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A sustainable Europe: Society, Politics and Culture in the Anthropocene

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1. Libro

Un autor

—Lluís Duch, *Mito, interpretación y cultura* (Barcelona: Herder, 1998), 56-58.
—Duch, *Mito*…, 15.
—Santiago Segura, *Gramática latina* (Bilbao: Universidad de Deusto, 2012), 74-76.
—Segura, *Gramática*..., 75.

Duch, Lluís. *Mito, interpretación y cultura*. Barcelona: Herder, 1998.

Segura, Santiago. *Gramática latina.* Bilbao: Universidad de Deusto, 2012.

Dos autores

—Orfelio G. León e Ignacio Montero, *Diseño de investigaciones: Introducción a la lógica de la investigación en psicología y educación* (Madrid: McGraw-Hill/Interamericana de España, 1993).

León, Orfelio G. e Ignacio Montero. *Diseño de investigaciones: Introducción a la lógica de la investigación en psicología y educación*. Madrid: McGraw-Hill/Interamericana de España, 1993.

Tres autores

—Julio Borrego Nieto, José Jesús Gómez Asencio y Emilio Prieto de los Mozos, *El subjuntivo*…

Borrego Nieto, Julio, José Jesús Gómez Asencio y Emilio Prieto de los Mozos. *El subjuntivo: valores y usos*. Madrid: SGEL.

Cuatro o más autores

En la nota se cita solo el nombre del primer autor, seguido de *et al*. Sin embargo, en la entrada de la bibliografía se citan todos los autores.

—Natalia Ojeda *et al*., *La predicción del diagnóstico de esquizofrenia...*
—Ojeda *et al*., *La predicción*…

Editor, traductor o compilador en lugar de autor

—Irene Andrés-Suárez, ed., *Antología del microrrelato español (1906-2011): El cuarto género narrativo* (Madrid: Cátedra, 2012), 15-16.
—Andrés-Suárez, *Antología del microrrelato*...

Andrés-Suárez, Irene, ed. *Antología del microrrelato español (1906-2011): El cuarto género narrativo*. Madrid: Cátedra, 2012.

Editor, traductor o compilador además de autor

—Salvador Fernández Ramírez, *La enseñanza de la gramática y la literatura*. Ed. por José Polo (Madrid: Arco/Libros, 1985), 145-46.

18 Fernández Ramírez, *La enseñanza*…, 33

Fernández Ramírez, Salvador. *La enseñanza de la gramática y la literatura*. Editado por José Polo. Madrid: Arco/Libros, 1985.

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—Josefina Gómez Mendoza, «Ecología urbana y paisaje de la ciudad», en *La ciudad del futuro*, ed. por Antonio Bonet Correa (Madrid: Instituto de España, 2009), 177-217.

19 Gómez Mendoza, «Ecología urbana y paisaje de la ciudad», 180.

Gómez Mendoza, Josefina. «Ecología urbana y paisaje de la ciudad». En *La ciudad del futuro*, editado por Antonio Bonet Correa, 177-217. Madrid: Instituto de España, 2009.

Prefacio, prólogo, introducción o parte similar de un libro

—James Rieger, introducción a *Frankenstein; or, The Modern Prometheus,* de Mary Wollstonecraft Shelley (Chicago: University of Chicago Press, 1982), XX-XXI.
—Rieger, introducción, XXXIII.

Rieger, James. Introducción a *Frankenstein; or, The Modern Prometheus*, de Mary Wollstonecraft Shelley, XI-XXXVII. Chicago: University of Chicago Press, 1982.

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—Jane Austen, *Pride and Prejudice* (Nueva York: Penguin Classics, 2008), edición en PDF, cap. 23.
—Austen, *Pride and Prejudice*, cap. 23.

Austen, Jane. *Pride and Prejudice*. Nueva York: Penguin Classics, 2008. Edición en PDF.

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—Salvador Gutiérrez Ordóñez, *Lingüística y semántica: Aproximación funcional* (Oviedo: Universidad de Oviedo, 1981), http://www.gruposincom.es/publicaciones-de-salvador-gutierrezordonez.
—Philip B. Kurland y Ralph Lerner, eds., *The Founders' Constitution* (Chicago: University of Chicago Press, 1987), acceso el 28 de febrero de 2010, http://press-pubs.uchicago.edu/founders/.
—Gutiérrez Ordóñez, *Lingüística y semántica.*
—Kurland y Lerner, *Founder's Constitution*, cap. 10, doc. 19.

Gutiérrez Ordóñez, Salvador. *Lingüística y semántica: Aproximación funcional*. Oviedo:

Universidad de Oviedo, 1981. http://www.gruposincom.es/publicaciones-de-salvador-gutierrez-ordonez.

Kurland, Philip B., y Ralph Lerner, eds. *The Founders' Constitution*. Chicago: University of Chicago Press, 1987. Acceso el 28 de febrero de 2010. http://press-pubs.uchicago.edu/founders/.

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—María José Hernández Guerrero, «Presencia y utilización de la traducción en la prensa española», *Meta* 56, n.º 1 (2011): 112-13.
—Hernández Guerrero, «Presencia y utilización de la traducción en la prensa española», 115.

Hernández Guerrero, María José. «Presencia y utilización de la traducción en la prensa española».*Meta* 56, n.º 1 (2011): 101-118.

2.2. Artículo en una revista en línea

—Ángeles Feliu Albadalejo, «La publicidad institucional en la arena parlamentaria española», *Revista Latina de Comunicación Social* 66 (2011): 470, doi:10.4185/RLCS-66-2011-941-454-481.
—Feliu Albadalejo, «La publicidad institucional», 475.

Feliu Albadalejo, Ángeles. «La publicidad institucional en la arena parlamentaria española»., *Revista Latina de Comunicación Social* 66 (2011): 454-481. doi:10.4185/RLCS-66-2011-941-454-481.

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—Sheryl Gay Stolberg y Robert Pear, «Wary Centrists Posing Challenge in Health Care Vote», *New York Times*, 27 de febrero de 2010, acceso el 28 de febrero de 2010, http://www.nytimes.com/2010/02/28/us/politics/28health.html.
—Stolberg y Pear, «Wary Centrists...».

Stolberg, Sheryl Gay, y Robert Pear. «Wary Centrists Posing Challenge in Health Care Vote». *New York Times*, 27 de febrero de 2010. Acceso el 28 de febrero de 2010. http://www.nytimes.com/2010/02/28/us/politics/28health.html.

4. Reseña del libro

—David Kamp, «Deconstructing Dinner», reseña de *The Omnivore's Dilemma: A Natural History of Four Meals*, de Michael Pollan, *New York Times*, 23 de abril de 2006, Sunday Book Review, http://www.nytimes.com/2006/04/23/books/review/23kamp.html.
—Kamp, «Deconstructing Dinner».

Kamp, David. «Deconstructing Dinner». Reseña de *The Omnivore's Dilemma: A Natural Historyof Four Meals*, de Michael Pollan. *New York Times*, 23 de abril de 2006, Sunday Book Review. http://www.nytimes.com/2006/04/23/books/review/23kamp.html.

5. Tesis o tesina

—Francisco José Hernández Rubio, «Los límites del eliminacionismo: Una solución epigenética al problema mente-cerebro» (tesis doctoral, Universidad de Murcia, 2010), 145, http://hdl.handle.net/10201/17600.
—Hernández Rubio, «Los límites del eliminacionismo», 130-132.

Hernández Rubio, Francisco José. «Los límites del eliminacionismo: Una solución epigenética al problema mente-cerebro». Tesis doctoral. Universidad de Murcia, 2010. http://hdl.handle.net/10201/17600.

6. Documento presentado en conferencias, ponencias, congresos o similares

—Silvia Rodríguez Vázquez, «Flujos de traducción: Herramientas de ayuda a la gestión de proyectos en función de la situación de trabajo» (conferencia, Universidad de Salamanca, 8 de noviembre de 2012).
—Rodríguez Vázquez, «Flujos de traducción».

Rodríguez Vázquez, Silvia. «Flujos de traducción: Herramientas de ayuda a la gestión de proyectos en función de la situación de trabajo». Conferencia pronunciada en la Universidad de Salamanca, 8 de noviembre de 2012.

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—«McDonald's Happy Meal Toy Safety Facts», McDonald's Corporation, acceso el 19 de julio de 2008, http://www.mcdonalds.com/corp/about/factsheets.html.

McDonald's Corporation. «McDonald's Happy Meal Toy Safety Facts». Acceso el 19 de julio de 2008. http://www.mcdonalds.com/corp/about/factsheets.html.

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—José Luis Ramírez, 17 de marzo de 2012 (21:28), comentario a Alberto Bustos, «Hacer los deberes», *Blog de Lengua española*, 13 de marzo de 2012, http://blog.lengua-e.com/2012/hacerlos-deberes/#comments.

Blog de Lengua española. http://blog.lengua-e.com/2012/hacer-los-deberes/#comments.

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—Lourdes Díaz, correo electrónico al autor, 15 de mayo de 2011.
—Mike Milanovic (director ejecutivo de Cambridge ESOL), en conversación con el autor, septiembre de 2011.

En lo que se refiere a las entrevistas, sea cual sea su forma, la cita normalmente comienza por el nombre de la persona entrevistada. El entrevistador, en caso de mencionarse, figura en segundo lugar:

—Benjamin Spock, entrevista por Milton J. E. Senn, 20 de noviembre de 1974, entrevista 67A, transcripción, Senn Oral History Collection, National Library of Medicine, Bethesda, MD.
—Spock, entrevista.

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—Asunto C-38/14, Mr. Jones versus Secretariat of State, Judgment of the Court of 23 June 2015, ECLI:EU:C:2015:222.

Norma jurídica

—Ley 14/2007, de 26 de noviembre, del Patrimonio Histórico de Andalucía (*BOJA* núm. 248 de 19 de diciembre de 2007).
—Real Decreto 1065/2007, de 27 de julio, por el que se aprueba el Reglamento General de las actuaciones y los procedimientos de gestión e inspección tributaria y de desarrollo de las normas comunes de los procedimientos de aplicación de los tributos (*BOE* núm. 213 de 5 de septiembre de 2007).
—Reglamento (UE) n.º 492/2011, del Parlamento Europeo y del Consejo, de 5 de abril de 2011, relativo a la libre circulación de trabajadores (*DOUE* L 241 de 27 de mayo de 2011).

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Sumario / Contents

Presentación
Introduction

Introduction

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Abstract: The process of European integration has evolved through crises of governance towards ever greater integration of the societies of the participating member states, giving rise to new questions about the political organization of the European continent. At the same time, European societies have become ever more diverse, giving rise to new and complex problematiques of coexistence. Europe must now also deal with the consequences of an economic model based on the consumption of finite resources. Beyond specific crises and events, Europe is therefore faced with a multifaceted challenge of ecological, democratic and societal sustainability. To approach the challenges from the point of view of sustainability means to see the ecological, democratic and societal long-term viability of Europe as made possible by the continuous reconstruction of European societies through innovative cultural, social, economic and political practices under the ecological constraints posed by the limits of our planet.

Keywords: Sustainability, democracy, diversity, societal trust, magic concepts, Spitzenkandidaten, sustainable development, participatory democracy; European Citizens' Initiative, community-based tourism, imaginary, threat perception, factorial survey

Europe has been described as a model that is continuously 'failing forwards' through crises towards ever-greater institutional integration, supported by increased economic efficiency and prosperity. However, climate change has made it perfectly clear that the current model of economic expansion based on the consumption of finite resources and continuous contamination of the natural environment cannot continue to form the basis of the material underpinning of societal integration in Europe.

At the same time, we are also witnessing how the discussion regarding the *finalité* or 'end point' of European integration is increasingly on the political agenda, with political parties and social movements representing substantial parts of the European population openly questioning the current state of affairs in Europe as well as the spill-over logics of European integration associated with the 'failing forward' approach, openly advocating

for a spill-back, taking competences and functions back to the state, and reconstructing the nation-state as the most important focus for value orientations and political and social solidarity.

Furthermore, these agendas often include a securitisation of difference and a strong self-other dichotomy with diversity and human mobility being constructed as a threat on economic, cultural, social and religious grounds. In fact, the notion of the Anthropocene stresses precisely the interconnectedness of ecological, social, economic and political problems and struggles, epitomised by wars over natural resources, the challenge of managing a circular economy and climate change giving rise to increased human mobility, challenges to the redistribution of wealth in societies and the aggravation of existing and creation of new social and political cleavages.

Whereas the triple ecological, democratic and societal challenge that Europe faces may be conceptualised in terms of looking for solutions to crises, an approach from the concept of sustainability maintains a vision of the broader embeddedness of whichever specific problems we may focus on with an awareness of the broader patterns of ecological, political and social change at the beginning of the 21st century, in Europe and beyond. Sustainability has generally been thought of in terms of creating a balance between current and future human needs and aspirations in the intersection of macroeconomics (GDP growth), the environment (balanced eco-systems) and the social field (education, employment), which has again led to criticisms of the concept as having an inherently conservative analytical and political bias. However, the notion of a sustainable Europe does not need to imply a static, reactionary, self-sufficient and inward-looking Europe. In contrast, it could also be conceptualised as a dynamic concept that sees ecological, democratic and societal long-term viability as made possible by the continuous reconstruction of European societies through innovative cultural, social, economic and political practices under the ecological constraints posed by the limits of our planet, as well as the global embeddedness of the multifaceted challenges currently facing Europe.

In this context, this current issue 64/2021 of the *Deusto Journal of European Studies* include 4 articles about sustainability in and of Europe. They were written as part of the intensive programme of the Erasmus Mundus Master Degree Programme in Euroculture organised by the University of Deusto in June 2020 under the title "A sustainable Europe? Society, politics and culture in the Anthropocene" and in which participated more than 100 students and academic staff from the Euroculture Consortium that apart from the University of Deusto also includes: University of Groningen, Georg-August-Universität Göttingen, Jagellonian

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University of Krakow, Palacký University of Olomouc, University of Strasbourg, University of Udine, University of Uppsala.

Trond Ove Tøllefsen opens this special issue with a systematic and critical examination of the contested concept of sustainability and its magical properties, in terms of its broadness, positive connotations, consensus adoption widespread use. Through a horizontal and vertical analysis, the article questions the meaning of sustainability in the context of millennia of human impact on nature. It becomes clear that although the magical properties of concept of sustainability have made it a victim of strategic misuse by self-interested actors, it has also allowed a broadly shared discourse on the responsible use of natural resources to be a powerful rallying point.

Trond Ove Tøllefsen abre esta edición temática con una examinación sistemática y crítica del concepto de sostenibilidad y sus propiedades mágicas, entendido como su amplitud de significado, connotaciones positivas, adopción consensuada y uso extendido. A través de un análisis horizontal y vertical, el artículo cuestiona el significado de sostenibilidad en el contexto de la historial larga del impacto humano en la naturaleza. Concluye que las propiedades mágicas del concepto de sostenibilidad han permitido generar un discurso compartido sobre el uso responsable de recursos naturales que moviliza a la acción, a pesar de que estas mismas propiedades mágicas también ha posibilitado su mal uso estratégico.

Carlos Espaliú Berdud, turns the focus to democratic sustainability in the EU, concretely in the parliamentarisation of the political system and the experiences with the appointments of the Commission president in 2014 and 2019. Whereas the 2014 appointment reflected a functioning of the *Spitzenkandidaten* system that could be considered a strengthening of the parliamentarisation of the EU political system, the 2019 appointment showed an opposite outcome. The author concludes that this was a result of a lack of respect for the results of the European parliamentary elections that contributed to decrease the legitimacy of the EU, and ultimately of the democratic sustainability of the EU as a political system in between the international organization and the federal state.

Edurne Bartolomé, **Hermann Dülmer and Lluis Coromina**, focus on the societal sustainability of Europe, concretely how diversity in society generates threat perceptions and trust among different groups. The empirical basis of the article is a factorial survey carried out in Bilbao and Cologne that examined the impact on social trust of different factors, such as age, skin colour, religion and socio-economic conditions. The authors conclude that socio-economic factors are more important than cultural factors in terms of social trust, but also that numerous obstacles remain for the consolidation of social trust in a context of diversity. The creation of a

more inclusive European identity and a societally sustainable Europe will therefore require a change in general attitudes, through education and generational replacement.

Monica Pascoli analyses the impact of tourism on sustainability, with special emphasis on the societal sustainability of local communities. The author analyses how a tourist imaginary arises as a negotiated image through the negotiation of different stakeholders. The article is based on interviews carried out in Paularo, Italy. In this case, no dissonant constructions were found between stakeholders, although a large difference in the interpretation of natural and cultural heritage among locals and tourist professionals was found, both in terms of how it should be experienced and the meaning attached to different sites. This further indicates a great potential for community-based approaches to tourism as facilitator of societal sustainability.

About the author

Steffen Bay Rasmussen is associate professor of international relations at the University of Deusto and Director of Studies of the Erasmus Mundus Master in Euroculture: Society, politics and culture in a global context. He teaches courses on Public International Law and International Relations, including on the history and theory of European integration, comparative regional integration and public diplomacy and has been a visiting professor and researcher at various universities, such as the Netherlands Institute of International Relations (Clingendael), the Sultan Qaboos University (Oman), University of Navarra (Spain), and the University of the Basque Country (Spain). His current research is centred on EU international strategy and diplomatic relations, public diplomacy as well as on EU international identity and ontological security. His recent publications include "The ideas and practices of the European Union's structural antidiplomacy: An unstable equilibrium", Boston, Brill, 2018.

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Presentación

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Resumen: El proceso de integración europea ha evolucionado a través de crisis de gobernanza hacia una integración cada vez mayor de las sociedades europeas, provocando nuevas preguntas sobre la organización política del continente europeo. A la vez, las sociedades europeas se han hecho más diversas, haciendo surgir nuevos y complejos problemas de coexistencia. Ahora, Europa también debe gestionar las consecuencias de su modelo económico basado en el consumo de recursos finitos. Más allá de crisis y acontecimientos específicos, Europa se enfrenta, por tanto, a un desafío multifacético de sostenibilidad ecológica, democrática y social. Abordar los desafíos desde el punto de vista de la sostenibilidad significa ver la viabilidad ecológica, democrática y social a largo plazo de Europa como posible gracias a la reconstrucción continua de las sociedades europeas mediante prácticas culturales, sociales, económicas y políticas innovadoras, dentro de las limitaciones ecológicas definidas por los límites de nuestro planeta.

Palabras clave: Sostenibilidad, democracia, diversidad, confianza social, conceptos mágicos, Spitzenkandidaten, desarrollo sostenible, democracia participativa; Iniciativa Ciudadana Europea, turismo comunitario, imaginario, percepción de amenazas, encuesta factorial

Europa ha sido descrita como un modelo que está continuamente «fallando hacia adelante» a través de crisis hacia una integración institucional cada vez mayor, respaldada por un aumento de la eficiencia económica y de la prosperidad. Sin embargo, el cambio climático ha dejado perfectamente claro que el modelo actual de expansión económica basado en el consumo de recursos finitos y la contaminación continua del medio ambiente natural no puede seguir formando la base del sustento material de la integración social en Europa.

Al mismo tiempo, también estamos siendo testigos de cómo la discusión sobre la *finalité* o «punto final» de la integración europea está cada vez más en la agenda política, con partidos políticos y movimientos sociales que representan partes sustanciales de la población europea cuestionando abiertamente la situación actual en Europa, así como las lógicas de desbor-

damiento funcional en la integración europea asociado con el enfoque de «fallar hacia adelante», y abogando abiertamente por un *spill-back*, que implica devolver competencias y funciones al estado y reconstruyendo el estado-nación como el lugar más importante para las orientaciones identitarias y la solidaridad política y social.

Además, estas agendas a menudo incluyen una securitización de la diferencia y una fuerte dicotomía yo-otro, construyendo la diversidad y la movilidad humana como una amenaza por motivos económicos, culturales, sociales y religiosos. De hecho, la noción del Antropoceno enfatiza precisamente la interconexión de los problemas y luchas ecológicas, sociales, económicas y políticas, ejemplificada por las guerras por los recursos naturales, el desafío de gestionar una economía circular y el cambio climático que a su vez da lugar a una mayor movilidad humana, desafíos para la redistribución de la riqueza en las sociedades y el agravamiento de las divisiones sociales y políticas existentes y la creación de nuevas.

Mientras que el triple desafío ecológico, democrático y social que enfrenta Europa puede conceptualizarse en términos de búsqueda de soluciones a las crisis, un enfoque desde el concepto de sostenibilidad mantiene una visión más amplia de cualquier problema específico con una conciencia de los patrones más amplios de cambio ecológico, político y social a principios del siglo XXI, en Europa y más allá. En general, se ha pensado en la sostenibilidad en términos de crear un equilibrio entre las necesidades y aspiraciones humanas actuales y futuras en la intersección de la macroeconomía (crecimiento del PIB), el medio ambiente (ecosistemas equilibrados) y el campo social (educación, empleo), que a su vez ha generado críticas al concepto por tener un sesgo analítico y político inherentemente conservador.

Sin embargo, la noción de una Europa sostenible no tiene por qué implicar una Europa estática, reaccionaria y autosuficiente que mira hacia adentro. Al contrario, también podría conceptualizarse como un concepto dinámico que considera que la viabilidad ecológica, democrática y social a largo plazo es posible gracias a la reconstrucción continua de las sociedades europeas mediante prácticas culturales, sociales, económicas y políticas innovadoras, dentro de las limitaciones ecológicas definidas por los límites de nuestro planeta.

Es en este contexto que se ha creado el número 64/2021 de los *Cuadernos Europeos de Deusto* que incluye 4 artículos sobre la sostenibilidad en y de Europa. Fueron redactados como parte del Programa Intensivo del Máster Erasmus Mundus en Eurocultura organizado por la Universidad de Deusto en junio de 2020 bajo el título «¿Una Europa sostenible? Sociedad, política y cultura en el Antropoceno» y en el que participaron más de 100 estudiantes académicos del Consorcio Eurocultura, que además de la Uni-

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versidad de Deusto incluye: Universidad de Groningen, Georg-August-Universität Göttingen, Universidad Jagelloniana de Cracovia, Universidad Palacký de Olomouc, Universidad de Estrasburgo, Universidad de Udine, Universidad de Uppsala.

Trond Ove Tøllefsen abre esta edición temática con una examinación sistemática y crítica del concepto de sostenibilidad y sus propiedades mágicas, entendido como su amplitud de significado, connotaciones positivas, adopción consensuada y uso extendido. A través de un análisis horizontal y vertical, el artículo cuestiona el significado de sostenibilidad en el contexto de la historial larga del impacto humano en la naturaleza. Concluye que las propiedades mágicas del concepto de sostenibilidad han permitido generar un discurso compartido sobre el uso responsable de recursos naturales que moviliza a la acción, a pesar de que estas mismas propiedades mágicas también ha posibilitado su mal uso estratégico.

Carlos Espaliú Berdud, pone el foco a la sostenibilidad democrática en la UE, concretamente en la parlamentarización del sistema político y las experiencias con los nombramientos del presidente de la Comisión en 2014 y 2019. Mientras que el nombramiento de 2014 reflejó un funcionamiento del sistema *Spitzenkandidaten* que podría considerarse un fortalecimiento de la parlamentarización del sistema político de la UE, el nombramiento de 2019 mostró un resultado opuesto. El autor concluye que esto fue el resultado de una falta de respeto por los resultados de las elecciones parlamentarias europeas que contribuyó a disminuir la legitimidad de la UE y, en última instancia, disminuir la sostenibilidad democrática de la UE como sistema político entre la organización internacional y el estado federal.

Edurne Bartolomé, Hermann Dülmer y Lluis Coromina se centran en la sostenibilidad social de Europa, concretamente en cómo la diversidad en la sociedad genera percepciones de amenaza o confianza entre diferentes grupos. La base empírica del artículo es una encuesta factorial realizada en Bilbao y Colonia que examina el impacto en la confianza social de diferentes factores como la edad, el color de piel, la religión y las condiciones socioeconómicas. Los autores concluyen que los factores socioeconómicos son más importantes que los culturales en términos de confianza social, pero también que quedan numerosos obstáculos para la consolidación de la confianza social en el actual contexto de diversidad. La creación de una identidad europea más integradora y una Europa socialmente sostenible requerirá, por tanto, un cambio en las actitudes generales, a través de la educación y el relevo generacional.

Monica Pascoli analiza el impacto del turismo en la sostenibilidad, con especial énfasis en la sostenibilidad social de las comunidades locales. La autora analiza cómo un imaginario turístico surge como resultado de la negociación de diferentes actores. El artículo está basado en entrevistas reali-

zadas en Paularo, Italia. En este caso, no se encontraron construcciones disonantes entre los actores, aunque sí se encontró una gran diferencia en la interpretación del patrimonio natural y cultural entre locales y profesionales del turismo, tanto en términos de cómo debe ser vivido como del significado que se atribuye a los diferentes sitios. Esto indica además un gran potencial para los enfoques comunitarios del turismo como facilitadores de la sostenibilidad social.

Sobre el autor

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Estudios

Sustainability as a "magic concept"*

Sostenibilidad como «concepto mágico»

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Abstract: Sustainability studies have not been able to come up with a consensus conceptualization of "sustainability," despite many attempts. This article asks what this conceptual confusion means. I do this through a (conceptual history) vertical analysis, and horizontal (discourse) analysis of the current use of the term. It finds that sustainability is a perfect fit for what Hupe and Pollit have called a "magic concept," in that it is; broad, has a positive normative charge, imply consensus or at least the possibility of overcoming current conflicts, and has global marketability (2011: 643). This has both positive and negative effects: On the one hand, the popularity of the concept of sustainability has enabled an overarching discourse on the responsible use of natural resources. On the other hand, the concept is vulnerable to various strategic misuses, ranging from corporate greenwashing to Luddite passions. Based on a vertical analysis of the history of sustainability, this vagueness is not a coincidence: It was part of a political bargain at its birth, where environmental concerns were grafted onto an older discourse on "development" during the writing of the 1987 Brundtland report. Based on a horizontal analysis, this vagueness is now inherent to the concept and cannot be abandoned without losing the very magic qualities that make sustainability such a rallying point. This finding points to the conclusion that we should be cautious about how sustainability is wielded.

Keywords: Sustainability, sustainable development, development, magic concepts, conceptual history.

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Resumen: *Estudios de sostenibilidad hasta el momento no han sido capaces de generar una definición consensuada de «sostenibilidad», a pesar de muchos intentos. Este artículo pregunta qué significa esta confusión conceptual a través de un análisis vertical (historia conceptual) y horizontal (uso contemporáneo) del término. Sostenibilidad es un buen ejemplo de lo que Hupe y Pollit han denominado un «concepto mágico», puesto que: es amplio, tiene connotaciones positivas, implica consenso o por lo menos la posibilidad de superar conflictos actuales y comerciabilidad global (2011:643). Por un lado, la sostenibilidad ha hecho posible un discurso general sobre el uso de recursos naturales. Por otro lado, se presta a una amplia gama de «mal uso» estratégico desde el greenwashing corporativo hasta las pasiones luditas. Basado en el análisis vertical, este significado difuso no es una coincidencia, sino fue parte de un compromiso político inicial, mediante el cual preocupaciones medioambientales fueron injertadas en el discurso más antiguo sobre el «desarrollo» durante la redacción del informe Brundtland de 1987. Basado en el análisis horizontal, este significado difuso es ahora inherente al concepto y no se puede abandonar sin perder esas cualidades «mágicas» que convierte «sostenibilidad» en un punto de encuentro tan importante. Esto permite concluir que debemos de tener mucho cuidado de cómo ejercer sostenibilidad.*

Palabras clave: *Sostenibilidad, crecimiento sostenible, crecimiento, conceptos mágicos e historia conceptual.*

I. **Introduction**

The Colombian drug lord Pablo Escobar left behind a private zoo when he died in 1993. Most of the animals were taken from his luxurious compound outside of Medellin and sold to other zoos or euthanized. For reasons that are not completely clear, four hippopotamuses were left behind. Soon after, they broke out of their enclosures and headed into the wild. Since then, they, and their numerous offspring, have thrived in the Colombian countryside.[1]

With no natural predator and living in an almost ideal environment of tropical weather, grassland, rivers and lakes, their numbers have grown exponentially. There are now around hundred Colombian wild hippos, and at the current growth rate, there will be 1 000 hippos there in 2042, 10 000 in 2064. By the end of the 2080's, there will be 130 000 hippos, more than the current worldwide population.[2]

[1] Asher Elbein, "Pablo Escobar's Hippos Fill a Hole Left Since Ice Age Extinctions," *The New York Times*, March 26, 2020, sec. Science, https://www.nytimes.com/2020/03/26/science/pablo-escobar-hippos.html (Accessed February 22 2021).

[2] Jonathan B. Shurin *et al*., "Ecosystem Effects of the World's Largest Invasive Animal," *Ecology* 101, no. 5 (2020).

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It might seem that such a population explosion of a massive invasive species will lead to wide scale environmental destruction. Hippos, like other large herbivores, have a dramatic effect on their environment. They trample crops and grassland and eat seedling trees. They also have a large effect on lakes and rivers, where they cool down during hot tropical days.[3] Hippo dung and hippo feet mix up the water with nutrients from the grassland around them, potentially leading to explosive algal growth and mass aquatic death, in the same way excessive farmland fertilizer in waterways does.[4]

Local conservationists have for this reason been calling for the removal of this invasive species before the number of hippos become too large to handle. They have so far not succeeded, due to the opposition by locals, who have seen their fortunes improve as the hippos became a tourist attraction, and an indifferent Colombian government.[5] This is a classic sustainability conflict, where economic interests stand in opposition to efforts to conserve nature against the damages of an invasive species.

Recent academic research has upturned this debate, arguing that the hippos might be returning the local environment to the biological balance that existed before humans arrived in Colombia over 12 000 years ago.[6] Most megafauna disappeared from the Americas within the first few thousand years of humans arriving, around the last ice age. The disappearance drastically changed the landscapes where the megafauna formerly dominated.[7] According to another recent academic study, the hippos of Colombia are taking over the vacant environmental niche of a giant llama (*Hemiauchenia paradoxa*) and a semi-aquatic rhinoceros-looking *Trigonodops lopesi*, both hunted to extinction by the first humans on the continent.[8] In other words, the hippos are helping to return the land to its condition before humans arrived, rewilding it, as its proponents call it.[9] The debate is now raging between the "rewilders" that want the hippos to stay in

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[3] Keenan Stears *et al*., "Effects of the Hippopotamus on the Chemistry and Ecology of a Changing Watershed," *Proceedings of the National Academy of Sciences* 115, no. 22 (May 29, 2018): E5028-37.

[4] Stephen R. Carpenter *et al*., "Nonpoint Pollution of Surface Waters with Phosphorus and Nitrogen," *Ecological Applications* 8, no. 3 (1998): 559-68.

[5] Elbein, "Pablo Escobar's Hippos Fill a Hole Left Since Ice Age Extinctions."

[6] Shurin *et al*., "Ecosystem Effects of the World's Largest Invasive Animal."

[7] Christopher E. Doughty, Søren Faurby, and Jens-Christian Svenning, "The Impact of the Megafauna Extinctions on Savanna Woody Cover in South America," *Ecography* 39, no. 2 (2016): 213-22.

[8] Erick J. Lundgren *et al*., "Introduced Herbivores Restore Late Pleistocene Ecological Functions," *Proceedings of the National Academy of Sciences* 117, no. 14 (April 7, 2020): 7871-78.

[9] Paul Schultz Martin, *Twilight of the Mammoths: Ice Age Extinctions and the Rewilding of America*, vol. 8 (Univ of California Press, 2005).

order to return the Colombian countryside to the ecological balance it had before the arrival of humans, and traditional environmentalists that wants to remove the hippos to maintain the countryside in its current balance.

In this debate, the question of what to do about the Colombian hippos is no longer a question of sustainability versus unsustainability. It is a question of what the end goal of sustainability is. Should we be aiming to restore nature to a state as close to what it was before humans disrupted it, or should we seek to maintain nature in the state it is now, after thousands of years of human interference?

So far, the concept of sustainability has in the public debate largely been put in opposition to unsustainable practices and environmental, social and economic collapse. The concept has been increasingly successful as a rallying cry ever since the Brundtland report of 1987 brought sustainable development to the international mainstream.[10] It has been so successful that one could claim that there is no real intellectual force arraigned against it any longer, as support for more sustainable practices are growing year by year.[11] However, its conceptual core remains elusive, according to the vast majority of academic studies on sustainability,[12] as does its end goal.

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[10] Gro Harlem Brundtland *et al*., *Our Common Future* (Oxford University Press, 1987).

[11] There is little in the sustainability literature on the public acceptance of the term. There is rather more on related issues, such as acceptance of anthropogenic climate change and the need to safeguard the environment versus economic growth. These studies shows a gradual increase in environmental consciousness from the mid 1960's onwards, albeit with some ebbs and flows. By 2020 a majority of Americans thought safeguarding the environment was more important than focusing on economic growth. See: "Challenges in Assessing Public Opinion on Economic Growth Versus Environment: Considering European and US Data," *Ecological Economics* 146 (April 1, 2018): 265-72, "Environmental Protection Rises on the Public's Policy Agenda As Economic Concerns Recede," *Pew Research Center – U.S. Politics & Policy* (blog), February 13, 2020, https://www.pewresearch.org/politics/2020/02/13/as-economic-concerns-recede-environmental-protection-rises-on-the-publics-policy-agenda/ (Accessed February 22, 2021); Axel Franzen, "Environmental Attitudes in International Comparison: An Analysis of the ISSP Surveys 1993 and 2000," *Social Science Quarterly* 84, no. 2 (2003): 297-308; Riley E. Dunlap, "Trends in Public Opinion toward Environmental Issues: 1965-1990," *Society & Natural Resources* 4, no. 3 (July 1, 1991): 285-312, "Surveys Show Widening Worry on Climate Change—and Willingness to Fix It," Environment, January 23, 2019, https://www.nationalgeographic.com/environment/article/climate-change-awareness-polls-show-rising-concern-for-global-warming (Accessed February 22, 2021).

[12] These are the most relevant results on the first page when searching on Google Scholar for "sustainability" and "definitions". (Out of 1.9 million total results.): Peter Glavič and Rebeka Lukman, "Review of Sustainability Terms and Their Definitions," *Journal of Cleaner Production* 15, no. 18 (2007): 1875-85; Karl de Fine Licht and Anna Folland, "Defining "Social Sustainability": Towards a Sustainable Solution to the Conceptual Confusion," *Etikk i Praksis-Nordic Journal of Applied Ethics*, no. 2 (2019): 21-39; Jeffry L. Ramsey, "On Not Defining Sustainability," *Journal of Agricultural and Environmen-*

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Why are we using the concept, then? The most obvious reason is this: much of the strength of "sustainability" comes from it being a big tent concept, which has room for a great diversity of approaches and insights, theories and definitions. Many of them are mutually exclusive.[13] Caradonna, the most read conceptual historian on the term, sees its broadness as a positive: "… in the marketplace of ideas, breadth has been advantageous for sustainability."[14] But it should also naturally make us wary of using it, both in academic research and for practical purposes. Fuzzy concepts do not lead to analytical clarity or clear policies.

The response to this conceptual confusion is most commonly to sidestep the issue, by pointing out some of the major debates within its wide tent of meaning, such as the balance between its environmental, societal and economic aspects, or between so-called soft and hard sustainability.[15] Many seek to solve the issue by coming up with their own "unifying" definitions.[16] For each author doing this, the conceptual confusion increases.[17]

This article takes a different approach, it seeks to make the fuzziness of the concept the core characteristic under study. How does one analyze inherently fuzzy concepts? To try to find a conceptual core is impossible if there is no core. To find the limits of the concept is a lost cause if no one can agree what they are.

This article seeks to draw out some of the implications of the fuzziness of sustainability. It asks: What does the conceptual confusion on sustainability actually mean?

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tal Ethics 28, no. 6 (December 1, 2015): 1075-87; D. L. Little, "Defining Sustainability in Meaningful Ways for Educators," *Journal of Sustainability Education* 7 (2014): 1-18; "Review of Sustainability Terms and Their Definitions," *Journal of Cleaner Production* 15, no. 18 (December 1, 2007): 1875-85; Julia E. Moore *et al*., "Developing a Comprehensive Definition of Sustainability," *Implementation Science* 12, no. 1 (2017): 1-8.

[13] *Ibid*.

[14] Jeremy L. Caradonna, *Sustainability: A History* (Oxford University Press, 2014), 7.

[15] Caradonna, *Sustainability*.

[16] Moore *et al*., "Developing a Comprehensive Definition of Sustainability"; Peter Johnston *et al*., "Reclaiming the Definition of Sustainability.," *Environmental Science and Pollution Research International* 14, no. 1 (January 1, 2007): 60-66; Robert Costanza and Bernard C. Patten, "Defining and Predicting Sustainability," *Ecological Economics* 15, no. 3 (1995): 193-96; T. F. H. Allen and Thomas W. Hoekstra, "Toward a Definition of Sustainability," *Covington, WW; DeBano, LF,(Tech. Coords.). Sustainable Ecological Systems: Implementing an Ecological Approach to Land Management. Gen. Tech. Rep. RM-247. Fort Collins, CO: US Department of Agriculture, Forest Service, Rocky Mountain Forest and Range Experiment Station*, 1994, 98-107.

[17] Heather M. Farley and Zachary A. Smith, Sustainability: If It's Everything, Is It Nothing? (Routledge, 2020).

I.I. *Methodological and theoretical frame*

The answer to this question has two parts, based on a vertical and horizontal analysis. Vertically by analyzing both the conception history of the term from up to the Brundtland report of 1987, and the later popularity of the terms "sustainable development" versus "sustainability". The vertical analysis is a historical analysis using secondary historical literature and select primary sources such as UN reports. In the horizontal analysis the current use of sustainability is analyzed through a discourse analysis using academic literature.

Both the history and use of "sustainability" is analyzed through the lens of Pollitt and Hupe's "Magic Concepts".[18] With magic concepts, Pollitt and Hupe – academics studying public policy – sought to describe the common characteristics of certain immensely popular buzzwords in public policy and academia, such as "governance" and "accountability". This article will show that "sustainability" perfectly fits the criteria for being a magic concept.[19]

I.II. *Defining magic concepts*

The concept of magic concepts was coined by Pollitt and Hupe,[20] building on work done by H. G. Frederickson on outlining common characteristics of certain "buzzwords" within public management.[21] According to Pollitt and Hupe magic concepts all have four characteristics in common:

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[18] Christopher Pollitt and Peter Hupe, "Talking About Government - The Role of Magic Concepts," *Public Management Review* 13, no. 5 (June 1, 2011): 641-58.

[19] A couple of studies have pointed out that "sustainability" and "sustainable development" are magic concepts in passing, but none have laid out the case for it. See: Niki Frantzeskaki, Shivant Jhagroe, and Michael Howlett, "Greening the State? The Framing of Sustainability in Dutch Infrastructure Governance," *Environmental Science & Policy* 58 (April 1, 2016): 123-30; Alexander Roberto Constantijn De Haan, "Aircraft Technology's: Contribution to Sustainable Development," 2007.

[20] They developed the concept in three articles. Although they focus on different aspects, the last article is generally the one cited. Christopher Pollitt and Peter Hupe, "Talking Governance: The Role of Magic Concepts," July 24, 2009; Peter Hupe and Christopher Pollitt, "The Magic of Good Governance," January 29, 2010, https://repub.eur.nl/pub/51017/ (Accessed February 22, 2021); Pollitt and Hupe, "Talking About Government."

[21] H. George Frederickson, "Whatever Happened to Public Administration? Governance, Governance Everywhere," *The Oxford Handbook of Public Management*, 2005, 282-304.

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> 1 *Broadness*. They cover huge domains, have multiple, overlapping, sometimes conflicting definitions, and connect with many other concepts. They have large scope and high valency.
>
> 2 *Normative attractiveness*. They have an overwhelmingly positive connotation; it is hard to be "against" them. Part of this is usually a sense of being "modern" and "progressive" - often replacing something which is now alleged to be out of date. (e. g. networks replace bureaucracy and / or hierarchy).
>
> 3 *Implication of consensus*. They dilute, obscure or even deny the traditional social science concerns with conflicting interests and logics (such as democracy versus efficiency, or the profit motive versus the public interest).
>
> 4 *Global marketability*. They are known by and used by many practitioners and academics – that is, they are fashionable. They feature frequently in official policy documents, the titles of reform projects and new units in both governmental and university departments. The concepts provide themes for academic conferences, subjects for seminars and titles for journal articles.[22]

Pollitt and Hupe suggested that the total number of magic concepts according to this criteria were relatively limited; "performance", "participation", "innovation", "governance", "accountability" and "networks", "transparency" (as a subsidiary concept to accountability).[23] Their frame has since become a part of the standard academic discussion around these concepts.[24] In the last few years, magic concepts have started to be found outside of the short list outlined by Pollitt and Hupe. Some examples are resilience,[25] leadership[26] and "co-production".[27]

The article is organized as follows: First it lays out the conceptual history of "sustainability" as a magic concept in its vertical analysis, then lays out the evidence of "sustainability" fitting perfectly into the magic concepts framework in the horizontal analysis. Then it discusses what it means for "sustainability" that the concept is a magic one. Finally, it will discuss what adding "sustainability"

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[22] Pollitt and Hupe, "Talking About Government," 643.

[23] Gemma Carey and Eleanor Malbon, "Strange Magic: What Can the Emergence of "Magic Concepts" Tell Us about Policy Implementation?," *Policy Design and Practice* 1, no. 3 (July 3, 2018): 169-82.

[24] Carey and Malbon.

[25] A. Cabrera Flamini, K. Schwartz, and R. Kloosterman, "Incorporating Resilience in a Dutch Water Utility: Exploring the Translation of a "Magic Concept"to Everyday Practices," *Resilient Water Services and Systems*, 2019, 95.

[26] Eva Knies, Christian Jacobsen, and Lars Tummers, "Leadership and Organizational Performance," *The Routledge Companion to Leadership* (Routledge, 2016), 404-18.

[27] Maddalena Sorrentino, Mariafrancesca Sicilia, and Michael Howlett, *Understanding Co-Production as a New Public Governance Tool* (Taylor & Francis, 2018).

to the short list of "magic concepts" proposed by Pollitt and Hupe does to this framework. It will show how the inclusion of "sustainability" problematizes the back story Pollitt and Hupe gives to "magic concepts": A conceptual history of "sustainability" as a magic concept raises the intriguing possibility that magic concepts might not be a product of late modernity, as the authors argue, but as a semantic strategy of policy elites stretching back much farther into the past.

II. **Vertical analysis**

The academic literature on magic concepts has not dealt much with the conceptual history of the concepts that have been identified as "magic". This does not mean that there is no implied theory of the historical origins of magic concepts. According to Pollitt and Hupe, magic concepts are products of what social theorists call late modernism, because they are highly abstract, are very general, and are presented as above ideology or group interests. Finally, they "are part of a quintessentially modernist narrative of progress", because more of the magic concept is always called for in order to make a better future.[28]

Going beyond previous conceptual histories of "sustainability" and the previously almost ahistorical literature on magic concepts; this article pinpoints *when* "sustainability" became a magic concept, showing *how* its growth is inherently linked to the political bargains of its birth, and discussing *what* this means both for the idea of magic concepts in general and for sustainability in particular.

The conceptual history literature of "sustainability" is relatively small, but shows a great deal of agreement regarding the idea's history. The three main writers in the field are Simon Dresner,[29] David Grober[30] and Jeremy Caradonna.[31] According to these authors, the roots of sustainability can be found in the writings of officials and economists of the 18th and 19th Century, who worried about the depletion of forests through overlogging and the balance of the economy from population growth. I will first lay out

[28] Pollitt and Hupe, "Talking About Government," 653, following the definition of: James C. Scott, *Seeing Like a State* (Yale University Press, 1998); Scott has taken his definition of modernism from the noted marxist scholar: David Harvey, *The Condition of Postmodernity* (Blackwell, 1990).

[29] Simon Dresner, *The Principles of Sustainability* (Earthscan, 2008).

[30] Ulrich Grober, *Sustainability: A Cultural History* (Green Books Cambridge, 2012).

[31] Caradonna, *Sustainability*; A good summary of their findings can be found Caradonnas historiographical essay in: Jeremy L. Caradonna, ed., *Routledge Handbook of the History of Sustainability* (Routledge, 2017).

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this familiar story, then discuss how seeing sustainability as a magic concept changes this perspective:

There is general agreement that sustainability as an idea had its origin in Early Modern Europe and developed gradually over the following centuries. Grober traces the origin of the word itself to the German word *Nachhaltigkeit,* used by the Saxon mining official Hans Carl von Carlowitz in his *Sylvicultura Oeconomica*.[32] Carlowitz advocated for sustainable forestry practices, to secure long term supplies for the Saxon mining industry.[33] While these ideas had wide influence on European forestry, the wider debate about human society and the carrying capacity of the land was more muted over the next hundred years. With the advent of romanticism, a new appreciation for the natural beauty of the land started growing in the nineteenth century. With it came reactions to the destruction of this natural beauty. The conservationist and preservationist movements in the United States during the progressive era, 1896-1916, was undoubtedly the most influential of these reactions. During the presidency of Theodore Roosevelt (1901-09), large swathes of land in the United States were made into national parks, safe from human exploitation.[34] These movements were spearheaded by the social elites at the time. Among them, there were two main camps: Firstly the anthropocentric conservationist movement, that sought "sustainable use" of wilderness areas. Secondly the ecocentric preservationists, that sought to leave select wilderness areas in a pristine, untouched condition.[35]

After the disruption and destruction of the two world wars, a new generation of environmentalists started asking searing questions about the effect of modernity on nature. They were led by anti-nuclear activists and the new movement of ecology. Leading early activists were the Barry Commoner of the Committee for Nuclear Information, and especially Rachel Carson. Her 1962 book *Silent Spring,* documenting the environmental damage done by DDT and other pesticides, is said to have kick started the postwar environmentalist movement.[36] This new movement moved away from the particularist focus of earlier environmentalists, towards a global ecological vision. To these environmental activists, the

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[32] Ulrich Grober, "Hans Carl von Carlowitz: Der Erfinder Der Nachhaltigkeit," *Erscheint In* 300 (1999): 1645-1714; Hans Carl Von Carlowitz, *Sylvicultura Oeconomica* (Leipzig, 1713).

[33] Grober, *Sustainability: A Cultural History*.

[34] Dresner, *The Principles of Sustainability*.

[35] Charlotte Epstein, "The Making of Global Environmental Norms: Endangered Species Protection," *Global Environmental Politics* 6, no. 2 (2006): 32-54.

[36] Rachel Carson, *Silent Spring* (Houghton Mifflin, 1962).

world was no longer divided into the human and the natural domain. They saw humanity and nature as interconnected, as the hippie movement of the late sixties preached.[37]

These concerns became mainstream at the end of the 1960's, as counterculture movements in the United States and Western Europe went mainstream.[38] Among these groups were the Club of Rome, an elite gathering of industrialists, government officials and leaders of international organisations. The group had, with the help of early computer science, run simulations on what would happen to the world if human population growth and resource extraction continued unabated. The result was an inevitable collapse, according to their landmark report, *The Limits to Growth*.[39]

At the same time, the United Nations were starting to take up the issue of global sustainability. Svante Oden from Uppsala University had discovered in the late 1960's that Swedish forests were slowly dying from acid rain, pollution from industrial production brought along with the winds from the large industrial powers of Europe.[40] UN General Assembly Resolution 2398 from 1968 was the first to take up the issue, and was the start of the leading role the United Nations have taken in global sustainability. The resolution itself led to the first UN conference on the environment, the Stockholm Conference of 1972.[41] The conference laid bare severe differences on how to attain global sustainability: Among these, developing nations resented the call from industrialized nations to limit population growth in order to safeguard the health and well being of rich westerners. They also worried that any global drive to reduce pollution would inevitably hinder their own efforts to lift their own populations out of poverty.[42]

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[37] Erik W. Johnson and Pierce Greenberg, "The US Environmental Movement of the 1960s and 1970s - Building Frameworks of Sustainability," in *Routledge Handbook of the History of Sustainability* (Routledge, 2017), 137-50.

[38] Blake Slonecker, "The Counterculture of the 1960s and 1970s", Oxford Research Encyclopedia of American History, 28 June 2017; Michael Bess, The Light-Green Society: Ecology and Technological Modernity in France, 1960-2000 (University of Chicago Press, 2003); Sabine Von Dirke, All Power to the Imagination!: The West German Counterculture from the Student Movement to the Greens (U of Nebraska Press, 1997).

[39] Donella H. Meadows *et al*., *The Limits to Growth* (Universe Books, 1972).

[40] Peringe Grennfelt *et al*., "Acid Rain and Air Pollution: 50 Years of Progress in Environmental Science and Policy", Ambio 49, no. 4 (1 April 2020): 849-64, https://doi.org/10.1007/s13280-019-01244-4.

[41] Grober, *Sustainability: A Cultural History*, 161-66.

[42] Dilys Roe, "The Origins and Evolution of the Conservation-Poverty Debate: A Review of Key Literature, Events and Policy Processes", Oryx 42, no. 4 (October 2008): 491-503, https://doi.org/10.1017/S0030605308002032.

