ministerial directives), and by concrete act of order nature, the classical socialist economy was based on the decomposition, plan instructions that was imposed by administrative acts to the companies.*[845]

The contractual relationship among the companies was arranged with 'plan contracts', "that had plan-executive, plan-exhaustive and plan-controlling functions". In case disputes arose

[842] Attila Harmathy, ed., "Chapter 7. Contracts and Torts," in *Introduction to Hungarian Law*, by Attila Harmathy (The Hague; London; Boston: Kluwer Law International, 1998), 98.
[843] Norbert Reich, "Transformation of Contract Law and Civil Justice in New EU Member Countries - The Example of the Baltic States, Hungary and Poland," *Riga Graduate School of Law Working Paper* 21 (2004): 8.
[844] Tamás Sárközy, "Transformation of the Role of Law in the Economy (The Progress of the Hungarian Business Law between 1988-2005)," in *The Transformation of the Hungarian Legal Order 1985-2005: Transition to the Rule of Law and Accession to the European Union*, ed. András Jakab, Peter Takács, and Allan F. Tatham (Alphen aan den Rijn: Kluwer, 2007), 313.
[845] Ibid., 314.

from those contracts, they were referred not to the courts but an economic administrative board of referees. [846]

In the period of the planned socialist economy, consumer interests were totally neglected. State enterprises did not seek to make profit, but to fulfil plan-targets. They "were expected to serve the interest of the people and the protection of the people against a unity of their state was out of the question".[847] Indeed, since the vast majority of the economy belonged to the state, on a theoretical level, it belonged to the entire society. Therefore, one could not depart from an opposition of interests between the consumer and the trader, which is the underlying rationale of a consumer protection system.[848] As summarized by *Bakardjieva Engelbrekt*:

> *Given the prevalence of state ownership of economic resources and the pervasive role of the Communist Party in steering economic relations, the suggestion that consumers need protection could be perceived as questioning the essence of the socialist economic and societal order. Consequently, there were strong ideological barriers to developing a genuine consumer protection policy. Quality of consumer goods and consumer safety were instead pursued through pervasive and largely inefficient systems of administrative control and sanction.*[849]

Typically, the content of the contracts between state enterprises and consumers was very simple – as the economic relationship was also simple: in the economy of shortage the focus of the state was to provide goods for the basic needs and what was offered was subject to intensive price fixing. Therefore, there was no opportunity to make free choices. "The shortage economy created a safe market for the seller and the producer, neither interested in nor motivated by quality investment, product innovation, or delivery time".[850]

The Hungarian Civil Code was adopted in 1959 under the socialist regime. The bill was based on the draft of 1928, but emphasized nevertheless the importance of socialism: "It can be stated in retrospect that the Civil Code tried to fulfil the tasks expected under the given political and economic conditions, but at the same time it preserved a great part of the Civil and Commercial Law of the pre-war period (in reality, part of the rules of the Civil Code

[846] Ibid.
[847] Harmathy, "Chapter 7. Contracts and Torts," 98.
[848] Rafał Mańko, "Resistance towards the Unfair Terms Directive in Poland: The Interaction between the Consumer Acquis and a Post-Socialist Legal Culture," in *European Consumer Protection: Theory and Practice*, ed. James Devenney and Mel Kenny (Cambridge; New York: Cambridge University Press, 2012), 413.
[849] Antonia Bakardjieva Engelbrekt, "The Impact of EU Enlargement on Private Governance in Central and Eastern Europe: The Case of Consumer Protection," in *Making European Private Law: Governance Design*, ed. Fabrizio Cafaggi and Horatia Muir Watt (Cheltenham, UK; Northampton, MA: Edward Elgar, 2008), 104–5.
[850] Katalin Cseres, "The Hungarian Cocktail of Competition Law and Consumer Protection: Should It Be Dissolved?," *Journal of Consumer Policy* 27, no. 1 (2004): 43.

were not much of practical use under the circumstances)".[851] From the perspective of the protection of the weaker party, it should be noted that the provisions of the Civil Code adopted in 1959 mainly covered the protection of quality and the guarantee of the safety of supply.[852]

3.1.2. THE NEW ECONOMIC MECHANISM AND THE CONTROL OF UNFAIR TERMS

The new economic mechanism

In 1956 the people tried to revolt against the government of the Hungarian People's Republic and its Soviet-imposed policies, but this attempt was unsuccessful. However, it did have some effect on the government and some concessions were made. János Kádár was placed as the communist leader of the People's Republic of Hungary and the Hungarian Socialist Workers' Party (HSWP) was created. In 1966, the Central Committee of the HSWP announced Kádár's plans for economic reform, known as the New Economic Mechanism (NEM). The plan, which became official in 1968, was a major shift to decentralization in an attempt to overcome the inefficiencies of central planning. The basic policy aim was the enlargement of the independence of state-owned organizations against the central state apparatus.[853] "The essence of the reform can be summarized in the effort to establish an economic system based on state ownership of the means of production but mixed with market economy elements and loose central planning".[854]

When the role of the market and of profit-making activity were admitted as a result of the NEM, a slow political change started as well. It could no longer be denied that the interests of consumers and big enterprises were not identical. State enterprise became more independent to fix the content of their contracts and abuse of dominant position became more important. This development resulted in an amendment to the Civil Code in 1977, which aimed to adapt the Code to the new economic conditions, to introduce some new solutions employed in Western European countries, and to establish some kind of consumer protection by means of

[851] Attila Harmathy, ed., "Part II. Survey of the History of Civil and Commercial Law," in *Introduction to Hungarian Law*, by Attila Harmathy (The Hague; London; Boston: Kluwer Law International, 1998), 17.
[852] Judit Fazekas, "Development of Hungarian Consumer Law 1985-2005," in *The Transformation of the Hungarian Legal Order 1985-2005: Transition to the Rule of Law and Accession to the European Union*, ed. András Jakab, Peter Takács, and Allan F. Tatham (Alphen aan den Rijn: Kluwer Law International, 2007), 331.
[853] Sárközy, "Transformation of the Role of Law in the Economy (The Progress of the Hungarian Business Law between 1988-2005)," 315.
[854] Harmathy, "Part II. Survey of the History of Civil and Commercial Law," 18.

civil law rules.[855]

Indeed, at the end of the 1970s and the beginning of the 1980s, some legal experts and scholars, who studied the Western literature, concluded that the existence of consumer protection beyond quality protection would also be justified in the socialist legal system. The amendment of the Civil Code in 1977 resulted in a "conceptual breakthrough".[856] Following the German model, the 1977 Civil Code amendment allowed individuals to dispute general contractual terms applied by legal entities.[857]

The control of unfair terms

Particularly, the 1977 Civil Code amendment provided for a possibility to annul standard terms that gave an unjustified, one-sided advantage to the legal person (Article 209(1) Hungarian Civil Code). Standing to initiate an action was given to the injured party under the rules of relative nullity and also to some agencies and representative organisations, and the judgment had an *erga omnes* effect. The Law-Decree no. 2 of 1978 putting into force the amended text of the Civil Code listed among these possible claimants: ministers, local councils, public prosecutor and as a result of the slow political changes - interest groups.

In preparation of the amendment to the Civil Code, the different modes of the latest contemporary developments in different European countries, particularly in Germany, France and England, were studied. As explained by *A. Harmathy*:

> *The peculiar situation of Hungary, with its economy in transition to a special kind of mixed market and planned economy, combined with uncertain political conditions required a special solution. The solution was confined within the limits of civil law rules. It meant control of contracts by courts. Administrative control was not trusted.*[858]
>
> *Under the conditions of an evolving market the focus was on the weaker party, whether that was a consumer or any other buyer, faced with monopolies imposing terms of contracts on them. This solution was in harmony with the concept of unity of civil law as well, in the sense of not dividing legislation according to whether it concerned a citizen or a business organization. Experience was lacking and information on unfair terms was scare. Consequently, there was no basis on which*

[855] Ibid.
[856] Fazekas, "Development of Hungarian Consumer Law 1985-2005," 332.
[857] Ibid.
[858] Harmathy, "Chapter 7. Contracts and Torts," 98.

> *to establish terms. The legislator could do no more at this stage than to formulate a general rule.*[859]

The acceptance of public intervention in private relationships went back to the system of central planning. Since, during the planned economy period, the terms of the contracts of state enterprises were controlled by different ministries, this already known way of controlling general conditions by administrative institutions was transferred. However, since the administrative institution (ministry) controlling the state enterprise in question might be interested in protecting its enterprise, instead of the other party, decisions in cases of contractual litigation were entrusted to the courts.[860] Information regarding the court practice at that time is, however, missing.

3.1.3. THE END OF COMMUNISM AND THE FIRST SIGNS OF CONSUMER PROTECTION

The soviet domination lasted until 1989, when Hungary became an independent democracy. With the change of regime in 1989-1990, the need for consumer protection emerged more intensely:

> *(A)s a consequence of the opening of the market, the country saw not only the free appearance of goods but also that of commercial methods, and advertising patterns usual in Western markets, and these strengthened the defencelessness of the consumer, despite many positive effects. Gradual changes took place in the structure of society and its stratification became similar so to that of industrial societies of an average development. With the development of market conditions, an ever-stronger differentiation of income could be experienced. In this economic-social situation was articulated the needs for the so-called 'social market economy' as a justified requirement towards the management of the economy, that is, formulating such an economic policy which is able to harmonise the operation of the market system with the protection of the interests and security of consumers.*[861]

However, it is considered that the initial stage of transition was characterised by an emphasis on market-facilitating measures, that is, company law, investment law, competition and unfair competition law, rather than market-correcting measures, as consumer law. Consumer problems were addressed through antitrust law and early laws on unfair competition, as specifically in Hungary, with the 1984 Act to Prohibit Unfair Business Practices, which was substantially amended by Act LXXXVI of 1990 on the prohibition of Unfair Market Practices. Therefore, the competition agencies had to deal with a rising number of consumer-

[859] Ibid., 105.
[860] Ibid.
[861] Fazekas, "Development of Hungarian Consumer Law 1985-2005," 333.

related proceedings, initiated by private parties or by the agencies acting in their own name.[862]

However, change was underway regarding consumer protection at the institutional and societal level: In 1991, the Consumer Protection Supervisory Authority was established "to provide for the public tasks of consumer interest protection". Slowly, consumer associations were created as in Western Europe. The National Consumer Protection Association (OFE) started operating in 1991. However, there was no coherent and independent legal regulation for consumer protection and its need was not supported by either legal science or policy.[863]

3.2. ACCESSION TO THE EU AND IMPLEMENTATION OF DIRECTIVE 93/13/EC

3.2.1. ACCESSION TO THE EU

From the mid-1990s, the development of consumer protection was driven by the obligation for legal harmonization as a consequence of European integration. As pointed out by *Fazekas*: "It is not far from reality to say that the government accepted the necessity of the modernisation of consumer protection as a result of the stimulation from EC legal harmonization".[864] The 1991 Europe Agreement, the accession process and the accession criteria adopted by the European Union made it clear that the obligation of legal harmonization covered the transposition of the *acquis communautaire* on consumer protection.[865] The European integration prompted the adoption of the Hungarian Consumer Protection Act of 1997 and facilitated the acknowledgement of an independent consumer protection policy.[866]

3.2.2. THE IMPLEMENTATION OF DIRECTIVE 93/13/EC

Directive 93/13/EEC was transposed by amendments to the Hungarian Civil Code by Act CXIX of 1997 and the adoption of a separate government decree 18/1999 of 15.2.1999

[862] Cseres, "The Hungarian Cocktail of Competition Law and Consumer Protection"; Bakardjieva Engelbrekt, "The Impact of EU Enlargement on Private Governance in Central and Eastern Europe: The Case of Consumer Protection," 105.
[863] Fazekas, "Development of Hungarian Consumer Law 1985-2005," 334.
[864] Ibid.
[865] Article 68 of the Europe Agreement lists the obligation for the approximation of the rules on product liability and consumer protection among the fields of legal harmonization. Moreover, the so-called Cannes White Book (COM(95) 163 final/2) served as guidelines for the implementation of the approximation of laws (see Chapter 23 on Consumer Protection).
[866] Fazekas, "Development of Hungarian Consumer Law 1985-2005," 334–47.

containing a black and grey list of prohibited clauses between businesses and consumers.[867]

While some provisions are exclusively applicable to consumer contracts (like the separate government decree), the provisions are generally not limited to consumer contracts. A standard term is constituted by the user determining the contract conditions in advance, unilaterally and for the purpose of repeat contract conclusion without the other party being able to participate. As has been subject to criticism, it does not, however, require that the clause has not been individually negotiated.[868] As restricted to consumer contracts, the burden of proof regarding non-participation in the formulation rests with the user. It is assumed that the insistence on 'participation' instead of 'negotiation' was related to a misunderstanding of the EU provisions. The concept of unfairness has been defined with reference to the concept of 'good faith' and is exemplified by two examples of a one-sided and unjustified imposition of rights and duties, "namely if the clause deviates substantially from central provisions of contract law, or if it is incompatible with the subject matter or provisions of the contract." [869]

Standing to sue was provided to the injured contracting party, and to the organization empowered in a separate legislation. However, the transposition of Directive 93/13/EEC was criticized because it only provided for relative nullity, and not absolute nullity, meaning that the injured party had to contest the term. Indeed, in the preliminary reference of a Hungarian court in *Ynos*, Advocate General Tizzano reasoned that Article 6(1) of Directive 93/13/EEC precluded Hungarian legislation under which a national court may rule that an unfair term is without effect as regards the consumer only where the latter has expressly contested it. While the CJEU did not rule on that issue due to lack of competence, the case drew attention to the faulty implementation of the Directive.[870]

The 2006 amendments brought about the correct implementation of Article 6(1) of the Unfair Terms Directive. According to Article 209/A(2) of the Hungarian Civil Code, standard terms and individually non-negotiated terms will be null and void, if nullity is in the interest of a

[867] Lénárd Darázs, "Missbräuchliche Klauseln in Verbraucherverträgen von marktbeherrschenden Unternehmen im Spannungsfeld zwischen Privatrecht und Wettbewerbsrecht," in *Privatrechtsreform in Deutschland und Ungarn*, ed. Lajos Vékás and Peter-Christian Müller-Graff, vol. 50 (Baden-Baden: Nomos, 2009), 184.
[868] Lajos Vékás, "Europäisches Privatrecht - Europäisches Verbraucherrecht," in *Europäisches Recht Im Ungarischen Privat- Und Wirtschaftsrecht*, ed. Lajos Vékás and Marian Paschke, vol. 40 (Münster: Lit Verlag, 2004), 24 ff.
[869] Reich, "Transformation of Contract Law and Civil Justice in New EU Member Countries - The Example of the Baltic States, Hungary and Poland," 25.
[870] Case C-302/04 *Ynos*, ECLI:EU:C:2006:9.

consumer. In individual actions the judgment has *inter partes* effect, but the legal consequence of public interest action contained in Article 209/B(1) Hungarian Civil Code is wider, having an effect on all the contracts concluded using the annulled contract term (a *quasi erga omnes* effect). Indeed, despite the judgment having an *erga omnes* effect, it will only relate to the business in the dispute and to the particular contract term.[871] The amendments also changed the system of the control of unfair terms, introducing a preventive control mechanism by empowering the organizations entitled to sue for protecting the interest of consumers to annul published but not yet used contract terms. Regardless of whether the term was used, the court will annul the contract term and order a ban on its future use (Art. 209/B(1) and 209/B(3) Hungarian Civil Code). The preventive action might be also taken against the business that did not draft or use an unfair contract term, but made a public recommendation of its usage (Art. 209/B(4) Hungarian Civil Code).[872]

4. THE CONFLICT AT THE NATIONAL LEVEL

This part aims to set out the conflict and the evolution of the *Invitel* case at the national level. The reference for a preliminary ruling in *Invitel* arose out of the public interest action brought by the Hungarian Authority for Consumer Protection (the applicant, hereafter the 'Authority') against the company Invitel Zrt. (the defendant, hereafter 'Invitel'), a fixed-line telephone network operator, concerning the latter's use of allegedly unfair terms in its contracts concluded with consumers. After setting out shortly the factual background of the case, this part will reconstruct the views of the Authority (**section 4.1.**) and of Invitel (**section 4.2.**) on the basis of the interviews conducted with the parties.

In January 2008, Invitel amended its general business conditions (hereafter 'GBC') and introduced the following term: 'If the subscriber pays the amount of the invoice by means of a money order, the supplier of services shall have the right to invoice the additional fees which result (such as postal fees)'. The GBC did not contain any provision specifying the method of calculation of those additional money order fees. On the basis of this amendment, in summer 2008, Invitel started to charge a fee resulting from the payment of invoices by postal money order from its customers using that payment method.[873] In Hungary, this

[871] András Osztovits and Gergely Baross, "Die Wirksamkeit von Verbraucherverträgen im ungarischen Recht," *Recht der internationalen Wirtschaft* 58, no. 8 (2012): 517.
[872] Osztovits and Baross, "Die Wirksamkeit von Verbraucherverträgen im ungarischen Recht."
[873] Case C-472/10 *Invitel*, ECLI:EU:C:2012:242, paras. 17, 18.

payment method is commonly referred to as '*yellow cheque*' referring to the yellow colour of the sheet of paper with which the customer can pay - in cash - their invoice at the post office, which will in turn transfer the money to the bank of the service provider.[874] Because of a large number of consumer complaints, the Hungarian Consumer Protection Authority examined the above-mentioned term, found that the term unduly affected consumer interests and consequently, decided to take legal action against Invitel.[875]

4.1. THE VIEW OF THE APPLICANT

The Hungarian Authority for Consumer Protection was the applicant in the proceedings against the company Invitel. On the basis of the interview with three representatives of the legal department of the Authority,[876] this part will set out the Authority's reasons for initiating the public interest action against Invitel (**section 4.1.1**.), the Authority's competences to take legal action (**section 4.1.2.**), the Authority's legal assessment of the disputed practices and contractual term as argued before court (**section 4.1.3.**), and its legal arguments to justify its claim that Invitel should be ordered to refund the unlawfully charged fees to its customers (**section 4.1.4.**).

4.1.1. THE DECISION TO TAKE LEGAL ACTION AGAINST INVITEL

The Hungarian Authority of Consumer Protection received more than 50 complaints from consumers, who objected to the application of the fee for postal money orders.[877] Thereupon, the Authority examined Invitel's GBCs and formed the view that the application of the postal money order fee constituted an unfair trading practice and the disputed clause an unfair contract term.[878] As stated during the interview, "*it was not the clause on the fee that was the main problem, but how this was introduced. Prior to that, such a fee did not exist and the provider decided to introduce this fee unilaterally*". While Invitel informed its customers about their new obligation, "*it was not a bilateral agreement, but a unilaterally introduced*

[874] Interview with the Chief Legal and Regulatory Officer of Invitel Zrt. (defendant), 12 June 2013.
[875] Case C-472/10 *Invitel*, ECLI:EU:C:2012:242, para. 19.
[876] No distinction will be made between the three representatives when referring to the interview. The views and evaluations expressed by the three representatives of the Authority's legal department will be considered constitutive for those of the Authority in the *Invitel* case.
[877] Interview with three representatives of the legal department of the Hungarian Authority of Consumer Protection (applicant), 13 June 2013. Regarding the interview, it is not clear whether these 50 complaints relate to the practices of Invitel only or whether they also apply to other service providers.
[878] E-Mail of the Head of the Legal Department of the Hungarian Authority of Consumer Protection (applicant), received on 24 January 2013.

condition". The Authority clarified further that "*[i]f the company would have said that they would apply this fee only to new customers, then this case probably would not have been brought to court*".[879]

On 1 September 2008, the Authority contacted Invitel by way of letter and advised the company to amend the disputed clause of the GBC in accordance with the law. Since Invitel did not agree with their observations and did not intend to make the requested amendment, in December 2008, the Authority initiated a public interest action against the company.[880] While the attempt to give the alleged infringer a chance to change its practices voluntarily was not a requirement for the Authority to be able to subsequently initiate legal proceedings before a court, according to the Authority, in most cases, they are able "*to solve the problem like that*" and "*do not need to bring the case to a court, which is better for both parties, and better for the consumers as well*".[881]

The Authority decided to initiate an action in the public interest because "*accepting the application of the cheque fee threaten the consumers with a process that is difficult to foresee and especially detrimental to consumers*". Moreover, the Authority expressed its general fear that "*in the course of this process, service providers would introduce different types of fees for those sub-elements of their services, which cost had already been integrated into their service fee previously*".[882]

The Authority did not only initiate an action against Invitel but also against Telenor, who also imposed a fee for payment by postal money order on its customers. However, in comparison to Invitel, it also added a mark-up fee. Those practices were widely reported in the Hungarian media, and therefore it was "*apparent that this case elicited a wide interest*". During the interview, the Authority confirmed that the proceedings against Telenor and Invitel were test cases since "*these two companies were leading the market in a very bad direction*" and they were "*afraid that this new pricing practice would be generalized among similar companies*".

[879] Interview with three representatives of the legal department of the Hungarian Authority of Consumer Protection (applicant).
[880] E-Mail of the Head of the Legal Department of the Hungarian Authority of Consumer Protection (applicant), received on 24 January 2013.
[881] Interview with three representatives of the legal department of the Hungarian Authority of Consumer Protection (applicant), 13 June 2013.
[882] E-Mail of the Head of the Legal Department of the Hungarian Authority of Consumer Protection (applicant), received on 24 January 2013.

