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Los derechos humanos en la era digital: el reto europeo

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Instituto de Estudios Europeos

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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.

Capítulo u otra parte de un libro

—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, int roducción, XXXIII.

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

Libro publicado electrónicamente

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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.

Libro consultado en línea

—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-salvadorgutierrez-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/.

2. Artículo de revista

2.1. Artículo en una revista impresa

Para la nota a pie de página o final de capítulo, si procede, se cita el número concreto de la página consultada. En la bibliografía, se deben indicar los números de comienzo y fin del artículo completo.

—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.

7. Sitio web

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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.

8. Entrada de blog o comentario

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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.

9. Comunicación personal y entrevista

Las referencias a conversaciones, entrevistas, correos electrónicos, mensajes de texto o similares, normalmente se incluyen en el texto («En conversación telefónica con el autor el 7 de julio de 2010, el líder sindicalista admitió que…») o se dan en nota; raramente se incluyen en la bibliografía:

—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.

10. Obra registrada en bases de datos

Para los documentos localizados mediante bases de datos o repositorios, se indica el nombre de la base de datos y, entre paréntesis, el número de identificación proporcionado o recomendado por la base de datos:

Choi, Mihwa. «Contesting *Imaginaires* in Death Rituals during the Northern Song Dynasty». Tesis doctoral. Universidad de Chicago, 2008. ProQuest (AAT 3300426).

11. Documento legal y jurisprudencia

En los documentos legales y públicos, las menciones a la documentación se hacen generalmente en el cuerpo del texto. En otras materias, especialmente académicas, que usan como fuente documental textos legales y públicos, se mencionan tanto en el cuerpo del texto como en nota.

—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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Presentación
Introduction

Presentación
Los derechos humanos en la era digital: el reto europeo

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Resumen: El orden democrático liberal contemporáneo atraviesa actualmente un periodo de profunda introspección y presión externa, caracterizado por un desafío sistémico a los valores fundamentales que definen el proyecto europeo. Este número especial de la prestigiosa revista *Cuadernos Europeos de Deusto*, ampliamente reconocida como una de las mejores y más influyentes publicaciones especializadas en estudios europeos y cuestiones jurídicas, reúne una colección de trabajos académicos que exploran el precario equilibrio entre la resiliencia institucional interna y la creciente amenaza de la injerencia extranjera y la inconsistencia normativa.

La investigación aquí presentada es el resultado de una importante colaboración académica entre el Observatorio Tomás Moro de Relaciones Internacionales de la Universidad CEU Fernando III de Sevilla y el Las Casas Institute, Blackfriars Hall, Universidad de Oxford. Las ideas contenidas en este volumen se desarrollaron meticulosamente a través de dos seminarios especializados en línea celebrados en mayo de 2025 y noviembre de 2025, respectivamente, que proporcionaron un foro riguroso para el análisis multidisciplinar de la nueva situación de seguridad a la que se enfrenta la Unión Europea y el orden mundial en general.

Estos seminarios sirvieron de plataforma crítica para la revisión técnica y el debate previos a la presentación de los artículos finales. Los resultados subrayan la necesidad vital de un enfoque interdisciplinario para abordar los complejos retos que la digitalización y las crisis geopolíticas actuales plantean al sistema jurídico y político europeo, en particular en lo que respecta a la protección de los derechos humanos.

Esta publicación postula que el Estado de Derecho, la democracia y los derechos humanos forman un triángulo inseparable en el que la ausencia o la erosión de cualquiera de sus elementos hace que todo el marco constitucional resulte ineficaz. En el contexto europeo, no se trata de principios meramente abstractos, sino que representan el ADN mismo de la Unión. Sin embargo, como demuestran las siguientes contribuciones, este triángulo interdependiente se encuentra sometido a una presión considerable. Observamos una doble realidad en la que la Unión es pionera en la creación de marcos jurídicos sofisticados para proteger su integridad digital y judicial, al tiempo que lucha por mantener la credibilidad de sus reivindicaciones normativas en la escena mundial.

Palabras clave: Unión Europea, estado de derecho, derechos humanos, democracia, desinformación, independencia judicial.

La primera contribución a este número especial corre a cargo de **Susana Sanz Caballero**, Catedrática de Derecho Internacional Público y Catedrática Jean Monnet en la Universidad Cardenal Herrera CEU. En su artículo titulado «**The Fragility of Human Rights in Times of Rule of Law Erosion: The Case of Judicial Independence in America and Europe**», examina cómo el declive del Estado de Derecho desencadena directamente una cascada de violaciones de los derechos humanos. Sanz Caballero establece que la independencia judicial no es un privilegio para los jueces, sino una garantía fundamental para los ciudadanos que asegura la igualdad ante la ley, juicios justos y protección contra el uso arbitrario del poder ejecutivo. El artículo documenta una inquietante tendencia al retroceso del Estado de Derecho a ambos lados del Atlántico, citando ejemplos como el uso arbitrario de los indultos presidenciales en Estados Unidos para proteger a aliados políticos y la Ley de Amnistía de 2024 en España, que los críticos describen como una forma de autoamnistía que desafía la autoridad judicial. La autora también detalla el creciente acoso a los jueces en Polonia y España, donde se utilizan campañas públicas de desacreditación y acusaciones de guerra jurídica para presionar a los magistrados que investigan casos cercanos a los círculos políticos. En última instancia, advierte que cuando el poder judicial es capturado o debilitado, el sistema constitucional en general fracasa, dejando a las sociedades vulnerables a la impunidad y la corrupción.

El segundo artículo, titulado «**Multilayered Democracy, Media Freedom and Online Platforms**», está firmado por **Claes Granmar**, doctor en Derecho, y profesor titular de Derecho Europeo en la Facultad de Derecho de la Universidad de Estocolmo. Granmar explora la respuesta institucional proactiva a estas amenazas a través del Escudo de la Democracia Europea, puesto en marcha a finales de 2025. Sostiene que la Unión Europea se ha convertido en el principal garante de la democracia en Europa al utilizar sus competencias en el mercado interior para promover la formación de opiniones informadas como base de la resiliencia democrática. Esto representa una reconceptualización de la democracia que se basa en los derechos fundamentales y el Estado de Derecho, en lugar de en meras mayorías parlamentarias. El autor ofrece un análisis detallado de la Ley de Servicios Digitales, la Ley Europea de Libertad de los Medios de Comunicación y la Ley de Transparencia y Orientación de la Publicidad Política, ilustrando cómo estos instrumentos transponen la libertad de expresión a la regulación de los medios de comunicación y las plataformas. Este marco es esencial para reprimir la manipulación y la injerencia extranjeras en la información, al tiempo que protege la integridad de los proveedores de medios de comunicación que actúan bajo responsabilidad editorial.

La dimensión geopolítica de esta lucha es analizada más a fondo por **Carlos Espaliú Berdud**, Catedrático de Derecho Internacional Público,

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Relaciones Internacionales y Derecho de la Unión Europea en la Universidad CEU Fernando III, director del observatorio Tomás Moro de Relaciones Internacionales e investigador del Las Casas Institute, Blackfriars Hall, Universidad de Oxford. En su obra, «**Saint George and the New Dragon: The Fight of the European Union Against Disinformation Sponsored by Foreign States**», sigue la evolución de la lucha europea contra las campañas de desinformación patrocinadas por Estados, en particular Rusia y China. Espaliú Berdud describe una transición de una guerra en el papel, caracterizada por leyes blandas y códigos voluntarios, a una guerra real, definida por instrumentos legales estrictos y un régimen de sanciones sólido. Destaca la importancia del marco de sanciones de 2024, que permite la congelación de fondos y la prohibición de entrada a personas y entidades responsables de actividades desestabilizadoras. En la actualidad, este régimen ha sancionado a 47 personas y 15 entidades y ha suspendido las licencias de 27 medios de comunicación respaldados por el Kremlin. El autor también participa en un debate jurídico teórico sobre el derecho a la legítima defensa en virtud del artículo 51 de la Carta de las Naciones Unidas, en el que analiza si las campañas de desinformación catastróficas podrían considerarse equivalentes a un ataque armado.

La última contribución ofrece una evaluación externa crítica de la identidad normativa de la Unión Europea y está firmada conjuntamente por **Sonia Boulos** e **Isaias Barrenada Bajo**. Sonia Boulos es profesora titular de Derecho Internacional de los Derechos Humanos en la Facultad de Derecho y Relaciones Internacionales de la Universidad Nebrija. Isaias Barrenada Bajo es profesor de Relaciones Internacionales en la Facultad de Ciencias Políticas y Sociología de la Universidad Complutense de Madrid. En su artículo, «**Preaching Norms, Perverting Law, and Trading Arms: Palestine as a Litmus Test for Normative Power Europe**», los autores sostienen que la situación en Palestina y Gaza pone de manifiesto una profunda crisis moral y normativa. Introducen el concepto de subalternidad jurídica para describir cómo los palestinos están reconocidos formalmente como titulares de derechos, pero se les niega estructuralmente la protección del derecho internacional. El artículo critica la colisión entre los compromisos proclamados por la Unión en materia de derechos humanos y sus prácticas externas, como la continua exportación de armas a Israel por parte de Estados miembros como Alemania, a pesar de las conclusiones de la Corte Internacional de Justicia sobre un riesgo plausible de genocidio. Esta brecha cada vez mayor entre la retórica y la acción crea un déficit de legitimidad que amenaza con reestructurar la Unión, pasando de ser un líder normativo a un actor cómplice a los ojos de la mayoría mundial.

En conjunto, estos cuatro artículos retratan a una Unión Europea en una encrucijada, que se esfuerza por construir una sofisticada fortaleza regula-

dora para proteger su integridad digital y judicial, al tiempo que lucha por mantener la credibilidad de sus reivindicaciones normativas en la escena mundial. La supervivencia de la gobernanza democrática en el siglo XXI depende de la protección vigilante del poder judicial y de la integridad del espacio informativo, junto con un compromiso firme y coherente con los principios que definen el alma de la Unión.

Este número especial destaca la importancia vital de la colaboración entre el Observatorio Tomás Moro de Relaciones Internacionales y el Instituto Las Casas. Creemos que las perspectivas multidisciplinares que aportan estos distinguidos académicos ofrecen una hoja de ruta esencial para comprender la supervivencia de la gobernanza democrática en la era contemporánea. Es un honor que este esfuerzo colectivo sea acogido en esta ocasión por la revista *Cuadernos Europeos de Deusto*, cuyo prestigio como referente de los estudios europeos garantiza que estos análisis críticos lleguen al amplio y especializado público que merecen.

Por último, me gustaría dar las gracias a la directora de la revista, Beatriz Pérez de las Heras, por haber tenido la amabilidad de proponerme como editor de este número especial de *Cuadernos Europeos de Deusto*.

Sobre el autor

Carlos Espaliú ha sido becario de investigación del Ministerio de Educación (1995-1998); profesor de la Universidad de Navarra (1998-2000); Letrado de la Corte Internacional de Justicia (2000-2006); investigador Ramón y Cajal en la Universidad de Córdoba (2007-2012) ; profesor, vicedecano de la Facultad de Derecho y Director del Instituto Carlomagno de Estudios Europeos en la Universitat Internacional de Catalunya (2012-2018); Catedrático de Derecho Internacional Público y de la Unión Europea, Secretario General, así como Investigador Principal del Grupo de Seguridad, Gestión de Riesgos y Conflictos (SEGERICO) y Director del Centro de investigación en Seguridad, Estado de Derecho y Altas Tecnologías, en la Universidad Nebrija de Madrid (2018-2024). Desde 2024, es Catedrático de Derecho Internacional Público, Relaciones Internacionales y Derecho de la Unión Europea de la Universidad CEU Fernando III en Sevilla. Asimismo, es Research Fellow en el Las Casas Institute, Blackfriars Hall, University of Oxford y profesor visitante de la Universidad para la Paz de las Naciones Unidas, en Costa Rica. También cuenta con tres sexenios de investigación del CNEAI. En materia de derechos humanos, entre otros trabajos, ha coordinado en *Cuadernos Europeos de Deusto*, el Núm. 02 (2019): Número especial. «Identidad Europea: raíces y alcance».

Introduction
Human rights in the digital age: the european challenge

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Abstract: The contemporary liberal democratic order is currently navigating a period of profound introspection and external pressure, characterized by a systemic challenge to the core values that define the European project. This special issue of the prestigious journal *Cuadernos Europeos de Deusto*, which is widely recognized as one of the best and most influential specialized publications for European studies and legal questions, brings together a collection of scholarly works that explore the precarious balance between internal institutional resilience and the growing threat of foreign interference and normative inconsistency.

The research presented here is the result of a significant academic partnership between the **Tomas Moro Observatory of International Relations** at the **Universidad CEU Fernando III** in Seville and the **Las Casas Institute**, **Blackfriars Hall**, **University of Oxford**. The insights contained in this volume were meticulously developed through two specialized online seminars held in May 2025 and November 2025 respectively, providing a rigorous forum for the multidisciplinary analysis of the new security situation facing the European Union and the broader global order.

These seminars served as a critical platform for technical review and debate prior to the submission of the final articles. The results underscore the vital need for an interdisciplinary approach to address the complex challenges that digitalization and current geopolitical crises pose to the European legal and political system, particularly regarding the protection of human rights.

This publication posits that the rule of law, democracy, and human rights form an inseparable triangle where the absence or erosion of any single element renders the entire constitutional framework ineffective. In the European context, these are not merely abstract principles but represent the very DNA of the Union. However, as the following contributions demonstrate, this interdependent triangle is under significant strain. We see a dual reality where the Union is pioneering sophisticated legal frameworks to protect its digital and judicial integrity while simultaneously struggling to maintain the credibility of its normative claims on the world stage.

Keywords: European Union, rule of law, human rights, democracy, disinformation, judicial independence.

The first contribution to this special issue is provided by **Susana Sanz Caballero**, who is Full Professor of Public International Law and Jean Monnet Chair at the Universidad Cardenal Herrera CEU. In her article titled "**The Fragility of Human Rights in Times of Rule of Law Erosion: The Case of Judicial Independence in America and Europe**", she examines how the decline of the rule of law directly triggers a cascade of human rights violations. Sanz Caballero establishes that judicial independence is not a privilege for judges but a fundamental safeguard for citizens to ensure equality before the law, fair trials, and protection against the arbitrary use of executive power. The article documents a disturbing trend of rule of law backsliding across the Atlantic, citing examples such as the arbitrary use of presidential pardons in the United States to protect political allies and the 2024 Spanish Amnesty Law, which critics describe as a form of self-amnesty that challenges judicial authority. The author also details the increasing harassment of judges in Poland and Spain, where public campaigns of discreditation and accusations of lawfare are used to pressure magistrates investigating cases close to political inner circles. Ultimately, she warns that when the judiciary is captured or weakened, the broader constitutional system fails, leaving societies vulnerable to impunity and corruption.

The second article, titled "**Multilayered Democracy, Media Freedom and Online Platforms**", is authored by **Claes Granmar**, who is LL.D., DIHR, and Associate Professor (Docent) of European Law at the Faculty of Law, Stockholm University. Granmar explores the proactive institutional response to these threats through the European Democracy Shield launched in late 2025. He argues that the European Union has become the main guarantor of democracy in Europe by utilizing its internal market competences to promote informed opinion-formation as the bedrock of democratic resilience. This represents a reconceptualization of democracy that is anchored in fundamental rights and the rule of law rather than mere parliamentary majorities. The author provides a detailed analysis of the Digital Services Act, the European Media Freedom Act, and the Transparency and Targeting of Political Advertising Act, illustrating how these instruments transpose freedom of expression into the regulation of media and platforms. This framework is essential for repressing foreign information manipulation and interference while protecting the integrity of media providers who act under editorial responsibility.

The geopolitical dimension of this struggle is further analyzed by **Carlos Espaliú Berdud**, who is Full Professor of Public International Law and International Relations at the Universidad CEU Fernando III and Research Fellow at the Las Casas Institute, Blackfriars Hall, University of Oxford. In his work, "**Saint George and the New Dragon: The Fight of the European Union Against Disinformation Sponsored by Foreign**

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States", he tracks the evolution of the European fight against state-sponsored disinformation campaigns, particularly from Russia and China. Espaliú Berdud describes a transition from a paper war characterized by soft law and voluntary codes to a real war defined by hard-law instruments and a robust sanctions regime. He highlights the significance of the 2024 sanctions framework, which allows for the freezing of funds and the prohibition of entry for individuals and entities responsible for destabilizing activities. Currently, this regime has sanctioned 47 individuals and 15 entities and suspended the licenses of 27 Kremlin-backed media outlets. The author also engages in a theoretical legal debate regarding the right to self-defense under Article 51 of the UN Charter, exploring whether catastrophic disinformation campaigns could ever be considered equivalent to an armed attack.

The final contribution offers a critical external evaluation of the European Union's normative identity and is co-authored by **Sonia Boulos** and **Isaias Barrenada Bajo**. Sonia Boulos is Associate Professor of International Human Rights Law at the Faculty of Law and International Relations, Nebrija University. Isaias Barrenada Bajo is a Lecturer in International Relations at the Faculty of Political Sciences and Sociology, Universidad Complutense de Madrid. In their article, "**Preaching Norms, Perverting Law, and Trading Arms: Palestine as a Litmus Test for Normative Power Europe**", the authors argue that the situation in Palestine and Gaza serves as a revealer of a profound moral and normative crisis. They introduce the concept of legal subalternity to describe how Palestinians are formally recognized as rights-holders but are structurally denied the protections of international law. The article critiques the collision between the Union's proclaimed commitments to human rights and its external practices, such as the continued export of weapons to Israel by Member States like Germany despite the findings of the International Court of Justice regarding a plausible risk of genocide. This widening gap between rhetoric and action creates a legitimacy deficit that threatens to reframe the Union from a normative leader into a complicit actor in the eyes of the global majority.

Together, these four articles portray a European Union at a crossroads, striving to build a sophisticated regulatory fortress to protect its digital and judicial integrity while struggling to maintain the credibility of its normative claims on the world stage. The survival of democratic governance in the twenty-first century depends on the vigilant protection of the judiciary and the integrity of the information space, coupled with a steadfast and consistent commitment to the principles that define the Union's soul.

This special issue highlights the vital importance of the collaboration between the Tomas Moro Observatory of International Relations and the

Las Casas Institute. We believe that the multidisciplinary perspectives provided by these distinguished scholars offer an essential roadmap for understanding the survival of democratic governance in the contemporary era. We are honored that this collective effort is hosted on this occasion by the journal *Cuadernos Europeos de Deusto*, whose prestige as a benchmark for European studies ensures that these critical analyses reach the wide and specialized audience they deserve.

Finally, I would like to thank the director of the journal, Beatriz Pérez de las Heras, for having the courtesy to propose me as editor of this special issue of *Cuadernos Europeos de Deusto*.

About the author

Carlos Espaliú was a research fellow at the Ministry of Education (1995-1998); professor at the University of Navarra (1998-2000); Legal Officer at the International Court of Justice (2000-2006); Ramón y Cajal researcher at the University of Córdoba (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); Full Professor of Public International Law and European Union Law, Secretary General, Principal Investigator of the Security, Risk and Conflict Management Group (SEGERICO), and Director of the Research Center for Security, Rule of Law, and High Technologies at Nebrija University in Madrid (2018-2024). Since 2024, he has been Full Professor of Public International Law, International Relations, and European Union Law at CEU Fernando III University in Seville. He is also a Research Fellow at the Las Casas Institute, Blackfriars Hall, University of Oxford, and a visiting professor at the United Nations University for Peace in Costa Rica. He has also been accredited with three six-year periods of research by the CNEAI. In the field of human rights, among other works, he has coordinated *Cuadernos Europeos de Deusto*, No. 02 (2019): Special issue “European Identity: Roots and Scope”.

Estudios

The fragility of human rights in times of rule of law erosion. The case of judicial independence in America and Europe

La fragilidad de los derechos humanos en tiempos de erosión del estado de derecho. El caso de la independencia judicial en América y Europa

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Summary: I. Introduction.—II. The Rule of Law and Its Link to Human Rights as a Matter of Existential Survival of Democracies. A European Lens.—III. Human Rights Violations Related to Judicial Independence. 1. Presidential pardons and amnesties. a. Examples in the United States. b. Examples in Europe. 2. Harassment of judges and contestation of judgments. a. Examples in the United States. b. Examples in Europe.—IV. Conclusions.

Abstract: The article highlights the existence of a direct and existential relationship between human rights and the rule of law, insofar as one cannot exist without the other, and vice versa. To this end, it first reviews the historical evolution of the protection of human rights and the rule of law in both the United States and the European Union, emphasizing the international legal norms and documents in which they have been enshrined. It then takes judicial independence as a case study. The article examines the human rights that become unprotected when states undermine judicial independence, focusing on pardons and amnesties, as well as on the harassment of judges and the non-compliance with judicial decisions, in both the United States and the European Union.

Keywords: rule of law, human rights, judicial independence, the USA and the EU.

Resumen: *El artículo muestra la existencia de una relación directa y existencial entre los derechos humanos y el Estado de Derecho, pues unos no pueden existir sin el otro y viceversa. Para ello, el artículo revisa primero la evolución histórica de la protección de los derechos humanos y el Estado de Derecho tanto en EE.UU. como en la UE, destacando las normas y documentos internacion-*

ales en los que se han recogido, para, posteriormente, tomar como caso de estudio la independencia judicial. El artículo pasa revista a los derechos humanos que quedan desprotegidos cuando los Estados violan la independencia judicial, poniendo el foco en los indultos y amnistías y en el acoso a jueces y la desobediencia de sentencias, tanto en EE.UU. como en la Unión.

Palabras clave: *Estado de Derecho, derechos humanos, independencia judicial, EE.UU. y UE.*

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I. **Introduction**[1]

This contribution aims to explore the intrinsic relationship between the rule of law and the protection of human rights, showing how both values are being challenged today in the United States and in the European Union. The rule of law and human rights are the two sides of the same coin: where the rule of law is not upheld, the effective protection of human rights becomes unattainable. Conversely, in the absence of respect for human rights, the rule of law is neglected[2]. Be it gradual or abrupt, any deterioration of the rule of law inevitably compromises the protection of human rights. Thus, undermining legal standards triggers a cascade of adverse effects on both individual and collective rights, since human rights can only be fully safeguarded within democratic systems governed by the rule of law[3]. The very essence of the rule of law lies in its capacity to ensure the dignity, freedom, and equality of all people[4]. In light of recent global developments, it is legitimate to ask whether human rights can endure the ongoing assault on legal and democratic norms.