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The stalemate at the conference did not mean that the United Nations stopped working with the issue. As a direct consequence of the conference, the United Nations Environmental Program (UNEP) was founded.[43] All through the seventies and up the mid 1980's, UN planners and representatives churned out draft papers and held conferences, while the world around them changed. The western, capitalist first world went through a series of right-wing reforms and electoral victories. In the United States former western movies actor Ronald Reagan won the presidential elections, and promptly took down the solar panels his predecessor had put on the White House roof.[44] In the Communist second world, the economy was stagnating and militarizing, as their population turned more and more sceptical of the vision of a coming workers utopia. In the poor third world nations, a series of wars and climate catastrophes wreaked havoc, especially in Africa. Millions of people starved to death, as the rains stopped in the Sahel, and the Sahara desert marched southwards. Acid rain was now killing waste swathes of European forests, and there was increasing worry about a growing hole in the protective ozone layer above the South Pole, created by indiscriminate usage of CFC gasses by industrialized nations.

It was during this time that sustainability as we know it now was shaped among UNEP planners and scientists. The United Nations World Commision on Environment and Development, led by the Norwegian physician and politician Gro Harlem Brundtland, sought to find a middle ground between calls for conservation of the environment and calls for economic growth. It was in many way a rhetorical sleight-of-hand: They claimed that far from being opposites, the two sides were mutually supportive, if the goal was sustainable growth. There can be no sustainable economic or societal developments, without them also being ecologically sustainable, because human societies are part of nature. This can not be done at the level of nation states, but must be dealt with globally, because all human societies share the same world. We all need to cooperate on a global scale to accomplish sustainable development. From these preconditions came the most cited definition of sustainable development and sustainability: "… development that meets the needs of the present without compromising the ability of future generations to meet their own needs."[45]

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[43] Stanley Johnson, UNEP the First 40 Years (UNEP, 2012).

[44] Jeremy L. Caradonna, Sustainability: A History (Oxford University Press, 2014), 139.

[45] Brundtland *et al*., *Our Common Future*.

III. **The Brundtland report as a turning point**

The Brundtland report was what made "sustainability" (and sustainable development) into a magic concept. Von Carlowitz's sustainability had very few of the constituent qualities of a magic concept. Its definition was narrow and precise, and should probably be translated as "sustained yield", not as "sustainability, as Grober and Caradonna does. According to the famed political scientist James C Scott, what von Carlowitz created was not "sustainability" at all, but German scientific forestry, of monoculture.[46] The monoculture of German forestry science would devastate German and later global old growth forests, and replace them with regimented rows of quick growing and valuable imported trees. As the diverse ecology of the old forests were lost, this would often lead to severe local environmental damage.[47] When looking at von Carlowitz and his view of sustainable forestry, it seems very distant indeed from the current fuzzy concept of sustainability. His idea of sustainability was clearly not a magic concept, as it was narrow in meaning, clearly defined, and did not imply consensus.

Clearly the debate between conservationists and preservationists in the antebellum United States came closer to current debates of sustainability. Their definitions were fuzzier, and it was seen as not only a local but a global problem. On the other hand, conservationist versus preservationist ideas never had the same implications of consensus or broadness as Pollitt and Hupe's magic concepts.

The post-war ecological movement encompassed a normatively attractive and marketable concept, but it was never as conceptually fuzzy as sustainability is nowadays, nor did it lay claim to consensus to the same degree. Ecology was self-consciously revolutionary, connecting itself to counter-culture, not UN special commissions.

IV. **Towards a Magic Concept**

If "sustainability" indeed is a magic concept, it means that we cannot, as the conceptual history literature on it so far has done, only look for its roots in the environmental field. To work its magic, the concept needs to be attractive also in other societal realms and disciplines. As Pollitt and Hupe pointed out "… the added value magic concepts ... provide is precisely the

[46] Scott, *Seeing Like a State*, 15-22.
[47] *Ibid*.

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value attributed to them."[48] We therefore need to look for the roots of "sustainability" in all three spheres of "sustainable development" raised by the Brundtland report; not only the environmental but also the social and economic. One easy way to start is with the increasingly unfashionable part of "sustainability", "development."

Development, at least as it was seen in the first few decades after the Second World War, shares many of the characteristics of magic concepts that we discuss in this article.[49] It was a doctrine that grew out of the lessons learned during the rebuilding of Europe after the War, focusing on strengthening the economy to accomplish high standards of living, full employment and social progress the world over. It was one of the few things both communist and capitalist countries could agree was needed during the first few decades of the Cold War, although they disagreed somewhat on which methods to use to accomplish it.

Since the heady days of the Cold War, the global marketability of the development paradigm has faded significantly. Partly because it was widely seen as having failed at its core goal of reducing poverty.[50] Secondly because it came under sustained attack from both the right and the left, both politically and intellectually, from the 1970's onwards.

Part of this critique was coming from environmentalists. According to one of its supporters in 1990, the development paradigm was under sustained attack by "culturalist" and "environmentalist" critique. … The fact is that this new paradigm not only criticizes development methods, but questions the very goals and definitions of development as hitherto pursued by all parties." This paradigm, according to the author, became prominent with the publications of *Limits of Growth*, by the Club of Rome in 1972.[51]

In its modern form "development" found its expression in a speech by US president Truman in 1949, seeking to "lift up" the recently independent poor countries of the world, with American assistance. This would be the start of decades of focus on "developing" former European colonies into facsimiles of their benefactors, be they communist or capitalist. This was done by economic aid and expert advice on

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[48] Hupe and Pollitt, 24.

[49] Gilbert Rist, The History of Development: From Western Origins to Global Faith (Zed Books, 2002).

[50] For a good overview of the conceptual history literature on development, see: Joseph Morgan Hodge, "Writing the History of Development (Part 1: The First Wave)", Humanity: An International Journal of Human Rights, Humanitarianism, and Development 6, no. 3 (2015): 429-63.

[51] Adrian Atkinson, "Development Redefined," *Third World Planning Review* 13, no. 4 (1990).

modernizing society and the economy. Large scale attempts at scientific forestry, fishery and industrial production were made. The results were not great. Industries failed, the oceans were fished clean, agricultural yields fell, and the economy of the new states kept shrinking. By the mid 1980's scepticism was setting in, as millions in Africa starved and died and the Sahara marched southwards with alarming speed. This had only been partially addressed in dominant development doctrines. Only in the late 1970's did Western focus on development change from focusing only on increasing economic growth to also focusing on redistribution and meeting the basic needs of the poorest. By this point, the debt burden of third world countries was so high, from failed economic reforms and corruption, that they had to endure "painful stabilization and structural adjustment policies." The Mexican financial crisis of 1982, for instance, was so severe that it threatened "the survival of the international financial system."[52]

From this angle, the Brundtland report can be seen as not only seeking to make environmental sustainability palatable to poorer member states in the United Nations. It was also a way to move away from the overarching focus on failed notions of "development" that had dominated United Nations policy making, as well as Western and Communist foreign aid, since the start of the Cold War. It did so by consciously mixing cards. "Sustainable growth" was part of the development doctrine of the Western world from the 1950's on, and denoted stable economic growth.[53] It also found a place in the Brundtland report, where it was seen as one of the goals of "sustainable development".[54] According to Gilbert Rist, "sustainable development" was merely the last step in a constantly changing reimagination of "development", from Trumans conception, to "endogenous development" to "human development" to "social development" before becoming sustainable with the Brundtland report:

> The height of absurdity was reached when the Brundtland Commission (WCED 1987) tried to reconcile the contradictory requirements to be met in order to protect the environment [...] and, at the same time, to ensure the pursuit of economic growth that was still considered a condition for general happiness. This impossible task resulted in the coining of the catchy phrase "sustain- able development", which immediately achieved star status. Unfortunately it only meant exchanging one buzzword for another. "Sustainable development

[52] Erik Thorbecke, "The Evolution of the Development Doctrine, 1950-2005", Advancing Development (Palgrave Macmillan 2007), 15.

[53] Thorbecke, "The Evolution of the Development Doctrine, 1950-2005".

[54] Caradonna, *Sustainability*, 153.

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> became a global slogan that all could readily endorse, and one that was sufficiently vague to allow different, often incompatible interpretations" [...]"Sustainable development" is nothing but an oxymoron, a rhetorical figure that joins together two opposites such as "capitalism with a human face" or "humanitarian intervention".[55]

If "development" is a magic concept, along with "sustainable development" and "sustainability", the conceptual history of "sustainability" changes markedly. We should be looking at the ebb and flow in the use of magic concepts among policy elites, instead of tracing the origins of literature on environmental sustainability. As we shall see below in the horizontal analysis, the shift between "development", "sustainable development" and "sustainability" in usage are still ongoing today.

V. **Horizontal analysis: "sustainability" as a magic concept today**

In the vertical analysis I explored the origins of "sustainability", from the conceptual perspective of magic concepts. I showed that magic concepts as a conceptual tool helps pinpoint exactly when "sustainability" as we understand it today came to be, as opposed to similar sounding but narrower concepts. From the perspective of UN policy makers, it should rightfully be seen as a conceptual chain moving away from the ring of "development", through the chain link of "sustainable development" to the new ring of "sustainability". This mirrored the changing interests of global elites, shifting from the Cold War focus on economic growth in the developing countries to a new focus on stabilizing the environment, society and economy.

This does not mean that there has been no important changes in the history of "sustainability" since the Brundtland report. Many books have been written about the policy initiatives, global, regional and national sustainability legislation and agreements, as well as the academic debates.[56] It is nevertheless my claim that all these different developments still exists within the very wide frames of the Brundtland report. A general outline of this wideness will be given in the following horizontal analysis, which will strengthen my claim that "sustainability" (and its synonym "sustainable development") is a magic concept.

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[55] Gilbert Rist, "Development as a buzzword", Cornwall, Eade, eds., *Deconstructing Development Discourse: Buzzwords and Fuzzwords* (Oxfam GB, 2010), 21.

[56] The most up to date overview is: Jeremy L. Caradonna, ed., Routledge Handbook of the History of Sustainability (Routledge, 2017).

The first, and most fundamental of the characteristics of magic concepts are their broadness. One could see the broadness of magic concepts as the foundation of their magic, while their normative attractiveness, consensus-making and fashionability as being the superstructure. I will therefore spend most of this horizontal analysis on discussing the broadness of the concept, especially on its valency, or its tendency to conjoin with other (magic) concepts.

VI. **Broadness**

For "sustainability" to be defined as broad, according to Pollitt and Hupe, it needs to have multiple, often contradictory definitions, it needs to be used in many different settings, and it needs to effortlessly connect to a large number of other concepts. "They have large scope and high valency," according to Pollitt and Hupe.[57] By broadness, Pollitt and Hupe refer to it having multiple, often contradictory definitions, diverse use, and tendency to be connected with other broad concepts.

A common theme in the academic literature on "sustainability" is the impossibility of coming up with an agreed-upon definition of it. The lack of a common definition is not from lack of trying. There have been literally hundreds of attempts to define "sustainability" or its close relative "sustainable development".[58] The conceptual confusion has led to a significant number of academic works not even including a definition of the term.[59]

It is probably easier to conceptualize "sustainability by focusing on the core debates about what exactly "sustainability" entails. The two most important ones are: the nature of the tripartite relationship of sustainability:

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[57] Pollitt and Hupe, "Talking About Government," 643.

[58] Walter Alfredo Salas-Zapata and Sara Milena Ortiz-Muñoz, "Analysis of Meanings of the Concept of Sustainability," *Sustainable Development* 27, no. 1 (2019): 153-61; Ivan Bolis, Sandra N. Morioka, and Laerte I. Sznelwar, "When Sustainable Development Risks Losing Its Meaning. Delimiting the Concept with a Comprehensive Literature Review and a Conceptual Model," *Journal of Cleaner Production* 83 (2014): 7-20; Glavič and Lukman, "Review of Sustainability Terms and Their Definitions"; Desta Mebratu, "Sustainability and Sustainable Development: Historical and Conceptual Review," *Environmental Impact Assessment Review* 18, no. 6 (1998): 493-520.

[59] One study found that 91,3% of their selection did not define sustainability: Salas-Zapata and Ortiz-Muñoz, "Analysis of Meanings of the Concept of Sustainability,"; Similar findings were reported by: Remigijus Ciegis, Jolita Ramanauskiene, and Bronislovas Martinkus, "The Concept of Sustainable Development and Its Use for Sustainability Scenarios," *Engineering Economics* 62, no. 2 (2009).

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the ecological, the economic and the social / equity aspects.[60] The second one is about the debate between proponents for weak or strong "sustainability", a contentious environmental economics issue.[61]

If there is a core definition of "sustainability it is the Brundtland report's: "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."[62] Unfortunately it has proven very difficult to use this definition for anything practical. The central problem is that we simply can not know the capabilities and needs of future generations. The result has been a plethora of different, often mutually exclusive clarifications.[63] There is a thriving cottage industry of new attempts at coming up with a unifying definition, or workable conceptualizations and operationalizations of the concept in the academic and grey literature.[64]

When it comes to policy outcomes, the results are also extremely diverse and sometimes mutually exclusive. An example is the United Nations Sustainable Development Goals, set out in 2015, with a planned finishing date of 2030.[65] Out of 17 different sustainable development goals, three focus on economic growth, eight on societal sustainability, three on making human environments more sustainable, and only four directly focus on global environmental sustainability. As a result of the tripartite focus of sustainability (societal, economic, environmental) Goodland and Daly has noted that "sustainability" is turning into a "… landfill dump for everyone's environmental and social wishlists".[66]

Magic concepts, like atoms with high valency, likes to clump together with other broad concepts. Sustainability is no exception. In its original conception, it already connected with four other concepts: "Sustainable development"; and sustainable environment, society and economy. A

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[60] Ben Purvis, Yong Mao, and Darren Robinson, "Three Pillars of Sustainability: In Search of Conceptual Origins", Sustainability Science 14, no. 3 (1 May 2019): 681-95, https://doi.org/10.1007/s11625-018-0627-5.

[61] Robert Ayres, Jeroen van den Berrgh, and John Gowdy, "Strong versus Weak Sustainability: Economics, Natural Sciences, and Consilience", Environmental Ethics, 1 May 2001, https://doi.org/10.5840/enviroethics200123225.

[62] Brundtland *et al*., *Our Common Future*.

[63] Julian D. Marshall and Michael W. Toffel, "Framing the Elusive Concept of Sustainability: A Sustainability Hierarchy," *Environmental Science & Technology* 39, no. 3 (February 1, 2005): 673.

[64] Niels Faber, René Jorna, and Jo Van Engelen, "The Sustainability of 'Sustainability'—A Study into the Conceptual Foundations of the Notion of 'Sustainability,'" *Journal of Environmental Assessment Policy and Management* 7, no. No. 1 (2005): 1-33.

[65] United Nations General Assembly, "Transforming Our World: The 2030 Agenda for Sustainable Development," 2015.

[66] Caradonna, *Sustainability*, 137.

search on Google Scholar also shows a very strong connection between "sustainability" and the other magic concepts outlined by Pollitt and Hupe. They were mentioned in between 14 and 73 percent of all academic articles discussing "sustainability".[67]

An example of this confusion is the debate about the differences between "sustainability and "sustainable development". Everyone agrees that sustainability is closely related to sustainable development, the term made famous by the Brundland report of 1987.[68] How *exactly* they relate is much more contentious: Are the two terms functionally the same?[69] Is "sustainability" the new term for "sustainable development"?[70] Is "sustainable development" an oxymoron, and stands in opposition to real "sustainability"?[71] Or is "sustainability" a condition, and "sustainable development" is the means for us to reach it?[72] From the perspective of magic concepts, this debate is itself a sign of the broadness in general and valency of both terms. For this article's purpose, both the two terms and the debate about them are seen as part of the overall conceptual frame of "sustainability".

While Google Ngram[73] is an imprecise measuring stick for the popularity of a concept, it does give us a glimpse into the historical use of concepts. A search on it shows that "development" peaked in English language literature around 1977, at the same time as both "sustainability" "sustainable development" took off. The two latter terms were equally popular in the 1990's, but "sustainable development" peaked around 2000, and is now slowly declining. "Sustainability" overtook "sustainable development" in 1995, and has grown steadily ever since. As of 2019 (the last year of Google Ngram data) "sustainability" was used three times as often as "sustainable development".

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[67] A search was done on Google Scholar (scholar.google.com, accessed 5.1.21) where "sustainability" was paired with "performance" (the highest), then "participation", "innovation", "governance", "accountability", "networks" and "transparency" (the lowest). The search also revealed the immensity of the academic literature on "sustainability". With about 4,3 million hits, it was more popular than "democracy". Given that research on democracy has been going on since antiquity, these are impressive numbers indeed.

[68] Brundtland *et al*., *Our Common Future*.

[69] Nearly 60 percent of academic works sampled used the terms as synonyms, according to Salas-Zapata and Ortiz-Muñoz, "Analysis of Meanings of the Concept of Sustainability."

[70] Mark A. White, "Sustainability: I Know It When I See It," *Ecological Economics*, 86 (February, 2013): 213-17.

[71] Michael Redclift, "Sustainable Development (1987-2005): An Oxymoron Comes of Age," *Sustainable Development* 13, no. 4 (2005): 212-27.

[72] Graeme D. Buchan, Ian F. Spellerberg, and Winfried EH Blum, "Education for Sustainability," *International Journal of Sustainability in Higher Education*, 2007.

[73] "Google Books Ngram Viewer," accessed January 21, 2021, https://books.google.com/ngrams/ (Accessed February 22, 2021)..

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Why "sustainable development" has faded as a synonym to "sustainability" is somewhat unclear. Despite an intense academic debate about the differences between the terms, there are few real conclusions from the debate, and they continue to be used interchangeably. From the perspective of magic concepts, however, a simple hypothesis is readily available. If "sustainable development" is a composite of the two magic concepts "sustainability" and "development", it would make sense that if one of its component terms falls out of fashion, it will also. The gradual decline of "sustainable development" should therefore be seen as a result of the gradual decline of the "development" doctrine from the 1990's onwards, a time when foreign aid from the western world fell, while contradictory economic growth among developing countries grew.

The gradual fading of the term "sustainable development" in relation to "sustainability" clearly isn"t related to a change of definitions. "Sustainability" has continued to maintain the importance of all three dimensions of sustainable development raised by the Brundtland report. One could hypothesise that when "development" lost its normative attractiveness and global marketability from the 1990's onwards, it started being seen as unfashionable, and was increasingly dropped from talk about sustainability. This was merely a marketing change, not a change of meaning. From a conceptual perspective, they should be considered synonyms.

One enticing hint at how such endeavors to influence global policies through semantic shifts from "development", through "sustainable development" to "sustainability" might not be an altogether passive process comes from the foreword of a 1990 book by the think tank IIED (The International Institute for Environment and Development), a leading which advocated for the creation of a new value system, "which enshrines the principle of sustainability over generations.":

> Sustainable development can mean different things to different people, but it still represents a most productive way of thinking. […] For it to be understood and made fully effective, we have to look at certain cherished assumptions and habits of thought, and create new and more realistic values. That means: We need to recast our vocabulary. Words are not only a means of expression but also the building blocks of thought. The instruments of economic analysis are blunt and rusty. Such words as "growth", "development", [etc] are used in such a misleading way that they are more than ripe for redefinition.[74]

[74] Foreword by Sir Crispin Tickell. Johan Holmberg, ed., *Making Development Sustainable: Redefining Institutions Policy And Economics* (Island Press, 1992), 11-12.

VII. **Normative attractiveness**

By normative attractiveness, or normative charge as they also call it, Pollitt and Hupe refers to how magic concepts tend to tell, explicitly or implicitly, how things ought to be. These positive connotations are usually framed in such a way that it is difficult to be against them, for instance by claiming to be replacing outmoded modes of thinking, and that to be against the concept therefore means not being modern or progressive.[75]

Sustainability clearly is normatively attractive. In the face of growing evidence of a climate catastrophe, "sustainability" is the answer everyone (that has accepted the overwhelming scientific evidence for anthropogenic climate change) is looking for. It is very difficult to be against it without throwing out a century of climate and weather science, and without butting up against core principles of biology and physics. The opposition of "sustainability", according to its adherents is "collapse." We simply cannot continue along the track we are going without exhausting nature around us and causing societal collapse. Given the extremely loose and all-encompassing nature of the concept of "sustainability" virtually all efforts towards creating a more sustainable environment, society or economy is for this reason seen, at least by some, as being in opposition to "collapse."

VIII. **Implications of consensus**

Unlike older public management concepts, magic concepts claims to overcome earlier policy conflicts. According to Pollitt and Hupe, most traditional concepts within public management (the ground from whence "sustainability" and its twin concept "sustainable development" sprouted) have a certain proverbial commonsense quality, that nevertheless can be countered by an equally common sense alternative.[76] Magic concepts do not share this quality. They tend to claim to overcome such conflicts of interest. They either do not admit any alternatives, or only admit alternatives so manifestly bad that no sane person would choose them.

Both because of this broadness of use, applications and connections, as well as its normative attractiveness sustainability also has a strong appearance of consensus. "Sustainability" implies consensus for similar reasons to why it is so normatively attractive: By placing itself in

[75] Pollitt and Hupe, "Talking About Government," 643.

[76] Pollitt and Hupe uses centralization and decentralization as good examples of this. Both can be defended on commonsense grounds, depending on what one seeks to accomplish. Pollitt and Hupe, 643.

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opposition to environmental, societal and economic collapse, and by never fully defining itself, it does not leave any meaningful room for opposition to it. To oppose "sustainability" is either to embrace collapse or reject all evidence that we are heading towards a collapse, an increasingly untenable intellectual position.

IX. **Global marketability**

Part of the allure of magic concepts are their fashionableness. For every conference, academic article, planning document, interdepartmental working group and funding round, the concept gets more "buzz", and with it comes funding to talk and plan using it.[77]

"Sustainable" has now reached such a degree of global marketability, that the term itself is used to market other things. There is an entire field of "sustainability marketing".[78] The impact of it can be easily measured in the academic literature: "Sustainability" plus "marketing" gives 2,2 million hits on Google Scholar. Legions of academic researchers produce papers on how to maximise profit through sustainability branding.[79] The marketability of "sustainability" is now so high that entire countries[80] and transnational regions[81] have sought to reimage themselves as sustainable. As long as this move towards using sustainability in marketing and branding is concurrent with a shift in corporate culture and production towards more sustainable practices, one might see this as a step in the right direction. But it does have the taint of "greenwashing", or even worse, mere profit-seeking to it.[82]

X. **Discussion**

In this discussion I will first discuss the findings of the horizontal analysis from a practical point of view: What does it mean that "sustainability" is a magic concept? Then I will discuss the theoretical argument raised by the

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[77] Pollitt and Hupe, "Talking About Government."

[78] Frank-Martin Belz and Ken Peattie, *Sustainability Marketing* (Wiley & Sons, 2009).

[79] Suraksha Gupta and V. Kumar, "Sustainability as Corporate Culture of a Brand for Superior Performance," *Journal of World Business* 48, no. 3 (July 1, 2013): 311-20.

[80] Maja Konecnik Ruzzier, Nusa Petek, and Mitja Ruzzier, "Incorporating Sustainability in Branding: I Feel Slovenia," *The IUP Journal of Brand Management* 12, no. 1 (2015): 7-21.

[81] "10 Things You Should Know about Nordic Sustainability". https://www.thenordics.com/tool/10-things-you-should-know-about-nordic-sustainability (Accessed February 22, 2021).

[82] Farley and Smith, Sustainability.

conceptual history analysis of "sustainability" as a magic concept; that Pollitt and Hupe might be wrong about magic concepts being a product of late modernity, and that they might have uncovered the characteristics of a semantic strategy for consensus making among international policy elites stretching much further back in time.

As we can see from the horizontal analysis, "sustainability" fits into all characteristics of a magic concept; it is overly broad, has a strong normative pull, constructs an implied consensus and has global marketing reach. Taken together with the conclusions from the vertical analysis, showing that vagueness of the term can be attributed to an attempt at shoehorning environmental sustainability and foreign aid to developing nations into the same conceptual framework, one might even start harboring some resentment towards the concept. One could end up concluding that in its fuzziness and over-inclusiveness sustainability as a concept does more harm than good. This would be a mistake.

Magic concepts also have positive characteristics. As Pollitt and Hupe point out, there is a reason why magic concepts are so widely used in our post-modern world, and not all of them are bad:[83] They are very good at creating new connections between different academic disciplines, interest groups and between countries and regions. They are great rallying banners for policy change within and between governmental, academic and private organizations, due to their implied consensus and fashionableness. They therefore gently side step much of the ideological conflicts and turf wars that have defined human history.

We should therefore be careful of how we use sustainability, given its magical qualities. Magic concepts make poor academic research tools, given that imprecision and instability are part of their definition, but good for government reform, international agreements and other areas where appearance is as important as substance.

The vertical analysis in this article indicates that it was indeed the vague and fashionable qualities of the term that made it such a fit for international decision making from the Brundtland report onwards. In the brief historical outline above one can see indications of a political compromise between the interests of rich and poor members of the UN. It was built on a semantic stitching together of two very different conceptual traditions; environmentalism and development.

It was from this mixing that "sustainability" got its social and economic elements. As has been noted in a vast amount of literature on "sustainability" and "sustainable development" this tripartite division is

[83] Hupe and Pollitt, "The Magic of Good Governance," 22.

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conceptually problematic, and means that most policies or views can in some way be labeled as sustainable. But as I note, this is what made it into a magic concept, and therefore a prime reason for why it has been so successful as a rallying cry.

As has been pointed out earlier in this article, one of the most fascinating aspects of "sustainability" is exactly it's capacity to encompass almost completely opposite views on what is sustainable. The advocates of re-wilding Colombia through hippos are part of a wider movement that seeks to return as much of nature as possible to its pre-human state. On the other side, you have corporate sustainability drives telling you to reuse your towel in the hotel, or to buy carbon credits when you fly. Unfortunately though, while there is some charm to Walt Whitmans notion of contradictions, a concept cannot contain multitudes without eventually falling apart.[84]

When "sustainability" will lose its magic all-inclusiveness is unclear. One might suspect that the continuing and growing popularity of the term is fed by the atavistic forces raised against it. If so, a further weakening of the forces behind the election of Trump in the United States and similar right wing demagogues around the world should be expected to also weaken the consensus surrounding sustainability.

Most likely the very wide tent that sustainability currently encompasses will fracture as soon as the potency of the political forces raised against it weakens. Without the common enemy of unsustainable populism, "sustainability" will most likely lose its unifying appeal, as its disparage supporters start arguing about the specifics. Let us hope that this fracture will lead to a fruitful debate on what exactly should be done to make our home planet more sustainable.

XI. **Conclusion**

This article has shown that "sustainability" is an example of Pollitt and Hupe calls magic concepts; it is broad, has strong normative attractiveness, it implies consensus and has global marketability. "Sustainability" is analyzed vertically, through conceptual history, and horizontally, through mapping the concept along Pollitt and Hupes criteria for magic concepts. From the perspective of conceptual history, viewing "sustainability" as a magic concept raises enticing questions. As I show, the concept can be seen

[84] Walt Whitman, "Song of Myself, Part 51, v. 1324-1326," in *Leaves of Grass* (New York U.P., 1965), 88.

as the current end of a chain of concepts among UN planners, from post-war focus on "development", to "sustainable development" as a connecting point, to "sustainability" now. Should the history of the success of "sustainability" focus less on the dictionary use of "sustainability" over the ages, and more at it's place within a chain of dogmatic concepts influencing ruling elites? More research is needed.

The horizontal analysis showing that "sustainability" is a perfect fit as a magic concept raises interesting implications for the usability of "sustainability" for research. As a magic concept it is more usable as a rallying cry for action than as a measuring stick.

Finally, this study "sustainability" as a magic concept raises the intriguing possibility that magic concepts might not be a product of late modernity, as Pollitt and Hupe argue, but as a semantic strategy of policy elites stretching back much farther into the past. Further research is needed to clarify this.

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The abandonment of the *Spitzenkandidaten* System: (Un)sustainable democracy in the EU?

El abandono de los Spitzenkandidaten*: ¿Democracia (in)sostenible en la UE?*

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Abstract: In the process of the parliamentarisation of the EU, the Treaty of Lisbon took a further step forward by introducing into the founding treaties -Article 17.7 TEU- the need to take into account the elections to the European Parliament for the appointment of the President of the Commission. Nevertheless, the European Parliament has been trying to impose its interpretation of Article 17.7 TEU, which has been coined into the *Spitzenkandidaten* doctrine, according to which the head of the party winning the elections should be elected as Commission President. The Parliament succeeded in imposing its vision with the occasion of the appointment of Juncker in 2014. Nevertheless, by not proposing Manfred Weber, the leader of the most voted party in the 2019 elections, as President, the European Council has prevented the consolidation of the 2014 precedent. Article 17.7 of the TEU also expresses the desire to bring the European elections closer to the citizens, so that their opinion is taken into account when the President of the Commission is elected. And it seems that both the results of participation in 2019 and the perception of the voters show that the *Spitzenkandidaten* system has been useful for that purpose. In any event, I consider that the fact that citizens voted in the 2019

elections in the belief that their votes would be decisive in appointing the President of the Commission and, in the end, it was not elected an *Spitzenkandidaten* as head of the Commission, is a very serious lack of consideration for citizens.

Keywords: Participatory Democracy; European Citizens' Initiative; Spitzenkandidaten; single European constituency.

Resumen: *En el proceso de parlamentarización de la UE, el Tratado de Lisboa dio un nuevo paso adelante al introducir en los tratados constitutivos —Artículo 17.7 TEU— la necesidad de tener en cuenta las elecciones al Parlamento Europeo a la hora de nombrar al Presidente de la Comisión. Sin embargo, el Parlamento Europeo ha intentado imponer su interpretación del artículo 17.7 TUE, que ha sido acuñada en la doctrina Spitzenkandidaten, según la cual el jefe del partido que gana las elecciones debe ser elegido como Presidente de la Comisión. El Parlamento logró imponer su visión con ocasión del nombramiento de Juncker en 2014. Sin embargo, al no proponer como Presidente a Manfred Weber, el líder del partido más votado en las elecciones de 2019, el Consejo Europeo ha impedido la consolidación del precedente de 2014. El artículo 17.7 del TUE expresa también el deseo de acercar las elecciones europeas a los ciudadanos, para que su opinión sea tenida en cuenta en la elección del Presidente de la Comisión. Y parece que tanto los resultados de la participación en 2019 como la percepción de los votantes muestran que el sistema de Spitzenkandidaten ha sido útil para ese fin. En cualquier caso, considero que el hecho de que los ciudadanos hayan votado en las elecciones de 2019 en la creencia de que sus votos serían decisivos para designar al Presidente de la Comisión y, al final, no se haya elegido a un Spitzenkandidaten como jefe de la misma, es una falta de consideración muy grave en relación con los ciudadanos.*

Palabras clave: *Democracia participativa; Iniciativa ciudadana europea; Spitzenkandidaten; Circunscripción común única.*

I. Introduction

In recent decades, democracy and the rule of law have been some of the most cherished values among the European population[1]. Therefore, among other things, the debate about democratic legitimacy[2] in the process of

[1] For example, one of the Commission's latest special Eurobarometers shows that a large proportion of citizens regard respect for democracy, human rights and the rule of law as the main asset of the European Union. In this regard, see: European Commission, Special Eurobarometer 479, Future of Europe, October-November 2018: 20.

[2] In this article we will embrace the meaning of legitimacy by focusing on procedural and representative aspects. In that sense, we can say that the EU will have legitimacy, like any political system, insofar as citizens feel that they are participating directly or indirectly in the decision-making procedures and in the formation of the rules of their legal system. Of course, the possibility of effective participation by citizens in the political system is inversely proportional to their size and the distance between the decision-making centres

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European integration embodied in the European Communities, and today in the European Union (EU), has been a constant from its first steps. In general, during the first decades of its existence, the European Communities were blamed for receiving power from the Member States, which were required to function democratically, but then this power was exercised in the Communities by institutions other than the European Parliament[3], so that its democratic functioning was far from evident. Rather, one would say that the Communities were governed by management models that are more intergovernmental than democratic. Later, once the European Communities had developed and settled, the accusation also arose of the over-dimensioning of the Brussels bureaucratic apparatus, which controls all the Union's machinery from its ivory tower, far removed from the reality of citizens[4]. It is clear that the accusations of distancing from citizens by Communities spheres and actors when it comes to management, and the institutional model clearly intergovernmental, would be fed back, contributing in an ominous way to an image of lack of democratic legitimacy of the institutions of the Communities. Logically, this characterization is very dangerous for the future of integration, since one of the virtues of legitimacy in the framework of a political system is to unite those who govern and those who are governed[5]. If this perception, which is so common among citizens, of the Union's lack of legitimacy were to become consolidated, it would generate a detachment among the governed towards the international organisation, a situation that could lead to the departure of the Member States, as has occurred in the case of the

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and themselves. In the case of the EU, due to the nature of things, as the international organisation is a gigantic political system of a supranational nature, the participation of individuals in the running of the organisation is not easy.

[3] European Parliament, "Resolution on the Democratic Deficit in the European Community", Doc. A-2-276/87, June 1988, pars. 10-11, *OJ* C 187, 18 July 1988.

[4] On this point see: Christian Rauh, "No longer an ivory tower: How public debates influence European Commission policies", Evidence-based analysis and commentary on European Politics, London School of Economics and Political Sciences, accessed on 21/09/2020, https://blogs.lse.ac.uk/europpblog/2016/09/07/no-longer-an-ivory-tower-ec/. On the debate about the democratic deficit of the EU, see also, among others: Giandomenico Majone, "Europe's "Democratic Deficit": The Question of Standards", *European Law Journal*, 4: 1 (1998): 5-28; Andrew Moravscik, "In Defence of the Democratic Deficit: Reassessing Legitimacy in the European Union", *Journal of Common Market Studies* 40: 4 (2002): 603-634; Andreas Follesdal; Simon Hix, "Why there is a democratic deficit in the EU: A response to Majone and Moravcsik", *Journal of Common Market Studies* 44: 3 (2006): 533-562.

[5] Javier Arregui Moreno, "Problemas de legitimidad democrática, representación y rendimiento de cuentas en el proceso político de la Unión Europea", *Cuadernos Europeos de Deusto* 46 (2012): 88-89.

United Kingdom, or take the phenomenon to the extreme, to the very death of the international organisation[6].

Having warned of the danger of the Union's lack of legitimacy, we must move forward by explaining that this has been overcome historically in various ways, although in the background there is an ambition to give greater weight to citizens' opinions in European policy.

Firstly, the aim was to increase the weight of citizens' opinion by making them more representative in the European Parliament through the organisation of direct elections, as well as by giving more powers to the European Parliament itself – the institution which must defend the interests of the citizens – in the institutional firmament of the Communities. As it was stressed by the European Parliament itself in its Resolution of 1988 on the Democratic Deficit, that problem could "[…] be remedied only at the level of the Community itself, by a redistribution of powers between the Council and Parliament; […]"[7]. That program has been implemented through the successive Treaty reforms, and today it can be perceived in the multiple and relevant competences settle down in article 14.1 of the Treaty on European Union (TEU). Mainly in the decisive involvement of the European Parliament in the legislative procedure[8], but also in its increased competences regarding the nomination process of the Commission (Article 17. 7 TEU) and its control over it, including the possibility of motion of censure (Article 17. 8 TEU and Article 234 Treaty on the Functioning of the European Union (TFEU)). Thus, the times when Parliament played only

[6] With regard to European integration, Luis Bouza considers that it suffers from a lack of popular support, motivated not so much by the institutional structure and its functioning, but by the citizens' perception of this architecture and its work. In this author's opinion, the problem of the EU's lack of legitimacy is sociological and political in nature, rather than constitutional or institutional, and therefore institutional responses are not sufficient to solve it; it would be necessary to implement solutions that make political sense of the Union. In this regard, see: Luis Bouza García, "Democracia participativa, sociedad civil y espacio público en la Unión Europea. Algunas propuestas para el desarrollo del artículo 11 TUE del Tratado de Lisboa", Estudios de Progreso. Fundación Alternativas 57 (2010): 14-15.

[7] European Parliament, "Resolution on the Democratic Deficit in the European Community…": par. 20. According to Prieto and Abad, there is a widespread perception that the more parliamentary the system is, the more democratic the EU will be, as Parliament is the only directly elected institution of the Union, which will at the same time make the European Union more legitimate and sustainable. In this regard see: Alberto Priego; Gracia Abad, "La parlamentarización del sistema político de la Unión Europea: sus consecuencias para la legitimidad", *Cuadernos Europeos de Deusto* 52 (2015): 18.

[8] On this issue, see: Gregorio Garzón Clariana, "El Parlamento Europeo y la evolución del poder legislativo y del sistema normativo de la Unión Europea", *Revista de Derecho Comunitario Europeo* 50 (2015): 43-83.

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a secondary role, essentially of a consultative nature, remain as a distant memory of the founding era[9].

Secondly, the increase in the weight of citizens' opinion has been sought, particularly in recent times, through the promotion of direct participation by citizens in the Union's political procedures. In this regard, it must be underlined the relevant impulse given by the Lisbon Treaty by setting up the European citizens' initiative of Article 11.4 of the TEU and 24 TFEU[10] and opening the door to the possibility that the European citizens could have a voice in the nomination of the President of the Commission by Article 17.7 TEU. That article is as follows:

> Taking into account the elections to the European Parliament and after having held the appropriate consultations, the European Council, acting by a qualified majority, shall propose to the European Parliament a candidate for President of the Commission. This candidate shall be elected by the European Parliament by a majority of its component members. If he does not obtain the required majority, the European Council, acting by a qualified majority, shall within one month propose a new candidate who shall be elected by the European Parliament following the same procedure.

The rather vague expression of the first phrase of Article 17.7 TEU – "Taking into account the elections…" – needed to be interpreted and translated into practice on the first possible occasion after the entry into force of the Treaty of Lisbon, in the 2014 elections to the European Parliament. It was implemented by appointing as President of the Commission the head of the list of the party with the most votes in those elections, after complicated internal candidate selection processes by the large European parties. That interpretation of Article 17.7, patronized by

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[9] About the process of gaining of competences by the European Parliament, see: Enrique Barón Crespo, "El desarrollo de la codecisión como procedimiento legislativo de la UE", *Cuadernos Europeos de Deusto* 46 (2012): 19-47.

[10] Under these rules, one million Union citizens, who are nationals or permanently resident in at least one quarter of the Member States may call on the Commission to submit a proposal for a legal act they consider necessary to implement the Constitutive Treaties of the Union. On the European citizens' initiative, see, among others: Andres Auer, "European Citizens' Initiative", *European Constitutional Law Review* 1: 1 (2005): 79-86; Luis Bouza Garcia; Justin Greenwood, "The European Citizens' Initiative: A new sphere of EU politics?", Interest Groups & Advocacy 3 (2014): 246-267; Víctor Cuesta López, "The Lisbon Treaty's Provisions on Democratic Principles: A Legal Framework for Participatory Democracy", European Public Law Review 16: 1 (2010): 123-138; Nicolas Levrat, "L'initiative citoyenne européenne: une réponse au déficit démocratique?", Cahiers de droit européen 47: 1 (2011) : 53-101.

the Parliament, has been coined in the so call, with the German name, *Spitzenkandidaten* system.

We will consecrate this paper to the study of the scope of Article 17.7 TEU and the *Spitzenkandidaten* system when it comes to the participation of citizens in the political functioning of the EU. Particular attention will be given to the effects of the abandonment of the *Spitzenkandidaten* system after the European Parliament elections of 2019 in the light of the sustainability of democracy in the EU. Indeed, after having had internal election in the main European parties before the European Parliament 2019 elections and presented the resulting leaders as candidates for the post of President of the Commission, the European Council did not follow the results of the elections. It did not nominate the leader of the European People's Party (EPP), who was the winner of the elections to the European Parliament, nor another *Spitzenkandidaten* of the new majority as President of the Commission. This non-respect of the citizens' opinion could be taken for a serious blow to the democracy in the EU, even more when the citizens have voted under the conviction that their will would be taken into account with regard to the nomination of the President of the Commission. To complete the perspective of the gravity of the EU institutions conduct, it should also be highlighted the fact that, for the first time since 1979, in 2019 elections the turnout was higher than in 2014.

Thus, in the following section we will present the Article 17.7 TEU and the *Spitzenkandidaten* system in the framework of the direct participation of citizens in the EU political activity and its implementation during the 2014 European Parliament elections. In the third section, we will first shed light over the conflict between the European Parliament and the European Council regarding the interpretation of Article 17.7 TEU and its implementation during the upcoming 2019 election to the European Parliament. Second, we will have a look onto the non-respect of the *Spitzenkandidaten* system after the European Parliament 2019 elections and the nomination of the candidate proposed by the Members States for the post of President of the Commission instead of the one chosen by the citizens. Finally, we will present our conclusions over the effect of the abandonment of that system for the sustainability of the democracy in the EU.

Finally, with regard to the methodological aspects, as EU Law is a branch of Public International Law, we will use the methodology proper to this legal science: the study of the creative process of legal rules, their interpretation and application, in their historical and sociological context. In this methodological journey, we will use the presentation of the various theoretical conceptions of what is understood by democratic functioning within the EU, complementing the ideas already set out in this introduction on the subject. We will also examine the empirical results of the

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interpretative and power battles between EU institutions in the context of European citizens' participation in the democratic life of the Union.

II. **Toward a more sustainable democracy in the EU: Article 17.7 TEU and the *Spitzenkandidaten* system**

1. *Article 17.7 TEU and the* Spitzenkandidaten *system in the context of reinforcing the direct participation of citizens in the EU's political procedures. Theoretical grounds*

As has been already stated above, in order to deepen the ways in which the democratic legitimacy of the Union could be enhanced, the Treaty of Lisbon introduced in the founding treaties a provision whereby the voice of the European citizens should be heard with regard to the President of the Commission's nomination[11].

The new provisions of Article 17.7 of the TEU seem to have their origin in point 47 of a document called "A Constitution for a Strong Europe" presented in Estoril (Portugal) in October 2002 during a meeting of the EPP in preparation for the Convention on the Future of Europe. That article, which was produced seeking to introduce greater democratic legitimacy into the European elections, reads as follows:

> 47. A candidate for the President of the European Commission should be proposed to the European Parliament by the European Council in light of the outcome of European elections, and by qualified majority vote. The European Parliament should give or withhold its approval by majority vote. This would give European political parties the opportunity to present their own candidates in the framework of the campaign for European elections. It would ensure a more personalised election campaign and increase democratic control and support of the European Commission.[12]

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[11] Of course, as Sophia Russack has put it: "The Spitzenkandidaten system implicitly promotes the 'parliamentarisation' of the EU and a federal model of European democracy […].", see: Sophia Russack, "EU parliamentary democracy: how representative?", CEPS Policy Insights No. 2019-07 / May 2019: 10.

[12] See: European Popular Party, Factsheet "The Story of the 'Spitzenkandidaten'", June 2014: 2. Subsequently, in December 2002, during the Convention, the EPP faction proposed an article 78 (3) in the draft Constitution along the following lines: "(3) A candidate for the President of the Commission shall be proposed to the European Parliament by the Council, acting by qualified majority, in the light of the results of the European Parliament elections. To become President of the Commission, the proposed candidate requires the approval of an absolute majority of the members of the European Parliament." (*Ibid.)* The *Praesidium* of

The successful initiative moved from the EPP meeting in 2002, during the Convention process, to the Intergovernmental Conference, then to the 2004 Treaty itself and then, as we have seen, to the founding treaties by the Treaty of Lisbon.

Notwithstanding that inception in the European framework, the idea has probably its roots in national politics. Perhaps in the proposal made in 1997 during the general convention of Germany's Christian Democratic Union party (CDU) of putting forward a "top candidate" in the European elections who would go on to become President of the European Commission, should the party win the elections[13].

Moving forward to Article 17.7 TEU interpretation, it has to be noted that there is a difference between the initial text of the 2002 EPP meeting and the final text approved by the Intergovernmental Conference, which was introduced at the time of the Convention. In the first text, the expression "in light of the outcome of European elections…" seems to be a little bit stronger in the sense of *obligation* than the one finally adopted at the Convention, "Taking into account the result of the elections to the European Parliament…".

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the Convention included the proposal in its April 2003 draft (*ibid*.) and it eventually became Article 26 (1) of the final text adopted by the Convention: "Article 26: The President of the European Commission 1. Taking into account the elections to the European Parliament and after appropriate consultations, the European Council, deciding by qualified majority, shall put to the European Parliament its proposed candidate for the Presidency of the Commission. This candidate shall be elected by the European Parliament by a majority of its members. If this candidate does not receive the required majority support, the European Council shall within one month propose a new candidate to the European Parliament, following the same procedure" (*ibid*.: 3). Finally, the idea was taken up in Article I-27 (1) of the text adopted by the 2004 Intergovernmental Conference as the Treaty establishing a Constitution for Europe (see *ibid*.), which reads as follows: "The President of the European Commission: 1. Taking into account the elections to the European Parliament and after having held appropriate consultations, the European Council, acting by a qualified majority, shall propose to the European Parliament a candidate for President of the Commission. This candidate shall be elected by the European Parliament by a majority of its component members. If he or she does not obtain the required majority, the European Council, acting by qualified majority, shall within one month propose a new candidate who shall be elected by the European Parliament following the same procedure" (*ibid*.).

[13] In that sense, see: European Commission, European Political Strategy Centre, *Building on the Spitzenkandidaten Model*. Bolstering Europe's Democratic Dimension, Issue 1 February 2017: 3, accessed on 23 September 2020, http://www.politico.eu/wp-content/uploads/2018/02/Spitzenkandidaten.pdf. The idea was endorsed by a petition from the Jacques Delors Notre Europe Institute in 1998, signed by Tommaso Padoa-Schioppa: Jacques Delors – Notre Europe, 1998, "From the single currency to the single ballot box", accessed on 23 September 2020: http://institutdelors.eu/wp-content/uploads/2018/01/tps-ceo1998-en-singlecurrencyandelections.pdf

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Moreover, as Martin Westlake has stressed, in some language versions (for example, English, French, Italian) of what is now Article 17.7 TEU, the European Council proposes a candidate for the Presidency of the European Commission after "taking into account the elections". And yet in other language versions (German and Spanish, for example), the Article talks about "taking into account the result of the elections". For him, "taking into account the elections" could mean ensuring a balance of the best-performing political families when making nominations to that position. While "taking into account the result" "[…] could only mean, more narrowly, nominating for the Presidency of the Commission the representative of the political family which had won the most seats".[14]

Article 17.6 and 17.7 TEU were complemented, in theory, by Declaration 11 annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon[15]. The wording of the Declaration 11 does not shed light over the key issue, that is whether or not the European Council must follow the results of the European Parliament elections in order to nominate the President of the Commission. The text only indicates that "[…] the European Parliament and the European Council are jointly responsible for the smooth running of the process leading to the election of the President of the European Commission"[16]. During that process, some consultations between the two institutions are foreseen, with the only indication that they will focus "on the backgrounds of the candidates for President of the Commission, taking account of the elections to the European Parliament, in accordance with the first subparagraph of Article 17(7)"[17].

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[14] See: Martin Westlake, "Chronicle of an Election Foretold: The Longer-Term Trends leading to the Spitzenkandidaten Procedure and the Election of Jean-Claude Juncker as European Commission President", *LSE Europe in Question Paper Series* 102 (2016): 39-40.

[15] "11. Declaration on Article 17(6) and (7) of the Treaty on European Union. The Conference considers that, in accordance with the provisions of the Treaties, the European Parliament and the European Council are jointly responsible for the smooth running of the process leading to the election of the President of the European Commission. Prior to the decision of the European Council, representatives of the European Parliament and of the European Council will thus conduct the necessary consultations in the framework deemed the most appropriate. These consultations will focus on the backgrounds of the candidates for President of the Commission, taking account of the elections to the European Parliament, in accordance with the first subparagraph of Article 17(7). The arrangements for such consultations may be determined, in due course, by common accord between the European Parliament and the European Council" (Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, *OJ* C 326 26 October 2012).

[16] *Ibid*.

[17] *Ibid*.

Obviously, one can conclude on this point, that the idea behind the original text of the EPP, along the lines of the CDU proposal, was that the leader of the party who would win the elections to the Parliament should be proposed by the European Council as the candidate for the office of President of the Commission. Nevertheless, even if that intention would have remained implicit in the final text of Article 17.7 TEU, the wording -at least in the English version- indicates only the necessity of dialogue between the European Council and the European Parliament, taking into account the results of the elections. From the wording cannot be inferred that the winner of the election must automatically be nominated as Commission President. Furthermore, in any case, in no place is said that taking into account the result of the elections implies to appoint the head of the winner party; it could be the leader of the majority, even if it is the leader of another party forming the majority in the Parliament after the elections[18].

In my opinion, the lowest level of influence of the results in the appointment as President of the Commission would be to nominate someone from the party or parties forming the new majority; better of the winner, even if he or she had not been a candidate in the elections. Nevertheless, while this possibility would be acceptable, if we look at the text of Article 17.7 TEU, it would probably be contrary to the spirit of the changes, and certainly it would leave people unsatisfied. Indeed, one might think that in the end, Commission Presidents have usually come from politicians from the ranks of parties in the EPP or the S&D. Then, what is the point of having made the changes to the Treaties to nominate again someone from those parties when they are most likely still the winners of the elections or, together, the majority? Certainly, the changes must bring something much more than that.

