III. RECONCILING IN CONSTITUTIONAL ADJUDICATION: RULES OF ENGAGEMENT IN THE COMPOSITE EUROPEAN CONSTITUTION

FUNDAMENTAL RIGHTS PROTECTION IN THE EU: THE ECJ'S DIFFICULT MISSION TO STRIKE A BALANCE BETWEEN UNIFORMITY AND DIVERSITY

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Abstract
Over the past few years, the Court of Justice of the European Union (ECJ) case law on fundamental rights protection has become increasingly differentiated, as the Luxemburg court often claims the "last word" when it comes to fundamental rights protection in the European Union (EU). On the other hand, member states' constitutional courts, too, are eager to keep the final say in EU-related fundamental rights cases. This not only threatens the supremacy of EU law, but also challenges its uniform interpretation and application. To avoid conflicts of jurisdictions, the ECJ should adopt a margin of appreciation concept like the one developed by the European Court of Human Rights or like the Swiss Federal Supreme Court's approach of varying judicial scrutiny towards cantonal courts. This would enable the ECJ to strike a balance between uniformity and diversity when it comes to fundamental rights protection in the EU.

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1. Introduction

"Le droit national reste […] le domaine réservé des juridictions nationales et la Cour se concentre sur le droit de l'Union, pour que celui-ci soit interprété et appliqué de façon uniforme dans tous les États membres."[1] This is how the former President of the European Court of Justice (ECJ), *Vassilios Skouris*, on a conference back in 2014, described his vision of dividing responsibilities between national courts and the Court of Justice of the European Union (ECJ) with regard to the preliminary reference procedure. Reflecting about the consequences of the ECJ's *Melloni* judgment, the current President of the ECJ, Koen Lenaerts, pointed out that European Union (EU) member states, on the one hand, had to respect the primacy of EU law even over national constitutional law, while, on the other hand, EU law had to leave room for protecting the member states' constitutional identity as well as for diverging national standards, even when EU law is implemented.[2] However, it remains unclear what these statements mean for the constitutional adjudication in the EU and the position of the ECJ towards national constitutional courts, in particular when it comes to fundamental rights protection. Over the past few years, ECJ case law in the field of fundamental rights protection has become increasingly differentiated, with the ECJ claiming the "last word" when it comes to fundamental rights protection in the EU. On the other hand, member states' constitutional courts, too, are eager to keep the final say in EU-related fundamental rights cases, which not

[1] V. Skouris, *Speech*, in U. Neergaard & C. Jacqueson (eds.), *Proceedings: Speeches from the XXVI FIDE Congress, Copenhagen 2014* (2014), 112, 123; Translation: "National law remains the exclusive domain of the national courts and the ECJ concentrates on EU law in order to ensure that this is interpreted and applied uniformly in all member states."

[2] K. Lenaerts, *Kooperation und Spannung im Verhältnis von EuGH und nationalen Verfassungsgerichten*, EuR 3, 27 (2015).

only threatens the primacy of EU law, but also challenges its uniform interpretation and application.

This article explores the ECJ's difficult mission to strike a balance between uniformity and diversity when it comes to fundamental rights protection in the EU, analyzing both the ECJ's and the national constitutional courts' positions on the applicability of the EU Charter of Fundamental Rights (CFR) and of national fundamental rights. It will be argued that both positions, basically, are incompatible with each other, so that potential conflicts can only be solved by means of constitutional dialogue and mutual consideration. For this purpose, the article will examine how other courts facing a wide range of political, social and cultural diversities deal with these challenges and in what way their solutions might be adopted to the EU. In this context, the *margin of appreciation* doctrine developed by the European Court of Human Rights (ECtHR) and the Swiss Federal Supreme Court's (SFSC) approach of varying judicial scrutiny towards cantonal courts in certain cases can serve as a role model for a consistent approach of the ECJ towards national constitutional courts and their desire to preserve diversity in the EU. The ECtHR's and the SFSC's approaches must be studied carefully to figure out the criteria suitable for the development of an ECJ *margin of appreciation* doctrine which allows for a reasonable constitutional adjudication in the EU. Conversely, it will be argued that the principle of discretion can also be applied in favor of the ECJ, with national constitutional courts reducing their intensity of scrutiny towards the ECJ.

2. Striving for uniformity: The ECJ's approach

One of the main features of EU law is its primacy over national law, which, along with its direct effect, guarantees the uniform application of Union law in all EU member states. Back in 1964, in its landmark *Costa v. E.N.E.L.* judgment, the ECJ decided that Community law had primacy over national law,[3] demanding that contradicting national law be "disapplied". This principle shapes the relationship between EU law and national law to this day. In *Internationale Handelsgesellschaft*, the ECJ stressed that in order to guarantee the uniformity and efficiency of Community

[3] ECJ, C-6/64, Costa v. E.N.E.L., ECLI:EU:C:1964:66, p. 1251, 1270.

law, Community law prevailed also over national constitutional law,[4] which means that the primacy of EU law is "absolute" and that national fundamental rights can no longer be applied if they contradict EU law. This is of particular importance, as EU competences have significantly increased over time, enabling the Union to adopt legal norms in a variety of fields. With the entering into force of the Lisbon Treaty in 2009, the CFR became part of EU primary law, prevailing over contradicting national fundamental rights. However, Art. 51(1) CFR, in accordance with the ECJ case law developed in the cases *Wachauf*,[5] *ERT*[6] and *Annibaldi*,[7] states that the CFR is binding on the member states only when they are implementing Union law. In its *Åkerberg Fransson* judgment, the Court ruled that EU fundamental rights are applicable "in all situations governed by European Union law, but not outside such situations"[8]. The Court continued that "the applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter"[9], whereas "where, on the other hand, a legal situation does not come within the scope of European Union Law, the Court does not have jurisdiction to rule on it"[10]. Following the ECJ's wide interpretation of Art. 51(1) CFR, the Charter is also applicable in situations with little connection with EU law. Subsequent decisions like *Hernández*,[11] in which the Court tried to clarify and circumscribe its approach, have changed little in this regard, especially since the Court, in its latest decisions, has returned to its position taken in *Åkerberg Fransson*.[12]

The impact of the wide applicability of the CFR on the fate of national fundamental rights was further intensified by the ECJ's position in the *Melloni* case, the consequence of which is that national fundamental rights can coexist with EU fundamental rights and supplement them only as long as the effective

[4] ECJ, C-11/70, Internationale Handelsgesellschaft, ECLI:EU:C:1970:114, para. 2 et seq.
[5] ECJ, C-5/88, Wachauf, ECLI:EU:C:1988:321, para. 19.
[6] ECJ, C-260/89, ERT, ECLI:EU:C:1991:254, para. 43.
[7] ECJ, C-309/96, Annibaldi, ECLI:EU:C:1997:631, para. 21 et seq.
[8] ECJ, C-617/10, Åkerberg Fransson, ECLI:EU:C:2013:280, para. 19.
[9] ECJ, C-617/10, Åkerberg Fransson, ECLI:EU:C:2013:280, para. 20.
[10] ECJ, C-617/10, Åkerberg Fransson, ECLI:EU:C:2013:280, para. 21.
[11] ECJ, C-198/13, Hernández, ECLI:EU:C:2014:2055, para. 37; s. also EJC, C-206/13, Siragusa, ECLI:EU:C:2014:126, para. 24 et seq.
[12] Cf. ECJ, C-218/15, Paoletti and Others, ECLI:EU:C:2016:748, para. 13 et seq.

application of EU law is not affected.[13] The *Melloni* decision was a clear sign of the ECJ's strive for a uniform application of EU law, leaving little space for the application of national fundamental rights even in cases with a very loose connection to EU law, which, in the long run, could threaten the standing of national constitutional courts.[14]

However, it remains to be seen if the ECJ will really stick to *Åkerberg Fransson* and *Melloni*.[15] In the *Taricco II* case, the ECJ, after a preliminary reference by the Italian Constitutional Court asking for clarification on the ECJ's rather robust and harsh *Taricco I* decision,[16] recently ruled that Art. 325 TFEU did not require the disapplication of national provisions in cases in which such a disapplication would result in an infringement on the supreme principles of a member state's constitutional identity.[17] This shows that the ECJ, in spite of *Åkerberg Fransson* and *Melloni,* does not aim at fully marginalizing national fundamental rights, but is rather ready to accept a higher national standard of protection at least under certain conditions without, however, giving up the general principle of primacy of EU law.[18] All in all, *Åkerberg Fransson* and *Melloni* seem to be watered down at least slightly by *Taricco II*.[19]

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[13] B. De Witte, *Art. 53 – Level of protection*, in S. Peers, T. Hervey, J. Kenner and A. Ward (eds.) *The EU Charter of Fundamental Rights* (2014), para. 53.27.