The United States is widely recognized as the first modern liberal and representative democracy, established with the adoption of its Constitution in 1787 and its Bill of Rights in 1791, the latter of which contains the first ten amendments[5] (freedom of religion, speech, press, assembly, and petition; the right to keep and bear arms; protection against the forced quartering of soldiers; protection against unreasonable searches and seizures; the right to due process, and protection against self-incrimination and double jeopardy; the right to a speedy and public trial with an impartial jury and to confront witnesses; the right to a jury trial in civil cases; protection against excessive bail, excessive fines, and cruel and unusual punishment; recognition that the people retain rights not specifically listed in the Constitution; and reservation of undelegated powers to the states or the people). Not

[1] This article is one of the results of the research projects PID2021-126765NB-I00 of the MICINN and CIACO/2024/191 of the GVA on the crisis of European values and resilience to hybrid threats. AI has been used to refine the English and help locate parts of the documentation.

[2] Bessler, D.: "The Rule of Law: A Necessary Pillar of Free and Democratic Societies for Protecting Human Rights," *Santa Clara Law Review*, vol. 61, no. 2, 2021, pp. 467-588, p. 468.

[3] Apodaca, C.: "The Rule of Law and Human Rights", *Judicature*, vol. 87, no. 6, 2004, pp. 292-299, p. 294.

[4] Baer stated that dignity, liberty, and equality are cornerstones of constitutionalism (Baer, S.: "Dignity, Liberty, Equality: A Fundamental Rights Triangle of Constitutionalism", *University of Toronto Law Journal*, vol. 59, no. 4, pp. 417-468, p. 467).

[5] Harlan, J. M.: "The Bill of Rights and the Constitution", *ABAJ,* vol. 50, 1964, p. 918-921, p. 920, where the author speaks of rights of the American Constitution as ideological imperatives; see also Pederson, C. E.: *US Constitution & Bill of Rights,* ABDO Publishing Company, 2010, *passim*.

without reason, the forged Republic of the United States is seen as the nascent version of what today is considered a rule of law regime[6]. During the American Revolution, the colonists rejected any model of absolute power. Their opposition to Britain was based on the belief that a superior form of law, rooted in natural law, set limits on every governing body, including their own colonial legislatures. The conviction that legal principles existed above and beyond ordinary legislation became a cornerstone of their constitutional thinking. It later shaped the United States system of limited government and institutional checks on authority. The expression that in the United States "the king is the law" clearly summarizes a rule of law vision of power[7].

Not so long before the Bill of Rights, the Virginia Declaration of Rights of 1776 had already laid down foundational principles that are consubstantial to human rights and the rule of law, such as the right to due process, equality before the law, the limitation of arbitrary power, and government by consent[8]. Although it did not use the expression "rule of law", in many of its articles (called Sections) the Virginia Declaration enshrined most of its core elements, particularly Section one, which affirms that individuals are born free and equal, possessing inherent and inalienable rights; Section two, which clarifies that all power derives from the people, magistrates being their trustees and servants; Section 3, that reminds that government ought to be instituted for the common benefit, warning against the danger of maladministration. Additionally, Section 4 proclaims that no individual has the right to enjoy exclusive benefits or privileges derived from the community, except as compensation for public service. Section 5 underscores the preservation of the independence of the legislative, executive, and judicial branches, ensuring that each can act as a safeguard against abuses of authority. It also provides that members of the legislative and executive branches periodically return to private life, rejoining the citizenry from which they originated, and that new representatives are chosen through regular elections. Section 6 affirms the rights of suffrage and property, recalling that citizens must be free to elect their representatives, participate in decisions on taxation and legislation, and not be deprived of their possessions or subjected to laws without their own consent or that of their duly elected

[6] Bessler, *op. cit.*, p. 499.

[7] Humphreys, R. A.: "The Rule of Law and the American Revolution", *Law Quarterly Review*, vol. 53, no. 1, 1937, pp. 80-98. In page 89, the author stresses that power is always abused if unchecked and unlimited.

[8] Helderman, L. C.: "The Virginia Bill of Rights", *Wash. & Lee L. Rev.*, vol. 3, 1941, p. 225-245; Hylton, J. G.: "Virginia and the Ratification of the Bill of Rights, 1789-1791", *U. Rich. L. Rev.*, vol. 25, 1990, p. 433.

delegates. Similarly, Section 7 condemns any suspension of laws or interruption of their enforcement by any authority acting without the consent of the people's representatives, considering such acts contrary to citizens' rights. With respect to procedural guarantees, Section 8 ensures the right of every person to know the charges brought against them, to face their accusers and witnesses, to present evidence in their defense, and to be judged promptly by an impartial jury. It also protects individuals from self-incrimination and affirms that no one may be deprived of liberty except by due process of law or by the judgment of their peers. Ultimately, and as a fitting conclusion, Section 15 states that no free government can be preserved except through a firm adherence to justice, moderation, temperance, frugality, and virtue, and through frequent recourse to fundamental principles. The Virginia Declaration, the Constitution, and the Bill of Rights are the three instruments that collectively demonstrate the early and deliberate intertwining of fundamental rights and the rule of law in the American political tradition[9].

For its part, in Europe, the rule of law and human rights are not merely abstract legal principles enshrined in treaties; they are foundational values that shape the Union's political identity. They are the EU's DNA[10]. The nature of these values as core constitutional elements was brought to the forefront during the drafting of the (ultimately unsuccessful) Constitutional Treaty of the European Union[11]. However, the Lisbon Treaty reform revived these values by embedding them as interdependent values in Article 2 of the Treaty of the European Union (TEU), which goes like this: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the member states in a society in which pluralism, non-discrimination, toler-

[9] Scheiber, H. N.: "Public rights and the rule of law in American legal history", *California Law Review*, vol. 72, 1984, p. 217-251. As this author puts it, no other expression is more honored in America than the rule of law (p. 217).

[10] Among other recent contributions on this, *vide*: Sanz Caballero, S.: "Quo Vadis Europe? The decline of the rule of law in the EU: Who, why, how, what?", *Overcoming the Crisis of Democratic Values in the European Union*, Volume I, Sanz Caballero, S. and Bar Cendón, A., (eds), 2026, pp. 29-70, p. 60; Bar Cendón, A.: "The EU fundamental values: As important as difficult to protect", *Overcoming the Crisis of Democratic Values in the European Union*, Volume I, Sanz Caballero, S. and Bar Cendón, A., (eds), 2026, pp. 71-122; Puigderrajols Triadó, A. and Wouters, J.: "Do the Fundamental Values of the European Union Align with those of the Council of Europe?", *Overcoming the Crisis of Democratic Values in the European Union,* Volume I, Sanz Caballero, S. and Bar Cendón, A., (eds), 2026, pp. 185-230.

[11] Follesdal, A.: "Subsidiarity, Democracy and Human Rights in the Constitutional Treaty for Europe", *Journal of Social Philosophy*, vol. 37, no. 1, 2006, p. 61-80, especially from page 68.

ance, justice, solidarity and equality between women and men prevail". The mutual reinforcement of these values is not merely rhetorical: one cannot meaningfully exist without the others, and the erosion of any one of them, including the value of democracy, threatens the integrity of the entire European legal and political order[12].

This contribution will elaborate on the existence of a strong, mutually reinforcing relationship between the rule of law and the protection of human rights, as exemplified in the case of judicial independence. It will also showcase how these core values are being neglected today in both the United States and some members of the EU. However, to do so, it is essential first to define what the rule of law entails.

II. The Rule of Law and Its Link to Human Rights as a Matter of Existential Survival of Democracies. A European Lens

Growing concern over what has come to be known as rule of law backsliding has triggered a swift and substantial expansion of the EU's rule of law instruments[13]. The fact that the rule of law was not mentioned in the Treaties in their original form in the 1950s did not help; strikingly, human rights were also not included initially, only appearing later with the Maastricht Treaty reform of 1992 (former Article F.2 TEU). Notably, the first institution to protect human rights was the Court of Justice of the European Communities, in its *Stauder* case of 1969[14], which also, remarkably, referred to the rule of law and linked it to the protection of fundamental rights[15].

Although the EU's first efforts to address political challenges to the rule of law date back to the early 2000s, when the rise of a far-right party in Austria led to the creation of the "preventive weapon" of Article 7 TEU (later incorporated through the Lisbon Treaty) and the imposition of an EU diplomatic boycott[16], the range of mechanisms aimed at countering democratic and judicial backsliding has expanded dramatically since 2012. Several of

[12] Pech, L. and Grogan, J. (coords.): Meaning and Scope of the EU Rule of Law, Reconnect, 2020, p. 7. Accessible at: https://reconnect-europe.eu/blog/meaning-and-scope-of-the-eu-rule-of-law/

[13] Bar Cendón, A.: "El Estado de Derecho en la Unión Europea y su protección en tiempos de crisis", *La Europa de los Valores*, Sanz Caballero, S. (ed.), Aranzadi, 2024, p. 37-77, p. 39.

[14] Court of Justice of the European Communities: C-29/69, Erich Stauder v City of Ulm, 12 November 1969, par. 7.

[15] *Ibid*. par. 3.

[16] Sanz Caballero, S.: "El declive del Estado de Derecho en la Unión Europea. Propuestas de solución", *Pliegos de Yuste*, no. 24, 2024, pp. 63-78, p. 71.

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these tools are directly grounded in EU primary law[17]. The European Commission's 2014 Rule of Law Framework[18], for example, is generally viewed as a preparatory stage before launching an Article 7 TEU procedure[19], whose purpose is to sanction the rogue state by political means[20]. The Rule of Law Review Cycle is likewise justified as a means to enhance compliance with Article 2 values and to pave the way for potential Article 7 or Article 258 of the Treaty on the Functionning of the European Union (TFEU) actions, that is, through political sanctions and infringement procedures against the state before the Court of Justice, respectively[21]. The European Semester has also evolved to include closer scrutiny of national judicial systems, drawing on its foundations in Title VIII TFEU on economic and monetary governance and the secondary legislation implementing it[22]. Since 2020, this framework has been complemented by the Commission's annual Rule of Law Report, a preventive monitoring instrument that assesses the strength of the rule of law in each member state[23], as well as by the Conditionality Regulation[24], which allows the Union to suspend or restrict EU funds when breaches of the rule of law threaten the sound financial management of the EU[25].

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[17] Bauerschmidt, J.: "The Rule of Law in the European Union and the Toolbox to Defend it: Article 7 TEU, Rule of Law Report and Dialogue, Budgetary Conditionality", *The Rule of Law Under Threat*, Edward Elgar Publishing, 2024. p. 196-218, p. 198.

[18] Kochenov, D. and Pech, L.: "Better late than never? On the European Commission's rule of law framework and its first activation", *Journal of Common Market Studies*, vol. 54, no. 5, 2016, p. 1062-1074.

[19] Kochenov, D. and Pech, L.: "Upholding the Rule of Law in the EU: On the Commission's 'Pre-Article 7 Procedure' as a Timid Step in the Right Direction", *European Constitutional Law Review*, vol. 11, 2015, pp. 512-540.

[20] Wilms, G.: *Protecting fundamental values in the European Union through the rule of law: Articles 2 and 7 TEU from a legal, historical and comparative angle,* Robert Schuman Centre for Advanced Studies, European University Institute, 2017, doi: 10.2870/083300

[21] Kochenov, D. and Pech, L.: "Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality", *Robert Schuman Centre for Advanced Studies Research Papers*, No. 24, 2015, Available at https://ssrn.com/abstract=2625602 or http://dx.doi.org/10.2139/ssrn.2625602

[22] Fromont, L. and Van Waeyenberge, A.: "The European Semester as a Governance Mechanism for Rule of Law Risks in the EU", *European Journal of Risk Regulation*, 2025, p. 1-10.

[23] Pech, L. and Bard, P.: "The Commission 2021 Rule of Law Report and the EU Monitoring and Enforcement of Article 2 TEU Values", 2022, available at SSRN 4100083; Sanz Caballero, S.: "El Estado de Derecho en la UE en los Informes del Consejo de Europa y de la Comisión Europea de 2021: ¿Hay luz al final del túnel?", *La UE y el Reto del Estado de Derecho*, Thomson Reuters, 2022, pp. 25-55, p. 26.

[24] EU: Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 *on a general regime of conditionality for the protection of the Union budget*, OJ L 433I, 22 December 2020, pp. 1-10, which entered into force on 1 January 2021.

[25] Hegedus, D.; Christiansen, T.: "Contesting the Rule of Law in the European Union: The Creation and Implementation of the Rule of Law Conditionality Regulation", *EU Rule*

Even without a single, exhaustive definition of the rule of law in the Treaties, several provisions of primary law express its core meaning or impose obligations linked to its essential components. The first subparagraph of Article 19(1) TEU captures the essence of the rule of law by providing that the Court of Justice of the European Union shall ensure that, in the interpretation and application of the Treaties, the law is observed. Its second subparagraph, read together with Article 47 of the Charter of Fundamental Rights of the EU, enshrines the obligation to guarantee judicial independence both at the EU level and within the member states, requiring them to provide remedies sufficient to ensure effective legal protection in areas covered by Union law. From this, it is easy to see how closely respect for the rule of law is connected to the human rights typically associated with justice, such as the prohibition of arbitrariness, the right to a fair trial before impartial judges, and equality before the law[26].

To understand what is at stake when the rule of law is eroded, it is worth explaining that the European Union identifies four fundamental pillars as essential to a robust rule of law system, namely, judicial independence, media pluralism and freedom of expression, an efficient anti-corruption framework, and effective checks and balances[27]. Each of these elements plays a crucial role in safeguarding human rights: Judicial independence ensures impartial protection of individual and collective rights, access to justice and equality before the law; media pluralism and freedom of expression allow for transparency and the public visibility necessary to uphold rights; combating corruption fosters fairness, equality, and justice, all of them core to human dignity; and checks and balances prevent abuses of power, securing institutional accountability, which is key to human rights. Since 2020, the European Commission's annual Rule of Law Report has consistently emphasized that well-functioning rule of law systems are those that uphold these fundamental pillars[28].

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of Law Procedures at the Test Bench: Managing Dissensus in the European Constitutional Landscape, Cham: Springer Nature Switzerland, 2024, p. 225-241.

[26] Bingham, T.: *The Rule of Law*, Penguin Books, 2010, specially pages 49, 63, 72, 78, 85 and 115.

[27] European Commission: Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *2025 Rule of Law Report. The rule of law situation in the European Union*, 8 July 2025, COM(2025) 900 final, page 2, https://commission.europa.eu/publications/2025-rule-law-report-communication-and-country-chapters_en

[28] European Commission: Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *2020 Rule of Law Report. Communications and Country Chapter*, 30 September, 2020, https://commission.europa.eu/publications/2020-rule-law-report-communication-and-country-chapters_en

However, it was the Venice Commission of the Council of Europe that was the pioneer in this field. In 2016, its Rule of Law Checklist elaborated on these requirements, emphasizing that laws must be clear, predictable, and consistently applied. Decisions by authorities should treat individuals with dignity and equality, and those affected must have the right to challenge decisions before independent and impartial courts through fair procedures[29]. This comprehensive legal framework, rooted in Council of Europe instruments such as the European Convention on Human Rights of 1950 (ECHR) and the Social European Charter of 1961 and 1996 but also in the European Union's Charter of Fundamental Rights of 2000, all of them supplemented by universal tools such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Cultural, Social and Economic Rights (ICESCR) of 1966, provides a necessary benchmark to analyze challenges faced within EU member states. By comparison, this framework can also help illuminate other democracies, since the ICCPR and ICESCR have been widely ratified worldwide, and much of the content of the mentioned European instruments also reflects principles of customary international law.

At its core, the rule of law means that all citizens and officials are equally bound by the law, which constrains power and ensures accountability. In other words, this principle is about limiting those in power and about the self-restraint of authorities themselves[30]. The notion of the rule of law can be understood, at its most basic, as referring to the core attributes that law should embody: fairness, neutrality, and the ability to provide order[31]. From an operational viewpoint, it is about institutional safeguards that prevent arbitrary decision-making: a coherent set of rules, bodies that supervise their application, and protection against political interference[32]. Thus, the rule of law is not simply a description of legal structures or law-making powers; it signifies something more than the mere presence of institutions. Yet, when examined closely, the concept brings together potentially mixed legal and political elements, both theoretical and institutional. Importantly,

[29] Council of Europe: Rule of Law Checklist, adopted by the Venice Commission at its 106th Plenary Session, Venice, 11-12 March 2016, available at https:// www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf

[30] Bassiouni, M. C.: "Challenges facing Rule-of-law Oriented World Order", *Santa Clara Journal of International Law*, vol. 8, no. 1, 2010, pp. 1-10, for whom the rule of law is based in the premise of the imposition of limits on collective and unilateral state action (p. 8).

[31] Feinberg, J.: "Justice, Fairness and Rationality", *Yale Law Journal*, vol. 81, no. 5, April 1972, pp. 1004-1031, p. 1005.

[32] Riley, S.: "Human Dignity and the Rule of Law", *Utrecht Law Journal*, volume 11, Issue 2, June 2015, pp. 91-105, p. 91.

it acts as a political ideal that presupposes limits on the exercise of power[33]. Contemporary doctrine has moved beyond a minimalist view of the rule of law, focused on legal clarity and procedural predictability (the so-called "thin" approach), toward a more substantive perspective, which, in addition to these requirements, demands that laws also uphold justice and fundamental rights (the "thick" approach to the rule of law).[34]. While legality, clarity, and legal certainty are essential procedural components of the rule of law because they prevent arbitrariness, so too is the material requirement that laws be just and respectful of human rights[35].

The Venice Commission outlines six interrelated dimensions of the rule of law, ranging from legality, legal clarity, and protection against arbitrariness to judicial access before independent and impartial courts, equal treatment, and respect for human rights[36]. For the rule of law to be genuine, laws must be democratically enacted by elected representatives. That is the only way in which the general will be expressed in those laws. But, beyond that, the content of those laws must guarantee fundamental rights, making the rule of law inseparable from democracy and human rights. Together, the rule of law, democracy, and human rights form the three angles of the same triangle. It is widely accepted that the rule of law is incompatible with human rights violations or illiberal governance. These three values are of equal importance, such that the absence of any one of them renders the whole framework ineffective. In the EU, they also underpin external relations and accession criteria.

The EU's construction links the organization's internal governance with its external policies, conditioning relations on adherence to these fundamental values[37]. This constitutional identity, where the EU's external role is shaped by its internal core values, and vice versa, conditions the accession process of aspiring European states[38]. This had always been implicit in

[33] Ferrajoli, L.: "The Past and the Future of the Rule of Law", *The rule of law history, theory and criticism*. Dordrecht: Springer Netherlands, 2007. p. 323-352, p. 324.

[34] Tamanaha, B. Z.: "The History and Elements of the Rule of Law", *Singapore Journal of Legal Studies*, 2012, pp. 232-247.

[35] For a critic of the liberal democratic thick conception of the rule of law and a contestation of the relation between the rule of law and human rights, see Peerenboom, R.: "Human rights and rule of law: what's the relationship?", *Georgetown Journal of International Law*, vol. 36, no. 3, 2005, pp. 809-946 and, especially, pages 900, 908, and 945.

[36] *Rule of Law Checklist, cit*.

[37] European External Action Service: *EU Action Plan on Human Rights and Democracy 2020-2027,* https://www.eeas.europa.eu/eeas/eu-action-plan-human-rights-and-democracy-0_en; Lucarelli, S. and Manners, I.: *Values and principles in European Union foreign policy,* Routledge, 2006.

[38] Sanz Caballero, S.: "Justice as the Key Component of the Rule of Law: The State of Play in Europe", *Europske vrijednosti i izazovi članstva u eu.*, Cepo, D. (ed.), Hrvatska u komparativnoj perspektivi, Zagreb, 2020, pp. 61-78, p. 66.

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the European construction process but only became explicit with the Copenhagen (1993) and Madrid (1995) European Council's Conclusions[39]. And it is EU primary law from the Amsterdam Treaty of 1997. This Treaty reform stated that the Union was founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the member states. With the Lisbon Treaty, this provision evolved into the current Article 2 TEU. Reference should also be made to the current Article 3(5) TEU, which requires the EU, in its external relations, to uphold and promote its own values and interests while protecting its citizens. According to this provision, the EU must support free and equitable trade, combat poverty, protect human rights and ensure strict compliance with, and further development of international law, including full respect for the principles set out in the United Nations Charter. Human rights, the rule of law, and democracy have thus become central pillars in the EU accession process. Also in the EU's external policy, according to Article 21 TEU, "(t)he Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law". Human rights, the rule of law, and democracy reflect the Union's own internal development. The EU aspires to positively influence the international environment by promoting democracy, human rights, and rule of law standards abroad, in any state seeking to join the EU or engage in trade with this supranational organization[40]. Inconsistent application of these values within the Union undermines its internal legitimacy and external credibility. Failure to apply those values within the EU prevents the organization from imposing rules on others, be they candidate states or third countries[41]. Concerning the former, the EU has been more effective in monitoring respect of human rights and the rule

[39] Kochenov, D.: 'Behind the Copenhagen Facade. The Meaning and Structure of the Copenhagen Political Criterion of Democracy and the Rule of Law", *European Integration Online Papers*, vol. 8, 2004, pp. 1-24; Hillion, C. (ed): EU *Enlargement: A Legal Approac*h, Hart Publishing, 2004, p. 4.

[40] Pech, L.: 'Promoting the Rule of Law Abroad: On the EU's limited contribution to the shaping of an international understanding of the rule of law', Amtenbrink, F. and Kochenov, D. (eds), *The EU's Shaping of the International Legal Order*, CUP, 2013, p. 115.

[41] Janse, R.: "Is the European Commission a credible guardian of the values? A revisionist account of the Copenhagen political criteria during the Big Bang enlargement", *ICON*, vol. 17, no. 1, 2019, pp. 43-46, p. 46.

of law in candidate states than in member states[42]. The political sanctioning mechanism against rogue member states, enshrined in Article 7 TEU, has proven ineffective in the face of misguided solidarity among member states, which has so far prevented any sanction from being imposed on non-compliant governments. Concerning third countries, the EU has been accused of hypocrisy in the use of the conditionality clause, as security or economic priorities have usually overridden human rights considerations in commercial agreements[43].

A robust respect for the rule of law and human rights is not only a normative imperative but also an essential condition for any functioning democracy. The following sections will examine one core element of the rule of law, judicial independence, in relation to the human rights most closely linked to it, namely, the access to justice and right to a fair trial, equality before the law, and access to justice. The survival of democratic regimes is contingent upon the protection of these rights.