Despite this specific historical origin, which is situated in the process of adopting the Treaty that was intended to create a Constitution for Europe, it would be wrong to think, however, that the pivotal role allotted to the Parliament by Article 17.7 was the result of a unique impulse. Rather, the provisions of Article 17.7 represent a further step in the institutional development of the Union and, in particular, in the influence of the European Parliament on the appointment of the Commission in general[19]. In

[18] In that sense, see: Araceli Mangas Martín, "El nuevo equilibrio institucional en tiempos de excepción", *Revista de Derecho Comunitario Europeo* 50 (2015):24.

[19] In that regard, see: *Building on the Spitzenkandidaten Model*. Bolstering Europe's Democratic Dimension…" : 2, accessed on 24 September 2020. See also: Westlake, "Chronicle of an Election Foretold:…": 24-40. In the same lines, see: Thomas Christiansen, "After the *Spitzenkandidaten*: fundamental change in the EU's political system?", *West*

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that respect, we should recall that, first, by the Maastricht Treaty, in 1992, it was stipulated that the appointment of the President and other Members of the Commission, by common accord of the governments of the Member States, would take place after approval by the European Parliament[20]. Second, thanks to the Treaty of Amsterdam, in 1997, the Parliament approved the candidate for President of the Commission, prior to the approval of the entire college of Commissioners[21]. Third, the Treaty of Nice in 2001 amended the appointment procedure in the European Council, moving from the need for unanimity to qualified majority[22]. Finally, via the Treaty of Lisbon, as we already know, the Parliament has gained more influence in the nomination[23], on account of the necessity to link the nomination with the elections results. It rests for us to measure the scope of that influence.

2. *The "success" of the* Spitzenkadidaten *system in 2014. Empirical results*

The first occasion in which the citizens' voices should have been taken into account for the nomination of the Commission Presidency, after the entry into force of the Treaty of Lisbon, was the 2014 European Parliament elections, and the Parliament seized the opportunity.

Indeed, by a resolution of 22 November 2012 on the elections to the European Parliament in 2014, the European Parliament urged the European political parties "[… to nominate candidates for the Presidency of the

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European Politics 39: 5 (2016): 994; Hilde Reiding; Fons Meijer, " 'This time it's different' – the European lead candidate procedure of 2014 and its historical background", *Parliaments, Estates & Representation* 39: 1 (2019): 64-79. Regarding the role of the Commission in the EU, see, among others: Marta Ortega Gómez, *La Comisión Europea y el gobierno de la Unión* (Madrid: Marcial Pons, 2013) and Fernando Castillo de la Torre, "La Comisión Europea y los cambios en el poder ejecutivo de la Unión Europea", *Revista de Derecho Comunitario Europeo* 50 (2015): 85-124.

[20] Article 158 of the Treaty establishing the European Economic Community, introduced by the Treaty on European Union, signed in Maastricht on 7 February 1992, *OJ* C191, 29 July 1992.

[21] Amendment to Article 158 of the Treaty establishing the European Community introduced by the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, *OJ* C340, 10 November 1997.

[22] Amendment to Article 214 of the Treaty establishing the European Community introduced by the Treaty of Nice, signed on 26 February 2001, *OJ* C325, 24 December 2002.

[23] On this issue see, for instance: Antonio Calonge Velázquez, "El Consejo Europeo y sus relaciones con las demás instituciones de la Unión", *Revista de Derecho de la Unión Europea* 18 (2010): 109-110.

Commission […]"[24], with the aim of enhancing the legitimacy of this institution. Thus, in the light of the wording of the resolution -elections to the European Parliament- and the call to European parties to nominate candidates for the Commission Presidency, there can be no doubt about the Parliament's conviction on the existence of an obligation to follow the result of the elections, deriving from Article 17.7 TEU. The Parliament added that it expected "[…] those candidates to play a leading role in the parliamentary electoral campaign, in particular by personally presenting their programme in all Member States of the Union"[25].

For its part, the Commission also seemed to share that conviction, when, on 12 March 2013, it called on European political parties to nominate candidates for the office of the Commission President [26].

However, the European parties, which consist of various separate member parties at the national level, amalgamated into European party organizations, did not have any indication on how to proceed for that selection[27]. Thus, due to the fact that there are not so far European lists, even if there

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[24] European Parliament resolution of 22 November 2012 on the elections to the European Parliament in 2014, P7_TA(2012)0462.

[25] *Ibid*.

[26] Recommendation 2013/142/EU on enhancing the democratic and efficient conduct of the elections to the European Parliament of 12 March 2013 (*OJ* L 79, 21 March 2013).

[27] See on that respect: Gert-Jan Put; Steven Van Hecke; Corey Cunningham; Wouter Wolfs, "The Choice of *Spitzenkandidaten*: A Comparative Analysis of the Europarties' Selection Procedures", *Politics and Governance* 4: 1 (2016): 14. In this regard, there is no need to recall that the procedures for electing the European Parliament are governed both by European and national legislation. The European legislation, which defines rules common to all Member States, lay down general principles, like proportional representation, thresholds, incompatibilities, etc. This legislation is contained basically in the Act of 20 September 1976 concerning the election of the representatives of the Assembly by direct universal suffrage (1976 Electoral Act, 76/787/ECSC, EEC, Euratom: Decision of the representatives of the Member States meeting in the council relating to the Act concerning the election of the representatives of the Assembly by direct universal suffrage, ***OJ*** L 278, 8 October 1976), which has undergone several modifications. For instance, in 2002, through the 2002/772/EC, Euratom: Council Decision of 25 June 2002 and 23 September 2002 amending the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, annexed to Decision 76/787/ECSC, EEC, Euratom (*OJ* L 283, 21 October 2002). The last amendments to the 1976 Electoral Act were adopted by Council Decision (EU, Euratom) 2018/994 of 13 July 2018 amending the 1976 Electoral Act (Council Decision (EU, Euratom) 2018/994 of 13 July 2018 amending the Act concerning the election of the members of the European Parliament by direct universal suffrage, annexed to Council Decision 76/787/ECSC, EEC, Euratom of 20 September 1976 (*OJ* L 178, 16 July 2018). While national laws rule other important issues, such as the number of constituencies or the exact electoral system. About the impact of the new nomination procedure on the role of European parties, see: Oliver Höing; Johannes Müller Gómez, "Towards the German model? Spitzenkandidaten and European Elections 2014", *Europe en formation: les cahiers du fédéralisme* 373:3 (2014): 45-65.

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have been already several proposals in that line, the citizens cannot vote for the leader of the European party who should become President of the Commission, with the exception, of course, of the voters of her or his constituency[28]. In that case, the only solution was to proceed to internal elections in the European parties beforehand.

In that line, the EPP convened an Election Congress in March 2014 in Dublin, in which Jean-Claude Juncker was elected as the party candidate for President of the European Commission, obtaining a majority of votes against Michel Barnier[29].

For its part, the Group of the Progressive Alliance of Socialists and Democrats in the European Parliament (S&D) elected Martin Schulz as its common candidate for the 2014 European elections on the 1st of March 2014 during an election congress that took place in Rome[30].

With regard to the Alliance of Liberals and Democrats for Europe Party (ALDE), two candidates raced for the selection, Olli Rehn and Guy Verhofstadt. Nevertheless, instead of convening an elective congress, they reached an agreement on 20 January 2014. The two candidates decided that Verhofstadt would be the ALDE Party's candidate for Commission President, while Olli Rehn would be the party's candidate for one of the other senior posts in the EU, in particular in the field of economic affairs and foreign policy[31].

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[28] After the 2014 elections, by Council Decision 2018/994, an interesting amendment has been introduced, calling on Member States to allow for the display, on ballot papers, of the name or logo of the European political party to which the national political party or individual candidate is affiliated. See Article 3b Council Decision (EU, Euratom) 2018/994 of 13 July 2018 amending the Act concerning the election of the members of the European Parliament by direct universal suffrage, annexed to Council Decision 76/787/ECSC, EEC, Euratom of 20 September 1976 (*OJ* L 178, 16 July 2018).

[29] See the press release: "Jean-Claude Juncker elected as EPP candidate for President of the European Commission", Dublin 7 March 2014, accessed on 28 September 2020, http://juncker.epp.eu/press-releases/jean-claude-juncker-elected-epp-candidate-president-european-commission.

[30] See the press release: "Rome 2014. First PES Common Candidate: Martin Schulz", accessed on 28 September 2020, https://www.pes.eu/en/about-us/the-party/congress/rome-2014/index.html.

[31] See the press release: "Agreement between Olli Rehn and Guy Verhofstadt - statement by ALDE party president", 20th January 2014, accessed on 10 November 2020, https://www.eureporter.co/frontpage/2014/01/21/agreement-reached-between-olli-rehn-and-guy-verhofstadt-statement-by-alde-party-president/?__cf_chl_jschl_tk__=e2ed95745ef57561a058456750f7a93071405ea6-1605027541-0-AX66K7lsCfSsH5m06vGGYlENxR6wEtbBC6DAksboAXHG4t1vkgdG4acSfaM7oBnkcbU1Omr0jxAHAzs5iakLw2hfrhICeTD9Q3lzI4JEKE-2oIePQwfHirSxqax-xJI9526Z6Ut2Q7-P9fRelLG0VqqCNEheqkyRkkgPyPWiyAUJ8riFX-OGUPCAWn2dfw7uQYkRZ5Wy8h28qk4bum4Fx5tL6nFXZE08XA5_PHd6dvBRL7Ga9b-KpdU1KBJ1eXJDVjOSMxdcjXhgf2XwH4gnDXgX1cZDH8undhMEqIzc63Be5WOziKR-1rNvLm05DM9BRqHEmVZ0PgsHOMdBNwwCk5fIy6VRfAgeilgyW51FLUHd0_iGhx5g-WIDvOqHPp4S3CYSd9TxoF7PzB2JIvGkkJGmzpFs-cl-_damURWJZnuf7Arov

When it comes to the Party of the European Left, it held its 4th Congress in Madrid under the name "Change Europe. For a Europe of Work" in December 2013. One of the issued to be decided was the party candidate for the Presidency of the Commission in the subsequent European elections. In the end, a majority of the delegates gave their support to Alexis Tsipras' candidature[32].

More innovative still, the European Greens party organized a Europe-wide open online process to select their leading candidates for the European elections and then the President of the Commission. That process, called "Green Primary", ended up in January 2014 by selecting Ska Keller and José Bové as their party's nominees[33].

Once all the main political parties had decided their candidatures, for the first time since there are direct elections to the European Parliament, they launched an EU-wide election campaigns and held public events across the Union to raise awareness of their candidates and their political programmes for the future of the EU. Thus, instead of campaigning only in the territory of their constituencies, the lead candidates travelled around the Continent to obtain popular support[34] – although in reality it seems that they only visited a few countries selected on the basis of various parameters[35] –. On top of that, some televised debates were organized among the *Spitzenkandidaten* in different Member States and languages[36]. In so doing, the awareness among the population about the personalities of the main candidates and the problems at stake during the subsequent elections could have been higher than in previous occasions, in the attempt to revert the so-

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[32] In this regard, see the press release: "Tsipras, Nominated by the European Left, as the Voice to Denounce the Policies of the Troika in the European Commission". Accessed on 28 September 2021, https://oldsite.european-left.org/de/4th-el-congress/tsipras-nominated-european-left-voice-denounce-policies-troika-european-commission.

[33] On this point, see the press release: "Ska Keller and José Bové will lead the Greens in their European campaign", European Greens, 29th January 2014, accessed on 10 November 2020, https://europeangreens.eu/press-release-jose-bove-and-ska-keller-will-lead-greens-their-european-campaign.

[34] Apparently, they visited only 246 cities. See in this regard: "Report on the 2014 European Parliament elections", Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: 7.

[35] In that sense, see: Johannes Müller Gómez; Wolfgang Wessels, "The EP Elections 2014 and their Consequences. A Further Step towards EU Parliamentarism?", *Cuadernos Europeos de Deusto* 52 (2015): 41.

[36] See: "Report on the 2014 European Parliament elections", Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2015) 206 final: 6-7. In that regard, see also: Christiansen, "After the Spitzenkandidaten: fundamental change…": 995-998.

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called second-order theory of the European elections[37]. According to this theory, most electors – and the political parties themselves – consider the European political arena to be less important than the national one and that they, accordingly, use their votes in EP elections to express approval or disapproval in respect of their national parties.

The elections to the European Parliament took place from 22 to 25 May 2014 in all the Member States of the Union, with a turnout of 42,61 %, which suppose a small decrease with regard to previous one of 2009 – 42,97% –. As a reminder, we should mention that the EPP won the elections, with the 29,43 % of the vote cast and obtaining 221 seats. In second position, the S&D secured the 25,43 % of the votes and gained 191 seats. The third party in number of votes was the European Conservatives and Reformists, that obtained the 9,32% of vote cast, which represented 70 seats in the Parliament. Next to that, ALDE ranked fourth in the elections, with the 8,92% of the voters and 67 MEPs. The fifth party was the European United Left/Nordic Green Left, which obtained the 6,92% of the votes and 52 seats. Very close to the European United Left/Nordic Green Left, but behind, the European Greens were only be the sixth party in the elections, with a result of the 6,66% of voters and 50 MEPs[38].

After the elections, on 27 June 2014, the European Council nominated Jean-Claude Juncker, the head of the EPP, in a formal vote in which he obtained 26 votes in favour meanwhile David Cameron, the British Prime Minister[39] and Viktor Orbán, the Hungarian Prime Minister, voted against his candidacy[40]. Then, on 15 July 2014, the European Parliament, by a large majority of votes – 422 in favour, 250 against, 47 abstention –, elected Juncker as President of the Commission[41]. Some weeks later, once Juncker and the Member States had agreed on the formation of the College of Com-

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[37] On this point see: Karlheinz Reif; Hermann Schmitt, "Nine second-order national elections- a conceptual framework for the analysis of European elections results", *European Journal of Political Research* 8:1 (1980): 3-44. See also: Arregui, "Problemas de legitimidad democrática…": 94.

[38] See: European Parliament, "Results of the 2014 European elections", accessed on 30 September 2020, https://www.europarl.europa.eu/elections2014-results/en/election-results-2014.html.

[39] David Cameron, among other things, opposed the nomination of Jean-Claude Juncker on the grounds that he was too federalist, see: House of Commons Library, "European Parliament Elections 2014", Research paper 14/32, 11 June 2014: 7.

[40] European Council, the President, Press release: "Remarks by President Herman Van Rompuy following the European Council", 27 June 2014, accessed on 1 October 2020, https://data.consilium.europa.eu/doc/document/ST-138-2014-INIT/en/pdf.

[41] European Parliament, Press release, "Parliament elects Jean-Claude Juncker as Commission President", accessed on 1 October 2020, https://www.europarl.europa.eu/news/en/press-room/20140714IPR52341/parliament-elects-jean-claude-juncker-as-commission-president.

missaries at the 5 September 2014 meeting of the Council of the European Union, the European Parliament, on 22 October 2014, gave its strong support to the new European Commission with 423 votes in favour, 209 against and 67 abstentions[42]. Finally, the European Council appointed the new European Commission at its Summit of 23-24 October 2014[43].

Therefore, for the first time in history, the Member States appointed the leader of the party that had won the elections to the European Parliament as the President of the Commission, putting into practice the changes brought about by Article 17.7 TEU[44].

Even more, they were achieved both aims of the interpretation of Article 17.7 TEU that the Parliament wanted to imposed through the *Spitzenkandidaten* system, that it's to increase the power of Parliament in the context of institutional balance as well as the weight of citizens' opinion. First, with regard to the extension of Parliament's power, some analyst, such as Thomas Christiansen, pointed out that the introduction of the *Spitzenkandidaten* system has led to a greater parliamentarisation of the Union, a greater politicisation of the European Commission and a greater union between Parliament and the Commission[45]. Second, in relation to the popular support, if we give credit to a survey commissioned by the European Parliament after the 2014 elections, it seems that a majority of European citizens cheered the role that the European Parliament played in Juncker's election[46].

However, despite the overall positive impression given by the implementation of the changes linked to the new Article 17.7 TEU, two relevant nuances must be taken into account. On the one hand, the slight

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[42] European Parliament, Press release, 22 October 2014, "European Parliament elects Juncker Commission", accessed on 1 October 2020, https://ec.europa.eu/commission/presscorner/detail/en/IP_14_1192.

[43] See: European Council (23 and 24 October 2014), "Conclusions", EUCO 169/14, 24 October 2014.

[44] As for its practical application in 2014, according to analysts, it should be noted that in addition to the influence of the EPP on the origin of the idea, which we noted above, when it was implemented in reality, much is due to the figure of Martin Schulz, who worked resolutely to achieve this objective. In that sense, see: Joseph Weiler, "The Spitzenkandidaten Exercise One Year Later – The Unsung Hero", *European Journal of International Law* 26: 2 (2015): 312: See also: Reiding; Meijer, " 'This time it's different' – the European lead candidate procedure…": 78.

[45] Christiansen, "After the Spitzenkandidaten…" :1005. See also: Simon Hix, "Why the EU needs (Left-Right) Politics? Policy Reform and Accountability are Impossible without it", in Stefano Bartolini; Simon Hix, "Politics: The Right or the Wrong Sort of Medicine for the EU?", *Notre Europe* Policy Paper 19 (2006): 7-11.

[46] See: European Parliament, 2014, "Parlameter survey 2014: citizens cheer Parliament's role in Juncker election", accessed on 30 September 2020, http:// www.europarl.europa.eu/news/en/press-room/20150213IPR24006/ parlameter-survey-2014-citizens-cheer-parliament-s-role-injuncker-election.

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decrease of the turnout – the 42,61 % of the vote cast – in comparison to the 2009 elections. On the other hand, according to above mentioned survey, only the 5 % of the respondent indicated that the main reason that made them going to vote was to influence the choice of Commission President[47], so that imply that the changes operated by Article 17.7 TEU had only little impact in the turnout. In my opinion, it also implies that the above mentioned results regarding the satisfaction of the voters in relation to the role of the Parliament were not completely linked to the *Spitzenkandidaten* system, if we want to give any credit to the survey commissioned by the European Parliament. Or perhaps, the question was not correctly put forward.

In any event, only the future could say then if that steps were to be maintained in subsequent elections[48]. We will see what happened in the 2019 elections further.

III. **The fall of the *Spitzenkandidaten* system: toward a more (un) sustainable democracy in the EU?**

1. *The tension between the European Parliament and the European Council with regard to the* Spitzenkandidaten *system. Theoretical and power disputes*

In the presence of Juncker's appointment in 2014 – the head of the party winner of the elections – by all the main actors in the Union's politics, it can be argued that Members States, along with the Council and the European Council, had lost a battle in favour of the European Parliament and the democratisation of the EU. However, the war was still going on, of course…

The Parliament was strongly in favour of following this practice, and proposed it vehemently for the following elections. Already in November 2015, the European Parliament took the first step when it adopted a resolution on the reform of the 1976 Electoral Act in the context of the special legislative procedure laid down in Article 223 TFEU. The resolution aimed at strengthening the democratic and transnational dimension of the elections to the European Parliament, by proposing several innovations, such as equal

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[47] See: European Parliament, 2014 post-election survey: 25, accessed on 30 September 2020, http://www.europarl.europa.eu/pdf/eurobarometre/2014/post/post_2014_survey_analitical_overview_en.pdf

[48] On this point see, for instance: Marco Goldoni, "Politicising EU Lawmaking? The *Spitzenkandidaten* Experiment as a Cautionary Tale", *European Law Journal* 22: 3 (2016): 279-295.

visibility of European and national political parties on ballot papers, or of a joint constituency in which lists are headed by each European party's candidate for the post of President of the Commission[49].

Furthermore, in its Decision of 7 February 2018 on the Revision of the Framework Agreement on relations between the European Parliament and the European Commission, it stated that the Head of List system contributes to transparency, "[…]as candidates for President of the Commission are made known prior to the European elections, rather than after them as was previously the case"[50]. For the European Parliament, moreover, the procedure for appointing heads of list "[…] fosters the political awareness of European citizens in the run-up to the European elections and reinforces the political legitimacy of both Parliament and the Commission by connecting their respective elections more directly to the choice of the voters; […]"[51]. In addition, the European Parliament considered "[…] that in 2014 the 'Spitzenkandidaten' process proved to be a success, and stresses that the 2019 European elections will be the occasion to cement the use of that practice; […]" [52].

On top of that, the Parliament made a veiled threat to the European Council by clearly stating that: "[…] by not adhering to the 'Spitzenkandidaten' process, the European Council would also risk submitting for Parliament's approval a candidate for President of the Commission who will not have a sufficient parliamentary majority"[53]. The Parliament also warned the European Council, with no less clarity, that it was ready "[…] to reject any candidate in the investiture procedure of the President of the Commission who was not appointed as a 'Spitzenkandidat' in the run-up to the European elections"[54].

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[49] European Parliament Resolution of 11 November 2015 on the reform of the electoral law of the European Union (2015/2035(INL)), *OJ* C 366, 27 October 2017. We have to recall that the legal basis for reforming the electoral procedure is enshrined in Article 223 TFEU. Article 223.1 TFEU established that the "[…] European Parliament shall draw up a proposal to lay down the provisions necessary for the election of its Members by direct universal suffrage" and that the Council, "[…] acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, which shall act by a majority of its component Members, shall lay down the necessary provisions. These provisions shall enter into force following their approval by the Member States in accordance with their respective constitutional requirements".

[50] European Parliament decision of 7 February 2018 on the revision of the Framework Agreement on relations between the European Parliament and the European Commission (2017/2233(ACI)): (5).

[51] *Ibid*.: (6).

[52] *Ibid*.: (9).

[53] *Ibid*.: (3).

[54] *Ibid*.: (4).

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By contrast, the European Council clearly expressed its reluctance to accept the system of the head of list. Therefore, in an informal meeting that took place on February 2018, the heads of State or Prime Ministers of the Member States stressed that the formulation of Article 17.7 TEU, "[…] means that the European Council cannot deprive itself of its prerogative to choose the person it proposes as President of the European Commission without a change of the Treaty […]"[55]. For the Heads of State or Government, the process of appointing heads of list is linked to the question of "balances" in the context of high-level appointments, such as respecting the geographical and demographic diversity of the Union and its Member States, or sex balance."[…] If the President of the Commission were to be selected in accordance with the logic of the 'Spitzenkandidaten' process, and if such balances are to be taken into account, the choice of the European Council regarding other nominations will be more limited."[56].

In addition, a few months later, according to the special legislative procedure settled down by Article 223.1 TFEU, the Council of the European Union, adopted unanimously, on 7 June 2018, a draft decision on the reform of the Electoral Act. In that document, the Council reiterated its refusal to the establishment of both the system of the heads of list or the joint constituency, as was suggested by Parliament in November 2015, but accepted the Parliament suggestion in order to have the name of the European parties on ballot papers[57]. On 4 July 2018, the European Parliament gave its consent[58] and consequently the Act was adopted by the Council on 13 July 2018[59].

The Commission, for its part, was also in favour of repeating the *Spitzenkandidaten* system for the 2019 elections. For example, by its Recommendation 2018/234 of 14 February 2018, the Commission called on each European political party to make known, in good time before the

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[55] European Council, Leaders' Agenda, February 2018, The next institutional cycle, High-level appointments.

[56] *Ibid*.

[57] Council of the European Union, Proposal for a Council Decision adopting the provisions amending the Act concerning the election of the members of the European Parliament by direct universal suffrage (the 'Electoral Act'), 9425/18.

[58] European Parliament legislative resolution of 4 July 2018 on the draft Council decision amending the Act concerning the election of the members of the European Parliament by direct universal suffrage, annexed to Council Decision 76/787/ECSC, EEC, Euratom of 20 September 1976 (09425/2018 - C8-0276/2018 - 2015/0907(APP)), (*OJ* C 118, 8 April 2020).

[59] Council Decision (EU, Euratom) 2018/994 of 13 July 2018 amending the Act concerning the election of the members of the European Parliament by direct universal suffrage, annexed to Council Decision 76/787/ECSC, EEC, Euratom of 20 September 1976 (*OJ* L 178, 16 July 2018).

elections to the European Parliament and if possible by the end of 2018, the candidate for the office of President of the European Commission whom it supports and, as far as possible, the political programme of that candidate[60]. According to the Commission, "[r]einforcing the democratic legitimacy of the EU and ensuring the participation of citizens in the political life at European level is essential"[61]. It also insisted on the benefits of having recourse to the *Spitzenkandidaten* system for the improvement of the elections turnout. For the Commission, European citizens would be readier to vote in the elections to the European Parliament "[…] if they would trust that they can have their say on the Union's most important choices, such as the selection of the leaders of the EU institutions and the establishment of priorities for the future of the Union"[62].

To put an end to the presentation of this institutional quarrel, it should be highlighted that, at least for us, this reference to the "trust" of the citizens is capital. Even if in 2014, probably because it was the first time, citizen's awareness about the fact that they can influence the President of the Commission choice with their vote was not high, the seed was thrown, and over time it would bear fruit, if the European institutions keep their promises. One cannot play with people's trust, and even less in the fragile context of European politics.

2. *The abandonment of the* Spitzenkandidaten *system in 2019. Empirical results of the disputes*

After having presented the chain of events that surrounded the 2014 elections, we will shed light on what happened before and after the 2019 ones.

On the one hand, it should be underlined that, irrespective of the dispute that we have presented in the previous section between the European institutions, a large proportion of citizens cherished the *Spitzenkandidaten* system as an ally in the fight for democracy within the EU. Indeed, as a Eurobarometer survey that the European Parliament presented in 2018 shows, one year before the elections, almost half (49%) of the 27 Member States citizens considered that having recourse for the second time to the head of the list process would increase their likelihood to

[60] See: Commission Recommendation (EU) 2018/234 of 14 February 2018 on enhancing the European nature and efficient conduct of the 2019 elections to the European Parliament, *OJ* L 45, 17 February 2018.

[61] *Ibid*.: (5).

[62] *Ibid*.

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vote. By contrast, 43% of respondents sustained that the *Spytzenkandidaten* process would not affect their decision to vote, while 8% of citizens declared that they did not know whether that element would have a positive or a negative impact on their motivation to vote[63]. On the other hand, most respondents (63%) agreed that the lead candidate system had brought about more transparency in European politics, supposes a significant progress for European democracy (61%) and increases the European Commission legitimacy (60%)[64].

Besides, the electoral machinery began to function as if the winner in the elections would be the President of the Commission. In fact, the parties began to choose their candidates for the 2019 elections at the end of 2018. Thus, for example, the EPP, at a congress in Helsinki on 8 November 2018, elected Manfred Weber[65]. For its part, the S&D decided on its candidate, Frans Timmermans, the then First Vice-President of the Commission, at a congress in Lisbon on 8 December 2018[66]. On 12 November 2018, the European Conservatives and Reformists chose Jan Zahradil as their *Spitzenkandidat*[67]. ALDE followed another path; during a party congress that took place in Madrid, on 9 November 2018, the party announced that, instead of nominating one lead candidate, it would designate a team of liberal leaders for the upcoming elections[68]. The European Green Party, at its 23-25 November 2018 Berlin Congress, elected Ska Keller – who had been also one of its candidates for the 2014 election – and Bas Eickhout as their *Spitzenkandidaten*[69]. To complete the

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[63] European Parliament, "Democracy on the move European Elections. One year to go, Eurobarometer Survey 89.2 of the European Parliament. A Public Opinion Monitoring Study": 30. Accessed on 26 October 2020, https://www.europarl.europa.eu/at-your-service/files/be-heard/eurobarometer/2018/eurobarometer-2018-democracy-on-the-move/report/en-one-year-before-2019-eurobarometer-report.pdf.

[64] *Ibid*.: 7.

[65] In this regard, see the EPP press release: "Manfred Weber elected as EPP candidate for the President of the European Commission", accessed on 5 October 2020, https://www.epp.eu/press-releases/manfred-weber-elected-as-epp-candidate-for-the-president-of-the-european-commission/.

[66] On this point, see the European Socialist's Party press release: "Frans Timmermans launches campaign to become President of the European Commission in Lisbon", accessed on 5 October 2020, https://www.pes.eu/en/news-events/news/detail/Frans-Timmermans-launches-campaign-to-become-President-of-the-European-Commission-in-Lisbon/.

[67] See the press release: "Conservatives endorse Czech MEP for Commission top job", accessed on 5 October 2020, https://www.politico.eu/article/tories-european-allies-endorse-jan-zahradil-for-commission-top-job/.

[68] See the press release: "Towards the 2019 Elections", accessed on 5 October 2020, https://www.aldeparty.eu/towards_2019_elections.

[69] See the press release: "European Greens elect leading duo", accessed on 5 October 2020, https://europeangreens.eu/news/european-greens-elect-leading-duo.

list of the candidates of the larger parties, we must point out that, at the beginning of the elections' year, on 26-27 January 2019, at the meeting of the Executive Board of the Party of the European Left Party, Violeta Tomič and Nico Cue were designated as its lead candidates[70].

With regard to the election campaign, it should be noted that, according to a report published in July 2019 containing the results of an EU-funded research project (Platform Europe) on the election campaign and conducted by a network of universities, led by the Italian *Roma Tre*, it could not be considered a true supranational campaign. It was more a question of the overlapping of different national campaigns, with a prevalence of national content over European one. In addition, it is remarkable that the *Spitzenkandidaten* factor could not alter this trend, as it had little communication potential. In fact, as this study shows, only some of the lead candidates made a real European tour[71], to which we must add the fact that several parties did not even appoint their *spitzenkandidaten* or, as ALDE did, limited themselves to appointing a team of politicians to this role[72]. Therefore, the findings of this study would go along the lines of the so-called second-order theory of the European elections[73].

As for the elections, that took place between 23 and 26 May 2020, they were marked mainly by the last hour participation of the UK, embroiled in its parliamentarian process to exit the EU. In connection with the results, it should be emphasized that, like in 2014, the EPP won the elections with the 20.80% of the vote cast, obtaining 182 seats, which supposed a significant decrease in comparison with the 2014 results. In second position, the S&D attained the 17.88% of the vote, gaining 154 seats, also far away from its previous results. The combination of those losses implied that both parties had lost the absolute majority that hitherto they have mustered. The third party in contention was ALDE, that on 12 June 2019 decided to be renamed

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[70] See the press release: "Two candidates from the people for the people", accessed on 5 October 2020, https://www.european-left.org/campaigns/two-candidates-from-the-people-for-the-people/.

[71] As we have already noted, something similar happened in the case of the 2014 campaign, see in that sense: Müller Gómez; Wessels, "The EP Elections 2014 and their Consequences..": 41.

[72] Edoardo Novelli; Bengt Johansson (eds.), "2019 European Elections Campaign. Images, topics, media in the 28 Member States. International research project lead by University Roma Tre Funded by the European Parliament Category Events COMM/SUBV/2018/E/0147 Directorate-General for Communication Public Opinion Monitoring Unit July 2019": 15, accessed on 27 October 2020, https://www.electionsmonitoringcenter.eu/article/b8948aed-67b6-4575-bb9c-4df29ae08538.

[73] See: Reif; Schmitt, "Nine second-order national elections…": 3-44.

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as Renew Europe[74], with the 12.01% of the vote cast and 108 MP's. For its part, the group of the Greens/European Free Alliance was voted by the 10.04% of the voters and secured 74 seats, and close to them, Identity and Democracy group obtained 73 seats derived from the 10.59% of the vote cast[75].

However, the most relevant aspect in relation to the 2019 European Parliament elections was neither the participation of the UK nor the results, but the turnout. The fact is that, for the first time in history, the downward trend in the percentage of participation was reversed, since in May 2019 more than half of the potential voters (50.66%) voted, the highest percentage in 20 years. In fact, the participation in the elections had fallen from 61.99% in 1979 to 42.61% in 2014, despite the use of the *Spitzenkandidaten* system in this last one, as we know[76].

In addition, it seems clear that these positive results in terms of voting percentages in the 2019 elections, were accompanied by a positive perception of the growing importance of the voice of citizens in the political functioning of the Union. Indeed, the results of the Eurobarometer that contains the post-electoral survey, which field-work took place in June 2019, that is before the nomination of the President of the Commission, shows that more than half of Europeans (56%) considered that their voice counted in the Union[77]. Besides, according to the same Eurobarometer, there is a clear connection between thinking that one's voice counts in the EU and voting in the European Parliament elections[78].

In this context, taking into account the results of the elections, and notwithstanding the slightness of the EPP victory, it is obvious that Manfred Weber should have been appointed as President of the Commission, according to the *Spitzenkandidaten* system. However, the reality was another... In fact, already on 28 May 2019, two days after the elections, with the occasion of an informal dinner of EU Heads of State or Government, the President of the European Council put forward again the

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[74] See the press release: "ALDE Group becomes Renew Europe", accessed on 20 October 2020, https://www.aldeparty.eu/alde_group_becomes_renew_europe.

[75] See all the results: European Parliament, "2019 European election results", accessed on 26 October 2020, https://www.europarl.europa.eu/election-results-2019/en/european-results/2019-2024/

[76] *Ibid*.

[77] See: "The 2019 post-electoral survey. Have European elections entered a new dimension. Eurobarometer Survey 91.5 of the European Parliament A Public Opinion Monitoring Study": 11. Accessed on 26 October 2020, https://www.europarl.europa.eu/at-your-service/files/be-heard/eurobarometer/2019/post-election-survey-2019-complete-results/report/en-post-election-survey-2019-report.pdf.

[78] *Ibid*.

well-known position of the Member States. According to him, there cannot be automaticity when it comes to elect the Commission President. For President Tusk, in accordance with the Treaties, "[…] the European Council should propose, and the European Parliament should elect"[79]. He ended up by recalling that, before taking such a decision, balances should be taken into account, "[…] that is: the need to reflect the diversity of the Union when it comes to geography, the size of countries, gender as well as political affiliation"[80]. In the end, after some intense discussions about the core of top EU positions nomination, on 2 July 2019, the European Council came up with the decision proposing Ursula von der Leyen to the European Parliament as candidate for President of the European Commission[81]. At that time, she was serving as German Minister of Defence. For its part, the European Parliament elected the proposed candidate on 16 July 2019[82], by a majority of 383 votes in favour, 327 against, and 22 abstentions[83]. Then, after a new elaborate process, on 27 November 2019 the European Parliament gave its consent to the appointment, as a body, of the President, the High Representative of the Union for Foreign Affairs and Security Policy, and the other members of the Commission[84]. Finally, on 28 November, the European Council appointed by written procedure the new Commission for the next term of office[85]. By so doing, it became evident that this time the *Spitzenkandidaten* doctrine was not followed. Moreover, reality also demonstrated that the Parliament's menace, according to which it would not elect a non *Spitzenkandidaten*, was not put into practice.

In short, it seems that this abandonment of the head-of-list system is yet another episode in the struggle for institutional balance between

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[79] See the press release: European Council, "Remarks by President Donald Tusk at the press conference of the informal dinner of EU heads of state or government", accessed on 27 October 2020, https://www.consilium.europa.eu/en/press/press-releases/2019/05/28/remarks-by-president-donald-tusk-at-the-press-conference-of-the-informal-summit-of-eu-heads-of-state-or-government/.

[80] *Ibid*.

[81] European Council Decision (EU) 2019/1136 of 2 July 2019 proposing to the European Parliament a candidate for President of the European Commission, *OJ* L 179, 3 July 2019.

[82] European Parliament decision of 16 July 2019 on the election of the President of the Commission (2019/2041(INS)).

[83] See the press release: European Parliament, "Parliament elects Ursula von der Leyen as first female Commission President", 26 July 2019, accessed on 11 November 2020, https://www.europarl.europa.eu/news/en/hearings2019/commission-president-2019/20190711IPR56824/parliament-elects-ursula-von-der-leyen-as-first-female-commission-president.

[84] European Parliament decision of 27 November 2019 electing the Commission (2019/2109(INS)).

[85] European Council Decision (EU) 2019/1989 of 28 November 2019 appointing the European Commission, *OJ* L 308, 29 November 2019.

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intergovernmental and parliamentary elements, present from the beginning of European integration.

Nevertheless, whatever the reasons were, the institutions of the EU have not respected the voice of the European citizens, even when the electorate went to vote thinking that they were choosing the President of the Commission[86].

IV. **Conclusions**

In the process of the parliamentarisation of the EU, the Treaty of Lisbon took a further step forward by introducing into the founding treaties – Article 17.7 TEU – the need to take into account the elections to the European Parliament for the appointment of the President of the Commission. Nevertheless, the European Parliament has been trying to impose its interpretation of Article 17.7 TEU, which has been coined into the *Spitzenkandidaten* doctrine, according to which the head of the party winning the elections should be elected as Commission President. Such an interpretation amounts to depriving the European Council of any capacity to decide.

For us, notwithstanding the lack of clarity in the above mentioned phrase wording, its interpretation cannot alter the meaning of the other provisions of Article 17.7 TEU, which establish that it is up to the European Council to propose the candidate and up to the Parliament to elect him/her. The Treaty seems to give the Council the upper hand in the process. However, one should not think of an absolute preponderance, as this is very limited by several factors: firstly, because Parliament can of course veto the European Council's proposal and given that, in the light of all the provisions governing the process of electing both the President and the Commission as a whole, that process must be conducted in a spirit of dialogue between the two institutions. And secondly, and above all, because, although there is no need to recall it, in the end Parliament keeps the ace of the motion to censure the Commission up its sleeve, under Article 17. 8 TEU and in accordance with Article 234 TFEU. Thus, while its role in the election of the President of the Commission is somewhat

[86] For Stergios Fotopoulos, tha abandonment of the *Spitzenkandidaten* process, "[…] was a step backwards, in the direction of a less transparent and less inclusive decision-making process made behind closed doors, and the inter-institutional quarrel over the issue was perceived by some Eurosceptics as 'another EU weakness". See: Stergios Fotopoulos, "What sort of changes did the *Spitzenkandidat* process bring to the quality of the EU's democracy?", *European View* 18: 2 (2019): 200.

more secondary than that of the European Council, in the overall relationship with the Commission, Parliament plays the primary role[87].

Therefore, although the TEU requires the results of the European Parliament elections to be taken into account, nothing in the treaties imposes the automatism that the leader of the most voted party will imperatively be the President of the Commission. Perhaps the European Parliament has gone too far in trying to impose this automatism on the occasion of the 2014 and 2019 elections. By not proposing Manfred Weber, the leader of the most voted party in the 2019 elections, as a candidate, the European Council has prevented the consolidation of the 2014 precedent. In this sense, although the Parliament may again consider the forthcoming elections as a direct means of electing the President of the Commission, and thus impose its interpretation of Article 17.7 TEU, the most effective way of ensuring this objective would be to reform the Treaty[88].

However, nobody should feel that this step must be taken necessarily, as the EU, being an international organisation and not a state, should not mimetically follow the state political model[89]. Although it may have its advantages, as we shall see below, it is not imperative that the President of the Commission should be elected by the European Parliament, without the EU being blamed for a loss of democratic character.

In addition to this new step in parliamentarisation, which is mentioned above, the text of Article 17.7 of the TEU also expresses the desire to bring the European elections closer to the citizens, so that their opinion is taken into account when the President of the Commission is elected. The aim was to halt the historic decline in participation in parliamentary elections since 1979. And it seems that both the results of participation in 2019 and the perception of the voters show that Parliament's interpretation of article 17.7 TEU according of the *Spitzenkandidaten* system has been useful in reversing the aforementioned trend. European citizens have finally been

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[87] As for the history of interinstitutional relations between the European Parliament and the Commission, see, for instance: European Parliament, "Building Parliament: 50 years of European Parliament History,1958-2008" (2009): 184-207. See specially the cases of the Santer's Commission or the Prodi's Commission.

[88] In that sense, see also: Manuel Müller, "Make European Elections more meaningful. How to Reinforce Parliamentary Democracy at the EU Level" (Brussels: Friedrich-Ebert-Stiftung, 2020), 4, accessed on 3 November 2020, http://iep-berlin.de/wp-content/uploads/2020/07/Make-european-elections-more-meaningful_Mueller.pdf. On balanced interinstitutional relations and their translation into the treaties, see: Paul Craig, "Institutions, Power and Institutional Balance", in *The Evolution of EU Law* (eds.) Paul Craig; Grainne de Burca (Oxford: Oxford University Press, 2011), 41–84.

[89] In that sense, see also: Mangas Martín, "El nuevo equilibrio institucional en tiempos de excepción…": 25.

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attracted by elections that have traditionally been considered second rate to national ones, and have thus been able to feel closer to the political life of the EU. There is no doubt that, from this point of view, the head-of-list system does represent a major advance in terms of the public's perception of the EU's legitimacy, contributing significantly to its sustainability.

In any event, I consider that the fact that citizens voted in the 2019 elections to the European Parliament in the belief that their votes would be decisive in appointing the President of the Commission and, in the end, it was not elected an *Spitzenkandidaten* as head of the Commission, is a very serious lack of consideration for citizens. European citizens have once again felt their trust betrayed by the European institutions. The European Council, the Commission and the Parliament should have agreed before letting the citizens be betrayed.

It is not clear what will happen in the next elections, but it would be unforgivable if, whether or not the *Spitzenkandidaten* system is continued, with whatever modifications, citizens are once again betrayed. In my view, another setback of this kind would make democracy in the EU unsustainable.

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Professor Espaliú got a scholarship from the Spanish Ministry of Education (1995-1998), he has been Lecturer in the University of Navarre (Spain) (1998-2000), Legal Officer of the International Court of Justice (2000-2006) and Ramón y Cajal Researcher in the University of Córdoba (Spain) (2007-2012), Professor, Vice-Dean of the Faculty of Law and Director of the Charlemagne Institute of European Studies at the International University of Catalonia (2012-2018). At present, he is Professor in Public International Law and European Union Law, as well as Principal Investigator/Full Professor of the Research Group about Security, Risks Management and Conflicts of Nebrija University, Madrid (Spain). He obtained the accreditation as Associate Professor (ANECA) in 2011 and as Full Professor (AQU) in 2015. Furthermore, he has been awarded two six-years research periods (CNAI) and two six-years research periods (AQU). Regarding European Citizenship, he has published, among others, the following articles: A Reflection on the Participation of Individuals in the Creation of European Law through the European Citizens' Initiative and its Scope in International Law, *Cuadernos Europeos de Deusto*, N.º 54, 2016, pp. 181-202; Fostering the Participation of Citizens as a Factor of Legitimacy in the European Integration Project, *Cuadernos Europeos de Deusto*, N.º 60/2019, pp. 157-185.

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Social sustainability and social (Dis)trust in outgroups: Evidence from Germany and Spain using the Factorial Survey

Sostenibilidad social y (Des)confianza social en grupos externos: Evidencia de Alemania y España a través de la Encuesta Factorial

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Summary: I. Introduction.—II. Theoretical framework and hypotheses. 1. Social identity, perceived threat and trust. 2. Hypotheses. —III. Methods, operationalisations and data. 1. The factorial survey. 2. Data. —IV. Empirical results.—V. Conclusions.

Abstract: In the short to medium term, ethnic diversity tends to reduce trust. This negative relationship can be explained by social identity theory and integrated threat theory. The latter theory distinguishes realistic (socio-economic) threat perceptions from symbolic (cultural) ones. Huntington[1] believes that with the end of the Cold War, conflicts shifted from being primarily economic to cultural, mainly religious ones. The goal of this article is to disentangle for the first time the impact of different sources of perceived threat as well as of in-group/out-group–based differences on trust by using a factorial survey conducted in Bilbao (Spain) and Cologne (Germany). Our main findings are that although both towns differ in religious and socio-economic composition, their citizens possess a similar level of generalised trust and perceive socio-economic threat as being much stronger than cultural threat. Weak evidence is also found for in-group/out-group–based differences in particularised trust.

Keywords: generalised trust, particularised trust, threat perception, factorial survey, social sustainability.

[1] Samuel P. Huntington , The Clash of Civilizations and the Remaking of the World Order (New York: Simon & Schuster Paperback, 2003 [1996]).

Resumen: *En el corto y medio plazo, la diversidad étnica tiende a reducir la confianza. Esta relación negativa se puede explicar por la teoría de la identidad social y por la teoría integrada de la amenaza. La última teoría distingue la amenaza realista (socio-económica) de la simbólica (cultural). Huntington plantea que, con el fin de la guerra fría, los conflictos han cambiado de puramente económicos a culturales, y principalmente religiosos. El objetivo de este artículo es desenmarañar por primera vez el impacto de las diferentes fuentes de percepción de amenaza además de las diferencias de grupos internos/externos a través del uso de una encuesta factorial, que se llevó a cabo en Bilbao (España) y Colonia (Alemania). Nuestro principal hallazgo es que, aunque ambas ciudades difieren en su composición religiosa y socioeconómica, sus ciudadanos poseen un nivel similar de confianza generalizada y de percepción de amenaza socioeconómica que supera a la simbólica. Se han encontrado evidencias algo más débiles de las diferencias en la confianza particularizada hacia grupos externos.*

Palabras clave: *confianza generalizada, confianza particularizada, percepción de amenaza, encuesta factorial, sostenibilidad social.*

I. **Introduction**

During recent decades, increasing immigration has significantly changed the ethnic composition of the populations in Western societies[2]. Several researchers have empirically found a negative relationship between ethnic diversity and trust in metropolitan areas[3]and in ethnically diverse neighbourhoods[4] in the United States. A negative relationship between diversity and social trust puts at risk some of the basic principles and values the construction of Europe is based upon, namely solidarity, and supposes an obstacle for social sustainability, based on growing levels of social trust and the creation of a European identity based on diversity and equality values. Empirical studies for the European context have shown rather mixed results for the relationship between ethnic diversity and trust[5].

[2] Stephen Castles, Hein de Haas, and Mark Miller, The Age of Migration. International Population Movements in the Modern World, 5th ed. (New York: Palgrave Macmillan, 2014).

[3] Alberto Alesina y Eliana La Ferrara, "Who Trusts Others?", Journal of Public Economics 85, n.º 2 (2002): 207-34.

[4] Robert D. Putnam, "E Pluribus Unum: Diversity and Community in the Twenty-First Century. The 2006 Johan Skytte Prize Lecture", Scandinavian Political Studies 30, n.º 2 (2007): 137-74.

[5] Peter Dinsen y Kim Sønderskov, "Trust in a Time of Increasing Diversity: On the Realtionship between Ethnic Heterogeneity and Social Trust in Denmark from 1979 until Today", Scandinavian Political Studies 35, n.º 4 (2012): 273-94; Marc Hooghe,, Tim Reeskens, Dietlind Stolle y Ann Trappers, "Ethnic Diversity and Generalized Trust in Europe A Cross-National Multilevel Study", Comparative Political Studies 42, n.º 2 (2009): 198-223; Henrik Lolle y Lars

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However, by simultaneously analysing repeated cross-sectional survey data from the European Social Survey (2002–2010) via multilevel analysis, Ziller[6] could show that "higher levels of immigration and immigration growths over time are both related to lower trust". Economic and cultural conditions moderate this relationship.

In the social sciences, generalised social trust can be distinguished from particularised social trust. *Generalised trust* is "the belief that most people can be trusted", while *particularised trust* is the "notion that we should only have faith in people like ourselves"[7]. To measure generalised trust, most surveys use the tried and tested standard question, "Generally speaking, would you say that most people can be trusted or that you need to be very careful in dealing with people?"[8]. Compared to the use of this general question, only a few surveys ask questions about particularised trust[9], as, for instance, about trust in people of the respondent's own race[10].

Although these and similar survey questions measure trust, none of them allows an analysis of trust for actual persons with their different combinations of socio-economic and ethnic characteristics. To overcome this research gap, a factorial survey was developed. A factorial survey is an experimental design in which the researcher combines varying descriptions of persons or situations (vignettes). In contrast to typical survey questions, respondents must judge the characteristics of persons or situations not in isolation but conjointly, which comes much closer to reality[11] and therefore contributes to higher reliability and validity[12].

Another advantage of the factorial survey is that it allows the analysis of *generalised trust* as well as *particularised trust*. By estimating an

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Torpe, "Growing Ethnic Diversity and Social Trust in European Societies. Comparative European Politics", Comparative European Politics 9, n.º 2 (2011): 191-216; Patrick Sturgis, Ian Brunton-Smith, Sanna Read y Nick Allum, "Does Ethnic Diversity Erode Trust? Putnam's "Hunkering down" Thesis Reconsidered", British Journal of Political Science 41, n.º 1 (2011): 57-82.

[6] Conrad Ziller, "Ethnic Diversity, Economic and Cultural Contexts, and Social Trust: Cross-Sectional and Longitudianal Evdidence from European Regions, 2002-2010", Social Forces 93, n.º 3 (2014): 12-34.

[7] Eric M. Uslaner, *The Moral Foundations of Trust* (Cambridge: Cambridge University Press, 2002), 21.

[8] Jan Delhey, Kenneth Newton y Christian Welzel, "How General Is Trust in 'Most People'? Solving the Radius of Trust Problem", *American Sociological Review* 76, n.º 5 (2011): 787.

[9] Uslaner, *The Moral Foundations…*; Kenneth Newton y Sonja Zmerli, "Three Forms of Trust and Their Associates", *European Political Science Review* 3, n.º 5 (2011): 169-200.

[10] Robert D. Putnam,, "E Pluribus Unum …": 137-74.

[11] Michael Beck y Karl-Dieter Opp, "Der Faktorielle Survey und die Messung von Normen", *Kölner Zeitschrift für Soziologie und Sozialpsychologie* 52, n.º 2 (2001): 283-306.