[14] Cf. R. Streinz, *Streit um den Grundrechtsschutz? Zum Grundrechtsschutz in der Europäischen Union nach den Urteilen des EuGH in den Fällen Åkerberg Fransson und Melloni und des BVerfG zur Antiterrordatei*, in D. Heid, R. Stotz & A. Verny (eds.), *Festschrift für Manfred A. Dauses zum 70. Geburtstag* (2014), 429, 442; C. Franzius, *Zwischen Selbstbehauptungen und Selbstbeschränkungen der Rechtsordnungen und ihrer Gerichte*, ZaöRV 75 383, 400 (2015); F. Vecchio, *I casi Melloni e Akerberg: il sistema multilivello di protezione dei diritti fondamentali, Quaderni costituzionali*, 454, 456 (2013); P. Hallström, *Balance or Clash of Legal Orders – Some Notes on Margin of Appreciation*, in J. Nergelius & E. Kristoffersson (eds.), *Human Rights in Contemporary European Law* (2015), 59, 71.

[15] On the debate cf. C. Peristeridou & J. Ouwerkerk, *A Bridge over Troubled Water – a Criminal Lawyer's Response to Taricco II*, VerfBlog 12/12/2017, http://verfassungsblog.de/a-bridge-over-troubled-water-a-criminal-lawyers-response-to-taricco-ii/ (accessed 4 January 2018).

[16] ECJ, C-105/14, Taricco *and Others ("Taricco I")*, ECLI:EU:C:2015:363.

[17] ECJ, C-42/17, M.A.S. and M.B. ("Taricco II"), ECLI:EU:C2017:936, para. 62.

[18] K. Wegener, *Vorhang zu und alle Fragen offen? – Zum Verhältnis von nationalem Verfassungsrecht und unmittelbar anwendbarem Unionsrecht nach „Taricco II"*, JuWiss 143-2017 (accessed 8 January 2018).

[19] Cf. D. Burchardt, *Belitting the Primacy of EU Law in Taricco II*, VerfBlog, 7/12/2017, http://verfassungsblog.de/belittling-the-primacy-of-eu-law-in-

3. Challenging uniformity: National constitutional courts and their desire to uphold diversity

Since the EU is not (and perhaps will never be) a state, member states' constitutional courts generally refuse to accept the concept of "absolute" primacy of EU law over national law, claiming that primacy of EU law is both granted and limited by national constitutional law. Most prominently, the German Federal Constitutional Court (FCC) that had developed its *Solange II* doctrine[20] of judicial self-restraint back in 1986 insists that any transfer of sovereign powers to the EU is itself limited by the "constitutional identity" ('Verfassungsidentität') of the German state,[21] which means that EU law must not violate national fundamental rights that shape this constitutional identity and that the FCC itself retains the "last word" with regard to the competences of the EU and a possible *ultra vires* review of EU acts. Against this backdrop, it was not surprising that the FCC reacted very harshly to the ECJ's *Åkerberg Fransson* and *Melloni* judgments. In its *Antiterrordatei* decision, the German Court claimed that EU fundamental rights were not applicable, because the Counter-Terrorism Database Act and the activities carried out on its basis were no implementation of Union law within the meaning of Art. 51(1) CFR, since the connection with EU law was too weak.[22] In the FCC's view, the ECJ's decision in *Åkerberg Fransson* did not challenge this conclusion, since it "must not be read in a way that

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taricco-ii/ (accessed 8 January 2018); M. Bassini & O. Pollicino, *Defusing the Taricco Bomb through Fostering Constitutional Tolerance: All Roads Lead to Rome*, VerfBlog, 5/12/2017, http://verfassungsblog.de/defusing-the-taricco-bomb-through-fostering-constitutional-tolerance-all-roads-lead-to-rome/ (accessed 8 January 2018); P. B. Donath, *EuGH zum Verhältnis von EU-Recht und nationalem Recht: Unionsrecht hat nicht immer Vorrang*, Legal Tribune Online, 5 December 2017, https://www.lto.de/recht/hintergruende/h/eugh-urteil-c4217-vorrang-gesetz-europaeisches-nationales-recht-europa-eu-union/ (accessed 8 January 2018); D. Sarmiento, *To bow at the rhythm of an Italian tune*, 5 December 2017, https://despiteourdifferencesblog.wordpress.com/2017/12/05/to-bow-at-the-rhythm-of-an-italian-tune/ (accessed 8 January 2018); B. Budinska/Z. Vikarska, J*udicial dialogue after Taricco II: who has the last word, in the end?*, EU Law Analysis, 7 December 2017, https://goo.gl/dE279s (accessed 8 January 2018).

[20] BVerfGE 73, 339, 375 et seq. – Solange II.

[21] BVerfGE 73, 339, 375 et seq. – Solange II; cf. also BVerfGE 89, 155, 187 et seq. – Maastricht; BVerfGE 123, 267, 351 et seq. – Lissabon; BVerfGE 126, 286, 302 – Honeywell.

[22] BVerfGE 133, 277, para. 88 et seq. – Antiterrordatei.

would view it as an apparent *ultra vires* act or as if it endangered the protection and enforcement of the fundamental rights in the Member States […] in a way that questioned the identity of the Basic Law's constitutional order"[23]. In its press release on the decision, the German Court emphasized that it acted on the assumption that the ECJ's reasoning in *Åkerberg Fransson* was based on the distinctive features of the particular case and that it expressed no general view.[24] Without being a "threat of war" against the Luxemburg Court,[25] the FCC's *Antiterrordatei* decision constitutes a clear warning signal towards the ECJ,[26] with the FCC, nonetheless, seeming to accept the application of the Charter on national provisions determined by EU law.

Another example of the FCC's desire to uphold diversity in the field of fundamental rights protection is its 2015 decision on the European Arrest Warrant.[27] On this occasion, the German Court undertook an "identity control" ('Identitätskontrolle') over the implementation of a European Arrest Warrant, i.e. in a case fully covered by EU law, where, in principle, there would have been no space for the application of national fundamental rights. By means of its "identity control", the FCC indirectly reviewed the EU Framework decision itself, applying the German standard of fundamental rights protection on EU secondary law,[28] which is widely regarded as a modification or even partial withdrawal of the FCC's *Solange II* doctrine[29] of judicial self-restraint.[30] This

[23] BVerfGE 133, 277, para. 91 – Antiterrordatei.

[24] FCC, Press Release No. 31/2013 of 24 April 2013.

[25] Assuming a harsh threat towards the ECJ, however, M. Steinbeis, *Antiterrordatei-Urteil: Fäusteschütteln in Richtung Luxemburg*, VerfBlog, 24/04/2013, http://verfassungsblog.de/antiterrordatei-urteil-fausteschutteln-in-richtung-luxemburg/ (accessed 19 October 2017)

[26] J. Schwarze, *Die Wahrung des Rechts durch den Gerichtshof der Europäischen Union*, DVBl., 537, 541 (2014);ähnlich N. Lazzerini, *Il contributo della sentenza Åkerberg Fransson alla determinazinone dell'ambito di applicazione e degli effetti della Carta dei diritti fondamentali dell'Unione Europea*, Rivista di diritto internazionale 96, 883, 898 (2013); F. Fontanelli, *National Measures and the Application of the EU Charter of Fundamental Rights – Does curia.eu Know iura.eu?*, HRLR 14, 231, 262 et seq. (2014).

[27] BVerfGE 140, 317 – Europäischer Haftbefehl II.

[28] BVerfGE 140, 317 para. 51 et seq – Europäischer Haftbefehl II.

[29] BVerfGE 73, 339, 375 et seq. – Solange II.

[30] D. Burchardt, *Die Ausübung der Identitätskontrolle durch das Bundesverfassungsgericht – Zugleich Besprechung des Beschlusses 2 BvR 2735/14 des BVerfG vom 15.12.2015 („Solange III" / „Europäischer Haftbefehl II")*, ZaöRV 76, 527,

demonstrates that the FCC is not willing to give in to the ECJ's strive for creating a uniform standard of fundamental rights protection in the EU.[31]

The Spanish Constitutional Court, in its 2014 *Melloni* decision, stressed that the EJC judgment in the *Melloni* case was "of great use", but not a binding decision,[32] accepting the ECJ's criteria, but only on the grounds of the Spanish constitution.[33] This shows that the Spanish Constitutional Court, too, seeks to defend national fundamental rights against the influence of the CFR and its unifying effects.

Last but not least, also the UK Supreme Court expressed its displeasure with the *Åkerberg Fransson* and *Melloni* judgments, emphasizing in its 2014 *HS2* decision that the UK constitution or common law may contain "fundamental principles, […] of which Parliament when it enacted the European Communities Act 1972 did not either contemplate or authorise the abrogation"[34], so that the primacy of EU may face certain constitutional limits. Some weeks before the *HS2* judgment was released, Supreme Court Judge *Lord Mance*, publically, had agreed with the FCC's

543 (2016); F. Schorkopf, *BVerfG aktiviert Identitätskontrolle: Karlsruhe will Kommunikation, nicht Konfrontation*, Legal Tribune Online, 29 January 2016, http://www.lto.de/recht/hintergruende/h/bverfg-2bvr273514-eu-haftbefehl-auslieferung-verfassungsidentitaet-menschenwuerde-gg-eu-recht-emrk/ (accessed 19 October 2017); M. Hong, *Human Dignity and Constitutional Identity: The Solange III-Decision of the German Constitutional Court*, VerfBlog, 18/02/2016, http://verfassungsblog.de/human-dignity-and-constitutional-identity-the-solange-iii-decision-of-the-german-constitutional-court/ (accessed 19 October 2017).