III. **Human Rights Violations Related to Judicial Independence**

A critical precondition for upholding the rule of law is ensuring judicial independence. Any form of external or internal interference in judges' impartial duties risks undermining the very fabric of the rule of law. Judicial independence is not a privilege granted to judges for their benefit; it is a foundational principle essential to the functioning of any democratic state[44]. Judicial independence guarantees fair trials and serves as the cor-

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[42] Kochenov, D.: "Overestimating Conditionality", *University of Groningen Faculty of Law Research Paper Series,* no. 03, 2014, p. 6.

[43] Saltnes, J. D.: "The European Union's human rights policy: is the EU's use of the human rights clause inconsistent?", *Global Affairs*, vol. 4, issue, 2-3, 2018, pp. 277-289, available at https://doi.org/10.1080/23340460.2018.1535251; Zimelis, A.: "Conditionality and the EU–ACP Partnership: A Misguided Approach to Development?", *Australian Journal of Political Science*, vol. 46, no. 3, 2011, pp. 389-406, https://doi.org/10.1080/10361146.2011.595698; Taylor, I.: Bait and Switch: "The European Union's Incoherency towards Africa", *Insight on Africa*, vol. 8, no. 2, 2018, pp. 96-111, https://doi.org/10.1177/0975087816646890.

[44] United Nations High Commissioner for Human Rights: *Basic Principles on the Independence of the Judiciary*, adopted on 6 September 1985 by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985, available at ww.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-independence-judiciary; U.S. Federal Judicial Centre: *Judicial Independence in the United States: Current Issues and Relevant Background Information*, available at https://www.fjc.gov/content/judicial-independence; Council of Europe: *Plan of action on strengthening judicial independence and impartiality*, CM(2016)36 final, adopted at the 1253rd meeting of the Ministers' Deputies, on 13 April 2016, https://rm.coe.int/1680700125

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nerstone of justice. Decisions undermining judicial independence, often disguised as reforms, are unacceptable. Judicial independence is a fundamental guarantee of the right to a fair trial. Judges make decisions that impact citizens' lives, freedoms, rights, duties, and property. Judicial independence is not merely a right for judges but a necessity for all those who seek and expect justice[45].

When judicial independence is compromised and the judiciary falls under the influence or control of the executive branch, the fundamental human right to a fair trial is severely jeopardized. In Europe, judicial independence is enshrined in Article 6 of the European Convention on Human Rights and Articles 47 and 48 of the Charter of Fundamental Rights of the European Union. These European provisions guarantee the right to an effective remedy before a tribunal, the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, the right to be advised, defended, and represented, the right to be presumed innocent until proven guilty according to law, the right to be informed promptly of the nature and cause of the accusation, and to have adequate time and facilities for preparing a defense, among other rights. Additionally, if judges follow governmental directives, the right to equality and non-discrimination will be impacted. There will also be a risk that similar wrongful actions will be prosecuted (or not) depending on the identity or political affiliation of the suspect. The fairness of the judicial process will likely depend on whether the accused aligns with the political establishment. States where the judiciary is captured can hardly guarantee human rights. If judges fail to enforce the law impartially, citizens will not be treated equally. In a way, there is the subjective right to an independent judge[46]. This underscores the importance of impartial judges for a healthy democracy and a robust rule of law regime[47].

In the United States, the rule of law is intrinsically linked to judicial independence, understood as a structural requirement that ensures government action remains subject to the law. Courts play a central role in interpreting and enforcing the Constitution, and this function presupposes their ability to act free from political influence[48]. Judicial independence is pri-

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[45] International Association of Judges: *The Universal Charter of the Judge*, adopted in Taipei on 17 November 1999, http://www.iaj-uim.org/universal-charter-of-the-judges/, articles 1 to 5.

[46] Bustos Gisbert, R.: "Judicial Independence in European Constitutional Law", *European Constitutional Law Review,* vol. 18, no. 4, 2022, pp. 591-620. doi:10.1017/S1574019622000347

[47] United Nations Office on Drugs and Crime: *Bangalore Principles of Judicial Conduct* (endorsed by the Economic and Social Council in ECOSOC resolution 2006/23 "Strengthening basic principles of judicial conduct", July 2006).

[48] Pro, P. M.: "Defending Judicial Independence and the Rule of Law", *Communiqué,* August 2025, https://clarkcountybar.org/tag/communique-august-2025/

marily secured at the federal level through Article III of the Constitution, which grants federal judges life tenure "during good behaviour" and protects their salaries. These guarantees are intended to protect judges from pressure by the political branches, particularly when adjudicating politically sensitive disputes[49]. This constitutional framework enables courts to exercise judicial review, allowing them to set aside legislative or executive acts and thereby uphold constitutional supremacy and legal certainty, core elements of the rule of law[50]. In addition to Article III, judicial independence is reinforced by statutory provisions as well as impeachment procedures that limit the removal of judges to exceptional cases of serious misconduct. While the federal system strongly emphasizes independence, the picture is more complex at the state level, where many judges are elected and therefore exposed to partisan pressures. Although there is a potential impact of judicial elections on impartiality and public confidence in the courts, the U.S. constitutional doctrine continues to treat judicial independence as a necessary condition for guaranteeing impartial adjudication, equal application of the law, and effective legal remedies, all of which are essential components of the rule of law[51].

The International Covenant on Civil and Political Rights is clear about the importance of judicial independence. Article 14 of this universally accepted legal instrument guarantees a comprehensive set of rights related to justice. The effective enjoyment of these rights relies entirely on the judiciary's independence from interference by the legislative and executive branches. This international treaty affirms that all individuals are equal before the courts and everyone is entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law. It further provides that anyone charged with a criminal offense must be presumed innocent until proven guilty according to law. Individuals have the right to be promptly informed, in detail and in a language they understand, of the nature and cause of the charges against them. They are also entitled to adequate time and facilities to prepare their defense and to communicate with the legal counsel of their choosing. The right to be tried without undue delay, to be present during the trial, and to defend oneself either personally or through legal assistance of one's choice is also protected. Where the interests of justice require, legal assistance must be provided without cost if the

[49] Hamilton, A.: "The Federalist No. 78: The Judiciary Department", *The Federalist Papers*, 1788.

[50] Redish, M. H.: *Judicial Independence and the American Constitution: A Democratic Paradox*, Stanford University Press, 2017, passim.

[51] U.S. Supreme Court: *Caperton v. A.T. Massey Coal Co.*, 556 U.S., pp. 882, 886 and 889 (2009).

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individual lacks the means to pay. Defendants have the right to examine, or have examined, witnesses against them, and to obtain the attendance and examination of witnesses on their behalf under the same conditions. If they do not understand or speak the language used in court, they are also entitled to free interpretation services. Additional safeguards include the right not to be compelled to testify against oneself or to confess guilt, the right to have one's conviction and sentence reviewed by a higher tribunal per the law, and the right not to be tried or punished again for an offense for which they have already been finally convicted or acquitted.

Any interference with the judiciary, whether through harassment, undue influence, attempts at judicial capture, or the systematic erosion of the authority of judicial decisions, represents a serious threat to judicial independence and, consequently, to the separation of powers, which constitutes an essential pillar of the rule of law[52]. Both forms of deviations risk impairing fundamental rights closely linked to the proper administration of justice, such as access to a court, the right to a fair trial, the rights of the defense, the presumption of innocence, the right to a reasoned decision, the right to appeal, and equality before the law. This does not mean that judicial conduct should remain beyond scrutiny. In fact, equally problematic is the existence of biased or politically motivated conduct by judges themselves, insofar as it departs from the impartial application of the law and the principles of justice[53]. Where reasonable doubts as to a judge's impartiality arise, mechanisms of recusal and disqualification must be available. Where a judgment has already been rendered, parties must retain the right to appeal or to seek its annulment through appropriate legal remedies. Finally, in instances of manifestly arbitrary adjudication, judges should be subject to reporting mechanisms and, where appropriate, disciplinary or even criminal liability. Judicial independence is not merely a formal principle; the impartiality of courts is essential to ensuring that legal outcomes are based on evidence and law rather than on political expediency or internal and external pressures. Beyond individual rights, interference erodes public confidence in the judiciary and threatens democratic institutions. Protecting judicial independence requires robust institutional safeguards, accountability mechanisms, and a culture of integrity within the judiciary. The opposite leads to insecurity, uncertainty and arbitrariness[54].

The following pages will explore certain factors that compromise judicial independence, along with their impact on specific human rights. The

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[52] Article 1 of the *Universal Charter of the Judge, cit*.

[53] Ibídem, Articles 6 and 7.

[54] Villegas Fernández, J. M. and Rodríguez-Blanco, V.: The Independence of the Judiciary: Meaning and Threats, *Juridica*, vol. 31, 2022, https://doi.org/10.12697/JI.2022.31.06

analysis will include examples observed of such breaches both in the USA and in the EU.

1. *Presidential pardons and amnesties*

Recent developments in several countries reveal persistent pressures on the judiciary, manifested in various ways. These include the arbitrary or questionable use of executive pardons granted to individuals convicted for actions aligned with the government's interests, as well as the adoption of legislative amnesties. Such trends —observed, among others, in both the United States and Europe— raise human rights concerns, as these acts of clemency may compromise the principle of equality before the law and the right to non-discrimination, particularly when comparable offenders do not receive similar treatment. Many legal systems provide mechanisms for extinguishing criminal penalties, though in different forms. Pardons typically revoke the sentence of a specific individual, whereas amnesties are broader, impersonal retroactive measures that exempt a category of conduct from criminal liability and thereby remove the responsibility of those who committed it[55]. While social reintegration, political reconciliation, transitional justice, or peacebuilding may justify recourse to such measures, they inevitably affect the equal treatment of those who, having committed the same offences, are not included among the beneficiaries because their criminal action did not have the political connotation that is the object of the executive's or legislative's mercy.

a. Examples in the United States

In the USA, mention can be made of the surprising and unprecedented presidential pardons issued by the Biden administration in the final days of his term in January 2025. President Biden granted preemptive last-minute pardons to several of his relatives, including his brothers, sister, and notably his son Hunter Biden, who had been previously sentenced, as well as to public figures such as Anthony Fauci and members of the January 6 congressional investigation committee[56]. These pardons were granted despite none of the beneficiaries having been formally prosecuted at the time, except for his

[55] Mandozai, M. S., & Zadran, A.: "Characteristics and Effects of Amnesty and Pardon", *Integrated Journal for Research in Arts and Humanities*, 3(3), 2023, pp. 89-94, p. 91.

[56] U.S. Department of Justice: Office of the Pardon Attorney, Pardons Granted by President Joseph Biden (2021-2025), 19 January 2025, https://www.justice.gov/pardon/pardons-granted-president-joseph-biden-2021-2025.

son Hunter. The official reasoning was to protect them from politically motivated legal actions, but the decision has been criticized as a misuse of presidential power that may violate the principle of equality before the law[57]. Presidential pardons are not restricted to the Biden administration. President Trump issued a broad and controversial pardon in January 2025 that applied to the vast majority of individuals involved in the assault on the Capitol on January 6, 2021[58]. This included both individuals who had already been sentenced and others whose cases were still pending. The pardon reportedly covered a wide range of offenses, including serious crimes such as assaulting law enforcement officers during the attack. While not every single participant may have been explicitly included, the proclamation granted a "full, complete, and unconditional pardon" to all individuals convicted of offenses "related to events at or near the Capitol" on that day, raising serious concerns about political favoritism and unequal treatment under the law[59]. These examples, from the two most recent American administrations, demonstrate the risk of using presidential pardons that grant privileges to specific individuals in contravention of the principle of equality, for political reasons.

b. Examples in Europe

A comparable example in Europe is the amnesty law passed in Spain in 2024, which remits the offences of those involved in the events surrounding the 2017 attempted coup d'état in the region of Catalonia (commonly referred to as the "procés")[60]. The law also undermines the authority of the judiciary as it has the effect of cancelling and/or preventing future judicial procedures, as well as the finalization of pending ones[61]. In this respect, it somehow challenges the independence of the judiciary, as an integral part of the separation

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57 Gramlich, J.: Biden granted more acts of clemency than any prior president, Pew Research Center, 7 February 2025, https://www.pewresearch.org/short-reads/2025/02/07/biden-granted-more-acts-of-clemency-than-any-prior-president/

58 The White House: Presidential Actions: Granting pardons and commutation of sentences for certain offenses relating to the events at or near the United States Capitol on January 6, 2021. https://www.whitehouse.gov/presidential-actions/2025/01/granting-pardons-and-commutation-of-sentences-for-certain-offenses-relating-to-the-events-at-or-near-the-united-states-capitol-on-january-6-2021/

59 Evans Ibingo I.: "Pardon" as an escalating impediment to criminal justice in democracy", *Nnamdi Azikiwe University Journal of International Law and Jurisprudence*, vol. 16, no. 2, 2025, pp. 168-181, p. 179.

60 Spanish State Presidency: BOE-A-2024-11776, no.141, 11 June 2024, de amnistía para la normalización institucional, política y social en Cataluña. https://www.boe.es/eli/es/lo/2024/06/10/1/con

61 Council of Europe: European Commission for Democracy through Law: Spain Opinion on the Rule of Law Requirements of Amnesties, with Particular Reference to the Parlia-

of powers. The law grants amnesty for a wide range of criminal, administrative, and accounting offenses committed during an also very long period of time (between 1 November 2011, and 13 November 2023), in connection with actions promoting the secession of Catalonia. Among the amnestied offenses are embezzlement of public funds, disobedience, public disorder, assault against authority, membership in criminal groups, and other related crimes —including some involving violence, such as injuries and crimes against moral integrity. In terms of human rights, the issue is that someone charged with these same crimes, if committed outside Catalonia and unrelated to the secessionist process, does not benefit from this measure of grace, which has raised concerns about unequal treatment under the law. The law specifically excludes in its Article 2.c, terrorism where there has been a serious and intentional violation of human rights, as well as certain crimes that directly affect the financial interests of the European Union in Article 2.e.

As of mid-2025, a good number of individuals had already benefited from the law, through the cancellation of convictions, dismissal of charges, or annulment of legal proceedings, with estimates suggesting that the total number of beneficiaries is more than 300 people[62]. The Spanish Supreme Court raised constitutional challenges to several parts of the law, particularly those relating to crimes of public disorder and assault against law enforcement, arguing that it may violate principles of legal certainty and equality before the law[63]. Nevertheless, the Spanish Constitutional Court upheld the law in a narrow ruling, stating that the amnesty serves a legitimate purpose of promoting social cohesion and political normalization[64]. Critics, however, argue that the law functions in part as self-amnesty, as it benefited some of the same political actors who voted in favor of it in Parliament[65]. Two preliminary questions are pending before the Court of Jus-

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mentary Bill for the Institutional, Political and Social Normalisation of Catalonia (adopted by the Venice Commission at its 138th session, Venice, 15-16 March 2024), p. 16.

[62] Solé, O.: La amnistía supera su primer año con el aval del TC y más de 300 beneficiados pero pendiente de Puigdemont, *El Diario.es*, 28 June 2025.

[63] Spanish Supreme Court. Criminal Chamber. July 24, 2024. Recurso de casación. Procedure: 3269/2022. Auto de planteamiento de cuestión de inconstitucionalidad sobre el artículo 1 de la Ley Orgánica 1/2024, de 10 de junio, de amnistía para la normalización institucional, política y social en Cataluña.

[64] Spanish Constitutional Court: BOE-A-2025-15939. Pleno. Sentencia 137/2025, de 26 de junio de 2025. Recurso de inconstitucionalidad 6436-2024. Interpuesto por más de cincuenta diputados y más de cincuenta senadores de los grupos parlamentarios Popular en el Congreso de los Diputados y en el Senado, respectivamente, en relación con la Ley Orgánica 1/2024, de 10 de junio, de amnistía para la normalización institucional, política y social en Cataluña.

[65] Ramos Rodríguez, L.: «Una autoamnistía monstruosa», Aragón, M., Gimbernat, E. and Agustín Ruiz Robledo, A (eds.)*., La amnistía en España, Constitución y Estado de Derecho,* Colex, A Coruña, 2024.

tice on this particular issue, as both the National High Court of and the Court of Auditors have requested the Luxembourg Court to clarify whether certain provisions of the Spanish amnesty law may be incompatible with the equality before the law and the right to effective judicial protection protected by the Charter of Fundamental Rights and whether it respects the Directive (EU) 2017/541 on the fight against terrorism.

Measures of clemency must comply with the constitutional framework and pursue a legitimate higher purpose, such as social reintegration, democratic transition, or political reconciliation. They should also be carefully attuned to the broader social context, must never apply to serious international crimes or human rights violations, and cannot be used to shield the policymakers who adopt them, or their close associates, from accountability.

2. *Harassment of judges and contestation of judgments*

Public discreditation of judges whose decisions displease the executive branch, as well as attacks on those prosecuting individuals close to the government, have become increasingly common[66]. Harassing judges due to their rulings or the cases they handle constitutes clear interference by the executive and/or legislative branches in the judiciary's work. In rule of law systems, there are established democratic means to challenge controversial rulings or abusive judges (such as recusals and appeals) so direct political attacks are wholly unjustifiable and may even constitute criminal offenses[67].

When judges face harassment, threats, or undue pressure related to their rulings or cases, several fundamental human rights are at stake, both those of the judge individually and of society as a whole. From the judge's perspective, such actions may violate the right to liberty and personal security, protected under Article 9 of the ICCPR and Article 3 of the ECHR. Threats of violence, surveillance, or physical intimidation infringe upon their physical integrity and may amount to inhuman or degrading treatment, protected under Article 7 of the ICCPR and Article 3 of the ECHR. Harassment often includes unjustified intrusions into private and family life, such as smear campaigns or exposing personal information publicly, violating the right to

[66] Bright, S. B.: "Political attacks on the judiciary: Can justice be done amid efforts to intimidate and remove judges from office for unpopular decisions", *NYUL Rev.*, vol. 72, 1997, pp. 308-332.

[67] Barua, P., Makkar, S., and Hariharan, V.: "Judicial Recusal: Comparative Analysis" *GNLU Law Review,* vol. 7, 2020, pp. 1-16.

privacy under Article 8 of the ECHR and Article 17 of the ICCPR. Preventing judges from expressing legitimate concerns about threats to judicial independence may violate their right to freedom of expression under Article 10 of the ECHR and Article 19 of the ICCPR. Defamatory attacks or politically motivated disciplinary procedures also threaten their dignity and reputation, protected under international law.

Beyond the individual impact, judicial intimidation undermines society's right to an independent and impartial tribunal, guaranteed by Article 14 of the ICCPR and Article 6 of the ECHR. Judicial independence is fundamental to the rule of law; when compromised, the public loses assurance of equal protection before the law and access to effective remedies, especially in cases involving state interests[68]. This erosion disproportionately harms vulnerable groups, raising concerns about non-discrimination and equality before the law. Moreover, harassment of judges threatens democracy itself. An independent judiciary maintains checks and balances, upholds constitutional rights, and ensures government accountability[69]. Systematic or politically motivated attacks weaken public confidence in legal institutions and create a chilling effect that deters judges from impartiality. Thus, harassment is not merely a personal issue but a broader human rights concern that weakens democratic governance and the rule of law.

a. Examples in the United States

In the United States, several documented instances reveal executive branch rhetoric and actions that intimidate the judiciary, threatening judges' independence and potentially violating their rights and due process guarantees. A notable pattern is the public attacks of the administration against federal judges whose rulings counter the executive's agenda, repeatedly labeling judges as "obstacles to democracy"[70] or "disgraces" and "lunatics"[71] especially those blocking his immigration policies or other initiatives. These public condemnations, amplified through social media, have been

[68] Bright, *cit.,* p. 325.; Jaworski, L.: Judicial Intimidation: A Threat to the Advocate's Independence, *Litigation*, vol.1, no.1, 1975, pp. 11-13.

[69] Pérez, A. T.: *In Nobody's Name: A Checks and Balances Approach to International Judicial Independence*", Max Planck Institute for Comparative Public Law and International Law, 2017, *passim*.

[70] Gregory, M.: "Like many populist leaders, Trump accuses judges of being illegitimate obstacles to safety and democracy", *The Conversation,* 23 May 2025.

[71] Brenan Center for Human Rights: "In His Own Words: The President's Attacks on the Courts", 14 February 2020, https://www.brennancenter.org/our-work/research-reports/his-own-words-presidents-attacks-courts

viewed as attempts to undermine public trust and pressure judges to align with executive preferences[72].

In some cases, executive officials have gone further, calling for impeachment of judges after controversial rulings[73]. These threats often follow judicial decisions that temporarily block policies favored by the executive. For instance, when courts challenged limits on administrative restructuring, political allies and some executive members called for impeachments or further court restructuring. Legal scholars and judicial leaders have warned that such actions endanger judicial independence and separation of powers[74]. Direct interference occurs when executive officials resist complying with judicial decisions, either openly or through implicit threats of non-compliance[75]. During disputes over immigration enforcement or environmental regulations, some executive actors have signaled intentions to disregard court orders or delay implementation. While often indirect, these tactics chill the judiciary, especially when judges see their rulings ignored. For example, in April 2025, the federal administration deported foreign nationals deemed gang members to countries like Venezuela, despite federal judges' orders to halt removals. The deportations sparked controversy, relying on the 1798 Alien Enemies Act, historically wartime legislation[76]. Judges have also been pressured to close asylum cases by arguing that expelled individuals are no longer on U.S. soil, raising questions about the value of judicial decisions for the executive[77]. Evidence also exists of deporting U.S. citizen children to Honduras with their foreign mothers, underscoring due process concerns amid the Trump ad-

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[72] Stone, P.: "US judges who rule against Trump are being barraged with abuse and threats, experts warn". *The Guardian,* 17 May 2025.