[12] Cheryl S. Alexander y Henry J. Becker, "The Use of Vignettes in Survey Research", *Public Opinion Quarterly* 42, n.º 1 (1978): 93-104.

unconditional multilevel model (empty ANOVA model) we gain a measure for *generalised trust*: the estimated grand mean in this case reflects the level of generalised trust, which respondents as trusters have in other people (vignette persons), independent of their specific characteristics. By proceeding in this way we also overcome a problem associated with the commonly used indicator for generalised trust, criticised[13] for leaving "the circle of 'most people' unspecified". As a consequence of this vagueness, the item turned out not to be predominantly associated with out-groups in all countries. Including vignette and respondent level variables in the multilevel analysis allows the statistical disentanglement of the impact of different ethnic and socio-economic characteristics of both the described fictitious vignette persons (trustees) and of the respondent characteristics (trusters) on generalised social trust (main effect model). Whereas generalised trust is an unconditional trust in other people, particularised trust is restricted to one's own in-group. The impact of such conditional trust, which is based on ties of in-group membership[14], can be tested by including respective cross-level interaction terms between the vignette characteristics on the one hand and the respondent characteristics on the other hand within the multilevel model (cross-level interaction model).

The main aim of this contribution is twofold. Firstly, we empirically disentangle for the first time the impact of cultural and socio-economic threat perceptions, as caused by trustees' characteristics, on social trust. If Huntington[15] is right, then it can be expected that cultural threat perceptions in the population as a whole are stronger than socio-economic ones. This especially refers to religion, which, according to Huntington, is the most central element of each culture. Secondly, we analyse the impact of in-group/out-group–based differences on particularised trust, that is, on trust in people like ourselves[16]. Besides this, we also compare the level of generalised trust in both towns.

In the following, we present a conceptual framework for the basic social-psychological mechanisms which produce social trust, identify theoretically relevant determinants of trust, and derive our hypotheses. Next, we briefly introduce the methodology of factorial surveys, describe

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[13] Jan Delhey, Kenneth Newton y Christian Welzel, "How General Is Trust in "Most People"? Solving the Radius of Trust Problem", *American Sociological Review* 76, n.º 5 (2011): 787.

[14] Eric M. Uslaner y Richard S. Conley, "Civic Engagement and Particularized Trust: The Ties That Bind People to Their Ethnic Communities", *American Politics Research* 31, n.º 4 (2003): 331-60.

[15] Huntington, *The Clash of Civilizations…*

[16] Uslaner*The Moral Foundations…*

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operationalisations and outline the data collection. This is followed by the data analysis. Finally, we discuss the results and draw conclusions.

II. **Theoretical framework and hypotheses**

1. *Social identity, perceived threat and trust*

Due to sharply increased immigration to advanced Western societies after the 1960s, these societies became ethnically and culturally more diverse[17]. This process will most likely also continue into the future[18]. Although immigration, according to Putnam[19], is likely to have important cultural, economic and developmental benefits in the long run, over the short to medium term, it reduces social capital. Putnam[19] defines social capital as "social networks and the associated norms of reciprocity and trustworthiness", encouraging people towards the interaction and cooperation which facilitate co-ordinated actions. Commonly, trust is referred to as the most important indicator for social capital[20]. Theories which, together, explain the assumed negative relationship between diversity and social trust include social identity theory[21] and conflict-oriented approaches, such as the integrated threat theory[22]. A theoretical approach which explains how threat perceptions can be mitigated is contact theory[23].

S*ocial identity theory*[24] is a basic approach explaining how people develop an identity as group members and how stereotypes of out-group members arise. This theory sees *categorisation* as a fundamental cognitive

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[17] Castles, de Haas y Miller, *The Age of Migration…*; Putnam, "E Pluribus Unum…", 137-74; Tom Van der Meer y Jochem Tolsma, "Ethnic Diversity and Its Effect on Social Cohesion", *Annual Review of Sociology* 40 (2014): 459-78.

[18] Marc Hooghe, "Social Capital and Diversity. Generalized Trust, Social Cohesion and Regimes of Diversity", *Canadian Journal of Political Science* 40, n.º 3 (2007): 709-32.

[19] Putnam, "E Pluribus Unum…", 137.

[20] Hooghe, "Social Capital and Diversity…",709-32.

[21] Michael Hogg y Domic Abrams, *Social Identifications. A Social Psychology of Intergroup Relations and Group Processes* (London: Routledge, 1988).

[22] Walter G Stephan,, Oscar Ybarra y Kimberly Rios, "Intergroup Threat Theory", en *Handbook of Prejudice, Stereotyping, and Discrimination*, ed. por Todd D. Nelson (New York: Psychology Press, 2016), 255-78

[23] Gordon W. Allport, *The Nature of Prejudice*. (Reading, MA: Addison Wesley, 1958 [1954]); Thomas F. Pettigrew, "Intergroup Conflict Theory", *Annual Review of Psychology* 49 (1998): 65-85.

[24] Henry Tajfel y Jon Turner, "The Social Identity Theory of Intergroup Beahvior", en *Psychology of Intergroup Relations*, ed. por Stephen Worchel y William Austin, 2da edición (Chicago: Nell Hall, 1986):7-24; Michael Hogg y Domic Abrams, *Social Identifications. A Social Psychology of Intergroup Relations and Group Processes* (London: Routledge, 1988).

process used to structure the potentially infinite variability of stimuli. As such, categorisation also produces stereotypical perceptions about all members of a social category or group. Just as people categorise other people, they also categorise themselves, which leads to an accentuation of similarities between the self and other in-group members and an accentuation of differences between the self and members of an out-group. Self-categorisation causes one to perceive oneself as having the same social identity as other members of the relevant social category. As such, self-categorisation transforms individuals into groups.

According to social identity theory, the acquisition of knowledge is derived through *social comparison*. The confidence in the truth of our own view is provided by consensus among relevant people. All in all, categorisation and social comparison, together with a fundamental individual motivation for positive self-esteem, generate in-group favouritism and perceptions of an evaluative superiority of the in-group over the out-group. Out-group stereotypes are therefore based on in-group members' shared beliefs and expectations regarding the norms and behaviours of others. In this way, stereotypes also affect trust in other people, positively in the case of in-group members and negatively in the case out-group members.

The conditions under which stereotypes lead to discrimination and the conditions under which existing stereotypes are reduced are covered by two theoretical approaches, namely conflict and contact-based approaches. *Group conflict theories*[25] assume that negative attitudes towards out-group members are essentially rooted in perceived intergroup competition for scarce resources. Depending on the nature of the interests or scarce goods which are perceived as threatened by a group conflict, *integrated threat theory*[26] distinguishes two types of perceived threat, namely realistic and symbolic ones. *Realistic threat* perceptions refer to concerns about the very existence of the in-group, to threats to the political or economic power of the in-group and to threats to the physical and material wellbeing conditions of the in-group in a specific society. S*ymbolic threat* perceptions

[25] Hubert Blalock, *Toward a Therory of Minority-Group Realtions* (New York: John Wiley & Sons, 1967); Jay W Jackson, "Realistic Group Conflict Theory: A Review and Evaluation of the Theoretical and Empirical Literature", *The Psychological Record* 43, n.º 3 (1993): 395-413; Jaak Billiet, Bart Meuleman y Hans De Witte, "The Relationship between Ethnic Threat and Economic Insecurity in Times of Economic Crisis: Analysis of European Social Survey Data", *Migration Studies* 2, n.º 2 (2014): 135-61.

[26] Walter G. Stephan, Oscar Ybarra, Carmen Martínez Martínez y Joseph Schwarzwald, "Prejudice toward Immigrants to Spain and Israel. An Integrated Threat Theory Analysis", *Journal of Cross-Cultural Psychology* 29, n.º 4 (1998): 559-76; Stephan, Ybarra y Rios, "Intergroup Threat Theory…".

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concern a potential challenge to the in-group's meaning system, that is, to their values, culture, religion and worldview, which they believe to be right.

The second theoretical approach is the intergroup *contact theory*[27], where direct interpersonal contact between majority and minority group members of equal status with common goals, while supported by authority, law or custom, should lead to a reduction in intergroup prejudice. Under such optimal conditions, unfavourable stereotypes are reduced, resulting in rewarding interpersonal relationships between the members of two cooperating groups[28].

According to Stephan, Ybarra, and Rios[29], in practice, relations between in-groups and out-groups are far more likely to be antagonistic or competitive (conflict theory) than cooperative (contact theory). Based on conflict theory, Huntington[30] assumes that with the end of the Cold War, conflicts will be neither primarily ideological nor primarily economic. Instead, the dominating source of conflict will be cultural. Huntington[31] states that culture is defined by "common objective elements, such as language, history, religion, customs, institutions, and by the subjective self-identification of people". Although language and religion are seen as the most central elements of each culture, religion is seen as more important than language. In accordance with these considerations, Lancee and Dronkers[32] point to four types of diversity to be taken into account when explaining (dis-)trust in out-groups; these include economic, ethnic and religious diversity as well as language proficiency.

At this point one aspect of Uslaner's concept of particularised trust becomes important, namely its openness to extension beyond our family, friends, neighbours and colleagues to the *unknown* others with whom we share the same socio-economic status, ethnic origin, religion or language[33]. This aspect is important, since it allows us to analyse particularised trust relations in a broader way, for instance with respect to members of the same religion, which is already important in testing Huntington's thesis. Such analyses are not even possible with the item battery more recently developed for the World Values Survey 2005-07. Although the battery includes three

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[27] Allport, *The Nature of Prejudice*…, 65-85.

[28] Hogg y Abrams. *Social Identifications*…, 65-85.

[29] Stephan, Ybarra y Rios, "Intergroup Threat Theory", 255-78..

[30] Huntington, *The Clash of Civilizations*….

[31] Huntington, *The Clash of Civilizations*…, 43.

[32] Bram Lancee y Japp Dronkers, "Ethnic Diversity in Neighborhoods and Individual Trust of Immigrants and Natives: A Replication of Putman (2007) in a West-European Country",en *International Conference on Theoretical Perspectives on Social Cohesion and Social Capital (*Brussels: Royal Flemish Academy for Science and the Arts, 2008).

[33] Uslaner y Conley, "Civic Engagement…"; Zmerli, Sonja y Kenneth Newton. "Winners, Losers and Three Types of Trust" en *Political Trust. Why Context Matters*, editado por Sonja Zmerli y Marc Hooghe, 67-94. Colchester: ECPR Press, 2011.

items for in-group trust (trust in "your family", "your neighbourhood", "people you know personally") and three items for out-group trust ("people you meet for the first time", "people of another religion", "people of another nation")[34], it includes no item for in-group trust, for instance in people of our own religion or our own nationality (particularised trust). This is important, since in real life, these categories sometimes overlap; a person we meet for the first time may share our nationality (in-group) but not our religion or our skin colour (out-group). The factorial survey opens the opportunity to analyse such aspects more adequately by providing more information which might be relevant to trusting others.

2. *Hypotheses*

The focus for deriving our hypotheses is the integrated threat theory, with a special interest in assumptions which can be derived from Huntington. In a first step, we will formulate a hypothesis regarding the level of generalised trust. In accordance with conflict theory, it can be argued that diversity has a negative impact on trust by strengthening the identification with the in-group at the expense of an increased conflictivity with out-groups. The two contexts to be studied differ with respect to religious heterogeneity (a symbolic threat, as measured by the Pluralism Index, i.e. 1 minus the Herfindahl-Index) and socio-economic inequality (a realistic threat, as measured by the Gini coefficient). Whereas Germany is religiously much more heterogeneous than Spain (Pluralism Index of 0.7415 and 0.3911 in 2010, respectively; own computations based on data provided by ARDA[35], socio-economic inequality is somewhat higher in Spain than in Germany (Gini coefficient of 33.7 and 29.7 in 2013, respectively[36]). However, since only two towns are included in our study, it is impossible to separate the impact of counteracting factors empirically. Instead, we refer to available empirical results. According to the European Social Survey in 2014[37], the level of generalised trust in West Germany is higher than in Spain (the means for citizens on the answer scale ranging from 0 "you can't be too careful" to 10 "most people can be trusted"

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[34] Delhey, Newton y Welzel, "How General Is Trust…", 792; Newton, Kenneth y Sonja Zmerli. "Three Forms of Trust…", 177.

[35] ARDA, "Association of Religion Data Archives: World Religion Dataset", 2016, acceso el 14 de junio de 2016, http://www.thearda.com/Archive/Files/Downloads

[36] Eurostat, "Gini Coefficient of Equivalised Disponible Income" – *EU-SILC Survey*, acceso el 16 de diciembre de 2016, http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=ilc_di12&lang=en.

[37] NDS, "European Social Survey (ESS7-2014 Ed.2.1)", acceso 2018, https://www.europeansocialsurvey.org/data/.

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are 5.281 and 4.815, respectively). If this relationship should also hold for Bilbao (Spain) and Cologne (West Germany), then the following relationship can be expected:

H1: The level of *generalised trust* should be higher in Cologne than in Bilbao.

Our next hypotheses refer to the impact of trustees' characteristics on generalised social trust (main effect model) as well as, more specifically, on in-group/out-group–based differences between trustee and truster characteristics on particularised trust (cross-level interaction model). Including two different towns in our analysis has the advantage that it offers the opportunity to test our hypotheses in two different contexts and to see whether the expected empirical patterns are similar in both towns.

According to Huntington[38], culture is defined by "common objective elements, such as language, history, religion, customs, institutions, and by the subjective self-identification of people". Since religion is seen as the most central element of each culture, our hypothesis is as follows:

H2: People should trust adherents of their own *religion* more than adherents of other religions (particularised trust, H2a). Furthermore, since most people in a town belong to the main religion of the town, people of minority religions, on average, should be less trusted than people of the majority religion (H2)[39]. If religion becomes significant, the result would contribute to explaining lower levels of generalised trust.

After religion, language is seen by Huntington as the second-most important factor defining our socio-cultural identity. This leads to our next hypothesis:

H3: People should trust those with poor *language skills* in their mother tongue less than people fluent in their mother tongue (particularised trust, H3a). Since our analyses are restricted to respondents with the national citizenship and sufficient language skills to participate in an interview, people with poor national language skills are assumed, on average, to be less trusted than people with fluent national language skills (H3). This should contribute to lowing the level of generalised trust.

In-group out-group dynamics are also expected to relate to ethnicity, which is visible in skin colour:

H4: People should trust people of a different *skin colour* less than people with their own skin colour (particularised trust, H4a). Since people with black skin are a very small minority in both Germany and Spain, it is

[38] Huntington, *The Clash of Civilizations…*

[39] Hypotheses for particularised trust (cross-level interaction effects) are marked by the addition of "a" to the hypothesis number.

expected that black people, on average, are less trusted than white people (H3), which contributes to the reduction of the level of generalised trust.

By referring to integrated threat theory, not only symbolic (ethic, cultural) threat perceptions but also realistic (socio-economic) threat perceptions are assumed to reduce social trust. A relatively low socio-economic status may be seen by people of a higher socio-economic status as a reason for distrust. The main argument for such a link is that the relative value of even a comparably low amount of cash or valuables is, *ceteris paribus,* higher for poorer people than for richer people. Therefore, our next hypothesis is as follows:

H5: Distrust in others should be higher, the higher the *socio-economic* distance between the in-group and the out-group (particularised trust, H5a). Since the socio-economic status of people with a low income is below average, it is assumed that these people, on average, are less trusted than people with a higher socio-economic status/income (H5). Therefore, high differences in the socio-economic status should also contribute to reducing the level of generalised trust.

Another characteristic assumed to be related to social trust is gender. From criminology research[40], it is well established that female crime rates are much lower than male crime rates. Although this pattern is somewhat less pronounced for minor thefts such as shoplifting, the theft of services or passing bad cheques than it is for more severe crimes, the existing gender gap is quite persistent across countries and subgroups within a given country as well as over historical periods[41]. Besides the real gender gap, stereotypes of higher criminality amongst males also exist[42]. Therefore, gender is an indicator for realistic threat perceptions. This leads to our next hypothesis:

H6: *Men*, on average, are expected to be less trusted than women (H6). Hence, higher criminality amongst males should contribute to reducing the level of generalised trust. We will also test of whether the expected difference is weaker for men than for women (particularised trust, H6a).

Although the main focus of our study is the impact of trustees' characteristics on generalised trust as well as on in-group/out-group–based differences in particularised trust, we will also formulate some expectations concerning the impact of trusters' (respondents') characteristics on generalised social trust. Empirical research has shown that dominant groups in society show higher levels of generalised trust than marginali-

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[40] Darrell Steffensmeier y Emilie Allan. "Gender and Crime", *Encyclopedia of Crime and Justice,* 2002, ENCYCLOpedia.com, https://www.encyclopedia.com/law/legal-and-political-magazines/gender-and-crime; Marchbank, Jennifer y Gayle Letherby. *Introduction to Gender. Social Science Perspectives,* 2da edición (New York: Routledge, 2014).

[41] Steffensmeier y Emilie , "Gender and Crime…",

[42] Marchbank y Letherby, *Introduction to Gender*…, 315.

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sed groups[43]. This result is explained by the argument that marginalised groups, whether regarding ethnicity, gender or language, are objectively more likely to have experienced various forms of domination and marginalisation[44]; cf. also Hooghe[45]. A similar idea is expressed by Newton's[46] "winner hypothesis", which suggests that "the trusting in society are those who are successful in social, economic and political life"[47]. Based on these considerations, we state the following hypotheses:

H7: Members of the main *religion* should have a higher level of generalised social trust than members of smaller denominations.

H8: People with a higher *socio-economic status* should show a higher level of generalised social trust than people with a lower socio-economic status.

H9: *Males* are assumed to have a higher level of generalised social trust than females.

Finally, we must also control for cohort effects[48]. A well-established theory explaining cohort effects is Inglehart's[49]; cf. also Zmerli and Newton[50] theory of value change. By referring to a scarcity hypothesis and a socialisation hypothesis, Inglehart[51] claims that people who are socialised in a context of physical and economic insecurity are more prone to showing materialist value priorities. People socialised under conditions of high physical and economic security tend to show post-materialist value priorities for esteem, belonging and self-expression. Older cohorts who have experienced insecurity and stress in their formative years seek the predictability granted by strict rule obedience. Younger cohorts socialised under the unprecedented prosperity experienced by Western nations after World War II can more readily accept deviations from rules[50] and are therefore in a better position to trust those different from them. Hence, our last hypothesis is the following:

H10: Older *cohorts* should tend to show lower levels of generalised social trust than younger cohorts.

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[43] Hooghe, "Social Capital and Diversity…", 709-32.

[44] Melissa Williams, *Voice, Trust, and Memory. Marginalized Groups and the Failings of Liberal Representation* (Princeton: Princeton University Press, 1998).

[45] Hooghe, "Social Capital and Diversity…", 709-32.

[46] Kenneth Newton, "Social and Political Trust",en *The Oxford Handbook of Political Behavior*, ed. por Russell J. Dalton y Hans-Dieter Klingemann,.(Oxford: Oxford University Press, 2007): 342-61.

[47] Zmerli y Newton, "Winners, Loosers and Three Types of Trust", 68.

[48] Uslaner, The Moral Foundations….

[49] Ronald Inglehart, *Modernization and Postmodernization. Cultural, Economic and Political Change in 43 Societies* (Princeton: Princeton University Press, 1997).

[50] Zmerli y Newton, "Winners, Losers… a", 70.

[51] Ronald Inglehart, *Modernization and Postmodernization...*

III. **Methods, operationalisations and data**

1. *The factorial survey*

To test our hypotheses, we constructed a factorial survey[52]. A factorial survey is an experimental design in which the researcher constructs varying descriptions of fictitious persons or situations (vignettes) which will be judged by respondents under a particular aspect of theoretical interest. A vignette which describes a fictitious person includes a combination of different attributes or characteristics, for instance a female Catholic unemployed salesperson. Each of these attributes belongs to a different factor or dimension (gender, religion, employment).[53]

To test our hypotheses, we created a fictitious situation where a person left their unlocked bag in a train compartment in order to go to the toilet. Before the person left the compartment, only one other person was present. In each vignette, this other person is described as 35 years old, single and not having national citizenship. These three characteristics were not of substantial interest to our study but were necessary for the sufficient specification of the hypothetic situation. The task of the respondents was to judge the likelihood of the property in the bag being stolen during the first person's absence. Figure 1 includes an example vignette and the introduction to the factorial survey, for illustrative purposes.

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[52] Peter H. Rossi y Andy B. Anderson, "The Factorial Survey Approach: An Introduction", en *Measuring Social Judgments. The Factorial Survey Approach*, ed. por Peter H. Rossi y Steven L. Nock,. (Beverly Hills, CA: Sage, 1982): 15-67; Guillermina Jasso, "Factorial Survey Methods for Studying Beliefs and Judgments", *Sociological Methods & Research* 34, n.º 3 (2006): 334-423; Katrin Auspurg y Thomas Hinz, *Factorial Survey Experiments,* Paper Series on Quantitative Applications in Social Sciences (Sage. Newbury Park, 2006).

[53] The central idea of a factorial survey involves transferring the basic principles of the factorial design (multivariate experimental design) into a sample survey (Rossi, Peter H. y Andy B. Anderson. "The Factorial Survey Approach: An Introduction". En *Measuring Social Judgments. The Factorial Survey Approach*, editado por Peter H. Rossi y Steven L. Nock, 15-67. Beverly Hills, CA: Sage, 1982). In this way, the factorial survey increases both internal validity (uncovering causal relationships) and external validity (generalisability to the broader/general population). As an experimental design, even without having a representative survey, the factorial survey allows general conclusions about causal mechanisms (Auspurg, Katrin y Thomas Hinz. *Factorial Survey Experiments*. Paper Series on Quantitative Applications in Social Sciences. Sage. Newbury Park, 2006).

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Figure 1

Introduction and Example Vignette (Translated Spanish Version)

On the following pages we will present you 20 similar situations where a person left his or her unlocked bag in a train compartment in order to go to the toilet. In the bag are each time his/her wallet, with **about 100 Euros** inside, and his/her **mobile**.
Before the person left the train compartment, there was only one other person there. This other person is each time **35 years old**, **single**, has **no Spanish citizenship**, but differs with respect to his/her further characteristics from situation to situation. We would like to ask you to mark for each of the 20 situations how likely you think it is that the **property** of the person **has been stolen** when he/she was on the toilet. In order to answer the questions please use the following answer scale:
It is …

absolutely sure that it has not been stolen	1	2	3	4	5	6	7	8	9	10	absolutely sure that it has been stolen

V1 Ms J. is on a train that is arriving at the next station. When she is leaving the toilet she remembers that she has left her unlocked bag in the train compartment. In the bag are her wallet, with **about 100 Euros** inside, and her **mobile**.
Before she left the train compartment, there was only one other person there, **35 years old, single, without Spanish citizenship** and with the following further characteristics:

Gender:	female
Skin colour:	white
Knowledge of Spanish:	speaks broken Spanish
Religion:	Muslim
Employment:	manager of a medium sized company

In your opinion, how likely is it that the property of Ms J. has been stolen during her absence by the described person? It is …

absolutely sure that it has not been stolen	1	2	3	4	5	6	7	8	9	10	absolutely sure that it has been stolen

Note: The abbreviation of the name of the fictitious vignette person was on each vignette a different one.

In addition to these constants, five dimensions with varying characteristics were included in our factorial survey: gender, skin colour, knowledge of the national language, religion and employment. Table 1 gives an overview of the five vignette dimensions, their levels and the coding.

Table 1

Vignette Dimensions and Levels

Dimension (variables) describing the fictitious vignette person:	Levels (values) for the dimensions (personal characteristics):	Coding:
Gender:	– female – male	0 1
Skin color:	– white – black	0 1
Knowledge of German/ Spanish:	– speaks fluent German/Spanish – speaks broken German/Spanish	0 1
Religion:	– none – Protestant – Catholic – Orthodox – Muslim	Dummy-coding with "none" as reference
Employment:	– Manager of a medium sized company – Unemployed seller	0 1

For four dimensions, each with two levels, as well as one dimension with five levels, the completely crossed vignette universe consists of $2 \times 2 \times 2 \times 2 \times 5 = 80$ combinations of vignette characteristics. Since 80 vignettes could not be judged by each individual respondent, a reduced design with a smaller set size (vignette sample size per respondent) was used instead. To construct such a reduced design, a simple D-efficient design[54] was generated in a first step by using the SAS computer program. D-efficiency is a measure of the goodness of a design relative to a balanced orthogonal design, that is, a design where the chosen levels appear with equal frequency and where variables of different dimensions are uncorrelated for

[54] Warren F. Kuhfeld, "Experimental Design: Efficiency, Coding, and Choice Designs" en *Marketing Research Methods in SAS. Experimental Design, Choice, Conjoint, and Graphical Techniques*, ed. por Warren F. Kuhfeld,. (Cary, NC: SAS-Institute TS-722, 2010), 53-241.

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each vignette dimension[55]. A D-efficiency of 100 indicates that a design which includes only qualitative variables is both balanced and orthogonal. For our study, it was possible to generate a D-efficient design with a D-efficiency of 100 for a set size of 20 vignettes per respondent. Since the vignette variables turned out to be already correlated with two-way interaction terms, 15 further D-efficient designs of the same D-efficiency were constructed by permuting the levels of interaction terms of the first design. Combing these 16 D-efficient designs produces a confounded D-efficient design[56] with a D-efficiency of 100; hence, all vignette variables and their interaction terms are balanced as well as mutually orthogonal. Hence, the confounded D-efficient design perfectly covers the central features of the completely crossed vignette universe. After the 16 D-efficient designs were produced, we randomised the order of the vignettes. Each survey participant was randomly assigned to one of the 16 versions of the questionnaire.

2. *Data*

The fieldwork for the factorial survey was conducted in spring 2014. In Bilbao, the interviews were carried out face-to-face and in Cologne, via an online survey. To select the participants, a combined representative quota was applied to age and gender. The adult population in both towns was targeted. However, as an online survey was conducted in Cologne, only respondents born after 1947 were interviewed. A total of 304 interviews were successfully conducted in each town. In Bilbao, 14 respondents without national citizenship were excluded from analyses, and in Cologne, 10 were excluded.

For our empirical analyses, the answer scale for the factorial survey was reversed; a high value (code 10) now indicates a high level of trust. At the respondent level, gender, religion, cohort and highest level of education are included in our analyses. These predictor variables are all 0-1 dummy coded. The reference group for gender are females, the reference group for Catholics and Protestants are people without religion. Respondents from other religions were excluded (the only Protestant of Bilbao who participated in the survey was also excluded). The year 1947 was chosen as a starting point to distinguish three cohorts, namely those born in or before 1947, those born between 1948 and 1970 and those born in 1971 or later

[55] Warren F. Kuhfeld, Randall D. Tobias y Mark Garratt, "Efficient Experimental Design with Marketing Research Applications". *Journal of Marketing Research* 31, n.º 4 (1994): 545-57.

[56] Hermann Dülmer, "The Factorial Survey: Design Selection and Its Impact on Reliability and Internal Validity", *Sociological Methods & Research* 45, n.º 2 (2016): 304-47.

(reference group). The dummy variables for education (indicator for a respondent's socio-economic status) distinguish three levels, namely elementary or less than elementary education (reference group), secondary education and tertiary education. Due to the exclusions for religion and a few missing values on religion and education, the *reduced sample size* includes 273 respondents for Bilbao and 280 for Cologne. After also excluding respondents who judged all vignettes equally (constant answer behaviour), the *net sample size* was reduced further to 236 respondents for Bilbao and 213 respondents for Cologne.

Since every respondent to our factorial survey judged more than one vignette, the resulting data structure is a hierarchical one. For analysing such data, multilevel regression analysis[57] is recommended. All multilevel models presented in this article have been estimated with HLM 7.

IV. **Empirical results**

To see whether constant answer behaviour affects the level of generalised trust, we compared a multilevel model which includes respondents with constant answer behaviour with a model where these respondents are excluded (Table 2, Models 1a and 1b). By including a dummy variable for the town where the interviews were conducted at the respondent level (0 for Bilbao; 1 for Cologne), we also tested whether the level of generalised trust significantly differs between the two towns.

Table 2

Level of Generalised Trust (Multilevel Analysis)

Constant Answers Excluded	Model 1a		Model 2a (Oldest Cohort for Bilbao Excluded)	
Level 1:	8,979 Vignettes [a)]		7,639 Vignettes [a)]	
Level 2:	449 Respondents		382 Respondents	
	b	t	b	t
Intercept Level 1				
Intercept Level 2	5.547	40.973**	5.861	37.726**
Bilbao/Cologne (Cologne = 1)	.616	3.574**	.303	1.606

[57] Tom A.B. Snijders y Roel J. Bosker, "Modeled Variance in Two-Level Models". *Sociological Methods & Research* 22, n.º 3 (1994): 342–63.

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Constant Answers Included	Model 1b		Model 2b (Oldest Cohort for Bilbao Excluded)	
Level 1:	11,059 Vignettes [a)]		9,819 Vignettes [a)]	
Level 2:	553 Respondents		491 Respondents	
	b	t	b	t
Intercept Level 1				
Intercept Level 2	5.601	41.076**	5.907	38.962**
Bilbao/Cologne (Cologne = 1)	.534	3.071**	.228	1.227

Note: * $p \leq 0{,}05$; ** $p \leq 0.01$; Restricted Maximum Likelihood with Robust Standard Errors;
a) In Bilbao one respondent only rated 19 instead of 20 vignettes.

Our empirical results show that by excluding the respondents with constant answer behaviour, on the 11-point scale, the level of generalised trust decreases by 0.054 units from 5.601 to 5.547 for Bilbao, while it increases by 0.028 units from 6.135 (= 5.601 + 0.534) to 6.163 (= 5.547 + 0.616) for Cologne. Hence, excluding the respondents with constant answer behaviour did not substantively change the results. However, the level of generalised trust for both models is more than 0.5 scale points higher in Cologne than in Bilbao (Model 1a: $b = 0.616$, $p < 0.01$, Model 1b: $b = 0.534$, $p < 0.01$).

To test whether this difference is caused by the fact that no respondents born in or before 1947 were included in the Cologne survey, the oldest cohort was also excluded from the Bilbao survey (Models 2a and 2b). The results show that by excluding the oldest cohort, the level of generalised trust increased for Bilbao by approximately 0.3 scale points. Consequently, the difference in the level of generalised trust between Bilbao and Cologne becomes insignificant ($b = 0.303$, $p > 0.05$ and $b = 0.228$, $p > 0.05$, respectively). Therefore, the significant difference in Models 1a and 1b can be traced back to the lower level of generalised trust in the oldest cohort from Bilbao, which, in a first step, confirms H10. However, it does not confirm our hypothesis H1, according to which the level of generalised trust should be significantly higher in Cologne than in Bilbao.

In the next step, separate main effect multilevel models were estimated for Bilbao and Cologne (Table 3). To more easily distinguish vignette-level predictors from respondent-level predictors, the latter are indented slightly to the right in the table.

Table 3

Multilevel Analysis of Level of Trust: Main Effect Model

	Bilbao		Cologne	
R^2 Vignette Level	9.32%		12.38%	
R^2 Respondent Level	8.48%		0.00%	
Level 1:	4,719 Vignettes		4,260 Vignettes	
Level 2:	236 Respondents		213 Respondents	
	b	t	b	t
Intercept Level 1				
Intercept Level 2	5.542	13.031**	6.870	18.773**
Male	.599	2.252*	—.191	—.921
No Religion (Ref.)	—	—	—	—
Protestant			.120	.471
Catholic	—.249	—.733	.399	1.542
Education:	—	—	—	—
Elementary (Ref.)				
Education: Secondary	.720	2.257*	—.070	—.241
Education: Tertiary	.548	1.894*	—.087	—.264
Born 1971-96 (Ref.)	—	—	—	—
Born 1948-70	.394	1.255	.307	1.491
Born 1922-47	—.360	—1.019		
Male	—.101	—2.942**	—.055	—1.782*
Color of Skin (1=black)	—.095	—2.850**	.005	.118
Language Skills (1=low)	—.080	—2.746**	—.328	—7.245**
No Religion (Reference)	—	—	—	—
Protestant	—.002	—.044	.123	2.631**
Catholic	.140	2.600**	.144	3.446**
Orthodox	—.090	—1.968*	.114	2.227*
Muslim	—.316	—6.255**	—.075	—1.026
Unemployed	—.777	—8.982**	—1.454	—15.316**

Notes: * $p \leq 0{,}05$; ** $p \leq 0.01$ (hypotheses are tested one-tailed); Restricted Maximum Likelihood with Robust Standard Errors; The pseudo R^2 is calculated according to the simplified formula of Snijders and Bosker[58].

1) No Protestants in the sample from Bilbao, no people born between 1922 and 1947 in the sample from Cologne.

2) One respondent of Bilbao did not rate one vignette.

3) For Cologne, the slopes for the vignette characteristics "Protestant" and "Catholic" turned out to be insignificant and have been fixed for this reason. The intercept and all other slopes were estimated with a significant random component.

[58] Tom A.B. Snijders y Roel J. Bosker. "Modeled Variance in Two-Level Models". *Sociological Methods & Research* 22, n.º 3 (1994): 342–63.

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Among the various vignette characteristics, the socio-economic status of the vignette person has by far the biggest impact on the level of generalised trust. An unemployed person is significantly less trusted than the manager of a medium-sized company (b = –0.777 for Bilbao, b = –1.454 for Cologne). This result confirms that poorer people are perceived as less trustworthy than wealthier ones (H5). In Bilbao as a Catholic town, Catholics are significantly more trusted than those without a religion (b = 0.140). No significant difference exists between people without a religion and Protestants (b = –0.002). Orthodox and Muslim people are least trusted, though the b-coefficient for Muslims is much bigger than the b-coefficient for the Orthodox (b = –0.090 and –0.316, respectively). Cologne is a historically Catholic town in a mixed Protestant-Catholic country[59]. People from all three Christian religions (Catholic, Protestant and Orthodox) are significantly more trusted than people without a religion, whereby the b-coefficients for all three religions are very similar (between 0.144 for Catholics and 0.114 for Orthodox). Furthermore, Muslims are not significantly less trusted than vignette persons without a religion (b = –0.075). These results partially confirm the symbolic threat theory (H2); in a region where Catholics make up the overwhelming majority, Catholics are, on average, most trusted. The more dissimilar the other religions are (in this case, Muslims compared to Christians), the less they are trusted. However, contact theory is also partially confirmed in our analyses; in a more heterogeneous environment like Cologne, trust is generalised to other religions which are perceived as quite similar to the main religion. However, trust is not generalised in the same way to less similar religions (Islam), which again corroborates to a certain degree the symbolic threat theory. People without a religion are significantly less trusted than Catholics in Bilbao; they are also significantly less trusted than Catholics, Protestants and Orthodox in Cologne.

Huntington[60] points out that although culture is mainly defined by religion, language also constitutes a central element of any culture. People with poor national language skills are less adapted to the host culture and therefore should also be significantly less trusted than people who speak the national language fluently (H3). For Bilbao, this hypothesis is corroborated; here, language skills indeed play a less important role than religion

[59] Estimated percentages of religions in Cologne data: Forsa-Bus 2012–2014, sample of 3,883 German-speaking people from Cologne, aged 14 and older): Catholics: 40.1%, Protestants: 23.3%, other Christians: 1.5%, other non-Christian religions (mainly Muslim with Turkish roots): 3.6%, no religion: 31.4%; Forsa-Bus. 2014. "2014, 2013, 2012. GESIS Data Archive, Cologne. ZA5996, ZA5927, ZA5927. Data File Version 1.0.0". https://doi.org/10.4232/1.12349, 10.4232/1.12174, 10.4232/1.11592.

[60] Huntington *The Clash of Civilizations…*

(b = –0.080 for language skills vs. –0.456 as the maximal difference between two religions, i.e. between Catholics and Muslims). However, in Cologne, contrary to Huntington's theory, language has a bigger impact on trust than religion (b = –0.328 for language skills vs. –0.219 as the maximal difference between two religions, i.e. between Catholics and Muslims). Belonging to a specific ethnic minority (black skin, H4) is a further determinant of trust in Bilbao but not in Cologne (b = 0.095, $p < 0.01$ vs. b = 0.005, $p > 0.05$). In accordance with our expectations (H6), males are significantly less trusted than females in both Bilbao and Cologne (b = –0.101 vs. b = –0.055). The vignette characteristics together explain 9.32 per cent of answer behaviour in Bilbao and 12.38 per cent in Cologne.

So far, the socio-economic characteristics of the vignette persons provided a much more powerful explanation than the cultural ones. However, trust should not depend only on the characteristics of the person who must be trusted but also on the characteristics of the person who must trust. The impact of the respondent's gender (H9), religion (H7), education (H8) and cohort (H10) on generalised trust are displayed in the upper part of Table 3. The empirical results do not confirm that any of these characteristics have a significant influence on trust in Cologne. In Bilbao, however, males show a significantly higher level of trust than females (b = 0.599). Also, people with a secondary or tertiary level of education show a significantly higher level of trust than people with an elementary level of education (b = 0.720 and b = 0.548, respectively). This result confirms that people with the lowest level of education also display the lowest level of trust (H8).

Although the two oldest cohorts do not differ significantly from the youngest cohort, the results also show that the middle cohort has a somewhat higher level of trust, whereas the oldest cohort has a somewhat lower level of trust than the youngest cohort. The difference between the middle and oldest cohorts is significant (b = –0.754, $p < 0.05$, separately tested by changing the reference group). So empirically, we find a curvilinear pattern; the cohort born between 1948 and 1970 has the highest level of trust, the oldest cohort has the lowest level of trust, and the youngest cohort born in or after 1971 is in-between. Hence, hypothesis H10 is confirmed with respect to the oldest cohort.

In a final step, we test our hypotheses concerning particularised trust by including in our multilevel model cross-level interaction terms between in-group characteristics of respondents as trusters and corresponding in-group characteristics of described vignette person as trustees. The results of the models for Bilbao and Cologne can be found in Table 4.

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Table 4

Multilevel Analysis of Level of Trust: Cross-Level Interaction Model

	Bilbao		Cologne	
R^2 Vignette Level	9.36%		12.70%	
R^2 Respondent Level	8.48%		0.00%	
Level 1:	4,719 Vignettes		4,260 Vignettes	
Level 2:	236 Respondents		213 Respondents	
	b	t	b	t
Intercept Level 1				
Intercept Level 2	5.548	12.819**	6.632	16.797**
Male	.624	2.294*	–.225	–1.063
No Religion (Ref.)	—	—	—	—
Protestant			.102	.402
Catholic	–.249	–.721	.381	1.479
Education Elementary (Ref.)	—	—	—	—
Education Secondary	.620	1.803	.325	.970
Education Tertiary	.582	1.880	.071	.184
Born 1971-96 (Ref.)	—	—	—	—
Born 1948-70	.394	1.255	.306	1.489
Born 1922-47	–.361	–1.019		
Male	–.086	–2.196*	–.091	–1.814
Male	–.033	–.486	.054	.872
Color of Skin (1=black)	–.095	–2.850**	.005	.118
Language Skills (1=low)	–.080	–2.746**	–.328	–7.245**
No Religion (Ref.)	—	—	—	—
Protestant	–.002	–.044	.093	1.817
Protestant			.096	1.122
Catholic	.139	1.728	.111	2.149*
Catholic	.001	.007	.093	1.261
Orthodox	–.090	–1.968*	.114	2.227*
Muslim	–.316	–6.255**	–.075	–1.026
Unemployed	–.810	–6.370**	–1.051	–6.045**
Secondary Education	.177	.787	–.583	–2.748**
Tertiary Education	–.059	–.336	–.233	–.881

Notes: * $p \leq 0{,}05$; ** $p \leq 0{,}01$ (tested one-tailed)

1) For Cologne, only the slopes for the vignette characteristics "Protestant" and "Catholic" turned out to be insignificant and have been fixed for this reason. The intercept and all other slopes were estimated with a significant random component.

For further notes, cf. Table 3

The cross-level interaction effects between Catholics as trusters and Catholic vignette persons as trustees fail to become significant (Bilbao: $b = 0.001$, $p > 0.05$, Cologne $b = 0.093$, $p > 0.05$). The same applies to the cross-level interaction effects between Protestant respondents and Protestant vignette persons in Cologne ($b = 0.096$, $p > 0.05$). These results show that perceived in-group/out-group antagonisms regarding religion are too weak to strengthen in-group favouritism to the degree that the religious in-group is significantly more trusted than religious out-groups (particularised trust, H2a). Instead, trust in certain minority religions in both towns is lower in general than trust in people who belong to a majority religion (main effect model). It must be mentioned, however, that a cross-level interaction effect between Muslim respondents and Muslim vignette persons could not be tested in our study (only eight Muslims participated in the survey). Therefore, our study cannot address the question of whether particularised trust has a significant impact only amongst small minority groups.

For Cologne, one result is worth examining more closely: Protestants, Catholics and Orthodox are trusted almost equally (Table 3)[61]. Furthermore, neither Catholics nor Protestants are more trusted by the members of the respective religion than by people of other religions or by persons without a religion (Table 4). This pattern raises the question of whether being a member of one of these Christian denominations is more important for particularised trust than being a member of a specific religion. From their teachings, the Catholic and the Orthodox Churches are closer to each other than to the Lutheran Church, which is the main Protestant Church in Germany. There have been a number of attempts aiming towards ecumenical cooperation over a long period of time to improve the relationship between the Catholic and the Orthodox Churches[62]. The same also applies to the Catholic and the Lutheran Churches[63]. Hence, it might be that differences between these three denominations are perceived as less important than

[61] The differences between these three denominations turned out to be insignificant for multilevel models with Protestants and Catholics respectively as reference group.

[62] Apostolic Delegation. "Pilgrimage to the Holy Land on the Occasion of the 50th Anniversary of the Meeting Between Pope Paul VI and Patriarch Athenagoras in Jerusalem (24-26 May 2014): Common Declaration of Pope Francis and the Ecumenical Patriarch Bartholomew", acceso el 22 de julio de 2016, https://w2.vatican.va/content/francesco/en/speeches/2014/may/documents/papa-francesco_20140525_terra-santa-dichiarazione-congiunta.html.

[63] Michael W. Chapman, "Pope Francis to Join Ecumenical Celebration of Protestant Reformation", acceso el 22 de julio de 2016, http://www.cnsnews.com/news/article/michael-w-chapman/pope-francis-join-ecumenical-celebration-protestant-reformation.

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differences between those who are religiously affiliated, on the one hand, and those who are religiously non-affiliated on the other hand. To test this hypothesis, two new 0-1-coded dummy variables were computed, one for Protestant and Catholic respondents and one for Protestant, Catholic and Orthodox vignette persons. Thereafter, these two variables replaced the dummies, capturing the respective influence of the two and three Christian religions on both the respondent and vignette levels. If the in-group/out-group assumption is correct, then the cross-level interaction effect between Christian respondents and Christian vignette persons should become significant. And empirically, this is indeed the case (Table A2, Appendix); Christians have somewhat more trust in other Christians than in people without a religion ($b = 0.144$, $p < 0.05$ tested one-tailed).

In-group favouritism may not only be caused by symbolic threat perceptions but also by realistic threat perceptions. For Bilbao, none of the two cross-level interaction effects between the level of education of the truster (respondent) and the socio-economic status of the vignette person as trustee is significant ($b = 0.177$ for secondary education, $b = –0.059$ for tertiary education). In Cologne, we find a curvilinear pattern; while the cross-level interaction effect between secondary education and unemployment becomes significant ($b = –0.583$), the cross-level interaction effect between tertiary education and unemployment does not ($b = –0.233$). Hence, hypothesis H5a is not confirmed by the data. Finally, we tested for a cross-level interaction between a respondent's gender and the gender of the vignette person (H6a). The effect became significant neither for Bilbao ($b = –0.033$) nor for Cologne ($b = 0.054$). In light of the higher crime rates of males, this result is very plausible.

V. **Conclusions**

In this contribution, we analysed the impact of different determinants on social trust by using a factorial survey as an experimental design. The main results for conflict theory are rather mixed; empirically, it is confirmed that Catholics, being members of the main religion in Spain, are most trusted, whereas Muslims, as members of the religion most distinct from the other Christian religions, are least trusted. Protestants and people belonging to no religion fall between these two. In Cologne, as a historically Catholic town with a high percentage of citizens belonging to no religion or to the Protestant Church, trust in Catholics, Protestants and Orthodox does not differ significantly. Muslims and

people without religion are significantly less trusted. The observed difference between Bilbao and Cologne regarding trust in Muslims might be traced back to the fact that Muslims in Germany are mainly from Turkey, which, compared to other Muslim countries, is less traditional and more secularised. This may contribute to reducing the perceived differences between Muslims and other religions in Germany. So far, these results agree well with conflict theory. If in-group/out-group–based threat perceptions should strengthen in-group favouritism, then particularised trust, as measured by cross-level interaction effects between the religion of trusters and trustees who belong to the same in-group religion, should become significant. This only applies to Cologne after the distinction between the three Christian denominations is removed from the multilevel model. Whether particularised trust is much stronger amongst members of small minority religions, however, cannot be answered by this study, since the number of respondents belonging to these religions (eight Muslims, two Orthodox) is simply too small to be analysed.

Our results concerning language skills clearly confirm conflict theory. Contrary to Huntington, however, language skills in Cologne have a much bigger impact on trust than does religion (b = –0.328 vs. a maximal difference of –0.219 between Catholics and Muslims). The analyses also show mixed results for ethnicity; whereas the skin colour of the fictitious vignette person has the expected effect on trust in Bilbao, the impact of this predictor is virtually zero in Cologne. The latter result might be traced back to learning processes from German history, where Jewish people were persecuted and murdered by the national socialists for being members of a different ethnicity.

Contrary to Huntington's macro-theoretical approach, socio-economic factors turned out to be much more powerful predictors for trust than cultural factors. Unemployment had twice the impact on trust in Cologne compared to Bilbao. This difference in trust might be partially explained by the fact that the unemployment rate was much lower in Germany than in Spain; in the first quarter of 2014, unemployment was 5.4 per cent in Germany compared to 25.9 per cent in Spain[64]. Hence, being unemployed was much less likely in Germany than in Spain. Therefore, being unemployed might be perceived in Germany much more than in Spain as the result of low achievement or low motivation or as personal failure, which reduced trust in people who were unemployed.

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[64] Eurostat. "Gini Coefficient of Equivalised Disponible Income" – *EU-SILC Survey*, acceso el 16 diciembro de, 2016, http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=ilc_di12&lang=en.

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All in all, for two contexts (towns) with different religious and socio-economic compositions, we were able to show that socio-economic factors (realistic threat perceptions) are much stronger predictors of social trust than cultural ones (symbolic threat perceptions). Hence, we do not find micro-level support for Huntington's cultural clash thesis. A question which remains unanswered by our study is whether the same pattern of threat perceptions can also be found for situations where no economic resources (money, a mobile phone) are involved; perhaps if the main focus of the topic were more on cultural issues, cultural threat perceptions might be higher than economic ones. Whether or not this is the case is a question to be addressed by future research.

These results represent an evidence that social sustainability as a goal to achieve still requires a long way in Europe, as there are still clear obstacles for the consolidation of a culture of social trust in a context of diversity. This article shows how some characteristics of outgroups are still clearly a burden for the generation of social trust. Similarly, European societies still require a transformation in their attitudes, through education and generational replacement, to fully incorporate diversity and generate the required levels of social trust that contribute to generate a more inclusive European identity.

Appendix Table A1

Multilevel Analysis of Level of Trust: Cross-Level Interaction Model for Cologne

	Cologne	
R^2 Vignette Level	12.88%	
R^2 Respondent Level	0.20%	
Level 1:	4,260 Vignettes	
Level 2:	213 Respondents	
	b	t
Intercept Level 1		
Intercept Level 2	6.717	17.052**
Male	–.217	–1.011
No Religion (Ref.)	—	—
Christian (Protestant, Catholic)	.142	.598
Education Elementary (Ref.)	—	—
Education Secondary	.282	.849
Education Tertiary	–.110	–.288
Born 1971-96 (Ref.)	—	—
Born 1948-70	.306	1.473
Male	–.085	–1.609
Male	.044	.679
Color of Skin (1=black)	.005	.118
Language Skills (1=low)	–.328	–7.245**
No Religion (Ref.)	—	—
Christian (Protestant, Catholic, Orthodox)	.029	.452
Christian (Protestant, Catholic)	.144	1.946*
Muslim	–.075	–1.026
Unemployed	–1.059	–6.340**
Secondary Education	–.559	–2.149**
Tertiary Education	–.261	–.879

Notes: * $p \leq 0.05$; ** $p \leq 0.01$ (tested one-tailed)

1) Only the slopes for the vignette characteristics "Male", and "Christian" turned out to be insignificant and have been fixed for this reason. The intercept and all other slopes were estimated with a significant random component.

For further nots, cf. Table 3

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Community involvement in tourism: exploring the place image guided by the locals

Participación de la comunidad en el turismo: explorando la imagen del lugar

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Abstract: This paper is intended as a contribution to the debate on tourism sustainability and the need to involve local communities in planning practices, key to sustainable tourism.

The community-based approach has been widely theorized and used in projects of sustainable tourism development, because it tends to maximize the participation of local population from the earliest stages of development and affect tourism policies, while also responding to the changing needs of contemporary tourists, especially in terms of development of niche and special-interest tourism.