[31] In this context see also the judgment of the Danish Supreme Court of December 6, 2016 – 15/2014 – in reaction to ECJ, C-441/14, Dansk Industri, ECLI:EU:C: 2016:278; for a fundamental challenge to the applicability of the CFR and its primacy over national law see the judgment of the Hungarian Constitutional Court of November 30, 2016 – 22/2016 (XII. 5.) –.

[32] Spanish Constitutional Court, Judgment of February 13, 2014 - STC 26/2014 -, para. 2 et seq.

[33] D. Sarmiento, *The German Constitutional Court and the European Arrest Warrant: The latest twist in the judicial dialogue,* EU Law Analysis, 27 January 2016, http://eulawanalysis.blogspot.de/2016/01/the-german-constitutional-court-and.html (accessed 19 October 2017).

[34] Supreme Court, Judgment of January 22, 2014, R (on the application of HS2 Action Alliance Limited) (Appellant) v. Secretary of State for Transport and another (Respondents) [2014] UKSC 3, para. 207.

Antiterrordatei decision and its criticism of *Åkerberg Fransson*.[35] Moreover, Supreme Court President, *Lord Neuberger*, in a public lecture, joined his colleague's position, pointing out that the UK, in the absence of a written constitution, lacked the possibility of setting limits to the ECJ's proactive approach.[36] These reactions by the UK Supreme Court and some of its judges show that the court is no longer willing to accept the "absolute" primacy of EU law over British law,[37] even though this problem will resolve itself with Brexit on the horizon.

By contrast, the Austrian Constitutional Court refrained from openly criticizing the *Åkerberg Fransson* judgment. Instead, it stressed its readiness to follow the ECJ's clarifying case law put forward in *Hernández* and subsequent decisions, elaborating that the CFR was applicable when the case at hand provided for a sufficient link to EU law.[38]

The Italian Constitutional Court, in the *Taricco* saga, eventually did not apply its *controlimiti* doctrine, but rather submitted a preliminary reference to the ECJ,[39] seeking dialogue, not confrontation with the Luxembourg Court,[40] in spite of the critical tones that the preliminary reference did contain toward *Taricco I* and thus, more implicitly, also toward *Åkerberg Fransson* and *Melloni.*

All in all, however, member states' constitutional courts mostly have reacted at least reluctantly to the ECJ's approach taken in *Åkerberg Fransson* and *Melloni*, fearing that national fundamental rights may lose their relevance if the CFR is applied even in fields

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[35] Lord Mance, *Destruction or Metamorphosis of the Legal Order?*, World Policy Conference, 14 December 2013, https://www.supremecourt.uk/docs/speech131214.pdf (accessed 19 October 2017).

[36] Lord Neuberger, *The British and Europe*, Cambridge Freshfields Annual Law Lecture, 12 February 2014, *https://www.supremecourt.uk/docs/speech-140212.pdf* (accessed 19 October 2017).

[37] Cf. F. Fontanelli, *Implementation of EU law through domestic measures after Fransson: the Court of Justice buys time and "non-preclusion" troubles loom large*, ELRev 39, 682, 684 (2014).

[38] Cf. Austrian Constitutional Court, Judgment of 12 March 2014 – B 166/2013 –, para. 24.

[39] Corte costituzionale, Order n. 24 of 26 January 2017, ECLI:IT:COST:2017:24.

[40] Cf. D. Tega, *The Italian Way: A Blend of Cooperation and Hubris*, ZaöRV 77, 685, 709 et seq. (2017).

with little connection with EU law, which would bring about a harmonized standard of fundamental rights protection.

4. Implementation of the margin of appreciation doctrine in the ECJ case law

4.1. The ECtHR's margin of appreciation doctrine

Even more than the ECJ, the ECtHR faces the challenge of having to reconcile a huge variety of political, social and cultural traditions in its case law when interpreting the European Convention on Human Rights (ECHR) that, unlike the EU, is not a composite constitution with an established system of institutional communication, so that any comparison has to be exercised with caution. To reconcile the various national traditions, the Strasbourg Court developed its so-called margin of appreciation doctrine that grants contracting parties a certain margin of discretion, subject to the Court's supervision, when it comes to deciding whether or not a measure is necessary in a democratic society, when the Convention provision at hand contains vague expressions or when the contracting party has to fulfill a positive obligation from the Convention.[41] The margin of appreciation doctrine is a procedural instrument to express judicial self-restraint,[42] rather than a modification of the principle of proportionality.[43] The doctrine was first explained in the *Handyside* case back in 1976, where the Court stated that "by reason of their direct and continuous contact with the vital forces of their countries, state authorities are in principle in a better position than the international judge to give an opinion on the exact content of those requirements [of morals] as well as on

[41] J. Schokkenbroek, *The Basis, Nature and Application of the Margin-of-Appreciation Doctrine in the Case-Law of the European Court of Human Rights*, HRLJ 19, 30, 31 et seq. (1998).

[42] P. Mahoney, *Marvellous Richness of Diversity or Invidious Cultural Relativism?*, HRLJ 19,1, 3 (1998); R. St. J. Macdonald, *The Margin of Appreciation*, in R. St. J. Macdonald, F. Matscher & H. Petzold (eds.), *The European System for the Protection of Human Rights* (1993), 83, 84.

[43] Assuming a modification of the principle of proportionality, however, J. Kühling, *Grundrechte*, in A. v. Bogdandy & J. Bast (eds.), *Europäisches Verfassungsrecht* (2009), 657, 695 et seq.; A. Nußberger, *Das Verhältnismäßigkeitsprinzip als Strukturprinzip richterlichen Entscheidens in Europa*, NVwZ-Beilage, 36, 41 (2013).

the 'necessity' of a 'restriction' or 'penalty' to meet them"[44]. However, the ECtHR also stressed that the domestic margin of appreciation had to go hand in hand with a European supervision.[45] Thus, the margin of appreciation doctrine reflects the subsidiary role of the Convention in protecting human rights.[46] Metaphorically speaking, the margin of appreciation doctrine serves as "a mechanism by which a tight or slack rein is kept on state conduct, depending upon the context"[47]. Moreover, the concept manifests the "international" division of power between national courts and the ECtHR, which is why the margin of appreciation doctrine, by its origin, is a concept of international law.[48]

The margin of appreciation doctrine is applicable to all Convention articles and beyond that, to provisions in Additional Protocols to the ECHR. The scope of state discretion varies from a wide margin of appreciation to almost no margin at all, depending upon the context of the case. The ECtHR has developed certain criteria, according to which the scope of the margin of appreciation can be determined. For instance, a Convention party is allowed a considerable discretion when it comes to the protection of public morals[49] or when they are implementing social and economic policies.[50] On the contrary, Convention parties usually enjoy little or almost no discretion when "a particularly important facet of an

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[44] ECtHR, judgment of 7 December 1976 – 5493/72 – Handyside v. United Kingdom, A24, para. 48.

[45] ECtHR, judgment of 7 December 1976 – 5493/72 – Handyside v. United Kingdom, A24, para. 49.

[46] D. Harris, M. O'Boyle, E. Bates & C. Buckley (eds.), *Law of the European Convention on Human Rights*, 2nd ed., 13 (2009); P. Tanzarella, *Il margine di apprezzamento*, in M. Cartabia (ed.), *I diritti in azione* (2007), 145, 154; D. Shelton, *The Boundaries of Human Rights Jurisdiction in Europe*, Duke J. Comp. & Int'l L. 13, 95, 129 (2003); A.-D. Olinga & C. Picheral, *La théorie de la marge d'appréciation dans la jurisprudence récente de la Cour européenne des droits de l'homme*, RTDH, 567, 568 et seq. (1995).

[47] D. Harris, M. O'Boyle, E. Bates & C. Buckley, *Law of the European Convention on Human Rights*, cit. at 46, 13.

[48] J. Kühling, *Grundrechte*, cit. at 43, 697.

[49] ECtHR, judgment of 7 December 1976 – 5493/72 – Handyside v. United Kingdom – A24, para. 48; judgment of 24 May 1988 – 10737/84 – Müller and Others v. Switzerland, A133, para. 35; judgment of 22 October 1981 – 7525/76 – Dudgeon v. United Kingdom, A45, para. 52.