[73] NBC News. American Bar Association backs "rule of law" after Musk calls for judges to be impeached, 4 March 2025, https://www.nbcnews.com/politics/justice-department/american-bar-association-backs-rule-law-elon-musk-calls-judges-impeach-rcna194662

[74] Citron, R.: "Separation of Powers Conflict and Conciliation: President Trump and Chief Justice Roberts Defend their Institutions and Arrive at a Détente", *Verdict,* 17 May 2025, https://verdict.justia.com/2025/06/17/separation-of-powers-conflict-and-conciliation

[75] Baio, A.: "What order? Trump team ignoring 1 in 3 major judicial rulings against them, analysis finds", *The Independent,* 21 July 2025, https://www.independent.co.uk/news/world/americas/us-politics/trump-federal-court-ruling-ignore-b2792939.html

[76] Yon Ebright, K. & Goitein, E.: "Trump Is Attempting to Use Wartime Powers in the United States. To serve his deportation agenda, the president is warping an archaic, discredited law", *The Atlantic,* 24 April 2025. https://www.theatlantic.com/ideas/archive/2025/04/alien-enemies-act-trump/682565/

[77] Clarembaux, P. and Toll Pifarré, R.: "Gobierno de Trump pide a los jueces cerrar casos de asilo de venezolanos expulsados a la cárcel de pandilleros en El Salvador", *Univisión Noticias*, 24 April 2025, univision.com/noticias

ministration's immigration crackdown[78]. There have also been cases where executive officials threaten or initiate misconduct complaints against judges, seemingly in retaliation for their decisions. For example, Judge James Boasberg (who oversaw high-profile executive oversight cases) was reportedly targeted by Attorney General who threatened formal complaints after the judge raised concerns about executive noncompliance with court orders[79]. Though legal in form, such complaints function as indirect intimidation when wielded by powerful political figures. This could amount to lawfare.

Even absent direct executive orders, executive rhetoric has been linked to real-world intimidation. The "pizza doxxing" phenomenon, that is, repeated unwanted deliveries of pizzas sent anonymously to judges' homes, has occurred shortly after judges were criticized by executive officials[80]. Though carried out by private individuals, the hostile context fostered by executive condemnation increases harassment risk. On April 24, 2025, a federal judge in California issued an injunction preventing the Trump administration from denying or conditioning federal funds to "sanctuary" jurisdictions (cities and counties limiting cooperation with federal immigration enforcement). The ruling challenged executive orders withholding funds from non-compliant jurisdictions, emphasizing executive overreach. This controversy highlights escalating tension between federal authority and local discretion[81]. The tension intensified when, on April 26, the FBI arrested a local judge on charges of obstructing immigration agents attempting to arrest an undocumented migrant at a courthouse[82]. On May 7, 2025 Chief Justice John Roberts delivered pointed remarks in Buffalo, stating "government doesn't work if the judiciary is not independent," signaling concern over political attacks against judges undermining separation of

[78] Andone, D.: "3 children who are US citizens —including one with cancer— deported with their mothers, lawyers and advocacy groups say", *CNN*, 27 April 2025, https://www.cnn.com/2025/04/27/us/children-us-citizens-deported-honduras/index.html

[79] Hari, R.: "DOJ files misconduct complaint against federal judge James Boasberg over anti-Trump remarks, seeks recusal from key case", *Mint*, 29 July 2025, https://www.livemint.com/news/us-news/doj-files-misconduct-complaint-against-federal-judge-james-boasberg-over-anti-trump-remarks-seeks-recusal-from-key-case-11753797503546.html

[80] Macfarlane, S. and Rosen, J.: "Federal judges targeted nationwide by "pizza doxxings", *CBS News,* 13 May 2025, https://www.cbsnews.com/news/pizza-doxxings-federal-judges/

[81] Grumbach, G. & Gregorian, D.: Judge blocks Trump bid to halt federal funding for sanctuary cities, *NBC News,* 24 April 2025, https://www.nbcnews.com/politics/immigration/judge-blocks-trump-bid-halt-federal-funding-sanctuary-cities-rcna202828

[82] Barret, D.: "Wisconsin Judge Arrested, Accused of Shielding Immigrant from Federal Agents, *The New York Times,* 26 April 2025, https://www.nytimes.com/2025/04/25/us/politics/fbi-arrest-judge.html

powers[83]. Around the same time, multiple outlets reported spikes in threats, and harassment targeting federal judges opposing the administration. A Reuters investigation on May 2 detailed incidents against judges and families; follow-ups in mid- and late-May documented increasing threats and judges seeking enhanced security resources[84]. On July 21, 2025 *The Washington Post* published a review of litigation against administration actions since January, finding that in about one-third of adverse rulings, officials were accused of delaying, re-labeling blocked measures, or providing misleading assurances, prompting judges across ideologies to question executive good faith[85]. The report linked these patterns to battles over grant freezes and agency downsizing.

Two August 2025 cases highlighted these dynamics. First, a significant constitutional confrontation emerged in New Jersey over the appointment of an interim U.S. attorney. Under federal law, district judges are allowed to appoint a temporary U.S. attorney if the executive branch fails to secure Senate confirmation for a nominee in four months. When the interim term of Alina Habba (former Trump's personal attorney appointed as New Jersey attorney by the administration) expired, the district court exercised its authority to name a replacement. However, the executive branch removed the new appointee and reinstated Habba under a different title, this time without any term limit. This move triggered sharp criticism from legal experts and members of Congress, who argued that it undermined judicial oversight and violated constitutional norms. A federal judge subsequently agreed to hear a case questioning the legality of the executive's maneuver, while administration lawyers blamed the judiciary for provoking what they called a "constitutional confrontation"[86]. This episode further illustrates the growing pattern of executive defiance toward judicial decisions and the institutional checks they represent. Second, on August 15, the D.C. Circuit lifted a district injunction blocking mass layoffs at the

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[83] Craig, C.: "Roberts's remarks in Buffalo emphasizing judicial independence", *Democrat and Chronicle,* 2025, https://eu.democratandchronicle.com/story/news/2025/05/08/chief-justice-john-roberts-stresses-need-for-judicial-independence/83509268007/

[84] Parker, A., Spector, M., Eisler, P., So, L., Raymond, N.: "A Special Reuters Report. Threats and harassment toward judges surge in 2025: Reuters investigation". 2 May 2025, https://www.reuters.com/investigations/these-judges-ruled-against-trump-then-their-families-came-under-attack-2025-05-02/

[85] Washington Post: "Trump officials accused of defying 1 in 3 judges who ruled against him. Systematic analysis of executive noncompliance with adverse rulings", 21 July 2025, https://www.washingtonpost.com/politics/2025/07/21/trump-court-orders-defy-noncompliance-marshals-judges/

[86] Rivard, K. C. and Gerstein, J.: "Another Trump clash with the courts is already spinning out into criminal cases", *Politico,* 28 July 2025, https://www.politico.com/news/2025/07/28/alina-habbas-authority-as-new-jerseys-top-prosecutor-questioned-in-new-legal-filing-00480025

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Consumer Financial Protection Bureau, which the White House aimed to shrink dramatically. The ruling didn't immediately authorize firings but marked an appellate shift favoring executive power, criticized for weakening judicial checks[87].

Together, these events reveal converging pressures on judicial independence: escalating personal intimidation of judges; executive tactics undermining compliance with court orders; and structural maneuvers over personnel and agency design challenged in court with rhetoric framing judicial resistance as illegitimate. While no single episode proves a constitutional crisis, collectively they depict an environment where judicial authority and insulation face unusually direct challenges. These cases illustrate how the executive can exert undue pressure on the judiciary, not only through formal mechanisms but also via rhetoric, public messaging, threats, and resistance to obey judicial decisions. Such actions endanger judges' rights and the structural guarantees of judicial independence vital to democracy and the rule of law. This also leads to wondering what value judicial decisions have these days.

b. Examples in Europe

If we now turn to the EU, we can easily find examples of intimidation of judges in Poland and Spain, to name only two cases. In light of the judicial reforms implemented in Poland by the former government of the PiS (2015-2023), a serious cause for concern was the systematic campaign orchestrated by the executive branch against certain judges. These judges were especially targeted if they had protested their premature removal from office, publicly opposed arbitrary changes to the law, challenged the dismissal of their promotion applications through judicial review, or issued judicial decisions that the executive disliked[88]. In this context, particular attention must be given to the case of the former spokesperson of the National Council of the Judiciary (NCJ), who endured a prolonged and exhausting campaign of prosecution and defamation as a result of the public statements he made in his official capacity[89]. This strategy, which aimed to intimidate, discourage, and silence him -and to send a chilling message to

[87] Reuters: "US appeals court rejects states' lawsuit over Trump mass firings", 8 September 2025, https://www.reuters.com/legal/government/us-appeals-court-rejects-states-lawsuit-over-trump-mass-firings-2025-09-08/

[88] Sanz Caballero, S.: *"El Consejo Nacional de la Magistratura: actor en Polonia, repercusiones en Europa", Colección Ius Cogens,* Externado de Colombia, vol. 11, 2023, pp. 685-607.

[89] ECtHR: Judgment of June 16, 2022, Żurek v. Poland, App. No. 39650/18, paras. 48-92.

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other judges-ultimately led to his removal from office. His statements consistently defended the independence of the judiciary and publicly denounced political interference, arguing that the reforms were incompatible with the principles of the rule of law. His aim was to inform the public about the abuses being committed, since according to the jurisprudence of the European Court of Human Rights judges have a professional duty to speak out in defence of the rule of law[90]. This duty becomes even more significant when the speaker is acting on behalf of the national judicial council. Eventually, the NCJ spokesman presented himself an application against Poland before this Court. The European Court of Human Rights (ECtHR) was particularly firm in its judgment, strongly condemning the government's interference with the freedom of expression of someone whose specific role was to defend judicial independence and the separation of powers. The Court found that the judge's statements to the media, focused on the independence of the judiciary and the rule of law as fundamental values under threat in Poland, were not only made in a personal capacity but also, and primarily, in his role as spokesperson of the NCJ, and that they related to matters of public interest. As is to be expected, the ECtHR has shown heightened vigilance in ensuring protection for members of the judiciary against measures that threaten their independence and autonomy[91].

In the case of Spain, although there are no final court rulings directly addressing the situation, there has been a sustained and politically motivated campaign by members of the executive branch targeting specific judges. These judges are primarily those investigating cases involving individuals within the inner circle of the Prime Minister, including close family members, former government officials, or prominent figures of the ruling party. Among the judges targeted are those investigating the possible conflicts of interest of the prime minister's wife (Juez Peinado), the seemingly illegal acquisition of a public position by the prime minister's brother (Jueza Biedma), and the supposed payoffs obtained from private companies by high political figures of the ruling party to secure government licenses (Juez Puente)[92].

Other judges under political pressure are those handling cases related to the former President of the Generalitat of Catalonia and the illegal in-

[90] ECtHR: Judgment of June 23, 2016, Baka v. Hungary, App. no. 20261/12, para. 165.

[91] Zurek, paras. 222 and 224.

[92] Fernández Chillón, R.: "Sánchez, el Gobierno y el PSOE han lanzado más de 25 ataques frontales a los jueces esta legislatura" *El Debate,* 3 September 2025, https://www.eldebate.com/espana/20250903/sanchez-gobierno-psoe-han-lanzado-25-ataques-frontales-jueces-esta-legislatura_330730.html

dependence referendum held in 2017, which led to charges of sedition, embezzlement, and disobedience. What makes the situation particularly concerning is that the support of the Catalan separatist parties, including the one led by the former president under investigation, is essential for the current government to remain in power. Against this backdrop, several executive officials and political allies have publicly discredited judicial decisions, questioned the impartiality of judges, and suggested reforms to reduce the judiciary's independence, including changes to the selection process of judges and prosecutors[93]. Moreover, there has been a continued lack of implementation of judicial rulings mandating that Catalonian schools ensure instruction in the Spanish language. Parents and children who exercise their right to receive education in Spanish frequently become targets of harassment[94]. This tactic, while not always explicit, has a chilling effect on the judiciary, especially when judges face the prospect that their rulings may simply be ignored by the state. In this particular case, the non-respect of the judicial decision goes against the children's rights to education and be free from any form of violence or intimidation.

This ongoing political narrative, marked by public accusations of "lawfare" and alleged judicial persecution, contributes to undermining public trust in the judiciary and creates a chilling effect among magistrates, especially those dealing with politically sensitive cases. While no institutional steps have yet been taken against individual judges, the consistent rhetoric coming from executive figures fosters an environment of pressure and delegitimization that poses a threat to judicial independence and the principle of separation of powers. These public attacks on the judiciary have serious consequences for democratic discourse. By repeatedly discrediting individual judges and suggesting that judicial decisions are politically motivated, members of the executive contribute to inflaming public debate and deepening political polarization. Most worryingly, such rhetoric has led to increasingly hostile attitudes from sectors of society closely aligned with the government, who often direct their frustration toward specific judges. Reports from judicial associations have noted that these judges feel harassed, intimidated, and unsupported, particularly when their professional integrity

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[93] García Vázquez, C.: "La carrera judicial emplaza a Perelló a endurecer el tono contra el Gobierno por los ataques de Sánchez", VozPópuli, 4 September 2025, https://www.vozpopuli.com/tribunales/la-carrera-judicial-emplaza-a-perello-a-endurecer-el-tono-contra-el-gobierno-por-los-ataques-de-sanchez.html

[94] Arenas García, R.: "Vehiculariedad del Castellano en la Escuela Catalana y Desobediencia", *Fundación Hay Derecho*, 25 November 2021, https://www.hayderecho.com/2021/11/25/vehiculariedad-del-castellano-en-la-escuela-catalana-y-desobediencia/

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is questioned in the media or in parliamentary discourse[95]. This general erosion of respect for judicial decisions risks normalizing executive defiance of courts, undermines the personal safety and morale of those targeted, and also weakens public confidence in the judiciary as a neutral guarantor of rights and the rule of law. The abusive use of the resources to the freedom of expression by political leaders against judges, and/or the abuse of court lawsuits in vindictive, selective prosecutions against both opponents and judges perceived as inconvenient, erodes the pillars on which judicial independence and the rule of law are rooted. This situation, which undermines the judiciary's credibility in the eyes of citizens, stems from the belief held by some political leaders that the executive stands above the judicial branch, and that judges therefore have no authority to limit the power of the president or the government[96]. But this continuously increasing rhetoric discrediting judicial work has consequences on human rights in terms of rights to access to a court, equality of all individuals before the law, the right to a fair trial, the right to a judge, the right to equality of arms, and the rights of defense, among others.

[95] To name but a few: Asociación profesional de la magistratura, Asociación judicial Francisco de Vitoria, Foro Judicial Independiente, Asociación de Fiscales, Asociación profesional e independiente de fiscales: Comunicado de la Mayoría de Asociaciones de Jueces y Fiscales sobre el señalamiento de jueces en sede parlamentaria, 13 December 2023, https://www.ajfv.es/comunicado-de-la-mayoria-de-las-asociaciones-judiciales-y-fiscales/; Asociación Francisco de Vitoria y Foro Judicial Independiente: Comunicado conjunto AJFV y FJI sobre la Proposición de Ley Orgánica de garantía y protección de los derechos fundamentales frente al acoso derivado de acciones judiciales abusivas, 14 January 2025; https://www.ajfv.es/comunicado-conjunto-ajfv-y-fji-sobre-la-proposicion-de-ley-organica-de-garantia-y-proteccion-de-los-derechos-fundamentales-frente-al-acoso-derivado-de-acciones-judiciales-abusivas/; Asociación jueces y juezas para la democracia. Comunicado Conjunto de las Asociaciones de Jueces y Fiscales sobre las declaraciones de María Jesús Montero, 31 March 2025. https://www.juecesdemocracia.es/2025/03/31/comunicado-conjunto-de-las-aaj-jyff-sobre-las-declaraciones-de-maria-jesus-montero/; Asociación profesional de la magistratura: Informe APM_ libertad de expresión de los jueces/as, La Proposición de Ley Orgánica de garantía y protección de los derechos fundamentales frente al acoso derivado de acciones judiciales abusivas, presentada por el Grupo Parlamentario Socialista, 25 February 2025, https://magistratura.es/informe-apm_-libertad-de-expresion-de-los-jueces-as-y-la-proposicion-de-ley-organica-de-garantia-y-proteccion-de-los-derechos-fundamentales-frente-al-acoso-derivado-de-acciones-judiciales-abusivas/

[96] *The Guardian*: Outrage after JD Vance claims judges are not allowed to check executive power, 10 February 2025. https://www.theguardian.com/us-news/2025/feb/10/jd-vance-judges-trump; *Politico:* Hungary won't abide by EU court ruling on migration, Orbán says, 21 December 2021, https://www.politico.eu/article/hungary-challenge-eu-court-ruling-migration-viktor-orban/

IV. Conclusions

The analysis demonstrates the inseparable link between the rule of law and human rights, exemplified in judicial independence. Both in the United States and the European Union, these values are mutually reinforcing: the rule of law ensures that laws are applied fairly, consistently, and impartially, while the protection of human rights depends on an independent judiciary capable of upholding those laws. Historical and contemporary examples, from the U.S. Constitution, Bill of Rights, and Virginia Declaration of Rights to EU treaties, the ECHR, the Charter of Fundamental Rights, and the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, show that legal systems have long recognized this interdependence.

Recent developments reveal that the erosion of judicial independence, whether through political interference, harassment of judges, or arbitrary use of pardons and amnesties, directly threatens the effective protection of human rights and the functioning of democracy. The cases documented in the United States, including unprecedented presidential pardons and executive actions undermining court orders, illustrate how executive overreach can compromise equality before the law and due process. In Europe, targeted harassment of judges in Poland and Spain, alongside selective amnesties and politically motivated campaigns against magistrates, demonstrates similar risks to judicial autonomy, public confidence, and the equitable application of justice.

The evidence underscores that judicial independence is not a privilege reserved for judges but a necessary safeguard for all citizens seeking fair treatment under the law. Any interference with the judiciary, whether overt or indirect, jeopardizes the broader democratic framework and diminishes the credibility of legal institutions. Consequently, the rule of law, human rights, and judicial independence emerge not merely as abstract principles but as practical pillars essential for the survival of democratic governance and the protection of individual and collective rights. Ultimately, the sustained protection of these core values requires vigilant adherence to legal norms, robust institutional safeguards, and a societal commitment to justice, equality, and accountability. Without these protections, both in the United States and the European Union, the promise of the rule of law and human rights remains vulnerable, highlighting the urgent need to reinforce the independence of the judiciary.

The judiciary is one of the state powers, but it is probably the most vulnerable of all, as it relies on the integrity of its own members and the respect of other state branches to function effectively, being subject to the other branches deciding on its reform. Judicial independence is not merely

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a procedural formality; it is the cornerstone of human rights protection in any democracy. Without an impartial and autonomous judiciary, citizens cannot rely on courts to uphold equality before the law, ensure fair trials, or protect against abuses of power. In Western democracies, the independence of judges safeguards the rule of law, providing a necessary check on executive and legislative authority and guaranteeing that human rights are not subject to political whims. When judicial independence is compromised or the judicial system is captured, the very foundations of liberty, justice, and accountability are eroded, leaving societies vulnerable to arbitrary governance and the systematic violation of individual and collective rights. As a result, protecting the judiciary is tantamount to protecting democracy itself and the human rights it is designed to safeguard. Judges interpret and apply the law, and to do so with integrity -independently, impartially, and fairly- they must be free from both external and internal interference. The United States and the European Union must ensure that judicial independence is upheld. Failure to do so undermines the entire constitutional system, weakens institutional guardrails, and sets off a cascade of consequences, including impunity, inequality, corruption, and discrimination, ultimately eroding the very foundations of democracy.

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Multilayered democracy, media freedom and online platforms

Democracia multicapa, libertad de prensa y plataformas en línea

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Summary: I. Introduction.—II. Unification, fundamental rights, and democracy. 1. European unification and fundamental rights. 2. European unification and multilayered democracy. 3. Democracy and freedom of expression and information.—III. Unification, media freedom and informed opinion formation. 1. Media freedom, opinion formation and audiovisual media. 2. Democracy, media freedom and public services. 3. Democracy and transparent political advertisements.—IV. Democracy, transparency and platform providers. 1. Platform providers and media content. 2. Platform providers and political advertisements. 3. Public and private enforcement of platform responsibilities.—V. Conclusions.

Abstract: Paradoxically, the EU which is a *sui generis* polity largely based on intergovernmental cooperation and supranational bureaucracy, has become the main guarantor of democracy in Europe. In 2025, the European Democracy Shield was adopted to reinforce situational awareness, strengthen democratic institutions and boosting social resilience and citizen's engagement. As the Union lacks unambiguous powers to protect forms of governance, the shield consists mainly of frameworks for collaboration between national authorities and EU institutions. However, the Union's competences to establish and maintain an internal market has become a route to promote informed opinion-formation which is the very foundation for democracy. Within the scope of EU law, the EU institutions as well as the national norm giving powers must always take fundamental rights and interests recognised in the EU Charter into account. Primarily the freedom of expression and information enshrined in Article 11 of the EU Charter is, therefore, transposed into the regulation of media and platform services within the Union. It is a delicate matter to reconcile on the one hand the right to freely receive and impart information including media freedom and pluralism, and on the other hand to repress disinformation and protect the integrity and relevance of media providers acting under editorial responsibility. Indeed, a primary objective of the Democracy Shield is to protect against foreign information manipulation and interference (FIMI) in electoral as well as in legislative processes. Hence, the European Media Freedom Act (EMFA) and the Transparency and Targeting of Political Advertising Act (TTPA) which took effect in 2025, are impor-

tant components of the Shield. Since platform providers are in most instances not media service providers, they are instead subject to the legal and institutional framework established by the Digital Service Act (DSA). On occasion, conduct by platform providers can also be considered anticompetitive and infringe the Digital Markets Act (DMA) for media content providers and social-media platform providers. In this contribution, the interrelations between the relevant legal frameworks are explored. As an overall theme the reconceptualization of democracy within the EU, from being merely a matter of parliamentary majority to being anchored in fundamental rights, is discussed.

Keywords: Rule of law, democracy, media freedom, political advertising, online platforms.