The only exception is in the construction of the tourist imaginary: the involvement of the community in this fundamental sphere has always been scarce, with the result that often there is a strong imbalance – even dissonance – between the image promoted through the marketing, that continuously re-shaped by the locals and that experienced by the tourists. This contribution will explore the creation of tourism imaginary as negotiated activity.

Keywords: tourism, sustainability, participation, community-based tourism, imaginary.

Resumen: *El enfoque community based a sido ampliamente teorizado y tomado en cuenta en los proyectos de desarrollo de turismo sostenible, porque permite de maximizar la participación de la población local desde las primeras etapas de desarrollo, influyendo positivamente en las políticas del turismo. Una excepción significativa ha sido la construcción de la imaginación turística: la*

participación de las comunidades siempre ha sido poco considerada, resultando un fuerte desequilibrio, hasta disonancia, entre la imagen promovida a través del marketing, la modelada por los lugareños y la experimentada por los turistas. Esta contribución es parte del debate sobre la sostenibilidad del turismo y la participación de las comunidades locales, con la intención de explorar el proceso de creación de una imaginación turística en tanto que actividad negociada.

Palabras clave: *turismo, sostenibilidad, implicación, turismo comunitario e imaginario.*

I. **The impact of tourism and the paradigm of sustainability**

Tourism development is without doubt one of the leading causes of environmental problems both in renowned holiday resorts and destinations that have only recently started to gain in popularity. The issues all arise from a range of factors linked to the presence of tourists, and more specifically, the type of tourism traditionally associated with the destination, its seasonality and the intrinsic nature of the destination: urban and mountain areas, for instance, differ extensively in their ability to bear heavy flows of tourists. These factors interact with each other in a cumulative manner and this explains why the effects of tourist development in a given area cannot be calculated by simply summing up all the impacts; the outcome instead is the result of their combination and transformation into elements of change that are hard to trace back to their original source[1]. Among the variables believed to have a significant impact on the environment are: the number of tourists present and type of activities carried out, the infrastructures built as a consequence of tourism territorial planning, the type and amount of information provided to tourists and their feedback in terms of expectations, the vulnerability of the local environment, both natural and man-made[2].

Together with its impact on the environment, experts often highlight how tourism can trigger conflicts among the various people involved in the interaction. This issue first emerged in the Nineteen Seventies, when academics studying the social and cultural impact of tourism started viewing it as a factor of change, with all its negative consequences: it was

[1] Stephen Williams, *Tourism geography* (London-New York: Routledge, 1998), 100-104.

[2] Chris Ryan, *Recreational tourism. Demand and impacts* (Clevendon: Channel View, 2003), 204-209

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– and is still – considered a momentous force, capable of shattering the fragile social and cultural balances existing in a given destination. The role of tourism as a factor of change and the might of its destructive impacts were evident in the more popular mass tourism resorts, be they on the Mediterranean coasts or further away from home. It was at that time that ground-breaking papers on the social and cultural impact of tourism were published: those works analyzed the effects of tourism on society, language, health, religion and ethics, as well as on the people's habits and customs, the local arts and crafts[3].

Research on the social impact of tourism has been one of the most deeply investigated issues in social science. In a comprehensive overview on the subject, Deery *et al.*[4] describe the development of this line of research, highlighting how it unfolded from a first descriptive and more explorative stage[5], to one characterized by the creation of models to analyze tourism impacting factors, which was then followed by increasingly detailed investigations[6]. Some of these papers focus on the variety of interactions taking place between tourists and locals, describing how they are dynamic and subject to change. The elements potentially giving rise to clashes are numerous: the distance between value systems and social class; attitudes and behaviours of both tourists and locals, the different and often clashing expectations of both parties. The conflicts might occur at different levels: between clashing systems, when traditions and their underlying set of symbols are exploited for profit; or between individuals, usually in the

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[3] Emanuel De Kadt, *Tourism. Passport to development?* (Oxford: Oxford University Press, 1979).

Valene Smith (ed), *Hosts and guests. The anthropology of tourism* (Philadelphia: University of Pennsylvania Press, 1977).

Louis Turner and John Ash, *The golden hordes. International tourism and the pleasure periphery* (London: Constable, 1975).

[4] Margaret Deery, Leo Jago, and Liz Fredline. "Rethinking Social Impacts of Tourism Research: A New Research Agenda". *Tourism Management* 33, no. 1 (2012): 64–73. https://doi.org/10.1016/j.tourman.2011.01.026

[5] Liu, Juanita C., Pauline J. Sheldon and Turgut Var. "Resident perception of the environmental impacts of tourism". *Annals of Tourism Research* 14, no. 1 (1987): 17-37.

[6] Erik Cohen. "A phenomenology of tourist experiences". Sociology 13, no. 2 (1979): 179–201. Alister Mathieson and Geoffrey Wall, *Tourism: economic, physical and social impacts* (London: Longman, 1982). John Ap and John L. Crompton, "Developing and testing a tourism impact scale", *Journal of Travel Research* 37, no. 2 (1998): 120-130. Jeremy Boissevain, *Coping with Tourists. European Reaction to Mass Tourism* (Oxford-New York: Berghahn Books, 1996). Hwan-Suk Chris Choi and Ercan Sirakaya, "Measuring residents' attitude toward sustainable tourism: development of sustainable tourism attitude scale". *Journal of Travel Research* 43, no. 4 (2005): 380-394. Hasan Zafer Doğan, "Forms of adjustment: sociocultural impacts of tourism", *Annals of Tourism Research* 16, no. 2 (1989): 216-236.

event of a controversial or disputed exploitation of natural and cultural assets[7].

The conflicts that can be ascribed to tourism development not only occur between holiday-makers and residents, but also between residents and stakeholders, because they often end up competing for the same resources[8]. Conflicts within a community are usually pre-existing, but are greatly amplified by the advent of tourism: its goal is to "sell" images that can be easily communicated to and understood by the wider public. In order to be more accessible, these images must be simplified through a process that defines them as opposites: the hazier, more complex concepts are simplified and their meaning is made understandable by identifying and comparing them with their antipode (for instance: novel/traditional; artificial/natural; processed/genuine; familiar/foreign).

However, as emphasized by Deery *et al*., research has often attempted to "provide lists of impacts without a clear understanding of how the perceptions of these impacts were formed and, more importantly, how such perceptions could be changed if necessary"[9].

Not all impacts are negative: Boissevain reminds us that one of the most important features of tourism is how it promotes consciousness, pride, confidence and solidarity among people living in a given destination[10].

Studies on the social impacts of tourism are interlocked with the debate on sustainability. The first definition attempting to encompass the concept of sustainability[11] in its entirety was elaborated in the late Nineteen Eighties by the World Commission on Environment and Development[12].

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[7] Mike Robinson and Priscilla Boniface, eds., *Tourism and Cultural Conflicts*. (Wallingford: CABI, 1999): 9-10.

[8] Ibidem: 11-17.

[9] Margaret Deery *et alii*, "Rethinking Social Impacts of Tourism Research…": 65.

[10] Boissevain, Jeremy. *Coping with Tourists*: 5.

[11] Hence including both the environmental concept of "sustainable use" and the more economic-oriented one of "sustainable growth".

[12] In its final report, the Commission defines sustainable development as that meeting "the needs of the present without compromising the ability of future generation to meet their own needs": a rather hazy definition.The United Nations' Conference on Environment and Development held in Rio de Janeiro and more specifically, the drafting of the action plan known as Agenda 21 made an attempt to pragmatize the concept of sustainable development, resulting in an organic set of guidelines involving action at international, national, regional and local levels. World Commission on Environment and Development. *Our Common Future*. 1987. https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf. Ibidem: 43. Martin Mowforth and Ian Munt, *Tourism and sustainability. New tourism in the Third World* (London-New York: Routledge, 1998). Fabio Pollice, *Territori del turismo. Una lettura geografica delle politiche del turismo* (Milano: FrancoAngeli, 2002).

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The goal of "sustainability" continues to be an important issue in the public debate concerning the ability to compromise between the needs for economic development and responsibility ethics[13]. Sustainability has been defined as a "bridge concept" spanning between the dissimilar needs of opposite stakeholders and the paradigms of eco- and anthropocentrism[14]. This notion of sustainable development is disputed, as evident when attempting to translate it into practice[15].

As regards tourism, the concept of sustainable development encompasses various dimensions: ecological, economical, social and cultural. It is our intent to focus on the latter two aspects. Social sustainability implies that the residents must increase their control over their lives, preserving and indeed reinforcing their identity and community cohesion, whilst cultural sustainability requires that development preserve and foster the meaningfulness, practices and societies of which they are the hallmark. As reconstructed by Saarinen[16], the complexity of the concept and its multidimensionality have led many authors to believe there is no precise definition of "sustainable tourism" and for this reason "has sometimes been understood as an ideology and point of view rather than an exact operational definition"[17].

Mainstay of the concept of sustainable tourism outlined so far is the involvement of all social, economical and political authorities of the territory and more in general, the subjects that either directly or indirectly take part in the process of tourism development. A sustainability-driven policy requires great attention towards local communities, which in theory should be the direct beneficiaries of the economic benefits brought about by tourism.

II. **Approaches to sustainability in tourism**

In tracing back the approaches to the concept of *sustainability*, Saarinen identifies a series of research focuses. The first can be defined as *resource-*

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[13] Alessandro Simonicca, "Teoria e prassi dell'heritage tourism". In *Turismo e sostenibilità. Risorse locali e promozione turistica come valore*, edited by Lucilla Rami Ceci, 133-155 (Roma: Armando Editore, 2005), 139-140.

[14] Stephen Page and Ross Dowling, *Ecotourism* (Harlow: Prentice Hall, 2002), 14-17.

[15] Jim Macbeth, "Towards an Ethics Platform for Tourism". *Annals of Tourism Research* 32, no. 4 (2005): 966-967. Wall, Geoffrey. "Rethinking impacts of tourism". In *Progress in Tourism and Hospitality Research* 2, no. 3-4 (1996): 207-215. https://doi.org/10.1002/pth.6070020302

[16] Jarkko Saarinen, "Traditions of sustainability in tourism studies". *Annals of Tourism Research* 33, no. 4 (2006): 1121-1140. https://doi.org/10.1016/j.annals.2006.06.007

[17] *Ibidem*: 1124

based, hence strictly linked to the models of *carrying capacity* and *limits of acceptable change*. These two tools are functional to the implementation of the concept of sustainability during the planning stage. The analysis in this case is based on the assumption that tourism is a dynamic activity leading to permanent changes, some of which are perceived as negative: tourism has an impact, and if greater growth and development are required, the stakeholders involved must interact with the environment in new and better ways, changing their approach and/or level of interaction, but not the available resources. According to this line of study, limits to growth and impacts are both assessed on the grounds of the resources exploited by tourism, taking into account the original conditions, be they known or presumed; limits to growth can be therefore considered objective, and can be measured by appraising the characteristics of said resources and their transformation[18].

The *activity-based* line of research, on the other hand, is characterised by a more relativistic approach: tourist activities develop differently, hence different are the responses to their impact. This type of approach is more industry-oriented and originates from the concept of *life cycle:* like many other products, the life cycle of a holiday resort can easily end if no reinvestment and renovation policies are implemented *(ibidem*: 1127-1129). Hence, if residents and the tourist sector are incapable of commitment, this could lead to a decline of the destination and ruin its image. This activity-based model is difficult to analyze, given its great variability: it is *dynamic*, because subject to continuous changes; *relative*, since it is defined through a constant process of comparison; *multiple*, given that it implies the appraisal of a variety of factors[19].

A solution can be found by adopting a different type of approach, known in literature as *community-approach*, whereby the limits to tourist development are defined by negotiation, within a *community-based* framework[20]. In other words, the tourist industry can only offer economic and social benefits if a community-based approach is employed, ditching an exclusively business-oriented approach in favour of one addressing the local community[21]. The way a community responds to the opportunities and challenges arising from tourism depends on the type of contact between residents and tourists and the significance of the industry for the individuals

[18] Jarkko Saarinen, "Traditions of sustainability in tourism studies": 1125-1127

[19] Chris Ryan, *Recreational tourism. Demand and impacts* (Clevendon: Channel View, 2003), 132.

[20] Jarkko Saarinen, "Traditions of sustainability in tourism studies": 1129-1131.

[21] Peter E. Murphy, *Tourism. A community approach* (New York: Methuen, 1985), 41-45.

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and for the community as a whole[22]. Participation takes shape thanks to a series of steps and practices carried out together with the residents. A community-based approach implies that sustainability is, or better, can be, defined though a negotiation process. By empowering the local communities, it is possible to define the growth limits in a beneficial manner for residents and local stakeholders: these become dynamic concepts, continuously defined and construed through negotiation processes. The community-based approach acknowledges the need to both promote the life quality of the residents and protect the resources[23]. Although community-based tourism entails a high degree of public participation, its detractors have underlined that in practice, local residents are rarely given the opportunity of responding to the programmes endorsed by public authorities and the private sector [24].

III. **Critics to the concept of community-based tourism**

Blackstock, taking the cue from community development, provides a critical view of community-based tourism (CBT)[25]. The author claims that there are three elements of conflict between these two approaches. One is linked to their aims: community-based tourism is not interested in the community as such, but only in tourist development, and this is the ultimate goal of any type of cooperation with the community[26]. Another element becomes evident by taking a critical view of the concept of community, and more specifically, the so-called atheoretical and apolitical approach to said concept: "This presentation of community is an *ideal* masquerading as social fact"[27]. In other words, CBT fails to take into account the heterogeneity, stratification and power structure of a community. Finally, the author also highlights how, in the end, economic interests linked to tourism development will always prevail on the those of the residents. Her conclusion is that "a socially equitable tourism industry is resisted as it challenges the vested interests of capital invested in tourism growth […] the current conceptualization of CBT is naïve and unrealistic […] CBT

[22] Ibidem: 119.

[23] Jarkko Saarinen, "Traditions of sustainability in tourism studies": 1127.

[24] Mick Smith and Rosaleen Duffy, *The ethics of tourist development* (London-New York: Routledge, 2003), 139.

[25] Kirsty Blackstock, "A critical look at community based tourism", *Community Development Journal* 40, no. 1 (2005): 39-49.

[26] *Ibidem*: 41

[27] *Ibidem*: 42

focuses on maximizing the economic stability of the industry. This is done through legitimating tourism development as locally controlled and in the 'community's' interest"[28]. As we can see, Blackstock's criticism revolves around economical aspects. Others researchers prefer to highlight how CBT has developed along three different dimensions: involvement, power and control, and effects[29]. The first dimension, i.e. involvement and participation, implies an integration of the community in the issues affecting it. There are different kinds of participation, which occur in spaces created for this purpose, and are defined as *invited spaces*. The second dimension is that of power and control, evident from the relations between community and external stakeholders, and the way power is split between these two parties. The third dimension is that pertaining to the outcomes of Community Based Tourism, both inside and outside of the community. These authors suggest that an analysis of CBT should follow all three directions[30].

IV. **On the concept of community**

Like the concept of *sustainability,* also that of community, although widely used, is far from being univocally defined[31]. In classic sociology, the word evokes a type of social relation characterized by strong bonds and ties between its members and involves the individuals in the entirety of their reciprocal relationships. In contemporary sociology this word is usually synonymous with local community, i.e. a small community with a traditional culture. When analyzing the concepts of community and, more specifically, local community, Pollini describes the two main models:

1. The first is defined by the author as one of "linear development". This model postulates the replacement of primary interpersonal relationships with secondary ones, as a consequence of the increased number of inhabitants and population density[32].

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[28] *Ibidem*: 44-45.

[29] Melphon Mayaka, W. Glen Croy and Julie Wolfram Cox, "A dimensional approach to community-based tourism: Recognising and differentiating form and context", *Annals of Tourism Research* 74 (2019): 177-190. https://doi.org/10.1016/j.annals.2018.12.002

[30] *Ibidem*: 179

[31] Fabio Berti, *Per una sociologia della comunità* (Milano: FrancoAngeli, 2005).

[32] Academics employing this model are Tönnies, Weber, Durkheim and Parsons. Gabriele Pollini, "Turismo, comunità locale ed appartenenza socio-territoriale", in *Turismo, fluidità relazionale e appartenenza territoriale*, ed. by Renzo Gubert and Gabriele Pollini (Milano: FrancoAngeli, 2002), 15-90.

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2. The second model considers the community as an essential aspect of our present: local communities are a complex network of kinship, friendship, formal and informal trade and business relationships which are deeply rooted in everyday family life and the need to socialize[33].

In today's society, small-community stakeholders are part of a network of economical, political, social and cultural relations that goes well beyond the local level. The possibility of interacting with countless contexts render these boundaries very fluid, to such an extent that one wonders whether they still exist or are progressively dissolving. On the other hand, the network of relations and the presence of "foreign" contexts can help reinforce the identity of a location and hence the feeling of being part of a community. Community thus becomes an antidote to uncertainty and the feeling of vulnerability deriving from the rapid changes of present-day life, wrapping a sense of belonging to a place considered to be a refuge from chaos[34].

The concept of community is a source of problems, but perhaps it is its "slipperiness" that makes it so popular[35]. In this respect, Amit and Rapport compare its nature to that of symbols, because "they evoke a thick assortment of meanings, presumptions and images. This kind of thickness doesn't make for precise definitions but it does ensure that the invocation of 'community' is likely to have far more emotional resonance than a more utilitarian term"[36]. Its evocative character makes it prone to cynical exploitation by the tourism industry, for instance, which plays a key role in the image-creating process of a certain place[37]. This has its consequences: imaginaries of tourist destinations include how the residents are presented (or ill-presented)[38].

The principles inspiring community-based tourism are rather elementary and in many ways commendable: the approach is based on the fact that stakeholders involved in the process of tourism development not only have

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[33] This model is based on the approach employed by the first academics of the Chicago school of thought (Ibidem).

[34] Doreen Massey, "A place called home", *New formations* 17 (1992): 3-15. Ibidem: 13.

[35] Vered Amit and Nigel Rapport. *The Trouble with Community: Anthropological Reflections on Movement, Identity and Collectivity* (London: Pluto, 2002).

[36] *Ibidem*: 13-14.

[37] Graham Dann, "People of tourist brochures". In *The Tourist Image: Myths and Myth Making in Tourism* edited by Tom Selwyn (New York: John Wiley and Sons, 1996), 61–81.

[38] Noel B Salazar, "Community-based cultural tourism: Issues, threats and opportunities", *Journal of Sustainable Tourism* 20, no. 1 (2012): 9–22. https://doi.org/10.1080/09669582.2011.596279: 9

the right to be part of tourism-related trade and business, but also play an active role in all planning and policy-making processes[39].

The socio-cultural impact of tourism on the local community entails a process of differentiation within the community, with a consequent segmentation of attitudes and opinions of the residents towards tourism. Highlighting the multi-faceted character of the community means admitting that there is no fixed, unchangeable relation between the elements which form a community.

Tourism is doubtlessly an active force. It would be a mistake however to believe that local communities live in a state of perfect balance. There can be a wide spectrum of views and opinions within a community, and given its dynamic, if not volatile nature, it can rapidly change the way it perceives tourists. Communities are by no means homogeneous in composition[40].

V. **Tourist imaginaries**

On imaginary

Imaginary can be viewed as the "ceaseless and essentially undetermined (social, historical and mental) creation of figures, forms and images […]. What we call 'reality' and 'rationality' are therefore the result of our imaginary"[41]. In this respect, it is without doubt a creative force. Imaginary is a mainstay of the tourism industry: a destination is not always selected on the

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[39] Mina Dragouni, Kalliopi Fouseki and Nikolaos Georgantzis, "Community participation in heritage tourism planning: is it too much to ask?", *Journal of Sustainable Tourism* 26, no. 5 (2018): 759-781. Doi: 10.1080/09669582.2017.1404606: 759.

See also, Douglas Pearce, "Alternative tourism: concepts, classifications and questions". In *Tourism Alternatives: Potentials and Problems in the Development of Tourism*, ed. by Valene L. Smith, and William R. Eadington (New York: John Wiley and Sons, 1992), 18–30. Eric Laws, *Tourist Destination Management: Issues, Analysis and Policies* (New York: Routledge, 1995). For an overview on the intersections between sustainable tourism and community-based tourism see Andrea Giampiccoli, Oliver Mtapuri, and Anna Dłużewska, "Investigating the intersection between sustainable tourism and community-based tourism", *Tourism Review* 68, no. 4 (2020): 415 – 433 https://doi.org/10.37741/t.68.4.4

Community-based tourism is also included in the document: United Nations World Tourism Organization [UNWTO] and United Nations Development Programme [UNDP], *Tourism and the Sustainable Development Goals – Journey to 2030* (2017). https://www.e-unwto.org/doi/epdf/10.18111/9789284419340

[40] Richard Sharpley, *Tourism, tourists and society* (Huntingdon: Elm, 2003), 10-15.

[41] Cornelius Castoriadis, *L'istituzione immaginaria della società* (Torino: Bollati Boringhieri, 1995), XXXVII-XXXVIII.

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grounds of its assets and features, but more usually because of its meaning for the collective imaginary. No place is a tourist destination *in se*, but becomes one after a transformation process aimed at making it meaningful for a considerable number of persons[42]. The creation of a place image or brand exploits mass communication media and an industry designed to make the tourist part of a fantastical dimension induced by the dream of going to a given destination. Likewise, tourism consumption is defined by a continuous process of selection and reorganization of meanings, all strongly interdependent: "Tourist imaginaries can be defined as spatial imaginaries that refer to the potential of a place as a tourist destination […] They allow individuals and groups to imagine a place as a conceivable tourist destination; they create the desire, they render the place attractive, they help render travel plans concrete (by influencing both the selection of the place visited and the practices associated with undertaking the trip) […] They intervene not only when choosing the destination, but also once there, directing, controlling or avoiding certain practices"[43]. Salazar is even more explicit when stating that tourism implies "the human capacity to imagine or to enter into the imaginings of others" [44].

Given these premises, we can consider imaginary as a collective narrative construction that interacts with the images created by each individual to create meaning: imaginary thus produces meanings while contemporaneously being its result[45].

Tourist imaginaries represent the whole set of (past-present-future) images regarding a destination, "refer to the potential of a place as a tourist destination", and not only intervene in the process of selection, the definition of the initial expectations concerning the place (including the activities offered within the territory, as highlighted by the recent development of special-interest tourism[46]) and the expected experiences and practices, but also in the way tourists decide to interact and behave once there. In other words, these imaginaries help tourists approach a new (in cultural, social and spatial terms)

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[42] John Urry, *Lo sguardo del turista. Il tempo libero e il viaggio nelle società contemporanee* (Roma: Ed. Seam, 1995).

[43] Maria Gravari-Barbas and Nelson Graburn, "Tourist imaginaries", published online on March 16, 2012. URL: http://journals.openedition.org/viatourism/1180; DOI : https://doi.org/10.4000/viatourism.1180

[44] Noel B Salazar, "Community-based cultural tourism: Issues, threats and opportunities": 864.

[45] *Ibidem*.

[46] Norman Douglas, Ngaire Douglas and Ros Derrett (eds). *Special Interest Tourism* (Brisabe: Wiley, 2001).

Birgit Trauer, "Conceptualizing special interest tourism – frameworks for analysis", *Tourism Mangement* 27 (2006): 183-200. http://dx.doi.org/10.1016/j.tourman.2004.10.004

environment and are the initial framework that will then contribute in determining the overall holiday satisfaction.

The construction of these imaginaries is an essential and complex aspect, given that they involve all the stakeholders: tourists, with their cultural background, intermediaries, professionals who are involved in actively creating the imaginary, and the hosting community: though largely ignored, the latter party should play a key role sustainable tourism development, because it concretely *embodies* the tourist-imaginary.

An involvement of local communities in tourism development is fundamental not only in response to the increasing attention towards issues of (environmental and social) sustainability, but for the whole process of image-building within a tourist destination.

VI. **Participation as practice: creating the image of a place**

The project of which we herein describe some preliminary results is inspired from the concept of participation as practice; its objective is the involvement of residents in creating the tourism imaginary of the destination[47]. The goal is to analyze the social construction of the tourist imaginary, focusing both on the activity of the tourist stakeholders and the role played by the local community in the active creation and re-creation of collective representations associated to tangible and intangible cultural assets. In brief, we explore whether and to what extent the imaginary created by the stakeholders corresponds to that shared and negotiated at community level.

The research project also aims at promoting a change in the way the issue of the *imaginary creation* is discussed and implemented within the framework of tourism. The research assumes that the interaction among and between all the parties contributes to creating the tourist imaginary and giving it an accepted and widely-shared meaning.

The concept of participation used herein echoes the thoughts of Cotta and Pellizzoni[48]. According to the former author, "participation" refers to two different aspects: *taking part* in a specific process, and thus acting

[47] The research presented here is part of Excover Project, part of the Interreg Ita-Cro Programm. Focus of the project is a community-led tourist development based on a sustainable valorisation of the natural and cultural resources of the territories involved: https://www.italy-croatia.eu/web/excover

[48] Maurizio Cotta, "Il concetto di partecipazione politica: linee di inquadramento teorico", *Rivista Italiana di Scienza Politica* 9, no. 2 (1979): 103-227. Luigi Pellizzoni, "Cosa significa partecipare", *Rassegna Italiana di Sociologia* 3 (2005): 479-514.

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purposefully, and secondly, *being part* of an organization or community. This means that on one hand, participants are involved in specific actions and are asked to decide upon specific issues; on the other, it implies that they are part of a solidarity system, a community. In other words, individuals who belong to a community are involved in the actions: one cannot *take part in* without *being part of*, and vice versa[49].

Participating does not simply mean cooperating; the *will to act* and *agency* (i.e. the *possibility of acting*) are of fundamental importance. With regard to the former aspect, it goes without saying that it is impossible to force participation; all relies on the willingness of individuals, who act out of interest, curiosity, or sense of responsibility. Agency, on the other hand refers to the possibility that an individual has to choose (hence, the opportunity to act upon certain events)[50].

These clarifications help us distinguish between different degrees of participation: from mere cooperation to the possibility for an individual to decide for him/herself, influence collective decisions or even the structure of the decision-making process.

Another common misinterpretation occurs for the concepts of participation and consultation. While the former on implies an active role for the community, with its ultimate control over the decision process, the term consultation implies the "sharing of information but not necessarily power". Consultation does not influence the decision-making process[51].

Participation to the planning and implementation of tourism policies has been unremittingly advocated: in general, whoever is affected by a decision has the right to take part in it. Participation represents a move from the global, top-down strategies dominating the first development projects to a more sensitive approach. In concrete terms, stakeholders and residents must have an active role in the decision-making process, expressing their opinions, making room for discussions about the issues at stake and facilitating consensus building, because only the involvement of all parties in the decision-making and product promotion processes can prevent the onset of tensions within the community. Hence participation becomes "an empowering process which enables local people to do their own analysis, to take command, to gain in confidence and to make their own decisions"[52].

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[49] Maurizio Cotta, "Il concetto di partecipazione politica: linee di inquadramento teorico": 203-204

[50] Luigi Pellizzoni. "Cosa significa partecipare": 7

[51] Tristan Claridge, *Designing Social Capital Sensitive Participation Methodologies*. 2004: 20. In https://www.socialcapitalresearch.com/wp-content/uploads/2013/01/Social-Capital-and-Participation-Theories.pdf?x15737 Accessed on October 15th, 2020.

[52] *Ibidem*: 23.

Participation is not a linear process: issues such as who should be involved, to what extent and on whose terms are at stake: "While participation has the potential to challenge patterns of dominance, it may also be the means through which existing power relations are entrenched and reproduced. The arenas in which people perceive their interests and judge whether they can express them are not neutral"[53]. Participation is a dynamic process, from which different, if not clashing interests emerge.

As mentioned previously, people cannot be forced to participate. Participation is a voluntary act; in this project we adopted an *invited participation* approach, i.e. that orchestrated by an external agency of some kind[54]. The mainstays of this type of strategy are: a) inclusion, given that various community groups are involved in the project; b) the sharing of aims and strategies; c) ensuring a continuous communication among partners and between partners and individuals or groups from the community.

Aim of the whole project is to involve the residents in creating the imaginary of their hometown, i.e. how the destination is presented to the potential tourist. We can now analyze the relationship between the image of a place, as it is presented to tourists, and the imaginary created, negotiated and shared at community level: do they match?

VII. **The research project**

The research results presented in this paper are a part of a wider research project founded by the European program Interreg Italy-Croatia (Excover). Aim of the project is the tourist valorization of small towns and villages with very relevant historical, cultural and natural assets, but visited by a little number of tourists, lower than the potentiality of the local natural and cultural resources would allow[55].

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[53] Sarah C. White, "Depoliticising Development: The Uses and Abuses of Participation", *Development in Practice* 6, no. 1 (1996): 6-15: 6. https://doi.org/10.1080/0961452961000157564

[54] Andrea Cornwall, "Unpacking 'Participation': Models, Meanings, and Practices", *Community Development Journal* 43, no. 3, 2008: 269-283. doi:10.1093/cdj/bsn010

[55] The territories involved in the Interreg Project Excover are: Lika-Senj County with the municipality of Gospić, Primorje-Gorski Kotar County and Karlovac County in Croatia; Unità Territoriale della Carnia (now Comunità di Montagna), the Municipality of Rive d'Arcano, Po Delta, the Municipality of Campobasso, the Interregional Park Authority of Sasso Simone e Simoncello, the Municipality of Predappio, the Local Action Group Montefeltro. In the project three Universities are involved as responsible for the activities: University of Udine, University of Bologna and University of Zadar.

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The core aspect of the project is therefore the involvement of the local communities, moving from the idea that only the participation of the residents will support a sustainable tourism development. This has been considered an essential part of the project itself, which is promoting a community-led participation process based on a sustainable valorization of the natural and cultural resources and on the development of the opportunities offered by the sharing economy. From the first phases of the project, the involvement of the locals has been supported. One of the activities included in the project was the development of 'Participatory Planning Processes' for identification of the cultural heritage to be integrated into the valorisation process of the destinations. Actually, this involvement has taken different strategies and forms in the various territories involved in the project: focus groups, seminars, workshops, one-to-one interviews, etc.; however, all the initiatives were led by the same connotation, that is a bottom up approach based on the participation of locals.

Participation is a voluntary act; the project is based upon what has been called invited participation, that is, participation of community members in a project which is initiated by an agency or organization. In this particular case, a group of actors has promoted the engagement with the larger community in order to develop a project of community-based tourism development which involves local population in the creation of the imaginary of a place (which will become, in a second stage of the project, a tourist product) [56]. The pillars on which this strategy relies are: a) inclusion, as various groups from the community are involved in the project; b) sharing, putting in common aims and strategies; c) constant communication among the partners and between partners and individuals and groups within the community.

Within this more general framework, in the following pages the first results of the field work conducted in one of the territories involved in the project will be presented. Aim of the field work was to explore what the locals conceive as heritage, what are the most relevant elements they would consider as local patrimony, which are the aspects that reveal the bond with the territory and the feelings of attachment and belonging to it[57]. By heritage we mean something handed down from the past, as a tradition,

[56] The research presented here is part of Excover Project, part of the Interreg Ita-Cro Programm. Focus of the project is a community-led tourist development based on a sustainable valorisation of the natural and cultural resources of the territories involved: https://www.italy-croatia.eu/web/excover. Donatella Cozzi and Monica Pascoli are the responsible for the field work; *Uti Carnia* (now *Comunità di Montagna*) is the territorial partner that administratively supported the process.

[57] Irwin Altman and Setha M. Low (eds), *Place Attachment* (New York-London: Plenum Press, 1992).

which becomes the hallmark and identifying factor of a people, hence "a 'discursive construction' with material consequences". *Heritage* has been defined as the present-day look at the past, a very specific past, or the future. In both cases the viewpoint is the present: the perspective is therefore affected by the viewer's current concerns, and vision is limited, selective. This definition has significant consequences, including the fact that heritage responds to different, even clashing purposes and bears a variety of meanings: it is therefore intrinsically discordant or "dissonant" [58].

The field work was exploratory, and was aimed at understanding whether the destination image created for promotional purposes coincided with that held true by the residents; in particular, the research was driven by the following research questions:

1. What do the residents consider their heritage? What are the most significant features of the area in the eyes of its residents?
2. Are the key attractions promoted by the tourism industry perceived as such by the residents? Or do they believe that others are the distinctive features of their territory?

VIII. **The context of the research**

"Situated at the centre of Val d'Incarojo and surrounded by wonderful woodland, Paularo is primarily known for its natural and alpine aspects. In fact, the area lends itself to excursions and walks that are able to satisfy even the most demanding of visitors. Even the centre of the town is worthy of a walk, to see the Palazzo Calice Screm, an architectural ensemble with characteristic loggias which are considered the prototype of the Carnian house, and the eighteenth century Palazzo Linussio Fabiani, residence of the family of Jacopo Linussio, creator of one of the biggest eighteenth century textile manufacturers [sic] in Europe. In the shops you can buy traditional Carnian artisanal items: rustic furniture, plates, bowls, boxes, wooden chopping boards, baskets and panniers, but also traditional clothes and *scarpèts*. Worthy of a visit is the Mozartina, a precious collection of old and modern musical instruments"[59].

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[58] Brian Graham, Greg J. Ashworth and John E. Tunbridge, *A geography of heritage. Power, culture & economy* (London: Arnold, 2000: 2-3)

[59] https://www.turismofvg.it/locality/paularo. Accessed January 10th, 2021.

See also http://www.comune.paularo.ud.it/index.php?id=21833&L=606. Accessed January 10th, 2021.

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This is the description of Paularo (2.477 inhabitants) and the Incarojo Valley published online on the homepage of PromoTurismoFVG, the official tourism-promoting agency in Friuli Venezia Giulia, north-eastern Italy. The words portray the main attractions of this rather secluded destination, located among the Carnia mountains, near the border with Austria. Carnia has always been a crossway of different people, in particular during the Middle Ages. In 1077 King Henry IV of Germany established the Patriarchate of Aquileia as an Imperial State, and Carnia became part of it. In 1420 it was conquered by the Republic of Venice, and remained under its power until 1797, when it fell under the Austro-Hungarian Empire. It was in 1866 that it became part of the Italian territory. From the point of view of tourism, the main attractions promoted both at local and regional levels are linked to the natural environment (trekking and sports). Cultural assets however are not neglected: these include the eighteenth-century church of Sts. Vito, Modesto and Crescenza, with its frescoes, the Church of Santa Maria Maggiore in Dierico, famous for its carved wooden altar, palazzo Calice-Screm (1591), palazzo Mocenigo-Linussio-Fabiani, dating back to the eighteenth century, palazzo Calice di Villafuori (17th century), Casa Scala (18th century), with the "Mozartina", a private collection of pianos, pipe organs, and other ancient musical instruments. Tourism in this area is mostly short-termed (1-2 nights or weekend stays), and guests are usually families or adults (usually trekkers). Tourism is seasonal, with the greatest flows recorded in summertime, especially during specific events organized in the area (cultural and food festivals, mountain excursions, sports activities, and so forth). There are also religious celebrations that attract many visitors and in late August, a festival known as *Mistîrs,* which involves the whole community. The theme is ancient crafts and trades, and this event also serves to promote the eco-museum of this territory.

IX. **Methodology**

This explorative investigation was carried out using a non-standard approach in defining both the framework of the survey and its structure. The reason for this choice was to ensure a satisfactory degree of freedom and flexibility to both interviewer and respondents.

Thirty-two individuals have been interviewed. The interview was unstructured and non-directive; it included questions about the territory, basically focusing on the respondents' opinion in relation to the most interesting characteristic of the place, what is considered most valuable

and what, on the contrary, represents a problem. The field work took place from July to November 2020[60]. The meetings were organized mostly at the respondents' house, but took place also in public spaces.

The respondents, all residing in the town of Paularo, were selected through the *snowball technique*, to ensure an adequate variability in terms of gender, age and profession. It was decided not to involve persons active in the tourist sector, in an attempt to better understand the opinion of the residents, mostly native to the town, who were not directly involved in the debate on tourism development.

The facilitator, Agata Gridel, came from Carnia and, though not native of Paularo, was fluent in the local dialect. Her vast experience in community work (eco-museums and community maps), knowledge of the territory and lack of involvement in the sometimes-conflicting dynamics within the town ensured a successful outcome. Access to the field developed by accumulation: the facilitator involved some "friendly" contacts first, which in turn allowed to enter the broad community. Aim of the facilitator was to collect a heterogeneous group of informants (in terms of age, gender, working activities, etc.).

The surveys, either individual or in small groups[61], took the shape of spontaneous, easy-going conversations; the relation-creating approach employed overcame any trace of wariness. The respondents were asked to talk about their territory, describing what were in their opinion its most interesting cultural and natural resources and why did they consider them so meaningful. They were also asked what places would they show to friends visiting them, and what experiences would they advise them to live. The purpose of the survey was to understand the image of the destination from the residents' viewpoint.

In a second stage, the contents of the interviews and focus groups have been analysed with the support of two different tools: a database form and the "Participatory Planning Process Report".

The database form collects all the information regarding the sites, attractions and experiences selected by the locals as the most relevant aspects of the territory. This will be incorporated in an interactive community map, which will present (and represent) the place as it is seen and interpreted by the residents: in other words, the visitor or the tourist

[60] The research was supposed to start in February 2020, but the Covid-19 pandemic interrupted the fieldwork activities, that could start again only during the Summer Season. There were no limitations of movement during those months and the field work has been conducted without any problem.

[61] Despite the freedom of movement, for safety reasons we decided to organize the focus groups within families.

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will see the place through the eyes of the local, listen to the stories linked to those place told by its inhabitants, share their memories.

The "Participatory Planning Process Report" (PPP Report) organizes all the information in relation to the participatory process, that is the involvement of the locals. In particular, it presents the information in relation to the access to territory (information about the process of access/ entry in the territory), the interviewees and their characteristics, their contribution to the PPP, their attachment to the place and feeling of belonging to their community, their participation in the life of the community, etc.

In the following paragraph, the focus will be on the image of the place as it is conceived by the locals: the adoption a bottom up-approach in the image-making process of a tourist destination.

X. **First results**

The fieldwork reveals that the images promoted by the regional tourism authorities and those of the residents match, although in the latter case, imaginary is much richer and more articulated.

In other words, we are not in presence of a dissonant or contrasting heritage and the aspects that are considered more "valuable", "attractive", "interesting" by the tourist promoting authority are in line with those selected and narrated by the local population.

Nevertheless, there are some substantial differences, which are related to: a) how the cultural and natural heritage (that represent the tourist attractions) should be experienced, according to the locals; b) the hidden heritage; c) the community life.

In relation to the first element, we should note that the environmental and cultural resources mentioned by the locals frequently coincide with those promoted by tourism offices, but the contexts of experience differ substantially. In other words, while the natural and historical heritage is fully and widely recognised both by the tourism sector and by the locals, it is the meaning of that heritage that changes. For instance, trekking itineraries and walks along the narrow streets of the villages would follow different routes, including stairways leading to hidden vantage points, or the little-known springs of iron and sulphur waters; according to one interviewee, walks should take place at night, to experience the silence for which this valley is so famous. Churches and palazzos are usually described in a heartfelt, subjective manner, dotting the narrative with stories passed down from their ancestors or more recent anecdotes of the community.

The better-known attractions promoted by tourism however are only a small part of the destination's heritage. The respondents spoke about places that were extremely meaningful for them despite not even being mentioned in most of the promotional material issued by tourist offices: the trenches and galleries dug during First World War, for instance, the fortress of the "Vallo Littorio", dating back to the Fascist period, or remote, uninhabited hamlets. These hidden places, completely ignored by tourists, are distinctive elements that, according to the locals, make Paularo and the Incarojo Valley a unique place.

The most interesting elements that emerged during the interviews however concern community life, and its identity-bearing heritage: the legends and tales of the older folk, or the stories revolving around traditional crafts and trades, such as basket-weaving, an essential activity for carrying wood or for other daily tasks, and the old community dairy where the residents brought or bought milk. One of the hallmarks of the territory is hand embroidery, an art that in the eighteenth-century was at the heart of the local textile industry. The tradition has now been revived by a local association, the aim of which is to promote the handiwork beyond the boundaries of the valley.

XI. **Conclusion**

Approaches to the concept of sustainability are manifold, all reflecting "different ethical positions and entailing varying policy objectives and management strategies"[62]. The authors note seven dimensions of sustainability: environmental, cultural, political, economic, social, managerial and governmental, all closely interlaced[63]. Our analysis of the concept of social sustainability originates from studies on the social impacts of tourism, which from the Nineteen Seventies onwards have become quite evident in many popular destinations of mass tourism. Said impacts can be defined as a network of relations arising from the interaction between how the territory is used by the visitors and the responses of the residences aimed at exploiting the benefits and minimizing the drawbacks of tourism development. Cohen lists many, including those more pertinent to our research: the involvement of the community in a wider network of relations, the development of interpersonal relationships, the redistribution

[62] Bill Bramwell and Angela Sharman, "Approaches to Sustainable Tourism Planning and Community Participation". In *Tourism and Sustainable Tourism Development*, ed. by Derek Hall and Greg Richards (London: Routledge, 2000), 17-35. *Ibidem*: 18.

[63] *Ibidem*: 32.

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of power, changes in local customs and arts[64]. Attention towards the community translates into the need to establish a negotiation relationship between the various stakeholders, given that the tourism industry can become a source of benefits if the planning process focuses on the community. The approach employed is therefore community-based, so as to maximize the participation of the residents from the very first stages of planning and allow the social construction of tourism development. When analyzing the idea of social sustainability, it became obvious that it should be related to other two concepts: participation, intended both as *taking part* and *being part*, and community.

The meaning of the word "community" is polysemous and often disputed. The interpretation we gave it is that defined by Clemente, who claims that a community is "neither a condition nor a set of practices, and not even a collective imaginary, but an ever-changing plural subjectivity involved in the project-action-process-solidarity cycle"[65]. Within the framework of our investigation on sustainable tourism development, the residents were asked to identify their heritage, hence the material and immaterial resources[66] they believed were most meaningful and important. Through this process, "the immaterial cultural heritage handed down from generation to generation is continuously recreated by communities and groups of individuals [...], giving them a sense of identity and consistency"[67]. In our case, the concept of social sustainability translated as the participation of the residents in the image-creation process relative to their territory and community. The concept of community, as we understand it, is not a crystallized entity of which one can grasp the essence, but rather, "a field of mobile forces"[68] sharing a territory and a set of cultural elements with which it identifies itself. Our investigation revealed that there are no conflicting elements between the heritage selected through a top-down process and that identified by the residents.

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[64] Erik Cohen, "The Sociology of Tourism: Approaches, Issues, and Findings", *Annual Review of Sociology* 10 (1984): 373-392. *Ibidem*: 382.

[65] Pietro Clemente, "Communitas", *Antropologia Museale*, 37-39 (2017): 11-15. *Ibidem*: 12.

[66] In 2003 UNESCO promoted the Convention for the Safeguarding of the Intangible Cultural Heritage, identified in the "traditions or living expressions inherited from our ancestors and passed on to our descendants, such as oral traditions, performing arts, social practices, rituals, festive events, knowledge and practices concerning nature and the universe or the knowledge and skills to produce traditional crafts". Even more explicitly, during the *Faro Convention* (Council of Europe Framework Convention on the Value of Cultural Heritage for Society), it was agreed that both cultural heritage and rights of the residents to access and participate in said heritage should be protected.

[67] *Ibidem*.

[68] *Ibidem*: 13.

The symbolic representation of tourist attractions selected, presented and sold by tourist boards to potential visitors and trekkers is not *dissonant* [69] from that of the local community. There is however a great difference in how the material heritage is "lived", the residents having a much richer and more articulated experience, and the importance given to immaterial assets: tales and legends in particular are extremely meaningful for the locals, but are almost ignored by tourism stakeholders.

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[69] Brian Graham, Greg J. Ashworth and John E. Tunbridge, *A geography of heritage. Power, culture & economy* (London: Arnold, 2000).

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Jurisprudencia

Crónica de la Jurisprudencia del Tribunal de Justicia de la Unión Europea

Case Law Review of the Court of Justice of the European Union

David Ordóñez Solís
Magistrado y miembro de la Red de Especialistas en Derecho de la Unión Europea del Consejo General del Poder Judicial

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I. **Introducción**

Cuando se crearon las Comunidades Europeas el mercado común era lo que importaba. Cuando se intuyó en el Acta Única Europea un espacio de libertad, seguridad y justicia la cooperación judicial resultaba esencial. En el siglo XXI ya no solo importan el mercado, o la libertad, la seguridad y la justicia sino que la Unión Europea también se preocupa por el Estado de Derecho.

El 30 de septiembre de 2020 la Comisión Europea presentó su primer *Informe sobre el Estado de Derecho*, COM (2020) 580 final, del que destaca, precisamente, que se haya elaborado este documento y los temas abordados. El informe se ocupa, básicamente, de cuatro cuestiones: el sistema judicial, el marco de la lucha contra la corrupción, el pluralismo de los medios de comunicación y otras cuestiones institucionales relativas a los controles y equilibrios entre los poderes.

En un examen individualizado ofrece respecto de España una situación bastante aceptable en los distintos parámetros tenidos en cuenta, que van desde los genéricos «la percepción de la independencia judicial se sitúa en un nivel mediano» o «la utilización de herramientas TIC está bien asentada en el sistema judicial y prosigue la inversión en digitalización», hasta «la duración de los procedimientos judiciales en España está aumentando».

Así pues, la calidad y la eficiencia del Estado de Derecho reposan, en último término, en sus jueces y precisamente si en esta *Crónica* me vengo ocupando de la actividad del Tribunal de Justicia pocas veces he leído un estudio tan esclarecedor como el de Christoph Krenn (2020), «A Sense of Common Purpose. On the Role of Case Assignment and the Judge-Rapporteur at the European Court of Justice", *MPIL Research Paper Series* | No. 2020-31, del Instituto Max Planck de Derecho Público Comparado y Derecho Internacional, de Heidelberg. Este revelador estudio analiza dos cuestiones clave y con gran trascendencia en un tribunal colegiado: la designación del juez ponente y la atribución de los asuntos a las distintas salas del mismo tribunal.

El análisis resulta muy ilustrativo de la vida interna del Tribunal de Justicia y de la importante función que desempeña el presidente, en este caso del presidente K. Lenaerts, y del reparto de ponencias en la Gran Sala que permite elaborar un listado de los jueces más activos, que constituyen el *elite group*, como el juez danés Bay Larsen o la juez holandesa Prechal, en la orientación de la jurisprudencia europea; y que da cuenta de la existencia, en realidad, de una «jerarquización interna» en el mismo Tribunal de Justicia (Gran Sala, Salas de 5 y Salas de 3 jueces).

Ahora bien, esta situación, inevitable en un Tribunal de Justicia de 27 miembros, más los 11 Abogados Generales, lleva a frecuentes divergen-

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cias entre las sentencias de tal modo que lo que gana la Gran Sala en autoridad lo pierde en coherencia argumentativa. Y a la inversa, la coherencia argumentativa de un auto que resuelve una sencilla cuestión prejudicial de manera elocuente, lo pierde en los matices de una Sala con 3 o 5 jueces o la Gran Sala y no digamos si se convocase el excepcional Pleno. Así ocurre, a mi juicio, con el *auto Câmara Municipal de Gondomar*, C-135/20, conforme al cual la cláusula 5 del acuerdo marco de la Directiva 1999/70 impide la aplicación de la legislación portuguesa que prohíbe de manera absoluta y en el sector público la transformación de una sucesión de contratos de trabajo de duración determinada en un contrato de duración indeterminada en la medida en que esta legislación no cuenta con otra medida efectiva para evitar y, en su caso, sancionar la utilización abusiva de los contratos de duración determinada sucesivos (apartado 26).

Nuevamente, también en el Tribunal de Justicia su calidad depende de quienes hayan sido elegidos jueces. Históricamente el poder de los Estados ha sido omnímodo y eso explica el modo abrupto en que ha terminado el *asunto Sharpston*. Como ya había comentado en la anterior *Crónica*, la magnífica abogada general británica Eleanor Sharpston, una vez que el Reino Unido se retiró de las instituciones de la Unión el 31 de enero de 2020, pretendió continuar hasta el término de su mandato, el 6 de octubre de 2021.

La Sra. Sharpston interpuso ante el Tribunal General un recurso contra el Consejo y contra los Representantes de los Estados miembros, T-180/20, y otro contra el Tribunal de Justicia, T-184/20, por haber puesto en marcha el procedimiento de renovación del puesto de abogado general que concluyó el 2 de septiembre de 2020 con el nombramiento por los Representantes de los Estados miembros de un nuevo abogado general, el presidente del Consejo de Estado griego Athanasios Rantos, que también fue recurrido ante el Tribunal General, T-550/20.

La primera batalla de la Sra. Sharpston fue obtener la suspensión cautelar del nuevo nombramiento. Así lo acogió el 4 de septiembre de 2020 el Tribunal General. Sin embargo, el Tribunal de Justicia, a través de su Vicepresidenta Silva de Lapuerta, en sendos autos de 10 de septiembre de 2020, anula la suspensión cautelar decidida por el Tribunal General y desestima la adopción de la suspensión solicitada (Consejo / Sharpston, C-423/20 P(R), y Representantes de los Estados Miembros / Sharpston, C-424/20 P(R).

La clave para adoptar esta decisión del Tribunal de Justicia radica en que el nombramiento de los miembros del Tribunal de Justicia no lo hace el Consejo de la Unión sino un acuerdo común de los representantes de los Estados miembros. En el primer auto el Tribunal de Justicia considera que es inadmisible manifiestamente el recurso contra el Consejo dado que el nombramiento corresponde a los Representantes de los Estados miembros.