[50] ECtHR, judgment of 8 July 2003 – 36022/97 – Hatton and Others v. United Kingdom, RJD 2003-VIII, para. 97.

individual's identity or existence is at stake",[51] which means that the nature or importance of the fundamental right concerned influences the scope of the margin of appreciation. The same can be said of the aim pursued with the interference in the Convention right.[52] However, the margin of appreciation is wide when there is no consensus within the Convention parties on the issue at stake, particularly if the case raises sensitive moral or ethical questions.[53] Though a wide margin of discretion usually applies "if the state is required to strike a balance between competing interests or Convention rights",[54] there are also cases in which the respondent state was granted very little or no discretion, despite the fact that competing interests or Convention rights were at stake.[55] This demonstrates that conflicting interests or rights alone are not enough to justify a wide margin of appreciation. By contrast, particularly in recent cases, the width of the margin of appreciation also depends on whether or not domestic courts have weighed

[51] D. Harris, M. O'Boyle, E. Bates & C. Buckley, *Law of the European Convention on Human Rights*, cit. at 46, 13; cf. ECtHR, judgment of 22 October 1981 – 7525/76 – Dudgeon v. United Kingdom, A45, para. 52 et seq.

[52] ECtHR, judgment of 22 October 1981 – 7525/76 – Dudgeon v. United Kingdom, A45, para. 52; E. Brems, *The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights*, ZaöRV 56, 240, 256 et seq. (1996); P. Mahoney, *Marvellous Richness of Diversity or Invidious Cultural Relativism?*, cit. at 42, 5; J. Schokkenbroek, *The Basis, Nature and Application of the Margin-of-Appreciation Doctrine in the Case-Law of the European Court of Human Rights*, cit. at 41, 34.

[53] ECtHR, judgment of 10 April 2007 – 6339/05 – Evans v. United Kingdom, para. 77; judgment of 1 July 2014 – 43835/11 – S.A.S. v. France, RJD 2014, para. 129.

[54] ECtHR, judgment of 4 December 2007 – 44362/04 – Dickson v. United Kingdom, RJD 2007-V, para. 78; similarly already ECtHR, judgment of 13 March 2003 – 42326/98 – Odièvre v. France, RJD 2003-III, para. 46; judgment of 10 April 2007 – 6339/05 – Evans v. United Kingdom, RJD 2007-I, para. 77; judgment of 15 January 2013 – 48420/10, 59842/10, 51671/10 and 36516/10 – Eweida and Others v. United Kingdom, RJD 2013, para. 106; cf. F. Wollenschläger, *Die Gewährleistung von Sicherheit im Spannungsfeld der nationalen, unionalen und EMRK-Grundrechtsordnungen*, in J. Iliopoulos-Strangas, O. Diggelmann & H. Bauer (eds.), *Rechtsstaat, Freiheit und Sicherheit in Europa* (2010), 45, 75.

[55] Cf. ECtHR, judgment of 24 June 2004 – 59320/00 – von Hannover v. Germany (No. 1), RJD 2004-VI, paras. 57 and 79.

conflicting interests carefully.[56] If this was the case, the ECtHR often, but not always, exercises judicial self-restraint.[57]

It is for its lack of predictability that the margin of appreciation concept is criticized frequently, with opponents claiming that the ECtHR decided on a rather random basis whether or not a Convention party should be given a margin of appreciation.[58] Moreover, the doctrine is controversial, as when it is applied widely, it may give a state a blank cheque or help tolerate questionable national practices or decisions.[59] However, such criticism brought forward against the margin of appreciation doctrine is not convincing, since the Court has developed certain well-defined groups of cases in which Convention states enjoy a wide margin of appreciation, making the application of the doctrine

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[56] ECtHR, judgment of 23 September 2010 – 425/03 – Obst v. Germany, paras. 42 and 52; judgment of 3 February 2011 – 18136/02 – Siebenhaar v. Germany, paras. 39, 45 and 47; judgment of 12 June 2014 – 56030/07 – Martínez v. Spain, para. 147 et seq.; generally on the domestic courts' weighing of interests cf. M. Pellonpää, *Kontrolldichte des Grund- und Menschenrechtsschutzes in mehrpoligen Rechtsverhältnissen*, EuGRZ, 483, 484 (2006); W. Hoffmann-Riem, *Kontrolldichte und Kontrollfolgen beim nationalen und europäischen Schutz von Freiheitsrechten in mehrpoligen Rechtsverhältnissen*, EuGRZ, 492, 496 et seq. (2006).

[57] Granting a wide margin of appreciation in such a case ECtHR, judgment of 26 February 2002 – 36515/97 – Fretté v. France, RJD 2002-I, para. 42; judgment of 10 April 2007 – 6339/05 – Evans v. United Kingdom, RJD 2007-I, para. 83 et seq.; reducing the Convention party's discretion in a similar case, however, ECtHR, judgment of 17 December 2004 – 49017/99 – Pedersen and Baadsgaard v. Denmark, RJD 2004, para. 68 et seq.; judgment of 23 September 2010 – 1620/03 – Schüth v. Germany, RJD 2010, paras. 55 et seq. and 61 et seq.

[58] Cf. F. C. Mayer, in U. Karpenstein & F. C. Mayer, *EMRK* (2015), Introduction, para. 67; G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (2009), 80 et seq.; R. St. J. Macdonald, The *Margin of Appreciation*, in R. St. J. Macdonald, F. Matscher, H. Petzold (eds.), *The European System for the Protection of Human Rights* (1993), 83, 84 et seq.; J. Gerards, *Pluralism, Deference and the Margin of Appreciation Doctrine*, ELJ 17, 80, 114 (2011); P. Tanzarella, *Il margine di apprezzamento*, cit. at 46, 148 and 158 et seq.; to demonstrate that this criticism has a point cf. ECtHR, judgment of 15 January 2013 – 48420/10, 59842/10, 51671/10 and 36516/10 – Eweida and Others v. United Kingdom, RJD 2013, paras. 94 and 106.

[59] D. Harris, M. O'Boyle, E. Bates & C. Buckley, *Law of the European Convention on Human Rights*, cit. at 46, 13; De Meyer, partly dissenting opinion in ECtHR, judgment of 25 February 1997 – 22009/93 – Z. v. Finland, Reports 1997-I, 323; s. also J. Schokkenbroek, *The Basis, Nature and Application of the Margin-of-Appreciation Doctrine in the Case-Law of the European Court of Human Rights*, cit. at 41, 35.

at least to some degree predictable.[60] Moreover, the margin of appreciation concept, by its nature, is very much context-related, making an abstract definition impossible.[61] Last but not least, the Court's case law is far from granting Convention parties a blank cheque when it comes to fundamental rights protection, since the Court, in the majority of cases, reviews the acts of the Convention parties very carefully.[62] All in all, the margin of appreciation doctrine has proven to be a useful instrument for the ECtHR when it comes to striking the right balance between strict control and abdication of responsibilities.

4.2. The SFSC's concept of varying judicial scrutiny towards cantonal authorities

Similar to the ECtHR with regard to Convention parties, the SFSC, varies the intensity of judicial scrutiny towards cantonal authorities, especially cantonal courts, depending on the case at hand, with the intensity of review reaching from a full-scale review to a mere arbitrary test, which is relatively rare in ECtHR case law. The Swiss Court may grant cantonal courts a certain degree of discretion even in cases in which, according to its concept of judicial cognition, it has full cognizable authority.[63]The intensity of judicial scrutiny depends on various factors, including the intensity of the interference, the right concerned, the degree of federal harmonization, special knowledge of cantonal authorities, aspects of division of power, the existence of local or personal particularities, especially local customs and traditions, the existence

[60] J. Callewaert, *Quel avenir pour la marge d'appréciation?*, in P. Mahoney et al. (eds.), *Mélanges en mémoire à Rolv Ryssdal* (2000), 147, 148; M. Pellonpää, *Kontrolldichte des Grund- und Menschenrechtsschutzes in mehrpoligen Rechtsverhältnissen*, cit. at 56, 486; J. Rubel, *Entscheidungsfreiräume in der Rechtsprechung des Europäischen Gerichtshofes für Menschenrechte und des Europäischen Gerichtshofes* (2005), 83.

[61] R. St. J. Macdonald, The *Margin of Appreciation,* cit. at 58, 85.

[62] F. C. Mayer, in U. Karpenstein/F. C. Mayer, *EMRK*, cit. at 58, Introduction, para. 67; U. Prepeluh, *Die Entwicklung der Margin of Appreciation-Doktrin im Hinblick auf die Pressefreiheit*, ZaöRV 61, 771, 826 and 831 (2001) with regard to Art. 10 ECHR.