Resumen: *Paradójicamente, la UE, que es una entidad política sui generis basada en gran medida en la cooperación intergubernamental y la burocracia supranacional, se ha convertido en la principal garante de la democracia en Europa. En 2025 se adoptó el Escudo de la Democracia Europea para reforzar la conciencia situacional, fortalecer las instituciones democráticas e impulsar la resiliencia social y la participación ciudadana. Dado que la Unión carece de competencias inequívocas para proteger las formas de gobernanza, el escudo consiste principalmente en marcos de colaboración entre las autoridades nacionales y las instituciones de la UE. Sin embargo, las competencias de la Unión para establecer y mantener un mercado interior se han convertido en una vía para promover la formación de opiniones informadas, que es la base misma de la democracia. En el ámbito del Derecho de la UE, tanto las instituciones de la UE como las normas nacionales que otorgan competencias deben tener siempre en cuenta los derechos e intereses fundamentales reconocidos en la Carta de la UE. Por lo tanto, la libertad de expresión y de información consagrada en el artículo 11 de la Carta de la UE se transpone principalmente a la regulación de los medios de comunicación y los servicios de plataforma dentro de la Unión. Es delicado conciliar, por un lado, el derecho a recibir y difundir libremente información, incluida la libertad y el pluralismo de los medios de comunicación, y, por otro, reprimir la desinformación y proteger la integridad y la relevancia de los proveedores de medios de comunicación que actúan bajo responsabilidad editorial. De hecho, uno de los objetivos principales del Escudo de la Democracia es proteger contra la manipulación y la injerencia extranjeras en la información (FIMI) en los procesos electorales y legislativos. Por lo tanto, la Ley Europea de Libertad de los Medios de Comunicación (EMFA) y la Ley de Transparencia y Orientación de la Publicidad Política (TTPA), que entraron en vigor en 2025, son componentes importantes del Escudo. Dado que, en la mayoría de los casos, los proveedores de plataformas no son proveedores de servicios de medios de comunicación, están sujetos al marco jurídico e institucional establecido por la Ley de Servicios Digitales (DSA). En ocasiones, la conducta de los proveedores de plataformas también puede considerarse anticompetitiva e infringir la Ley de Mercados Digitales (DMA), que a su vez establece normas para las interfaces en línea. En esta contribución se exploran las interrelaciones entre los marcos jurídicos pertinentes. Como tema general, se debate la reconceptualización de la democracia dentro de la UE, que pasa de ser una mera cuestión de mayoría parlamentaria a estar anclada en los derechos fundamentales.*

Palabras clave: *Estado de Derecho, democracia, libertad de prensa, publicidad política, plataformas en línea.*

I. **Introduction**

On 12 November 2025, the European Democracy Shield was launched by the European Union (EU) to promote and empower European democracies in accordance with the 2025 Work Programme of the European Commission, and the Political Guidelines for the Commission 2024-2029.[1] More to the point, the policy document establishing the Democracy Shield identifies three priority areas: "reinforcing situational awareness and support response capacity to safeguard the integrity of the information space"; "strengthening democratic institutions, free and fair elections and independent media"; and "boosting societal resilience and citizens' engagement."[2] It builds on the 2020 European Democracy Action Plan and the 2023 Defence of Democracy package, which were adopted with a view to give "a new push for European Democracy".[3] Unlike previous Union actions in the area, the Democracy Shield is developed by the European Commission in collaboration with the European External Action Service (EEAS), which testifies to its significance for the European way of life in a new security situation.[4] By exploiting the inherent vulnerabilities in open and democratic societies, foreign malevolent powers and their proxies seek to divide and create confusion among the people of Europe.[5] In this context, the Commission's

[1] Joint Communication from the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy, European Democracy Shield: Empowering Strong and Resilient Democracies, JOIN(2025) 791 final; Communication from the Commission, Commission work programme 2025, Moving forward together: A Bolder, Simpler, Faster Union, COM(2025) 45 final; and https://commission.europa.eu/document/download/e6cd4328-673c-4e7a-8683-f63ffb2cf648_en?filename=Political%20Guidelines%202024-2029_EN.pdf, last visited 2026-01-13. Neither cybersecurity nor legal frameworks relating to free movement of capital will be addressed.

[2] *Ibid*, at 2.

[3] Communication from the Commission on the European democracy action plan COM(2020) 790 final; and Communication from the Commission on Defence of Democracy, COM(2023) 630 final; implementing Communication from the Commission, Commission Work Program 2020 – A Union that strives for more, COM(2020) 37 final; and point 6 of the Political Guidelines for the next European Commission 2019-2024 adopted by the then candidate for the President of the European Commission, Ursula von der Leyen, https://commission.europa.eu/document/download/063d44e9-04ed-4033-acf9-639ecb187e87_en?filename=political-guidelines-next-commission_en.pdf, visited 2026-01-13.

[4] See also Joint Communication from the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy, on the European Preparedness Union Strategy, JOIN(2025) 130 final.

[5] See outcome of proceedings in the Council of the European Union 21 May 2024, 10119/24, JP/kp, 1 RELEX 5, and Annex, Council conclusions on democratic resilience: safeguarding electoral processes from foreign interference, ttps://data.consilium.europa.eu/doc/document/ST-10119-2024-INIT/en/pdf, visited 2026-01-13.

President stated, in the policy document on the Democracy Shield, that "it is only by showing that democracy works for people and that it delivers, that we can create a stronger Union. Europe can only thrive if democracy thrives."[6] However, the Democracy Shield is introduced in a multilayered constitutional structure and must be seen in the light of limited normative competences conferred on the EU.[7]

At the supranational level, the European Parliament has gained increased powers, and EU citizenship complements national citizenship with additional rights to participate in electoral processes. However, the Member States have not conferred any clear competences on the Union to safeguard democratic processes at national level. On the contrary, the Union shall according to Article 4(2) of the Treaty on European Union (TEU), respect the Member States' "national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government."[8] Furthermore, the list of EU competences provided for in Articles 3-6 of the Treaty on the Functioning of the European Union (TFEU) is silent on the protection of democracy.[9] Since the provisions enshrined in the TEU and TFEU, like the terms of all international agreements, must be "interpreted in good faith in accordance with the ordinary meaning", the Union has limited formal powers to protect national democracies.[10] Consequently, the Democracy Shield consists to a large extent of institutional and procedural frameworks for collective efforts of Member States and the Union to uphold democracy.[11] However, the EU also relies on its powers to establish and maintain an internal market for media services and online intermediation services (platform services) to promote democracy.

As provision of media services in general and current affairs and news reporting in particular is essential for opinion formation, the deliberation of media services is directly linked to democracy. Although the EU and its

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[6] Statement at the Charlemagne Prize award ceremony regarding work done in the service of European unification, quoted in the European Democracy Shield: Empowering Strong and Resilient Democracies, supra note 1, at 1.

[7] For an overview, see for instance K. Lenaerts and P. v. Nuffel (ed. T. Corthaut), EU Constitutional Law, Oxford University Press (OUP), 2022.

[8] Consolidated version of the TEU, Official Journal (OJ) 2012, C 326/13.

[9] Consolidated version of the TFEU, OJ 2012, C 326/47.

[10] See Article 31of the Vienna Convention on the Law of the Treaties, 1969, United Nations (UN), Treaty Series, vol. 1155, p. 331.

[11] See the European Democracy Shield: Empowering Strong and Resilient Democracies, supra note 1; 2025 Strategic Foresight Report Resilience 2.0: Empowering the EU to thrive amid turbulence and uncertainty, COM/2025/484 final; and "Rethinking societal resilience in a time of polycrisis", https://publications.jrc.ec.europa.eu/repository/handle/JRC142772, retrieved 2026-01-15.

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Member States have shared powers to regulate the internal market and the Union has, therefore, largely refrained from harmonising public service media, market integration has paved the way for a value-based regulation of media and platform services. Since the Lisbon Treaty revision in 2009, all Union and national measures within the scope of EU law must be aligned with the Charter of fundamental rights of the EU (EU Charter).[12] Conflicting rights and interests enshrined in the provisions of the TEU, TFEU and the EU Charter (EU primary law) must be reconciled by necessary limitations pursuant to the principle of proportionality, and the trade-offs are specified in EU legislative acts (secondary legislation).[13] Hence, secondary legislation concerning media and platform providers that forms part of the Democracy Shield, must be seen in the light of the European rule of law mechanism.[14]

In constantly changing media landscapes, journalism is challenged by media providers who do not act under editorial responsibility, and the distinction between news and entertainment is blurred. As a result of technological developments and migration of media content from terrestrial networks to digital devices, the limelight has moved to the responsibility of platform providers.[15] Evidently, a distinction needs at the outset to be made between those who provide media content and those who provide digital infrastructure for sharing and hosting the media content. Media providers are covered by the European Media Freedom Act (EMFA) and the Transparency and Targeting of Political Advertising Act (TTPA), which entered into force in 2025 and are now essential elements in the development of the European Democracy Shield.[16] Providers of online platforms are instead primarily covered by the Digital Service Act (DSA).[17] However, sophistication of algorithms for organizing and operating online interfaces, implies that platform providers become increasingly responsible for repressing illegal content such as disinformation, while at the same time not inhibiting

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[12] EU Charter, OJ 2012, C 326/391.

[13] See TFEU, supra note 9, Article 288.

[14] See for an overview, https://commission.europa.eu/document/download/0202c616-e7e6-4378-9961-512c56d246c5_en?filename=rule_of_law_mechanism_factsheet_en.pdf, retrieved 2026-01-15.

[15] See the Joint Research Centre (JRC) report on the influence of online media on citizens' behaviour: https://ec.europa.eu/jrc/en/publication/eur-scientific-and-technical-research-reports/technology-and-democracy, retrieved 2026-01-15

[16] Regulation (EU) 2024/1083 establishing a common framework for media services in the internal market and amending Directive 2010/13/EU (European Media Freedom Act), OJ 2024 L, 2024/1083; and Regulation (EU) 2024/900 on the transparency and targeting of political advertising, OJ 2024 L, 2024/900.

[17] Regulation (EU) 2022/2065 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act), OJ 2022 L, 277/1.

freedom of expression and information.[18] In addition, platform providers can be held liable as publishers of political advertising under the TTPA. In particular providers of very large online platforms (VLOPs) and very large online search engines (VLOSEs) are covered to some extent by the rules in the EMFA.[19]

Through deregulation, media and platform services also become subject to the EU's exclusive powers to develop a competition law regime necessary for the functioning of the internal market. If the platform provider is classified among gatekeepers for access to media content, it becomes subject to the related legal obligations arising from the Digital Market Act (DMA).[20] As all platform services addressed to end-users in the Union are covered by EU law regardless of whether the service provider is established in the Union or not, the distinction between trade and competition in the internal market and external trade between, on the one hand the EU and its Member States, and on the other hand non-EU countries (third countries), collapses. Whereas media and platform services escape the scope of the Common Commercial Policy (CCP), they are subject to behind the border regulation at Union and Member State level in accordance with the principle that the rules in the jurisdiction where a measure takes effect apply. EU law applies globally insofar as it can be enforced by legal entities in the Union against providers established in third countries.

In an overall perspective, the obligation under EU law to transpose fundamental rights into secondary legislation, and the lack of clear competences to protect democracy *per se*, promotes a European form of democracy that is conditioned on the rule of law including fundamental rights.[21] In this chapter, the interrelations between free movement of media and platform services, freedom of expression and information, and the protection of democracy will be explored.

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[18] See Joint Communication from the Commission and the High Representative of the Union for Foreign Affairs and Security Policy, Action Plan against Disinformation JOIN(2018) 36 final; and Communication from the Commission, Guidance on Strengthening the Code of practice on Disinformation COM/2021/262 final.

[19] Communication from the Commission, Guidelines to support the implementation of Regulation (EU) 2024/900 on the transparency and targeting of political advertising, C(2025) 6829 final, at 4-10.

[20] Regulation (EU) 2022/1925 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), OJ 2022 L, 265/1.

[21] See as to the interrelations between democracy, the rule of law and fundamental rights for instance Communication from the Commission, 2022 Rule of Law Report, COM(2022) 500 final; and compare with the European Commission for Democracy Through Law (Venice Commission) Report on the rule of law (2011), Study No. 512/2009, CDL-AD(2011)003rev; and K. Annan, (2004), The rule of law and transitional justice in conflict and post-conflict societies; report of the Secretary-General, S/2004/616.

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II. Unification, fundamental rights, and democracy

1. *European unification and fundamental rights*

Already before the European Economic Community (EEC) was established by the Treaty of Rome in 1958, a Consultative Assembly of national members of parliament was set up in 1952 by the time limited Coal and Steel Treaty.[22] As a main objective, the Assembly should develop a political community, and it became the forum for developing the Western European military alliance established in 1948 into the Western European Union (WEU) in 1954.[23] However, the Assembly has been described as "a multilingual talking shop". Hence, the ambitious political project was soon put on hold and the WEU was overshadowed by the North Atlantic Treaty Organisation (NATO).[24] Instead, the idea of a European common market attracted greater interest. In that connection, the architect of the EEC, Jean Monnet was, wise from the experiences of political mass-movements and the rising tensions in the Alsace region at the time, an outspoken sceptic of the ability of political leaders to create cross-border unity and peace.[25]

For a long time, the interrelation between fundamental rights and economic integration was ambiguous. Indisputably, the founders of the EEC, who had experienced two world wars, were in favour of the United Nations (UN) Universal Declaration of Human Rights of 1948, as operationalised by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), that took effect in 1953.[26] However, fundamental rights should be rooted in parliamentarism, and the Member States were reluctant to relinquish constitutional powers. Furthermore, in the external di-

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[22] Treaty establishing the European Coal and Steel Community and related instruments (ECSC treaty), available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:11951K, retrieved 2026-01-15.

[23] See https://www.cvce.eu/en/collections/unit-content/-/unit/02bb76df-d066-4c08-a58a-d4686a3e68ff/9059327f-7f8a-4a74-ac7e-5a0f3247bcd3/Resources#73277207-d250-41c5-8960-1d8bce9f11aa_en&overlay, retrieved 2026-01-15.

[24] D. Farrell, Professor Farrel, "The EP is now one of the most powerful legislatures in the world, ttps://www.europarl.europa.eu/RegData/presse/pr_avi/2007/EN/03A-DV-PRESSE_IPR(2007)06-15(07837)_EN.pdf, retrieved 2026-01-15.

[25] See in Swedish, A. Ström Melin, Monnets blinda flack – Om EU:s grundare och hans skapelse, DIALOGOS, 2023, at 78-86.

[26] UN General Assembly resolution 217 A adopted on December 10, 1948, A/RES/3/217A; and ECHR that applies in all EU Member States is available here, www.echr.coe.int/documents/d/echr/convention, retrieved 2026-01-15. Winston Churchill had promoted a "Council of Europe" already during the war and he famously emphasised the need for such an organisation in a speech held at the University of Zurich on 17 December 1946, www.churchill-in-zurich.ch/en/churchill/en-churchills-zurcher-rede/, retrieved 2026-01-15.

mension, already the comprehensive free trade area established by the Treaty of Rome was pushing the limits of what could be accepted by the United States (US) within the framework of the General Agreement on Tariffs and Trade (GATT) established in 1947.[27] Nonetheless, it was stated in the first recital in the preamble to the EEC Treaty, that it was intended to "lay the foundations for an ever-closer union among the peoples of Europe".[28]

As the customs union was completed in 1968, the internal market could finally be established. However, the lack of powers to protect fundamental rights soon resulted in frictions between free movement of products and means of production, and national welfare models. Inevitably, the European Court of Justice (ECJ), therefore, had to reconcile the economic rights underpinning market integration with other fundamental rights and interests.[29] Famously, in 1970, the ECJ clarified in the *Internationale Handelsgesellschaft Case*, on the one hand, that the uniformity and efficacy of Community law required that the EEC legal acts took precedence over even national constitutional law, and on the other hand, that fundamental rights constituted general principles protected under EEC law.[30] Indeed, in the 1970s, the possibility of justifying trade barriers on grounds of public order became a rout to reconcile the right to conduct a business with the protection of other fundamental rights and interests by means of proportionate limitations.[31] However, the complainants in the national proceedings resulting in the ECJ's ruling in the *Internationale Handelsgesellschaft Case* had also turned to the German Constitutional Court, which explained that the primacy of EEC law over domestic law could be accepted only as long as ("Solange") structural principles of the national Basic Law could be maintained.[32] Similar reservations were made by the highest courts in other Member States.[33]

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[27] F. McKenzie, The GATT-EEC Collision: The Challenge of Regional Trade Blocs to the General Agreement on Tariffs and Trade, 1950-67, The International History Review, Vol. 32, No. 2 (Jun 2010), at 229-252.

[28] Treaty of Rome, available here, https://eur-lex.europa.eu/EN/legal-content/summary/treaty-of-rome-eec.html, retrieved 2026-01-15.

[29] See Judgment of the ECJ of 12 November 1969, Erich Stauder v City of Ulm – Sozialamt, Case 29/69, EU:C:1969:57.

[30] Judgement of the ECJ of 17 December 1970, internationale Handelsgesellschaft, Case 11/70, EU:C:1970:114

[31] See Judgment of the ECJ of 4 December 1974, Yvonne van Duyn v Home Office, Case C-41/74, EU:C:1974:133; Judgment of the ECJ of 28 October 1975, Roland Rutili v Ministre de l'intérieur, Case 36/75, EU:C:1975:137; and Judgment of the ECJ of 27 October 1977, Régina v Pierre Bouchereau, Case C— Case 30/77 EU:C:1977:172.

[32] BverfdGE 37, 291, 29 May 1974 (Solange I).

[33] In France the principle of primacy was not accepted in administrative law by the Conseil d'Etat until 1995 in the case of Nicolo published in the Common Market Law Review (CMLR) [1990] 1 173. However, for instance Conseil d'Etat, 1 October 2014, 365054, Mme B. A. et Mme A.

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In 1986, the German Constitutional Court eventually abandoned the requirement for constitutional review of Community acts.[34] However, the protection of fundamental rights at the supranational level remained a subject of contention even after the European Union (EU) was established in 1993.[35] In Opinion 2/94, the ECJ declared that the Union could not accede to the ECHR in the absence of clear competences relating to human rights conferred by the Member States in the Maastricht Treaty.[36] Nonetheless, only European states that met the Copenhagen criteria, including the recognition of the rule of law, democracy and fundamental rights, could become EU Member States.[37] In connection with the EU enlargement into central and eastern Europe, the EU Charter was adopted in 2000 as a policy instrument.[38] Furthermore, the idea of a European Constitution gained traction in leading circles, but the project was brought to a halt by referendums in France and the Netherlands. Nonetheless, the Lisbon revision of the EU Treaty that resulted in the adoption of the TEU and TFEU in 2009, established a quasi-constitutional superstructure due to the elevation of the EU-Charter to primary law by Article 6(1) of the TEU.[39]

Within the scope of the competences conferred by the Member States on the Union under Article 4 of the TEU, the EU institutions shall according to Article 5(2) thereof, act "only to attain the objectives set out in the Treaties". As a primary objective, the Union shall pursuant to Article 3(1) of the TEU promote "peace, its values and the well-being of its people". On that note, the Member States have manifested in Article 2 of the TEU that the Union is founded on the values of "human dignity, freedom, democracy, equality, the rule of law and human rights […]".[40] In parity with the clarification in Article 6(1) of the TEU that the EU Charter has the same legal value as the Treaties, Article 51(1) of the Charter states that the Union and its Member States shall within the scope of EU law and in accordance with their respective powers "respect the rights, observe the principles and promote the applica-

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[34] BverfGE 73, 339, 22 October 1986 (Solange II). However, compare with the concept of ultra vires in BVerfGE 89, 155, 12 October 1993 (Brunner).

[35] Maastricht Treaty available here https://eur-lex.europa.eu/EN/legal-content/summary/treaty-of-maastricht-on-european-union.html, retrieved 2026-01-15.

[36] Opinion 2/94 of the Court of 28 March 1996, EU:C:1996:140.

[37] Copenhagen Criteria available here, https://eur-lex.europa.eu/EN/legal-content/glossary/accession-criteria-copenhagen-criteria.html, retrieved 2026-01-15.

[38] EU Charter, supra note 12.

[39] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, OJ 2007 C, 306/1.

[40] See originally Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, OJ 2001 C, 80/1.

tion" of the provisions in the Charter. Incompatible Union measures can be revoked by the ECJ and negligence on national level for instance by failing to transpose a directive specifying fundamental rights into domestic law, may give rise to national administrative court cases and actions for infringement of the EU Treaties.[41] Hence, the ECJ has since 2010 reiterated that "situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable."[42]

Fundamental rights as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, shall remain general principles of the Union's law pursuant to Article 6(3) of the TEU. In addition, Article 6(2) of the TEU manifests the persistent idea that the Union should accede to the ECHR-system to forge a united foundation of values, but only as long as an accession does "not affect the Union's competences as defined in the Treaties." Soon this contradiction in terms was brought to a head in Opinion 2/13 where the ECJ rejected a proposal for accession to the ECHR for the second time, now mainly because of the need to ensure system-coherency of the Union legal order and to avoid geo-political tensions resulting from actions by Member States and third countries against the EU institutions.[43] When it comes to normative coherency, it should be reminded of that Article 7 of the TFEU requires the Union to "ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers."

Although the Union has so far not been able to accede to the ECHR-system, Articles 52(3) and 53 of the EU-Charter, establish that the meaning and scope of the rights and freedoms recognised in primary EU law should be the same as those laid down in the ECHR, or provide more extensive protection. However, this perhaps laudable intention must be taken with a pinch of salt, since economic freedom and market integration remains at the centre of the European unification process. Furthermore, it stands to reason that the extension of one right corresponds to the limitation of another. For instance, an extensive right to data protection under Article 8 of the EU Charter, may confine the right to conduct a business under Article 16 thereof, and vice versa. If the Court of Justice of the European Union (CJEU) which consists of the General Court (GC) and the ECJ, would construe a provision of the EU Charter in another way than the Euro-

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[41] See Articles 263 TFEU, Judgment of the ECJ of 9 November 1995, Andrea Francovich v Italian Republic, Case C-479/93, EU:C:1995:372; and Articles 258-260 of the TFEU.

[42] Judgment of the ECJ of 26 February 2013, Åklagaren v Hans Åkerberg Fransson, Case C-617/10, EU:C:2013:105, para. 21.

[43] Opinion 2/13 of the Court of 18 December 2014, EU:C:2014:2454.

pean Court of Human Rights (ECtHR) would interpret a corresponding right under the ECHR, one of the rights under the ECHR would be more limited in scope than under the EU Charter.

There are also structural differences between the ECHR and the Union legal order, which makes it difficult to compare the systems in terms of a higher or lower level of protection of fundamental rights. In contrast to the possibility for a private party to bring a case before the ECtHR once all domestic legal remedies have been exhausted, fundamental rights and interests recognised in EU primary law, are as mentioned often specified in regulations and directives with primacy over national law in terms of direct or indirect applicability, and direct or indirect effect. Hence, the Charter appears rather as a yardstick for assessing the validity of Union measures, and as a fall-back position in case a Member State fails to align the domestic legal system. Furthermore, proportionality is a cardinal principle of EU law. Although conflicting rights and interests need to be reconciled by necessary limitations based on the facts of each individual case within both the ECHR-system and the Union legal order, proportionality defines the Union's shared right to regulate the internal market and ensures required system-coherency.