En el segundo auto el acuerdo de los Gobiernos de los Estados miembros, según la jurisprudencia, no es susceptible de control jurisdiccional por lo que también desestima la medida cautelar solicitada.

A tal efecto señala la Vicepresidenta, en ambos autos, que la adopción de la medida cautelar requiere acumulativamente el *fumus boni iuris* y la urgencia, pero no hay duda de que, a primera vista, los recursos principales no parece que puedan prosperar.

La decisión cautelar del Tribunal de Justicia tuvo efectos inmediatos hasta el punto de que mediante sendos autos de 6 de octubre de 2020, el Tribunal General desestima los tres recursos principales, T-180/20, T-184/20 y T-550/20, presentados por la antigua abogada general Sharpston.

Esta intrahistoria del Tribunal de Justicia nos permite recordar que los Estados siguen siendo los dueños de los tratados, en especial cuando nombran a los miembros de sus instituciones, pero ello no empece la obligación de que se garantice un nivel mínimo de competencia profesional. En este sentido, en el artículo antes citado de Christoph Krenn se propone que con datos como los que presenta se evalúe el rendimiento de los jueces. De este modo se evita que los Estados gocen de una suerte de patente de corso, de manera que, como se contaba hace años, hubo algún juez procedente de un pequeño país que en los años 70 fue destinado por su Gobierno a Luxemburgo y dos años después de ocupar el cargo de juez y a la hora de jubilarse seguía sin distinguir la Comisión del Consejo.

Precisamente, con el fin de mejorar estos mecanismos de nombramientos, en España se ha codificado la práctica seguida hasta ahora. De este modo, el Real Decreto 972/2020, de 10 de noviembre, regula el procedimiento de selección para la propuesta de candidaturas por el Reino de España en la designación de miembros del Tribunal de Justicia de la Unión Europea y del Tribunal Europeo de Derechos Humanos (*BOE* n.º 297, de 11 de noviembre de 2020). Para la designación del juez y del abogado general del Tribunal de Justicia la regla será que continúen aquellos que estén ocupando el cargo si así lo desean, aunque la decisión última corresponde al Gobierno español.

II. **Primera parte. Los desarrollos jurisprudenciales del Derecho de la Unión Europea**

Resulta arriesgado buscar una clasificación de la variadísima gama de cuestiones y litigios resueltos por el Tribunal de Justicia y que merecen una breve consideración en esta *Crónica*. Sin embargo, estructurarlos en torno a la Carta y la interpretación de los derechos fundamentales, el espacio de li-

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bertad, seguridad y justicia, el mercado interior europeo y las políticas europeas puede ser tan sencillo como útil.

1. *La Carta y la interpretación de los derechos fundamentales*

La Carta ya está omnipresente en las decisiones del Tribunal de Justicia que, sin embargo, ha tenido que advertir sobre los límites de su aplicación. También se han producido desarrollos importantes en materia de igualdad, protección de datos y derecho de propiedad.

a) No siempre se aplica la Carta

El *auto Maler*, C-256/19, inadmite una cuestión prejudicial remitida por el Tribunal de lo Contencioso-Administrativo de Viena porque en ese supuesto no se aplicaba la Carta. El asunto se refería a dos liquidaciones giradas contra la empresa Maler por un organismo encargado de la gestión y de la liquidación de las indemnizaciones en concepto de vacaciones retribuidas de los trabajadores del sector de la construcción. Este organismo se encarga en Austria de la aplicación de la Directiva 2003/88/CE relativa a determinados aspectos de la ordenación del tiempo de trabajo.

Ahora bien, la controversia jurídica versaba sobre el reparto de asuntos entre los magistrados del tribunal austriaco y la pregunta aludía al alcance del artículo 47 de la Carta, que consagra el derecho a la tutela judicial efectiva y a un juez imparcial, en relación con el artículo 19.1.2 TUE en cuanto que obliga a los Estados miembros a establecer las vías de recurso necesarias para garantizar la tutela judicial efectiva en los ámbitos cubiertos por el Derecho de la Unión.

El Tribunal de Justicia recuerda su jurisprudencia conforme a la cual «los derechos fundamentales garantizados en el ordenamiento jurídico de la Unión deben ser aplicados en todas las situaciones reguladas por el Derecho de la Unión, pero no fuera de ellas».

Sin embargo y con el fin de despejar cualquier duda respecto de otros asuntos en que parecía que no había Derecho de la Unión aplicable, el Tribunal de Justicia matiza que su respuesta se debía a que «la interpretación prejudicial solicitada al Tribunal de Justicia podía influir en la cuestión de la determinación del órgano jurisdiccional competente para resolver sobre el fondo de los litigios relativos al Derecho de la Unión». Lo que, sin embargo, no ocurre en este caso en el que «las referidas cuestiones prejudiciales no versan sobre una interpretación del Derecho de la Unión que responda a una necesidad objetiva para la resolución de dicho litigio, sino que tienen carácter general».

b) La igualdad por razón del sexo y la igualdad de oportunidades

En dos importantes sentencias el Tribunal de Justicia aborda el derecho fundamental a la igualdad entre mujeres y hombres. La primera se refiere a la maternidad y la segunda al alcance de este derecho fundamental en los funcionarios de las instituciones europeas.

La *sentencia Syndicat CFTC du personnel de la Caisse primaire d'assurance maladie de la Moselle*, C-463/19, resuelve la cuestión de si es discriminatorio un convenio colectivo francés que reserva a las trabajadoras que crían a sus hijos el derecho a un permiso una vez expirado el permiso legal de maternidad, mientras que los trabajadores carecen de este permiso.

La respuesta del Tribunal de Justicia es que no hay discriminación cuando el permiso adicional concedido tenga por objeto la protección de las trabajadoras tanto en relación con las consecuencias del embarazo como en lo que se refiere a su maternidad.

A tal efecto, el Tribunal de Justicia insiste en cómo concibe el trato que debe dispensarse a una trabajadora embarazada o que acaba de dar a luz: por una parte, el derecho al permiso de maternidad reconocido a favor de las trabajadoras embarazadas debe considerarse un medio de protección del Derecho social que reviste particular importancia; y, por otra parte, las modificaciones sustanciales en las condiciones existenciales de la mujer durante el período limitado de al menos catorce semanas que precede y sigue al parto constituyen un motivo legítimo para suspender el ejercicio de su actividad profesional, sin que ni las autoridades públicas ni los empresarios puedan cuestionar en modo alguno la legitimidad de dicho motivo.

El Tribunal de Justicia distingue entre dos tipos de protección de las mujeres trabajadoras: la vinculada a la maternidad de la mujer trabajadora y la relativa al cuidado de los hijos. En el primer caso la maternidad incluye a la embarazada y a la que haya dado luz; pero también el período de descanso por maternidad concedido a la mujer una vez expirado el plazo legal de protección de la Directiva 2006/54, en la medida en que su objetivo es la protección de la mujer tanto en relación con las consecuencias del embarazo como en relación con su maternidad. En este caso el período de descanso puede lícitamente reservarse a la madre, con exclusión de cualquier otra persona, habida cuenta de que únicamente la madre puede verse bajo la presión, no deseable, de reanudar prematuramente su trabajo. Como insiste el Tribunal de Justicia este permiso adicional se ha de destinar a proteger la condición biológica de la mujer y las particulares relaciones que mantiene con su hijo durante el período posterior al parto.

Por tanto, el Tribunal de Justicia considera que una vez expirado el permiso legal de maternidad, las legislaciones nacionales pueden reservar a la madre del hijo un permiso adicional cuando dicho permiso la contemple no

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como progenitora, sino tanto en relación con las consecuencias del embarazo como en relación con su maternidad.

La *sentencia Hebberecht*, C-93/19 P, resulta muy interesante porque el Tribunal de Justicia confirma la interpretación adoptada por el Tribunal General en la aplicación del principio de igualdad en favor de las mujeres que trabajan en el Servicio Europeo de Acción Exterior. Se trataba de la prórroga de Chantal Hebberecht en el puesto de jefa de la Delegación de la Unión en Etiopía. El Alto Representante había nombrado a esta funcionaria en 2013; sin embargo, decidió no prorrogarla en ese puesto en aplicación de su política de rotación y explicó expresamente que no procedía tener en cuenta su condición de mujer.

Ahora bien, el Tribunal General anuló la decisión porque la decisión podría haber sido diferente si no se hubieran excluido las consideraciones sobre la igualdad de sexos; sin embargo, denegó la pretensión indemnizatoria.

El Tribunal de Justicia confirma esta interpretación y resulta reseñable que, en primer lugar, argumente en estos términos: «aun cuando el principio de igualdad entre hombres y mujeres, como derecho subjetivo, no exige para su aplicación medida alguna de ejecución [...] no es este el caso, sin embargo, de las ventajas concretas destinadas a facilitar al sexo menos representado el ejercicio de actividades profesionales».

En segundo lugar, el Tribunal de Justicia rechaza tajantemente que «una institución quede dispensada de la obligación de tener en cuenta el principio de igualdad entre hombres y mujeres al adoptar una decisión individual».

Y, en tercer lugar, a juicio del Tribunal de Justicia, el principio de igualdad de oportunidades entre mujeres y hombres no se limita a las situaciones de competencia entre candidatos (procedimientos de selección), sino que implica asimismo comprobar si el trato dispensado, en este caso a una mujer, se habría dispensado del mismo modo a un hombre situado en una situación comparable (en el supuesto de la petición de prórroga en el puesto).

c) El derecho a la protección de datos personales: transferencia internacional y seguridad nacional

Vuelve el Tribunal de Justicia a desarrollar el derecho a la protección de los datos personales adoptando una firme postura en cuanto a las garantías requeridas para la transferencia internacional de los datos personales y a los supuestos excepcionales en que cabe un control de los datos personales por los servicios de inteligencia amparado en el imperativo de la seguridad nacional.

La Gran Sala se pronunció en la *sentencia Facebook Ireland y Schrems*, C-311/18, sobre la transferencia de datos de los usuarios de Facebook en la UE a los Estados Unidos y su distinto nivel de protección. Maximillian Schrems, ciudadano austríaco y usuario de Facebook, denunció ante el comisario de protección de datos irlandés que Facebook Irlanda, con la que había contratado su acceso a esta red social, había transferido todos sus datos a los Estados Unidos, cuyo nivel de protección no le ofrecía suficientes garantías.

Frente a la desestimación de la autoridad irlandesa de protección de datos, acudió a la High Court de Dublín, que cuestionó la validez de la Decisión 2000/520/CE de la Comisión sobre la adecuación de la protección conferida por los principios de puerto seguro para la protección de la vida privada y las correspondientes preguntas más frecuentes, publicadas por el Departamento de Comercio de los Estados Unidos de América.

El Tribunal de Justicia resolvió dos problemas: el primero se refería al control de la validez de la Decisión de la Comisión que corresponde ejercer a los particulares o incluso a las autoridades nacionales de protección de datos que, en su caso, pueden o deben acudir a los tribunales nacionales impugnando la decisión de la Comisión Europea y son estos tribunales nacionales los que están obligados a plantearle la cuestión prejudicial.

Sobre este particular, el Tribunal de Justicia dejó bien claras las obligaciones de las autoridades nacionales en materia de protección de datos.

En primer lugar, cuando una persona, cuyos datos personales han sido o pudieran ser transferidos a un tercer país que haya sido objeto de una decisión de la Comisión, presenta a la autoridad nacional de control una solicitud para la protección de sus derechos y libertades frente al tratamiento de esos datos e impugna la compatibilidad de dicha decisión con la protección de la vida privada y de las libertades y derechos fundamentales de las personas, incumbe a la autoridad nacional examinar la solicitud con toda la diligencia exigible (apartado 63).

En segundo lugar, si la autoridad nacional desestima las alegaciones, es el particular quien debe poder acudir a los tribunales para que, en su caso, planteen la cuestión prejudicial de validez; en cambio, si la autoridad nacional estima las alegaciones, es ella misma quien debe poder acudir a los tribunales con el mismo propósito.

Y la segunda cuestión se refería al fondo del asunto, es decir, a si era válida la decisión de la Comisión Europea sobre la transferencia de datos personales a los Estados Unidos.

En primer lugar, el Tribunal de Justicia constata, por una parte, que «una normativa que permite a las autoridades públicas acceder de forma generalizada al contenido de las comunicaciones electrónicas lesiona el contenido esencial del derecho fundamental al respeto de la vida privada garanti-

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zado por el artículo 7 de la Carta»; y, por otra parte, «una normativa que no prevé posibilidad alguna de que el justiciable ejerza acciones en Derecho para acceder a los datos personales que le conciernen o para obtener su rectificación o supresión no respeta el contenido esencial del derecho fundamental a la tutela judicial efectiva que reconoce el artículo 47 de la Carta». En este sentido, el Tribunal de Justicia comprueba que la Comisión no manifestó en la Decisión 2000/520 que Estados Unidos «garantizaba» efectivamente un nivel de protección adecuado en razón de su legislación interna o sus compromisos internacionales.

Y, en segundo lugar, el Tribunal de Justicia también comprueba que en la Decisión de la Comisión Europea se priva a las autoridades nacionales de control de las facultades que les atribuye el artículo 28 de la Directiva 95/46 en el supuesto de que una persona alegue factores que puedan afectar a la compatibilidad de una decisión de la Comisión, que haya constatado con fundamento en esa Directiva que un tercer país garantiza un nivel de protección adecuado, con la protección de la vida privada y de las libertades y derechos fundamentales de las personas.

La falta de tales garantías conduce al Tribunal de Justicia a anular la Decisión europea de transferencia de datos a los Estados Unidos.

Otras dos sentencias se refieren a los límites a la protección de datos personales y las comunicaciones electrónicas cuando están implicadas la seguridad nacional y la lucha contra la criminalidad grave.

El Tribunal de Justicia, en su formación de Gran Sala, se pronunció en la *sentencia La Quadrature du Net*, C-511/18, C-512/18 y C-520/18, provocada por el Consejo de Estado francés y del Tribunal Constitucional belga, y en la *sentencia Privacy International*, C-623/17, procedente del *Investigatory Powers Tribunal* británico.

En la primera sentencia se resolvía la cuestión de la conformidad de la legislación francesa y belga que imponían a los proveedores de servicios la obligación de conservación de datos electrónicos por razones de seguridad pública y de orden público. En el caso británico la cuestión se refería a la transmisión generalizada e indiferenciada de datos de tráfico y de localización en relación con la protección de la seguridad nacional, con la actuación de los servicios secretos.

En la *sentencia La Quadrature du Net* el Tribunal de Justicia señala, con carácter general, que la Directiva 2002/58/CE sobre la privacidad y las comunicaciones electrónicas permite a los Estados miembros adoptar medidas legales para limitar el alcance de los derechos y las obligaciones que reconoce cuando tal limitación constituya una medida necesaria proporcionada y apropiada en una sociedad democrática para proteger la seguridad nacional (es decir, la seguridad del Estado), la defensa, la seguridad pública, o la prevención, investigación, descubrimiento y persecución de

delitos o la utilización no autorizada del sistema de comunicaciones electrónicas, refiriéndose, en particular, a aquellas que exijan que los datos se conserven durante un plazo limitado.

A tal efecto, el Tribunal de Justicia, inspirándose en su jurisprudencia y en la de Estrasburgo, considera justificada tal previsión de la Directiva de modo que no permite que se imponga a los proveedores de servicios una conservación generalizada e indiferenciada de datos relativos al tráfico y de datos de localización de los sistemas de comunicaciones electrónicas.

Sin embargo, prevé dos excepciones: la seguridad nacional y la lucha contra la criminalidad grave.

Por una parte y en cuanto a la seguridad nacional, el Tribunal de Justicia considera que este objetivo es susceptible de justificar medidas que supongan injerencias en los derechos fundamentales más graves de las que podrían justificar otros objetivos. Por tanto, puede establecerse una obligación de conservación de datos de estas características siempre y cuando se trate de una amenaza grave, real y actual contra la seguridad nacional; siempre y cuando esta conservación de los datos sea susceptible de un control efectivo por una jurisdicción o una autoridad administrativa independiente, cuyas decisiones tenga efectos vinculantes y que verifiquen la existencia de una situación de tales características y garantice el respeto de las condiciones y de las garantías que se prevean.

Por otra parte y en lo que se refiere a la lucha contra la criminalidad grave, el Tribunal de Justicia considera que no impide una legislación nacional que imponga, a título preventivo, una conservación bien determinada de datos relativos al tráfico y a los datos de localización para luchar contra la criminalidad grave y la prevención de las amenazas graves contra la seguridad pública siempre y cuando esa conservación sea limitada a lo estrictamente necesario en cuanto a las categorías de datos que deben conservarse, los medios de comunicación previstos, las personas afectadas y la duración de la conservación impuesta.

Ahora bien y de manera específica, el Tribunal de Justicia señala que tal interpretación debe aplicarse sin ningún tipo de restricción temporal por parte de los tribunales nacionales y en virtud del principio de primacía.

En la *sentencia Privacy International* el Tribunal de Justicia subraya, en primer lugar, que la legislación británica, que permite que una autoridad estatal obligue a los proveedores de servicios de comunicaciones electrónicas a transmitir a las agencias de seguridad e inteligencia datos de tráfico y de localización con el fin de proteger la seguridad nacional, está sometida a la Directiva 2002/58 sobre la privacidad y las comunicaciones electrónicas.

Y, en segundo lugar, el Tribunal de Justicia determina el alcance de la excepción que supone la seguridad nacional de modo que «el objetivo de protección de la seguridad nacional puede justificar medidas que supongan

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injerencias en los derechos fundamentales más graves que las que podrían justificar esos otros objetivos [de lucha contra la delincuencia en general, incluso grave, y de protección de la seguridad pública]».

No obstante, estas restricciones deben cumplir el principio de proporcionalidad. Esto quiere decir que «las excepciones a la protección de los datos personales y las limitaciones de esta deben establecerse sin sobrepasar los límites de lo estrictamente necesario» por lo que, a juicio del Tribunal de Justicia, «una normativa nacional que suponga una injerencia en los derechos fundamentales consagrados en los artículos 7 y 8 de la Carta debe respetar los requisitos derivados de la jurisprudencia [del Tribunal de Justicia]».

Esto significa, en definitiva, que cuando la transmisión de los datos de tráfico y de localización tiene lugar de manera generalizada e indiferenciada, afecta de manera global a todas las personas que utilizan servicios de comunicaciones electrónicas, por lo que excede de los límites de lo estrictamente necesario y no puede considerarse justificada en una sociedad democrática.

d) Las creencias religiosas de los pacientes y la asistencia sanitaria en la Unión

La *sentencia Veselības ministrija (Ministerio de Sanidad de Letonia)*, C-243/19, interpreta tanto el Reglamento (CE) n.º 883/2004 sobre la coordinación de los sistemas de seguridad social como la Directiva 2011/24/UE relativa a la aplicación de los derechos de los pacientes en la asistencia sanitaria transfronteriza.

Se trataba de un paciente que iba a someterse a una operación a corazón abierto, prevista en la sanidad pública letona, pero, al ser Testigo de Jehová, no admitió una transfusión de sangre. Esta operación solo podría hacerse en otro país de la Unión Europea, en este caso en Polonia. En instancia y en apelación los tribunales administrativos desestimaron el recurso y en casación el Tribunal Supremo de Letonia recurre al Tribunal de Justicia.

En la interpretación del Reglamento (CE) n.º 883/2004 sobre la coordinación de los sistemas de seguridad social el Tribunal de Justicia considera que, en realidad, la negativa a conceder la autorización previa para el tratamiento en otro país establece una diferencia de trato indirectamente basada en la religión.

Sin embargo, examina si tal diferencia de trato se basa en un criterio objetivo y razonable. A tal efecto, el Tribunal de Justicia considera que «no puede excluirse que un riesgo de perjuicio grave para el equilibrio financiero del sistema de seguridad social constituya una razón imperiosa de interés general que pueda justificar una diferencia de trato basada en la reli-

gión. El objetivo de mantener un servicio médico y hospitalario equilibrado y accesible a todos también puede estar comprendido en las excepciones por razones de salud pública, en la medida en que dicho objetivo contribuye a la consecución de un elevado grado de protección de la salud».

Por tanto, concluye el Tribunal de Justicia, es posible que los sistemas sanitarios nacionales puedan exponerse a un gran número de solicitudes de autorización para recibir asistencia sanitaria transfronteriza basadas en motivos religiosos y no en la situación médica del asegurado, por lo que ni el Reglamento ni la Carta impiden que Letonia deniegue la autorización de la operación en Polonia cuando en Letonia está disponible un tratamiento hospitalario cuya eficacia médica no se pone en duda, pero las creencias religiosas del paciente reprueben el método de tratamiento empleado.

La Directiva 2011/24/UE sobre los derechos de los pacientes en la asistencia sanitaria transfronteriza prevé que el Estado miembro de afiliación, en este caso Letonia, garantice el reembolso de los gastos contraídos por un asegurado que haya recibido asistencia sanitaria transfronteriza, siempre que dicha asistencia sanitaria figure entre las prestaciones a que el asegurado tiene derecho en Letonia. La Directiva determina que los gastos de la asistencia sanitaria transfronteriza sean reembolsados directamente por el Estado miembro de afiliación hasta la cuantía que habría asumido dicho Estado si la asistencia sanitaria se hubiera prestado en su territorio, sin exceder del coste real de la asistencia sanitaria efectivamente prestada.

Pues bien, puntualiza el Tribunal de Justicia, en el marco de la Directiva 2011/24 y a diferencia de las situaciones reguladas por el Reglamento n.º 883/2004, el Estado miembro de afiliación no estará expuesto, en principio, a una carga económica adicional en el caso de una asistencia transfronteriza, de suerte que tal objetivo no puede, en principio, invocarse para justificar la negativa a conceder la autorización prevista.

De modo que la única justificación para mantener la discriminación indirecta por razón de las creencias religiosas sería que la denegación estuviese objetivamente justificada por una finalidad legítima relativa al mantenimiento de una capacidad de asistencia sanitaria o de una competencia médica y constituyese un medio apropiado y necesario para alcanzarla.

e) Las limitaciones de la legislación bancaria italiana al derecho de propiedad, la libertad de empresa y la libre circulación de capitales

El Tribunal de Justicia ha tenido ocasión de interpretar el derecho de propiedad y la libertad de empresa, en relación con la libre circulación de capitales, en la *sentencia OC y otros / Banca d'Italia y otros*, C-686/18.

En este caso se cuestionaba la conformidad de la legislación italiana, aplicada por el Banco Central, que permite establecer un límite máximo a

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los activos de los bancos populares constituidos como sociedades cooperativas y que permite limitar el derecho al reembolso de las acciones de los socios que causan baja.

Distintas asociaciones de consumidores habían impugnado la actuación del Banco Central italiano que aplicaba los referidos límites. Sin embargo, los recursos fueron desestimados por el Tribunal Administrativo del Lacio y, en apelación ante el Consejo de Estado, se planteó primero la cuestión de inconstitucionalidad, que fue rechazada, y luego acudió al Tribunal de Justicia.

El hecho de haber ido primero al Tribunal Constitucional y luego al Tribunal de Justicia no resulta relevante pues como dice el Tribunal de Justicia: «la eficacia del Derecho de la Unión se hallaría amenazada y el efecto útil del artículo 267 TFUE quedaría reducido si, como consecuencia de la existencia de un control de constitucionalidad, se impidiera al juez nacional plantear al Tribunal de Justicia cuestiones prejudiciales y dar inmediatamente al Derecho de la Unión una aplicación conforme a la resolución o a la jurisprudencia del Tribunal de Justicia».

Cuatro de las cuestiones planteadas por el Consejo de Estado fueron inadmitidas por falta de argumentación del propio tribunal administrativo italiano. Por eso, el Tribunal de Justicia limita su respuesta a solo dos cuestiones.

En primer lugar, el Tribunal de Justicia considera que la legislación italiana que permite a los bancos populares limitar el reembolso de sus instrumentos de capital no vulnera la Carta. El Tribunal de Justicia recuerda que los artículos 16 y 17 de la Carta reconocen tanto la libertad de empresa («la protección conferida por el citado artículo implica la libertad para ejercer una actividad económica o mercantil, la libertad contractual y la libre competencia») como el derecho de propiedad. Ahora bien, no se trata de prerrogativas absolutas. La libertad de empresa «puede estar sometida a un amplio abanico de intervenciones del poder público que establezcan limitaciones al ejercicio de la actividad económica en aras del interés general». Y en cuanto al derecho de propiedad «su ejercicio puede ser objeto de restricciones, siempre que estas respondan efectivamente a objetivos de interés general perseguidos por la Unión y no constituyan, habida cuenta del objetivo perseguido, una intervención desmesurada e intolerable que afecte a la propia esencia del derecho así garantizado». De hecho, la Carta permite introducir limitaciones a los derechos fundamentales mediante ley que garantice su contenido esencial y que estén justificadas y sean proporcionadas.

El Tribunal de Justicia comprueba que la legislación italiana cumple estos requisitos al estar amparada por una ley y las limitaciones están dirigidas a asegurar el buen gobierno del sector bancario cooperativo, su estabilidad y el ejercicio prudente de la actividad bancaria, y contribuyen a evitar

la quiebra de las entidades de que se trata, o incluso el riesgo sistémico, y, por consiguiente, a garantizar la estabilidad del sistema bancario y financiero.

En definitiva, el Tribunal de Justicia considera que «las limitaciones al ejercicio del derecho de propiedad y, en caso de que existan, al ejercicio de la libertad de empresa resultantes de una normativa como la que es objeto del asunto principal obedecen efectivamente a objetivos de interés general reconocidos por la Unión».

Del mismo modo y por lo que se refiere a la libre circulación de capitales, el Tribunal de Justicia recuerda su jurisprudencia conforme a la cual cabe que las legislaciones nacionales establezcan restricciones siempre y cuando cumplan unos requisitos. En efecto, estas restricciones «pueden estar justificadas por razones imperiosas de interés general, siempre que sean adecuadas para garantizar la realización del objetivo que pretenden y no vayan más allá de lo necesario para alcanzarlo». En este caso vuelve a remitir a la argumentación anterior referida al derecho de propiedad y la libertad de empresa en cuanto que hay razones de interés general que justifican la restricción impuesta por la legislación italiana.

2. *El espacio de libertad, seguridad y justicia*

En materia de extranjería el Derecho de la Unión tiene como punto de referencia la distinción entre ciudadanos de la Unión y nacionales de terceros países, los «no comunitarios», a lo que habría que añadir la condición especial de los solicitantes de asilo, de los refugiados. En este ámbito la jurisprudencia se pronuncia con profusión. Bastará recordar dos tipos de cuestiones referidas a la expulsión de los no comunitarios y al estatuto de los refugiados.

a) El retorno y la expulsión de los «no comunitarios»

La expulsión de los nacionales de terceros países por estancia irregular sigue ocupando las energías del Tribunal de Justicia. En la *sentencia JZ*, C-806/18, explica si cabe imponer una pena de prisión a quienes permanezca en territorio europeo después de habérselo prohibido. La cuestión prejudicial la planteó el Tribunal Supremo holandés y el Tribunal de Justicia vuelve a matizar su doctrina sobre la Directiva 2008/115/CE para el retorno de los nacionales de terceros países en situación irregular.

En primer lugar, el Tribunal de Justicia admite que las autoridades holandesas recurran al Código penal en materia de extranjería, en particular para imponer una pena de prisión a un no comunitario en situación irregular

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respecto del cual ha concluido el procedimiento de retorno y, sin embargo, no ha abandonado el territorio de la Unión, cuando la conducta típica consiste en la estancia irregular con conocimiento de una prohibición de entrada, dictada, principalmente, debido a sus antecedentes penales o al peligro que representa para el orden público o la seguridad nacional.

En segundo lugar, a juicio del Tribunal de Justicia si la obligación de retorno nunca fue cumplida, el no comunitario se encuentra en una situación ilegal derivada de su estancia irregular inicial, y no de una estancia irregular posterior que sea consecuencia de un incumplimiento de la prohibición de entrada.

En tercer lugar, el Tribunal de Justicia hace dos referencias expresas a la necesidad de respetar la jurisprudencia de Estrasburgo en la medida en que, por un parte, la imposición de sanciones penales a los nacionales de terceros países a los que se aplique el procedimiento de retorno y que se hallen en situación irregular en el territorio de un Estado miembro sin que exista un motivo justificado para el no retorno está sujeta al pleno respeto de los derechos fundamentales, y en particular de los que garantiza el Convenio Europeo de Derechos Humanos; y, por otra parte, recuerda: «según la jurisprudencia del Tribunal Europeo de Derechos Humanos, la ley que faculta al juez para privar de libertad a una persona debe ser suficientemente accesible, precisa y previsible en su aplicación para evitar cualquier riesgo de arbitrariedad (TEDH, sentencia de 21 de octubre de 2013, Del Río Prada c. España, CE:ECHR:2013:1021JUD 004275009, § 125)» (apartado 41).

La Directiva 2008/115/CE para el retorno de los nacionales de terceros países en situación irregular ha sido interpretada en las *sentencias CPAS de Lieja*, C-233/19, y *CPAS de Seraing*, C-402/19, donde el Tribunal de Justicia precisa el alcance de la tutela judicial efectiva y de la protección cautelar.

En este caso, el Tribunal de lo Social de Lieja preguntaba al Tribunal de Justicia en dos asuntos relativos a sendos Centros Públicos de Acción Social belgas de Lieja y de la vecina Seraing en los que dos nacionales de terceros países impugnaban las decisiones de retorno por padecer una enfermedad grave en el caso de la primera recurrente o de ser el progenitor del que depende un hijo, aunque sea mayor, aquejado de una grave enfermedad.

A juicio del Tribunal de Justicia, «la tutela judicial efectiva garantizada a un nacional de un tercer país contra el que se ha dictado una decisión de retorno cuya ejecución pueda exponerle a un riesgo real de ser sometido a un trato contrario al artículo 19, apartado 2, de la Carta no sería suficiente si ese nacional de un tercer país no dispusiera de un recurso suspensivo de pleno Derecho contra esa decisión desde el momento de su notificación».

En este sentido, el Tribunal de Justicia equipara lo dispuesto en el artículo 19.2 de la Carta, es decir «un grave riesgo de ser sometido a la pena de muerte, a tortura o a otras penas o tratos inhumanos o degradantes», con la exposición de «un nacional de un tercer país que padece una grave enfermedad a un riesgo grave de deterioro serio e irreversible de su estado de salud».

Pues bien, la protección que confiere el Derecho de la Unión y la primacía incluye la suspensión de las decisiones de retorno por los jueces belgas.

En el caso de la *sentencia CPAS de Seraing*, la enfermedad grave alegada era la de un hijo que dependía del progenitor sobre el que recaía la orden de retorno y al respecto el Tribunal de Justicia señala que las autoridades nacionales deben, en aplicación de la Directiva 2008/115/CE de retorno, velar por que, en la medida de lo posible, se mantenga la unidad familiar con los miembros de la familia en Bélgica, se garantice la atención sanitaria de urgencia y el tratamiento básico de enfermedades, y se tomen en consideración las necesidades especiales de las personas vulnerables.

b) Los refugiados y el abuso en la solicitud de asilo

La *sentencia JP / Commissaire général aux réfugiés et aux apatrides*, C-651/19, interpreta la Directiva 2013/32/UE sobre procedimientos comunes para la concesión o la retirada de la protección internacional en lo que se refiere a la legislación belga sobre el lugar y el plazo para impugnar la inadmisibilidad de una protección internacional.

La legislación belga se refiere a un supuesto en que, después de haber rechazado una solicitud de asilo de un no comunitario, se le inadmite una solicitud de protección internacional que se le había notificado, a falta de domicilio en Bélgica, en la sede del Comisionado General para los Refugiados y Apátridas dándole un plazo de diez días naturales para recurrir la inadmisión.

En cuanto a la notificación, el Tribunal de Justicia señala: «las normas de procedimiento en materia de notificación de las resoluciones sobre las solicitudes de protección internacional están comprendidas en el principio de autonomía procesal de los Estados miembros, con sujeción a los principios de equivalencia y de efectividad». Y encarga al juez belga que compruebe si se cumplen en este caso la equivalencia y la efectividad.

No obstante, del examen general que hace el Tribunal de Justicia no se desprende que haya en sí misma una incompatibilidad entre la Directiva y la legislación belga, siempre y cuando se informe a los solicitantes de que, en caso de no designar domicilio a efectos de la notificación de la decisión relativa a su solicitud, se reputará que han designado como domicilio la

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sede de la autoridad nacional competente para el examen de esas solicitudes.

En lo que se refiere al plazo, tampoco el Tribunal de Justicia ve ningún obstáculo a la aplicación de la Directiva y del derecho a la tutela judicial efectiva, es decir, debe tratarse de «plazos razonables para que los solicitantes de protección internacional puedan ejercitar su derecho a un recurso efectivo, precisando que los plazos que se establezcan no deben hacer imposible o excesivamente difícil dicho ejercicio».

Aunque es el juez belga quien debe comprobar si tal plazo cumple los principios de equivalencia y efectividad, sobre este último el Tribunal de Justicia señala que se trata de un procedimiento más sencillo que el de la primera solicitud de asilo porque «el solicitante debe limitarse esencialmente a demostrar que podía esgrimir de manera fundada la existencia de circunstancias o datos nuevos respecto de los examinados en el marco de su solicitud anterior». En suma, el escrito de oposición no presenta especial complejidad que exija un plazo superior a los diez días naturales.

3. *El mercado único europeo*

Son numerosas las cuestiones que plantea la realización del mercado interior relativas a las libertades económicas fundamentales, la aplicación de la Directiva de servicios, la contratación pública, la cooperación administrativa tributaria o, en fin, el régimen de ayudas de Estado.

a) La libre circulación de los trabajadores

La Gran Sala se ha pronunciado en la *sentencia Jobcenter Krefeld*, C-181/19, sobre la improcedencia del recorte de los derechos sociales de un trabajador comunitario con hijos escolarizados a su cargo.

Esta sentencia resulta especialmente importante porque subraya el alcance del Reglamento (UE) n.º 492/2011 relativo a la libre circulación de los trabajadores dentro de la Unión y el ámbito de la Directiva 2004/38/CE relativa al derecho de los ciudadanos de la Unión y de los miembros de sus familias a circular y residir libremente en la Unión. El Reglamento fija un régimen amplio en favor de los trabajadores; en cambio, la Directiva constituye una codificación y una revisión de los instrumentos existentes que trataban separadamente a los asalariados, los trabajadores por cuenta propia, los estudiantes y otras personas inactivas, con el fin de simplificar y reforzar el derecho de libre circulación y residencia de todos los ciudadanos de la Unión, rebasando así el enfoque sectorial y fragmentario anterior.

En este caso un trabajador polaco vivía Alemania con sus hijas menores escolarizadas, pero al quedar en paro no se le reconoció una ayuda social que había solicitado porque en ese preciso momento estaba buscando empleo.

En primer lugar, el Tribunal de Justicia puntualiza que los hijos de un polaco que trabaja o ha trabajado en Alemania y el progenitor que ejerce efectivamente su custodia pueden ampararse, en Alemania, en un derecho de residencia autónomo basándose exclusivamente en lo dispuesto en el artículo 10 del Reglamento n.º 492/2011, sin estar obligados a cumplir los requisitos definidos en la Directiva 2004/38, entre ellos, e disponer de recursos suficientes y de un seguro de enfermedad.

En segundo lugar, a juicio del Tribunal de Justicia, el principio de igualdad de trato se aplica tanto al progenitor como a los hijos del trabajador comunitario de manera que los derechos reconocidos al trabajador de la Unión y a los miembros de su familia pueden subsistir, en determinadas circunstancias, incluso tras la extinción de la relación laboral, sin que se exponga al riesgo si pierde la condición de trabajador, de tener que interrumpir la escolaridad de sus hijos y regresar a Polonia al no poder beneficiarse de las prestaciones sociales que Alemania garantiza a sus propios nacionales y que permitirían a su familia disponer de medios de subsistencia suficientes.

El Tribunal de Justicia explica el distinto alcance del Reglamento n.º 492/2011 y de la Directiva 2004/38, hasta el punto de que la excepción al principio de igualdad de trato solo se aplica cuando el derecho de residencia se basa en la Directiva, pero no cuando dicho derecho tiene un fundamento autónomo en el Reglamento. Por tanto, afirma categóricamente el Tribunal de Justicia, el trabajador polaco se beneficiará en Alemania, incluso si hubiera quedado en situación de desempleo, de las mismas ventajas sociales y fiscales que los trabajadores alemanes.

b) La libertad de establecimiento y la libertad de cátedra en Hungría de las universidades de otros países de la OMC y del EEE

El Tribunal de Justicia sigue adoptando, en su formación de Gran Sala, sentencias contra la legislación manifiestamente contraria al Estado de Derecho de Hungría. La *sentencia Comisión / Hungría (Enseñanza superior)*, C-66/18, constata la vulneración por la Ley húngara que supedita el ejercicio en Hungría de una actividad de formación universitaria al control del Gobierno.

Las normas vulneradas son el Acuerdo General sobre el Comercio de Servicios de la Organización Mundial del Comercio (Ronda Uruguay), la libertad de establecimiento y la libre prestación de servicios reconocidos

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por el artículo 49 TFUE y por la Directiva 2006/123 relativa a los servicios en el mercado interior) y, en fin, la Carta de los Derechos Fundamentales de la Unión Europea.

En primer lugar, el Acuerdo General sobre el Comercio de Servicios forma parte del Derecho de la Unión. Por tanto, es contrario a este tratado internacional supeditar el ejercicio de las instituciones de enseñanza superior que tengan su sede en un país miembro de la OMC distinto de los que forman parte del Espacio Económico Europeo (EEE) y ejerzan sus actividades en el territorio húngaro a la facultad discrecional de las autoridades húngaras.

En segundo lugar, es contraria al mismo Acuerdo de la OMC, al derecho de establecimiento y a la Directiva de servicios la legislación húngara que exige a las universidades del EEE tener su sede en Hungría.

En tercer lugar, la vulneración de la Carta resulta la más flagrante al constatar el Tribunal de Justicia que se ha vulnerado la libertad de cátedra, garantizada en el artículo 13, y la libertad de creación de centros docentes y la libertad de empresa, consagradas respectivamente en los artículos 14.3 y 16 de la Carta.

Para desarrollar su jurisprudencia el Tribunal de Justicia se refiere a la del Tribunal Europeo de Derechos Humanos y considera, en particular, respecto de la libertad de cátedra que «no se limita a la investigación académica o científica, sino que se extiende igualmente a la libertad de los universitarios de expresar libremente sus puntos de vista y opiniones», añadiendo una mención a «la infraestructura autónoma necesaria para llevar a cabo sus investigaciones científicas y ejercer sus actividades pedagógicas». En cuanto a los otros dos derechos fundamentales, el Tribunal de Justicia subraya: «la libertad de creación de centros docentes públicos o privados se garantiza como uno de los aspectos de la libertad de empresa».

Además, el Tribunal de Justicia comprueba que ninguna de las restricciones a estas libertades fundamentales está justificada por ninguno de los objetivos de interés general reconocidos por la Unión pues no se ve afectado el mantenimiento del orden público, ni está basada en razones imperiosas de interés general relativas a la prevención de prácticas que induzcan a error ni permite garantizar una enseñanza superior de calidad.

c) La Directiva de servicios, los apartamentos compartidos y las aplicaciones para taxis

El Tribunal de Justicia ha dictado dos sentencias de gran trascendencia para la aplicación de la Directiva 2006/123/CE relativa a los servicios en el mercado interior en el ámbito local que se aplican a las autorizaciones del uso de apartamentos turísticos y de taxis.

En la *sentencia Cali Apartments*, C-724/18 y C-727/18, la Gran Sala aplica la Directiva de servicios a la autorización municipal de una práctica cada vez más frecuente: el arrendamiento de un inmueble amueblado de forma reiterada durante breves períodos de tiempo a clientes de paso que no fijan en él su domicilio.

La primera cuestión que aborda el Tribunal de Justicia es si en estos casos se aplica la Directiva 2006/123 y la respuesta es afirmativa en la medida en que no hay razones para que se entienda excluida. Únicamente le preocupa al Tribunal de Justicia comprobar que la normativa que regula el acceso a determinadas formas específicas de actividades de arrendamiento de inmuebles y el ejercicio de esas actividades no constituye una normativa aplicable indistintamente en materia de ordenación del territorio, urbanismo y ordenación rural y, por tanto, no puede quedar excluida del ámbito de aplicación de la Directiva 2006/123.

La segunda cuestión se refiere a si la normativa francesa y la parisina constituyen un régimen de autorización en el sentido de la Directiva. La respuesta es afirmativa en la medida en que «tal normativa exige que las personas que deseen prestar ese servicio de arrendamiento inmobiliario se sometan a un procedimiento que tiene como efecto obligarlas a realizar un trámite ante una autoridad competente para obtener de ella un acto formal que les permita acceder a esa actividad de servicios y ejercerla».

La tercera cuestión tiene que ver con la posibilidad de encomendar a determinados entes locales, en este caso la ciudad de París, la aplicación de un régimen de autorización previa de estas actividades con el fin garantizar una oferta suficiente de viviendas destinadas al arrendamiento de larga duración a precios asequibles.

A juicio del Tribunal de Justicia, esta autorización está justificada por una razón imperiosa de interés general como la lucha contra la escasez de viviendas destinadas al arrendamiento y es proporcionada al objetivo perseguido, dado que este no puede alcanzarse con una medida menos restrictiva, en particular porque un control *a posteriori* se produciría demasiado tarde para ser realmente eficaz.

Por último, el Tribunal de Justicia considera que la obligación de compensación en forma de transformación accesoria y concomitante en viviendas de inmuebles con otro uso para otorgar la licencia municipal de arrendamiento constituye, en principio, un instrumento adecuado para alcanzar los objetivos de diversidad social del hábitat en su territorio, de oferta suficiente de viviendas y de mantenimiento de los alquileres a un precio asequible y no es contraria a la Directiva de servicios.

Ahora bien, el Tribunal de Justicia somete esta compensación a una serie de requisitos, en particular que los entes locales precisen de manera clara, inequívoca y objetiva, de modo que la comprensión de este régimen

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no deje lugar a dudas en cuanto al ámbito de aplicación de las condiciones y de las obligaciones así establecidas por dichas autoridades locales y que estas últimas no puedan aplicar arbitrariamente este concepto.

La *sentencia Star Taxi App*, C-62/19, permite al Tribunal de Justicia pronunciarse, a solicitud de un tribunal rumano, sobre la aplicación de la Directiva 2000/31/CE sobre el comercio electrónico y la Directiva 2006/123/CE relativa a los servicios en el mercado interior. En este caso el Ayuntamiento de Bucarest le había impuesto una multa a la empresa Star Taxi App por falta de autorización para operar en este ámbito del taxi.

Como se encarga de precisar el propio Tribunal de Justicia en este caso la aplicación informática consiste en un servicio de intermediación que conecta, mediante teléfonos inteligentes, a personas que desean desplazarse en taxi y a conductores de taxi autorizados; los taxistas deben pagar un abono mensual por la utilización de dicha aplicación, aunque el prestador de servicios, Star Taxi App, no les transmite directamente las solicitudes de taxi ni fija el precio de la carrera ni tampoco media en el pago.

El Tribunal de Justicia se apresura a subrayar que se trata de un sistema distinto del utilizado por Uber, que ya había resuelto el Tribunal de Justicia en la sentencia de 20 de diciembre de 2017, Asociación Profesional Élite Taxi, C-434/15, EU:C:2017:981, a petición del Juez de lo Mercantil de Barcelona.

En primer lugar, el Tribunal de Justicia considera que este servicio no puede considerarse como parte de un servicio de transporte, dado que «[no] organi[za] el funcionamiento general del servicio de desplazamiento urbano subsiguiente, toda vez que el prestador no selecciona a los conductores de taxis, ni fija o percibe el precio de la carrera, ni tampoco ejerce control sobre la calidad de los vehículos o de sus conductores ni sobre el comportamiento de estos últimos». Esto quiere decir, en definitiva, que se trata de un servicio de la sociedad de la información en el sentido de la Directiva sobre el comercio electrónico.

En segundo lugar, se plantea si se aplica la Directiva (UE) 2015/1535 que establece un procedimiento de información previo a la Comisión Europea en materia de reglamentaciones técnicas relativas a los servicios de la sociedad de la información. A juicio del Tribunal de Justicia, la normativa rumana que aquí se aplica no hace referencia a los servicios de la sociedad de la información. Por tanto, esta normativa rumana no constituye un reglamento técnico y, en consecuencia, no había que comunicar el proyecto de norma a la Comisión Europea.

En cambio, en tercer lugar, el Tribunal de Justicia se refiere a la libre prestación de servicios y ofrece una respuesta ambivalente pero muy significativa sobre la aplicación de la Directiva de servicios.

Por una parte, considera que en el caso concreto el artículo 56 TFUE, el artículo 3, apartados 2 y 4, de la Directiva 2000/31 y el artículo 16 de la Directiva 2006/123 no son aplicables a un litigio entre una sociedad rumana como Taxi Star App, sin proyección exterior, y las autoridades municipales rumanas, pues se trataría de situaciones puramente internas.

Pero, por otra parte, el Tribunal de Justicia interpreta la Directiva 2006/123/CE relativa a los servicios en el mercado interior en cuanto que sus artículos 9 y 10 sobre regímenes de autorización también se aplican a una situación en la que todos los elementos pertinentes se circunscriben al interior de un único Estado miembro.

La Directiva 2006/123 exige, por un lado, que el régimen de autorización no sea discriminatorio, esté justificado por una razón imperiosa de interés general y sea proporcionado; y, por otro, que los criterios de concesión de las autorizaciones sean claros, inequívocos y objetivos, se hagan públicos con antelación y sean transparentes y accesibles.

El Tribunal de Justicia explica el carácter de la norma europea aplicable y los pasos que debe dar el tribunal rumano: los artículos 9 y 10 de la Directiva de servicios establecen «obligaciones claras, precisas e incondicionales que les confieren un efecto directo»; y es preciso «apreciar separada y sucesivamente, primero, el carácter justificado del propio principio del establecimiento de este régimen y, a continuación, los criterios de concesión de las autorizaciones previstas por él».

El propio Tribunal de Justicia, que se queja de los escasos datos que le ofrece el tribunal de Bucarest, le da algunas pistas interpretativas haciéndose eco de la opinión del Abogado General: «el hecho de supeditar la concesión de una autorización para prestar un servicio al cumplimiento de requisitos técnicos inadecuados para el servicio de que se trate y, por ende, generadores de cargas y costes injustificados para sus prestadores no puede ser conforme con el artículo 10, apartado 2, de la Directiva 2006/123».

Por eso, el Tribunal de Justicia considera que la obligación de transmitir las carreras a los taxistas a través de un emisor-receptor de radio «no solo es inútil, sino que también carece de cualquier relación con las características de un servicio que está plenamente vinculado a las capacidades técnicas de los teléfonos inteligentes que permiten, sin intermediación humana directa, localizar tanto a los conductores de taxis como a sus clientes potenciales y conectarlos inmediatamente».

d) Contratación pública: ¿algún contrato puede salirle gratis a la Administración?

Es peculiar la pregunta que le hizo un tribunal esloveno al Tribunal de Justicia y su respuesta es muy ilustrativa del régimen de contratación pú-

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blica. La *sentencia Tax-Fin-Lex*, C-367/19, responde a lo que abogado general Bobek resumió así al principio de sus Conclusiones: «¿Es el cero (un número) anormalmente bajo?».

La cuestión es muy simple y directa porque plantea si puede rechazarse una oferta de un precio de cero euros para un contrato público de acceso a un sistema de información jurídica durante un período de 24 meses y cuyo valor estimado había fijado el Ministerio del Interior esloveno en 39.959,01 euros.

La respuesta del Tribunal de Justicia es que no se puede excluir automáticamente esta oferta presentada por la empresa *Tax-Fin-Lex* lo que, sin embargo, no impide que «cuando una oferta parezca anormalmente baja, los poderes adjudicadores exigirán al licitador que explique el precio o los costes que en ella se propongan, explicaciones [que] contribuirían a evaluar la fiabilidad de la oferta y permitirían acreditar que, aun cuando el licitador proponga un precio de cero euros, la oferta en cuestión no afectará al cumplimiento correcto del contrato».

Por tanto y como se apunta en la propia sentencia, la empresa Tax-Fin-Lex puede contar con que, en caso de que se acepte la oferta, podrá tener acceso a un nuevo mercado u obtener referencias. Como señalaba el abogado general Bobek en sus conclusiones: «la contrapartida exigible en el marco de un contrato público no implica necesariamente una transferencia directa de dinero, sino que puede ser una contrapartida en especie, siempre que tenga como mínimo cierto valor económico».

A tal efecto, el Tribunal de Justicia señala que «el poder adjudicador deberá evaluar la información proporcionada consultando al licitador y solo podrá rechazar tal oferta en caso de que los documentos aportados no expliquen satisfactoriamente el bajo nivel de los precios o costes propuestos» y «la evaluación de tal información debe efectuarse con observancia de los principios de igualdad y de no discriminación entre los licitadores, así como de transparencia y proporcionalidad».

e) El alcance de la tutela judicial efectiva y la cooperación administrativa en materia tributaria

La Gran Sala del Tribunal de Justicia ha pronunciado una clarificadora *sentencia État luxembourgeois*, C-245/19 y C-246/19, en dos asuntos en que está en juego la cooperación tributaria entre España y Luxemburgo en los términos establecidos por la Directiva 2011/16/UE relativa a la cooperación administrativa en el ámbito de la fiscalidad.