[63] Generally on the cognizable authority of the SFSC s. W. Kälin, *Das Verfahren der staatsrechtlichen Beschwerde* (1994), 157 et seq.; R. J. Schweizer, *Durchsetzung des Grundrechtsschutzes*, in D. Merten & H.-J. Papier (eds.), *Handbuch der Grundrechte*, Vol. VII/2 (2007), § 229 paras. 27 et seq. and 76.

of conflicting rights or interests, consideration of cantonal issues and the lack of uniform legislation on cantonal level.[64] Even though cantonal aspects must not influence the interpretation of Swiss federal law, because otherwise, the uniform application of federal law would be threatened, the SFSC, when controlling the proportionality of a cantonal measure, reduces the intensity of its judicial scrutiny in certain well-defined cases, which implies that the SFSC's concept of granting cantonal authorities a margin of appreciation, like the ECtHR's margin of appreciation doctrine, constitutes a procedural instrument. The main reason for the SFSC to lower the intensity of its review is the principle of subsidiarity, which in the Swiss federal state has constitutional rank (Art. 5a of the Swiss Constitution). In addition, Switzerland with its 26 cantons and four official languages (German, French, Italian and Rhaeto-Romanic) is a culturally diverse country in which political decision-making is based on the principle of consensus.[65] Consequently, cantonal authorities are granted a margin of discretion if the case at hand requires particular knowledge of the local situation, which cantonal authorities are more likely to have than the Lausanne-based SFSC.[66] The cantonal courts' margin of discretion will be particularly wide when ethical or moral questions are at stake.[67] For instance, in a case concerning the ban on a peepshow in the Canton of St Gall, the SFSC argued that cantonal authorities were more familiar with the mentality of local citizens than the SFSC itself.[68]

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[64] B. Schindler, *Beschwerdegründe, Kognition und Prüfungsdichte*, in I. Häner & B. Waldmann (eds.), *Brennpunkte im Verwaltungsprozess* (2013), 47, 54 et seq.; Y. Hangartner, *Richterliche Zurückhaltung in der Überprüfung von Entscheidung von Vorinstanzen*, in B. Schindler & P. Sutter (eds.), *Akteure der Gerichtsbarkeit* (2007), 159, 167 et seq.; see also W. Kälin, *Das Verfahren der staatsrechtlichen Beschwerde*, cit. at 63, 197 et seq.; F. D. A. Bertossa, *Der Beurteilungsspielraum* (1984), 78 et seq., M. Leuthold, *Die Prüfungsdichte des Bundesgerichts im Verfahren der staatsrechtlichen Beschwerde wegen Verletzung verfassungsmässiger Rechte* (1992), p. 46 et seq. and 160 et seq.

[65] P. Tschannen, *Staatsrecht der Schweizerischen Eidgenossenschaft*, 4th ed. (2016), § 3 para. 31.

[66] BGE 115 Ia 370, 372 E. 3; 116 Ia 401, 414 E. 9a); 117 Ia 141, 143 E. 2a; more recently BGE 136 II 539, 548 E. 3.2; 140 I 218, 237 E. 6.7.4; W. Kälin, *Das Verfahren der staatsrechtlichen Beschwerde*, cit. at 63, 202; M. Leuthold, *Die Prüfungsdichte des Bundesgerichts im Verfahren der staatsrechtlichen Beschwerde wegen Verletzung verfassungsmässiger Rechte*, cit. at. 64, 157.

[67] BGE 101 Ia 252, 256 f. E. 3c); 106 Ia 267, 272 E. 3; 87 I 114, 119 E. 3.

[68] BGE 106 Ia 267, 272 E. 3.

Furthermore, the SFSC exercises judicial self-restraint when the legislative competence[69] for the subject concerned lies with the cantons or if the issue at hand had been the subject of political controversy in the canton.[70] In addition, cantonal authorities enjoy a wide discretion when conflicting interests or rights have to be balanced.[71] The intensity of judicial control is also lowered when cantonal authorities had to assess complex technical or rapidly-changing matters.[72] Finally, the SFSC reduces the intensity of its control when the interpretation of cantonal fundamental rights is not intended to bring about a Swiss-wide, uniform solution, but instead, the existing diverging cantonal approaches shall be conserved.[73] This approach is also used in cases in which the SFSC had to review the constitutionality of a cantonal legal provision which exists in a similar fashion in most other cantons, as the SFSC, due to fears of potential consequences, shows a tendency to shy away from declaring cantonal law unconstitutional.[74] At this point, the SFSC's reasoning is different from the ECtHR's position, with the Swiss court primarily aiming at preserving an inter-cantonal consensus, while the ECtHR intends to apply a strict review if a Convention party does not stick to a common European consensus, which, however, does not make both approaches incompatible with each other, since the SFSC's reasoning primarily results from the fact that it does not want to endanger cooperation between the cantons in the Swiss federal state, a goal that is not that preeminent within the ECHR system, which is not a state entity.

4.3. General applicability of the margin of appreciation concept on the ECJ

In spite of its international nature, the margin of appreciation concept, as developed by the ECtHR and, in quite a similar manner,

[69] BGE 111 Ia 184, 187 E. 2c); similarly BGE 103 Ia 272, 278 E. 6c).
[70] BGE 115 Ia 234, 244 E. 3c); 111 Ia 184, 187 E. 2c); 103 Ia 272, 278 E. 6c); s. Kälin, *Das Verfahren der staatsrechtlichen Beschwerde*, cit. at 63, 201 et seq.
[71] BGE 112 Ia 97, 106 E. 6e); s. M. Leuthold, *Die Prüfungsdichte des Bundesgerichts im Verfahren der staatsrechtlichen Beschwerde wegen Verletzung verfassungsmässiger Rechte*, cit. at 64, 52.
[72] BGE 115 Ib 131, 135 E. 3; 112 Ib 543, 549 E. 1d); 103 Ia 272, 278 E. 6c).
[73] BGE 97 I 839, 844 E. 6; 99 Ia 262, 271; M. Leuthold, *Die Prüfungsdichte des Bundesgerichts im Verfahren der staatsrechtlichen Beschwerde wegen Verletzung verfassungsmässiger Rechte*, cit. at 64, 50.
[74] Cf. BGE 114 Ia 221, 232 E. 6c).

also applied by the SFSC, can be adopted by the ECJ,[75] even though the EU is no longer a simple international organization, but rather a supranational federal union of states.[76] One reason for the general possibility of applying the margin of appreciation doctrine on the ECJ is the fact that the EU itself still displays intergovernmental features, in particular with regard to the Common Foreign and Security Policy (CFSP). Moreover, the idea of subsidiarity, on which the margin of appreciation concept is based, cannot only be found in Swiss law, but also in Art. 5(1)(2) and Art. 5(3) TEU.[77] In addition, the founding treaties of the EU constituted international law, which means that the idea of implementing an international doctrine to the EU has its historical precedents.[78] Art. 4(2) TEU, according to which the Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government, also argues for the adoption of the margin of appreciation concept,[79] since in the absence of any member states' discretion, their national identity might be trampled all over. The protection of national peculiarities is all the more important as there is an enormous legal heterogeneity within the EU that reaches from common law systems to civil law systems, from countries with a constitutional court in the Kelsenian sense to

[75] J. Kühling, *Grundrechte*, cit. at 43, 696; M. Herdegen, *Grundrechte der Europäischen Union*, in J. Isensee & P. Kirchhof (eds.), *Handbuch des Staatsrechts*, Vol. X (2012), § 211 para. 38; J. Gerards, *Pluralism, Deference and the Margin of Appreciation Doctrine*, cit. at 58, 80 et seq. and 102 et seq.; E. Schmidt-Aßmann, Einheit und Kohärenz der Europäischen Mehrebenenrechtsordnung, EuGRZ, 85, 92 (2016); I. Canor, *Harmonizing the European Community's Standard of Judicial Review?*, EPL 8, 135, 165 et seq. (2002); J. Cirkel, *Die Bindungen der Mitgliedstaaten an die Gemeinschaftsgrundrechte* (2000), 198; see also E. M. Frenzel, *Die Charta der Grundrechte als Maßstab für mitgliedstaatliches Handeln zwischen Effektuierung und Hyperintegration*, Der Staat 53, 1, 12 (2014).

[76] Cf. supra, section 3.

[77] D. Shelton, *The Boundaries of Human Rights Jurisdiction in Europe*, cit. at 46, 95, 135 et seq.; A. Torres Pérez, *Conflicts of Rights in the European Union* (2009), 170.

[78] BVerfGE 140, 317, para. 44 – Europäischer Haftbefehl II; M. Schweitzer & H.-G. Dederer, *Staatsrecht III*, 11th ed. (2016), para. 78.

[79] P. Hallström, *Balance or Clash of Legal Orders – Some Notes on Margin of Appreciation*, cit. at 14, 70; C. Walter & M. Vordermayer, *Verfassungsidentität als Instrument zwischen Konstitutionalisierung und Fragmentierung*, JöR 63 N.F., 129, 148 (2015); H. D. Jarass, *Charta der Grundrechte der Europäischen Union*, 3rd ed. (2016), Art. 53 para. 32 et seq.

member states with only very restricted judicial review and from post-socialist member states and member states inspired by the Nordic model of welfare states. This legal heterogeneity is based on factual differences between the EU member states with regard to language,[80] culture and religion that have increased further after the accession of 10 countries from Central and Eastern Europe to the EU in 2004.