2. *European unification and multilayered democracy*

As the EEC and Euratom were established in 1958, the Consultative Assembly set up by the Coal and Steel Treaty became part of the common institutional framework of the three Communities. Moreover, in 1962, the Communities Assembly was renamed the "European Parliament". Then again, the realisation of the internal market relied heavily on the expertise of the civil servants in the European Commission, and on the creativity of the ECJ. As these supranational institutions accumulated increasing normative powers, the democratic deficit emerged as a problem, or perhaps rather as an argument against an increasing approximation of the domestic legal systems of the Member States.[44] However, instead of resulting in reduced powers of the EEC-institutions, the first elections to the European Parliament by direct and universal suffrage was carried out in 1979. Even if the election was valid, supranational parliamentarism remained immature in terms of voter turnout, the election of representatives and the positions of party groupings.[45] In democracies where opinions were formed in local

[44] See for an overview, A. Kammel, The Democratic Deficit of the European Union: Its Origins and the Role of the European Parliament, VDM Verlag Dr. Müller, 2010.

[45] *Ibid*.

communities, by political speech at rallies and in a limited range of media, the European Parliament was rarely heard of. In general, the national discourse on the EEC was rather about resistance to supranational influence. Nonetheless, as the EEC survived one crisis after another and the number of Member States increased, members of the Parliament demanded more influence.

An important step towards more democratic justification of the unification process was taken in 1990 when the ECJ handed down its seminal judgement in the *Case C-70/88, Chernobyl*.[46] In the ruling, the Court recognised an extended right of the European Parliament to participate in the supranational legislative processes in order to ensure an institutional balance.[47] Furthermore, as the EU was formed in 1993, the Parliament was given significant powers to for instance appoint the Commission, and decide on the budgets proposed by the Commission. A decade later, the powers and functioning of the European Parliament were consolidated in connection with the enlargement of the Union at the turn of the millennium.[48] As a result of the Lisbon revision in 2009, the Parliament became a co-legislator with competences equivalent to those of the Council of Ministers in most instances.[49] However, the people of Europe can influence supranational decision making in other ways than through their governments and members of the European Parliament. In EU legislative processes, the committee of the regions is normally consulted, and since 2009 national parliaments can cooperate under Protocol 2 to the EU Treaties in order to request revisions of draft legislative acts from the European Commission.[50] Also stakeholders are habitually involved in normative processes and in the "new push for European Democracy", participation of young Europeans aged 15 to 25 has been emphasised.[51] In addition, an interest group that consists of at least one million citizens of the EU Member States can submit a legislative proposal that the Commission must take into consideration.[52]

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[46] Judgment of the Court of 22 May 1990, European Parliament v Council of the European Communities, Case C-70/88, EU:C:1990:217.

[47] Supra note 47, paras. 21-26.

[48] Articles 2-4, Treaty of Nice, supra note 41.

[49] See primarily Article 289 of the TFEU, and for an overview of the trilogue https://eur-lex.europa.eu/EN/legal-content/glossary/ordinary-legislative-procedure-codecision.html, retrieved 2026-01-15.

[50] See Protocol (No 2) on the application of the principles of subsidiarity and proportionality, 2008 OJ C, 115/ 206.

[51] See the European Democracy Shield: Empowering Strong and Resilient Democracies, supra note 1, at 24-25.

[52] See Articles 11 and 24 of the TFEU. See also https://citizens-initiative.europa.eu/_en, retrieved 2026-01-15.

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Since the Union was founded in 1993, every citizen of an EU Member State is also an EU citizen. In addition to the right to move freely within the Union and reside in any Member State under certain conditions, the EU citizen can pursuant to Articles 20-23 of the TFEU vote and stand as a candidate in elections to the European Parliament and in municipal elections in his or her Member State of residence on the same terms as nationals of that State.[53] These electoral rights are also manifested in Articles 39 and 40 of the EU Charter and they are specified in secondary legislation that has recently been amended and form part of the Democracy Shield.[54]

However, it must be said that the intergovernmental and bureaucratic features of the EU remain demonstrable. Indeed, the intergovernmental coordination in the Council of Europe is crucial and the Council of Ministers is used as a platform for joint actions beyond the Unions's competences.[55] In external relations the powers of the European Parliament are limited within the scope of EU law, as Commission measures need only to be approved by the Council of Ministers.[56] In addition to Union actions within the CCP, the trade bloc speaks with one voice through the Commission when developing neighbourhood policies, including accession procedures, as well as in the fields of cooperation with third countries further afield, and humanitarian aid.[57] As things are now, also intergovernmental cooperation to shape a Common Foreign and Security Policy and the Diplomatic Service of the EU have gained increased importance.[58]

As the basic structures of the Union belies the idea that the polity is a democracy in parity with a federation, democracy within the EU is first and foremost to be ensured at Member State level. Since the Lisbon revision in 2009, the requirement that a country must adhere to a democratic form of government to become an EU Member State, is manifested in Article 49 of

[53] Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ 2004 L 158/77.

[54] Council Directive (EU) 2025/1788 of 24 June 2025 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in elections to the European Parliament for Union citizens residing in a Member State of which they are not nationals (recast), OJ 2025 L, 2025/1788. See also the Commission's proposal for the Council Directive, COM/2021/732 final; and Communication from the Commission, Securing free and fair European elections A Contribution from the European Commission to the Leaders' meeting in Salzburg on 19-20 September 2018, COM/2018/637 final.

[55] See as to the open method of coordination at https://eur-lex.europa.eu/EN/legal-content/glossary/open-method-of-coordination.html, retrieved 2026-01-15.

[56] Articles 207(3) and 218 of the TFEU.

[57] Article 8 of the TEU; and Articles 208-214 of the TFEU.

[58] Article 15-18, 21-27 and 30-46 of the TEU; and Articles 218-222 and 236 of the TFEU.

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the TEU. However, once accepted as a member, the state cannot be excluded from the Union although departing from democracy may have repercussions such as reduced voting rights and budgetary sanctions depending on the views of other Member States in the Council.[59]

As the Union has no unambiguous powers to safeguard democracy, the Commission has adopted soft law instruments to monitor and support free and fair elections at national level.[60] In order to promote cooperation and coordination within the priority areas of the Democracy Shield, a European Centre for Democratic Resilience is now established.[61] A main objective of the Centre is to facilitate information sharing and support capacity building to combat foreign information manipulation and interference (FIMI) in electoral processes at EU, national, regional and local levels, as well as in legislative processes.[62] In addition, a Stakeholder Platform is set up to allow a "broad set" of independent and relevant stakeholders and communities to feed information and views into the work of the Centre.[63]

3. *Democracy and freedom of expression and information*

Evidently, it was well understood already in the embryonic democracies of the Greek city-states, that the limited male section of the public that constituted the electorate could be swayed.[64] Indeed, history shows how totalitarian states have emerged from legitimate general suffrages. Nonetheless, Winston Churchill was of course right in his speech to the nation on November 11,

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[59] Article 7 of the TFEU.

[60] See for an overview European Democracy Shield: Empowering Strong and Resilient Democracies, supra not 1.

[61] European Democracy Shield: Empowering Strong and Resilient Democracies, supra note 1, at 2-3. See also

[62] See also as to democracy and electoral rights, the European cooperation network on elections, https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/democracy-eu-citizenship-anti-corruption/democracy-and-electoral-rights/european-cooperation-network-elections_en, retrieved, 2026-01-15; and further information at https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/democracy-eu-citizenship-anti-corruption/democracy-and-electoral-rights_en#european-cooperation-network-on-elections, retrieved 2026-01-15.

[63] See also Commission Recommendation on promoting the engagement and effective participation of citizens and civil society organisations in public policy-making processes OJ 2023 L, 2023/2836; and Directive (EU) 2024/1069 of the European Parliament and of the Council of 11 April 2024 on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings ("Strategic lawsuits against public participation"), OJ 2024 L, 2024/1069.

[64] Plato, the Republic, published most recently by Wilder Publications, 2022.

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1947, when he concluded by stating that "it has been said that democracy is the worst form of Government except for all those other forms that have been tried from time to time."[65] However, the complexity of amalgamating nation-states into a polity through regulatory approximation, makes it necessary to abstract policy making from popular sovereignty. It must also be said that a changing media landscape and the difficulties to get messages across in the noise, amplify the risk of democracy turning into "bread and spectacles".[66] It is necessary to reduce the leeway for despots with deep pockets to dictate human conditions by conditioning democracy on the rule of law including fundamental rights. Indeed, reliance on fundamental rights rather than popular sovereignty may prove to be a bulwark against techno-populism and polarisation in the age of digital globalisation.[67]

Within the scope of EU law, the promotion of informed opinion-formation and repression of FIMI are based on the freedom of expression and information under Article 11 of the EU Charter:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
2. The freedom and pluralism of the media shall be respected.

When it comes to the first paragraph of the provision, an open and multifaceted debate typically promotes well-founded opinions better than state controlled or monopolised information channels. Censorship for political or commercial reasons may also create political tensions in society.[68] From this point of view, the right to receive and impart information and ideas needs to be ensured through limited opportunities for public powers to restrict and regulate spaces for communication.[69] Indeed, the EU shall pursuant to Article 22 of the EU Charter respect cultural, religious and linguistic diversity and there-

[65] See https://winstonchurchill.org/resources/quotes/the-worst-form-of-government/. Retrieved 2026-01-15.

[66] Quotation attributed to the Roman poet Juvinus who used the notion in his Satires, section X56-113, see https://www.poetryintranslation.com/PITBR/Latin/JuvenalSatires10.php, retrieved 2026-01-15.

[67] This author has previously made the point in ISDS from an EU point of view, chapter 10 in The EU law of Investment: Past, Present, and the Future, Hart Publishing/Bloomsbury 2023.

[68] However, see as to Article 10 of the ECHR, Animal Defenders International v United Kingdom, Appl. No. 48876/08, 22 April 2013.

[69] As to Article 10 of the ECHR, see Handyside v United Kingdom, Appl. No. 5493/72, 7 December 1976 where the ECtHR clarifies that restrictions must be laid down in law, serves a public interest and be necessary in a democratic society. A restriction on the freedom of expression must be proportionate, see Perincek v Switzerland, Appl. No. 27510/08, 15 October 2015, paras. 230-231 and 273-280.

fore also promote the cultivation of a rich media landscape. However, like all fundamental rights, freedom of expression must be reconciled with conflicting rights and interests by necessary limitations pursuant to Article 52 of the EU Charter. Limitations are specified in for instance EU secondary legislation and national civil and criminal law on hate speech, defamation, deceit and infringement of intellectual property rights.

Freedom of expression contradicts the idea of an absolute requirement to convey only the truth.[70] Indisputably, it is desirable that people in general and politicians in particular communicate truthfully, and the German philosopher Ferdinand von Schirac has gone so far as to suggest that everyone should have a fundamental right to reliable statements from politicians.[71] However, a possibility to hold elected representatives accountable for not fact-checking a claim, would constitute a disproportionate limitation of the freedom of expression.[72] Unlike machine learning, the basis for human opinion-formation is broader than just correct data sets, and the political debate must appeal to both the minds and beliefs of voters. Nonetheless, there is a limit where impartation of information takes upon the features of *disinformation*.[73] Although there is no generally accepted definition of disinformation in the abstract, and it may often be difficult to tell it from irony or satire, the intent of the communication that can be discerned from the facts and circumstances of a case, should be decisive.[74] No matter how witty FIMI may be, the nature of the sender may classify the post as disinformation. A distinction should also be made between disinformation that is intended to deceive in a way that could harm legitimate interests, and misinformation which may be equally deceptive but is not intended to cause such harm, as may be the case when disinformation is forwarded.[75]

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[70] As to Article 10 of the ECHR, see Lingens v Austria, Appl. No. 9815/82, 8 July 1986 paras. 45-46.

[71] F. v. Schirac, Jeder Mensch, Luchterhand Verlag, 2021.

[72] As to Article 10 of the ECHR, there is no general fact-checking requirement even for journalists, see Thorgeir Thorgeirson v Iceland, Appl. No. 13778/88, 25 June 1992 paras. 63-65.

[73] See a definition of disinformation in the European democracy action plan, supra note 3, at4; See also for instance K. M. Carley, A Political Disinfodemic, in Covid 19 Disinformation: A Multi-National, Whole Society Perspective (eds. R. Gill and R. Goolsby), Springer 2022, at 3 *et seq*. See also linted applicability of Article 17 of the ECHR, in Vejland and Others v Sweden, Appl. No. 1813/07, 9 February 2012.

[74] See as to fake news for instance C. Wardle and H. Derkhshan, Information disorder. Toward an interdisciplinary framework for research and policy making, Council of Europe Report DGI(2017)09.

[75] As to Article 10 of the ECHR, see Bladet Tromsø v Norway, Appl. No. 21980/93, 20 May 1999, paras. 62-66; and Salov v Ukraina, Appl. No.65518/01, 6 September 2005, paras. 111-117.

Public media that are subject to ethical and regulatory requirements for the exercise of editorial responsibility has an important role to play in the checks and balances and has become a Fourth Estate. Without public watch dogs providing facts and figures at some level, it is difficult for people to form well-founded opinions and vote in elections in a meaningful way. Hence, in contrast to freedom of expression, editorial freedom and media pluralism which shall be protected under Article 11(2) of the EU Charter, is conditional on press ethics including factchecking. However, the need to attract attention in the media buzz is problematic as it affects the nature of journalism, bringing large parts of the press sector into a grey zone of infotainment.[76] In addition, the notion of journalism is blurred as persons who do not have press credentials can enjoy rights to report current events and news under Article 11(2) of the EU Charter.[77] Regardless of the political system of a Member State, the right to organise the media sector is circumscribed by the integration of national markets and fundamental rights under EU law.

III. **Unification, media freedom and informed opinion formation**

1. *Media freedom, opinion formation and audiovisual media*

Technological developments have constantly brought about new avenues of mass-communication, including means, methods and formats for current events and news reporting.[78] Traditionally, a distinction has been made between the press sector, the radio sector and the audiovisual media sector, characterised by different relationships to the public powers. Since the dawn of the printed press in the 18th and early 19th century, newspapers have been published by private undertakings, albeit often with state support. In contrast, the need for public investment in broadcasting infrastructure, meant that national radio and later national television was provided as a public service. On the European continent radio

[76] A flagrant example is the Sun tabloid paper, see V. Adelmant and B. Cali, The European Convention on Human Rights and Immigration Control in the UK: Informing the Public Debate, Bonavero Report 3/2025, Oxford University, Faculty of Law, available at https://www.law.ox.ac.uk/sites/default/files/2025-09/European%20Convention%20on%20Human%20Rights%20and%20Immigration%20Control%20in%20the%20UK_4%20Sept%202025.pdf, retrieved, 2026-01-15.

[77] See as to the very broad definition of "journalistic purposes" in EU law, Judgment of the ECJ of 16 December 2008, Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy and Satamedia Oy, Case C-73/07, EU:C:2008:727, para. 62.

[78] See for instance, J. Fiske, Introduction to Communication Studies, Routledge, 2010.

and television were provided by a public body or with public funding, and media independence was ensured at some level through regulation. Public service media should be educational and freed from private interests and profit maximation. In contrast, attempts by the government led by Winston Churchill to gain control of national radio broadcasting were met with suspicion in the United Kingdom (UK). Hence, the British Broadcasting Company (BBC) has always been separated from government control and funded mainly by user licence fees pursuant to the public service remit.[79]

Given the limited demand for foreign newspapers and radio as well as the state of technological development at the time, the Union focused originally on cross-border audiovisual media services.[80] Whereas the competence to decide on ownership structures in the media sector and to regulate news and current affairs reporting were questionable because of the close relationship to national identity and forms of governance, cross-border television broadcasting was indisputably an aspect of the internal market. Hence, by avoiding issues of industrial organisation and funding of public media, the service to broadcast programmes to the general public became subject to market integration and liberalisation. Consequently, also supranational competition law addressing abuse of dominance, anticompetitive collaboration and mergers, as well as the rules on state aid, become applicable.[81] However, in the *Magill Case* 1991, the ECJ found that denying access to television programme listings did not constitute an abuse of a dominant position in the market for weekly magazines.[82]

With a view to specify the obligations of Member States under primary law, Directive 89/552/EEC on the coordination of laws, regulations or administrative provisions, concerning the pursuit of television broadcasting activities, was adopted in 1989.[83] By allowing people in one Member State to receive media services from other Member States under the conditions

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[79] See https://www.bbc.co.uk/historyofthebbc/100-voices/birth-of-tv/the-bbc-steps-in/, retrieved 2026-01-16.

[80] See, however, for instance Judgment of the ECJ of 8 March 2001, Konsumentombudsmannen (KO) v Gourmet International Products AB (GIP), Case C-405/98, EU:C:2001:135, regarding magazines.

[81] For an overview see https://competition-policy.ec.europa.eu/system/files/2024-01/stateaid_decisions_to_media.pdf, retrieved 2026-01-16.

[82] Judgment of the ECJ of 6 April 1995, Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities Joined Cases C-241/91 P and C-242/91 P., EU:C:1995:98

[83] Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, OJ 1989 L, 298/23.

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applicable in the country of origin of the broadcast, national public service media providers were exposed to competition in the internal market.[84] Although the Directive did not specify the ban on state monopolies under Article 37 of the TFEU, it created pressure for deregulation. Moreover, the Television without Frontiers Directive, established that television advertising should be accepted as a source of revenue as long as health and human dignity was protected. Television advertising should be readily recognisable and separated from programmes, and discriminatory advertising and advertising of tobacco products should be prohibited. Yet, television advertising was still banned in the 1990s for instance in Sweden. Although the public limited company Swedish Television (SVT) no longer had a monopoly position, the broadcasting of programs with commercial breaks from the United Kingdom (UK) raised concerns especially regarding advertisement aimed at children. In response to questions referred by the Swedish Market Court, the ECJ explained in the 1997 *Da Agostini et al* Case that advertising is a service *per se* and that the provision of that service can be restricted only if necessary to safeguard other fundamental rights or interests specified in the Directive.[85]

On the international scene the Union sought to develop a clear identity. In the negotiations that resulted in the creation of the World Trade Organisation (WTO) which replaced the GATT in 1995, the European Parliament maintained that audiovisual services should not form part of the General Agreement on Trade in Service (GATS).[86] Free flow of media content from third countries could undermine the European audiovisual market model embracing a mix of state financed public service media providers and commercial actors with or without a public service permit.[87] Although unleashed market forces and international cutthroat competition can generate funds for lavish shows, short term profit maximation also tends to streamline media content. Then again, public media service providers shall promote cultural diversity, education and social cohesion. Hence, within the scope of the ECHR-system, the representatives of public service media in

[84] See Case Judgment of the ECJ of 9 February 1995, Société d'Importation Edouard Leclerc-Siplec v TF1 Publicité SA and M6 Publicité SA, Case C-412/93, EU:C:1995:26; and Judgment of the ECJ of 10 September 1996, Commission v United Kingdom, Case C-222/94, EU:C:1996:314.

[85] Judgment of the Court of 9 July 1997, Konsumentombudsmannen (KO) v De Agostini (Svenska) Förlag AB et al., Joined cases C-34/95, C-35/95 and C-36/95, EU:C:1997:344.

[86] https://www.europarl.europa.eu/doceo/document/TA-10-2025-0256_EN.html, retrieved 2026-01-16.

[87] See the European Audiovisual Observatory report, Governance and independence of public service media, https://rm.coe.int/iris-plus-2022en1-governance-and-independence-of-public-service-media/1680a59a76, retrieved 2026-01-15.

the European Broadcasting Union (EBU) were sceptical to international approximation.[88] Although, audiovisual services in general and public service media in particular have been continuously debated under the GATS, and the EU also engaged in related negotiations on deepened collaboration in the area with 23 other WTO members within a trade in service agreement (TiSA), no commitments have so far been made by the Union.[89] Consequently, the Union and its Member States are free to discriminate against foreign providers of audiovisual services in accordance with the internal distribution of competences.

Within the EU, the relationship between the integration of national markets and public service was clarified as a result of the Lisbon revision in 2009 by the adoption of protocol 29 to the TFEU. In the introduction to the protocol, the Member States emphasise that public broadcasting is "directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism." Hence, EU competences to regulate media markets are accepted only with reservations.

The provisions of the Treaties shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting and in so far as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and in so far as such funding does not affect trading conditions and competition in the Union to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account.

After being amended on several occasions, Directive 89/552/EEC was replaced by Directive 2010/13/EU, which extends the scope of approximation of national rules in the audiovisual media sector to video-streaming platforms provided by undertakings established in Member States.[90] In addition to providers of on-demand video streaming services such as Netflix and Disney+, providers of over-the-top (OTT) services such as YouTube are caught by the Directive. In contrast, platform services designed primarily for audio on demand such as Spotify, or interaction between end-users such as TikTok and WhatsApp, may escape the scope of the Directive.

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[88] See for instance https://www.ebu.ch/news/2025/10/european-parliament-defends-eu-media-rules-against-us-pressure, retrieved 2026-01-16.

[89] See https://www.europarl.europa.eu/legislative-train/theme-international-trade-inta/file-trade-in-services-agreement-(tisa), retrieved 2026-01-16.

[90] Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ 2010 L 95/1. It also covers radio but not newspapers or magazines, see recital 28 of the preamble to the Directive.

Like the revoked Television without Frontiers Directive, the Audiovisual Media Service Directive focuses on the liberalisation of services.[91] Although it is mainly silent on public media services including current affairs and news reporting, the right to information under Article 11 of the EU Charter is recognised.[92] In addition to the general right to receive broadcasts and on demand videos, the diversity of news production and programmes across the Union is emphasised. According to Article 14 of the Directive, a service provider must not have exclusive rights to broadcast an event which is of major importance of society ”in such a way as to deprive a substantial proportion of the public in that Member State of the possibility of following such events by live coverage or deferred coverage on free television.” Although exclusive broadcasting rights are accepted under the Directive, any broadcaster in the EU shall, therefore, pursuant to Article 15 of the Directive have access “on a fair, reasonable and non-discriminatory basis to events of high interest to the public.”

In external relations, Member States remain free to take whatever measures they deem appropriate regarding audiovisual services provided from a third country insofar as the measure complies with domestic rules and regulations, primary EU law and international commitments.[93] Furthermore, Member States shall ensure that broadcasters covered by the Directive reserve a portion of the transmission time for European works created by producers who are independent of broadcasters primarily for informational, educational and cultural reasons.[94]

In general, the Audiovisual Media Service Directive particularises the conditions for advertising in television programmes and services provided on-demand by platforms in the light of the fundamental rights and interests enshrined in the provisions of the EU Charter and Treaties. Article 19 thereof, inculcates that television advertising and teleshopping shall be “readily recognisable and distinguishable from editorial content.” However, news and current event programmes must not be sponsored, although commercial breaks should be allowed also in programmes of that kind. Product placement is generally prohibited, but there are several exceptions specified in Article 11 of the Directive such as in cinematographic works and sports programs. These

[91] See also the Creative Europe Media Programme at https://digital-strategy.ec.europa.eu/en/policies/creative-europe-media, retrieved 2026-01-16.