While some unofficial exchange of information took place between the Authority for Consumer Protection and the Authority for Media and Telecommunications regarding those practices, the latter did not want to take part in the initiative.[883] The Authority of Consumer Protection explained that "*their legal interpretation was different*". However, more specific reasons were not revealed.[884]

4.1.2. THE AUTHORITY'S ENFORCEMENT TOOLS

As an administrative authority, the Hungarian Authority for Consumer Protection can only act within its mandate. As clarified during the interview, "*the Consumer Protection Authority has virtually no mandate regarding contracts, [as] under Hungarian law, this falls within the authority of the civil courts*".[885] The mandate of the Authority does not include an independent investigative power; if there is a suspicion of an unfair business or pricing practice, they are only entitled to initiate an action before a civil court, which will then independently conduct the investigation.[886]

When there is evidence of an unfair practice, the Authority is able to initiate an action in its own right based on the Hungarian Civil Code. According to Subsection (1) of Section 209/B of the Hungarian Civil Code, "bodies designated in separate legislation may apply to the courts for the declaration of invalidity of an unfair term which appears in a consumer contract as a standard contract term". Subsection 2 enables those bodies to request to have a standard contract term declared unfair, that has been defined for consumer contracts and made available to the general public, regardless of the fact that the term or condition in question had or had not been applied. In these proceedings, the court annuls the unfair standard contract term with regard to any parties involved in a contractual relationship with the user of the unfair term (with *erga omnes* effect). The expression 'any parties' does not solely mean persons who are parties to already existing contracts, but all parties entering into a contract in

[883] The interviewer inquired regarding the role of the Authority for Media and Telecommunications in the *Invitel* case, as Article 8(4) of the Framework Directive 2002/21/EC requires the national regulatory authorities to ensure a high level of protection for consumers in their dealings with suppliers. Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108, 24.4.2002, p. 33.
[884] Interview with three representatives of the legal department of the Hungarian Authority of Consumer Protection (applicant).
[885] Interview with three representatives of the legal department of the Hungarian Authority of Consumer Protection (applicant).
[886] Interview with three representatives of the legal department of the Hungarian Authority of Consumer Protection (applicant).

the future. The Law-Decree No. 2 of 1978 amending the Civil Code lists the organizations that may request to have an unfair standard contract term declared null and void by a court. Those are, for instance, the prosecutor, the head of a central administrative body (as for example the director general of the Authority for Consumer Protection), the notary and non-governmental organizations for the protection of consumers' interests.[887]

4.1.3. THE LEGAL ASSESSMENT OF THE DISPUTED PRACTICES

In its public interest action against Invitel, the Authority requested the Pest County Court (*Pest Megyei Bíróság*) to determine that (i) Invitel's conduct was contrary to Act LVII of 1996 on the Prohibition of Unfair Trading Practices and Unfair Competition, (ii) the relevant clause was unfair under Article 209 of the Hungarian Civil Code, and that (iii) the defendant's illegal conduct affected a wide range of consumers and/or caused substantial harm. Furthermore, the Authority requested the court to order Invitel "*to eliminate the caused disadvantages by refunding the cheque fee that was unlawfully charged by the defendant (and which was paid out by the subscribers) automatically, even in the absence of consumers' requests for this– with a retroactive effect*" (see on this **section 4.1.4.**).[888]

According to Section 2 of the Act LVII of 1996 on the Prohibition of Unfair Trading Practices and Unfair Competition, it is prohibited to conduct economic activities in an unfair manner, in particular, in a manner violating or jeopardizing the lawful interests of competitors, business partners and consumers, or in a way which conflicts with the requirements of business integrity. According to the Authority, 'lawful interest' encompasses the consumers' economic interest, which is jeopardized by the application of the postal money order fee. Specifically, "*[f]ollowing the defendant's measures, not only the gratuitousness of the payment method was ceased (it should be noted that formerly there was*

[887] The new Hungarian Civil Code, which entered into force on 15 March 2014 (i.e. after the conclusion of the proceedings in *Invitel*), incorporated the enumeration of organizations entitled to file a public interest action, further specifying and supplementing this list to include: public prosecutors, government ministers, autonomous organs of public administration, government agencies, the heads of the central administrative offices, chambers of the economy, associations of professionals, public interest groups, associations for the protection of consumers' interests within the scope of the consumer interests they protect and organizations set up for the protection of consumers' interests under the laws of any Member State of the European Economic Area (see Article 6:105 of the new Civil Code). For more details, see Rita Sik-Simon, "Unterlassungsklage als Instrument der Durchsetzung von Verbraucherrechten in der Tschechischen Republik und Ungarn," *Zeitschrift für Gemeinschafsprivatrecht* 11, no. 1 (2014): 16–24; Viktória Harsági, "The Need for Further Development of Collective Redress in Hungary," in *Multi-Party Redress Mechanisms in Europe : Squeaking Mice?*, ed. Viktória Harsági and C. H. van Rhee (Cambridge; Antwerp: Intersentia, 2014), 173–75.

[888] E-Mail of the Head of the Legal Department of the Hungarian Authority of Consumer Protection (applicant), received on 24 January 2013.

no payment cost for postal cash transfer orders to the side of the payer), but there was no other option to those who would like to evade the newly introduced charge but to choose from other payment methods, which go hand in hand with additional cost or additional burden".[889] According to the judicial practice, an entrepreneurial economic activity cannot be considered unfair "*if it is in accordance with the social expectations and established patterns of the economic life*".[890] The Authority therefore additionally argued that "*at that time (in 2008) the 'cheque fee' was not accepted at all, moreover, it did not meet the social expectations*".[891]

In addition, the Authority considered the disputed clause to be unfair on the basis of Article 209(1) of the Hungarian Civil Code. That provision provides that a standard contract term, or a non-individually negotiated term of a consumer contract, shall be regarded as unfair if, in breach of the obligation to act in good faith and fairly, it unilaterally and unjustifiably establishes the contractual rights and obligations of the parties to the detriment of the party other than that imposing the contract term in question. The Authority reasoned that the cheque fee that was introduced by Invitel "*did not help the consumers' fulfilment, because the only free payment method –due to the amendment of the T&Cs [general terms and conditions]– was terminated, whilst the practice of electronic communication services, universal service providers and public-utility services showed, at that time, that the reasonable conduct under the given circumstances is to service providers made available a method of payment, which does not result in additional cost on the consumers' side*". Apart from the possibilities of payment free of charge at Invitel's customer service offices (hereafter 'Telepoints') or by bank transfer, all other payment methods were accompanied with additional costs or processing fees. Although the payment at Invitel's Telepoints was free of charge, recourse to this option would not be realistic for many consumers, such as pensioners or out-of-town residents, since post offices can be found more easily than the Telepoints.[892]

Moreover, "*the application of the cheque fee was unjustified, since the defendant devolved a cost by imposing a fee on the subscribers, the cost of which was obviously integrated into the service fee up to that time by the defendant, as a company that operates on the principle of*

[889] E-Mail of the Head of the Legal Department of the Hungarian Authority of Consumer Protection (applicant).
[890] E-Mail of the Head of the Legal Department of the Hungarian Authority of Consumer Protection (applicant).
[891] E-Mail of the Head of the Legal Department of the Hungarian Authority of Consumer Protection (applicant).
[892] E-Mail of the Head of the Legal Department of the Hungarian Authority of Consumer Protection (applicant).

economic rationality".[893] Therefore, Invitel would have charged this fee to the consumers twice. During the interview, the Authority further clarified that Invitel "*should obviously calculate [the fee] with its fixed costs, like the salaries of its employees. A rational company should calculate with these costs in advance but in this case, these were charged retroactively, after the fact - and that constituted the problem*".[894] The Authority was aware that the factor that caused Invitel and Telenor to charge those fees retroactively to the consumers, was as a result of the rising fees imposed by the Hungarian Post.[895] The Authority considered that the practices of other service providers, such as starting promotional sweepstakes or offering a discount to those subscribers who switch to bank transfer or direct debit, would have been more reasonable and justifiable than imposing a new charge.[896]

It should be noted at the outset that the Authority's legal arguments appear equivocal regarding the substantive assessment of a unilateral price amendment clause under the Unfair Terms Directive 93/13/EEC. Clauses which allow the supplier or service provider to amend the price unilaterally may indeed significantly prejudice the consumer, creating an imbalance between the rights and obligations of the parties.[897] The essential question is whether and under which conditions a clause, which allows the service provider to unilaterally amend costs related to its services, could be considered fair. The legal assessment of the Authority, however, was not directly related to the possible detrimental effect of the clause on consumers in the sense that the consumer is put at the mercy of the service provider, but relates rather to the issue that Invitel's consumer-customers have no other payment method at disposal, which does not involve further costs or efforts.

[893] E-Mail of the Head of the Legal Department of the Hungarian Authority of Consumer Protection (applicant).
[894] Interview with three representatives of the legal department of the Hungarian Authority of Consumer Protection (applicant).
[895] Interview with three representatives of the legal department of the Hungarian Authority of Consumer Protection (applicant).
[896] E-Mail of the Head of the Legal Department of the Hungarian Authority of Consumer Protection (applicant), received on 24 January 2013.
[897] A comparative analysis of the transposition of point 1(l) of the Annex to the Directive reveals that the majority of Member States consider unilateral price amendment clauses to be always unfair (black letter rule), in particular Austria, Belgium, Bulgaria, Czech Republic, Germany, Estonia, Spain, Greece, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Romania, Slovenia. In the following Member States, the provision has been transposed as a grey letter rule, i.e. that the clause may be considered unfair: Cyprus, France, Ireland, Hungary, Italy, Poland, Portugal, Slovakia and the UK. Martin Ebers, "Unfair Contract Terms Directive (93/13)," in *EC Consumer Law Compendium — Comparative Analysis*, ed. Hans Schulte-Nölke, Christian Twigg-Flesner, and Martin Ebers, 2008, 401.

4.1.4. THE AUTOMATIC REFUND TO INVITEL'S CUSTOMERS

The Authority considered Section 39(1) of the Law CLV of 1997 on consumer protection as its legal basis to ask for an automatic refund for Invitel's consumer-customers. That provision provides that the Authority "may bring proceedings against any party whose illegal activities affect a wide range of consumers or cause substantial disadvantage, in order to defend a wide range of consumers or eliminate substantial disadvantage". However, the Authority pointed out that "*the law on consumer protection is ambiguous and courts had very different interpretations about […] [the Authority's] competence as an administrative authority to ask for a reimbursement for the consumers, or if […] [the courts] would simply determine whether there was a legal infringement or no*t". In particular, it was ambiguous "*whether the court can force the company to reimburse the customers or whether the court can only establish that unfair contractual practices did take place. Because if the court can only establish that [i.e. the latter], then each consumer would have to ask for reimbursement through a separate procedural filing*".[898] The Authority specified further:

> *The problem of the courts regarding this [point], is that since the consumers are themselves not parties to the case, the courts cannot name directly the legal and physical persons who are adversely affected in their ruling. And some judges thought that if they were unable to name precisely who should be refunded by name and by what amount by which company, then they wouldn't go as far as to ask for a refund. Some judges therefore thought that asking for a reimbursement would be impossible while others thought that it would be sufficient to establish that all consumers being in a contractual relation with a company at a given time could be refunded.*[899]

Moreover, "*some judges had issues with the enforcement of such a decision", i.e. that "if the company refuses to refund the individual consumer, how could that consumer claim for his reimbursement – that was problematic*". On the question of whether such an action has been ever successful, the Authority replied that "*there was a case when the court ruled that the company should refund customers, but ultimately we don't know about the final enforcement*".[900]

[898] Interview with three representatives of the legal department of the Hungarian Authority of Consumer Protection (applicant).
[899] Interview with three representatives of the legal department of the Hungarian Authority of Consumer Protection (applicant).
[900] Interview with three representatives of the legal department of the Hungarian Authority of Consumer Protection (applicant).

4.2. THE VIEW OF THE DEFENDANT

On the basis of the interview conducted with Invitel's legal and regulatory officer,[901] this section will firstly set out the problem as perceived by Invitel (**section 4.2.1.**) and then Invitel's legal assessment as to the disputed practices and alleged unfair contractual clause (**section 4.2.2.**).

4.2.1. THE BACKGROUND OF THE CASE

The legal and regulatory officer of Invitel introduced the case in the following way:

> *Looking at it from a local, Hungarian law perspective, the actual merit of this particular case was that in Hungary many people pay their bills via so-called yellow cheques […] In Hungary, this is a national sport. For some reason, people don't like to give mandates to pull the amounts from their bank accounts.*[902]

Traditionally, the Hungarian Post Office's third party payment system is the main means of bill payment for service providers in Hungary. According to the officer of Invitel, the Hungarian Post "*collects practically 34.3 Billion HUF in yellow cheque fees every year*". Under this payment method, the customers fill out a payment order and pay the outstanding amount to the Hungarian Post Office, which in turn transfers all amounts paid by Invitel's customers to the company's account.[903] For the issuing of an individual postal money order, which allows the customer to pay its bill at the post office, at the time when the case started, Invitel had to pay around 80 HUF to the Hungarian Post.[904] The vast majority of Invitel's customers paid their bills through the Hungarian Post Office's third party payment system, even though Invitel customers had various other payment possibilities at their disposal:

> *They could wire-transfer the amount, which is free, they could go into any of our Telepoints in the country, and pay there. [..] Usually these are in very frequent locations. It is like you enter here into the Invitel store, there to the post office. It really does not make a difference.*[905]

The officer of Invitel explained that the economic situation and the fact that the price of their service halved over the years, while postal charges doubled, forced Invitel to pass that cost on to consumers rather than to increase the costs in general. A general increase in costs would

[901] The views and evaluations expressed by the officer of Invitel will be considered constitutive for those of Invitel Zrt. in the *Invitel* case.
[902] Interview with the Chief Legal and Regulatory Officer of Invitel Zrt. (defendant), 12 June 2013.
[903] Invitel, Annual Report 2008, p 50, available at: http://www.invitel.hu/english/investor-relations.
[904] Interview with the Chief Legal and Regulatory Officer of Invitel Zrt. (defendant).
[905] Interview with the Chief Legal and Regulatory Officer of Invitel Zrt. (defendant).

have allocated the cost of the postal money order to all consumers indiscriminately, so that those who do not make use of the method of payment by postal money order, but pay their bills by bank transfer, for example, would also have paid more money.

Due to the increasing costs that the Hungarian Post Office charged for the issuing of the postal money order, the various Hungarian telecom companies adopted different strategies, as described by Invitel's officer: Invitel decided to charge customers a fee if they paid their invoices by way of a cash payment at post offices. That meant that if a customer decided to pay its invoice via the postal money order, Invitel added on the following invoice the fee. Magyar Telecom charged a general flat fee for paying the invoices, which applied indistinctively for payment in their Telepoints, by postal money order or by bank transfer. At Vodafone, if the customer paid their invoice via another instrument other than the postal money order, the company provided a 3% discount from the invoice. Telenor charged it the same way as Invitel did, but added a mark-up fee. According to the officer of Invitel, "*so, it was different strokes for different folks, but pretty much the same*".[906]

With Hungarotel merging into Invitel in January 2008, Invitel changed its terms and conditions applying to all (i.e. new and existing) consumer contracts.[907] The new practice of charging the fee for postal money orders directly from the customer was taken over from Hungarotel. On 1 September 2008, the Authority of Consumer Protection contacted Invitel requesting it to modify their GBC according to the Authority's request and to pay back the collected sums to the relevant customers. However, Invitel refused to change its practices since they "*believe[d] that such requests lack[ed] merit*". [908] Invitel's 2009 Annual Report gave some indications regarding the costs involved:

> *According to our management, monthly revenues from extra fees charged on postal cash payments since the introduction of such extra fees amount to $0.3 million (€0.2 million). As a result, the original amount of the claim ($2.6 million (€1.7 million)) has increased to approximately $4.1 million (€2.7 million) to date due to the ongoing billing of the disputed recharge. Please note that, before May 2008, only the historical customers of Hungarotel were required to pay such extra fees. The court proceeding in the matter is ongoing. The current court procedure has been suspended as the court has initiated a preliminary ruling procedure before the European Court of Justice. Although, in our assessment, the risk of*

[906] Interview with the Chief Legal and Regulatory Officer of Invitel Zrt. (defendant).
[907] Through that merger, the Hungarotel historical concession areas and the Invitel historical concession areas merged together.
[908] Invitel, Annual Report 2009, p 99, available at: http://www.invitel.hu/english/investor-relations .

> *losing the litigation and being required to repay the claimed amount ($4.1 million (€2.7 million) or any increased amount depending on the date of the final judgment) to customers is remote, we are not in a position to predict the final judgment of the court.*[909]

The 2011 Annual Report stated:

> *According to our management, monthly revenues from extra fees charged on postal cash payments since the introduction of such extra fees amount to approximately €0.135 million. As a result, the original amount of the claim (approximately €1.7 million) has increased to approximately €7.0 million as of December 31, 2011 due to the ongoing billing of the disputed recharge.*[910]

4.2.2. THE LEGAL ASSESSMENT OF THE DISPUTED PRACTICES

According to the officer of Invitel, the company was entitled to charge the fee for postal money orders from its customers, as there was no legislation which prohibited this practice and since telecom providers were under no legal obligation to maintain free payment by postal money order. In addition, the postal money order was part of the normal cost structure of the company, which it was entitled to pass-on to the customer. Regarding the unfairness of the practice, Invitel's lawyer pointed out that:

> *First of all, we were saying that, how can this be unfair, because if we were to put a significant charge on it, maybe it can be considered unfair but it is per customer that the post office bills us, and we don't add anything to that, we just simply onward-invoice what the post invoices us, we onward-invoice that to the customer. So we said that, that cannot be considered an unfair trading practice. And the other thing we said was that, if we introduce this into our general terms and conditions, we did it the proper way. If a customer wanted to be released from their contract because of this, they had 60 days to terminate their contract and there was practically no termination based on this. So, we said that this cannot be considered unfair.*[911]

Moreover, Invitel's officer argued as follows:

> *Based on the [Hungarian Law on electronic communication],*[912] *you do not need to state the reasons and the method of calculation that was contained in the explanatory letter to the customers, which was simply one sentence: it's exactly the fee that the post office charges us. So there was no method of calculation. It was said in our general terms and conditions, that it is based on the identical charge [that is charged to] us by the post [office]. And this was another argument, that every time the post office changed their fee, […] we notified the customer*

[909] Invitel, Annual Report 2009, p 99, available at: http://www.invitel.hu/english/investor-relations .
[910] Invitel, Annual Report 2011, p 97, available at: http://www.invitel.hu/english/investor-relations .
[911] Interview with the Chief Legal and Regulatory Officer of Invitel Zrt. (defendant).
[912] For more details on the claim of Invitel regarding the Hungarian Law on electronic communication, see the decision for a preliminary reference by the Hungarian court as set out in **section 5.1.**

> *accordingly every time 60 days in advance, that the post increased it by 2 HUF, you have the right to terminate […].*[913]

The officer of Invitel reported that no customer terminated its contract because of that change, which was due to the small amount charged. Furthermore, no customer complained to Invitel about this change. In 2011, a consumer protection organization also initiated an action against Invitel on the same grounds as the Authority, however, they did not request that Invitel automatically refund it customers. According to the non-binding Official Opinion of the Supreme Court of Hungary published in 2011, if one body had already initiated an action in the public interest, the subsequent action of another body against the same defendant, which aims to establish the unfairness of the same clause on the same grounds, has to be rejected or terminated.[914] Indeed, this also happened with regard to the action of the consumer protection organization against Invitel. After the settlement between the Authority and Invitel, the consumer protection organization did not initiate a new legal action, even though it was legally entitled to do so.[915]

5. THE PROCEEDINGS BEFORE THE HUNGARIAN COURTS

Since Invitel refused to voluntarily change its practice, the Hungarian Authority of Consumer Protection initiated a public interest action against Invitel before the Pest County Court (*Pest Megyei Bíróság*) with a view to obtaining a declaration that the contested term was void as being unfair; and the automatic and retroactive reimbursement to Invitel's consumer-customers of the amounts illegally invoiced and received as fees for postal money orders. On 25 August 2010, the Hungarian court decided to stay the proceedings between the Authority and Invitel in order to obtain a preliminary ruling from the CJEU in accordance with Article 267 TFEU. It took the view that the outcome of the dispute depended on the interpretation of the provisions of the Unfair Terms Directive 93/13/EEC. This part will set out the reasoning behind the decision for a preliminary reference to the CJEU by the Pest County Court (**section 5.1.**). Following, the views of the parties, that is the Authority and Invitel, as to the reference for a preliminary ruling will be set out (**section 5.2.**).

[913] Interview with the Chief Legal and Regulatory Officer of Invitel Zrt. (defendant).
[914] Invitel, Annual Report 2011, p 97, available at: http://www.invitel.hu/english/investor-relations, see on this the following article, providing a summary of the Official Opinions of the Hungarian Supreme Court regarding the effectiveness of consumer contracts in Hungarian law: Osztovits and Baross, "Die Wirksamkeit von Verbraucherverträgen im ungarischen Recht," 522.
[915] Interview with the Chief Legal and Regulatory Officer of Invitel Zrt. (defendant), 12 June 2013.

5.1. THE PRELIMINARY REFERENCE OF THE PEST COUNTY COURT

The decision for a preliminary reference of the Pest County Court did not include a summary of the subject-matter of the dispute or the relevant findings of fact. Instead, it set out only the European and Hungarian provisions applicable to the case at hand and its grounds, which prompted it to inquire about the interpretation of certain provisions of the Unfair Terms Directive 93/13/EEC. The grounds for its decision for a preliminary reference will be set out in this section.

From the outset, the Hungarian court explained that the judgments of the CJEU in *Mostaza Claro,*[916] *Océano Grupo*[917] and *Pannon GSM*[918] were delivered in proceedings brought by individual consumers who complained about the conduct of a service supplier. However, the legal proceedings at stake were brought in a public interest action and, going beyond the damage to the individual consumer, concerned all the consumers who have concluded or may conclude a contract with the service supplier. Therefore, according to the Hungarian court, it was necessary for the CJEU to rule as to whether the principles established in the context of claims made by individual consumers and, specifically, the CJEU's interpretation of Article 6(1) of the Unfair Terms Directive 93/13, were applicable without alteration in the context of public interest actions.[919]

Moreover, as regards public interest actions, the Hungarian court considered it necessary for the CJEU to decide whether Article 6(1) of the Unfair Terms Directive 93/13 expressly confers on consumers who are not party to the proceedings in the public interest, the right to enforce the ruling made in those proceedings, and specifically whether they may claim, on the basis of the provisions of the Directive, a refund of the costs and expenses charged by the supplier of services under the unfair terms.[920] On the basis of this reasoning, it must be remarked here that it appears that the national judge did not ask the CJEU explicitly about the Authority's claim for an automatic refund by Invitel to its affected customers, but, instead, whether consumers who are not party to proceedings can subsequently claim a refund on the basis of the finding of an unfair term in a public interest action. This indicates that the

[916] Case C-168/05 *Mostaza Claro*, ECLI:EU:C:2006:675.
[917] Joined Cases C-240/98 to C-44/98 *Océano Grupo Editorial and Salvat Editores*, ECLI:EU:C:2000:346.
[918] Case C-243/08 *Pannon GSM*, ECLI:EU:C:2009:350.
[919] Decision for a reference for a preliminary ruling by the Pest County Court (*Pest Megyei Bíróság*), 25 August 2010, 7.G.29.356/2008/12.
[920] Decision for a reference for a preliminary ruling by the Pest County Court (*Pest Megyei Bíróság*).

national court probably rejected already the possibility to order Invitel to automatically refund its affected customers.

From a substantive perspective, the Hungarian court pointed out that the subject matter of the case had become particularly pressing in Hungary:

> *[I]t can be considered to be usual practice for a seller or supplier, in long term contracts of fixed duration (so-called loyalty contracts), subsequently to demand or impose on the consumer costs which were not previously stipulated in the contract. Following the conclusion of the contract, the seller or supplier invoices costs and expenses such as negotiating costs, administrative costs or postage. That practice, in itself, is also liable to distort the situation on the market, given that sellers or suppliers who are in competition make advantageous offers to attract consumers (who choose the seller or supplier with whom they conclude the contract expressly because of such offers) and, subsequently, introduce or impose conditions and costs of which the consumer could not be aware beforehand. As a result of such costs, relating to the entire duration of the service (for a fixed period, known as a loyalty period), the offer made by the seller or supplier no longer entails the price or the other advantages on the basis of which the consumer chose that service.*[921]

In particular, according to the decision for a preliminary reference, the national judge considered that the provisions of the Hungarian Law on electronic communications did not afford sufficient protection to a consumer who concluded a loyalty contract. Section 132 of the Hungarian act on electronic communications of 2003 states the following (emphasis added):[922]

> *Article 132*
>
> *(1) The rules of concluding a subscriber contract shall apply to the amendment of the individual subscriber contract also. The general terms and conditions of contract may enable the amendment of the individual subscriber contract according to paragraph (2).*
>
> *(2)* ***The service provider is entitled to unilaterally amend the subscriber contract only in the following cases****:*
>
> *a) in the event of the amendment of the conditions incorporated in the individual subscriber contract or the general terms and conditions of contract with the*

[921] Decision for a reference for a preliminary ruling by the Pest County Court (*Pest Megyei Bíróság*).