Moreover, Art. 6(3) TEU as well as Art. 52(3)(1) and Art. 53 CFR require a congruent interpretation of the CFR and the ECHR, including ECJ and ECtHR case law. If the ECtHR, under certain circumstances, grants Convention parties a margin of appreciation, the ECJ should follow this example in order to avoid incongruities in the interpretation of parallelly guaranteed fundamental rights. Another reason why the margin of appreciation concept can and should be adopted by the ECJ is that by means of this procedural instrument, conflicting rights or interests can be balanced more easily, a goal that cannot be achieved with the help of minimum standard clauses like Art. 53 ECHR. Most importantly, however, the ECJ itself, quite frequently, refers to the legal situation in the EU member states, taking into account national particularities without explicitly using the term "margin of appreciation".[81] Finally, even the SFSC, the Supreme Court of a federal country, under certain conditions, grants cantonal authorities a margin of discretion, which implies that the margin of appreciation concept is actually applicable outside the scope of international organizations. If the idea of reducing the intensity of judicial review, therefore, can also be made fruitful within a federal state, this applies all the more to the EU which is not a federal state, but a federal union of states that is more similar to an international organization than a country like Switzerland.

4.4. Common criteria and their applicability on ECJ case law

Due to the fact that the criteria applied by the ECtHR and the SFSC for granting a margin of discretion are not entirely congruent, it has to be examined if and how each criterion can be applied to

[80] Currently, the EU has 24 official languages.

[81] ECJ, C-159/90, Grogan, ECLI:EU:C:1991:378, para. 20; cf. D. Shelton, *The Boundaries of Human Rights Jurisdiction in Europe,* cit. at 46, 136.

ECJ case law. Additionally, since the EU is neither a federal state nor a simple international organization, each criterion identified in ECtHR and SFSC case law must be tested for its applicability to the EU context.

4.4.1. Nature and importance of the fundamental right concerned

One of the factors that determine the scope of the margin of appreciation in ECtHR case law is the nature and importance of the fundamental right concerned.[82] The SFSC, by contrast, does not only refer to these criteria,[83] but also takes into account the intensity of the interference,[84] which, however, is often connected directly to the right at stake. The criterion of the nature and importance of the fundamental right concerned can be applied to ECJ case law as well, particularly in the light of the fact that CFR and ECHR provisions widely have the same content and importance. Moreover, interferences with fundamental guarantees like the guarantee of human dignity or the right to life must be subject to careful judicial scrutiny in the EU as well. By contrast, when it comes to social or economic matters, Convention parties usually enjoy a wide margin of appreciation, which can be explained by the fact that the ECHR, by its nature, governs those areas only very fragmentarily. This reasoning, however, does not apply to the EU, with the Union disposing of far-reaching competences related to the European Single Market and economic matters in general. This applies even more, as the EU has passed extensive economic legislation, thus bringing about a wide-scale harmonization of the area. Therefore, generally reducing the ECJ's intensity of judicial review in this field seems not convincing, especially as the EU itself is more likely to interfere with fundamental rights in economy-related contexts than the member states, which only implement entirely determined EU law. This approach is fully in line with the SFSC's position to reduce the intensity of its scrutiny only where the relevant legislative competences have remained with the cantons. On the other hand, however, EU member states can enjoy a wide margin of

[82] See supra, section 4.1.
[83] Cf. BGE 96 I 586, 592 E. 6.
[84] See supra, section 4.2.

appreciation when it comes to social legislation, since the EU has only limited competences in this area.

4.4.2. Existence of a Union-wide consensus

The ECtHR grants Convention parties a wide margin of appreciation when there is no European consensus on the question at hand.[85] In spite of differences in reasoning, the SFSC's position in this regard is quite similar, with the Swiss Court reducing the intensity of its review when there is an inter-cantonal consensus.[86] Adopting the margin of appreciation concept to the EU in consequence means that the ECJ has to reduce the intensity of its scrutiny towards member states when there is no EU-wide consensus, or, putting it differently, where there is no EU harmonization, a wide margin of appreciation has to be granted. On the contrary, it is less obvious what the ECJ should do when there is an EU-wide consensus and one member state steps out of line. One option would be to refer to the identity-clause, provided that peculiar identities are protected by Article 4(2) TEU. Whereas, against the backdrop of the need for a uniform interpretation of EU law, there can be no room for the ECJ to lower the intensity of scrutiny if EU law brings about a full harmonization of a specific area, things look quite differently when the consensus exists on member states' level only. Moreover, if there is a member states-wide consensus on a certain fundamental right, at least theoretically, the creation of an unwritten EU fundamental right by the ECJ is possible,[87] which means that the ECJ could take steps towards the harmonization of fundamental rights protection in this area. Against this background, it would be inconsequent if the ECJ had to reduce the intensity of its judicial review towards a member state that does not stick to an EU-wide consensus, which means that the criterion brought forward by the ECtHR and shared by the SFSC should be adopted by the ECJ.

4.4.3. National or regional particularities

Both the ECtHR and the SFSC exercise judicial self-restraint when national or, respectively, cantonal particularities exist, which

[85] See supra, section 4.1.
[86] See supra, section 4.2.
[87] ECJ, C-11/70, Internationale Handelsgesellschaft, ECLI:EU:C:1970:114, para. 4; C-4/73, Nold, ECLI:EU:C:1974:51, para. 13.

can be better assessed by the national/cantonal authorities.[88] This criterion can be applied to ECJ case law without a second thought, because within the EU, many fields still fall short of full harmonization, with member states having upheld their own specific political, social and cultural traditions, even though diversities within in EU are less pronounced than between the 47 ECHR Convention parties. On the other hand, the EU is more heterogeneous than the Swiss Confederation. For instance, when it comes to the relationship between the state and religious communities, differences within the EU are overwhelming. While France sticks to the model of laicism, countries like the United Kingdom or Greece still have a state church, whereas the German system is characterized by the "friendly" separation between the state and religious communities.[89] In a certain way, the different models reflect the EU member states' national identities, which are protected by Art. 4(2)(1) TEU and which should be taken account of by means of a reduction of judicial scrutiny. Moreover, when it comes to the freedom of expression and the assessment of expressions potentially incompatible with the protection of morals, national authorities are in a far better position to deal with the case, since they usually have better knowledge of the local language than judges from the Luxembourg Court. Finally, the acceptance of the EU with the citizens of the member states can be increased if national authorities are granted a margin of discretion in order to take into account national particularities, which is crucial with regard to the future of the EU and the current crisis of confidence that has, among others, led to the Brexit vote in the United Kingdom.

4.4.4. Conflicting rights or interests

Both the ECtHR and the SFSC tend to reduce the intensity of judicial scrutiny when there is a conflict of rights or interests, particularly, if other criteria like regional particularities are met as well.[90] Even though the mere existence of a conflict of rights or interests usually is not sufficient for Convention parties or cantons to enjoy a margin of discretion, the general tendency shown by the

[88] See supra, sections 3.1. and 3.2.

[89] Cf. A. Freiherr von Campenhausen & H. de Wall, *Staatskirchenrecht*, 4th ed. (2006), 90 et seq.

[90] See supra, section 4.1 and 4.2.

ECtHR and the SFSC in such cases should be taken up by the ECJ. This is particularly true, as for cases of conflicting rights or interests, national courts often have developed specific guidelines and ways of balancing. This would be undermined if the ECJ imposed its own way of reasoning by hook or crook. Consequently, a wide margin of appreciation in case of conflicting rights or interests would be in line with Art. 5(3) TEU and the principle of subsidiarity.

4.4.5. Sufficient weighing of conflicting rights or interests by national courts

In direct connection with the existence of conflicting rights or interests stands the question of whether or not national authorities have sufficiently assessed and balanced those conflicting rights or interests. The ECtHR reduces the level of scrutiny if national authorities carried out a thorough judicial review and considered carefully the various interests at stake.[91] The SFSC, even though not mentioning this criterion explicitly, lowers the intensity of its judicial review as well if cantonal authorities took into account the different conflicting positions.[92] Both the principle of subsidiarity and the protection of the member states' national identities imply the application of the criterion to ECJ case law, since by renouncing a thorough review, the ECJ can demonstrate its respect for national courts, especially constitutional courts and their case law, which is crucial for a reasonable division of constitutional adjudication within the EU.

4.5. Consequences of an adoption on ECJ case law

4.5.1. The ECJ's current approach

Generally speaking, the intensity of the ECJ's judicial review on member states' measures is relatively high in comparison to the obvious judicial self-restraint with regard to EU acts that still prevails in ECJ case law.[93] On the other hand, even though not

[91] See supra, section 4.1.

[92] See supra, section 4.2.