[92] Recitals 48 and 55 of the preamble to the Audiovisual Media Services Directive, supra note 91.

[93] Recital 54 of the preamble to the Audiovisual Media Services Directive, supra note 91.

[94] Articles 13, 16 and 17 of the Audiovisual Media Services Directive, supra note 91.

rules shall be read in conjunction with the framework for consumer protection and unfair commercial practices.[95] Furthermore, the Directive specifies the requirement to combat hate speech. There are special requirements regarding children's programmes, and Member States are encouraged to collaborate with the Commission to develop codes of conduct.[96]

In 2018, the Audiovisual Media Service Directive was amended by Directive (EU) 2018/1808.[97] Among other things, the transparency requirements were tightened so that information about ownership of media providers, including the beneficial owners, must be made publicly available.[98] Whereas high transparency standards are often set in the public sector, decisions at board meetings in private broadcasters as well as reports, projects, program tables etc. can be kept secret under corporate and civil law akin to intellectual property rights.[99] Moreover, media pluralism implies, as mentioned, that service providers may, within necessary limitations, sympathise with any political, religious, philosophical or ideological view they like. As media sectors become increasingly privatised, transparency regarding ownership gains importance to reconcile media pluralism and the interest in reliable current event and news reporting. Hence, there is a need to protect professional journalists and their sources from threats.[100]

As to external relations, Article 13 of Directive (EU) 2018/1808 clarifies that "Member States shall ensure that media service providers of on-demand audiovisual media services under their jurisdiction secure at least a 30 % share of European works in their catalogues and ensure prominence of those works." Member States can also impose levies on third country providers of video-on-demand services to promote the production and acquisition of rights in European works.

[95] See primarily Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market ("Unfair Commercial Practices Directive"), OJ 2005 L, 149/22.

[96] Article 9(2) of the Audiovisual Media Services Directive, supra note 91.

[97] Directive (EU) 2018/1808 amending the Audiovisual Media Services Directive, OJ 2018 L, 303/69

[98] Article 5 of the Directive (EU) 2018/1808, supra note 98.

[99] See Joined Cases C-241/91 P and C-242/91 P, Magill, supra note 83.

[100] Commission Recommendation (EU) 2021/1534 on ensuring the protection, safety and empowerment of journalists and other media professionals in the European Union OJ L 331/8 and https://commission.europa.eu/publications/2025-rule-law-report-communication-and-country-chapters_en, revised 2026-01-16.

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2. *Democracy, media freedom and public services*

As a result of the geopolitical situation, there is an interest in more co-operation to ensure informed opinion formation through media freedom and diversity, editorial independence and trustworthiness. In April 2025, the EBU and its 123 members from 56 countries, launched Eurovision News Spotlight, which is a network for fact-checking and open-source intelligence (OSINT) to "combat misinformation and support trusted news" across Europe.[101] Within the scope of EU law, the EMFA is an essential element in the Democracy Shield as it establishes a common framework for media services and compliance control in the internal market by amending Directive 2010/13/EU.[102] After decades of harmonisation of audiovisual media services, and in view of that all types of media services are available online, the EU could adopt the Act which applies as domestic law in the Member States and develops the system for collaboration between national authorities. As to the organisation of media industries, the Member States shall pursuant to Article 3 of the EMFA "respect the right of recipients of media services to have access to a plurality of editorially independent media content and ensure that framework conditions are in place in line with this Regulation to the benefit of free and democratic discourse." According to Article 4 thereof, media service providers, such as providers of television and radio broadcasts, on-demand audiovisual media services, audio podcasts and press publications, are entitled to exercise economic activities without restrictions "other than those allowed pursuant to Union law".[103] As always within the scope of the EU Treaties, proportionate restrictions on the right to conduct a business in the media sector pursuant to Article 16 of the EU Charter may be justified to safeguard other fundamental rights and interests recognised under EU primary law.

Public service media providers are defined in the Regulation as undertakings entrusted with a public service permit and receiving public funding for the fulfilment of that remit. Furthermore, the Member States have an obligation under Article 5 of the EMFA to ensure that the undertakings concerned "are editorially and functionally independent, and provide in an impartial manner a plurality of information and opinions to their audiences, in accordance with their public service remit" as well as in line with the above-mentioned Protocol No. 29 to the TFEU. Although media mar-

[101] See https://www.ebu.ch/news/2025/04/ebu-launches-spotlight-fact-checking-network-to-combat-misinformation-and-support-trusted-news, retrieved 2026-01-16.

[102] See the Media Pluralism Monitor published by the Centre for Media Pluralism, ttps://cmpf.eui.eu/projects-cmpf/media-pluralism-monitor/, retrieved 2026-01-15.

[103] See also recital 9 of the preamble to EMFA, supra note 17.

kets cannot be fully harmonised pursuant to the Protocol, state-owned as well as private media monopolies sit uncomfortably with editorial independence and media pluralism that is required under Article 11(2) of the EU Charter. Instead, concessions for access to infrastructure is important for balancing independence, plurality and trustworthy information.[104] Undertakings whose primary purpose is the provision of programs including news reporting must meet legal and ethical standards to obtain a permit *ex ante*, and once the permit has been obtained these standards can be invoked *ex post facto*. For instance, the public watchdog may be subject to supervision by an authority or body such as an ombudsman or adhere to a co-regulatory or self-regulatory mechanism. However, as broadcasting is replaced by streaming media, the possibility for the State to charge service providers for access to infrastructure is under challenge. For instance, in Sweden, where SVT has partly been financed by concession fees from other service providers, the public media service sector may need to be restructured again. Perhaps advertising funded public media services must eventually be accepted.

At first blush, it may seem to be a systematic anomaly that the Union has adopted a regulation regarding media services, since the Member States have conferred powers to the EU institutions only to adopt directives to liberalise service markets under Article 59 of the TFEU.[105] However, the scope of the EMFA extends beyond trade in media services *stricto sensu*, as it for instance addresses interrelations between media service providers and platform providers. Therefore, the EU institutions could rely on their general powers to regulate the internal market set out in Article 114 of the TFEU as the legal basis for the adoption of the Regulation. Moreover Article 23 of the EMFA, introduces an obligation for Member States to adopt transparent, objective, necessary and non-discriminatory rules and procedures for the assessment of market concentrations that could have a significant impact on media freedom and pluralism. As the objective of the rules and procedures is to promote media pluralism and editorial independence as opposed to undistorted competition, the requirements regarding merger control differ from those applicable when national competition authorities or the European Commission's Directorate-General for Competition (DG-Comp) intervenes under Regulation 139/2004. Anyhow, the special media market merger control cannot be based on Union competences to deliberate cross border trade in media services under Article 59 of the TFEU. Also, the rules on audience measurement under Article 24 of the EMFA and on

[104] See Commission Recommendation (EU) 2022/1634 on internal safeguards for editorial independence and ownership transparency in the media sector OJ 2022 L, 245/56.

[105] See recital 1 of the preamble to EMFA, supra note 17.

allocation of public funds for state advertising under Article 25 thereof require a broader basis in the TFEU.

In addition to the framework for regulatory and administrative collaboration between national authorities, the EMFA establishes the European Board for Media Services. Although the Board is composed of representatives of competent national regulatory authorities it shall act in full independence. It has more far-reaching powers than the preceding European Regulatory Group for Audiovisual Media Services. For instance, the Board can after consulting the European Commission request cooperation between regulatory authorities or bodies and mediate in disputes between these actors or bodies, draw up opinions on dialogues between media service providers and providers of very large online platforms, and issue opinions on media market concentrations. According to Article 17 of the EMFA, the Board shall, at the request of national regulatory authorities from at least two Member States, "coordinate relevant measures by the national regulatory authorities or bodies concerned related to the dissemination of or access to media services originating from outside the Union [...]".[106] It may also in consultation with the Commission issue opinions on appropriate national measures in relation to the dissemination or access to media services from third countries, and develop criteria for assessment of such services by national authorities. As always when the Union requires service providers targeting the internal market from a third country to comply with EU standards, EU law may appear to apply extraterritorially. However, there are no good reasons for accepting transmissions in the internal market from for instance state controlled Russian media houses that knows of no media freedom.

3. *Democracy and transparent political advertisements*

Social media has blurred the lines between facts and fiction and the difficulty distinguishing between information and entertainment, personal opinions and political campaigns, endangers democracy and erodes trust in public institutions. Online platforms may reinforce alternative realities in filter bubbles and be used by politicians to attack the press which operates under editorial responsibility. Populism thrives when truth is relativised in a media landscape that grows wild. In addition to trustworthy editorial content, transparent political advertising is the antidote.[107]

[106] Compare with Article 3 of the of the Audiovisual Media Services Directive, supra note 91.

[107] Commission Recommendation on internal safeguards for editorial independence and ownership transparency in the media sector, supra note 105, at 61-64.

In the media-driven democracy, the ability to identify the sponsor behind the promotion of political ideas, or the ridicule of political opponents, enable voters to form well-founded opinions. Ever since the Cambridge Analytica scandals, in which a British consulting firm collected large amounts of personal data to tailor political advertising to Facebook users, the vulnerability of voters to influence operations and FIMI has been considered a real threat to democracy. More recently, Romania's Constitutional Court annulled the second round of the 2024 national elections since it was excessively influenced by partly AI generated mis— and disinformation, disseminated by Russian state actors and their proxies on social media such as TikTok.[108] Transparency regarding sponsors and providers of political advertising services is a remedy against undue influence from groups within a society, as well as against the risk of FIMI.[109] Hence, in March 2024, the TTPA was adopted and it took effect on the 10th of October 2025.[110] A Union-wide definition of "political advertising" is provided in Article 3(2) of the Regulation:

> political advertising means the preparation, placement, promotion, publication, delivery or dissemination by any means, of a message normally provided for remuneration or through in-house activities or as part of a political advertising campaign:
>
> a) by, for, or on behalf of a political actor, unless it is of a purely private or a purely commercial nature; or
> b) which is liable and designed to influence the outcome of an election or referendum, voting behaviour or a legislative or regulatory process, at Union, national, regional or local level.[111]

Official information provided by a Member State or the Union that is strictly limited to the modalities for participating in elections or referendums, as well as public communication that aims to provide official information to the public, or presentation of candidates in specified public spaces or media while ensuring equal treatment of candidates, is not political advertising.

[108] https://apnews.com/article/romania-election-president-georgescu-court-585e8f8f-3ce7013951f5c7cf4054179b, retrieved 2026-01-16.

[109] Guidelines to support the implementation of Regulation (EU) 2024/900, supra note 19, at 27-35.

[110] TTPA, supra, note 17.

[111] See also Article 8 of the TTPA, supra, note 17.

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As the Regulation aims to enable citizens in the Union to exercise their democratic rights in an informed manner, it applies to any means for dissemination of or access to political advertisements. As particularised in recital 2 of its preamble, the Regulation, therefore, applies when political advertising is published or is intended to be published "via traditional offline media such as newspapers, television and radio, but also increasingly via online platforms, websites, mobile applications, computer games and other digital interfaces." As regards the Union's powers to legislate to protect democracy, recital 4 of the preamble clarifies that ensuring transparency in conformity with the values shared by the Union and its Member States pursuant to Article 2 of the TEU, is a legitimate public goal. Although that is of course true, it would be an infringement of Articles 4 and 5 of the TEU to invoke the Regulation *ultra vires*, i.e. beyond the powers conferred on the Union. Therefore, market integration is highlighted as the *rationale* for the adoption of the Regulation in recital 1 of the preamble to the TTPA. More to the point, the objectives are pursuant to Article 1(4) thereof, to "contribute to the proper functioning of the internal market for political advertising and related services", and to protect fundamental rights recognised by the Union, "in particular the right to privacy and the protection of personal data." Hence, the Act is primarily based on Articles 16 and 114 of the TFEU.

Political advertising is typically provided under the direct or indirect control of a *sponsor*.[112] Pursuant to Article 3(10) of the TTPA, the sponsor of political advertising is "the natural or legal person at whose request or on whose behalf a political advertisement is prepared, placed, promoted, published, delivered or disseminated in the internal market." A combined reading of Articles 3(2)(a) and 3(4) of the Regulation provides that the sponsor can be a political actor such as a political party, a political alliance, a political campaign organisation, a candidate for or holder of an elected office, a member of Union institutions, or any natural or legal person representing or acting on behalf of such a legal entity. However, the sponsor can also be a legal or natural person that is not classified among political actors, but takes measures that are specified in Article 3(2)(b) of the Regulation. Furthermore, another entity may ultimately exercise control over the sponsor for instance in terms of decisive influence over decision making.

According to Article 3(5) read in conjunction with Article 3(6) of the TTPA, any natural or legal person that engages in the preparation, placement, promotion, publication, delivery or dissemination of political advertising ser-

[112] Recital 22 to the Regulation. See also Guidelines to support the implementation of Regulation (EU) 2024/900, supra note 19, at 3.

vices in the Union, with the exemption of purely ancillary services, can be held liable as a *provider of political advertising services*.[113] As stated in recital 1 of the preamble to the Regulation, there is an abundance of services associated with political advertising and the provider can be for instance "political consultancies, advertising agencies, 'ad-tech' platforms, public relations firms, influencers, and various data analysts and brokage operators." However, political advertising services provided without consideration as part of platform services, are exempted from the applicability of the TTPA. Conversely, if the platform provider would for instance charge an extra fee for an account that can be used for advertising purposes, the platform provider is a publisher of political advertising under the TTPA.

In addition to the situation where a legal entity provides a political advertising service under the direct or indirect control of a sponsor, the sponsor may provide the service in-house. For instance, a political party or a state actor that has its own public relations department and publish political advertising on its own website or in a periodical publication is caught by Article 3(2) of the TTPA. Similarly, if a legal entity disseminates political advertisements via social media, and the platform provider publishes the advertisements without consideration, the advertisements are disseminated by a provider of political advertising services without a sponsor.

According to Article 5(1) of the TTPA, sponsors must not be discriminated solely based on their place of residence or establishment. However, in the last three months preceding an election or referendum organised at Union, national, regional, or local level, the services may pursuant to Article 5(2) thereof only be provided to sponsors or their proxies who are Union citizens, third-country citizens permanently residing in the Union, or legal persons establishes in the Union which are not ultimately controlled by third country nationals. This is an important tool for repression of FIMI.

In order to ensure transparency in accordance with Article 6 of the TTPA, the provider of political advertising shall according to Article 7 thereof request sponsors and providers of political advertising acting on behalf of sponsors, to declare whether the requested service concerns political advertising and whether the above-mentioned requirements regarding sponsoring prior to elections are met. Providers of political advertising shall pursuant to Article 9 also "retain to the extent necessary", information that they collect when providing the service regarding for instance the nature of the service, the amount charged for the service, contact details to the spon-

[113] See also Guidelines to support the implementation of Regulation (EU) 2024/900, supra note 19, at 4.

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sor and whether the requirements under Article 5 are met. These data shall pursuant to Article 10 be transmitted in "a timely, complete and accurate manner to political advertising publishers to enable them to comply" with the Regulation.

According to Article 11 of the TTPA, the political advertising *publisher* shall by means of a label, indicate in a clear, salient and unambiguous way that the statement is a political advertisement, who the sponsor is and where applicable who the entity ultimately controlling the sponsor is, whether targeting or ad-delivery techniques have been used and whether the political advertisement is linked to a political election or referendum. In addition, an easily accessible transparency notice shall be provided. It shall according to Article 12 contain comprehensive information about for instance the identity of the sponsor, and where applicable about the entity that ultimately controls the sponsor, the period during which the political advertisement is intended to be published and the aggregated amounts and value received by the service providers. A notice can be referred to by means of a link or quick response (QR) code.

As the TTPA took full effect, the Swedish private television broadcaster TV 4 AB, made inquiries into advertisements published on social media by the undertaking AiP Media AB. Several posts published in paid advertising spaces on various online platforms qualified as political advertisements and they lacked labels and transparency notices. According to the the definitions in the TTPA, AiP Media AB appeared to be the sponsor, and the platform providers appeared to be political advertising publishers. AiP Media AB in turn is sponsored by the Social democratic labour party, albeit it is disputable whether the party can be considered controlling AiP Media AB. Anyhow, under scrutiny, the posts were soon taken down by the sponsor or the advertising publishers.[114]

According to Article 15 of the TTPA the political advertising publisher must have in place mechanisms to enable natural or legal person to report potential infringements. As political advertisement publishers are so called public interest entities under Directive 2013/34/EU, they must also provide national authorities with periodical information about the amounts, value or other benefits that they have received for their services. National competent authorities may also request information from providers of political advertising in order to ensure compliances with statutory requirements. In addition, categories of persons such as researchers, political actors and journalists are entitled to receive statistics upon request from the provider of

[114] https://www.tv4.se/artikel/xxhvye5HFcfw3mHKHnn2w/expert-socialdemokraternas-annonser-kan-bryta-mot-lagen, retrieved 2026-01-03.

political advertising. Micro and small entities are exempted from most obligations of the service providers.

Targeting and ad-delivery techniques are pursuant to Article 18 of the TTPA allowed only insofar as the processing activity is based on data collected with explicit consent by the data subject in accordance with the General Data Protection Regulation (GDPR) or Regulation (EU) 2018/1725 regarding data processing by EU institutions. Profiling using sensitive personal data is prohibited.[115] Political advertising targeting a data subject that is known by the controller with reasonable certainty to be at least one year under the voting age under national law is also prohibited.[116]

In parity with the obligations under the DSA and the GDPR, a provider of political advertising services in the Union that does not have an establishment in the Union, shall designate a legal representative in one of the Member States where it provides the advertising services.[117] Whereas national data protection authorities and the European Data Protection Board are competent authorities regarding the provisions enshrined in the TTPA regarding targeting and ad-delivery techniques, other authorities designated by the Member States shall monitor compliance with the transparency requirements. A network of competent national authorities and bodies shall be established and cooperate with the European Commission to develop best practices, guidelines and rules. According to Article 22 of the TTPA, a national contact point shall be designated by the Member State to facilitate the exchange of information and collaboration. It shall also work in close cooperation with European Cooperation Network on Elections, European Board for Media Services and similar networks within the Democracy Shield.[118]

[115] Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ 2016 L, 119/1; and Regulation (EU) 2018/1725 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, OJ 2018 L, 295/39.

[116] Article 18(2) of the TTPA, supra note 17.

[117] Compare Article 21 TTPA, supra note 17 with Article 13 DSA, supra note 16, and Article 27 of the GDPR, supra note 116. Since the EU institutions are per definition in the EU no such requirements exists under Regulation (EU) 2018/1725, supra note 13.

[118] See sections and II.2 and III.2 above.

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IV. Democracy, transparency and platform providers

1. *Platform providers and media content*

In the late 1990s the development of streaming media and content sharing over online platforms added a dimension to the integration of media markets as well as to external trade in media services. According to Article 14 of Directive 2000/31/EC, on certain legal aspects of information society services (E-commerce Directive) the provider of a hosting service i.e., platform service, is "not liable for the information stored at the request of a recipient of the service" on condition that a) "the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent", or b) "the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information."[119]

Due to sociotechnological changes, the E-commerce Directive was amended by the DSA in 2024.[120] Article 6 of the DSA states that the platform provider is not liable for information stored at the request of end-users, unless the platform provider has actual knowledge of an activity or content that is illegal, or as regards damages, is aware "of the facts or circumstances from which the illegal activity or illegal content is apparent". Furthermore, the platform provider becomes liable when upon obtaining such knowledge or awareness does not act expeditiously to remove or to disable access to the content.

As providers of online video-streaming platforms and providers of OTT services designed for video sharing, actively modify the media content on-demand, they are as mentioned in section III.1, media service providers under Directives 2010/13/EU and (EU) 2018/1808, and the EMFA. Conversely, for instance providers of platforms for hosting and sharing of media content that is uploaded by end-users, such as TikTok, X and Meta, are not media service providers. However, given the refined computational methods for tailoring media content and creating 'filter bubbles', platform providers are increasingly involved in shaping the media experience. Although the content is provided by the users, the platform provider designs the presentation. It has been said that Brexit was largely driven by social media, presenting one-sided information

[119] Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), OJ 2000 L, 178/1

[120] Article 39 of the DSA, supra note 16.

which fueled fears and prejudices primarily about immigration among end-users.[121] Even if platform providers cannot be held liable for the content uploaded to or downloaded from their online platforms, Article 25 of the DSA imposes an obligation on them to refrain from designing, organizing or operating their online interfaces "in a way that deceives or manipulates the recipients of their service or in a way that otherwise distorts or impairs the ability of the recipients of their service to make free and informed decisions."[122]

Those who provide the technological infrastructure, including artificial intelligence (AI), are also in a position to transpose fundamental rights into machine code and monitor content and activities.[123] However, it would sit uncomfortably with the right to privacy and data protection enshrined in Articles 7 and 8 respectively of the EU Charter, and as particularised in the GDPR and Regulation (EU) 2018/1725 regarding data processing by EU institutions, to require platform providers to constantly monitor end-users' communication and content sharing on the platforms. Monitoring of uploading and downloading of media content, and active search for incriminating information, was therefore prohibited under Article 15 of the E-commerce Directive. Then again, as the DSA entered into force, Article 15 of the E-commerce directive was deleted and the absolute ban on monitoring and inquiries by platform providers was modified.[124] Article 8 of the DSA now instead establishes that "[n]o general obligation to monitor the information which providers of intermediary services transmit or store, nor actively to seek facts or circumstances indicating illegal activity shall be imposed on those providers."

Along with the sophistication of algorithms used to organize and operate online platforms, the likelihood that the platform provider has actual knowledge of an activity or content on the platform increases. With the deployment of AI, also the meaning of 'monitoring' is obscured since it is difficult for the machine not to 'know' in some sense how end-users might perceive an online interface. Whereas public bodies may not impose a gen-

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[121] See for instance Y. Gorodnichenko, T. Pham, and O. Talaver, Social media, sentiment and public opinions: Evidence from #Brexit and #USElection, European Economic Review, Vol. 136, 2026.

[122] See Commission Decision against X December 5, 2025, regarding among other things the deceptive design of the "blue checkmark" service, https://ec.europa.eu/commission/presscorner/api/ files/ document/print/en/ip_25_2934/IP_25_2934_EN.pdf, retrieved 2026-01-16. In response, X has closed the Commission's advertising account on the platform.

[123] Articles 14, 34, 35 and 40 of, and recitals 81, 84, 88, 91 of the preamble to, the DSA, supra note 16.

[124] Article 89(1) the DSA, supra note 16.