[922] This Section of the Hungarian act on electronic communications constitutes the transposition of Article 20(4) of the Universal Services Directive 2002/22/EC, which states: "Subscribers shall have a right to withdraw from their contracts without penalty upon notice of proposed modifications in the contractual conditions. Subscribers shall be given adequate notice, not shorter than one month, ahead of any such modifications and shall be informed at the same time of their right to withdraw, without penalty, from such contracts, if they do not accept the new conditions."

> *provision that unless legislation or a rule pertaining to electronic communications otherwise provides, the amendment may not result in a substantial amendment in the conditions of contract;*
>
> *b) the amendment is warranted by change in legislation or a decision by the authority, or*
>
> *c)* ***the amendment is warranted by a substantial change in circumstances****.*
>
> *(3) Changes concerning the conditions of using the service or its quality target values shall, in particular, qualify as substantial amendment.*
>
> *(4)* ***When the service provider is entitled to unilaterally amend the general terms and conditions of contract in the cases specified therein, it shall inform subscribers of the amendment at least 30 days prior to its entry into force in accordance with the provisions of this Act together with information concerning the conditions of termination available to the subscribers****. In such cases, the subscriber shall be entitled to terminate the contract with immediate effect within 8 days following the notification sent concerning the amendment.*
>
> *(5) When the amendment contains provisions disadvantageous to the subscriber, the subscriber shall be entitled to terminate the subscriber contract within 15 days from notification without any further legal consequence.* ***The subscriber may not terminate the subscriber contract in such a case when he has undertaken a commitment to make use of the service for a specified period and entered into the subscriber contract in view of the discounts arising from this and the amendment does not affect the discount granted.*** *When the amendment affects the discounts granted and the subscriber terminates the subscriber contract, the service provider may not demand the amount of the discount for the period following the termination of the contract from the subscriber.*

According to the Hungarian court, on the basis of Section 132(2)(c) of the Law on electronic communications, the supplier would be allowed to unilaterally determine the cases in which it may modify the standard contract conditions after the contract is concluded without the legislature providing for any legal limits or conditions of such a decision. Under Section 132(5), subscribers are not entitled to terminate the contract if they have undertaken to use the services for a specific period of time and if they have concluded the subscriber contract in light of the benefits stemming from such an undertaking, and the amendment does not affect the benefits received. According to the Hungarian court, "[t]hat legal provision governs, unilaterally and without grounds, the contractual rights and obligations of the parties to the detriment of the consumer, with almost no substantive limit, in breach of the requirements of good faith, fair practices in industry or commerce and assumption of risk".[923]

[923] Decision for a reference for a preliminary ruling by the Pest County Court (*Pest Megyei Bíróság*).

As stated during the interview, this was not the first proceeding on unilateral price amendment clauses in the telecom sector. The judge explained that according to the principle *lex specialis derogat legi generali*, Hungarian judges would apply the Law on electronic communications instead of the provisions of the Civil Code, according to which such a term would be considered unfair. Moreover, the Hungarian judges would not examine the compliance of the clauses with EU law *ex officio* as required by the CJEU in *Océano Grupo* and *Pannon GSM*, since a procedural provision, which would explicitly allow the judge to do so, is absent from the Hungarian Code of Civil Procedure. The judge is not allowed to act on behalf of the parties in civil litigation without the parties' initiative. The referring judge considered the Hungarian Law on electronic communications to be incompatible with the Unfair Terms Directive 93/13/EC and therefore decided to submit a preliminary reference to the CJEU.[924]

In the view of the referring court, those contractual terms were compliant with the Unfair Terms Directive 93/13, if they grant the supplier those rights solely "where the circumstances of the parties after the conclusion of the contract are subject to a profound change which goes beyond the usual contractual risks, or where the conditions of the conclusion of the contract undergo a subsequent change which the parties could not reasonably have foreseen".[925] Additionally, as a consequence of the changes, "the economic balance between supply and consideration which the parties believed to exist between them should be broken: one of the parties should obtain an unfair, unexpected and disproportionate advantage, while the other should suffer a commensurate loss". [926] However, the provisions of the Law on electronic communications failed to provide substantive obligations in relation to the amendment of the contract by the supplier of services. [927]

As regards the interpretation of point 1(j) of the Annex to the Unfair Terms Directive 93/13, there was a need for the CJEU to indicate the extent to which this practice of service suppliers was acceptable. Specifically, it was questioned whether it was compatible with the provisions of the Unfair Terms Directive 93/13 for a supplier of services to burden a consumer with costs and expenses of which he was not previously aware, or whether the standard contract terms which allow such a possibility be classified as unfair for all

[924] Interview with the judge of the Pest County Court (*Pest Megyei Bíróság*).
[925] Decision for a reference for a preliminary ruling by the Pest County Court (*Pest Megyei Bíróság*).
[926] Decision for a reference for a preliminary ruling by the Pest County Court (*Pest Megyei Bíróság*).
[927] Decision for a reference for a preliminary ruling by the Pest County Court (*Pest Megyei Bíróság*).

consumers.[928]

The Hungarian court eventually referred the following two questions to the CJEU:

> *(1) May Article 6(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts be interpreted as meaning that an unfair contract term is not binding on any consumer where a body appointed by law and competent for that purpose seeks a declaration of the invalidity of that unfair term which has become part of a consumer contract on behalf of consumers in an action in the public interest (popularis actio)?*
>
> *May Article 6(1) of that directive be interpreted, where an order which benefits consumers who are not party to the proceedings is made, or the application of an unfair standard contract term is prohibited, in an action in the public interest, as meaning that an unfair term which has become part of a consumer contract is not binding on all consumers or as regards the future, so that the court has to apply the consequences in law thereof of its own motion?*
>
> *(2) May Article 3(1) of Directive 93/13, in conjunction with points 1(j) and 2(d) of the Annex applicable by virtue of Article 3(3) of that Directive, be interpreted as meaning that where a seller or supplier provides for a unilateral amendment of a contract term without explicitly describing the method by which prices vary or giving valid reasons in the contract, that contract term is unfair ipso jure?*

5.2. THE VIEWS OF THE PARTIES

This section will firstly set out the views of the Authority (**section 5.2.1.**) and then the views of Invitel (**section 5.2.2.**) as to the proceedings before the Hungarian courts.

5.2.1. THE VIEW OF THE APPLICANT

According to the lawyers of the Authority, "it was a surprising turn of events for both parties when the court decided to refer the case to the ECJ". Moreover, one lawyer of the Authority specified: "*I was personally astonished about the question of actio popularis because I thought this couldn't be an issue and obviously EU law is frequently very general and difficult to interpret, but I think that this opportunity was clearly mentioned [in the Directive 93/13]*". The lawyers suspected that the problem faced by the Hungarian court was that there was no specific provision on public interest actions in the Hungarian Code of Civil

[928] Decision for a reference for a preliminary ruling by the Pest County Court (*Pest Megyei Bíróság*).

Procedure.[929]

The Authority and Invitel did not make any submissions to the CJEU. The Authority relied instead on the submissions made by the Hungarian government:

> *We had the opportunity to express our opinion but in such cases the Ministry, when formulating an opinion, always asks the relevant administrative authorities and therefore it was clear that they would ask us and thus there wasn't any need for us to express our view since we could express it beforehand to the Ministry. It wouldn't have made sense to formulate it again separately.*[930]

Therefore, the Authority did not take up the opportunity to provide the CJEU with clarifications about their views and legal arguments on the dispute and furthermore, to make explicit their claim for an automatic refund, particularly as it was not addressed by the national court in its decision for a preliminary reference. It appears from Advocate General Trstenjak's summary of the observations of the Hungarian government that regarding the substantive assessment of the clause, citing the facts of the dispute at hand, the Hungarian government argued that "a unilateral amendment of the GBC, without indicating the method by which prices vary or the reason for the amendment, does not accord with Directive 93/13, as it leads to a substantial imbalance in the parties' contractual rights and obligations."[931] However, we cannot discern any concrete observations regarding the interlinking between collective and individual proceedings beyond the observation that "it is for the national court to determine the consequences in law of a finding that a contract term is unfair in the context of an action for an injunction."[932]

5.2.2. THE VIEW OF THE DEFENDANT

According to Invitel's legal and regulatory officer, Invitel's main concern was whether the provisions of the Hungarian Law on electronic communications would contradict the Unfair Terms Directive 93/13:

> *Because the Hungarian [Law on electronic communications] sets out the process and says that if you onward charge costs and you give that 60-day termination period, so you do the proper procedure, proper notification, in that case, that*

[929] Interview with three representatives of the legal department of the Hungarian Authority of Consumer Protection (applicant).
[930] Interview with three representatives of the legal department of the Hungarian Authority of Consumer Protection (applicant).
[931] Opinion of Advocate General Trstenjak in Case C-472/10 Invitel, ECLI:EU:C:2011:806, para. 29.
[932] Opinion of Advocate General Trstenjak in Case C-472/10 Invitel, ECLI:EU:C:2011:806, para. 25.

> *cannot be regarded as unfair. And that's why we were testing that against the consumer protection directive.*[933]

Regarding the question of why the national court asked about the compliance of the *actio popularis* and the *erga omnes* effect with the Unfair Terms Directive, the officer of Invitel gave the following evaluation:

> *The judge felt that, at that time, the Hungarian legislation under the civil code, the actio popularis action was not compatible with the applicable EU Directives. And he felt that there was a discrepancy between the two. Practically, what he was referring to, because [the Authority for] consumer protection at that stage was already asking that Invitel should be ordered to refund these amounts to each and every consumer. Now, and this is a very interesting area of civil law, imagine that I have a civil law agreement. I am the telecom company [and] you're the subscriber, right? We have a civil law agreement, which is a completely private agreement, right? And now comes the consumer protection authority. How can that consumer protection authority step into our legal agreement and our legal relation? […] How can the consumer protection authority, without your knowledge, order me to pay you certain amounts back under that agreement? And this was the material question of the judge, that if there is a bi-party legal relationship, how can a third party step in on behalf of one of the parties without that the party's consent.*[934]

Moreover, what was in question according to the officer of Invitel was the detailed process of the refund:

> *I think what the court questioned was the detailed process. Because the court did not doubt that there can be such an actio popularis; does that actio popularis mean that I order Invitel to pay it back and then Invitel automatically has to pay it back to everybody who it charged it to and raise a lot of complications, like what happens to former customers, dead customers. And then on the other hand, does that mean that I issue an order, saying, Invitel, if you're contacted by a customer, you need to pay them back. And that's a significant difference between the two. This is what the court was interested about.*
>
> *Who does Invitel pay that money to? What happens in cases, where the customer is no longer a customer? It raised lots of questions. And this is sort of unchartered territory in Hungary because of the lack of class actions in the past.*
>
> *Practically, what the court was interested in, and why in this question, they turned to the European Court, was to say that, can I order, if it comes to that, a refund or can I tell customers, and this was the position of the court, it was never put into a decision [because the parties eventually settled the case], but, this was the position of the court at the end, that I can issue a decision and based on that decision, each and every customer, who wants his money back, can come and file*

[933] Interview with the Chief Legal and Regulatory Officer of Invitel Zrt. (defendant).
[934] Interview with the Chief Legal and Regulatory Officer of Invitel Zrt. (defendant).

> *a claim. But the thing in this is that […], theoretically, they can order Invitel, pay it back to everybody, but then there are a lot of questions around that. But then if it is the customer who needs to initiate it and this was the position of the court at the end that, we issue a ruling like that, and then every customer can write a letter to Invitel that please send it back. […] Even if you compile that three or four years of charging this fee, it would amount to about a 1000, 2000 HUF per customer. Would you practically waste your time and write a letter to Invitel for 2000 HUF? Because 2000 HUF, it is like 5 Euro. So, it's not necessarily worth it. The amounts were extremely low. But then, if you know, you put that several thousand customers together, it is a huge amount for Invitel.*[935]

6. THE PROCEEDINGS BEFORE THE COURT OF JUSTICE OF THE EUROPEAN UNION

The CJEU rendered its judgment in the *Invitel* case on 26 April 2012, after the written procedure with submissions from the European Commission, Hungary and Spain, and following the delivery Advocate General Trstenjak's opinion on 6 December 2011. The case proceeded without a hearing. After some introductory remarks on the preliminary reference, this part will set out the written observations of the European Commission (**section 6.1.**), the opinion of Advocate General Trstenjak (**section 6.2.**) and the judgment of the Court (**section 6.3.**).

The facts of the *Invitel* case appear to not have been evident for the CJEU. The national decision for a preliminary reference serves as the basis for the proceedings before the CJEU and is necessary for the CJEU in order to understand the context of the case.[936] However, while the decision for a request for a preliminary reference by the Hungarian court contained the national provisions applicable in the case at hand and its grounds, which prompted it to inquire about the interpretation of certain provisions of the Unfair Terms Directive 93/13/EEC, it was missing a summary of the subject matter of the dispute and the relevant findings of fact. Also the parties to the national proceedings, meaning the Authority and Invitel, did not make any submissions from which the CJEU could have derived the national context.

It is apparent from the ruling of the CJEU in *Invitel* that the summary of facts was retrieved

[935] Ibid.
[936] See on this also Article 94 of the Rules of Procedure of the Court of Justice, OJ L 265, 29.9.2012, p. 1, and para. 22 of the Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings, OJ C 338, 6.11.2012, p. 1.

from the national case-file.[937] In comparison to the national decision for a request for a preliminary ruling, the national case-file, which is sent to the CJEU by the national court together with its decision for a preliminary reference, remains untranslated and is not forwarded to the national governments or to the European Commission. The single, untranslated case-file is only available for a limited time to the Advocate General, the CJEU judges and their référendaires working on that case before it is sent back to the national court.

The European Commission, the Advocate General and the CJEU dealt with the questions of the national court in two parts: i) the compliance of the configurations of the Hungarian *actio popularis* with the Unfair Terms Directive 93/13/EEC; and ii) the substantive assessment of a unilateral price amendment clause according to the Directive. As it appears, only Advocate General Trstenjak addresses the concerns of the national court as expressed in its decision for a preliminary reference in detail. Neither the European Commission nor the CJEU deal with the question whether consumers who are not party to proceedings can rely on the provisions of the Unfair Terms Directive in order to claim a refund.[938]

6.1. THE WRITTEN OBSERVATIONS OF THE EUROPEAN COMMISSION

6.1.1. THE *ACTIO POPULARIS* AND THE *ERGA OMNES* EFFECT

In its preliminary remarks, the European Commission confirmed that a public interest actions ensure an effective protection of the consumer, in particular view of the consumer's inferior position vis-à-vis the service provider, reducing the risk that the consumer is either not aware of his rights or faces difficulties in enforcing them, and the deterring costs of pursuing legal proceedings exceeding the amount of the dispute.[939] The Commission grounded its view on the case-law of the CJEU regarding Articles 6 and 7 of the Unfair Terms Directive. In particular, in *Océano Grupo*, the CJEU held that the Directive's system of protection was based on the notion that the imbalance between the consumer and the seller or supplier may only be corrected by positive action unconnected with the actual parties to the contract.[940]

[937] Case C-472/10 *Invitel*, ECLI:EU:C:2012:242, para. 18, which begins "As is apparent from the case-file […]."
[938] In the interview with one référendaire of a judge at the CJEU, who was sitting on the chamber for this case, it was expressed that neither the framing of the preliminary questions nor the separation between the concrete and the abstract control of unfair terms under Hungarian law were clear. However, the aim was to give the national court nevertheless the necessary tools to solve the specific dispute in the case at hand. Interview with a référendaire of a judge at the CJEU, who was sitting on the chamber dealing with Invitel, February 2014.
[939] European Commission, Written Observations in case C-472/10 *Invitel*, 12 January 2011, paras. 23, 24.
[940] Joined Cases C-240/98 to C-244/98 *Océano Grupo*, ECLI:EU:C:2000:346, para. 27.

Therefore, as confirmed in *Commission v. Italy*, Article 7 of the Unfair Terms Directive requires the Member States to implement adequate and effective means to prevent the continued use of unfair terms, and specifies that those means are to include allowing authorized consumer associations to take action in order to obtain a decision as to whether contract terms drawn up for general use are unfair and to have them prohibited.[941] In the light of these considerations, the European Commission concluded that the public interest action contributes to the achievement of the objective set by the Unfair Terms Directive, namely the effective protection of consumers.[942]

Turning to the national court's first question, the European Commission pointed out that Article 6(1) of the Unfair Terms Directive which stipulates that unfair terms are not binding on the consumer, places an obligation on the Member States to achieve a particular result. The purpose of the provision is to remedy the unequal situation between the consumer and the service provider and to replace the formal balance, which the contract establishes, between the rights and obligations of the parties with an effective balance which re-establishes equality between them.[943] The legal consequence laid down in Article 6(1) constitutes a minimum requirement. The details of this obligation have to be determined by the Member States, as Article 6(1) requires them to lay down that unfair terms are not binding on the consumer, 'as provided for under their national law'.[944]

While Article 6 of the Unfair Terms Directive relies on a bilateral legal relationship, Article 7 offers the Member States the possibility of providing wider legal effects upon the finding of an unfair term. However, apart from requiring a given result, Article 7(1) lacks precise and detailed rules on how to achieve this result, so that national variations may exist. Even if the CJEU has not previously ruled, save for the parties to the dispute, whether there are legal consequences arising from the declaration of invalidity of the abusive clause by the national court, in the light of Article 7(1), it does not appear incompatible with the rules laid down by the Directive.[945] On the other hand, the European Commission considered that the Hungarian legislation, which provided that a declaration of invalidity is applicable to any consumer concluding a contract containing the unfair term in question, also in the future, contributes

[941] Case C-372/99 *Commission v. Italy*, ECLI:EU:C:2002:42, para. 14.
[942] European Commission, Written Observations in case C-472/10 *Invitel*, 12 January 2011, paras. 25, 26.
[943] European Commission, Written Observations in case C-472/10 *Invitel*, 12 January 2011, para. 30.
[944] European Commission, Written Observations in case C-472/10 *Invitel*, 12 January 2011, para. 32.
[945] European Commission, Written Observations in case C-472/10 *Invitel*, 12 January 2011, para. 32.

towards achieving the objective of the Unfair Terms Directive.[946] In addition, the European Commission took the view that the Unfair Terms Directive does not preclude a national provision under which the national court is obliged to apply of its own motion the consequences in law stemming from a judgment, including one in favour of consumers who are not parties to the proceedings.[947]

6.1.2. THE CONTROL OF UNFAIRNESS

The European Commission explained that, by referring to the concepts of 'good faith' and 'a significant imbalance' between the rights and obligations of the parties, Article 3 of the Unfair Terms Directive only abstractly defines the elements for the assessment of the character of a contractual clause. Moreover, since the Annex to the Directive contains only an indicative and non-exhaustive list of clauses which may be declared unfair, an additional and detailed evaluation of the terms appearing in the list is necessary in each case.[948] In that regard, according to Article 4 of the Unfair Terms Directive, account has to be taken of the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances surrounding the conclusion of the contract.

On that basis, the European Commission concluded that it is for the national court to determine whether a contractual clause can be considered unfair within the meaning of Article 3(1) of the Directive.[949] Even though the CJEU interpreted the general criteria used by the Community legislature to define the unfairness of a term, the CJEU cannot rule on the application of those criteria to a particular term, which is the task of the national court in the light of the particular circumstances of the case.[950]

6.2. THE OPINION OF ADVOCATE GENERAL TRSTENJAK

6.2.1. THE *ACTIO POPULARIS* AND THE *ERGA OMNES* EFFECT

The opinion of Advocate General Trstenjak provided a general description of the system of protection under the Unfair Terms Directive and the role of the collective action as an

[946] European Commission, Written Observations in case C-472/10 *Invitel*, 12 January 2011, para. 33.
[947] European Commission, Written Observations in case C-472/10 *Invitel*, 12 January 2011, para. 37.
[948] European Commission, Written Observations in case C-472/10 *Invitel*, 12 January 2011, paras. 39-41.
[949] European Commission, Written Observations in case C-472/10 *Invitel*, 12 January 2011, paras. 42, 43.
[950] European Commission, Written Observations in case C-472/10 *Invitel*, 12 January 2011, para. 44.

appropriate and effective instrument within the meaning of Article 6 and 7 thereof. With regard to the latter, the Advocate General drew on the academic literature from various Member States and the various national experiences with collective actions.[951] On that basis, she concluded that the Hungarian system for the legal protection of collective rights complies, in general terms, with the requirements of the Directive and then turned to an assessment of the detailed configurations of the Hungarian system, focusing on the central question of the legal effects that the judgment of the national court seized with an action in the public interest should have according to the Unfair Terms Directive.[952]

Since the Directive is silent as to the way in which a judicial finding of the unfairness of a contract term should have legal effects extending beyond the individual case, it is ultimately for the Member States to determine which method is most appropriate and effective in the context of their national legal system.[953] However, "the Member States remain under an obligation to take other measures if under national law an instrument is definitively proven to be ineffective".[954] Moreover, the Member States' autonomy is limited by the protection of fundamental rights and the principle of proportionality under EU law.[955]

Advocate General Trstenjak confirmed that the *erga omnes* effect of findings of unfairness delivered by national courts complies with the principle of effectiveness. It prevents the continued use of an unfair term by eliminating it at a stroke from all contracts in which it was used, without the individual consumers having to contest it. The *erga omnes* effect "imposes one of the most profound legal consequences available under civil law", so that it can be assumed that it "will also have a deterrent effect on other sellers or suppliers wishing to use similar terms in contracts".[956] The Hungarian provision did not interfere disproportionately with fundamental rights that are protected under EU law, because the finding that the term is not binding affects only the defendant seller or supplier and does not apply indiscriminately to every other seller or supplier using a similar term but who is not a party to the proceedings.[957] Otherwise, the *erga omnes* effect "would be difficult to reconcile with the principles of a fair trial, particularly as such persons would be denied an opportunity to

[951] Opinion of Advocate General Trstenjak in Case C-472/10 *Invitel*, ECLI:EU:C:2011:806, para. 45.
[952] Opinion of Advocate General Trstenjak in Case C-472/10 *Invitel*, ECLI:EU:C:2011:806, para. 43.
[953] Opinion of Advocate General Trstenjak in Case C-472/10 *Invitel*, ECLI:EU:C:2011:806, paras. 52, 53.
[954] Opinion of Advocate General Trstenjak in Case C-472/10 *Invitel*, ECLI:EU:C:2011:806, para. 54.
[955] Opinion of Advocate General Trstenjak in Case C-472/10 *Invitel,* ECLI:EU:C:2011:806.
[956] Opinion of Advocate General Trstenjak in Case C-472/10 *Invitel*, ECLI:EU:C:2011:806, para. 57.
[957] Opinion of Advocate General Trstenjak in Case C-472/10 *Invitel*, ECLI:EU:C:2011:806, para. 59.

express their views on the accusation of using unfair terms in contracts before a judgment affecting them was delivered".[958]

Next, the Advocate General turned to the future non-binding effect of a term, whose application was prohibited in a public interest action. According to her view, actions for injunctions are not only permissible under EU law, but they constitute "a procedural necessity in order to achieve the objectives of the directive".[959] In the light of Article 7, the collective legal remedy "would be incomplete […] if it merely permitted the elimination of an unfair term existing at a given point in time without providing for the possibility of prohibiting the general use of this term and ordering measures to enforce such a prohibition in the event of contravention".[960] The Hungarian legislation complied with the requirement of 'effectiveness' as required not only by Article 7(2) of the Unfair Terms Directive, but also by Article 3 of Directive 2009/22,[961] "in that it permits persons or organisations with a legitimate interest in protecting the consumer to apply for a court finding that a term is invalid and to obtain an injunction against the particular seller or supplier even before it uses the term classified as unfair in contracts".[962] That early intervention of the national court responsible for the *in abstracto* verification prevents the repeated use of a term that has already been classified as unfair. Particularly, "if […] contraventions against an injunction […] were subject to a substantial penalty, the action for an injunction would be all the more incisive as a weapon against unfair terms".[963] Therefore, Advocate General Trstenjak concluded that Article 6(1) in conjunction with Article 7(1) and (2) of the Unfair Terms Directive does not preclude the Hungarian system for the collective protection of rights in the form of a public interest action.[964]

Although not directly included in the questions referred for a preliminary ruling by the national court, but included in its reasoning in the order for reference (see also **section 5.1.**), Advocate General Trstenjak dealt with the question of whether consumers who are not party to proceedings can rely on the provisions of the Unfair Terms Directive in order to claim a

[958] Opinion of Advocate General Trstenjak in Case C-472/10 *Invitel*, ECLI:EU:C:2011:806, para. 60.
[959] Opinion of Advocate General Trstenjak in Case C-472/10 *Invitel*, ECLI:EU:C:2011:806, para. 66.
[960] Opinion of Advocate General Trstenjak in Case C-472/10 *Invitel*, ECLI:EU:C:2011:806.
[961] Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests, OJ L 110, 1.5.2009, p. 30.
[962] Opinion of Advocate General Trstenjak in Case C-472/10 *Invitel*, ECLI:EU:C:2011:806, para. 69.
[963] Opinion of Advocate General Trstenjak in Case C-472/10 *Invitel,* ECLI:EU:C:2011:806.
[964] Opinion of Advocate General Trstenjak in Case C-472/10 *Invitel*, ECLI:EU:C:2011:806, para. 72.

refund.[965] Advocate General Trstenjak answered this in the negative, since the Directive did not cover consumers' possible claims for refund of payments improperly charged by the seller or supplier resulting from the partial invalidity of the contract with the consumer. The legislative purpose of Article 6(1) is merely to ensure that unfair contract terms do not impose any obligations on the consumer. This interpretation of Article 6(1) is not affected by the collective nature of the proceedings.[966] While Article 7(1) requires adequate and effective means in order to prevent the use of unfair terms, it does not require any adjustment of financial relationships to the legal situation consistent with the law.[967] However, in accordance with the ability of the Member States to adopt more stringent provisions to ensure a maximum degree of consumer protection in Article 8 of the Directive, the Member States are not precluded from recognizing a right to refund of costs and expenses charged by the service provider on the basis of unfair terms.[968]

6.2.2. THE CONTROL OF UNFAIRNESS

Before turning to the assessment of the pertinent term, Advocate General Trstenjak provided some general remarks regarding the content of the substantive assessment in the light of Article 4(2) of Directive 93/13 and the indicative nature of the list of terms contained in the Annex as well as the division of powers between the CJEU and the national courts.