La autoridad tributaria luxemburguesa, a instancias de la Agencia tributaria española que investigaba a un contribuyente, reclamaba a determinadas sociedades luxemburguesas información sobre el contribuyente in-

vestigado en España. Las cuestiones proceden del Tribunal Supremo de lo Contencioso-administrativo del Gran Ducado,

La primer cuestión gira en torno a la aplicación del derecho reconocido en el artículo 47 de la Carta que consagra la tutela judicial efectiva. A tal efecto, el Tribunal de Justicia distingue entre el investigado en España, las personas requeridas para entregar la documentación y terceros.

En cuanto a la tutela judicial de las personas requeridas por la Administración tributaria luxemburguesa, el Tribunal de Justicia es taxativo en la medida en que considera que no se puede privar del derecho a un recurso a quien sea requerido para que aporte la información solicitada.

En cambio, la legislación luxemburguesa que impide recurrir al investigado a quien se refiere a la información solicitada no es contraria a la Carta. Y tampoco lo es la legislación luxemburguesa que impide recurrir a terceras personas: «el respeto del contenido esencial del derecho a la tutela judicial efectiva no exige que las terceras personas a las que concierne la información en cuestión sin estar sometidas, no obstante, a una obligación jurídica de comunicar esa información ni, por tanto, al riesgo de ser sancionadas en caso de incumplimiento de esa obligación, tengan, en cuanto justiciables, la posibilidad de interponer un recurso directo contra la decisión de requerimiento de tal información».

En segundo lugar, la cuestión se refiere al alcance de la colaboración permitida por la Directiva 2011/16/UE relativa a la cooperación administrativa en el ámbito de la fiscalidad.

Así, por una parte, el Tribunal de Justicia considera que se aplica el principio general del Derecho de la Unión que impone la protección de las personas físicas o jurídicas frente a las intervenciones arbitrarias o desproporcionadas de los poderes públicos en su esfera de actividad privada. Esto significa que, por ejemplo, una investigación «aleatoria podría considerarse una intervención arbitraria o desproporcionada de los poderes públicos.

Por otra parte, el Tribunal de Justicia señala las obligaciones de la autoridad requerida: controlar que la motivación de la solicitud de intercambio de información que ha recibido de la autoridad requirente sea suficiente para concluir que esta información no carece de toda pertinencia previsible, habida cuenta de la identidad del contribuyente sometido a la investigación que ha originado dicha solicitud, de las necesidades de tal investigación y, en caso de que fuera necesario obtener la información de un tercero que la tenga en su poder, de la identidad de ese tercero.

Y, además, el Tribunal de Justicia se refiere al alcance del control jurisdiccional de la decisión de la autoridad requerida a instancias del tercero concernido: que la motivación de la decisión y de la solicitud en la que se basa sea suficiente para concluir que la información no carece manifiesta-

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mente de toda pertinencia previsible, teniendo en cuenta la identidad del contribuyente investigado, la del tercero en cuyo poder se halla esa información y las necesidades de la investigación tributaria.

f) Las ayudas de *minimis* y la acumulación de ayudas

La *sentencia Zennaro*, C-608/19, supone un espaldarazo a la utilización y a la invocación del régimen de ayudas *de minimis*.

El Consejo de Estado italiano conocía de un litigio que enfrentaba a la empresa Zennaro con el Instituto Nacional de Previsión (INAIL), que le había concedido una subvención de 130.000 euros; pero previamente también Zennaro había recibido de la Región del Véneto otros 64.483,91 euros y una tercera subvención de un organismo público por importe de 18.985,26 euros. Acumuladamente se trataba de una ayuda de 213.469,17 euros, que superaba el límite máximo de las ayudas *de minimis*, fijado por el Reglamento (UE) n.º 1407/2013 de la Comisión en los 200.000 euros que una única empresa puede recibir en tres años.

La empresa propuso varias soluciones y finalmente redujo la solicitud de la subvención a 111.401,16 euros, pero el INAIL se opuso, terminando el asunto ante el Tribunal administrativo regional del Véneto que le dio la razón a Zennaro después de haber consultado con la Comisión Europea, cuya Dirección General de la Competencia emitió un informe conforme al cual «la entidad pública competente para efectuar el pago podía reducir proporcionalmente la subvención, a fin de respetar el límite máximo de las ayudas *de minimis*, y que correspondía a las autoridades nacionales elegir una de las dos opciones —la reducción proporcional o la denegación total de la subvención—, puesto que ambas soluciones eran teóricamente conformes a dicho Reglamento».

El Tribunal de Justicia puntualiza que el momento en el que debe apreciarse si la acumulación con otras ayudas *de minimis* sobrepasa el límite máximo *de minimis* es el de la «concesión» de la ayuda.

Esto le permite concluir que, atendida la finalidad del régimen *de minimis* de las ayudas de Estado y dado el margen amplio que tienen los Estados miembros para su aplicación, una empresa a la que el Estado se propone conceder una ayuda *de minimis* que, debido a la existencia de ayudas anteriores, daría lugar a que el importe total de las ayudas concedidas a esa empresa sobrepasara el límite máximo de las ayudas *de minimis* puede optar, hasta el momento del pago efectivo de la ayuda en cuestión, entre la reducción de la financiación solicitada y la renuncia, total o parcial, a ayudas anteriores ya percibidas, a fin de no superar tal límite.

Sin embargo, el Tribunal de Justicia deja en manos de las autoridades nacionales que permitan a las empresas solicitantes modificar las solicitu-

des de ayuda para no sobrepasar el umbral y siempre que tales modificaciones se lleven a cabo antes de la concesión de la ayuda.

4. *Las políticas europeas*

La aplicación de las distintas medidas de las políticas europeas permite indagar sobre el alcance de los derechos sociales, los derechos de los consumidores y la neutralidad en Internet

a) Los derechos sociales: empleo temporal y vacaciones

Los progresos en los derechos sociales avanzan en la jurisprudencia europea: por una parte en o que se refiere al abuso en el caso de la contratación temporal de empleados públicos, las vacaciones de los jueces honorarios italianos.

El Tribunal de Justicia sigue interpretando, a requerimiento de los jueces nacionales, especialmente del sur de Europa, la Directiva 1999/70/CE relativa al Acuerdo marco de la CES, la UNICE y el CEEP sobre el trabajo de duración determinada.

Así, en el *auto JS / Câmara Municipal de Gondomar*, C-135/20, el Tribunal de Justicia, a requerimiento de Supremo Tribunal Administrativo de Portugal, se pronuncia sobre la solución en la contratación abusiva de un empleado encargado de la piscina municipal que de 2000 a 2013 había sido contratado sucesivamente en cinco ocasiones.

Las dos preguntas se refieren a si la legislación portuguesa que impide la transformación de un contrato de duración determinada en un contrato indefinido con una Administración; y si la Directiva impone como único medio para luchar contra el abuso de la contratación temporal la conversión de los contratos en indefinidos.

En su respuesta el Tribunal de Justicia considera que corresponde a las autoridades nacionales la adopción de las medidas que deben revestir un carácter no solo proporcionado sino igualmente suficientemente disuasorio para garantizar la plena eficacia del Acuerdo marco.

El auto constata que si no existe en la regulación portuguesa ninguna otra medida efectiva para evitar y sancionar los abusos que se comprueben respecto de los empleados del sector público se pondría en riesgo la consecución del objetivo y del efecto útil de la cláusula 5 del Acuerdo.

En la *sentencia Universitatea «Lucian Blaga» Sibiu*, C-644/19, interpreta la Directiva 2000/78/CE sobre discriminación por razón de la edad y la Directiva 1999/70/CE por contratación temporal. Ante un tribunal rumano se planteaba la discriminación entre profesores universitarios que se

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jubilan en la medida en que solo los profesores con el título de director de tesis podían mantener su condición de profesor titular, mientras que los profesores que no tuviesen esa condición solo podían celebrar contratos de trabajo de duración determinada, con un régimen de remuneración inferior a la otorgada a los profesores titulares con contratos de duración determinada.

En cuanto a la Directiva 2000/78/CE relativa al establecimiento de un marco general para la igualdad de trato en el empleo y la ocupación, el Tribunal de Justicia considera que no se incurre en discriminación por razón de la edad dado que la diferencia de trato radica en la posesión o no del título de director de tesis, es decir, se basa en la categoría profesional de las personas afectadas y no en la edad.

En cambio, respecto de la Directiva 1999/70/CE y, en particular, la cláusula 4ª, el Tribunal de Justicia observa que se puede producir una discriminación si las condiciones de trabajo de los docentes que poseen un título de director de tesis y que ejercen su profesión después de haber alcanzado la edad legal de jubilación son más beneficiosas que las condiciones de trabajo de quienes no lo son y, por tanto, están abocados a contratos de trabajo de duración determinada, cuya remuneración es inferior.

El Tribunal de Justicia recuerda su definición del principio de no discriminación que «exige que no se traten de manera diferente situaciones comparables y que no se traten de manera idéntica situaciones diferentes, a no ser que dicho trato esté objetivamente justificado».

A tal efecto, el Tribunal de Justicia indica que corresponde al juez rumano determinar si se trata de situaciones comparables las de estas dos categorías de profesores, en atención a la naturaleza de su trabajo y los requisitos de su formación.

Seguidamente, debe comprobar también el juez rumano que no hay razones que justifiquen la discriminación y recuerda que tales razones deben ser objetivas por lo que no pueden ser organizativas ni presupuestarias.

Las vacaciones y la equiparación de los jueces honorarios con los jueces de carrera en Italia son tratadas por la *sentencia UX*, C-658/18, que se refiere al peculiar estatuto de los jueces de paz italianos que son elegidos y no seleccionados mediante el correspondiente concurso; sin embargo, cumplen amplias e intensas funciones jurisdiccionales

En la sentencia el Tribunal de Justicia despeja cualquier duda y llega a la conclusión de que estos jueces pueden plantear cuestiones prejudiciales porque cumplen los criterios del artículo 267 TFUE para ser «órgano jurisdiccional de uno de los Estados miembros».

La primera cuestión que resuelve el Tribunal de Justicia se refiere a la aplicación de la Directiva 2003/88/CE relativa a determinados aspectos de la ordenación del tiempo de trabajo para que se les reconozca el derecho a las vacaciones retribuidas.

Para ello el Tribunal de Justicia recuerda su concepto autónomo de trabajador conforme al cual «la característica esencial de la relación laboral radica en la circunstancia de que una persona realice, durante un cierto tiempo, en favor de otra y bajo la dirección de esta, determinadas prestaciones a cambio de las cuales percibe una retribución». En el caso de la juez de paz recurrente durante un año conoció de unos 1.800 procedimientos, dictó 478 sentencias y 1.326 autos como juez penal y celebró vistas dos veces por semana.

Por tanto, a juicio del Tribunal de Justicia se aplica la Directiva 2003/88 a los jueces de paz italianos.

Y la segunda cuestión tiene que ver con la aplicación de la Directiva 1999/70/CE relativa trabajo de duración determinada. Pues bien, en este caso el Tribunal de Justicia puntualiza: «el hecho de que los jueces de paz sean titulares de un cargo judicial no basta, por sí solo, para privarles del disfrute de los derechos previstos en dicho Acuerdo Marco».

A tal efecto, el Tribunal de Justicia considera, en sustancia, que los jueces de paz son, en realidad, trabajadores con contrato de duración determinada. Ahora bien, cuando examina si los jueces de paz puede ser equiparados a los jueces de carrera, el Tribunal de Justicia deja en manos del juez nacional la resolución y a tal efecto le da una serie de indicaciones.

La más importante, sin duda, es aquella conforme a la cual «ciertas diferencias de trato entre trabajadores fijos seleccionados tras una oposición y trabajadores con contrato de duración determinada contratados tras un procedimiento distinto del previsto para los trabajadores fijos pueden, en principio, estar justificadas por las diferencias en las cualificaciones requeridas y la naturaleza de las funciones cuya responsabilidad deben asumir».

Por tanto, concluye el Tribunal de Justicia: «si bien las diferencias entre los procedimientos de selección de los jueces de paz y de los jueces de carrera no exigen necesariamente privar a los primeros de vacaciones anuales retribuidas, que se corresponden con las previstas para los segundos, no es menos cierto que tales diferencias y, en particular, la especial importancia concedida en el ordenamiento jurídico nacional y, más concretamente, en el artículo 106, párrafo primero, de la Constitución italiana, a los concursos específicamente concebidos para la selección de jueces de carrera parecen indicar una especial naturaleza de las funciones cuya responsabilidad deben asumir estos últimos y un distinto nivel de las cualificaciones requeridas para llevar a cabo tales funciones».

b) La protección de los consumidores y el uso de tarjetas bancarias

En su *sentencia DenizBank*, C-287/19, hace una interesante interpretación sobre los derechos de los consumidores en el uso de las tarjetas bancarias sin contacto (función NFC, *Near Field Communication*).

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En primer lugar, el Tribunal de Justicia señala que en este caso se aplica tanto la Directiva (UE) 2015/2366 sobre servicios de pago en el mercado interior como la Directiva 93/13/CEE sobre las cláusulas abusivas en los contratos celebrados con consumidores por lo que cuando es un consumidor el que contrata este tipo de servicios las cláusulas tipo que permiten la adaptación unilateral de los contratos deben satisfacer las exigencias de buena fe, equilibrio y transparencia.

En segundo lugar, este tipo de tarjeta bancaria es un instrumento de pago y un pago de escasa cuantía realizado sin contacto mediante la función NFC de una tarjeta bancaria multifuncional personalizada constituye una utilización «anónima» del instrumento de pago.

Ahora bien, en estas circunstancias el Tribunal de Justicia se muestra reacio a que las entidades bancarias se eximan de responsabilidades dado que, de acuerdo con la Directiva (UE) 2015/2366, los proveedores de estos servicios son responsables de las medidas de seguridad, que deben ser proporcionales a los riesgos asociados, y están obligados, en particular, a establecer un marco que permita paliar los riesgos y mantener procedimientos eficaces de gestión de incidentes.

Por tanto, un proveedor de servicios de pago que pretenda acogerse a la excepción no puede limitarse a afirmar que resulta imposible bloquear el instrumento de pago en cuestión o impedir que se siga utilizando, siendo así que, habida cuenta del estado objetivo de los conocimientos técnicos disponibles, no puede demostrarse tal imposibilidad.

Por último, el Tribunal de Justicia deniega a la entidad bancaria litigante la limitación en el tiempo de los efectos de esta sentencia porque, para poder decidir dicha limitación, es necesario que concurran dos criterios esenciales, a saber, la buena fe de los círculos interesados y el riesgo de trastornos graves. Por lo demás, el Tribunal de Justicia subraya que, en realidad, la sentencia no niega que haya la posibilidad de eximirse sino que solo la limita considerablemente.

c) La neutralidad en la red

La *sentencia Telenor*, C-807/18 y C-39/19, dictada en respuesta a las cuestiones prejudiciales planteadas por un tribunal húngaro le permiten a la Gran Sala interpretar el Reglamento (UE) 2015/2120 para el acceso a una Internet abierta y pronunciarse sobre la neutralidad de Internet y sobre las prácticas comerciales de los proveedores de servicios en el acceso a la red.

Los litigios derivaban de la oferta de la empresa Telenor a sus clientes y que consistía en un volumen de datos de 1 GB que podían utilizarse sin restricciones hasta que se agotasen, disfrutando de acceso libre a las

aplicaciones y a los servicios disponibles, sin que computase a efectos del cálculo de este volumen de datos la utilización de seis aplicaciones, como Facebook, Instagram y WhatsApp, a las que se aplicaba una tarifa denominada «tarifa cero»; no obstante, según la oferta, una vez agotado el volumen de datos, los abonados podían continuar utilizando las aplicaciones determinadas pero en el caso de las demás quedaban sujetas a la ralentización del tráfico en Internet.

El Tribunal de Justicia tiene ocasión de subrayar la limitación que impone el Reglamento (UE) 2015/2120 a los proveedores de servicios en la medida en que «el legislador de la Unión pretendió que la evaluación de los acuerdos y las prácticas comerciales de un proveedor de servicios de acceso a Internet determinado no quedara limitada a un acuerdo concreto o a una práctica comercial concreta, considerados individualmente, sino que también se realizara una evaluación de conjunto de los acuerdos y las prácticas comerciales de ese proveedor».

A juicio del Tribunal de Justicia, al potenciar la utilización de determinadas aplicaciones y reducir la utilización de las demás aplicaciones y los demás servicios disponibles el proveedor de Internet puede limitar el ejercicio de los derechos de los usuarios finales.

La legislación europea permite establecer diferencias objetivas entre los requisitos técnicos en materia de calidad de servicio de determinadas categorías específicas de tráfico pero no basar estas diferencias en consideraciones de índole comercial. Por eso el Tribunal de Justicia considera que las medidas de bloqueo o de ralentización del tráfico se aplican como complemento de la «tarifa cero» de la que disfrutan los correspondientes usuarios finales y hacen técnicamente más difícil, cuando no imposible, que estos utilicen aplicaciones y servicios no incluidos en la tarifa.

III. **Segunda parte. La jurisprudencia europea, los jueces españoles y sus efectos en el Derecho interno**

Desde la perspectiva española, la actividad del Tribunal de Justicia ha sido muy variada: las medidas cautelares contra un fugaz eurodiputado catalán, una nueva limitación de los órganos facultades para plantear cuestiones prejudiciales, el régimen de extranjería, el alcance de las cláusulas abusivas, los derechos de los pasajeros en el transporte aéreo, las tasas en las telecomunicaciones, las garantías en caso de despido colectivo, la protección de los derechos de autor o, en fin, la fiscalidad de la energía.

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1. *Las medidas cautelares de quien pierde el escaño en el Parlamento Europeo*

La Vicepresidenta del Tribunal de Justicia desestimó el recurso de casación contra la denegación de las medidas cautelares solicitadas en el litigio que enfrenta al fugaz eurodiputado catalán, Oriol Junqueras, con el Parlamento Europeo. En el *auto Junqueras i Vies / Parlamento*, C-201/20 P(R), el Tribunal de Justicia desestima la casación contra la denegación por el Tribunal General de la suspensión cautelar frente a la decisión del Parlamento Europeo de declarar vacante su escaño a partir del 3 de enero de 2020.

El máximo interés que tiene este auto de la Vicepresidenta Silva de Lapuerta es, a mi juicio y como ya ocurrió con el comentado *auto Sharpston*, que al comprobar si concurre el presupuesto del *fumus boni iuris*, examina y se pronuncia, en gran medida, sobre el fondo del asunto.

En efecto, la Vicepresidenta argumenta: «en caso de anulación del mandato de un diputado del Parlamento resultante de la aplicación del Derecho nacional, esta institución únicamente puede, con arreglo al artículo 13, apartado 3, del Acta electoral, tomar nota de la declaración, por parte de las autoridades nacionales, de la expiración del mandato del diputado de que se trate, es decir, de una situación jurídica preexistente y resultante exclusivamente de una decisión de dichas autoridades. En particular, no corresponde al Parlamento comprobar el respeto del procedimiento previsto por el Derecho nacional en esa materia, puesto que tal facultad corresponde exclusivamente a los tribunales nacionales competentes, ni comprobar la conformidad de dicho procedimiento con el Derecho de la Unión, puesto que tal facultad corresponde asimismo a los tribunales nacionales competentes, en su caso, tras una remisión prejudicial al Tribunal de Justicia con arreglo al artículo 267 TFUE, o a este último, en el marco de un recurso por incumplimiento» (apartado 66).

En fin, resulta paradójico, como ha ocurrido sin duda en el *auto Sharpston*, que el auto de medidas provisionales esté resolviendo el fondo del *asunto Junqueras*. De hecho y como ocurrió con Sharpston el recurso de anulación presentado por quien había sido eurodiputado fue inadmitido por *auto Junqueras i Vies / Parlamento*, T-24/20, por el Tribunal General. A juicio del Tribunal General la declaración de la vacante del escaño del Sr. Oriol Junqueras, a partir del 3 de enero de 2020, anunciada por el presidente del Parlamento Europeo en el Pleno de 13 de enero de 2020, «es un acto de carácter puramente informativo» no susceptible de control por los tribunales europeos; en cambio, señala el Tribunal General: «las medidas que han producido efectos jurídicos obligatorios que han podido afectar a la situación jurídica del demandante son el acuerdo de 3 de enero de 2020 de

la Junta Electoral Central y el auto de 9 de enero de 2020 del Tribunal Supremo, medidas que, ellas mismas, deducen las consecuencias de la sentencia de 14 de octubre de 2019 del Tribunal Supremo por la que se condenó al demandante a una pena de trece años de prisión, por un lado, y a una pena de trece años de inhabilitación absoluta, con la consiguiente privación definitiva de todos sus honores, empleos y cargos públicos, por otro».

2. *La Comisión Nacional de los Mercados y de la Competencia ya no podrá plantear cuestiones prejudiciales*

Todo parece indicar que se complica el acceso al Tribunal de Justicia por vía prejudicial: las inadmisibilidades son cada vez más frecuentes y los órganos facultados para acudir al Tribunal de Justicia son determinados con más cuidado que hasta ahora.

Por un lado, el Tribunal de Justicia ha inadmitido, en virtud de su *auto Repsol Comercial de Productos Petrolíferos*, C-716/19, una cuestión prejudicial procedente de un Juzgado de lo Mercantil de Madrid. El litigio versaba sobre una demanda de varios distribuidores de hidrocarburos en materia de competencia desleal frente a Repsol cuya actuación previa había provocado la intervención de la Comisión Europea y que también había sido sancionada por la autoridad española de defensa de la competencia, cuya legalidad fue confirmada por los jueces españoles. El Juzgado de lo Mercantil quería saber el valor de tales actuaciones y si se invertía la carga de la prueba.

Ahora bien, el Tribunal de Justicia inadmite el reenvío prejudicial porque el juez español no determina apropiadamente el objeto del litigio ni su contexto fáctico; no expone el Derecho español aplicable al caso; y, en fin, no explica suficientemente la relación existente entre el Derecho de la Unión y la legislación española aplicable al litigio. Esta inadmisión, indica el Tribunal de Justicia, no impide que el Juzgado vuelva a presentar y respecto del mismo litigio debidamente una nueva cuestión prejudicial.

Por otro lado, el Tribunal de Justicia vuelve a restringir los órganos españoles que están facultados para plantear cuestiones prejudiciales al Tribunal de Justicia: ya no lo pueden hacer los Tribunales Económico-Administrativos ni ahora la Comisión Nacional de los Mercados y de la Competencia.

A partir de la sentencia *Asociación Nacional de Empresas Estibadoras y Consignatarios de Buques (Anesco)*, C-462/19, la Comisión Nacional de los Mercados y de la Competencia (CNMC) no puede plantear cuestiones prejudiciales.

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La CNMC es el órgano administrativo español encargado de la aplicación del Derecho de la competencia. Con esta sentencia el Tribunal de Justicia continúa una jurisprudencia en la que refuerza el concepto de órgano judicial y limita quiénes pueden plantearle cuestiones prejudiciales.

La razón de ser para no permitir que la CNMC le plantee cuestiones prejudiciales radica, a juicio del Tribunal de Justicia y de manera especial, en que «el procedimiento sancionador ante la CNMC se sitúa al margen del sistema jurisdiccional nacional y no forma parte del ejercicio de las funciones jurisdiccionales», es decir, se trata de un órgano con funciones meramente administrativas.

El Tribunal de Justicia puntualiza que con anterioridad había contestado una cuestión prejudicial del predecesor de la CNMC, el Tribunal de Defensa de la Competencia, en virtud de *sentencia Asociación Española de Banca Privada*, C-67/91, EU:C:1992:330, pero señala que las funciones de aquel órgano eran distintas a las de la CNMC lo que justificaba que le hubiese permitido plantear cuestiones prejudiciales.

En la *Crónica* precedente recordaba la *sentencia Banco de Santander*, C-274/14, EU:C:2020:17, donde se decidió que los tribunales económico-administrativos, por su dependencia de la Administración, tampoco están facultados para plantear cuestiones prejudiciales al Tribunal de Justicia.

3. *Las sentencias en materia de extranjería: sentencia Subdelegación del Gobierno en Barcelona y Subdelegación del Gobierno en Guadalajara*

La *sentencia Subdelegación del Gobierno en Barcelona*, C-503/19 y C-592/19, interpreta de nuevo la Directiva 2003/109/CE sobre el estatuto de los nacionales de terceros países residentes de larga duración.

El Tribunal de Justicia responde sendas cuestiones prejudiciales de los Juzgados de lo Contencioso-administrativo n.º 17 y n.º 5 de Barcelona en dos litigios por denegación de la autorización de residencia de larga duración que habían solicitado dos ciudadanos «no comunitarios» que gozaban hasta ese momento del permiso de residencia temporal.

En el primer caso, la denegación se debía a la comisión de un delito de conducción bajo la influencia de bebidas alcohólicas cometido en 2014 y, en el segundo caso, se denegaba la residencia de larga duración por la comisión de un delito de falsedad en documento público cometido en 2011.

A juicio del Tribunal de Justicia, la Directiva permite que las autoridades nacionales denieguen el estatuto de residente de larga duración a un nacional de un tercer país por motivos de orden público o de seguridad pública.

Ahora bien, por un lado, el Tribunal de Justicia reitera que en este tipo de cuestiones es preciso proceder «a una valoración caso por caso, lo que

excluye la posibilidad de denegar el estatuto de residente de larga duración al interesado por el mero hecho de que tenga antecedentes penales, sea cual sea la naturaleza de estos».

Y, por otro lado, el Tribunal de Justicia vuelve a repetir su jurisprudencia conforme a la cual «las medidas justificadas por motivos de orden público o de seguridad pública solo pueden adoptarse cuando, tras una valoración caso por caso por parte de las autoridades nacionales competentes, se ponga de manifiesto que la conducta individual de la persona en cuestión representa actualmente una amenaza real y suficientemente grave para un interés fundamental de la sociedad».

En suma, no puede denegarse a un nacional no comunitario el estatuto de residente de larga duración en España por el mero hecho de que tenga antecedentes penales, sin examinar específicamente su situación por lo que respecta, en particular, al tipo de delito que haya cometido, al peligro que representa eventualmente para el orden público o la seguridad pública, a la duración de su residencia en el España y a la existencia de vínculos con nuestro país.

La *sentencia Mo / Subdelegación del Gobierno en Toledo*, C-568/19, contesta una cuestión prejudicial de la Sala de lo Contencioso-administrativo del Tribunal Superior de Justicia de Castilla-La Mancha sobre la interpretación de la Directiva 2008/115/CE relativa al retorno de los nacionales de terceros países en situación irregular.

En este caso un nacional colombiano había sido expulsado como consecuencia de su estancia irregular en España y dado que, según la jurisprudencia del Tribunal Supremo español, el interesado no justificaba la entrada en España por puesto habilitado ni el tiempo de residencia que llevaba en España, encontrándose totalmente indocumentado y la expulsión no le produciría al ciudadano colombiano desarraigo familiar, puesto que no acreditaba vínculos con familiares residentes legales en línea directa.

El Tribunal de Justicia precisa con esta sentencia la *jurisprudencia Zaizoune* (C-38/14, EU:C:2015:260) y, en particular, señala que la Directiva 2008/115 debe interpretarse en el sentido de que, cuando la legislación española, en caso de situación irregular de nacionales de terceros países en el territorio de un Estado miembro, imponga, o bien una sanción de multa, o bien la expulsión, teniendo en cuenta que la segunda medida solo puede adoptarse si existen circunstancias agravantes en la persona de dichos nacionales, adicionales a su situación irregular, la autoridad nacional competente no podrá basarse directamente en lo dispuesto en la Directiva para adoptar una decisión de retorno y hacer cumplir dicha decisión aun cuando no existan circunstancias agravantes.

Ahora bien, ha de puntualizarse que el propio Tribunal de Justicia indica que, al aplicar el Derecho interno, y dentro de los límites que estable-

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cen los principios generales del Derecho, los órganos jurisdiccionales nacionales deben interpretarlo en la medida de lo posible a la luz de la letra y de la finalidad de la directiva de que se trate para alcanzar el resultado que esta persigue. Parece que será el Tribunal Supremo (Sala C-A, auto de 27 de octubre de 2020, recurso n.º 2870/2020, ES:TS:2020:9272A, ponente: Tolosa Tribiño) el que a través de un recurso de casación resuelva esta cuestión poniendo, a falta de intervención de las Cortes Generales mediante la adaptación de la Ley de extranjería, un poco de orden.

4. *Las sentencias sobre cláusulas abusivas en los préstamos hipotecarios*

La jurisprudencia europea sobre cláusulas abusivas en materia de préstamos hipotecarios no deja de crecer gracias a las reiteradas preguntas de los tribunales españoles.

La *sentencia Ibercaja Banco*, C-452/18, en respuesta a una cuestión prejudicial del Juzgado de Primera Instancia e Instrucción n.º 3 de Teruel, se pronuncia sobre el abuso en la renegociación de cláusulas que fueron declaradas abusivas en un contrato de préstamo hipotecario: por una parte, la reducción de la cláusula suelo a cambio de que el consumidor renunciase a las reclamaciones por el abuso de la cláusula inicial; y, por otra parte, la renuncia del consumidor a ejercitar acciones referidas a la nueva cláusula suelo.

Pues bien, el Tribunal de Justicia considera que en la novación del contrato el consumidor puede renunciar a los efectos que pudieran derivarse de la declaración del carácter abusivo de esa cláusula, siempre que la renuncia proceda de un consentimiento libre e informado.

No obstante, la nueva cláusula presente en la novación puede declararse abusiva si no ha sido negociada individualmente, aunque en el contrato de novación constase la mención, escrita de puño y letra del consumidor, en la que indicaba que comprendía el mecanismo de la cláusula «suelo» y, sin embargo, el banco no le había facilitado con antelación una copia del contrato y tampoco le permitió que se lo llevara consigo para su conocimiento.

El Tribunal de Justicia detalla el alcance del principio de transparencia en el caso de las cláusulas suelo en la medida en que debe situarse al consumidor en condiciones de comprender las consecuencias económicas que para él se derivan de este mecanismo establecido, en particular mediante la puesta a disposición de información relativa a la evolución pasada del índice a partir del cual se calcula el tipo de interés. Y en el caso de la novación del préstamo hipotecario, la renuncia del consumidor debe ir precedida de la información dada por la entidad bancaria que permita a

un consumidor medio normalmente informado y razonablemente perspicaz calcular tales cantidades.

Ahora bien, la renuncia por el consumidor al ejercicio de acciones a la cláusula suelo inicial se hizo en una situación de incertidumbre también para el banco en la medida en que en el caso concreto y hasta la *sentencia Gutiérrez Naranjo y otros* (C-154/15, C-307/15 y C-308/15, EU:C:2016:980) no se supo que la existencia de una cláusula «suelo» abusiva justificaba la devolución íntegra de las cantidades indebidamente satisfechas pues la Sala Civil del Tribunal Supremo español había declarado los efectos únicamente a partir de su sentencia de 9 de mayo de 2013.

En cambio, la renuncia del consumidor, en lo referente a controversias futuras, a las acciones judiciales basadas en los derechos que le reconoce la Directiva 93/13 no le vincula.

También la *sentencia Caixabank*, C-224/19, aplica la Directiva 93/13/CEE sobre las cláusulas abusivas en los préstamos hipotecarios y responde quince cuestiones prejudiciales del Juzgado de Primera Instancia n.º 17 de Palma de Mallorca y del Juzgado de Primera Instancia e Instrucción de Ceuta.

Nuevamente el Tribunal de Justicia debe examinar la casuística planteada por los jueces españoles en cuanto al carácter abusivo de cláusulas incluidas en préstamos hipotecarios y sobre sus consecuencias, en particular las cláusulas sobre los gastos de constitución y cancelación de la hipoteca y sobre la comisión de apertura. El Tribunal de Justicia simplifica las preguntas y contesta cinco cuestiones fundamentales.

En primer lugar, se pronuncia sobre los efectos de la nulidad de la cláusula de constitución y cancelación de la hipoteca. Sobre este particular señala que la nulidad tiene efectos restitutorios en favor del consumidor. Sin embargo, también precisa el Tribunal de Justicia que el juez debe exigir la devolución al consumidor de lo abonado en virtud de esta cláusula abusiva salvo que las disposiciones de Derecho español aplicables en defecto de tal cláusula impongan al consumidor el pago de la totalidad o de una parte de esos gastos.

En segundo lugar, el Tribunal de Justicia se refiere a la cláusula de apertura y a su carácter abusivo y exige que el juez compruebe si el banco ha comunicado al consumidor los elementos suficientes para que este adquiera conocimiento del contenido y del funcionamiento de la cláusula que le impone el pago de una comisión de apertura, así como de su función dentro del contrato de préstamo. En este sentido, considera que el hecho de que una comisión de apertura esté incluida en el coste total de un préstamo hipotecario no implica que sea una prestación esencial de este. En fin, los jueces están obligados a controlar el carácter claro y comprensible de una cláusula contractual referida al objeto principal del contrato.

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En tercer lugar, a juicio del Tribunal de Justicia una cláusula de apertura sería abusiva si su pago puede causar en detrimento del consumidor, contrariamente a las exigencias de la buena fe, un desequilibrio importante entre los derechos y obligaciones de las partes que se derivan del contrato y la entidad financiera no demuestre ante el juez que esta comisión responde a servicios efectivamente prestados y gastos en los que haya incurrido.

En cuarto lugar y por lo que se refiere al plazo de prescripción de cinco años fijado en el Derecho español, el Tribunal de Justicia recuerda, por una parte, que la Directiva impide que se prohíba al juez declarar el carácter abusivo de una cláusula de un contrato entre un profesional y un consumidor al expirar un plazo de preclusión; y, por otra parte, llega a la conclusión de que no se opone a que el ejercicio de la acción dirigida a hacer valer los efectos restitutorios de la declaración de la nulidad de una cláusula contractual abusiva quede sometido a un plazo de prescripción, siempre que ni el momento en que ese plazo comienza a correr ni su duración hagan imposible en la práctica o excesivamente difícil el ejercicio del derecho del consumidor a solicitar tal restitución.

Ahora bien, en el caso concreto al aplicarse en España la prescripción desde la firma del contrato, con independencia de si el consumidor tenía o podía razonablemente tener conocimiento del carácter abusivo de la cláusula, puede hacer excesivamente difícil el ejercicio de los derechos que la Directiva 93/13 confiere a este consumidor y, por lo tanto, puede vulnerar el principio de efectividad, en relación con el principio de seguridad jurídica.

Por último, aborda el Tribunal de Justicia el espinoso problema de las costas en este tipo de litigios y concluye que el principio de efectividad se opone a un régimen que permite que el consumidor cargue con una parte de las costas procesales en función del importe de las cantidades indebidamente pagadas que le son restituidas a raíz de la declaración de la nulidad de una cláusula contractual por tener carácter abusivo, dado que ese régimen sobre las costas crea un obstáculo significativo que puede disuadir a los consumidores de ejercer el derecho, conferido por la Directiva 93/13, a un control judicial efectivo del carácter potencialmente abusivo de cláusulas contractuales.

5. *La protección de los pasajeros del transporte aéreo*

La *sentencia SL / Vueling Airlines*, C-86/19, se refiere a la pérdida de equipajes en el transporte aéreo.

A instancias del Juzgado de lo Mercantil n.º 9 de Barcelona, el Tribunal de Justicia interpreta el Convenio de Montreal para la unificación de cier-

tas reglas para el transporte aéreo internacional de 1999. A un pasajero que volaba de Ibiza a Fuerteventura, con escala en Barcelona, le perdieron el equipaje y reclamaba la máxima indemnización prevista en el Convenio de Montreal, unos 1.544 euros, mientras que Vueling le ofrecía una indemnización de 250 euros.

En su primera respuesta el Tribunal de Justicia considera que la referida cantidad prevista en el Convenio de Montreal es una indemnización máxima que no corresponde *ipso iure* y a tanto alzado al pasajero afectado, sino que corresponde al juez nacional determinar, dentro de ese límite, el importe de la indemnización adeudada al pasajero atendiendo a las circunstancias del caso concreto.

En la segunda respuesta el Tribunal de Justicia interpreta que corresponde a los pasajeros interesados, bajo el control del juez nacional, acreditar de forma suficiente en Derecho el contenido del equipaje extraviado. A tal efecto, el pasajero puede aporta pruebas documentales de los gastos en que ha incurrido para sustituir el contenido de su equipaje o también cabe tomar en consideración otros datos como el peso del equipaje extraviado y la circunstancia de que la pérdida se haya producido durante el viaje de ida o el de vuelta, para evaluar los daños sufridos y fijar el importe de la indemnización que procede abonar al pasajero perjudicado; datos que no deben tomarse en consideración aisladamente, sino que han de apreciarse en su conjunto.

6. *Las tasas a los servicios de comunicaciones*

La *sentencia Vodafone España / Diputación Foral de Gipuzkoa*, C-443/19, contesta una cuestión prejudicial planteada por la Sala de lo Contencioso-administrativo del Tribunal Superior de Justicia del País Vasco sobre la interpretación de la Directiva 2002/20/CE relativa a la autorización de redes y servicios de comunicaciones electrónicas.

Vodafone, después de abonar la tasa por la reserva del dominio público radioeléctrico, impugnó el impuesto de transmisiones patrimoniales aplicable a la misma operación invocando la Directiva 2002/20/CE, y la Sala de lo Contencioso-administrativo de Bilbao planteó al Tribunal de Justicia si era conforme con la Directiva que se gravase el derecho al uso de radiofrecuencias por parte de la operadora de telecomunicaciones, —ya sujeto a la llamada tasa de espectro—, con el impuesto general de transmisiones patrimoniales y actos jurídicos documentados aplicable en general a las concesiones administrativas de bienes de dominio público.

El Tribunal de Justicia hace un examen de su jurisprudencia conforme a la cual los Estados miembros no pueden percibir tasas o cánones sobre el

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suministro de redes y de servicios de comunicaciones electrónicas distintos de los previstos en la propia Directiva. El artículo 12 se refiere a las tasas administrativas destinadas a financiar las actividades de la autoridad nacional de reglamentación en materia de gestión del sistema de autorización y de concesión de derechos de uso. Y el artículo 13 se refiere a un canon cuya finalidad sea garantizar el uso óptimo de los derechos de uso de radiofrecuencias, números o derechos de instalación de recursos en una propiedad pública o privada, o por encima o por debajo de la misma, que concedan a los suministradores de redes y de servicios de comunicaciones electrónicas.

De la sentencia parece deducirse que el impuesto sobre transmisiones patrimoniales constituye, junto con la tasa por la reserva del dominio público radioeléctrico, un canon del artículo 13 de la Directiva, aunque corresponde al tribunal vasco determinar si cumple los siguientes requisitos: no es discriminatorio, es transparente, está justificado objetivamente, es proporcionado al fin previsto y tiene en cuenta, entre otros, los objetivos del fomento de la competencia y la promoción del uso eficiente de las radiofrecuencias.

7. *La protección frente a los despidos colectivos*

A raíz de la cuestión prejudicial planteada por el Juzgado de lo Social n.º 3 de Barcelona para saber si la Directiva 98/59/CE sobre los despidos colectivos se aplica en el caso de un despido individual, el Tribunal de Justicia contestó en la *sentencia Marclean Technologies*, C-300/19.

En el supuesto concreto la empresa Marclean había despedido el 31 de mayo de 2018 a una trabajadora y el Juzgado constató que desde ese momento hasta el 15 de agosto de 2018 se habían producido de 30 a 35 despidos, lo que podría calificarse como despido colectivo.

Ahora bien, la controversia radica en cómo contar el período previsto en la Directiva 98/59 de 30 a 90 días anterior o posterior al despido individual controvertido. El Juzgado explica que el Tribunal Supremo español solo elegía el período anterior pero consideraba el juez barcelonés que podía aplicarse el período posterior al despido individual para incluir los despidos que lo hubiesen sido en fraude.

El Tribunal de Justicia recuerda que la finalidad de la Directiva 98/59 consiste en reforzar la protección de los trabajadores en caso de despidos colectivos por lo que exige que el período de referencia sea continuo. De tal modo que los tribunales españoles pueden computar los despidos producidos antes o después de la fecha del despido individual impugnado a efectos de determinar si existe o no un despido colectivo, en el sentido de la Directiva (30 o 90 días, habiendo elegido el legislador español el plazo de 90 días).

Por tanto, el Tribunal de Justicia interpreta la Directiva 98/59 en el sentido de que, a efectos de apreciar si un despido individual impugnado forma parte de un despido colectivo, el período de referencia previsto para determinar la existencia de un despido colectivo ha de calcularse computando todo período de 30 o de 90 días consecutivos en el que haya tenido lugar ese despido individual y durante el cual se haya producido el mayor número de despidos efectuados por el empresario por uno o varios motivos no inherentes a la persona de los trabajadores.

8. *La protección de los derechos de autor de intérpretes y productores en la reproducción de fonogramas*

La *sentencia Atresmedia*, C-147/19, contesta una cuestión prejudicial de la Sala Civil del Tribunal Supremo sobre la interpretación de las Directivas 92/100/CEE y 2006/115/CE sobre derechos de alquiler y préstamo y otros derechos afines a los derechos de autor en el ámbito de la propiedad intelectual.

En este caso el litigio versaba sobre la procedencia de una indemnización que solicitaban dos entidades de gestión de derechos de propiedad intelectual, de productores fonográficos (AGEDI) y de artistas intérpretes (AIE) a Atresmedia, titular de varias cadenas de televisión, por obras audiovisuales en las que se habían incorporado fonogramas con fines comerciales.

El Tribunal de Justicia se encarga de precisar la pregunta de la Sala Civil del Tribunal Supremo indicando que no se refiere a la reproducción de los fonogramas con ocasión de su incorporación en las mencionadas grabaciones audiovisuales, pues la incorporación se efectuó con la autorización de los titulares de derechos afectados y a cambio de una remuneración que les fue abonada de conformidad con los acuerdos contractuales aplicables, sino si los artistas intérpretes o ejecutantes y los productores de fonogramas deben percibir una remuneración equitativa y única cuando las grabaciones audiovisuales sean objeto de comunicación pública posteriormente.

Para resolver la cuestión, el Tribunal de Justicia elabora un concepto propio de fonograma del que finalmente deduce que una grabación audiovisual que contenga la fijación de una obra audiovisual no puede calificarse de «fonograma» a los efectos de las Directivas 92/100 y 2006/115. Esto significa que la comunicación al público de la grabación no genera el derecho de remuneración.

Esto no impide que el Tribunal de Justicia precise que es preciso alcanzar un equilibrio adecuado entre el interés de los intérpretes y de los productores de fonogramas a percibir una remuneración por la difusión de un

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fonograma determinado y el interés de los terceros en poder emitir dichos fonogramas o comunicarlos al público en condiciones razonables. Sin embargo, este objetivo debe alcanzarse mediante la celebración, con motivo de la incorporación de los fonogramas o las reproducciones de dichos fonogramas en las obras audiovisuales de que se trate, de acuerdos contractuales adecuados entre los titulares de los derechos sobre los fonogramas y los productores de las obras, de modo que la remuneración de los derechos afines sobre los fonogramas como consecuencia de la incorporación se realice a través de estos acuerdos contractuales.

Por tanto, como habían señalado previamente el Juzgado de lo Mercantil de Madrid, la Audiencia Provincial, el Tribunal de Justicia se inclina por considerar que Atresmedia no tiene que pagar la remuneración equitativa y única que contemplan las Directivas cuando efectúen una comunicación pública de grabaciones audiovisuales que contengan la fijación de obras audiovisuales en las que se hayan incorporado fonogramas o sus reproducciones.

9. *La fiscalidad de la energía y los hidrocarburos*

El Tribunal de Justicia ha interpretado en su *sentencia Repsol Petróleo*, C-44/19, la Directiva 2003/96/CE sobre imposición de los productos energéticos y de la electricidad en relación con el impuesto especial sobre los hidrocarburos.

El litigio de Repsol Petróleo con la Agencia Tributaria española se refería a la aplicación del impuesto especial sobre los hidrocarburos que esa misma empresa había producido y que, a continuación, utilizaba, en sus propias instalaciones, con fines productivos, en la medida en que dicha producción había generado productos residuales no energéticos como el azufre y el dióxido de carbono. La Agencia Tributaria sostenía que los autoconsumos de hidrocarburos no estaban exentos del impuesto cuando se generaban productos no energéticos. Después de pasar por el Tribunal Económico-Administrativo central y la Audiencia Nacional, la Sala de lo Contencioso-administrativo del Tribunal Supremo planteó la cuestión prejudicial.

La respuesta, como resume felizmente el abogado general polaco Szpunar, debe tener en cuenta este punto de partida: «la coherencia del sistema de tributación establecido por la Directiva 2003/96 exige la imposición de los productos energéticos utilizados en un proceso productivo en la medida en que, durante dicho proceso, se obtengan productos no energéticos».

El Tribunal de Justicia considera que la Directiva 2003/96 establece un régimen de imposición armonizado de los productos energéticos y de la electricidad con el fin de promover el funcionamiento adecuado del mer-

cado interior en el sector de la energía, evitando, en particular, las distorsiones de la competencia. Por esa razón, si no se gravase el autoconsumo de productos energéticos utilizados en el proceso productivo cuando los productos obtenidos no fuesen productos energéticos se crearía una laguna en el sistema de tributación establecido por la Directiva 2003/96, ya que no estarían gravados productos energéticos que, en principio, deberían estarlo. Y, además, la tributación no se vería compensada por la tributación posterior de los productos finales obtenidos a partir de estos últimos, ya que los productos finales resultantes de ese consumo no son productos energéticos. Todo ello podría afectar al funcionamiento del mercado interior de la energía.

En consecuencia y a juicio del Tribunal de Justicia, no es conforme con la Directiva una interpretación que pretenda la exclusión de la tributación de los autoconsumos de hidrocarburos para la fabricación de productos no energéticos que proporcionen un beneficio económico.

IV. **Relación de las resoluciones judiciales comentadas**

1. TJUE, auto de 2 de julio de 2020, S.A.D. Maler und Anstreicher / Magistrat der Stadt Wien y Bauarbeiter Urlaubs- und Abfertigungskasse, C-256/19, EU:C:2020:523 (inadmisibilidad porque no se aplica la Carta).
2. TJUE, sentencia de 9 de julio de 2020, XZ / Ibercaja Banco, C-452/18, EU:C:2020:536 (cláusula abusiva y cláusula suelo).
3. TJUE, sentencia de 9 de julio de 2020, SL / Vueling Airlines, C-86/19, EU:C:2020:538 (indemnización en caso de pérdida de equipaje).
4. TJUE, sentencia de 16 de julio de 2020, OC y otros / Banca d'Italia y otros, C-686/18, EU:C:2020:567 (derecho de propiedad y libertad de empresa).
5. TJUE, sentencia de 16 de julio de 2020, UX / Governo della Repubblica italiana (Estatuto de los jueces de paz italianos), C-658/18, EU:C:2020:572 (derecho a vacaciones y equiparación de los jueces honorarios con los jueces de carrera en Italia).
6. TJUE, sentencia de 16 de julio de 2020, CY / Caixabank y LG y PK / Banco Bilbao Vizcaya Argentaria, C-224/19, EU:C:2020:578 (cláusulas abusivas en préstamos hipotecarios).
7. TJUE (Gran Sala), sentencia de 16 de julio de 2020, Data Protection Commissioner / Facebook Ireland y Schrems, C-311/18, EU:C:2020:559 (transferencia de datos de los usuarios de Facebook en la UE a los Estados Unidos).

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8. TJUE, sentencia de 3 de septiembre de 2020, UQ y SI / Subdelegación del Gobierno en Barcelona, C-503/19 y C-592/19, EU:C:2020:629 (residentes no comunitarios de larga duración).
9. TJUE, sentencia de 9 de septiembre de 2020, JP / Commissaire général aux réfugiés et aux apatrides, C-651/19, EU:C:2020:681 (desestimación de una solicitud posterior de asilo y plazo para interponer el recurso).
10. TJUE, sentencia de 10 de septiembre de 2020, Tax-Fin-Lex, C-367/19, EU:C:2020:685 (ofertas anormalmente bajas y precio cero del contrato).
11. TJUE (Vicepresidenta), auto de 10 de septiembre de 2020, Consejo / Eleanor Sharpston, C-423/20 P(R), EU:C:2020:700 (medidas cautelares y nombramiento de un abogado general del Tribunal de Justicia).
12. TJUE (Vicepresidenta), auto de 10 de septiembre de 2020, Representantes de los Estados Miembros / Eleanor Sharpston, C-424/20 P(R), EU:C:2020:705 (medidas cautelares y nombramiento de un abogado general del Tribunal de Justicia).
13. TJUE (Gran Sala), sentencia de 15 de septiembre de 2020, Telenor Magyarország / Nemzeti Média- és Hírközlési Hatóság Elnöke, C-807/18 y C-39/19, EU:C:2020:708 (neutralidad de Internet y prácticas comerciales de los proveedores de servicios en el acceso a la red).
14. TJUE, sentencia, de 16 de septiembre de 2020, Asociación Nacional de Empresas Estibadoras y Consignatarios de Buques (Anesco), C-462/19, EU:C:2020:715 (la autoridad nacional de la competencia española no puede plantear cuestiones prejudiciales).
15. TJUE, sentencia de 17 de septiembre de 2020, JZ, C-806/18, EU:C:2020:724 (pena de prisión en caso de prohibición de entrada de no comunitario).
16. TJUE (Gran Sala), sentencia de 22 de septiembre de 2020, Cali Apartments y HX / Procureur général près la cour d'appel de Paris y Ville de Paris, C-724/18 y C-727/18, EU:C:2020:743 (alquiler de pisos turísticos y normativa municipal).
17. TJUE, sentencia de 30 de septiembre de 2020, B. / CPAS de Liège, C-233/19, EU:C:2020:757 (tutela judicial efectiva y cautelar en el retorno de no comunitarios con una grave enfermedad).
18. TJUE, sentencia de 30 de septiembre de 2020, LM / CPAS de Seraing, C-402/19, EU:C:2020:759 (tutela judicial efectiva y cautelar en el retorno de no comunitarios con una grave enfermedad).
19. TJUE, auto de 30 de septiembre de 2020, JS / Câmara Municipal de Gondomar, C-135/20, JS / Câmara Municipal de Gondomar,

EU:C:2020:760 (transformación de contratos de duración determinada en indefinidos por abuso).