[93] Cf. ECJ, C-399/11, Melloni, ECLI:EU:C:2013:107, para. 55 et seq.; C-112/13, A, ECLI:EU:C:2014:2195, paras. 41 and 44; in detail on the intensity of the ECJ's judicial scrutiny before and after the entering into force of the Lisbon S. A. de Vries, *The Protection of Fundamental Rights within Europe's Internal Market after Lisbon – An Endeavour for More Harmony*, in S. A. de Vries, U. Bernitz & St. Weatherill (eds.), *The Protection of Fundamental Rights in the EU After Lisbon* (2013),

referring directly to the margin of appreciation concept, the ECJ, in its case law, already uses certain criteria to justify a reduction of judicial review on member states' measures. This is particularly true when it comes to interferences with the basic freedoms of the internal market. In the *Omega* case, for instance, the ECJ pointed out that it was not the Court's intention "to formulate a general criterion for assessing the proportionality of any national measure which restricts the exercise of an economic activity"[94], with the national provisions concerned not being excluded "because one Member State has chosen a system of protection different from that adopted by another State"[95]. The ECJ's reasoning in this case shows that the Court, at least in certain cases, is ready to grant member states a margin of discretion if there is no EU-wide consensus on the aspect concerned and if national moral, cultural or religious particularities are at stake.[96] As a consequence, in *Omega*, Germany could refer to the principle of respect for human dignity, which has a particular status as an independent fundamental right in the German constitution, to ban certain laser games the object of which was to fire on human targets and thus "play at killing people", even though neither Community Law nor other member states' constitutions, at the time, granted the respect for human dignity constitutional rank. Some months earlier, in the *Schmidberger* case, the Luxembourg court had already demonstrated that it was willing to accept the assessment of national authorities when reviewing their proportionality test.[97] In the *Viking* case, by contrast, the ECJ reviewed very carefully the objectives pursued by the labor unions and the national courts' assessment in this regard,

59, 93 et seq.; W. Weiß, *Grundrechtsschutz durch den EuGH: Tendenzen seit Lissabon*, EuZW, 287, 290 (2013); J. Gerards, *Pluralism, Deference and the Margin of Appreciation Doctrine*, cit. at 58, 92 et seq., who points out that the intensity of the ECJ's judicial review is particularly high where EU interests are at stake.

[94] ECJ, C-36/02, Omega, ECLI:EU:C:2004:614, para. 37.

[95] ECJ, C-36/02, Omega, ECLI:EU:C:2004:614, para. 38.

[96] See also ECJ, C-470/11, SIA Garkalns, ECLI:EU:C:2012:505, para. 36; C-42/07, Liga Portuguesa de Futebol Profissional u. Bwin International, ECLI:EU:C:2009:519, para. 57; C-244/06, Dynamic Medien, ECLI:EU:C:2008:85, para. 44; C-275/92, Schindler, ECLI:EU:C:1994:119, para. 32; C-53/80, Eyssen, ECLI:EU:C:1981:35, para. 16 et seq.; C-204/90, Bachmann, ECLI:EU:C:1992:35, para. 10; generally s. R. Streinz, *Die Rolle des EuGH im Prozess der Europäischen Integration*, AöR 135, 1, 10 with n. 130 (2010).

[97] ECJ, C-112/00, Schmidberger, ECLI:EU:C:2003:333, para. 69 et seq.

reducing the margin of discretion of the latter almost to vanishing point.[98] On the other hand, however, the ECJ refrained from replacing the national courts' proportionality test by its own assessment, granting national judges at least a minimum amount of discretion when it comes to reviewing the result of the proportionality test.[99] The Court argued in a similar way in the *Laval* case, where the margin of discretion national authorities enjoyed with regard to the assessment of the aims pursued was also extremely narrow.[100] Even though there are cases like *Omega* and *Schmidberger*, in which the ECJ conceded national authorities a wide margin of discretion due to national particularities and the absence of an EU-wide consensus, there are other occasions concerning national security,[101] public order,[102] morals[103] or cultural diversity[104] to be taken into account. On those occasions, the Court proved to be very reluctant when it had to decide whether or not it should reduce the intensity of its judicial review. This shows that the ECJ's approach in this regard is far less coherent than the ECtHR's and also the SFSC's position.

The ECJ's level of judicial review is also influenced by the nature of the fundamental right concerned. As a result, the Court reviews national measures particularly carefully if there has taken

[98] ECJ, C-438/05, Viking, ECLI:EU:C:2007:772, para. 81 et seq. and 88 et seq.
[99] ECJ, C-438/05, Viking, ECLI:EU:C:2007:772, para. 85 et seq. and 88 et seq.
[100] ECJ, C-341/05, Laval, ECLI:EU:C:2007:809, para. 107 et seq.
[101] ECJ, C-50/83, Commission v. Italy, ECLI:EU:C:1984:128, para. 18.
[102] ECJ, Joined Cases C-340/14 and C-341/14, Trijber, ECLI:EU:C:2015:641, para. 68 et seq.
[103] ECJ, C-121/85, Conegate, ECLI:EU:C:1986:114, para. 23 et seq.; granting a margin of discretion, however, ECJ, C-34/79, Henn & Derby, ECLI:EU:C:1979:295, para. 16; s. cf. G. de Búrca, *The Principle of Proportionality and its Application in EC Law*, YEL 13, 105, 128 et seq. (1993).
[104] ECJ, C-288/89, Stichting Collectieve Antennevoorziening Gouda, ECLI:EU:C:1991:323, para. 27 et seq.; C-134/10, Commission v. Belgium, ECLI:EU:C:2011:117, para. 44 et seq.

place an alleged discrimination for reasons of sex[105] or age[106], which constitutes a difference to ECtHR and SFSC case law where interferences with the principle of non-discrimination not automatically lead to an intensification of the level of judicial review. Consequently, there is very little room for national particularities when it comes to the application of EU antidiscrimination law.[107] Moreover, the ECJ tends to apply a strict level of control when there is a presumed interference with fundamental guarantees like the right to liberty,[108] the respect for private and family life[109] or the freedom of expression.[110]

ECJ case law differs from ECtHR and SFSC case law insofar, as conflicting rights or interests and their balancing have had little relevance in ECJ case law so far. However, even though the ECJ has not confirmed explicitly that a conflict of rights and interests could reduce the intensity of its judicial review, cases like *Omega* and *Schmidberger* imply that this option has at least not completely been ruled out, which leaves open the door for the implementation of a structured margin of appreciation doctrine.

When it comes to the criterion of national authorities having balanced conflicting rights or interests properly, the ECJ tends to exercise strict judicial review even if national authorities have weighed the interests involved very carefully. One example of this approach is the *Carpenter* case where the ECJ replaced the assessment of the national courts, which had balanced the

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105 ECJ, C-285/98, Tanja Kreil, ECLI:EU:C:2000:2, para. 24 et seq.; C-222/84, Johnston, ECLI:EU:C:1986:206, para. 38 et seq.; C-318/86, Commission v. France, ECLI:EU:C:1988:352, para. 28 et seq.; C-423/04, Richards, ECLI:EU:C:2006:256, para. 33 et seq.; in detail, s. O. Koch, *Der Grundsatz der Verhältnismäßigkeit in der Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften* (2003), 488 et seq.

106 ECJ, C- 499/08, Ingeniørforeningen i Danmark, ECLI:EU:C:2010:600, para. 33; C-388/07, Age Concern England, ECLI:EU:C:2009:128, para. 51; C-144/04, Mangold, ECLI:EU:C:2005:709, para. 61 et seq.

107 ECJ, C-13/05, Chacón Navas, ECLI:EU:C:2006:456, para. 56; Opinion of Advocate General Sharpston, C-188/15, Bougnaoui and ADDH, ECLI:EU:C:2016:553, para. 62 et seq.; granting a margin of discretion in such cases, however, Opinion of Advocate General Kokott, C-157/15, Achbita, ECLI:EU:C:2016:382, para. 125.

108 ECJ, C-601/15 PPU, J. N., ECLI:EU:C:2016:84, para. 56 et seq.

109 ECJ, C-465/00, Österreichischer Rundfunk and Others, ECLI:EU:C:2003:294, para. 83.

110 ECJ, C-73/07, Tietosuojavaltuutettu, ECLI:EU:C:2008:727, para. 56 et seq.

conflicting rights sufficiently, by its own opinion.[111] Similarly, in *Schmidberger*, in spite of granting Austrian authorities a margin of discretion, the ECJ actually reviewed the national courts' balancing of rights very carefully.[112] Therefore, with regard to the assessment of national/cantonal courts, both the ECtHR and the SFSC seem to exercise more judicial self-restraint than the ECJ.