The Advocate General referred first to Article 4(2), according to which the assessment of unfairness "shall relate neither to the definition of the main subject-matter of the contract nor to the adequacy of the price and remuneration […] as against the services or goods [to be supplied] in exchange, […] in so far as these terms are in plain intelligible language". Regarding the case at hand, she clarified that the dispute deals not only with the amount of the cost charged from the consumer for the payment by money order, but also on the entitlement of the defendant to unilaterally amend the contract terms for particular services. Therefore, the term relates to a particular method of contract amendment, which may significantly prejudice the consumer's bargaining position. Moreover, Advocate General Trstenjak identified a strong indication in favour of recognizing the need for a substantive assessment of the term in so far as Article 3(1) read in conjunction with point 1(j) of the

[965] Opinion of Advocate General Trstenjak in Case C-472/10 *Invitel*, ECLI:EU:C:2011:806, para. 73.
[966] Opinion of Advocate General Trstenjak in Case C-472/10 *Invitel*, ECLI:EU:C:2011:806, para. 72.
[967] Opinion of Advocate General Trstenjak in Case C-472/10 *Invitel*, ECLI:EU:C:2011:806, para. 75.
[968] Opinion of Advocate General Trstenjak in Case C-472/10 *Invitel*, ECLI:EU:C:2011:806, para. 76.

Annex lists a similar situation.[969]

The concepts of good faith and significant imbalance between the rights and obligations of the parties as referred to in Article 3(1) define, in a general way, the factors that render contractual terms unfair. The Annex contains an indicative and non-exhaustive list of terms that may be regarded as unfair.[970] In any case, an independent and detailed assessment is required to determine whether the term is unfair. According to Article 4(1), that assessment has to take "into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which the term is dependent".[971] In line with the division of powers in preliminary ruling proceedings, the CJEU will only interpret the relevant provisions of the Directive, which includes the Annex in line with *Pénzügyi Lízing*,[972] while it is for the national court to assess and decide whether a contractual term satisfies the requirements for it to be regarded as unfair.[973]

Regarding the assessment of the pertinent term under Article 3(1) in conjunction with point 1(j) of the Annex, Advocate General Trstenjak reasoned that the unilateral amendment of the price and costs of performing the contract could lead to a situation whereby the consumer is at the mercy of the seller or supplier. Such a term may result in a substantial shift in the rights and obligations arising under the contract, to the detriment of the consumer, and thereby contravene the good faith requirement.[974] However, only those terms that permit amendments without a valid reason or which do not state the reason for the amendment in the term itself are automatically unfair. The deciding factor would be "the existence of a legally overriding reason after assessment of the interests involved". In accordance with Article 5, the description of the reason in the term must be plain and intelligible to the consumer. It is not sufficient that the term merely repeats the general concept of a valid reason. While Advocate General Trstenjak suspected that the term at stake was unfair on the basis of these requirements, in line with the division of powers, the final assessment was to be decided by

[969] Opinion of Advocate General Trstenjak in Case C-472/10 *Invitel*, ECLI:EU:C:2011:806, para. 79.
[970] Opinion of Advocate General Trstenjak in Case C-472/10 *Invitel*, ECLI:EU:C:2011:806, para. 80.
[971] Opinion of Advocate General Trstenjak in Case C-472/10 *Invitel*, ECLI:EU:C:2011:806, para. 81.
[972] Case C-137/08 *Pénzügyi Lízing*, ECLI:EU:C:2010:401, para. 44.
[973] Opinion of Advocate General Trstenjak in Case C-472/10 *Invitel*, ECLI:EU:C:2011:806, paras. 82, 83.
[974] Opinion of Advocate General Trstenjak in Case C-472/10 *Invitel*, ECLI:EU:C:2011:806, para. 86.

the competent national court.[975]

Turning to the last issue, Advocate General Trstenjak proposed to interpret Article 6(1) as not preventing an unfair term being declared invalid *ipso jure* under national law. The Directive does not lay down in detail whether an unfair term is to be declared invalid or void – as this is left to national law.[976] According to the Advocate General, the concept of invalidity is fundamentally compatible with Directive 93/13, as in accordance with the purpose of Article 6(1) it prevents an unfair contract term from producing legal effects to the detriment of the consumer. Regarding the *ipso jure* effect, from the decisions of the CJEU in *Océano Grupo Editorial and Salvat Editores* and *Pannon GSM*, the Advocate General discerned that "there is an obligation under EU law for the national court to undertake an examination of unfair terms of its own motion and secondly that a contractual term must become ineffective *ipso jure*".[977] Therefore, the Member States are free to implement in their legal system the requirement that a term classified as unfair is not binding on the consumer in such a way that it is regarded as invalid *ipso jure*.[978]

6.3. THE JUDGMENT OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

The CJEU dealt with the questions of the national court in reverse order. Here, in line with the observations of the European Commission and the opinion of the Advocate General, the order of the questions as submitted by the national court will be followed.

6.3.1. THE *ACTIO POPULARIS* AND THE *ERGA OMNES* EFFECT

The CJEU held that the Unfair Terms Directive does not preclude the declaration of invalidity of an unfair term in an action for an injunction in the public interest from producing effects with regard to all consumers who concluded with the seller or supplier concerned a contract to which the same GBCs apply, including with regard to those consumers who were not party to the injunction proceedings. In reaching this conclusion, the CJEU referred to its case law on actions involving an individual consumer. It held that in view of the weak position of the consumer vis-à-vis the trader as regards both his bargaining power and his

[975] Opinion of Advocate General Trstenjak in Case C-472/10 *Invitel*, ECLI:EU:C:2011:806, para. 87.
[976] Opinion of Advocate General Trstenjak in Case C-472/10 *Invitel*, ECLI:EU:C:2011:806, para. 89.
[977] Opinion of Advocate General Trstenjak in Case C-472/10 *Invitel*, ECLI:EU:C:2011:806, paras. 92, 93.
[978] Opinion of Advocate General Trstenjak in Case C-472/10 *Invitel*, ECLI:EU:C:2011:806, para. 94.

level of knowledge,[979] Article 6(1) of the Directive required Member States to specify that unfair terms shall not be binding on the consumer: "[T]hat is a mandatory provision which aims to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them".[980]

While the Directive does not seek to harmonize the penalties applicable in the event of a term being found to be unfair in the context of actions for an injunction brought in the public interest, Article 7(1) required the Member States to ensure that adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers.[981] It was specified in paragraph 2 that those means are to include allowing authorized persons or organizations to take action in order to obtain a decision as to whether contract terms drawn up for general use are unfair and to have them prohibited. The deterrent nature and dissuasive purpose of those actions means that they may be brought even although the terms at stake have not been used in specific contracts.[982] The CJEU concluded that the effective implementation of that objective required that terms of the GBC in consumer contracts which are declared to be unfair in an action for an injunction are not binding on either the consumers who are parties to the actions for an injunction, or on those who have concluded with that seller or supplier a contract to which the same GBCs apply.[983] Therefore, the Hungarian legislation, providing that the declaration by a court, of the invalidity of a term in the GBC of consumer contracts is to apply to any consumer who has concluded a contract with a seller or supplier which includes that satisfies therefore the requirements of Article 6(1), read in conjunction with Article 7(1) and (2), of the Directive.

As regards the second part of the first question, the CJEU held that where the unfair nature of a term in the GBC has been acknowledged in an action for an injunction in the public interest,

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[979] Case C-472/10 *Invitel*, ECLI:EU:C:2012:242, para. 33, with reference to case C-453/10 *Pereničová and Perenič*, ECLI:EU:C:2012:144, para.27; see also Case C-168/05 *Mostaza Claro*, ECLI:EU:C:2006:675, para. 25, Case C-243/08 *Pannon GSM*, ECLI:EU:C:2009:350, para. 22, and Case C-40/08 *Asturcom Telecomunicaciones*, ECLI:EU:C:2009:615, para. 29.

[980] Case C-472/10 *Invitel*, ECLI:EU:C:2012:242, para. 34, with reference to Case C-453/10 *Pereničová and Perenič*, ECLI:EU:C:2012:144, para. 28; see also Case C-168/05 *Mostaza Claro*, ECLI:EU:C:2006:675, para. 36, Case C-40/08 *Asturcom Telecomunicaciones*, ECLI:EU:C:2009:615, para. 30, and Case C-137/08 *VB Pénzügyi Lízing*, ECLI:EU:C:2010:659, para. 47.

[981] Case C-472/10 *Invitel*, ECLI:EU:C:2012:242, para. 35.

[982] Case C-472/10 *Invitel*, ECLI:EU:C:2012:242, paras. 36, 37, with reference to Case C-372/99 *Commission v. Italy*, ECLI:EU:C:2002:42, paras. 14 and 15.

[983] Case C-472/10 *Invitel*, ECLI:EU:C:2012:242, para. 38.

"national courts are required, of their own motion, and also with regard to the future, to draw all the consequences provided for by national law in order to ensure that consumers who have concluded a contract to which those GBC apply will not be bound by that term".[984] The CJEU reasoned that the national court's power to determine of its own motion whether a term is unfair constituted in itself a means of preventing the continued use of unfair terms in contracts as required by Article 7 of the Directive 93/13.[985] Moreover, the nature and importance of the public interest underlying the Directive justifies the obligation of the national court to assess of its own motion whether a contractual term is unfair.[986] Once the national court finds a term included in GBC to be unfair, Article 6(1) of the Directive requires the national court to draw all the consequences that follow under national law, so that the consumer is not bound by that term.[987]

6.3.2. THE CONTROL OF UNFAIRNESS

The CJEU held that in order to determine, with regard to Article 3(1) and (3) of the Directive 93/13, the unfair nature of the term at stake, "the national court must determine, inter alia, whether, in light of all the terms appearing in the GBC of consumer contracts which include the contested term, and in the light of the national legislation setting out rights and obligations which could supplement those provided by the GBC at issue, the reasons for, or the method of, the amendment of the fees connected with the service to be provided are set out in plain, intelligible language and, as the case may be, whether consumers have a right to terminate the contract".[988]

The CJEU firstly noted that its jurisdiction is limited to "the interpretation of the concept of 'unfair term' used in Article 3(1) of the Directive and in the Annex thereto, and to the

[984] Case C-472/10 *Invitel*, ECLI:EU:C:2012:242, para. 43.
[985] The CJEU refers in that regard to para. 27 of its judgment in Case C-168/05 *Mostaza Claro*, ECLI:EU:C:2006:675: "It is on the basis of those principles that the Court has ruled that the national court's power to determine of its own motion whether a term is unfair constitutes a means both of achieving the result sought by Article 6 of the Directive, namely preventing an individual consumer from being bound by an unfair term, and of contributing to achieving the aim of Article 7, since if the court undertakes such an examination, that may act as a deterrent and contribute to preventing unfair terms in contracts concluded between consumers and sellers or suppliers." With reference to Case C-240/98 *Océano Grupo Editorial and Salvat Editores*, ECLI:EU:C:2000:346, para. 28 and Case C-473/00 *Cofidis*, ECLI:EU:C:2002:705, para. 32.
[986] Case C-472/10 *Invitel*, ECLI:EU:C:2012:242, para. 41, with reference to Case C-168/05 *Mostaza Claro*, ECLI:EU:C:2006:675, para. 38.
[987] Case C-472/10 *Invitel*, ECLI:EU:C:2012:242, para. 42, with reference to Case C-453/10 *Pereničová and Perenič*, ECLI:EU:C:2012:144, para. 30; see also Case C-40/08 *Asturcom Telecomunicaciones*, ECLI:EU:C:2009:615, paras. 58 and 59, and order C-76/10 *Pohotovosť*, ECLI:EU:C:2010:685, para. 62.
[988] Case C-472/10 *Invitel*, ECLI:EU:C:2012:242, para. 31.

criteria, which the national court may or must apply when examining a contractual term in the light of the provisions of the Directive".[989] The national court has to determine, in the light of those criteria, whether a particular contractual term is actually unfair in the circumstances of the case.[990] It then ruled out the applicability of the exclusion in Article 4(2) of Directive 93/13 to a term relating to a mechanism for amending the total prices of services provided to the consumer.[991]

In light of points 1(j) and (l) and 2(b) and (d) of the Annex to the Directive, the reason for and the method of the variation of the aforementioned price must, in particular, be set out, and the consumer must have the right to terminate the contract.[992] While the Annex contains only an "indicative and non-exhaustive list" of terms, which may be regarded as unfair,[993] it is an "essential element" of the assessment as to the unfair nature of the term at stake. In line with the 20th Recital in the preamble to the Directive and the obligation to draft terms in clear, intelligible language as laid down in Article 5 of the Directive, "the possibility for the consumer to foresee, on the basis of clear, intelligible criteria, the amendments, by a seller or supplier, of the GBC with regard to the fees connected to the service to be provided is of fundamental importance".[994] Further to this, where the method of amendment of the fees are specified by mandatory statutory or regulatory provisions within the meaning of Article 1(2) of the Directive, or where those provisions provide, for the consumer, the right to terminate the contract, it is essential that the consumer is informed of those provisions by either the seller or supplier.[995]

7. THE FOLLOW-UP AT THE NATIONAL LEVEL

The ruling of the CJEU in *Invitel* was not followed by a judgment of the referring Hungarian court as the parties settled their dispute. Since the parties reached a settlement and the

[989] Case C-472/10 *Invitel*, ECLI:EU:C:2012:242, para. 22.
[990] Case C-472/10 *Invitel*, ECLI:EU:C:2012:242, para. 22, with reference to Case C-137/08 *VB Pénzügyi Lízing*, ECLI:EU:C:2010:659, para. 44.
[991] Case C-472/10 *Invitel*, ECLI:EU:C:2012:242, para. 23: "In accordance with Article 4(2) of the Directive, the assessment of the unfair nature of terms is to relate neither to the definition of the main subject-matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other, in so far as those terms are in plain and intelligible language."
[992] Case C-472/10 *Invitel*, ECLI:EU:C:2012:242, para. 24.
[993] Case C-472/10 *Invitel*, ECLI:EU:C:2012:242, para. 25, with reference to Case C-243/08 *Pannon GSM*, ECLI:EU:C:2009:350, paras.37 and 38, Case C-137/08 *VB Pénzügyi Lízing*, ECLI:EU:C:2010:659, para. 42, and order C-76/10 *Pohotovosť*, ECLI:EU:C:2010:685 , paras. 56 and 58.
[994] Case C-472/10 *Invitel*, ECLI:EU:C:2012:242, paras. 27, 28.
[995] Case C-472/10 *Invitel*, ECLI:EU:C:2012:242, para. 29.

Authority withdrew its action, the national court dismissed the pending proceedings. The settlement was not an institutionalized element of the court proceedings, and the national court had, therefore, no oversight over the settlement process. This part will set out firstly the perception of the referring national judge as to the proceedings before the CJEU (**section 7.1.**). Then the views of the Authority (**section 7.2.1.**) and of Invitel (**section 7.2.2**) as to the CEJU ruling and their subsequent settlement will be set out.

7.1. THE VIEW OF THE NATIONAL JUDGE

The dominant concern of the national judge was the contradiction between the Hungarian Law on electronic communications and the Unfair Terms Directive 93/13, which it considered to be detrimental to consumer interests (see **section 5.1.**). According to the Hungarian judge, the contradiction was practically resolved because the interpretation by the CJEU of the Unfair Terms Directive 93/13 functions as a legal basis (*titulus juris*) and allows the Hungarian courts to render rulings that contradict the Hungarian Law on electronic communications.[996] As further stated in his article handed over to the thesis author at the occasion of the interview, "*the national court, in order to ensure the protection of constitutional consumer rights, acting on the basis of the supremacy of Community law and relying on a teleological interpretation of the relevant statutes, quasi degraded certain provisions of national law. This was not done as an illegitimate exercise of legislative powers or on the basis of an individual a contrario interpretation that violated the requirement of legal certainty*".[997]

As stated by the judge in the above-mentioned article regarding the unfairness test:

> *Advocate General Trstenjak's unfairness test concerning the unilateral alteration of consumer contracts is an excellent summary of the matter, and is fully endorsed by the author. If a service provider reserves the right to modify the main obligations of the contract, this may expose consumers to abusive practices. The more unspecific the term that can be altered unilaterally, the greater the imbalance that can result from the shift of contractual rights and obligations. Particularly if the alteration concerns the main-subject matter of the contract, such an imbalance can mean significant loss or damage to consumers, which is inconsistent with the requirement of good faith dealings. On the other hand, not*

[996] Interview with the judge of the Pest County Court (*Pest Megyei Bíróság*), who referred the case to the CJEU, 12 June 2013.

[997] "Judicial Interpretation and Quasi Legislation in Preliminary Ruling Procedures," is on file with the thesis author. The English translation of this article was handed over by the judge to the interviewer as setting out his views on the matter.

> *all unilateral contract modifications are unfair, as they can be justified by economic or legal reasons. An alteration can be acceptable if it is based on adequate reasons. However, a term that allows the service provider to alter the contract unilaterally will be unfair if it does not include a valid reason. The term will be unfair in itself without an indication of the reason for alteration.*[998]

In addition, the national judge stated that he agreed with the opinion of Advocate General Trstenjak that it is not required to recognize, in an action in the public interest, the refund of the costs unlawfully charged by the service provider from its consumer-customers under EU law. According to the Hungarian Code of Civil Procedure, compensation could be only granted to an applicant that is party to the proceedings and not to a third party. The Hungarian Code of Civil Procedure does not contain specific rules on the *actio popularis*. Therefore, the Hungarian judge considered that the legal consequences of invalidity established in the framework of a public interest action, have to be enforced by the consumer as the injured party in an individual action.

7.2. THE VIEWS OF THE PARTIES

After the ruling by the CJEU, the Hungarian Authority for Consumer Protection and Invitel settled their dispute. According to the Authority, Invitel accepted to refrain from charging a fee for postal money orders as of August 2012 and, additionally, "*undertook to plan and accomplish a campaign for the increase of consumer protection and consumer awareness, which focuses on the current issues, problems and their handling in the field of news release and media*". Moreover, Invitel promised "*to take into account the views and suggestions of the Hungarian Authority for Consumer Protection*".[999]

While it became clear throughout the interviews that the reasons of the parties to settle their dispute were diverse, some doubts about their motivation, however, remain. It appears that Invitel approached the Authority and proposed a settlement not because it realized that it was infringing consumer rights, but because it was aware that the Hungarian government was introducing legislation, which would prohibit Invitel from continuing to impose a fee on its consumer-customers for postal money orders. On the other hand, the Authority's reason for agreeing to the settlement lay in its perception that the national court would not have ordered Invitel to automatically refund its affected customers – and indeed clarifying this point of law

[998] Ibid.
[999] E-Mail of the Head of the Legal Department of the Hungarian Authority of Consumer Protection (applicant), received on 24 January 2013.

was one of the Authority's main concerns of the litigation (see on this **section 4.1.4.**).

Since the settlement between the parties was not publicly disclosed, the information provided in this part is based exclusively on the information provided by the parties during the interviews. This part will set out the views of the Authority (**section 7.2.1.**) and of Invitel (**section 7.2.2**) as to the CEJU ruling and their subsequent settlement.

7.2.1. THE VIEW OF THE APPLICANT

The lawyers of the Authority expressed their satisfaction with the legislature's prohibition of charging a fee for postal money orders from consumers. In particular, the Authority was concerned that other service providers might have implemented similar unfair practices to be confirmed (see **section 4.1.1.**). While they are not aware of whether the *Invitel* case had any direct influence on the legislator's decision, in the general communications about the new legislative initiative, consumer complaints were referred to and it was explained that consumer interests had been negatively affected. According to the Authority, due to the newly introduced prohibition, there was no need to explicitly state in the settlement that Invitel would refrain from charging this fee to its consumer-customers. Moreover, it was not agreed that Invitel would pay out a refund to its affected customers. Instead, the Authority pointed out that the settlement had "*other positive effects for consumers to speak in a general way*". Regarding the question of whether the Authority supervised Invitel's consumer protection campaign, they responded that the Authority receives constant updates about Invitel's compliance and that "*it is clear that they are taking it seriously*". It was clarified that the information disclosure was part of the settlement.[1000]

However, according to the Authority, its reason to agree to the settlement lay not in the newly introduced legislative prohibition, but in its perception that the national court would not have ordered Invitel to automatically refund all its affected consumer-customers. This is illustrated by the following statements of the lawyers of the Authority:

> *I would like to stress that when the yellow cheque was prohibited, it was prohibited for the future and we were discussing a behaviour that had taken place prior to it [the legal prohibition]. As we said earlier, our concern was not with the introduction of such a fee, but the implementation procedure.*

[1000] Interview with three representatives of the legal department of the Hungarian Authority of Consumer Protection (applicant), 13 June 2013.