20. TJUE (Gran Sala), sentencia de 6 de octubre de 2020, Privacy International / Secretary of State for Foreign and Commonwealth Affairs y otros, C-623/17, EU:C:2020:790 (protección de datos personales y seguridad nacional).
21. TJUE (Gran Sala), sentencia de 6 de octubre de 2020, La Quadrature du Net y otros / Premier ministre y otros, C-511/18, C-512/18 y C-520/18, EU:C:2020:791 (conservación de datos electrónicos por razones de seguridad pública y de orden público).
22. TJUE (Gran Sala), sentencia de 6 de octubre de 2020, Comisión / Hungría (Enseñanza superior), C-66/18, EU:C:2020:792 (libertad de establecimiento y libertad de cátedra).
23. TJUE (Gran Sala), sentencia de 6 de octubre de 2020, Jobcenter Krefeld / JD, C-181/19, EU:C:2020:794 (recorte de los derechos sociales de trabajador comunitario con hijos escolarizados a cargo).
24. TJUE (Gran Sala), sentencia de 6 de octubre de 2020, État luxembourgeois / B y otros, C-245/19 y C-246/19, EU:C:2020:795 (derecho de recurso contra una solicitud de información en materia fiscal).
25. TJUE, sentencia de 6 de octubre de 2020, Vodafone España, Vodafone España / Diputación Foral de Gipuzkoa, C-443/19, EU:C:2020:798 (autorización de redes y servicios de comunicaciones electrónicas).
26. TJUE (Vicepresidenta), auto de 8 de octubre de 2020, Junqueras i Vies / Parlamento, C-201/20 P(R), EU:C:2020:818 (denegación de medida cautelar por pérdida de escaño europeo por decisión de autoridades nacionales).
27. TJUE, sentencia de 8 de octubre de 2020, MO / Subdelegación del Gobierno en Toledo, C-568/19, EU:C:2020:807 (repercusiones de la sentencia Zaizoune y la expulsión de residentes no comunitarios irregulares).
28. TJUE, sentencia de 8 de octubre de 2020, FT / Universitatea «Lucian Blaga» Sibiu y otros, C-644/19, EU:C:2020:810 (discriminación entre profesores universitarios jubilados con contratos indefinidos y de duración determinada).
29. TJUE, sentencia de 28 de octubre de 2020, INAIL / Zennaro Giuseppe Legnami, C-608/19, EU:C:2020:865 (ayudas *de minimis* y reducción o renuncia para respetar el límite en la acumulación).
30. TJUE, auto de 28 de octubre de 2020, ZA y otros / Repsol Comercial de Productos Petrolíferos, C-716/19, EU:C:2020:870 (inadmisibilidad de cuestión prejudicial planteada por un Juzgado de lo Mercantil en materia de competencia desleal).

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31. TJUE, sentencia de 29 de octubre de 2020, A / Veselības ministrija (Ministerio de Sanidad de Letonia), C-243/19, EU:C:2020:872 (asistencia sanitaria en otros país de la Unión Europea y creencias religiosas).
32. TJUE, sentencia de 11 de noviembre de 2020, DenizBank, C-287/19, EU:C:2020:897 (tarjetas bancarias sin contacto y protección del consumidor).
33. TJUE, sentencia de 11 de noviembre de 2020, UQ / Marclean Technologies, C-300/19, EU:C:2020:898 (cómputo del período y despido colectivo encubierto).
34. TJUE, sentencia de 18 de noviembre de 2020, Syndicat CFTC du personnel de la Caisse primaire d'assurance maladie de la Moselle, C-463/19, EU:C:2020:932 (igualdad de oportunidades, maternidad y cuidado de los hijos).
35. TJUE, sentencia de 18 de noviembre de 2020, Atresmedia Corporación de Medios de Comunicación, C-147/19, EU:C:2020:935 (derechos de intérpretes de fonogramas).
36. TJUE, sentencia de 19 de noviembre de 2020, Servicio Europeo de Acción Exterior (SEAE) / Chantal Hebberecht, C-93/19 P, EU:C:2020:946 (principio de igualdad de mujeres y hombres en el empleo en el Servicio Europeo de Acción Exterior).
37. TJUE, sentencia de 3 de diciembre de 2020, Star Taxi App, C-62/19, EU:C:2020:980 (autorización municipal de los servicios de la sociedad de la información y los límites de la Directiva de servicios).
38. TJUE, sentencia de 3 de diciembre de 2020, Repsol Petróleo, C-44/19, EU:C:2020:982 (impuesto especial sobre los hidrocarburos y Directiva 2003/96/CE sobre la imposición de los productos energéticos y de la electricidad).
39. TGUE, auto de 15 de diciembre de 2020, Junqueras i Vies / Parlamento, T-24/20, EU:T:2020:601 (escaño vacante de un eurodiputado).

Crónica

Actualidad institucional y económica de España en el marco de la Unión Europea (Enero 2021)

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Sumario: I. Introducción.—II. El Estado de la Integración.—III. Cuestiones generales de la actualidad económica

I. **Introducción**

A lo largo del segundo semestre de 2020 la Unión ha tomado decisiones clave para afrontar la crisis sanitaria derivada de la pandemia del coronavirus, mediante la aprobación de unos estímulos fiscales comunes inéditos en la historia de la UE (el paquete «Next Generation EU» dotado con 750.000 millones de euros) y la ampliación de los estímulos monetarios por parte del Banco Central Europeo.

Los «Fondos de la Recuperación» se conseguirán con la emisión de Deuda Pública conjunta de una dimensión nunca vista, lo que muchos expertos han interpretado como un primer paso hacia una eventual Unión Fiscal.

La aprobación del Marco Financiero Plurianual 2021-2027 en Noviembre plantea la creación de nuevos impuestos europeos y una condicionalidad de protección del Estado de Derecho cuya aplicabilidad, rebajada por el veto de Hungría y Polonia, recaerá en el Tribunal de Justicia de la UE.

Asimismo, hubo que esperar al 24 de Diciembre para que se anunciase el Acuerdo Post-Brexit que, desde el 1 de Enero, establece la nueva relación comercial y económica de la UE-27 con el Reino Unido basada en el libre comercio de mercancías sin aranceles ni cuotas recíprocas.

During the second half of 2020 the Union has taken key decisions to face the sanitary crisis caused by the coronavirus pandemic, through the approval of an unprecedented common fiscal stimulus in the EU history

(the "Next Generation EU" pack of 750 billion euro) and the extension of the monetary stimulus on the part of the European Central Bank.

The "Recovery Funds" will be obtained through the issue of common Public Debt in a never seen scale, which has been interpreted by many experts as a first step towards an eventual Fiscal Union.

The adoption of the 2021-2027 Multiannual Financial Framework in November poses the possibility to create new European taxes and the conditionality to protect the Rule of Law, whose reduced implementation, because of the veto of Hungary and Poland, will be the responsibility of the EU Court of Justice.

Besides, it was necessary to wait until the 24th of December to have the announcement of the Post-Brexit Agreement which, as of the first of January, establishes the new commercial and economic relationship between the EU27 and the United Kingdom based in the free trade of goods without mutual tariffs and quotas.

II. **El estado de la integración**

1. *Los Fondos de la Recuperación, el Marco Financiero Plurianual 2021-2027 y la primera emisión de Deuda común del Plan de Emergencia.*

El 21 de Julio los Veintisiete alcanzaron un histórico acuerdo sobre los llamados «Fondos de recuperación» con los que la UE afrontará los devastadores efectos económicos de la crisis sanitaria, y que fueron bautizados simbólicamente como «Next Generation EU», en castellano «La UE de la próxima generación».

La aprobación de un estímulo económico de 750.000 millones de euros (390.000 en subvenciones a fondo perdido) constituía, en sí mismo, un paso histórico en la solidaridad europea y en el camino hacia la Unión Fiscal, ya que nunca se había acordado la emisión de Deuda conjunta de semejantes dimensiones.

En efecto, para conseguir estos fondos, la UE emitirá Deuda conjunta con el aval del presupuesto de la UE, basándose también en la recaudación de nuevos impuestos, como las nuevas tasas ecológicas (sobre el CO_2 o los plásticos), un impuesto digital o un impuesto a las grandes corporaciones.

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NEXT GENERATION EU («La UE de la próxima generación»)

Fuente: Comisión Europea
https://ec.europa.eu/info/sites/info/files/about_the_european_commission/eu_budget/mff_factsheet_agreement_en_web_20.11.pdf

En todo caso, y sin plantear condicionalidades en sentido estricto como las establecidas en los rescates de la crisis financiera, el acuerdo sí incluye, respecto al pilar principal de los Fondos, el llamado «Mecanismo de Recuperación y Resiliencia» (MRR o RRF, por sus siglas en inglés) un procedimiento de gobernanza de evaluación previa de los «planes nacionales de recuperación» y de valoración del «cumplimiento satisfactorio de los objetivos pertinentes».

Con una dotación global de 672.500 millones de euros (312.500 en ayudas y 360.000 en préstamos), los recursos de este MRR se destinarán a implementar las distintas reformas e inversiones planteadas por los Estados miembros en la medida en que contribuyan al cumplimiento de los objetivos marcados en el Semestre Europeo y se encuentren alineadas con las transiciones ecológica y digital marcadas por la UE.

Los planes nacionales deberán incluir, por tanto, proyectos que sigan las pautas establecidas en las «Recomendaciones Específicas por País» (CSR, por sus siglas en inglés) que la Comisión y el Consejo aprueban anualmente en el marco de la coordinación de política económica del Semestre Europeo y que se alineen, también, con las prioridades sectoriales que quedaron establecidas por la propia Comisión Europea en Septiembre.

En efecto, Bruselas identificó entonces siete áreas concretas hacia las que los Estados deberán dirigir los proyectos que incluyan en sus «planes nacionales de inversiones y reformas».

1) Energías renovables: Bruselas aconseja a los países que apuesten por poner en marcha cuanto antes tecnologías limpias con perspectivas de futuro, y acelerar el desarrollo y el uso de energías renovables.
2) Eficiencia energética: la Comisión también invita a que los planes nacionales incluyan proyectos de mejora de la eficiencia energética de los edificios públicos y privados.
3) Coche eléctrico: la tercera recomendación, también en clave de Economía verde, plantea que los países inviertan en el desarrollo de tecnologías limpias para acelerar el uso de un transporte sostenible, accesible e inteligente, de estaciones de carga y repostaje, y también la ampliación del transporte público.
4) Despliegue de banda ancha y 5G: en cuanto al desafío de la digitalización, una de las vertientes por las que canalizar las ayudas europeas es el despliegue de servicios de banda ancha rápida en todas las regiones y hogares, incluidas las redes de fibra y 5G.
5) Digitalización de la Administración: la segunda de las recomendaciones europeas en el ámbito digital tiene que ver con la digitalización de la Administración y los servicios públicos, incluidos los sistemas judicial y sanitario. Estas inversiones podrían ser particularmente útiles en algunos países de cara a facilitar la absorción de los fondos europeos.
6) Desarrollo de la nube: la Comisión sugiere aumentar las capacidades industriales europeas en materia de datos en la nube y el desarrollo de procesadores de máxima potencia, de última generación y sostenibles.
7) Reciclaje y Perfeccionamiento Profesionales: Bruselas pide a los países adaptar los sistemas educativos en apoyo de las competencias digitales y la educación, y la formación profesional a todas las edades.

Sobre la base de las Recomendaciones particulares dirigidas a cada país, y sobre la base, también, de estas áreas prioritarias (Economía Verde y Digital), los Estados han debido ir perfilando sus respectivos borradores de «planes de inversiones y reformas» que, necesariamente, deberán ser aprobados por la Comisión y el Consejo.

El objetivo es que, en efecto, las inversiones y las reformas estructurales «vayan de la mano» de manera coherente y garantizando un uso adecuado y eficiente de las ayudas europeas.

Posteriormente, en la fase de ejecución de los proyectos, se prevén una serie de procedimientos de supervisión que harían posible que, si uno o más Estados miembros considerasen que existen «desviaciones graves» en el cumplimiento de los planes, podrían solicitar un debate «exhaustivo» en el seno del Consejo Europeo, institución que, por consenso, podría paralizar la asignación de fondos.

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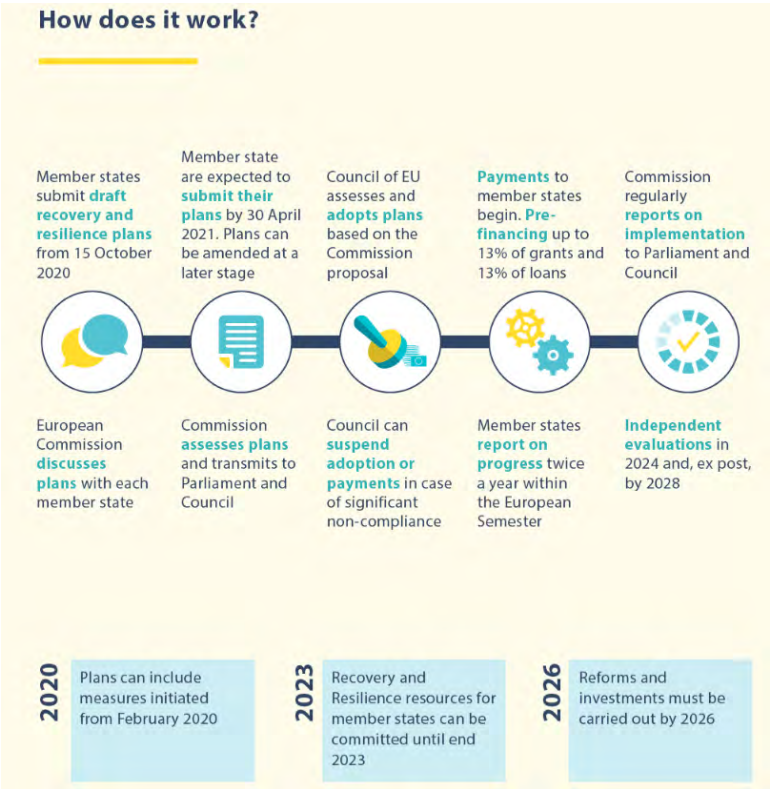


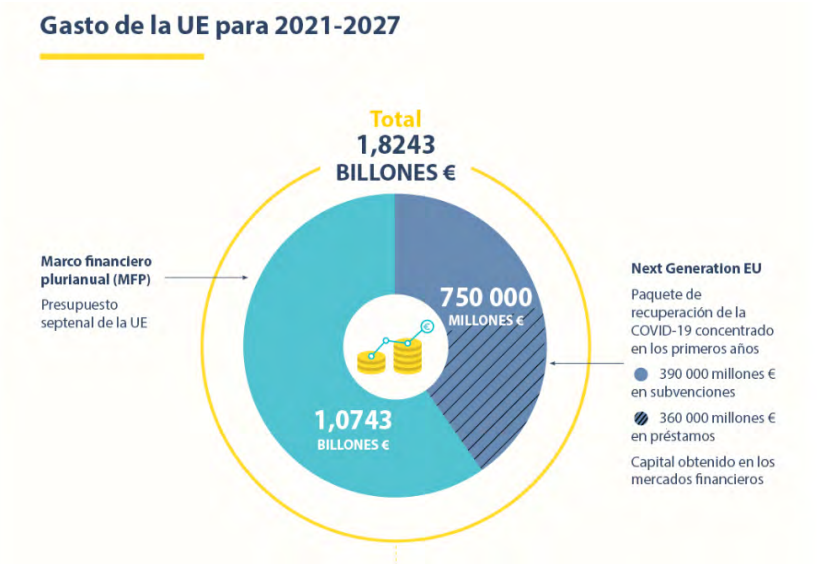
Funcionamiento del mecanismo de recuperación y resiliencia
(672.500 millones de euros)

Fuente: Consejo de la UE
https://www.consilium.europa.eu/es/infographics/20201006-recovery-resilience-rrf/

En todo caso, estos «Fondos de recuperación» forman parte del «Marco Financiero Plurianual 2021-27» de la UE, MFP, que establece la cuantía, el origen y el destino de los gastos de los Presupuestos anuales de la Unión en este horizonte 2021-27, de tal manera que serán precisamente estos presupuestos europeos los que actuarán como garantía para la emisión de la Deuda necesaria para conseguir los 750.000 millones previstos en el conjunto de la «Next Generation EU».

Fue en Noviembre cuando los Veintisiete alcanzaron finalmente un acuerdo con el Parlamento sobre las grandes cifras del mencionado MFP, con una cifra global de 1,0743 billones de euros, a los que se sumaban los 750.000 millones de los «Fondos de recuperación». Con la suma de ambas

cifras, 1,8243 billones de euros, la Unión se dotaba de un paquete financiero sin precedentes.



Marco financiero plurianual de la UE (201-2027)

Fuente: Consejo de la UE
https://www.consilium.europa.eu/es/infographics/recovery-plan-mff-2021-2027/

MFF 2021-2027 total allocations per heading

	MFF	NEXT GENERATION EU	TOTAL
1. Single Market, Innovation and Digital	132.8	10.6	143.4
2. Cohesion, Resilience and Values	377.8	721.9	1 099.7
3. Natural Resources and Environment	356.4	17.5	373.9
4. Migration and Border Management	22.7	-	22.7
5. Security and Defence	13.2	-	13.2
6. Neighbourhood and the World	98.4	-	98.4
7. European Public Administration	73.1	-	73.1
TOTAL MFF	**1 074.3**	**750.0**	**1 824.3**

Fuente: Comisión Europea
https://ec.europa.eu/info/sites/info/files/about_the_european_commission/eu_budget/mff_factsheet_agreement_en_web_20.11.pdf

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El acuerdo de Noviembre también incluía una «hoja de ruta» para la creación de nuevos Recursos Propios del presupuesto europeo. La Comisión se comprometía a presentar propuestas sobre un «mecanismo de ajuste en frontera de las emisiones de carbono» (gravámenes sobre las importaciones de productos que requieren grandes cantidades de energía, como el acero, el cemento o el aluminio, y que procedan de países cuyas políticas contra la emergencia climática sean menos exigentes que la europea) y sobre una «tasa digital» (la conocida como «tasa Google» aplicable a las grandes corporaciones tecnológicas) para Junio de 2021, con vistas a su aplicación a más tardar el 1 de Enero de 2023.

Bruselas revisará el actual régimen de comercio de derechos de emisión de la UE (el sistema europeo de reducción de las emisiones de gases de efecto invernadero) en la primavera de 2021, y que podría incluir su ampliación al transporte aéreo y marítimo. Y propondrá, también en este ámbito, un eventual recurso propio basado en este régimen de comercio de derechos a más tardar en Junio de 2021.

Además, propondrá nuevos recursos, entre los que podrían figurar un impuesto sobre las Transacciones Financieras y/o una contribución financiera vinculada al sector empresarial o a una nueva base imponible común del Impuesto de Sociedades, a más tardar en Junio de 2024.

Por otra parte, y como preludio de futuras operaciones vinculadas a los fondos «Next Generation EU», el 20 de Octubre la Comisión Europea se estrenó con una histórica colocación de Deuda común dirigida a financiar uno de los tres mecanismos de emergencia acordados en Abril, el Fondo destinado a apoyar a los países en sus programas dedicados a sostener las rentas de los trabajadores afectados por la pandemia, el conocido como «SURE» por sus siglas en inglés («*Support to mitigate Unemploymet Risks in an Emergency*»).

La colocación de 17.000 millones de euros en bonos a 10 y 20 años se saldó con una demanda de 233.000 millones, un éxito que fue ampliamente celebrado en Bruselas como prueba irrefutable de la confianza de los mercados hacia la propia Unión si se tiene en cuenta, en particular, que el programa SURE en su conjunto prevé movilizar un volumen máximo netamente inferior a la demanda registrada en esta primera emisión (100.000 millones de euros).

«Con esta operación, la Comisión Europea ha dado un primer paso para entrar en la primera división de los mercados mundiales de capital de deuda. El fuerte interés de los inversores y las condiciones favorables en las que se colocaron los bonos constituyen una prueba más del gran interés por los bonos de la UE», celebró el comisario de presupuestos Johannes Hahn.

De hecho, entre el SURE y el «Next Generation EU», la Comisión Europea prevé colocar 900.000 millones de Deuda mutualizada antes de que

finalice 2026. Esta será «la cantidad más alta en la historia de la Unión», señaló el comisario, que agregó que esto convertirá a la UE en el mayor emisor de deuda supranacional.

2. *La condicionalidad del Estado de Derecho en la recepción de fondos europeos*

El 5 de Noviembre las instituciones comunitarias alcanzaron un importante acuerdo político encaminado a condicionar el pago de fondos procedentes del presupuesto de la UE al respeto del Estado de Derecho. Con este nuevo «mecanismo de suspensión de los fondos», la UE pretendía, sin duda, reforzar y ser más coherente con sus valores y principios.

Artículo 2 del Tratado de la UE

«La Unión se fundamenta en los valores de respeto de la dignidad humana, libertad, democracia, igualdad, Estado de Derecho y respeto de los derechos humanos, incluidos los derechos de las personas pertenecientes a minorías. Estos valores son comunes a los Estados miembros en una sociedad caracterizada por el pluralismo, la no discriminación, la tolerancia, la justicia, la solidaridad y la igualdad entre mujeres y hombres»

La UE daba por fin un paso firme y con consecuencias reales en defensa de sus valores, más allá del procedimiento previsto en el artículo 7 del TUE que hasta la fecha tan sólo ha conseguido resultados simbólicos.

La Comisión ya había propuesto este mecanismo en 2018, pero desde entonces había quedado en el olvido y, de hecho, en su intento de recuperarlo había cedido respecto a su propuesta inicial planteando un sistema de votación que permitiera que el freno de las sanciones se consiguiera más fácilmente, con un número menor de votos de los países.

Sin embargo, en el Consejo Europeo celebrado el 19 de noviembre, Hungría y Polonia decidieron bloquear la aprobación del conjunto del MFP debido al citado mecanismo de vinculación del cumplimiento del Estado de Derecho a la recepción de fondos europeos, alegando que este vínculo amenazaba con socavar la autonomía y el poder de sus gobiernos.

Con esta postura, ambos países no sólo pretendían proteger sus derivas ultraconservadoras y autoritarias, sino que amenazaban con retrasar la puesta en marcha de los «Fondos de recuperación» pactados en Julio.

Así las cosas, fue preciso esperar hasta el 10 de Diciembre para conseguir revertir el veto de húngaros y polacos. Ambos gobiernos decidían finalmente aceptar la propuesta planteada por la canciller alemana Angela Merkel, en representación de la presidencia rotatoria del Consejo, a cambio

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de una declaración política que aportaba garantías a ambos países de que la Comisión no ejecutará el mecanismo hasta que se pronuncie el Tribunal de Justicia de la UE, tras el eventual recurso que, presumiblemente, los países implicados decidirían interponer ante la justicia europea por el inicio del procedimiento.

La declaración también dejaba claro que el nuevo Reglamento de protección del Estado de Derecho deberá aplicarse de forma «objetiva, justa e imparcial».

E incluía asimismo la promesa de que, si algún Estado decidiera impugnar el Reglamento nada más aprobarse, la Comisión no podría aplicar la suspensión de fondos hasta que se pronuncie el Tribunal de Luxemburgo. Y aunque esta «cesión» fue interpretada como una eventual invasión de las competencias del ejecutivo comunitario, lo cierto es que es muy posible que esta circunstancia no llegue a materializarse puesto que el grueso de los «Fondos de recuperación» no llegará a los Estados miembros hasta el segundo semestre de 2021.

De este modo, la UE neutralizaba el «fantasma» de un colapso presupuestario, que hubiera obligado a operar a partir de Enero con un presupuesto prorrogado, y daba luz verde a la movilización de los más de 1,8 billones de euros del nuevo marco presupuestario para los próximos años 2021-2027 incluidos los mencionados «Fondos de recuperación».

3. *Acuerdo post-Brexit en vigor el 1 de Enero de 2021.*

Las palabras de la presidenta de la Comisión Europea, Ursula Von der Leyen, «¡Por fin podemos dejar el Brexit atrás!», no podían ser más explícitas y acertadas respecto al sentimiento de alivio que provocó el anuncio del acuerdo Post-Brexit alcanzado el día de Nochebuena. Y es que durante los 4 años y medio transcurridos desde la celebración del referéndum de 2016 el divorcio ha llegado a ser una tortuosa y difícil travesía llena de desencuentros.

En todo caso, es importante destacar que, de la mano del negociador europeo, Michel Barnier, los Veintisiete se han mantenido firmes y unidos, y han dado sobradas muestras de paciencia y pragmatismo frente a un país sacudido por numerosos bandazos políticos, como las dimisiones de dos primeros ministros y de numerosos e importantes cargos del gobierno, las depuraciones de disidentes europeístas en el partido conservador o la renovación del disperso partido laborista.

El 1 de Enero de 2021 la UE estrenaba una nueva relación comercial y de cooperación con el Reino Unido en la que destaca el libre acceso de las mercancías a los Mercados, comunitario y británico respectivamente, sin

trabas arancelarias ni cuotas recíprocas que hubieran limitado de manera drástica el comercio.

Pero debe tenerse en cuenta que el acceso al Mercado europeo es una cuestión mucho más relevante para los intereses británicos de lo que significa el acceso al Mercado británico para las empresas europeas (según las cifras del comercio bilateral de 2019, las ventas británicas a los 27 significaron el 46 % del total mientras que las ventas de los 27 al Reino Unido apenas representaron el 14,9% de las exportaciones de la Unión con destinos extra-UE). Y ésta es, sin duda, la razón que explica que el Reino Unido haya debido aceptar, como parte del acuerdo, una serie de mecanismos vinculantes de vigilancia mutua y arbitraje que velarán por la competencia leal entre las partes.

El hecho de que uno de los argumentos que facilitó la victoria electoral de Boris Johnson en Diciembre de 2019 fuera la promesa de inversiones millonarias en el norte del país encendió las alarmas en Bruselas por la posibilidad de que Londres iniciara una política de ayudas masivas a las empresas británicas o que, en su caso, decidiera rebajas fiscales o normativas laborales o medioambientales que les sirviera de estímulo y les dotara de una ventaja competitiva lesiva para los intereses de las empresas europeas.

Es así como, para poder tener acceso al Mercado de los 27 sin cuotas ni aranceles, el Reino Unido no ha tenido más remedio que aceptar este marco de supervisión y solución de conflictos que podría derivar en la suspensión parcial del acuerdo o en la imposición de aranceles como medida de salvaguardia compensatoria por el eventual perjuicio sufrido. Aunque no se prevé la intervención del Tribunal de Justicia de la UE, Londres sigue vinculado a la legislación comunitaria.

Por otra parte, y dado que el Reino Unido abandona la Unión Aduanera europea, las aduanas en los intercambios recíprocos han reaparecido y con ellas, los trámites burocráticos derivados de declaraciones fiscales, aduaneras y de origen de los productos. Aunque no existan aranceles y cuotas mutuas, y aunque están previstos procedimientos simplificados para determinados casos, el comercio será más trabajoso y se ralentizará por el mero hecho de la existencia de las aduanas.

Respecto a la circulación de personas, el pacto permite la movilidad de ciudadanos europeos y británicos para visitas cortas de un máximo de 90 días seguidos con una suma límite de 180 días al año, sin necesidad de portar un visado. Pero respecto a las estancias de más larga duración, ninguna de las partes se ha comprometido a garantizarlas. El acuerdo, en efecto, no garantiza el derecho de los ciudadanos de la UE a entrar (con o sin visado), trabajar, residir o permanecer en Reino Unido, ni viceversa (el derecho equivalente para los ciudadanos británicos).

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De esta forma, el planteamiento general consiste en que, a partir del 1 de Enero, los ciudadanos europeos que quieran trabajar o vivir en Reino Unido deberán someterse a un nuevo sistema de inmigración por puntos y «competir» en igualdad de condiciones con los inmigrantes procedentes del resto del mundo. Y aunque podría negociarse un cambio en el futuro, ya no es aplicable con el Reino Unido el reconocimiento mutuo automático de determinadas cualificaciones profesionales, como médicos, enfermeras, dentistas, farmacéuticos o veterinarios.

El acuerdo garantiza la asistencia médica de los visitantes que la necesiten y la colaboración entre los sistemas de Seguridad Social, pero deja en manos de las compañías telefónicas la aplicación de tarifas de roaming. Y el programa de intercambios universitarios, Erasmus, ya no será aplicable en el Reino Unido.

Otra cuestión relevante del acuerdo Post-Brexit es que no contempla el sector de los servicios financieros. Si hasta el 1 de enero, las entidades de la City podían operar con libertad por todo el territorio comunitario con el llamado «pasaporte financiero», que reconoce automáticamente en toda la UE los permisos otorgados por los supervisores de uno de los Estados miembros, a partir de esta fecha sólo podrán hacerlo mediante el sistema de la equivalencia, el mismo que es aplicado a terceros países. Es cierto que, quizás en el futuro, la Unión podría aceptar los permisos otorgados por Londres, pero sólo si considerase que sus leyes tienen el mismo espíritu y logran el mismo resultado que la normativa europea. Las negociaciones en este ámbito, muy relevante para la Economía británica, están aún por empezar a definirse, porque Bruselas sostiene que todavía no tiene información suficiente para tomar algún tipo de decisión.

Así todo, el acuerdo entró en vigor el 1 de Enero de manera provisional tras la aprobación unánime de los 27 embajadores de los Estados miembros ante la UE el 28 de Diciembre. La ratificación en el Parlamento Europeo no fue posible en estos últimos días del año y es por ello que se retrasó hasta la celebración de su primera sesión plenaria de 2021, que previsiblemente tendrá lugar en la tercera semana de Enero.

El último paso deberá darlo el Consejo con la decisión final sobre la entrada en vigor definitiva del acuerdo. Si para el 28 de Febrero no se hubiera completado el proceso de ratificación, Bruselas y Londres deberían negociar una prórroga de la aplicación provisional.

El pacto post-Brexit es, sin duda, un acuerdo histórico, no sólo por ser el más ambicioso de todos los negociados por Bruselas con un país tercero sino por haberse logrado en un tiempo récord de 10 meses. La UE confía en que el Reino Unido sea, gracias al acuerdo, un socio preferente y leal.

4. *BCE: ampliación del Programa de Compras de Activos contra la Pandemia hasta 1,85 billones de euros*

Si durante el primer semestre del año el Banco Central Europeo aprobó la puesta en marcha de un programa extraordinario de compra masiva de Deuda para combatir los negativos efectos de la pandemia en las Economías de la Eurozona por un valor total de 1,35 billones de euros (750.000 millones en la decisión adoptada el 18 de Marzo y otros 600.000 millones el 4 de Junio), en su reunión de Diciembre, el Consejo de Gobierno del BCE aprobó una segunda ampliación del programa.

En esta ocasión, la autoridad monetaria de la Eurozona anunció un aumento en la compra de deuda de 500.000 millones de euros, con lo que el volumen global de este Programa de Compra de Activos contra la Pandemia («*Pandemic Emergency Purchase Programme*», PEPP, por sus siglas en inglés) alcanzaba la cifra de 1,85 billones de euros.

El BCE anunciaba, además, su decisión de extender el horizonte de las compras netas realizadas en el marco de este programa hasta «al menos finales de marzo de 2022», aunque, al igual que ya habían declarado sus responsables en ocasiones anteriores, el programa podría continuar hasta que el propio Banco «juzgue que la fase de crisis del coronavirus haya terminado». También reiteró su decisión, anunciada en los tramos anteriores del programa, de reinvertir la Deuda que vaya venciendo, ampliando el plazo de esta reinversión hasta «al menos finales de 2023», es decir un año más que el plazo fijado en Junio.

Tras su última reunión del año, el BCE también anunció su decisión de mantener sin cambios los tipos de interés de referencia para sus operaciones de financiación, que se situaban en el 0 %. De esta forma, la tasa de facilidad de depósito, porcentaje que cobra a los bancos por el exceso de liquidez a un día continuaría en el –0,50 % y la tasa de facilidad de crédito, interés que les cobra por préstamos a un día, seguiría en el 0,25 %. En su comunicado, el BCE explicaba que el precio del dinero «se mantendrá en sus niveles actuales o inferiores hasta que se observe una convergencia sólida de las perspectivas de inflación hasta un nivel suficientemente próximo, aunque inferior, al 2%».

«Las medidas de política monetaria adoptadas hoy contribuirán a mantener unas condiciones de financiación favorables durante el período de la pandemia, apoyando así el flujo de crédito a todos los sectores de la Economía, respaldando la actividad económica y salvaguardando la estabilidad de precios a medio plazo», aseguraba la institución en su comunicado de Diciembre.

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III. **Cuestiones generales de la actualidad económica**

1. *Pacto sobre la reforma del Mecanismo Europeo de Estabilidad*

El Eurogrupo aprobó el 30 de Noviembre la reforma del Mecanismo Europeo de Estabilidad, MEDE, el instrumento financiero permanente creado en 2012 para rescatar a los países del Euro en dificultades.

Con este acuerdo los ministros de Economía y Finanzas de la Eurozona aprobaban atribuir al MEDE más competencias en futuros rescates y, también, atribuirle más responsabilidades en la supervisión fiscal de los países, una competencia que compartirá con la Comisión Europea.

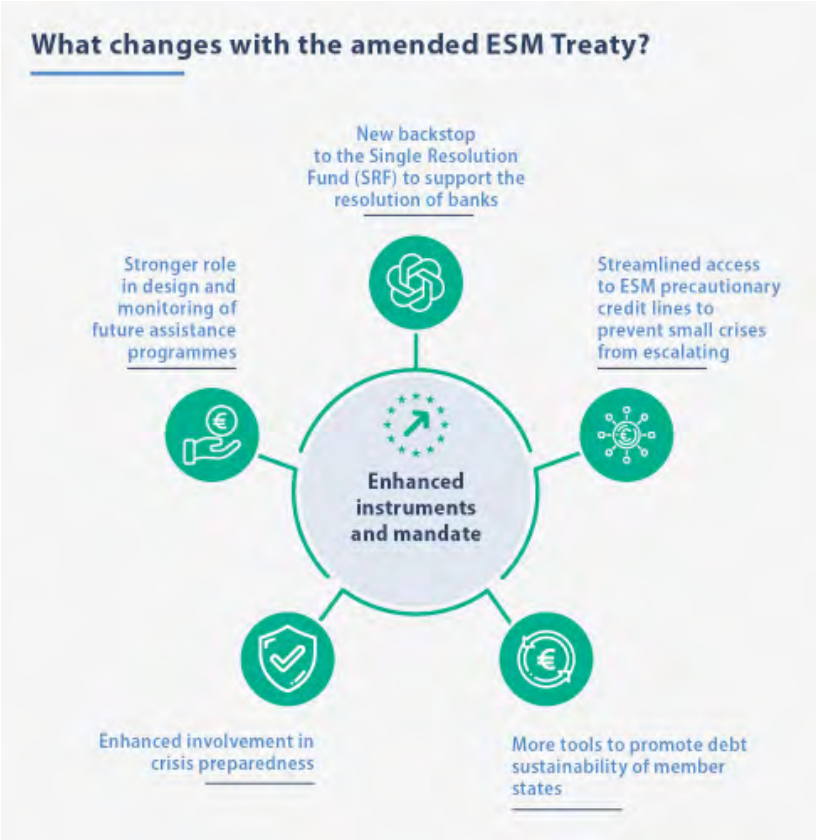
El MEDE mejorará el acceso a sus líneas de crédito preventivas y asumirá más responsabilidades en los rescates de países de la Eurozona en dificultades. Y, por otra parte, el Mecanismo se convertirá, como estaba previsto, en el instrumento de último recurso del Fondo Único de Resolución, FUR, destinado a financiar mediante la concesión de créditos, la quiebra de las entidades financieras en el marco del Mecanismo Único de Resolución (MUR) de la Unión Bancaria.

Esta nueva función del MEDE podría comenzar a ser operativa a finales de 2022, dos años antes de la previsión anterior, si se demuestran progresos suficientes en la reducción de los riesgos bancarios. Esta última era, en efecto, una condición fundamental planteada por los países más ortodoxos, como Alemania, Países Bajos o Finlandia.

En palabras del ministro de finanzas alemán, Olaf Scholz, «la reforma del MEDE refuerza el euro y a todo el sector bancario europeo porque estamos haciendo la Eurozona aún más robusta frente a los ataques de los especuladores; al mismo tiempo, adelantamos la red de seguridad para el Fondo de Resolución bancaria dos años, haciendo a los bancos europeos más resilientes y apoyando a la Economía real».

«Es una herramienta de última instancia, una red adicional que complementará los pilares de resolución de la Unión Bancaria y que garantizará que la caída de un banco no dañe a toda la Economía ni cree inestabilidad financiera», señaló, por su parte, el presidente del Eurogrupo Paschal Donohoe.

Tras la firma del acuerdo, éste deberá ser ratificado por los Diecinueve Estados miembros de la Unión Monetaria Europea para que el Tratado enmendado del MEDE pueda entrar en vigor en 2021 y, de esta manera, la Junta de Gobernadores del Mecanismo pueda, finalmente, dar los pasos necesarios para activar la red de seguridad bancaria a principios de 2022.



Fuente: Consejo de la UE
https://www.consilium.europa.eu/es/infographics/reform-of-the-european-stability-mechanism-esm/

2. *Acuerdo UE – China sobre Inversiones*

Tras la celebración de una cumbre extraordinaria por videollamada que reunió a los presidentes de la Comisión y el Consejo Europeo, Ursula Von der Leyen y Charles Michel, con el presidente de China Xi Jinpin, además del francés Emmanuel Macron y la canciller alemana Angela Merkel, la Unión Europea cerró en Diciembre un acuerdo de Inversiones con China con el que pretende mejorar el acceso de los inversores europeos en el mercado chino .

Gracias a este Tratado, cuyas negociaciones han durado casi siete años, es previsible que se eliminen las actuales barreras que frenan la inversión

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de empresas europeas en China en muy diversos sectores, como el del automóvil o la biotecnología.

Además, el pacto aborda problemas subyacentes en la política económica china como la competencia desleal derivada de ayudas de Estado, el control estatal de empresas y las transferencias de tecnología forzosas.

Es así como, según diferentes fuentes comunitarias, el acuerdo logrará avances en importantes puntos de fricción como el acceso al mercado financiero para las empresas europeas, el nivel de transparencia en las reglas que regulan las empresas públicas o las ayudas de estado, además de determinadas cuestiones relacionadas con la propiedad intelectual o la mencionada transferencia forzada de tecnologías.

También apuntaban estas fuentes que el pacto, que contribuirá a reequilibrar las relaciones comerciales y las inversiones, incluye disposiciones relevantes sobre el desarrollo sostenible, cuestiones climáticas y medioambientales y estándares laborales.

Para China, el acuerdo podría allanar la negociación hacia un acuerdo de libre comercio con la UE, algo que Pekín demanda desde hace años pero que la UE rechaza mientras no exista antes un acuerdo de Inversiones como el firmado en Diciembre.

A pesar de que la ley china que restringe la autonomía de Hong Kong ha provocado severas críticas en toda Europa, y aunque la UE ha acusado a Pekín de desinformación sobre la pandemia del coronavirus, la Unión ha mostrado en los últimos meses su determinación para buscar oportunidades económicas en Asia, no en vano China es el segundo socio comercial de la UE, con intercambios de 1.000 millones de euros al día.

En todo caso, para que el acuerdo entre en vigor será preciso que supere el proceso de ratificación en el Parlamento Europeo y en las Asambleas nacionales de los Estados miembros.

3. *Competencia: Sentencia sobre el pacto fiscal Irlanda-Apple y presentación de un Plan contra la evasión fiscal en la UE*

El Tribunal de Justicia de la UE publicó, el 15 de Julio, una sentencia que revocaba la decisión de la Comisión en relación con el pacto fiscal entre Irlanda y la multinacional Apple y por la que Bruselas, en 2016, instaba a la tecnológica a devolver a Dublín 13.000 millones de euros, al considerar la ventaja fiscal concedida a Apple como una ayuda ilegal contraria a la libre competencia.

De hecho, en Septiembre de 2018 Apple ya había reembolsado a Irlanda un total de 14.300 millones de euros, 13.100 en concepto de devolución de la ayuda considerada ilegal y 1.200 por intereses. Esta suma se en-

cuentra, desde entonces, depositada en una cuenta del gobierno irlandés a la espera de una sentencia firme y definitiva.

La decisión de Luxemburgo, que significaba un revés sin precedentes para el ejecutivo comunitario y, en particular, para la comisaria danesa responsable de la Competencia, Margrethe Vestager. Se fundamentaba en el argumento de que la Comisión no había logrado demostrar que existía una ventaja «a los efectos de la norma europea», es decir, que no había demostrado suficientemente que el pacto entre Irlanda y Apple fuera una ayuda económica selectiva, resultado de una decisión discrecional del gobierno irlandés.

El Tribunal no cuestionaba la estrategia global de la Comisión en materia de pactos fiscales selectivos, pero sí señalaba que para anularlos es preciso demostrarlos.

Vestager señaló en un comunicado, tras conocer la sentencia, que «si los Estados miembros otorgan a las empresas multinacionales ventajas fiscales que no están disponibles para sus rivales, esto perjudica la competencia leal en la UE. También priva al erario público y a los ciudadanos de fondos paras inversiones muy necesarias, y cuya necesidad es aún más aguda en tiempos de crisis». También destacaba que la Comisión continuará analizando medidas fiscales agresivas para analizar si son ayudas estatales ilegales, y apuntó hacia la necesidad de «avanzar en un cambio en las filosofías corporativas y en la legislación para abordar las lagunas y garantizar la transparencia».

De hecho, en los últimos años el Tribunal de Luxemburgo ha tomado decisiones diferentes en relación con los pactos fiscales. También rechazó una decisión similar de la Comisión respecto a Starbucks y la devolución de 20 millones de euros a Holanda. Pero, en cambio, sí avaló que Fiat devolviera 30 millones a Luxemburgo.

Sin embargo, y dado que, a partir de la sentencia de Julio, las partes implicadas podían recurrirla en un plazo de dos meses y diez días, no pasó mucho tiempo hasta que el 25 de Septiembre Bruselas anunciara dicho recurso, denunciando la existencia de «errores jurídicos» en el fallo de Luxemburgo, que podrían tener que ver con decisiones anteriores del Tribunal en cuestiones similares, y apuntando también al hecho de que la sentencia de Julio «generaba ciertas dudas en lo referente a las normas aplicables sobre las ayudas estatales en materia fiscal».

Coincidiendo con la sentencia de Luxemburgo, el mismo 15 de Julio se hizo público un plan de la Comisión para combatir la evasión fiscal en la UE, consistente en un paquete de 25 medidas dirigidas a combatir el «escándalo» de la evasión fiscal que, aseguraban los comisarios Dombrovskis y Gentiloni, cuesta 150.000 millones de euros al año a la UE (más de 35.000 millones de ingresos al año por elusión en el Impuesto de Socie-

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dades, en torno a 46.000 millones en Impuestos a personas físicas y unos 50.000 millones en el IVA transfronterizo). Bruselas proponía en el paquete legislativo mejoras en la gobernanza fiscal y medidas de simplificación en algunas normativas.

4. *Competencia: doble acusación a Amazon por el uso de datos de sus competidores y por el trato preferente otorgado a determinados vendedores independientes*

La Comisión Europea anunció en Noviembre el inicio de una investigación contra Amazon por haber infringido las normas comunitarias de competencia al utilizar, de manera sistemática y en su beneficio, los datos privados de los vendedores independientes que comercializan sus productos a través de la plataforma.

La comisaria Vestager señalaba que la Dirección General que dirige había llegado a la conclusión preliminar de que la tecnológica «había abusado ilegalmente de su posición dominante como proveedor de servicios de mercado por haber usado datos confidenciales a gran escala para competir con los minoristas».

La acusación contra el gigante del comercio online se centraba, por tanto, en la utilización de información no pública de los vendedores independientes que utilizan su «Marketplace» en beneficio de su propio negocio minorista que compite directamente con dichos vendedores.

En su explicación, la Comisión incidió en el hecho de que Amazon, por un lado, proporciona la plataforma para que cualquier vendedor pueda comercializar sus productos en línea pero, al mismo tiempo, también es un fabricante que actúa como minorista y compite, por tanto, con estos vendedores externos. Es en este esquema como se explica que la multinacional tiene acceso a «grandes cantidades de datos no públicos de vendedores», como el número de unidades de producto pedidas, el número de visitas a las ofertas o datos relacionados con los envíos. Estos datos, que aparecen en los sistemas automatizados de Amazon podrían estar siendo utilizados por el gigante del comercio online para ajustar sus ofertas minoristas y las decisiones comerciales estratégicas.

Asimismo, la Comisión presentaba una segunda investigación sobre Amazon por el posible tratamiento preferencial que la multinacional podría estar dando a sus propias ofertas, ya que, según indicó la comisaria Vestager, «las condiciones de competencia en la plataforma de Amazon tienen que ser justas».

En este segundo expediente la Comisión analizará también los criterios que utiliza Amazon para seleccionar los productos que aparecen en su Buy

Box, que permite a los clientes agregar artículos de vendedores específicos directamente en los carritos de compra. Y también examinará si permitir a los vendedores ofrecer productos a los usuarios Prime, el programa de suscripción de Amazon, supone un tratamiento preferencial y discriminatorio a los vendedores que usan los servicios de logística y distribución de Amazon.

«Nuestra preocupación es que Amazon pueda presionar artificialmente a los vendedores para que utilicen sus propios servicios relacionados. Queremos asegurarnos de que los minoristas puedan decidir cambiarse a mercados competidores sin verse atrapados en el ecosistema de Amazon», recalcó Vestager.

5. *Competencia: propuestas normativas sobre los Servicios y Mercados Digitales*

La comisaria Vestager presentó en Diciembre dos propuestas legislativas para contener las prácticas abusivas, contrarias a la normativa de libre competencia, que desarrollan las grandes multinacionales tecnológicas, las conocidas como «Ley de Servicios Digitales» (DSA, por sus siglas en inglés) y la «Ley de Mercados Digitales» (DMA).

La DSA impondría deberes de transparencia a las empresas tecnológicas y la obligación de eliminar contenidos ilegales en las plataformas online, desde la difusión de propaganda terrorista que incite al odio hasta las violaciones de los derechos de autor. También facilitaría el acceso a los supervisores a los datos «que sean necesarios para supervisar y evaluar el cumplimiento» del Reglamento. En caso de incumplimiento, las empresas podrían ser castigadas con multas que podrían llegar al 6% de su facturación global.

La responsabilidad de comprobar que las tecnológicas cumplan la normativa recaería, según la propuesta, sobre un coordinador nacional de Servicios Digitales, que sería quien accediera a los datos de las plataformas. Las corporaciones de mayor dimensión deberían someterse a una auditoría anual independiente, en la que se efectuaría una evaluación de riesgos en materia de derechos fundamentales, discriminación, libertad de expresión o manipulación de contenidos. A partir de estos informes, las compañías deberían adoptar las medidas correctivas oportunas, ya sea con códigos de conducta, con la moderación de contenidos o con la modificación de los términos y condiciones del servicio.

La DMA, en paralelo, trataría de reforzar el control de la UE sobre el dominio de mercado conseguido por las grandes corporaciones tecnológicas. Por ello, la Comisión pretende imponer ciertas reglas para las «gate-

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keepers», es decir, las empresas que se han convertido en puerta de entrada inevitable hacia la red.

A estas compañías, que según la Comisión pueden acabar convirtiéndose en «legisladores privados» en el mundo digital dictando las reglas del mercado, Bruselas pretendería imponerles una normativa específica.

En particular, trataría de impedir que esas empresas usen los datos de los clientes en su beneficio, bloqueen a usuarios dependiendo del software que tengan instalado o decidan desinstalar, o restrinjan el acceso a quienes hayan adquirido productos fuera de su plataforma.

Y plantearía también un régimen de sanciones que podría llegar hasta el 10% de la facturación global o al desmantelamiento del grupo mediante desinversiones o la separación de unidades de negocio, en caso de incumplimientos sistemáticos.

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