4.5.2. ECJ case law after the adoption of the margin of appreciation concept

Gerards suggests that the ECJ introduce three levels of judicial review: strict scrutiny, intermediate review and marginal review.[113] Unlike the SFSC, the ECJ, so far, very rarely reduces the intensity of its judicial review to a mere arbitrary test, an approach that is likely be pursued also after the adoption of the margin of appreciation concept to ECJ case law. Apart from that, the approach proposed by *Gerards* could help the ECJ determine the scope of the margin of appreciation adequate in the case at hand. However, the question remains as to how the ECJ should decide on the appropriate level of review if intensity-determining factors like the existence of an EU-wide consensus and the nature and importance of the right concerned are pulling in different directions. In this context, *Gerards* mentions the example of national measures aimed at protecting important constitutional values or complex socio-economic interests seriously hampering fundamental interests such as the right to personal autonomy.[114] So far, neither the ECtHR nor the SFSC or the ECJ have presented a coherent approach as to how to select the appropriate level of review in such cases, limiting themselves to stating that conflicting factors or criteria are present.[115] To solve the problem, *Gerards* suggests the recourse to classical theories of procedural democracy, according to which important decisions that require value judgments or specific expertise should normally be taken by the legislature and the

[111] ECJ, C-60/00, Carpenter, ECLI:EU:C:2002:434, para. 40 et seq.
[112] ECJ, C-112/00, Schmidberger, ECLI:EU:C:2003:333, para. 93.
[113] J. Gerards, *Pluralism, Deference and the Margin of Appreciation Doctrine*, cit. at 58, 117.
[114] J. Gerards, *Pluralism, Deference and the Margin of Appreciation Doctrine*, cit. at 58, 117.
[115] J. Gerards, *Pluralism, Deference and the Margin of Appreciation Doctrine*, cit. at 58, 117.

executive, not by courts.[116] Accordingly, the general approach to be taken by the ECJ should be the application of a marginal test, with intensive scrutiny only applicable if there is clear evidence that the national decision-making process was obviously taunted by essential flaws and defects.[117] The approach brought forward by *Gerards* seems a step into the right direction, as it allows for the consideration of the specific circumstances of a case, but nonetheless requires some specification as to how precisely the adequate level of review can be determined. For this purpose, firstly, the relevant criteria that justify the reduction of judicial scrutiny must be identified to figure out where only marginal review is adequate and where an intermediate level of review should be applied. With regard to factors pulling in different directions, in a second step, the "mean value" ('Mittelwert') of judicial scrutiny has to be identified, with factors in favor of a reduction of judicial review as well as aspects suggesting a strict review being taken account of. Such an approach is not completely uncommon within the framework of the application of the principle of proportionality and its judicial review, with German administrative authorities and courts relying on the idea as well when it comes to determining the amount of pollution or noise tolerable in a certain type of area.[118] Therefore, if one factor like the interference with a fundamental interest such as the right to life requires a strict scrutiny while another aspect like the fact that national courts have weighed all relevant factors very carefully argues for a wide margin of appreciation, a compromise has to be found, which means that the ECJ has to apply an intermediate level of scrutiny and concede member states a "corridor" when it comes to determining adequate solutions in such cases.

Applied to cases already decided by the ECJ, it becomes obvious that the judgment of the ECJ, at least in some cases, would have been different, if the Luxembourg court had stuck to the

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[116] J. Gerards, *Pluralism, Deference and the Margin of Appreciation Doctrine*, cit. at 58, 118.

[117] J. Gerards, *Pluralism, Deference and the Margin of Appreciation Doctrine*, cit. at 58, 119.

[118] BVerwGE 50, 49, 54 et seq.; detailed on the matter s. O. Reidt & G. Schiller, in R. v. Landmann & G. Rohmer (eds.), *Umweltrecht* (2017), § 2 18. BImSchV, para. 28 et seq.; H. Schulze-Fielitz, in M. Führ (ed.), *GK-BImSchG* (2016), § 50 para. 81.

concept outlined above. For instance, in the *Viking* case, where the scope of the margin of discretion granted to national authorities was very narrow,[119] the ECJ would have been forced to acknowledge that there was no EU-wide consensus on the matter at hand. Moreover, it would have had to take into account Finnish particularities with regard to labor law and the right to strike. Furthermore, the fact that conflicting interests lay at the core of the case could not have been neglected. In addition, the ECJ would have had to consider that the EU had no competence for regulating labor disputes. On the contrary, the Luxembourg court could have stuck to the fact that national industrial dispute measures interfered with the freedom of establishment, one of the basic freedoms of the EU Single Market. All in all, in *Viking*, the ECJ consequently should have applied an intermediate level of review instead of a strict review.

In the *Omega* case, by contrast, the approach outlined in this paper would have changed little with regard to the intensity of judicial review, with national authorities enjoying an intermediate margin of discretion also under these premises. In spite of the fact that the freedom of services had been interfered with, the protection of human dignity constituted a national guarantee unique within the EU at the time, implying a reduction of the level of judicial review for reasons of national particularities. Moreover, German authorities had balanced the conflicting rights and interests carefully, so that, in sum, the "mean value" of scrutiny had to be intermediate. This shows that the approach developed in this paper could change ECJ case law in some circumstances, while it has to be acknowledged that in other cases, the results might not differ very much from those found by the ECJ without the application of a coherent margin of appreciation doctrine.

5. National constitutional courts' judicial self-restraint towards the ECJ

However, the approach of exercising judicial self-restraint is not only applied by European courts to protect national courts, but, inversely, can be used by national courts in favor of European

[119] ECJ, C-438/05, Viking, ECLI:EU:C:2007:772, para. 81 et seq. and 88 et seq.; s. supra, section 4.4.1).

courts like the ECJ, shaping the division of constitutional adjudication in Europe as such. This is even true in the absence of national examples from federal states like Switzerland or Germany, where state courts usually do not reduce the intensity of judicial review to grant federal courts a margin of discretion. With regard to the EU and its relationship with member states, however, things are quite different, indicating that the Union is not a state. In comparison to the margin of appreciation doctrine, the concept of conceding the ECJ a right "to tolerance of error" implies that national courts review ECJ decisions very carefully and establish an error, but refrain from considering it sufficiently qualified to draw consequences from it. The concept in favor of the ECJ was first introduced by the FCC in its *Honeywell* decision back in 2010. Giving reasons for its decision, the German court argued that *ultra vires* review may only be exercised in an EU-friendly manner.[120] This means that *ultra vires* review can only be considered if it is manifest that acts of the European bodies and institutions have taken place outside the transferred competences.[121] According to the FCC, a breach of the principle of conferral is "only manifest if the European bodies and institutions have transgressed the boundaries of their competences in a manner specifically violating the principle of conferral, the breach of competences is in other words sufficiently qualified"[122] ('hinreichend qualifiziert'). Therefore, if an ECJ judgment is to be considered *ultra vires*, it must be "manifestly in violation of competences and […] the impugned act [must be] highly significant in the structure of competences between the Member States and the Union with regard to the principle of conferral and to the binding nature of the statute under the rule of law",[123] a formula that be also found in the *OMT* decision[124] and that can be made fruitful both with regard to the exercise of competences and the interpretation of the CFR, since an extremely wide interpretation of the scope of the CFR can also constitute an *ultra vires* act. Other national courts, in particular the

[120] BVerfGE 126, 286, 303 – Honeywell.
[121] BVerfGE 126, 286, 304 – Honeywell.
[122] BVerfGE 126, 286, 303 – Honeywell.
[123] BVerfGE 126, 286, 303 – Honeywell.
[124] BVerfGE 142, 123, 147 et seq. – OMT; see also FCC, preliminary reference of July 18, 2017 – 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16 –, NJW 2017, 2894, para. 63.

Czech Constitutional Court and the Danish Supreme Court, who have declared ECJ judgments *ultra vires* in the past,[125] should follow the FCC's example and grant the ECJ a right "to tolerance of error" when exercising *ultra vires* review, which would facilitate the cooperation between national courts and the ECJ significantly.

6. Conclusion

"Le droit national reste […] le domaine réservé des juridictions nationales et la Cour se concentre sur le droit de l'Union"[126] – this idea expressed by the former ECJ President Skouris, after *Åkerberg Fransson* and *Melloni*, seems to be wishful thinking, with the ECJ interpreting Art. 51(1) CFR very widely and reducing the room for the application of national fundamental rights in EU law-related cases to an absolute minimum, even though *Taricco II*, most recently, has offered some light on the horizon for national courts. In reaction to *Åkerberg Fransson* and *Melloni*, various national courts had shown their frustration over ECJ case law, emphasizing that they were ready to apply national fundamental rights when, in their view, the connection with EU law in the case at hand was too loose to speak of an implementation of EU law. This comes at a time when anger and disappointment with the EU, its policy and its institutions are increasing, culminating in the UK's Brexit decision and anti-EU movements in numerous EU countries. The only way to restore trust in the Union, therefore, is to respect member states' constitutional identity, which starts with preserving diversity in the EU without threatening the uniform interpretation and application of EU law. For this purpose, the margin of appreciation doctrine developed by the ECtHR and, in a similar form, also applied by the SFSC, with some due modifications, should be adopted by the ECJ to guarantee a more reasonable division of constitutional adjudication in the EU. This approach would enable the ECJ to vary the level of its judicial scrutiny from marginal review over intermediate review to strict review, depending upon the circumstances of the case at hand and the presence of certain criteria requiring the exercise of judicial self-

[125] Czech Constitutional Court, judgment of February 14, 2012 – Pl ÚS 5/12 –, Slovak Pensions –, and Danish Supreme Court, judgment of December 6, 2016 – 15/2014.

[126] V. Skouris, *Speech*, cit. at 1, 123.

restraint towards national courts, a strategy that is similar to the doctrine of judicial self-restraint[127] developed in the US Supreme Court's jurisprudence in favor of other branches of government. Conversely, member states, too, should reduce the intensity of scrutiny towards the ECJ in accordance with the FCC's position in *Honeywell*. Under these conditions, the EU system of fundamental rights protection is far from doomed to failure, but could show the Union as such which direction to take in the future if it wants to survive.

[127] T. A. O'Donnell, *The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights*, HRQ 4, 474, 478 (1982).