> *I would like to point out the difference between a court declaring the infringement or proceeding with a compensation for the infringement. If the judge would have simply established the infringement of consumer rights, we couldn't have potentially envisaged a compensation and we couldn't have spoken of real consumer protection and as we said earlier the legislation revised our competence a few weeks after the settlement so there wouldn't have been an opportunity to fully protect consumer interests. What we were concerned with was the best interest of consumers.*[1001]

It was clarified that at the time of the settlement, the Authority was already aware that it would lose its competence to initiate a legal action to 'defend a wide range of consumers' and importantly, to 'eliminate substantial disadvantage' under Section 39(1) of the Consumer Protection Act CLV of 1997 (see also **section 4.1.4.**). As clarified by the Authority:

> *The possibility to initiate a public interest action was in place until July 29 of last year [2012] and at the time the consumer protection law clearly mentioned us as the competent authority. By the way, civil [non-governmental] organizations still have this right but it was taken away from us.*[1002]

The Authority lost its broad legal basis under the Consumer Protection Act, which enabled it to construe an argument in favour of the automatic refund for the consumers affected by the unfair contractual term.[1003] The lawyers of the Authority eventually explained that because they were concerned with the "*best interest of consumers*", they considered Invitel's proposal for a consumer protection campaign more beneficial in terms of the consumers' access to better information, rather than the judicial finding of an unfair contractual clause.[1004]

Regarding the question of how they perceived the CJEU's judgment, which, contrary to Advocate General Trstenjak, did not address the consumer's right to refund of costs and expenses charged on the basis of an unfair term (and neither the Advocate General nor the CJEU discussed the Authority's major claim for an automatic refund of affected consumers),

[1001] Interview with three representatives of the legal department of the Hungarian Authority of Consumer Protection (applicant).
[1002] Interview with three representatives of the legal department of the Hungarian Authority of Consumer Protection (applicant).
[1003] However, it has to be pointed out that the Authority received other competences under Section 38 of the Consumer Protection Act CLV of 1997, which, however, do not apply to contractual disputes. Accordingly, firstly, it can ask the court for a finding of a violation of consumer law and a finding of the affected consumers (i.e. no *erga omnes* effect). The identified consumers can then more easily enforce their rights, as they only need to prove the amount of their damage and causation before court. Secondly, the Authority can initiate an action against a trader for specific performance if the damage can be clearly established without taking the individual circumstances of the consumer into account. If the undertaking fails to fulfil its duty, the consumer is entitled enforce the judgment before court. For more details, see Harsági, "The Need for Further Development of Collective Redress in Hungary," 177, 178.
[1004] Interview with three representatives of the legal department of the Hungarian Authority of Consumer Protection (applicant).

the Authority pointed out:

> *No, the problem is not with the ECJ ruling because in fact the ECJ ruling pointed out the lack of clear formulation in the national law. The problem is specific to Hungary and the question was, what we could have achieved with a public interest action: maybe the courts would have established the unfair contractual clause, but the story would have likely ended up there.*
>
> *And I don't think that this [the refund] would have had any relation with the ECJ ruling, but this is more of a problem of national regulation.*
>
> *Actually we were not waiting for this, but the court was. Of course if this ECJ ruling had ruled in a way to make it possible for the court to rule in our favour then we wouldn't have ... [does not finish the sentence].*[1005]

Therefore, it appears that the Authority did not see any ability of EU law to solve its perceived problems in national law. The primary responsibility was placed at the national level. The lawyers of the Authority expect that the greatest impact of the CJEU ruling will relate to the clarifications on the substantive assessment of the unfairness of a term:

> *What it can change is in the way of transparency, this was the first precedent from the ECJ in that regard and even since then there is only one other case - case RWE, I think - but right now these are the only two guiding precedents for Member State courts when they seek to determine if a clause is not clearly formulated.*[1006]

7.2.2. THE VIEW OF THE DEFENDANT

The legal and regulatory officer of Invitel was satisfied with the judgment of the CJEU because it confirmed Invitel's view that there is no general European prohibition on charging consumers a fee for the payment by postal cash transfer orders:

> *And interestingly, the way we read the European court's decision, is that, they said that there is no such European provision, but it's sort of back to the Hungarian court, and please interpret it based on your own national legislation [...] The preliminary ruling came back to the Hungarian court and a very interesting situation arose. At the time, the state was already thinking about introducing specific legislation to say that none of the companies are entitled to bill or pass-on any fees in regard to this yellow cheque. So, in that regard, practically, we were right, that no such legislation existed until that point. And for the future, since last November, the government did introduce specific legislation,*

[1005] Interview with three representatives of the legal department of the Hungarian Authority of Consumer Protection (applicant).
[1006] Interview with three representatives of the legal department of the Hungarian Authority of Consumer Protection (applicant). The lawyer refers to Case C-92/11 *RWE Vertrieb*, ECLI:EU:C:2013:180.

> *saying you cannot charge a fee for that. So from that minute on, we had to adapt. But this lawsuit, the consumer protection and us, we interpreted it in the same way and consumer protection said that, well, the European Court bounced it back to national law, so, you know, we can go either way and we settled.*
>
> *And now the local court couldn't have determined, it's against the law or unfair, when it was allowed and […]it was a later-on legislation, which specifically banned it. So, so that's why we were in a pretty good position in this case.* [1007]

The lawyer of Invitel reasoned that because the Hungarian parliament was, at that time, discussing the introduction of legislation, which would prohibit charging consumers a fee for the payment by postal money orders, that practice had to be consequently considered to be legal beforehand. That appeared also to be the reason why Invitel approached the Hungarian Authority for Consumer Protection to settle the case. In view of the officer of Invitel, the Hungarian Authority for Consumer Protection agreed to settle for the same reason. The ultimate goal of the Authority would have been that Invitel would not charge this fee in the future, which was now ensured through legislative action.

Moreover, the officer of Invitel recognized that it was unlikely that the national court would order Invitel to refund its customers based on national law at that time. In return for the Hungarian Authority of Consumer Protection withdrawing its legal action, Invitel committed to operate a consumer protection campaign for TV- and internet-use for a time-period of one year. Invitel committed to spend approximately 10 Million HUF on the campaign.[1008] The new legislation applicable since 1 September 2012, which prohibits utility providers from charging consumer-customers a fee based on the method of payment or invoicing, raised Invitel's costs by approximately ½ billion HUF per annum. [1009]

[1007] Interview with the Chief Legal and Regulatory Officer of Invitel Zrt. (defendant). According to Article 52(3) of the Payment Services Directive 2007/64/EC, Member States may forbid or limit the right to request charges taking into account the need to encourage competition and promote the use of efficient payment instruments. According to Recital 42, the Member States are entitled to do so "in view of abusive pricing or pricing which may have a negative impact on the use of a certain payment instrument taking into account the need to encourage competition and the use of efficient payment instruments." The CJEU held in Case C-616/11 *T-Mobile Austria*, ECLI:EU:C:2014:242 that this provision is also applicable "to the use of a payment instrument in the course of the contractual relationship between a mobile phone operator, as payee, and that operator's customer, as payer". Moreover, the CJEU held that the general prohibition of surcharges in Austria is compatible with that Article.
[1008] Interview with the Chief Legal and Regulatory Officer of Invitel Zrt. (defendant).
[1009] Interview with the Chief Legal and Regulatory Officer of Invitel Zrt. (defendant).

8. CONCLUDING REMARKS

This case study embeds the *Invitel* case in the historical development of both the European and Hungarian approach to consumer protection and the control of unfair contractual terms. While the Western European Member States had already collected extensive experience with regard to the regulation of unfair contractual terms before the adoption of Unfair Terms Directive 93/13/EEC, during the heyday of national consumer law in the 1970s; the Hungarian experience has developed somewhat contrarily to these developments. Hungary's development of a modern consumer protection policy went hand in hand with its accession to the EU. After the 1990s, Hungary became politically and legally linked to the European *acquis* by the Europe Agreement, which deeply influenced Hungarian contract law even before its accession, as is illustrated by the implementation of the Unfair Terms Directive 93/13/EEC. However, that does not apply to the remedies at stake in the *Invitel* case – the *actio popularis* with its *erga omnes* effect has existed in the Hungarian Civil Code since 1977. Studying its historical roots has revealed that its underlying rationale indeed contains a socialist legacy. With the introduction of the modernized control of unfair terms by the implementation of the Unfair Terms Directive 93/13/EEC, the traditional remedies already familiar to the Hungarian Civil Code have been retained.

Since references for preliminary rulings to the CJEU have hitherto related to the protection of individual rights, the *Invitel* case gave the CJEU the novel opportunity to clarify the requirements for collective actions under the Unfair Terms Directive. The reasoning of the CJEU was informed by the configurations of the Hungarian *actio popularis* with its *erga omnes* effect, and resulted in the important clarification that the effective implementation of the Directive's objectives requires that terms which are declared to be unfair in an action for an injunction are not binding on either the consumers who are party to the actions for an injunction, or on those who have concluded with that seller or supplier a contract to which the same terms apply.

However, the significance of the CJEU judgment for the dispute between the parties remains marginal. The parties settled their dispute out of court, as Invitel committed itself to establishing a consumer protection campaign. The Authority agreed to Invitel's proposal, and thereby gave up its aim for 'real' consumer protection in the sense that Invitel's affected consumer-customers would receive an automatic refund for the unlawfully charged fees.

However, while it appears that the national judge would have probably rejected the possibility of ordering an automatic refund, it must be pointed out that the absence of a judicial finding as to the unfairness of the disputed term does not facilitate the position of the individual consumer in claiming a refund. On the contrary, the settlement raises doubts about the unlawfulness of the disputed contractual term as reflected by the views of Invitel's officer.

The central legal question from the perspective of the national dispute at hand would have been the interlinking between the collective proceedings and the individual proceedings with a view to the individual consumer's right to a refund. Here we can perceive, to some extent, that there were communication problems between the national court and the CJEU. Although addressed in the decision for a preliminary reference by the national judge, the national judge did not formulate a specific question on that issue. That might be the reason why the CJEU was able to avoid providing, at least explicitly, an answer to that question. The Authority – which, generally, did not show any engagement with EU law to solve its perceived problems in national law - did not take the opportunity to reinforce the importance of that issue by submitting its observations to the CJEU. However, it certainly cannot be claimed that the CJEU was unaware of this issue – as Advocate General Trstenjak explicitly addressed and provided an answer to that very issue.

CHAPTER 5: A HORIZONTAL ANALYSIS OF THE FOUR LEVELS OF *HYBRIDITY*

1. INTRODUCTION

The aim of this Chapter is to horizontally evaluate the empirical findings of the three case studies as to the interaction between national and European law according to *Kaarlo Tuori*'s four levels of hybridity. The conceptual framework of the thesis as determined by the four levels of hybridity was set out in the introductory Chapter of this thesis (see in particular **section 2**). Accordingly, the distinctive feature of hybridity is that it breaks with the traditional mapping and basic systematization of the law as conceived from a national perspective. Therefore, the identification of hybridity involves a constant comparison between the historical conceptualizations and traditions that the levels derived from the national context and the divergences introduced by European law. The four levels of hybridity as proposed by *Tuori* are the following: the legal phenomenon, the legal field, the legal order and the legal space.

The horizontal analysis of the four levels of hybridity will proceed in the following way: firstly, the analysis starts with the examination of the nature of collective remedies within the three legal fields at stake, being environmental law, anti-discrimination law and consumer law, which lie at the core of the three case studies (**section 2**). Secondly, the collective remedies will be embedded in their respective legal fields, which are in turn examined according to the EU's influence on them (**section 3**). Thirdly, it will be determined whether the three policy fields are developing into a European social legal order and whether its relationship with the national social legal orders gives rise to hybridity (**section 4**). Finally, it will be set out how the CJEU's contribution to the creation of a European society in the framework of the preliminary reference procedure relates to hybridity (**section 5**).

2. *HYBRID REMEDIES*: INTERLINKING EUROPEAN SUBSTANCE WITH NATIONAL PROCEDURES

At the level of the individual phenomenon, the thesis tested the analytical framework of hybridity to examine the interaction between European and national law for the making and shaping of collective remedies for the enforcement of EU law. The European legal order is formally built on a distinction between, on the one hand, substantive law and, on the other,

remedial and procedural law. While the European legal order defines the substantive scope of European rights, it is principally for the Member States to provide the appropriate remedies and procedures to enforce them. This distinction is largely adhered to in secondary EU legislation, which rarely require more than effective, proportionate and dissuasive means of enforcement. However, this formal distinction between EU and Member State competence is not necessarily adhered to by the case law of the CJEU. Remedies, shaped by national and European law, have been described as 'hybrid' in order to reveal that the remedy contains elements deriving from the national and the European legal order.[1010]

The evidence collected in the three case studies has allowed the author to dig deeper into the hybrid relationship between European and national law. It has been argued that hybridity is the result of the strong intertwinement between substance and procedure, which is revealed by the three case studies' law in action approach. On the one hand, it means that the Member States might need to upgrade their national remedies and procedures to ensure the effectiveness of European law. This is what we observed in the *Janecek* case study, where the national remedies were understood as being insufficient for providing effective legal protection of the European right at stake. On the other hand, giving it a novel turn, it also means that by providing remedies and procedures for the enforcement of EU law, the Member States are able to influence the substantive protective standard of the harmonized regime. This was illustrated in the *Feryn* and *Invitel* case studies, where the Member States introduced more protective remedies than would appear to be required, looking at the European regulatory framework.

The three case studies involve remedies, which have a collective nature, meaning that they aim to produce effects beyond the parties to the specific case. Indeed, the three case studies are paradigmatic of the problems, which are encountered by relying exclusively on individual remedies, which are inherent in the areas of environmental law, anti-discrimination law and consumer law respectively. In the *Janecek* case study, the interests at stake were human health and the environment – these are interests which, in principle, concern everyone but which are rarely sufficient to induce an individual to monitor and enforce compliance. In the *Feryn* case study, while there was no identifiable individual victim of the employer's

[1010] Reich, "Horizontal Liability in EC Law: Hybridization of Remedies for Compensation in Case of Breaches of EC Rights"; Bernitz and Reich, "Case No. A 268/04, The Labour Court, Sweden (Arbetsdomstolen) Judgment No. 89/09 of 2 December 2009."

discriminatory practices, the humiliating and demoralising impact on persons of the respective origin could not be excluded. In the *Invitel* case study, the harm suffered by the individual consumer because of the unfair term would rarely give an incentive for the consumer to initiate an individual action before court. Providing for collective remedies could constitute a tool to include those weaker and more vulnerable societal interests at EU level. However, the EU institutions have been, until now, unsuccessful in advancing the development of collective remedies at EU level beyond injunctive relief in the area of consumer law.

Collective remedies also pose a challenge for the CJEU. While the CJEU has been described as actively intervening into national remedies and procedures at certain periods, collective remedies break with its individualized view of the European legal order.[1011] Therefore, the protection of vulnerable interests via collective remedies remained, until now, largely a matter of concern for the Member States. As a consequence of the intertwinement between substance and procedure, it will be therefore argued *a fortiori* that when it comes to collective remedies to protect vulnerable societal interests, the Member States are able to shape the EU substantive protective standard at stake.

The aim of this section is to determine, on the basis of the case studies, and by looking at the three legal fields (environmental law, anti-discrimination law and consumer law) in general, the interplay between the European and the national levels regarding remedies, in particular for collective remedies. To that end, the notion of 'remedy' will firstly be explained in general terms (**section 2.1.**). On that basis, the constitutive procedural and substantive elements of a remedy will be defined and subsequently examined as to the European and national influences exerted thereon. In that regard, the rules on legal standing (**section 2.2.**), the substantive content of the remedy (**section 2.3.**), the rules on proving the infirngement (**section 2.4.**) and the legal effects (**section 2.5.**) will be determined. The concluding section will summarize the findings with a focus on the intertwinement of substance and procedure, and the relationship between individual and collective remedies (**section 2.6.**).

[1011] Michael Dougan, *National Remedies before the Court of Justice: Issues of Harmonisation and Differentiation* (Oxford; Portland, Oregon: Hart Publishing Ltd, 2004); Micklitz, "The ECJ Between the Individual Citizen and the Member States – A Plea for a Judge-Made European Law on Remedies."

2.1. SOLVING THE DEFINITIONAL CONUNDRUM

2.1.1. THE NOTION OF 'REMEDY'

The legal notion of a 'remedy' is generally considered to originate from the common law tradition, and is thus somewhat foreign to the civil law tradition, whose reasoning is rooted in terms of rights.[1012] However, in the common law tradition, remedies are missing a stable core meaning as the term is used synonymously with a wide range of different terms.[1013] The concept of remedies has multiple meanings as they may be considered, for instance, as an action or cause of action, a substantive right, a court order, a sanction or a final outcome. The term 'remedy' has also found its way into European law: Article 19 TEU requires the Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law. Moreover, Article 47 of the EU Charter of Fundamental Rights seeks to assure that everyone whose rights and freedoms guaranteed by European law have been violated, has the right to an effective remedy before a tribunal. Although those provisions seem to confer the primary responsibility for ensuring effective remedies on the Member States, the notion of 'remedy' remains undefined.

The definitional conundrum is vividly reflected in the case studies: regarding the question of the Belgian court in *Feryn*, as to what is to be understood as an appropriate 'sanction' under Article 15 of the Race Equality Directive 2000/43, the Advocate General replied in terms of 'remedies', while the European Commission and the CJEU spoke again of 'sanctions'.[1014] In the *Janecek* case, the German court termed the question of whether an individual can require the preparation of an action plan in terms of a procedural rule falling under its national procedural autonomy, while the European Commission spoke of a substantive 'subjective right' requiring an EU autonomous interpretation, and the CJEU replied in terms of 'position' or 'course of action', but as confirmed by one CJEU judge, certainly not in terms of 'remedies', probably to avoid questions of the procedural autonomy.[1015] However, when the

[1012] Walter van Gerven, "The Horizontal Effect of Directive Provisions revisited," in *Zentrum für Europäisches Wirtschaftsrecht – Vorträge und Berichte*, vol. 32, 1993, 9; Pierre Legrand, "European Legal Systems Are Not Converging," *International and Comparative Law Quarterly* 45, no. 1 (1996): 70.
[1013] Rafal Zakrzewski, *Remedies Reclassified* (Oxford; New York: Oxford University Press, 2005).
[1014] In the Chapter on the *Feryn* case study, see section 5.2. for the questions of the Belgian court, section 6.1.3. for the observations of the European Commission, section 6.2.3. for the opinion of Advocate General Maduro and section 6.3.3. for the CJEU's judgment.
[1015] In the Chapter on the *Janecek* case study, see section 5.3.2. for the position of the German court, section 6.1.1. for the observations of the European Commission, section 6.2.1. for the CJEU judgment and section 6.3. for the interview with the CJEU judge.

Janecek litigation reached the UK courts, which referred to the CJEU in the *ClientEarth* case, and phrased their question in terms of 'remedies', the CJEU referred to *Unibet*[1016] and eventually spoke of 'remedies'.[1017] In *Invitel*, the language of the CJEU is more neutral and refers only to 'actions'.[1018]

The lack of a definition of what we actually consider to be a remedy under EU law and the varying influence of the EU, particularly the CJEU, on national remedies, containing ups and downs, has led to a voluminous amount of literature on this topic, dealing with specific cases where the CJEU, either sometimes more or sometimes less, intervened into the national procedural autonomy[1019] or tried to categorize the whole case law development.[1020] *Walter van Gerven* developed the most popular categorization, in his seminal paper "Of Rights, Remedies and Procedures". Although the distinction between rights, remedies and procedures is vaguely present in the CJEU's case law, it helps *Walter van Gerven* to approach the dichotomy between the uniform application of Community law and the procedural 'competence' of the Member States, in order to determine how much uniformity is needed for the enforcement of Community law in the Member States. He defines a 'right' as a legal position, which a person recognized by the law may have. He proposes defining remedies as 'classes of actions, intended to make good infringements of the rights concerned'. 'Procedures' govern the exercise of such classes of actions and render the remedy operational. He bridges the gap between the common law and the civil law tradition by proposing that a right must necessarily give rise to a remedy which allows the right to be enforced through the judicial process, which actually means that the 'constitutive' conditions of the remedy should be the same as the 'substantive law' conditions for the underlying right to arise. The 'constitutive' conditions of the remedy must be implemented by the 'executive' remedial rules, which, (1) identify the persons who are entitled to initiate proceedings, (2) establish the form and extent of the remedy, (3) determine the evidential rules and (4) fix the time-limits for bringing actions. While EU law sets the 'constitutive' conditions of the remedy, the 'executive conditions' of the remedy concerned are left to the discretion of the

[1016] Case C-432/05 *Unibet*, ECLI:EU:C:2007:163, para. 38
[1017] Case C-404/13 *ClientEarth*, ECLI:EU:C:2014:2382, para. 52.
[1018] In the Chapter of the *Invitel* case study, see section 6.3.
[1019] The existence of procedural autonomy of the Member States has already been extensively refuted: Kakouris, "Do the Member States Possess Judicial Procedural Autonomy"; Sacha Prechal, "Community Law in National Courts: The Lessons from Van Schijndel," *Common Market Law Review* 35, no. 3 (1998): 681–706; Bobek, "Why there is no principle of 'procedural autonomy' of the Member States."
[1020] Dougan, *National Remedies before the Court of Justice*; Micklitz, "The ECJ Between the Individual Citizen and the Member States – A Plea for a Judge-Made European Law on Remedies."

Member States. If the latter conditions are construed too narrowly, they are liable to affect the substance of the remedy itself; he then proposes to measure them according to the EU standard of 'adequate' judicial protection.[1021]

The aim of this research has been to build on the categorization by *van Gerven*. That means that this approach will be taken as a starting point, but further developed and differentiated with the help of the empirical evidence collected in the three case studies. The remedies discussed in the three foregoing case studies are conducive to offering new insights as they have a different nature to those discussed by van *Gerve*n. *Van Gerven* discusses the remedies of setting aside national measures, restitution, interim relief and compensation. He therefore focus on remedies to redress the infringement of individual rights, which have been granted by EU law. By way of comparison, the remedies discussed in the three case studies deal with collective interests and aim to prevent harm from occurring in the first place. The research project therefore adds a further perspective and ties in well with the discussions on promoting collective remedies at EU level.

In view of the three case studies and the broad understanding of the definition of a remedy, in order to reveal the meaning of *hybridity* for remedies, the national and European elements, which have been identified in detail in the case studies, will be assessed on the basis of the following four criteria: 1) legal standing, 2) substantive assessment, 3) proving the infringement and 4) legal effects. I have made the decision not to follow the categorization proposed by *Walter van Gerven* strictly, but I instead propose broader criteria, which allow for reflection of the key issues addressed in the three case studies on the basis of their law in action approach.

2.1.2. THE FUNCTIONAL APPROACH TO REMEDIES

Walter van Gerven and *Norbert Reich*, when they talk about remedies have a functional vision of the remedy at stake. Taking note of the absence of a clear definition of the concept of a 'remedy' in EU law and in view of the unsettled position of the concept in national legal systems, a functional definition may offer a way out of this definitional conundrum. They attribute a corrective function to the remedy i.e., as a means that aims to redress a wrong, thus

[1021] Gerven, "Of Rights, Remedies and Procedures."

building an intrinsic relationship between the remedy and the right to be repaired. Remedies are perceived as a cure to a wrong which the infringer committed in contravention of a plaintiff's legally recognized right. Looking at the three case studies, and in order to add to the research conducted by *van Gerven* and *Reich*, the result is that EU law does not shape national collective remedies with a view to establishing compensatory relief, but EU law requires collective remedies to fulfil a preventive function, meaning that incentives have to be put in place so as to reduce the future reoccurrence of such conduct, which is in contravention of EU law.

This is reflected in the three case studies: If we look at the *Janecek* case, the solution offered by the German legal system would have allowed Mr. Janecek to claim for concrete measures in the street where he resided in order to reduce pollution. In order to correct the violation of Mr. Janecek's right to clean air, it might be arguably sufficient if he can ask the authorities to take measures in his street. However, the inherent danger would be that by blocking traffic in his street, pollution in the neighbouring streets would increase. The remedy foreseen by the CJEU, which requires the authorities to set up an air quality action plan for the whole city of Munich, is broader and foresees preventing the danger of an exceedance of the air quality limit values in the wider area. In *Feryn*, the CJEU clarified that the employer does not need to act upon his own discriminatory statements in order for a finding of discriminatory practices. A discriminatory statement is sufficient to deter potential employees of a specific race or ethnic origin from applying, which contravenes the EU objective of a socially inclusive labour market. The injunction thereby also had a preventive effect. In the *Invitel* case, the CJEU recognized the deterrent and preventive function of an injunction against the use of unfair terms, which extended to every consumer, even future consumers, who have concluded a contract with the same trader.

2.2. LEGAL STANDING

The provisions of legal standing determine who, and under which conditions, is entitled to bring a claim before the courts. According to *van Gerven*, the provisions on legal standing are part of the 'executive' elements of the remedy, meaning that they render the remedy operational. In comparison to the 'constitutive' elements of the remedy, it would be for the national legal orders to lay down those rules, subject to the requirements of effectiveness and equivalence, or, as suggested by *van Gerven*, subject to the standard of adequate judicial

protection.

There appears to be no common denominator among the three case studies. In the *Janecek* case, the regulatory framework at stake does not provide for any remedies. The CJEU is restricted to intervene by its doctrine of direct effect. In the *Feryn* case, the regulatory framework focuses on complaints by individuals. Here the CJEU does not intervene and leaves the Member States freedom to set up collective actions. In the *Invitel* case, the regulatory framework provides for the legal standing of collective bodies and the CJEU determines to what extent the Hungarian system complies with the European standard.

2.2.1. *JANECEK*

In *Janecek*, CJEU held that natural or legal persons directly concerned by a risk that the limit values for air pollution may be exceeded must be in a position to require the competent authorities to draw up an action plan, even if national law provides for other causes of action to require the authorities to take specific measures against air pollution.[1022] In its preliminary reference, the German Federal Administrative Court reasoned that this matter would fall under the Member States' procedural autonomy. The CJEU instead relied on the doctrine of direct effect enabling natural and legal persons to invoke the provisions of a directive in certain circumstances before a national court. The follow-up at national level revealed that the result was a broadening of the legal standing rules under the German Administrative Process, without the CJEU having to refer to the principle of national procedural autonomy. Uncertainties, however, remained since the CJEU did not further clarify who those 'natural or legal persons directly concerned' are.

In *Janecek*, the CJEU was concerned with an individual person and reasoned on the basis of the aim of the Air Quality Framework Directive 96/62/EC to protect human health. Does that have to be an individual living on a highly-polluted street or could it be also be an individual, who does not live on a polluted street, but is concerned about the quality air in his city? Does 'legal persons' refer to NGOs? The CJEU referred to its standard formula regarding direct

[1022] Similarly, in Joined Cases C‑165/09 to C‑167/09 *Stichting Natuur en Milieu*, ECLI:EU:C:2011:348, the CJEU held that Directive 2001/81 grants rights to directly concerned individuals which can be relied upon before the national courts in order to claim that the Member States should adopt or envisage national programmes in conformity with the Directive. Directive 2001/81/EC of the European Parliament and of the Council of 23 October 2001 on national emission ceilings for certain atmospheric pollutants, OJ 2001 L 309, p. 22.

effect without determining who those 'legal persons' could be in such a case. That question was ultimately left to national law or further preliminary references. The German Federal Administrative Court subsequently decided that this notion encompassed environmental NGOs, on the basis of the CJEU's ruling in *Lesoochranárske zoskupenie*.[1023]

In *Lesoochranárske zoskupenie*, the CJEU was asked whether Article 9(3) of the Aarhus Convention could be directly relied upon before national courts. The CJEU denied direct effect to this provision, stating that Article 9(3) does not contain any clear and precise obligation capable of directly regulating the legal position of individuals since the provision is subject to the adoption of subsequent measures. However, in order to ensure effective judicial protection in the fields covered by EU environmental law, national courts had a duty to interpret their national law in a way which, to the fullest extent possible, is consistent with the objectives of Article 9(3) Aarhus Convention "as to enable an environmental protection organization […] to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law". [1024]

2.2.2. *FERYN*

The *Feryn* case dealt with the action of the Belgian equality body against the recruitment policy of an employer who publicly stated that he would not hire employees of a particular ethnic origin, without the existence of an identifiable complainant contending that he was the victim of that discrimination. The case therefore indirectly raised the question of collective legal standing. The Race Equality Directive 2000/43 was designed to facilitate actions by individual complainants and required the establishment of public bodies to act on behalf, or in support, of a claimant.

[1023] See *Janecek* case study, section 7.1.2.

[1024] Case C-240/09 *Lesoochranárske zooskupensie*, ECLI:EU:C:2011:125, para. 51. This case was referred by the Slovakian Supreme Court in a claim brought by Lesoochranárske zoskupenie VLK ("LZ"), an association concerned with environmental protection. LZ had asked to participate, with the status as a party to the administrative proceedings, in a number of administrative proceedings brought by, inter alia, various hunting associations requesting permission to derogate from the protective conditions accorded to the brown bear by the Habitats Directive. In particular, LZ argued that the proceedings in question affected its rights and legally protected interests arising from the Aarhus Convention. The Slovakian Ministry stated that LZ did not have the status of a party to the proceedings, which, as a consequence, meant that they could not directly initiate proceedings to challenge the legality of the administrative decision which granted the derogations mentioned. LZ lodged an action against the contested decision before the Bratislava Regional Court arguing that their right to participate in the decision-making proceedings, stemming from Article 9 of the Aarhus Convention, was violated and this Article had to be considered as having direct effect.

In its *Feryn* judgment, the CJEU expressly distinguished the scope of direct discrimination under the Directive and the legal procedures required: "Those legal procedures must, in accordance with the provisions of that article, be available to persons who consider that they have suffered discrimination".[1025] However, in line with its minimum harmonization nature, the Member States are not precluded "from laying down, in their national legislation, the right for associations with a legitimate interest in ensuring compliance with that directive, or for the body or bodies designated pursuant to Article 13 thereof, to bring legal or administrative proceedings to enforce the obligations resulting therefrom without acting in the name of a specific complainant or in the absence of an identifiable complainant".[1026] The CJEU confirmed this view in *Asociaţia Accept,* where it held that "where a Member State provides for such a right [i.e. the right of associations with a legitimate interest to bring legal or administrative proceedings to enforce the obligations resulting from the Directive without acting in the name of a specific complainant or in the absence of an identifiable complainant], [Directive 2000/78] does not preclude the modification of the burden of proof". [1027]

In *Feryn*, the CJEU followed the views expressed on this issue by the UK and Ireland in its written submissions, and the opinion of Advocate General Maduro. It is questionable how those kinds of breaches of EU anti-discrimination law, which happen at the offer of employment in terms of public statements could be effectively addressed in the Member States, which do not provide for legal standing of NGOs or equality bodies on their own behalf without the need for an identifiable complainant.

2.2.3. *INVITEL*

In comparison to European environmental law and anti-discrimination law, European consumer law includes provisions for collective legal standing. Therefore, that matter did not have to be expressly addressed by the CJEU in the *Invitel* case. As clarified by Advocate General Trstenjak:

[1025] Case C-54/ 07 *Feryn,* ECLI:EU:C:2008:397, para. 26.
[1026] Case C-54/ 07 *Feryn,* ECLI:EU:C:2008:397, para. 27.
[1027] Case C-81/12 *Asociaţia ACCEPT*, ECLI:EU:C:2013:275, para. 38. The case concerned the action commenced by a non-governmental organization whose aim is to promote and protect lesbian, gay, bisexual and transsexual rights in Romania, against SC Fotbal Club Steaua București SA ('FC Steaua') and Mr Becali, who presented himself as being the 'patron' of that club and who, in an interview concerning the possible transfer of a professional footballer, essentially stated that he would never hire a homosexual player.

> *From the procedural point of view, the existence of such a collective system of protection means first that persons or organisations representing consumer interests should be entitled to apply for a judicial finding that the contested unfair terms are invalid and for their continued use in contracts to be prohibited. Article 7(2) therefore provides that national provisions should be enacted to permit them to apply to courts or administrative authorities. This provision means that they should have the power to bring judicial proceedings or apply to the competent authority. In this way, they are granted a procedural status that enables them to defend the interests of third parties effectively and in an appropriate manner.*[1028]

According to the Advocate General, while it would be for the Member States to decide which means, whether under civil, administrative or criminal law, are most appropriate in their legal tradition (as long as they fulfil an "adequate level of effectiveness"), the collective action is the most important instrument of effective verification required by Directive 93/13/EEC.[1029] The express provision for collective actions in Article 7(2) of Directive 93/13/EEC shows that it constitutes an essentially appropriate and effective instrument within the meaning of Article 7(1) in order to prevent the use of unfair terms in contracts.[1030] The implementation of Directive 93/13/EEC in the Member States has indeed not led to an approximation of enforcement mechanisms in the Member States. The Member States place varying emphases on administrative measures, collective court proceedings by consumer associations or other persons who have the right to make a claim, or make additional provisions for criminal proceedings.

However, as it is clear from Directive 93/13/EEC, which was supplemented by the Directive on Injunctions,[1031] as a minimum standard, all Member States have to provide for collective court procedures by consumer associations in the form of an injunction against persons using or recommending unfair terms. Indeed, as illustrated by *Ebers'* comparative study, all Member States provide for collective court procedures against the use of unfair terms, consumer associations in all Member States have standing to bring collective proceedings and all Member States provide, at the very least, for an injunction against persons using or

[1028] Opinion of Advocate General Trstenjak in Case C-472/10 *Invitel*, ECLI:EU:C:2011:806, para. 46.
[1029] Opinion of Advocate General Trstenjak in Case C-472/10 *Invitel*, ECLI:EU:C:2011:806, para. 38.
[1030] Opinion of Advocate General Trstenjak in Case C-472/10 *Invitel*, ECLI:EU:C:2011:806, para. 39.
[1031] Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, OJ L 166, 11.6.1998, p. 51, which was replaced by Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests, OJ L 110, 1.5.2009, p. 30.

recommending unfair terms.[1032]

2.3. SUBSTANTIVE CONTENT

This section will determine the substantive content of the remedy, meaning the substantive law conditions underlying the remedy will be determined. According to *van Gerven*, the 'constitutive' elements of the remedy are determined by European law since they require a uniform interpretation throughout the EU. However, in order to determine the EU's influence on the substantive content of the remedy, we have to invoke some broader considerations. The basic division of competences foreseen by the preliminary reference procedure in Article 267 TFEU is that the role of the CJEU is to interpret EU law, while the national courts are responsible for the application of EU law to the facts of the particular case. However, the division of competences is not so clear-cut when we look at the case law of the CJEU. Interpretation and application rather constitute the "extreme poles of a sliding scale", in between which the competence divide between the CJEU and the national court is blurred. *Jan Zglinski* developed criteria to describe the relationship between the two courts.[1033] These criteria will be applied to the three case studies, albeit slightly amended, however, since the case studies do not deal with the judicial review of national regulations.

Firstly, the CJEU could limit itself to the interpretation of the law and leave the application of EU law to the facts of the case, entirely to the national judge, without making any factual stipulations at all (*fully decentralized*). Similarly, it could take over the assessment that the national court submitted in its reference, if that is the case (*adoption*). Thirdly, the CJEU could leave the application of its interpretation to the facts of the case to the referring court but specify the particular questions to be addressed, the considerations to be taken into account, or the evidence to be obtained (*guidelines*). Fourthly, the CJEU could let the referring court decide, but give its own *prima facie* assessment as to the outcome of the application of the facts to EU law (*tendency*). Fifthly, the CJEU could apply EU law to the facts of the case and thereby provide a comprehensive assessment of the case (*fully centralized*). The more detailed the response by the CJEU, the closer it comes to application; the less detailed it is, the further it moves towards interpretation.

[1032] Ebers, "Unfair Contract Terms Directive (93/13)," 422 ff.
[1033] Zglinski used the criteria for the analysis of the division of competences between the CJEU and the national court regarding the principle of proportionality to justify infringements of the free movement provisions. See, Jan Zglinski, *Europe's Passive Virtues: The Margin of Appreciation in EU Free Movement Law* (EUI Thesis, Law department, 2016).

2.3.1. *JANECEK*

The substantive content of the remedy in *Janecek* is constituted by the requirements as to the content of the action plan. The German court asked the CJEU "to what extent must the measures included in an action plan serve to reduce the risk of exceeding the limit value and to limit the duration of such an occurrence? Can an action plan be limited, on the principle of "one step at a time", to measures which, while not guaranteeing compliance with the limit value, nevertheless contribute in the short term to improvements in ambient air quality?". From the wording of Article 7(3) of the Air Quality Framework Directive 96/62, the CJEU inferred that the Member States are not obliged to take measures to ensure that those limit values are never exceeded. Instead, the Member States must take measures capable of reducing, to a minimum, the risk of the limit values being exceeded and the duration of such an occurrence, taking into account all the material circumstances and opposing interests.

However, the discretion of the Member State is limited, especially concerning the adequacy of the measures which must be included in the action plan, taking into account the balance which must be maintained between that objective and the various opposing public and private interests. In *Janecek*, the CJEU limited itself to the interpretation of the law and left the application of EU law to the facts of the case to the national judge, without making any factual stipulations at all (*weak guidelines*). This could lead to a varying degree of scrutiny as to the content of the action plan before the national courts.

2.3.2. *FERYN*

The preliminary reference of the Belgian court was remarkably detailed – it contained six primary questions, one of which was sub-divided into six further questions, which were all closely intertwined with the facts of the case and the Belgian law. The CJEU reasoned that the objective of fostering conditions for a socially inclusive labour market would be hard to achieve if the scope of the Race Equality Directive 2000/43 were to be limited to only those cases in which an unsuccessful candidate for a post, considering himself to be the victim of direct discrimination, brought legal proceedings against the employer. Therefore, the CJEU held that the "fact that an employer declares publicly that it will not recruit employees of a certain ethnic or racial origin, something which is clearly likely to strongly dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the

labour market, constitutes direct discrimination in respect of recruitment within the meaning of Directive 2000/43".[1034] In reaching this conclusion the CJEU clearly applied EU law to the facts of the case and thereby provided a clear outcome for the national court (*fully centralized*). However, that finding must be seen against the backdrop of the burden of proof (see section 2.4.2.).

2.3.3. *INVITEL*

Compared to the detailed factual questions of the Belgian court in *Feryn*, the questions referred in *Invitel* were of a rather abstract nature. In addition, the preliminary reference of the Hungarian court was missing a summary of the factual background of the case before the national court. However, the content of the disputed unfair term was made available to the CJEU. On the basis of the provisions of the Directive as well as its Annex, which constituted an "essential element" for the assessment of unfairness, the CJEU held: "In that assessment, the national court must determine, inter alia, whether, in light of all the terms appearing in the GBC of the consumer contracts which include the contested term, and the national legislation setting out the rights and obligations which could supplement those provided by the GBC at issue, the reasons for, or the method of, the amendment of fees connected with the service to be provided are set out in plain, intelligible language and, as the case may be, whether consumers have a right to terminate the contract".[1035] The CJEU thereby left the application of its interpretation to the facts of the case to the referring court, but specified the particular questions to be addressed and the considerations to be taken into account (*strong guidelines*).

2.4. PROVING THE INFRINGEMENT

According to *van Gerven*, the provisions on evidence are part of the 'executive' elements of the remedy, meaning that they render the remedy operational. This section does not intend to determine, in detail, the national evidential rules in the three case studies. However, it will be shown that in all three cases, the position of the weaker party in proving an infringement is facilitated by EU law.

2.4.1. *JANECEK*

[1034] Case C-54/ 07 *Feryn,* ECLI:EU:C:2008:397, para. 25.
[1035] Case C-472/10 *Invitel*, ECLI:EU:C:2012:242, para. 31.

For the *Janecek* case, it is important to point out how much effort the traditional remedies of the German Administrative Process would have required from the individual. According to the preliminary reference of the Federal Administrative Court, the individual could require the national authorities to take specific measures to reduce pollution. However, that would mean that Mr Janecek himself would need to determine why pollution at his home is a problem. He would need to decide whether it results, for example, from industrial installations and which exact industrial installations, and address his claim to the authority responsible for those matters. Or, if he considered that the pollution resulted from road traffic, he would need to decide whether to ask for measures against lorries or against passenger cars from the road traffic authority. If the pollution resulted from various sources, various authorities would then need to be addressed. The right of the individual to ask for an action plan significantly facilitates the situation of the individual. The individual therefore only had to address one authority, which in turn had to determine how to reduce pollution in that area. The authority, moreover, has a duty to publish the results of the various measuring stations on which the individual can base its claim that there is a danger that the limit values will be exceeded or have been exceeded.

2.4.2. *FERYN*

Article 8(1) of Directive 2000/43 provides for the shift of the burden of proof in discrimination cases. The CJEU concluded "that public statements by which an employer lets it be known that under its recruitment policy it will not recruit any employees of a certain ethnic or racial origin are sufficient for a presumption of the existence of a recruitment policy which is directly discriminatory within the meaning of Article 8(1) of Directive 2000/43. It is then for that employer to prove that there was no breach of the principle of equal treatment. It can do so by showing that the undertaking's actual recruitment practice does not correspond to those statements".[1036] The CJEU left it to the national court "to verify that the facts alleged are established and to assess the sufficiency of the evidence submitted in support of the employer's contentions that it has not breached the principle of equal treatment".[1037] Here the CJEU's approach is clearly mixed. While the CJEU decided itself that the public statement made by Feryn was sufficient to establish a *prima facie* case of discrimination (*fully centralized*), the rebuttal leaves the national court with discretion to determine whether Feryn

[1036] Case C-54/ 07 *Feryn,* ECLI:EU:C:2008:397, para. 34.
[1037] Case C-54/ 07 *Feryn,* ECLI:EU:C:2008:397, para. 34.

can show that it did not breach the principle of equal treatment by showing that its actual recruitment practice is different (*weak guideline*).

The shift of the burden of proof must be seen in the context of the CJEU's substantive findings (**section 2.3.2.**). Why did the CJEU firstly find that the employer's public statements constituted direct discrimination, but then considered that they constituted *prima facie* discrimination? This is related to the case's national context – after Feryn made its public statements, the Belgian equality body and Feryn tried to settle the case, which meant that quite some time passed between the public statements and the commencement of the body's legal action. Consequently, the question arose as to whether Feryn *continued* its discriminatory practice. In that regard, the statements gave rise to *prima facie* discrimination. It is interesting to note that the CJEU did not distinguish between the shift of the burden of proof for an individual applicant or a collective body.

In the *Asociaţia Accept*, the situation of the applicant was facilitated further. In that case, the actions were directed against a football club and Mr Becali. The public statements resulted from the latter, who presented himself and was perceived in the media and by the public as playing a leading role in that particular football club, without, however, necessarily having the legal capacity to bind it or to represent it in recruitment matters. The CJEU held that the mere fact that the statements might not emanate directly from the club is not necessarily a bar to establishing the existence of 'facts from which it may be presumed that there has been […] discrimination'. Moreover, the club cannot deny the existence of facts from which it may be inferred that it has a discriminatory recruitment policy, merely by asserting that statements suggestive of the existence of a homophobic recruitment policy come from a person who, while claiming and appearing to play an important role in the management of that employer, is not legally capable of representing it in recruitment matters. The fact that the club did not clearly distance itself from the statements concerned is a factor which the court hearing the case may have taken into account, in the context of an overall appraisal of the facts.[1038]

2.4.3. *INVITEL*

When it comes to unfair terms, the position of the applicant is facilitated by the *ex officio* obligation of the national court. The CJEU introduced a procedural remedy into Directive

[1038] Case C-81/12, *Asociaţia Accept* ECLI:EU:C:2013:275.

93/13/EEC: the obligation of national courts to examine, of their own motion, the unfair character of a contract term in a consumer contract.[1039] As consistently pointed out by the CJEU, the system of protection contained in Directive 93/13 is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, regarding his bargaining power and level of knowledge. In *Invitel*, the *ex officio* obligation was extended to collective proceedings.

2.5. LEGAL EFFECTS

This section deals with the legal effects in a broad sense, relating to the subsequent monitoring of compliance, the enforcement of the judgment and legal effects beyond the parties to the case. There is no common denominator among the three legal fields. Only in the field of consumer law did the CJEU took influence on the legal effects of the injunction in order to ensure that the market is cleared of all unfair terms.

2.5.1. *JANECEK*

In the *Janecek* case, and in the subsequent *ClientEarth* case, the CJEU clarified that the consequence of a Member State failing to comply with the limit values for air pollutants is to set up an air quality plan that complies with certain requirements under the Directive. While Member States have a degree of discretion in deciding which measures to adopt under the action plan, those measures must, in any event, ensure that the period during which the limit values are exceeded is as short as possible. If the authority does not comply with the order of the court, the applicant can enforce the court order – i.e., that a fine will be imposed. However, monitoring the acts of the authority is a difficult task, if the information regarding the progress made is not made available to the public. Indeed, as revealed in the *Janecek* case study (see **section 9.**), the German environmental organisations received funding from the European Commission for a project focussing on the right to participation in the setting up of air quality plans for citizens and NGOs.

2.5.2. *FERYN*

In the *Feryn* case, the Belgian court asked in its last question what is to be understood by an effective, proportionate and dissuasive sanction under Article 15 of Directive 2000/43. While

[1039] See for more details also section 2.3. of the *Invitel* case study.

Advocate General Maduro referred to the national court to decide which remedy would be appropriate in the circumstances of the present case, he answered that purely token sanctions are not sufficiently dissuasive to enforce the prohibition of discrimination and a court order prohibiting such behaviour would constitute a more appropriate remedy. Advocate General Maduro thereby clearly ruled out a mere declaration of direct discrimination. According to him, a prohibitory injunction seemed to constitute the minimum a Member State needed to enact, given the factual circumstances. The CJEU provided the national court with more options than Advocate General Maduro: "Those sanctions may, where necessary, include a finding of discrimination by the court or the competent administrative authority in conjunction with an adequate level of publicity, the cost of which is to be borne by the defendant. They may also take the form of a prohibitory injunction, in accordance with the rules of national law, ordering the employer to cease the discriminatory practice, and, where appropriate, a fine. They may, moreover, take the form of the award of damages to the body bringing the proceedings".[1040] In its follow-up decision, the Belgian court ordered the cessation of the discriminatory practice and the publication of the court's judgment in several newspapers. The national court considered the publication of the judgment useful for various reasons, which was ultimately very costly for Feryn. The injunction against Feryn could be enforced and he would have been subject to criminal sanctions, if he were to discriminate again.

2.5.3. *INVITEL*

In the *Invitel* case, the national judge asked about the legal effect of a declaration of invalidity of an unfair term, which is part of the GBC of a consumer contract in an action for an injunction. According to Hungarian law, unfair terms which appear in consumer contracts as standard contract terms, or which the seller or supplier has drafted unilaterally and without individual negotiation, shall be void. In case of an action for an injunction, the national court must declare the unfair clause invalid in the event of its (future) use in favour of all parties who conclude contracts with the seller or supplier who has published the term in question. The CJEU clarified that the effective implementation of that objective requires that terms of the GBC of consumer contracts which are declared to be unfair are not binding on either the consumers who are parties to the actions for an injunction, or on those who have concluded a contract with that seller or supplier to which the same GBCs apply.

[1040] Case C-54/ 07 *Feryn,* ECLI:EU:C:2008:397, para. 39.

Moreover, where the unfair nature of a term included in the GBC of consumer contracts has been recognized in an action for an injunction, the national courts are required, of their own motion, and also with regards to the future, to draw all the consequences provided for by national law in order to ensure that consumers who have concluded a contract to which those GBCs apply will not be bound by that term. The CJEU did not further address the question raised by Advocate General Trstenjak as to whether this extension also covers identical terms used by different suppliers. This was not necessary, as the Hungarian legal system does not provide for this option. The reasoning behind the judgment points to an obligation of the Member States to extend the legal effects of an action for an injunction to all consumers.

2.6. CONCLUSION

Looking at the collective remedies as involving all four elements, it is revealed that they are of a truly *hybrid* nature as they are shaped by substantive and procedural elements. While substance is largely determined by the European legal order, the EU's influence on the procedural elements varies, since no common denominator can be found, except for the collective nature of the remdies and their focus to prevent harm from happening in the first place.

The development of collective legal standing in the three subject areas is diverse. In the area of environmental and anti-discrimination law, the CJEU did not further the standing of collective actors on the basis of EU law. In the area of consumer law, EU legislation on collective legal standing was already existent and no concrete CJEU intervention on that matter was required. Therefore, all in all, it is doubtful whether CJEU intervention can be considered as a viable alternative to legislative provisions, in order to further the development of collective legal standing. Once collective legal standing for the enforcement of EU law has been established as a matter of EU law, the Member States retain a certain discretion in setting the criteria for determining which legal entities can have a legitimate interest and which cannot. This leads to *hybridity* in the sense that the basis for collective legal standing is set by EU law, while the concrete criteria is set by the Member States.

The substantive approach of the CJEU in the three case studies is very diverse. Looking at the sliding scale, in *Janecek*, the CJEU decentralized the substantive assessment of the action

plan to the national court. This makes perfect sense considering that the environmental and structural conditions are dependent on the location and the action plan requires a complicated scientific assessment about the effects of different measures. In *Invitel* and *Feryn*, the CJEU took a more dominant role, which is perhaps the reason why the CJEU formally restated the division of competences with the national court before rendering its own interpretation. In *Invitel*, the CJEU gave the national court guidelines about the factors to consider when assessing the unfairness of a unilateral price amendment clause. The CJEU was able to derive the guidelines from the annex of the Unfair Terms Directive and its transparency requirement in Article 5. How the national court would have applied them remains unanswered since the parties eventually settled the case. In *Feryn*, the CJEU categorized the behaviour of the company as directly discriminatory. It thereby sent a strong message to the national court, which was given freedom to analyse the evidence for the rebuttal of the burden of proof. However, the CJEU set the tone: the presumption cannot be rebutted by a new statement by the employer in the press that he does not or does not any longer discriminate, but the actual recruitment practice must be examined. This is a task where the national court is in a better position to collect and evaluate the evidence. The legal effects are largely determined by national law to the extent that they provide for effective protection.

3. *HYBRID* LEGAL FIELDS: THE EUROPEAN TWIST TO NATIONAL SOCIAL POLICIES

In line with *Kaarlo Tuori*'s distinction of the four levels of *hybridity*, this section will examine *hybridity* at the second level of the legal field and thereby build on the broad approach taken in the case studies, which have embedded the remedies at stake from a national and European perspective within their respective legal-political fields, being environmental, anti-discrimination and consumer law.[1041]

The three fields at stake concern the regulation of private activities, which have been developed in the context of the national welfare state and are associated with the rise of 'The Social' at the national level.[1042] In that context, the Member States developed their divergent models of social justice, which commonly use the law as a means to pursue social ends, namely the protection of weaker societal interests. With the EU taking a leading role in the three fields with the purpose of complementing the creation of an internal market, the EU has

[1041] See sections 2 for the European approach and sections 3 for the national approach of the three case studies.
[1042] Kennedy, "Three Globalizations of Law and Legal Thought: 1850-2000."

decoupled the fields from their national social welfare origin and re-established a policy which is less based on ensuring social justice by the setting of substantive standards and more based on procedural mechanisms, termed by *Micklitz* as "access justice" (i.e., establishing justice through access to the market).[1043] That shift of underlying rationale is also reflected in the lack of collective remedies at the European level, which espouses a truly protective purpose.

The CJEU is often considered to strengthen the 'EU Social' by increasingly invoking human and fundamental rights understood as constitutional rights.[1044] However, the 'EU Social' is thereby not moving towards a similar protective ambition as developed by 'The Social' at national level. Instead, the 'EU Social' increasingly embraces elements of the third globalization ('Neo-Formalism') as developed by *Duncan Kennedy*.[1045] The third globalization is characterized by an attempt to integrate 'politics through law' via a rights discourse which can be epitomized via the employment of proportionality, balancing and the emergence of identity-based (individual) rights.[1046]

3.1. THE LESSONS FROM THE *JANECEK* CASE STUDY

The *Janecek* case-study traced the development of the European environmental protection policy. As exemplified - particularly for Germany - in the case study, in Europe, environmental concerns first developed at the level of the Member States and from around the 1970s, the environment was established as a political category in Western European societies. The original intention of environmental policy and law were to protect the environment. Environmental protection was established as a duty of the welfare state and it was recognized that economic activity can be made subject to restrictions in order to achieve environmental protection goals.[1047] The underlying rationale for environmental policy and law changed, however, as a consequence of the EU's involvement, as will be set out in this section.

[1043] Micklitz, *The Many Concepts of Social Justice in European Private Law*, 5.
[1044] Collins, "The Constitutionalization of European Private Law as a Path to Social Justice?".
[1045] Kennedy, "Three Globalizations of Law and Legal Thought: 1850-2000."
[1046] Ibid.
[1047] See sections 3.1. and 3.2.3. of the *Janecek* case study.

3.1.1. THE EU'S PROCEDURAL APPROACH TOWARDS ENVIRONMENTAL PROTECTION

The EU's approach towards combatting air pollution contains two underlying and principal rationales. Alongside the EU's desire to complete the internal market, we can also discern a truly protective purpose - however, the primary focus was on public health and environmental protection was regarded a secondary thought. The former was represented by the setting of emission limits for the sources of pollution, while the latter focused on the setting of air quality standards. In the early 1990s, the EU's rationale behind environmental policy-making was given a procedural turn and shifted towards securing the efficiency and effectiveness of implementation, which was reflected in the Air Quality Framework Directive 96/62/EC.[1048]

The original motivation for regulating air pollution at the European level was economic - environmental regulation at EU level was accepted as a means of ensuring harmonization and preventing unfair competition. While the Single European Act introduced a specific legal basis for environmental legislation, the expansion of environmental legislation remained anchored to the completion of the internal market. The political incentives driving EU environmental policy, under the internal market regime, centred on economic competition. In line with considerations of economic competitiveness in the internal market, emission limits became the preferred type of regulating the sources of air pollution. Common emission limits would ensure that producers and products would have to comply with the same requirements, regardless of their geographical location within the internal market.[1049]

Parallel to the internal market rationale underpinning environmental legislation, we find the nascent roots of a more genuine protective rationale which was contained in the first EU environmental action programme of 1973.[1050] The programme was informed by acute threats to human health and the environment as recognized by the 1972 UN conference on the environment in Stockholm, and problematized as acid rain and forest death, and therefore focused accordingly on reducing pollution and nuisances. The early air quality directives,

[1048] See section 2 of the *Janecek* case study.
[1049] Ingmar von Homeyer, "The Evolution of EU Envrionmental Governance," in *Environmental Protection : European Law and Governance*, ed. Joanne Scott (Oxford University Press, 2009), 11–15; Emanuela Orlando, "The Evolution of EU Policy and Law in the Enviornmental Field: Achievements and Current Challenges," in *The EU, the US and Global Climate Governance*, ed. Christine Bakker and Francesco Francioni (Ashgate, 2014), 62–63.
[1050] Declaration of the Council of the European Communities and of the representatives of the Governments of the Member States meeting in the Council of 22 November 1973 on the programme of action of the European Communities on the environment, OJ C 112, 20.12.1973, p. 1–53.

resulting from the first environmental action programme, set air quality standards for various pollutants, leaving the concrete measures to achieve compliance to the Member States, and focused instead on assessment, reporting and planning requirements.[1051]

The procedural instruments contained in the various air quality directives were integrated into the Air Quality Framework Directive 96/62/EC. The Air Quality Framework Directive is redolent of the EU's general shift towards an 'integrated approach' accompanied by a procedural turn to environmental policies as anticipated in the fifth environmental action programmes.[1052] The procedural approach was complemented by horizontal measures, which enhanced the availability of information and established rights for affected stakeholders, like the first directive on public access to environmental information.[1053] The procedural turn was considered to be accompanied by a simultaneous decrease in the amount of substantive law. While fewer legislative acts contained precise standards, such as emission limits, it follows that if standards are formulated in a precise and quantitative way, they often "only" concern quality standards or objectives without describing the means to be used to attain them. From the perspective of securing effective environmental protection, although acknowledging the importance of procedures, the simultaneous lack of precise substantive law has been criticized – procedure "may function as a concept underlying EU environmental law rather than a standard to be realized by itself".[1054]

Environmental law at the European level has a different outlook than at the national level. EU environmental law is less comprehensive and protective in its nature. The internal market rationale resulted in a piecemeal and fragmented approach towards European environmental law – national initiatives for environmental protection were 'uploaded' to the European level, insofar as they might affect the internal market. However, when the EU took up its opportunity of creating a more genuine and comprehensive approach to environmental

[1051] Council Directive 80/779/EEC of 15 July 1980 on air quality limit values and guide values for sulphur dioxide and suspended particulates, OJ L 229, 30.8.1980, p. 30; Council Directive 82/884/EEC of 3 December 1982 on a limit value for lead in the air, OJ L 378, 31.12.1982, p. 15; Council Directive 85/203/EEC of 7 March 1985 on air quality standards for nitrogen dioxide, OJ L 87, 27.03.1985, p. 1. See section 2.2. of the *Janecek* case study and von Homeyer, "The Evolution of EU Envrionmental Governance," 8–10.

[1052] Resolution of the Council and the Representatives of the Governments of the Member States, meeting within the Council of 1 February 1993 on a Community programme of policy and action in relation to the environment and sustainable development - A European Community programme of policy and action in relation to the environment and sustainable development, OJ C 138, 17.5.1993, p. 1.

[1053] Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment, OJ L 158 , 23.06.1990, p. 56.

[1054] Epiney, "EU Environmental Law," 416, 417.

protection at EU level, it did not go beyond a mere proceduralization of environmental law. While the air quality limit values reflect a truly protective ambition of securing public health, the *Janecek* case illustrates the problems inherent in a purely procedural approach, which lacks concrete implementing measures to achieve compliance - the air quality limit values for particulate matter and nitrogen dioxide were adopted in 1999, were rendered binding in 2005 and 2010 respectively, and are still not complied with in many European cities today.[1055]

3.1.2. A CONSTITUTIONAL RIGHT TO A CLEAN ENVIRONMENT?

The *Janecek* case raised the following question: to what extent can environmental protection be enhanced with the constitutionalization of claims to a clean and healthy environment. At EU level, we are missing the recognition of a genuine environmental right. The Treaty neither provides for directly applicable environmental rules, nor do human rights and fundamental rights feature prominently in the environmental field. While we find, in EU secondary law, more favourable provisions for the recognition of procedural environmental rights concerning participation and information, it has hitherto not encapsulated a substantive right to a clean environment.[1056] In the *Janecek* case, the CJEU came close to recognizing a genuine EU citizen's right to a clean environment in accordance with the environmental quality standards on the basis of the doctrine of direct effect and with the aim of furthering the effectiveness of the Air Quality Framework Directive. Indeed, although not explicitly addressed by the CJEU, the right to a clean environment involves a strong citizenship dimension, which disconnects individually enforceable rights from their effectiveness-logic.

In principal, the right to an air quality plan has a genuine progressive nature – beyond a mere a negative or defensive right, private parties are entitled to affirmative action, such as more extensive environmental measures to be set out in the action plan. However, the *Janecek* case reveals that the evaluation of the air quality plans by the national courts poses problems. The right established by the CJEU in *Janecek* risks remaining of a procedural nature, if the national courts do not engage into a substantive evaluation of the plan. The CJEU clarified in *Janecek* that the measures contained in the action plan do not have to ensure that the limit

[1055] This is vividly reflected in the follow up proceedings to the *Janecek* case, see section 7 of the *Janecek* case study.
[1056] Sadeleer, *EU Environmental Law and the Internal Market*, 94ff.; Ludwig Krämer, "Vom Recht, das mit uns geboren - der Einzelne im Gemeinschaftlichen Umweltrecht," in *Law and diffuse interests in the European legal order: liber amicorum Norbert Reich*, ed. Ludwig Krämer, Hans-W. Micklitz, and Klaus Tonner (Nomos, 1997), 741–54.

values are never exceeded, but must reduce that risk and the duration of such an occurrence, taking into account the balance which must be maintained between that objective and the various opposing public and private interests.[1057]

In *ClientEarth*, in line with the new wording of the Ambient Air Quality Directive 2008/50/EC, the CJEU strengthened the judicial review of the plan by requiring that they must provide the measures to ensure that the period during which the limit values are exceeded is as short as possible.[1058] This interpretation by the CJEU gives the national courts leeway to balance the various interests at stake and allows principally for a gradual compliance with the limit values.[1059]

3.2. THE LESSONS FROM THE *FERYN* CASE STUDY

In comparison to consumer and environmental law, anti-discrimination law has been the least developed ambit at the national level. The recognition of the problem of discrimination on the ground of race has occurred in the Member States at different times, and has close links to their specific economic, social and political pressures. At the forefront of the development of anti-discrimination legislation on race at the national level was the UK. *Hepple* claimed that "the Race Directive is based on a British model of the 1970s rather than what is required in the 21st century in Europe in order to achieve racial equality".[1060] Inherent in this argument is that some of the Member States were already striving for a more substantive protection when the EU established itself as leading actor within the field.[1061]

3.2.1. THE EU'S HUMAN RIGHTS APPROACH TOWARDS DISCRIMINATION

Nationality and sex discrimination have been subject to EU regulation right from the beginning of the European integration process. In both cases, the original impetus for European intervention was rooted in the rationale of market integration. From the outset, it was recognized by the founders of the Communities that a common market, characterized by free movement, would not sit comfortably with internal discrimination based on nationality. In that regard, Article 6 of the original 1957 Treaty of Rome (now Article 18 TFEU)

[1057] See section 6.2.2. of the *Janecek* case study.
[1058] See section 9.2.3. of the *Janecek* case study.
[1059] See sections 7.2. and 9.3.of the *Janecek* case study.
[1060] Hepple, "Race and Law in Fortress Europe," 12, 13.
[1061] Hepple, "Equality at Work," 146 ff.

contained a general prohibition, within the ambit of the Treaty, against discrimination on grounds of nationality. Moreover, former Article 119 (now Article 157 TFEU), which required equal remuneration for equal work between men and women workers, was adopted as a result of France's concern that those countries which did not possess legislation on equal pay between men and women could rely more heavily on cheap female labour as a means of reducing production costs in comparison to Member States such as France, which had already prohibited such discrimination. Nationality and sex discrimination have subsequently been progressively supplemented and extended upon by secondary legislation and the case law of the CJEU.[1062]

The incorporation of Article 13 by the Amsterdam Treaty (now Article 10 TFEU) enabled Community law to cover discrimination on a number of further grounds. The Race Equality Directive 2000/43/EC addresses discrimination on racial and ethnic origin,[1063] while the Framework Employment Directive 2000/78/EC was adopted to cover discrimination on the grounds of religion or belief, disability, age and sexual orientation.[1064] The already existing protection and concepts applicable with regard to sex discrimination were not just merely extended to the new discrimination grounds, but new understandings, definitions and emphases were introduced. However, even the two new Directives, although mirroring key definitions and concepts, did not provide for a uniform degree of protection.[1065] Not only is the text of the Framework Employment Directive considered to appear more "complex and ambivalent", more fundamentally, its scope is limited to the employment sphere, while the Race Equality Directive additionally covers social protection, including social security and healthcare, education, access to and supply of goods and services which are available to the public and housing.[1066] This reveals that the political will of the Member States to combat racism was much stronger in relation to other grounds of discrimination. With its strong emphasis on social policy, mainly reserved to national discretion, the Race Equality Directive adopts an exceptional position in the body of EU anti-discrimination law. Indeed, *Chalmers* described the Race Equality Directive as "the most wide-sweeping equal opportunities

[1062] For a detailed account of the development, see Bell, *Anti-Discrimination Law and the European Union*, 32 ff.
[1063] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.07.2000, p. 22.
[1064] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 02.12.2000, p. 16.
[1065] Waddington and Bell, "More Equal than Others: Distinguishing European Union Equality Directives."
[1066] Bell, *Anti-Discrimination Law and the European Union*, 112–14.

legislation in the Community's history".[1067]

From the perspective of social protection, however, the Race Equality Directive is subject to criticism and considered as a symbol for the neo-liberal outlook of European integration. With regard to the latter, the literature begins with the fundamental critique that EU anti-discrimination law does not establish any positive aim setting out the preconditions of equality, but rather targets individual acts by (negative) prohibitions.[1068] This criticism is explained as follows: firstly, while the enforcement provisions are innovative from an EU law perspective, they are still based on an individual-complaint system, without providing for a collective enforcement mechanism. Secondly, it is considered that without positive duties to promote racial equality and diversity in both public and private sectors, there will be little prospect of overcoming institutional discrimination. Thirdly, nationality discrimination was excluded from its scope and therefore does not cover discrimination in case of third-country nationals, although discrimination of third-country nationals and racial discrimination cannot be readily distinguished.[1069]

3.2.2. A CONSTITUTIONAL RIGHT AGAINST DISCRIMINATION?

Looking at the three fields, the ambit of non-discrimination might be the most prominent candidate for the constitutionalization of rights. While the original Treaties included the right to equal pay for women and men, the starting point was not the protection of fundamental rights, but to avoid unfair competitive advantages. The gradual reinterpretation of the role of anti-discrimination legislation by the CJEU has recognized that anti-discrimination fields are closely connected to the protection of fundamental rights. Moreover, *Mangold*[1070] and *Kücükdeveci*[1071] are prominent examples of the constitutionalization on the basis of the principle of non-discrimination on grounds of age, which is also applicable in relations between private parties. According to the CJEU, this principle must be regarded as a general principle of EU law, which derives from various international instruments and from the constitutional traditions common to the Member States; furthermore, discrimination on grounds of age is prohibited by Article 21(1) of the Charter. However, the principle of non-discrimination does not constitute an autonomous right to non-discrimination - the existence

[1067] Chalmers, "The Mistakes of the Good European?," 194–96.
[1068] Dagmar Schiek, "Zwischenruf: Den Pudding an Die Wand Nageln? Überlegungen Zu Einer Progressiven Agenda Für Das EU Anti-Diskriminierungsrecht," *Kritische Justiz* 47, no. 4 (2014): 397–405.
[1069] Bell, *Anti-Discrimination Law and the European Union*, 72ff.
[1070] Case C-144/04 *Mangold*, ECLI:EU:C:2005:709.
[1071] Case C-555/07 *Kücükdeveci*, ECLI:EU:C:2010:21.

of secondary legislation remains crucial for the general principle of non-discrimination to take effect.[1072]

The constitutionally protected right to non-discrimination raises the crucial question of whether and to what extent the interference with that right must be balanced against competing rights of the other parties to the dispute. Here the constitutional dimension of the *Feryn* case arises, although it was hidden in the judgment. The case illustrates the dichotomies of freedom of expression versus hate speech and commercial liberty versus labour discrimination. In *Feryn*, the CJEU had to address, for the first time, a free speech problem, which exceeded the narrow scope of pure commercial speech and to scrutinize racist speech, which is considered to be a classic theme in the realm of freedom of expression, usually labelled as 'hate speech'.[1073] This is a domain of general human rights law. Freedom of expression can be invoked not only under the traditional legal frameworks of the Council of Europe but also as a fundamental right in the European Union. The right to freedom of expression is set out in Article 11 of the EU Charter of Fundamental Rights,[1074] and in Article 11 of the ECHR.[1075] However, neither the Advocate General, nor the CJEU engaged in an open discussion of the conflicting rights at stake.

3.3. THE LESSONS FROM THE *INVITEL* CASE STUDY

Although focusing on the particular Hungarian situation, where a modern consumer protection policy was established only after its accession to the EU, the *Invitel* case study nevertheless demonstrated that consumer protection law developed in the Western European Member States to compensate for the increasing risks and deficiencies related to the development of the consumption society in the 1960s and 1970s. Consumer protection policy

[1072] Mark Bell, "Constitutionalization and EU Employment Law," in *Constitutionalization of European Private Law*, ed. Hans-W. Micklitz (Oxford: Oxford University Press, 2014), 150–53.
[1073] Uladzislau Belavusau, "Fighting Hate Speech through EU Law," *Amsterdam Law Forum* 4, no. 1 (2012): 20–35.
[1074] Article 11 Freedom of Expression and Information: 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. 2. The freedom and pluralism of the media shall be respected.
[1075] Article 10 Freedom of Expression: 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in con dence, or for maintaining the authority and impartiality of the judiciary.

and law was inextricably linked to the rise of the social welfare state and followed a predominantly social rationale. The underlying conception was of the consumer as the weaker market actor, whom could not cope with the increased choice and the resulting risks of the consumption society, and therefore required legal protection by means of (mainly compulsory) compensatory regulations.[1076]

3.3.1. THE EU'S CONSUMER LAW APPROACH WITHOUT SOCIAL PROTECTION

The national emphasis on protecting consumers was weakened when, beginning in the second half of the 1970s, the EU slowly became the driving force behind the development of consumer law in Europe. The initial stage of EU involvement has been described as that of coordinating consumer policy projects bearing a strong social purpose. In line with the major concern of protecting consumers against information deficits, misleading advertising and new risks to health and safety, four directives were adopted by unanimity in the Council, namely Directive 84/450 on misleading advertising,[1077] Directive 85/374 on product liability,[1078] Directive 85/577 on doorstep selling[1079] and Directive 87/102 on consumer credit.[1080] [1081]

With the adoption of the 1986 White Paper on the accomplishment of the single European market,[1082] the European Commission discovered the concept of the consumer as an important market actor, whom plays a central role in accomplishing the single European market. However, the image of "the weak and underprivileged consumer" underlying the national conceptions was not instrumental to the EU's goals. Instead, a "single European market needs an active, informed and adroit consumer; in short, one that is a normative

[1076] Hans-W. Micklitz, "The Expulsion of the Concept of Protection from the Consumer Law and the Return of Social Elements in the Civil Law: A Bittersweet Polemic," *Journal of Consumer Policy* 35 (2012): 289.
[1077] Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising, OJ L 250, 19.09.1984, p. 17.
[1078] Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ L 210, 7.8.1985, p. 29.
[1079] Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, OJ L 372, 31.12.1985, p. 31
[1080] Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, OJ L 042, 12.02.1987, p. 48.
[1081] Hans-W. Micklitz, "European Consumer Law," in *The Oxford Handbook of the European Union*, ed. Erik Jones, Anand Menon, and Stephen Weatherill (Oxford University Press, 2012).
[1082] Completing the Internal Market, White Paper from the Commission to the European Council (Milan, 28-29 June 1985), COM (85) 310 final, 14 June 1985.

optimized, omnipotent consumer".[1083] From then on, the EU developed a relatively consistent body of European consumer private law. The EU thereby changed the outlook of this legal field from consumer protection law into consumer law without social protection.[1084]

European consumer law reduced the concern for the original protective outlook of national consumer policy in the 1960s and 1970s. While European consumer law is not lacking a protective purpose, protection is instrumental and limited to enabling the consumer to fulfil its tasks within the internal market project. This has also been reflected in the Unfair Terms Directive 93/13/EEC, which was the focus in the *Invitel* case study. The Directive is steered towards the aim of improving party autonomy and the function of the market mechanism, without, however, rectifying substantive outcomes of the market mechanism.[1085] This is reflected in its reduction of scope to "terms not individually negotiated", the merely indicative nature of the Annex, the elimination of the "definition of the main subject matter" and "the adequacy of the price and remuneration" from review, the restricted regulation of the consequences of an unfair term and the absence of interlinking collective with individual actions.[1086] The Directive therefore confirms the view of the consumer as "an ideal average market participant who constantly surveys the market and looks for the best price–quality ratio and who makes use of the mandatory information provided to her prior to the conclusion of a contract".[1087]

3.3.2. THE EMERGING CONSTITUTIONAL PROTECTION OF THE CONSUMER

While the Unfair Terms Directive harmonizes matters of substantive law related to unfair contract terms with the aim of enhancing the functioning of the internal market, the CJEU's case law has transformed it into an instrument capable of achieving a high level of consumer protection – even for the most vulnerable consumers facing the economic and social consequences of the financial crisis. The integration of a genuine protective rationale has been achieved by the CJEU by the integration of procedural remedies into the scope of the Unfair Terms Directive. Early in its case law on the Unfair Terms Directive, relying on the

[1083] Micklitz, "The Expulsion of the Concept of Protection from the Consumer Law and the Return of Social Elements in the Civil Law: A Bittersweet Polemic," 289.
[1084] Micklitz, "The Expulsion of the Concept of Protection from the Consumer Law and the Return of Social Elements in the Civil Law: A Bittersweet Polemic."
[1085] Thomas Wilhelmsson, "Varieties of Welfarism in European Contract Law," *European Law Journal* 10, no. 6 (2004): 718, 719.
[1086] See section 2.2. of the *Invitel* case study. See Micklitz and Reich, "The Court and Sleeping Beauty," 773–74.
[1087] Micklitz, "European Consumer Law," 530, 531.

weaker position of the consumer vis-à-vis the seller, the CJEU introduced the duty of the national judge to review unfair terms *ex officio* in a number of proceedings (for instance, declaratory,[1088] order for payment[1089] and enforcement proceedings[1090]).[1091]

In more recent cases, particularly *Mohamed Aziz*,[1092] *Sánchez Morcillo*[1093] and *Kušionová*[1094] – all three cases involving consumers facing the consequences of the economic crisis and whom risked losing their family homes – the CJEU was asked whether the national procedural law relating to mortgage enforcement proceedings ensures the effective judicial review of unfair terms in consumer contracts. In *Mohamed Aziz*, where the CJEU decided that a national court, in order to ascertain the unfairness of the contract term, must have the power to suspend the mortgage enforcement proceeding which has been initiated on the basis of this term, the constitutional dimension of the case was hidden.[1095] Although *Sánchez Morcillo* and *Kušionová* highlight inconsistencies in the approach of the CJEU, in both cases, the CJEU elevated the protection of the consumer debtor to the EU constitutional level by relying explicitly on the fundamental right to effective judicial protection contained in Article 47 of the Charter and the right to housing laid down in Article 7 of the Charter. Notably, it can be argued that the CJEU did not strictly apply the Charter to the implementation of EU rules by the Member States, but generally to those situations between private parties which fell within the scope of EU law.[1096]

On the basis of this case law, it can be claimed that the CJEU introduced procedural

[1088] Case C-240/98 *Océano Grupo Editorial SA*, ECLI:EU:C:2000:346; Case C-243/08 *Pannon GSM Zrt.*, ECLI:EU:C:2009:350; Case C-137/08, *VB Pénzügyi Lízing Zrt*., ECLI:EU:C:2010:659.
[1089] Case C-618/10, *Banco Español de Crédito*, ECLI:EU:C:2012:74.
[1090] Case C-40/08, *Asturcom Telecomunicaciones SL*, ECLI:EU:C:2009:615.
[1091] See section 2.3.1. of the *Invitel* case study for a more detailed account of the national judge's *ex officio* obligation.
[1092] Case C-415/11 *Mohamed Aziz v. Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, ECLI:EU:C:2013:164.
[1093] Case C-539/14 *Juan Carlos Sánchez Morcillo, María del Carmen Abril García v. Banco Bilbao Vizcaya Argentaria*, S.A., ECLI:EU:C:2014:2110. This case dealt with the unequal procedural defence mechanisms available to the parties involved in the mortgage enforcement proceedings. While the bank is allowed to appeal against the staying of enforcement proceedings during which a judgment on the potential unfairness of the contract terms is pending, the debtors, who are at risk of losing their family home, do not have similar possibilities in case their objection to enforcement is dismissed.
[1094] Case C-34/13 *Monika Kušionová v. SMART Capital, a.s.*, ECLI:EU:C:2014:2189.
[1095] Hans-W. Micklitz, "Unfair Contract Terms – Public Interest Litigation before European Courts," in *Landmark Cases of EU Consumer Law: In Honour of Jules Stuyck*, ed. Evelyne Terryn et al. (Cambridge: Intersentia, 2013), 651.
[1096] For a very thorough analysis, see Federico Della Negra, "The Uncertain Development of the Case Law on Consumer Protection in Mortgage Enforcement Proceedings: Sánchez Morcillo and Kušionová," *Common Market Law Review* 52 (2015): 1009–32.

protection mechanisms into the Unfair Terms Directive 93/13/EEC. The procedural turn towards protection has been endowed with constitutional dimension in the CJEU's recent case law. However, it is not always clear why in some cases the CJEU relies on constitutional rights, while in others, even although expected, it does not. The CJEU rarely invokes the Charter itself – in the cases discussed, the Charter has been most often invoked by the national court or the Advocate General. Moreover, the implication of constitutional rights necessarily raises the crucial question of whether and to what extent the interference with the consumer's constitutional rights must be balanced against the competing rights of the other parties to the dispute. Indeed, in *Banif Plus Bank*, the principle of *audi alteram partem* under Article 47 of the Charter resulted in a restriction of the effective judicial protection of the consumer.[1097]

In the *Invitel* case, the Advocate General examined the compatibility of the *relative erga omnes* effect of national judgments finding a term to be unfair with fundamental rights, particularly the right to be heard as set out in Article 47 of the Charter. The CJEU, however, did not take up that argument – but confirmed the compatibility of the relative *erga omnes* effect on the basis of the *effect utile* of the Unfair Terms Directive 93/13/EEC. However, the matter was raised again before the CJEU in *Biuro podróży Partner* – however, Polish law did not provide for a relative *erga omnes* effect, but an absolute *erga omnes* effect, meaning that a national judgment, recognizing particular contract terms as unfair, may have a binding force vis-à-vis sellers or suppliers, who were not parties to the proceedings. In the light of Article 47 of the Charter, the CJEU developed procedural criteria to secure the seller's right to be heard.[1098]

[1097] Case C-472/11 *Banif Plus Bank*, ECLI:EU:C:2013:88, para 36.

[1098] Case C-119/15 *Biuro podróży Partner*, ECLI:EU:C:2016:987. The Polish system of the abstract control of unfair terms is unique: an action for injunction could be brought by every person, who could have concluded the contract following an offer by a trader, consumer organizations and the President of the Office of Competition and Consumer Protection (UOKIK). A specialized Court of Competition and Consumer Protection, whose rulings are subsequently published in the Register of Unfair Contract Terms with an effect for all traders who include identical or similar clauses in their contracts proposed to consumers (i.e., not only the defendant in the case), carries out the abstract control. Subsequently, the President of the UOKIK is entitled to impose sanctions on traders, which use general contract terms in consumer contracts, which are identical, or similar to the clauses contained in the Register. Neither during the administrative proceedings nor judicial review of the administrative decision did the trader have the possibility of contesting the abusive nature of the clause, but only the equivalence to the clause already registered.

3.4. CONCLUDING REMARKS

The three legal fields at stake in the case studies reveal a similar pattern. They developed at the national level within the welfare state paradigm in order to secure social protection of the weaker interests at stake. This happened to varying extents – strongly for environmental and consumer protection, while the protection against racial discrimination has been developed to a lesser extent at the national level. The EU developed an interest in the three legal fields principally to enhance the internal market. While at EU level, we also find elements of a genuine protective nature, the dominant rationale remains anchored to the internal market. The EU has not taken up the opportunity to develop a genuine protective rationale for the three legal fields. Socially-oriented protection remains in the hands of the Member States. *Hybridity* is revealed by the complementary nature of both rationales as has been reflected in the case studies: in the *Janecek* case study, although the EU has set the binding limit values for pollutants in ambient air, the measure to achieve actual compliance with them is for the Member States to determine. The *Feryn* case study revealed that substantive equality, as ensured by the existence of collective remedies, is a matter for the Member States. In the *Invitel* case study, while the EU recognized the important role of collective actions to clear the market of unfair terms, the interlinking of collective actions with the protection of the individual's right to a refund were left to national law.

The CJEU can be described as "at the forefront of developing identity-based (human and fundamental rights".[1099] Indeed, there is no uniform subject of EU law, but the three fields at stake define their own identities: the citizen concerned about air pollution, discriminated minorities and consumers harmed by unfair terms. Through ever stronger reliance on the Charter of Fundamental Rights, the CJEU enhances the protection of those individuals on the basis of secondary law. The CJEU must manage differences in the respective policy field by weighing the rights of the weaker party against those of the stronger party.[1100] Looking at the nature of the legal fields at stake, the introduction of constitutional rights and reasoning in the three legal fields enhances their *hybrid* nature by further introducing public elements in the regulation of private activities.

[1099] Micklitz, "The Legal Subject, Social Class and Identity-Based Rights," 307; see also Keiva Carr, "Regulating the Periphery: Shaking the Core European Identity Building Through the Lens of Contract Law," EUI Department of Law Research Paper No. 2015/40, (2015).
[1100] Micklitz, "The Legal Subject, Social Class and Identity-Based Rights"; Carr, "Regulating the Periphery."

4. *HYBRID* LEGAL ORDER(S): THE EU SOCIAL LEGAL ORDER

The aim of this section is to examine the nature of the European *hybrid* social legal order with the help of the three case studies. This entails determining the character of the European legal order, and particularly, whether it remains separate from the national legal orders or whether and to what extent it should be seen as an integral part of the national legal orders. The CJEU has not been clear on that matter, but described in *Kadi* "the coexistence of the Union and the Community as integrated but separate legal orders".[1101]

The European social legal order is not build around the core areas of national welfare policy. Instead, it "has concentrated on areas which in the national setting lie on the fringes of the welfare state".[1102] In that regard, environmental law, consumer law and anti-discrimination law are constitutive of the European social legal order, which pursues its own model of access to justice.[1103] In the absence of directly enforceable Treaty provisions in these three fields, the European social legal order is enabled by fundamental rights, citizenship rights and principles of a constitutional nature (see section 3). The European social legal order has not replaced the national social legal orders. Instead, the European social legal order complements them in remedying deficiencies which result from nationally based policies.

5. *HYBRID* LEGAL SPACE: THE BUILDING OF A EUROPEAN SOCIETY

The three case studies revealed that the creation of the European social legal order has been heavily dependent on the participation by private and public actors, who actively use the preliminary reference procedure in order to implement the three policies. Indeed, as disclosed as early as in *Van Gend en Loos*, the building of the European legal order *relies* on national private actors for the supervision of EU law's implementation. The *Janecek* case demonstrates that those private actors may show up formally as individuals. Alongside private actors, an increasing number of public actors, as exemplified by the Belgian equality body in *Feryn* and the consumer authority in *Invitel*, are invited to participate in the building of the European legal order. The importance for participation in the legal space opened up by EU law lies in the fact that they act as "*mandataire*" for the European policy at stake.[1104] On

[1101] Joined cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v. Council and Commission*, ECLI:EU:C:2008:461.
[1102] Tuori, *European Constitutionalism*, 231.
[1103] Micklitz, *The Many Concepts of Social Justice in European Private Law*.
[1104] Micklitz, "The Legal Subject, Social Class and Identity-Based Rights," 308.

that basis, the preliminary reference procedure might be considered as the vehicle through which the CJEU can build a European society by legal means and reliance on national actors. In line with that view, it should be pointed out that the rulings of the preliminary reference procedure reveal a transnational collective dimension – they are applicable in the whole European Union, not just in the Member State from which they emerged.

5.1. THE CONSTRUCTION OF A EUROPEAN SOCIETY

From the beginning, EU law has conferred rights on citizens, however, these have been characterized by their connection to free movement and the internal market. The difficulty lies in the small proportion of the Union's population who are able to make use of their free movement rights. *Münch* has described Europe's building of a European society by judicially construing a European society of autonomous individuals superimposing themselves upon the traditionally existing Europe of nation-states. This development is given a negative connotation since it is considered that the CJEU contributed to the shift of power in favour of competitive companies and single individuals seeking the advantage of a European market without national barriers, by developing the principles of free movement and non-discrimination as the cornerstones of the European legal order:

> *With free movement and non-discrimination as conception of control the ECJ has contributed to the beginnings of a shift of paradigm away from the welfare of national collectives and status groups and towards the inclusion of empowered single individuals in the equal access to opportunities of any kind independent of nationality, gender, age and ethnicity in an emerging European society transcending the historically established family of European nations. This is well established in trade law as the core of the Common Market; it is under way in constructing the Internal Market beyond trade law in labor law in particular; but it is only in its beginnings in private law.*[1105]

In substantive terms, the European society is reserved for "powerful and competitive actors", who "are the pioneers advancing a process that does not only involve benefits, but also costs, particularly for such economic actors who are less powerful and competitive".[1106] The European legal order thereby strengthens the individual (as framed by Durkheim "*the cult of the individual*")[1107] and the opportunities for self-realization by liberating him from his traditionally established national constraints. Münch speaks of the "the market citizen who uses his/her liberties on the market to realise his/her own ideas of value, ideals of life and

[1105] Münch, "Constructing a European Society by Jurisdiction," 533.
[1106] Ibid.
[1107] Münch refers to E. Durkheim, The Division of Labour in Society (Free Press, 1964; French orig 1893).

interests".[1108] The resulting internal pluralization and differentiation of previously nationally defined homogenous cultures results in an alignment of the nations, which, in turn, helps again to advance the transnational ties between emancipated individuals.[1109] According to Münch, this "invokes a deep and long-lasting conflict between the avant-garde of transnational integration and the less equipped and less mobile people who cling to traditional securities guaranteed by the nation state".[1110] Indeed, Münch speaks of superimposition by a European élite and permanent conflict between European forces of change and national forces of persistence. He foresees that the consequential structural change will lead to greater inequality within national societies.[1111]

5.2. PARTICIPATION IN THE EUROPEAN SOCIETY

Münch's view regarding the one-sidedness of the participation in the European society must be set in context by looking at the empirical evidence gathered from the three case studies, which reveal a more positive picture. As it has been illustrated regarding the *hybrid* legal field (see section 3), the increasing role of the European Union as a protector of fundamental rights nurtures the sense of EU citizenship amongst the people of the Member States.[1112] It addresses the political objective of winning the trust of the citizens of the EU integration process. The three case studies reveal tendencies of the development of a 'social citizenship', which has the potential to generate a perception of a shared identity.[1113]

The conferral of rights by the EU puts the individual right-holder in the spotlight. As illustrated by *Janecek*, but also by *Mohamed Aziz*, the individual emerges within the policy field at stake "into an indivisible conglomerate" and the single case reveals a strong collective and societal dimension for the benefit of weaker societal interests.[1114] However, for the building of a balanced European society, which embraces participation of not only the 'market citizen', it can be argued that reliance on the individual alone is not sufficient. The building of a balanced European society ultimately depends on those who are able and

[1108] Richard Münch, "Constructing a European Society by Jurisdiction," *European Law Journal* 14, no. 5 (2008): 538.
[1109] Münch, "Constructing a European Society by Jurisdiction," 522.
[1110] Ibid., 537.
[1111] Ibid., 540.
[1112] Giovanni Comandè, "The Fifth European Union Freedom: Aggregating Citizenship...around Private Law," in *Constitutionalization of European Private Law*, ed. Hans-W. Micklitz (Oxford: Oxford University Press, 2014).
[1113] Carr, "Regulating the Periphery."
[1114] Micklitz, "The Legal Subject, Social Class and Identity-Based Rights," 309.

willing to initiate legal action. The obstacles and means required to reach the CJEU have been illustrated in the three case studies. The existence of collective remedies for private and public actors to enhance the role of vulnerable interests plays a significant role in ensuring their equal representation in the European society. The outlook of collective remedies is, however, still largely determined by the Member States (see section 2). This reveals the additional role of the Member States in making participation in the European society accessible to a greater proportion of their people.

6. CONCLUDING REMARKS

This Chapter has determined the nature of *hybrid* collective remedies as such and within their legal fields as well as their role in the creation of the European social legal order and of a European society. It has been illustrated that in the three legal fields at stake, the EU is following its own pattern of justice, which is distinct, but complementary to the national objectives of social protection, which have been developed in accordance with the welfare state paradigm. In line with that, collective remedies which reach beyond a procedural protection by injunctive relief remain largely untouched by EU law. However, in view of the deep intertwinement between substance and procedure, national collective remedies exhibiting a social protection ambition are able to elevate the substantive protective standard of the EU regulatory framework. National collective remedies stand in contrast to the individualized view of the European social legal order, which relies on individuals, strengthened by fundamental and citizenship rights, to enforce the three policies. While formally constituting individuals, they act as '*mandataire*' for the policy that they are advocating and thereby produce collective effects. Furthermore, they contribute towards the creation of a European society – however, national collective remedies also play a role here in ensuring the participation of weaker societal interests in the European society.

ANNEX I: TABLE OF INTERVIEWS

NATIONAL ACTORS

THE *JANECEK* CASE STUDY

Interviewee(s)	Date	Place	Language	Recorded	Translation[1115]
Lawyer of Mr. Janecek (applicant)	8 and 9[1116] October 2012	Munich (Germany)	German	Yes	Parts
Mr. Janecek (applicant)	9 October 2012	Munich (Germany)	German	Yes	Parts
Three representatives of the legal and scientific departments of the Bavarian State Ministry of the Environment and Consumer Protection (defendant)	9 October 2012	Munich (Germany)	German	Yes	Parts
Lawyer of UK environmental NGO (applicant in *ClientEarth* case)	16 January 2013	Not in person (Skype)	English	Yes	-

[1115] The translations were provided by the author.
[1116] The second interview was conducted after the legal proceedings before the Administrative Court of Munich (*Verwaltungsgericht München*) on 9 October 2012 (the follow-up to the initial *Janecek*-litigation, although this time the applicant was not constituted by an individual, but by a German environmental NGO).

THE *FERYN* CASE STUDY

Interviewee(s)	Date	Place	Language	Recorded	Translation
Director of the Centre for Equal Opportunities and Opposition to Racism (applicant)	18 December 2012	Brussels (Belgium)	English	Yes	-
Lawyer of the Centre for Equal Opportunities and Opposition to Racism (applicant)	19 December 2012	Antwerp (Belgium)	English	Yes	-
Lawyer of Feryn NV (defendant)	20 December 2012	Brussels (Belgium)	English	Yes	-
Judge of the Labour Court of Brussels (*Arbeidsrechtbank te Brussel*)	10 December 2013	Brussels (Belgium)	English	Yes	-
Judge of the Higher Labour Court of Brussels (*Arbeidshof te Brussel*), who referred to the CJEU	20 December 2013	Brussels (Belgium)	English	Yes	-

THE *INVITEL* CASE STUDY

Interviewee(s)	Date	Place	Language	Recorded	Translation
Representative of a Hungarian consumer NGO	11 June 2013	Budapest (Hungary)	English	Yes	-
Chief Legal and Regulatory Officer of Invitel Zrt. (defendant)	12 June 2013	Budaörs (Hungary)	English	Yes	-
Judge of the Pest County Court (*Pest Megyei Bíróság*), who referred to the CJEU	12 June 2013	Budapest (Hungary)	Hungarian/ English	Yes	Yes[1117]
Three representatives of the legal department of the Hungarian Authority of Consumer Protection (applicant)	13 June 2013	Budapest (Hungary)	Hungarian	Yes	Yes[1118]

[1117] This interview suffered from language problems. The interview was not planned, as the original interview was to be conducted in English with one of the judges of the Hungarian Supreme Court. The latter presented to me by surprise the first instance judge, who referred the case to the CJEU, but left himself. Since the author of the thesis cannot speak Hungarian and the judge only had a limited knowledge of English, only very limited information could be extracted from this interview. The interview has been, however, fully recorded and translated into English in written form by David Gergely Karas (former EUI researcher, Department of Political and Social Sciences).

[1118] During the interview, Dr. Mónika Józon (Professor of Civil Law, Corvinus University of Budapest) translated my questions and given me a short translation of the interviewees' responses. The interview was fully recorded and translated into English in written form by David Gergely Karas (former EUI researcher, Department of Political and Social Sciences).

EUROPEAN ACTORS

Interviewee	Date	Place	Language	Recorded	Translation
Lawyer of the Directorate-General for the Environment of the European Commission	17 January 2013	Not in person (Telephone)	English	Yes	-
Judge of the CJEU, who was sitting on the chamber dealing with *Feryn and Janecek*	16 March 2013	Florence (Italy)	English	Yes	-
Advocate General of the CJEU, who rendered an opinion in *Feryn*	26 March 2013	Florence (Italy)	English	Yes	-
Référendaire of a judge at the CJEU, who was sitting on the chamber dealing with *Invitel*	February 2014[1119]	Luxembourg	English	No	-

[1119] This interview was conducted during my internship at the CJEU (November 2013-April 2014).

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