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eral monitoring obligation, they can request platform providers to make inquiries. Moreover, platform providers may, pursuant to Article 7 of the DSA, take own-initiative voluntary measures with a view to detect, identify, remove or disable access to illegal content. If so, they shall not be deemed ineligible for the exemptions from liability under Article 6 of the DSA if conducting the voluntary investigation "in good faith and a diligent manner." Platform providers shall, according to Articles 16 of the DSA also have a notice and action mechanism in place which allows end-users to notify them about possible illegal content.[125] If the platform provider considers it necessary to moderate the information uploaded to the platform by a recipient of the platform service, the platform provider shall pursuant to Article 17 of the DSA provide a clear and specific statement of reasons to any affected recipient.[126] In case the platform provider becomes aware of information on the platform that gives rise to a suspicion that a serious criminal offence has taken place or is likely to place, it shall pursuant to Article 18 of the DSA immediately inform the law enforcement or judicial authorities. In order to promote foreseeability, the platform provider shall, according to Article 14 of the DSA, provide information on restrictions regarding the use of the service, as well as on procedures and tools used for content moderation, in the terms and conditions for the service.[127]

As the meaning of "illegal" content and activities is vague, the obligation of platform providers under the DSA to moderate and take down media content largely remains a subject of contention.[128] Although the uncertainties have been much criticised from a rule of law perspective, it must be said that the statutory framework is efficient from a normative perspective because without the rules and regulations, courts would need to develop obligations from scratch in reactive and casuistic rulings.[129] Obviously, a platform provider that becomes aware of for instance hate speech or discrimi-

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[125] See as to the possibility for legal persons such as media service providers to have fundamental rights under the ECHR that justify a take-down decisions Delfi AS v Estonia Appl. No. 64569/09, 16 June 2015.

[126] These statements are collected in the DSA Transparency Database, see Article 24(5) of, and recital 66 of the preamble to, the DSA. See the database at https://transparency.dsa.ec.europa.eu, retrieved 2026-01-16.

[127] See Articles 13-23 of the DSA supra note 16, regarding internal complaint handling systems, out-of-court disputes, trusted flaggers, measures and protection against misuse, and exemptions for micro and small enterprises.

[128] See for instance, O'. Fathaig, N. Appelman and N. Helberger, The perils of legally defining disinformation, Internet Poliicy Review, Vol. 10(4), 2021.

[129] Compare with A. Portaru, How the EU Digital Service Act (DSA) Affects online Free Speech in 2025, https://adfinternational.org/commentary/eu-digital-services-act-one-year, retrieved 2026-01-16.

nation, may be held liable for not limiting the end-user's freedom of expression on the platform.[130] Then again, it is questionable to what extent mis— and disinformation is illegal, and the ambiguity of these notions *per se* has sparked quite a debate about the lawfulness of private censorship.[131] In order to reduce information thresholds and costs, the industry has since 2018 adopted self-regulatory standards on disinformation, and most recently 42 platform providers including VLOPs such as Meta and TikTok, and VLOSEs such as Google, adopted a Code of Conduct on Disinformation which was endorsed by the European Commission in February 2025.[132] Nonetheless, the necessary vagueness of the words implies that further clarification is needed. Indeed, VLOPs tend to overregulate content uploaded by end-users, and unjustified content moderation is in most cases based on the platform provider's terms and conditions.[133] Sometimes one might wonder if excessive policing is a strategy used by platforms providers established in third countries to stir up a debate on obligations under the DSA. In any event, platform providers shall at least once a year make a comprehensible report on content moderation publicly available in an accessible manner under Article 15 of the DSA.[134]

In view of the aforementioned, the European Commission's proposal for a Regulation laying down rules to prevent and combat child sexual abuse has sparked quite a debate since it, if adopted, would require platform providers to evaluate real time communication between end-users.[135]

Special rules and procedures apply to providers of VLOPs and VLOSEs due to their societal importance. According to Article 33(1) and (4) of the DSA, VLOPs and VLOSEs are online platforms which have more than 45 million users in the EU and are designated by the European

[130] See file///C:/Users/User/Downloads/code_of_conduct_on_countering_illegal_hate_speech_online_ en_C08AC7D9-984D-679D-CAEF129AD536E128_42985.pdf, retrieve 2026-01-15.

[131] See an interesting account here, https://www.csis.org/blogs/europe-corner/does-eus-digital-services-act-violate-freedom-speech, retrieved 2026-01-16.

[132] See Commission Opinion of 13.2.2025 on the assessment of the Code of Practice on Disinformation within the meaning of Article 45 of Regulation 2022/2065, C(2025) 1008 final; See also European Commission digital strategy Next generation digital Commission, C(2022) 4388 final.

[133] See the DSA Transparency Database, https://transparency.dsa.ec.europa.eu, supra note 127.

[134] See also Article 24(1) of the DSA, supra note 16.

[135] Proposal for a Regulation laying down rules to prevent and combat child sexual abuse, COM/2022/209 final. See also the European Parliament's position, Interinstitutional File: 2022/0155 (COD), 15318/25, 13 November 2025.

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Commission.[136] Providers of VLOPs and VLOSEs shall according to Article 34 of the DSA diligently identify, analyse and assess systematic risks in the Union related to their services. According to Article 35 thereof they shall also take proportionate mitigation measures such as a compliance function with a management body and compliance officers, i.e. 'fact checkers', which are independent from the operational functions, under Article 41 thereof. As to transparency reporting, VLOPs and VLOSEs should typically publish the reports referred to in Article 15 of the DSA at least every six-month pursuant to Article 42 thereof. In times of crisis, i.e. when "extraordinary circumstances occur that can lead to serious threat to public security or public health in the Union or significant parts thereof", the European Commission can require providers of VLOPs and VLOSEs to initiate a crisis response, including content moderation and adoption of tailored terms and conditions under Article 36 of the DSA.[137] In that connection, the Commission may also initiate the drawing up of a voluntary crisis protocol for a collective cross border response in the online environment.[138] In addition, providers of VLOPs should be encouraged to develop individual crisis protocols that may include monitoring of targeted activities for a limited period of time.[139] Then again, such measures must not amount to general monitoring obligations or be considered justifying active search for facts and circumstances indicating illegal content or activities. VLOPs or VLOSEs have no general obligation to police the internet on behalf of societies.

When it comes to the relationship between professional media service providers including public media service providers, and providers of VLOPs, the rules in the DSA on liability for information stored at the request of platform users, are supplemented by Article 18 of the EMFA. As media service providers may find it problematic that platform providers act as an extra editor of the content, and moderation regarding news reporting is very sensitive, they should have a possibility to notify providers of VLOPs of the nature and intended use of the account. In addition, media service providers should be able to declare that they are editorially independent and subject to the regulatory requirements for the exercise of editorial responsibility as well as to declare that media content is not AI generated and subject to human review.

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[136] See as to designated platforms see https://digital-strategy.ec.europa.eu/en/library/designation-decisions-first-set-very-large-online-platforms-vlops-and-very-large-online-search, last visited 2026-01-08.

[137] Recital 91 of the preamble to the DSA, supra note 16.

[138] Recital 108 of the preamble to the DSA, supra note 16.

[139] See also 'Rethinking societal resilience in a time of polycrisis', supra note 11.

In case the provider of the VLOP that has been notified nevertheless finds it necessary to suspend or modify the media content, the media service provider shall according to Article 18(4) of the EMFA shall be given time to respond to the statement of reason issued under Article 17 of the DSA.[140] However, this right to respond does not apply when platform providers suspend the provision of a media services to protect minors under Article 28 of the DSA, to assess systematic risks under Article 34 thereof, or to mitigate such risks under Article 35. Nonetheless, if a media service provider considers that the provider of the VLOP has repeatedly restricted or suspended the provision of the platform service without sufficient grounds, an *inter partes* dialogue in good faith with a view to find an amicable solution is required. In case the parties cannot find an amicable solution, they may resort to mediation under Regulation 2019/1150 on fairness and transparency for business users of online platforms, or alternatively, an out-of-court dispute settlement procedure under Article 21 of the DSA.[141] If there are no sufficient grounds for restricting or suspending the service, the platform provider can be held responsible for illegal interference in the provision of programs or press publications.[142]

2. *Platform providers and political advertisements*

Considering the broad definition of political advertising in Article 3(2) of the TTPA, a platform provider can be classified among sponsors of political advertising pursuant to Article 3(10) of the TTPA and political advertising service providers pursuant to Articles 3(5) and (6) of the TTPA. A platform provider that publishes political advertisements for compensation on the platform can, therefore, be held liable under the TTPA as the publisher of a political advertisement. Conversely, if the criteria in Articles 3(2), (5), (6) or (10) of the TTPA are not met, the fact that the design, organization or operation of an online platform affects an electoral or legislative process in violation Article 25 of the DSA, does not *per se* make the platform provider a sponsor or provider of political advertising services that can be held liable under the TTPA. Moreover, a general exemption from liability under the TTPA is provided in Article 3(5) thereof. A platform service that meets the criteria of a political advertising service does, according to that provision, not constitute a political advertising service if it is pro-

[140] Recital 50 EMFA, supra note 17.

[141] Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation service, OJ 2019 L, 186/ 57.

[142] See recital 63 of the preamble to the DSA, supra note 16.

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vided without consideration. Consequently, the platform provider is not a publisher of political advertising when, for instance, influencers post political advertisements as generic content on their accounts. Then again, platform providers can be held liable under the TTPA to the extent that political advertising is published for compensation, for instance via a paid online advertising account.

According to Article 2(3)(i) of the TTPA, the rules regarding political advertising enshrined in the Regulation, shall be without prejudice to the application of the rules laid down in the DSA.[143] On that note, political advertising is covered by the general rules on advertising in the DSA.[144] According to Article 26 of the DSA, platform providers that present advertisements on their online interfaces shall ensure that each recipient of the platform service is able to identify, “in a clear, concise and unambiguous manner and in real time” that the post is an advertisement; on whose behalf the advertisement is presented; who paid for the advertisement; and the parameters used to determine the recipient to whom the advertisement is presented as well as how to change these parameters. If the provider of the online platform service uses a recommender system, i.e. an AI tool that provides suggestions for end-users regarding media content, the main parameters of the system and any option for the recipients to modify or influence those parameters, shall be set out in the terms and conditions in a plain and intelligible language.

Although the TTPA shall not affect the obligations for platform providers with regard to advertising under the DSA, providers of platform services are encouraged to facilitate the identification of political advertising which is uploaded or disseminated by end-users on the platform insofar as the measures do not constitute monitoring of content or activities on the platform.[145] In addition, the TTPA specifies the obligations of providers of VLOPs and VLOSEs.[146] Whereas Article 34(2)(d) of the DSA clarifies that the required risk assessment shall take into account systems for selecting and presenting advertisements, recital 46 of the preamble to the TTPA, clarifies that providers of VLOPs and VLOSEs “should diligently identify, analyse and assess any systemic risks that their political advertising services pose” under Article 34 of the DSA. Similarly, whereas Article 35(1)(e) of the DSA stipulates that the providers of VLOPs and VLOSEs shall

[143] Recital 51 of the preamble to the TTPA, supra note 17.

[144] Recital 57 and 69 of the preamble to the TTPA, supra note 17.

[145] See recitals 44, 54 and 55 of the preamble to the TTPA, supra note 17; and Guidelines to support the implementation of Regulation (EU) 2024/900, supra note 19, at 7.

[146] See Guidelines to support the implementation of Regulation (EU) 2024/900, supra note 19, at 5.

adapt “their advertising systems” and adopt “targeted measures aimed at limiting or adjusting the presentation of advertisements in association with the service they provide”, they shall pursuant to recital 46 of the preamble to the TTPA “put in place reasonable, proportionate and effective mitigation measures in accordance with Article 35 of that Regulation”.[147]

Furthermore, providers of VLOPs and VLOSEs shall according to Article 13(2) of the TTPA, ensure that the information in transparency notices regarding political advertisements required by Article 12(1) thereof, is available in a repository referred to in Article 39 of the DSA. According to that provision, the providers of VLOPs and VLOSEs shall make information about the content, sender and sponsor etc of the advertisements uploaded on the platform available “in a specific section of their online interface, through a searchable and reliable tool that allows multicriteria queries and through application programming interfaces.” As providers of platforms that are not classified among VLOPs and VLOSEs have no such obligation under the DSA, the European Commission shall according to Article 13(1) of the TTPA set up a European Repository that collects and makes publicly available information about online political advertisements published within the Union or directed to EU citizens or residents.

As mentioned above, platform providers shall provide a notice and take down mechanism under Article 16 of the DSA, and political advertisements publishers shall provide a corresponding notice and take down mechanism under Article 15 of the TTPA. According to Article 15(5) of the TTPA, a provider of VLOPs and VLOSEs that is a political advertisements publisher has a particular responsibility to assess notifications and take actions quickly.[148]

3. *Public and private enforcement of platform responsibilities*

Compliance with the DSA is promoted through public monitoring. In view of the overlapping obligations under the TTPA and the DSA, the same national authorities are often involved in the monitoring and enforcement of both legal frameworks.[149] Member States shall according to Article 49 of the DSA designate one or more competent authorities to be responsible for supervision of

[147] See also Commission Guidelines for providers of Very Large Online Platforms and Very Large Online Search Engines on the migration of systematic risks for electoral processes pursuant to Article 35(3) of Regulation (EU) 2022/2065, OJ 2024 C 2024/3014.

[148] See Guidelines to support the implementation of Regulation (EU) 2024/900, supra note 19, at 40-41.

[149] See e.g. recitals 91, 96, 100 and 105 of the preamble to the TTPA, supra note 17.

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compliance and enforcement of the DSA. One of these authorities shall be designated as the Member State's Digital Service Coordinator.[150] In addition to coordination of the activities on national level, these bodies shall according to Article 57 of the DSA cooperate closely and provide each other with mutual assistance. High-level officials representing the national Digital Service Coordinators shall make up an independent European Board for Digital Services pursuant to Articles 61-63 of the DSA.

With regard to providers of VLOPs and VLOSEs the European Commission assisted by the in-house Digital Service Committee introduced in Article 88 of the DSA, is the supervisor of compliance.[151] Since, VLOPs and VLOSEs are often provided by undertakings having their main establishment in third countries, this distribution of labour within the Union tallies with the competences conferred on the EU institutions to take other external actions.[152] Indeed, the mere negotiating powers of providers of VLOPs and VLOSEs tell against an enforcement model that relies on measures by the national authorities.

In order to apply the Regulation in a consistent and efficient manner across the Union, the Digital Service Coordinators and the Commission cooperate closely and provide mutual assistance. In that connection, the Commission's information sharing system based on reports from platform providers pursuant to Article 15 of the DSA has become an important tool for enforcement.[153] For instance, based on the reporting requirements in conjunction with the above mentioned duties under Article 25 of the DSA, the Commission is investigating TikTok in relation to the influencer campaign that led to annulment of the 2024 Romanian election.[154] Based on best practices the European Board for Digital Services and the Commission shall adopt guidelines and promote the development of technology standards.[155] They shall also encourage and facilitate for the industry and stakeholders to adopt voluntary codes of conduct, such as the Code of Conduct on Disinformation mentioned above.[156] Sometimes, codes of conduct adopted under

[150] See Articles 49-55 of the DSA, supra note 16.

[151] See Articles 56-60 of the DSA supra note 16. Ses also Commission Implementing Regulation (EU) 2023/1201 on detailed arrangements for the conduct of certain proceedings by the Commission pursuant to Regulation (EU) 2022/2065 of the European Parliament and of the Council ('Digital Services Act'), OJ 2023 L, 159/51.

[152] See section II.2 above.

[153] See section 5 of the DSA supra note 16 and in particular Article 85 thereof.

[154] See https://ec.europa.eu/commission/presscorner/detail/en/ip_24_6243, last visited 2026-01-09.

[155] Article 44 of the DSA, supra note 16.

[156] Articles 45-47 of the DSA, supra note 16.

other legal frameworks concern also the DSA.[157] For instance, the Code of Conduct on Countering Illegal Hate Speech Online was adopted pursuant to a Commission Framework Decision regarding the establishment of an area of Freedom, Security and Justice, and the Code of Conduct on Data Processing in Advertising Activities was adopted on basis of Article 40 of the GDPR before the entry into force of the DSA.[158] According to Articles 87 and 88 of the DSA, the Commission may also adopt delegated and implementing acts.[159]

When it comes to the repression of disinformation and FIMI also the European Digital Media Observatory (EDMO) should be mentioned. In brief, it is a pan-European, independent and interdisciplinary network of researchers that act as fact-checkers and can notify competent authorities.[160]

Competent national authorities and the European Commission respectively may order platform providers to provide information, make inquiries and moderate and take down content on the platforms.[161] Naturally, protection of personal data yields in the specific case where monitoring or investigation is ordered by a competent national authority or the Commission for overriding reasons. In order to facilitate communication with national authorities or the Commission, the platform provider shall according to Article 11 of the DSA designate a point of contact within the Union. If a platform provider that offers services in the Union does not have an EU establishment, it shall appoint a representative in a Member State where the service is provided.[162]

Private enforcement of fundamental rights is promoted by the notice and action mechanism that platforms providers shall have in place to police

157 See for an overview of existing codes of conduct https://digital-strategy.ec.europa.eu/en/policies/dsa-codes-conduct, retrieved 2026-01-15.

158 See as to hate speech ///C:/Users/User/Downloads/code_of_conduct_on_countering_illegal_hate_ speech_online_en_C08AC7D9-984D-679D-CAEF129AD536E128_42985.pdf; and as to advertising https://www.edpb.europa.eu/system/files/2021-04/code_of_conduct_data_processing_in_advertising_activities_en.pdf, retrieved 2026-01-15.

159 See for instance, Commission Implementing Regulation (EU) 2023/1201 on detailed arrangements for the conduct of certain proceedings by the Commission pursuant to the Digital Services Act, supra note 149.

160 See https://edmo.eu, retrieved 2026-01-16.

161 See Articles 9, 10, 40, 51(2)(b), 72, 73 of, and recitals 30, 34 and 103 of the preamble to, the DSA supra note 16.

162 Article 13 of the DSA, supra note 16. As stated in recital 89 of the preamble to the TTPA, supra note 17, the same legal entity can be appointed as a representative under the DSA, TTPA and GDPR. See as to the notion of an establishment in the Union Judgment of the ECJ of 15 September 2011, Criminal proceedings against Jochen Dickinger and Franz Ömer, Case C-347/09, EU:C:2011:582.

illegal content and activities on the platform.[163] There is a delicate balance to be made between, on the one hand, the end-users' right to privacy, and on the other hand, their interest in being protected against harm by media content. For instance, a news agency may expect the platform provider to take measures in order to prevent or restrict copyright infringement and other unfair use of the editorial material.[164] However, the platform provider has no duty to share information about an end-user to facilitate the enforcement of intellectual property rights.[165] If information uploaded to the platform is moderated or suspended, any recipient of the platform service who is affected can based on the statement of reason required under Article 17 of the DSA, lodge a complaint against the platform provider with the Digital Service Coordinator in the Member State where the recipient of the service is located or established. According to Article 53 of the DSA, "any body, organization or association mandated to exercise the rights conferred [by the Regulation]" is entitled to lodge such a complaint.[166]

In addition to the specific regimes regarding obligations for platform providers, the application of general competition law and the DMA, may promote the formation of well-founded opinions. Since people to an ever-greater extent access media services through online platforms, competition between platform providers may affect even current affairs and news reporting. In the field of competition law, economic theory may be used to reveal connections and effects on markets that may be difficult to discern without econometrics. However, efficient resource allocation according to one economic theory or another, is an aspect of the functioning of markets that *per se* provides no normative guidance. It is trite that 'efficiency' is a yardstick for how well an objective is achieved, and a measure that is efficient for achieving one objective may be ineffective for achieving another. Scholars inclined to rely on economic theory when making normative proposals often assume that short term productivity for an undertaking is the guiding star for market regulation. However, this arbitrarily chosen objective is a Cinderella in a legal system designed to promote stable long-term conditions for industrial and overall societal development by reconciling conflict-

[163] Article 16 of the DSA, supra note 16.

[164] See Article 17 of Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ 2019 L, 130/92.

[165] See Judgment of the ECJ of 29 January 2008, Productores de Música de España (Promusicae) v Telefónica de España SAU, Case C-275/06, EU:C:2008:54.

[166] Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ 2012 L, 351/1.

ing rights and interests through proportionate limitations. As mentioned, the EU Charter always applies within the competences of the Union.[167]

Although the aim of competition law is to promote a proper functioning of markets as opposed to protect fundamental rights such as free and pluralistic media or privacy, infringements of fundamental rights may constitute an abuse of a dominant position. Because a violation of fundamental rights can result in unjustifiable competitive advantages that at least potentially distort existing or future competition in the relevant market. After much debate this was clarified by the ECJ in Case 252/21, *Facebook Germany*.[168] In response to questions referred from the German Administrative Court in a case between the German Federal Cartell Office and primarily Facebook Germany, the ECJ explained that it may be an infringement of Article 102 of the TFEU not to afford the end-users a real choice regarding data processing for tailoring of commercial offers by offering them access to platform services without requesting such data. A valid consent under the GDPR must be freely given, specific, informed and unambiguous. In contrast, consent that is forced by information asymmetry and lack of choice is invalid under the GDPR. In addition, such terms and conditions are anti-competitive if they effectively foreclose competition from undertakings that can provide equivalent platform services but are not in a position to collect and trade in the same amount of personal data. Hence, the ECJ concluded that the provider of a VLOP must offer end-users a possibility to access an equivalent service, without requiring them to give a way personal data that are intended to be used for profiling, targeting and tailoring of messages including advertising.[169] A platform provider may instead charge a proportionate fee for access to an equivalent platform services. As stated in recital 81 of the preamble to the TTPA, the reasoning of the ECJ in the *Facebook Germany* Case may apply also to data processing for targeting and tailoring of political advertising.

In addition to abusive consumer contracts, a large search engine that without objectively acceptable reasons primarily refers the end-users to its own trading platforms (self-preferencing) may constitute an abuse of a dominant position under Article 102 of the TFEU.[170] As mentioned, the ECJ has

[167] Commission report by J. Crémer, Y-A de Montjoye, H. Schweitzer, *Competition Policy for the Digital Era*.

[168] Judgment of the ECJ of 4 July 2023, Meta Platforms Inc and Others v Bundeskartellamt, Case C-252/21, EU:C:2023:537, para 48.

[169] Meta Platforms Inc and Others v Bundeskartellamt, Case C-252/21, supra note 169, para. 102.

[170] See Commission decision against Google 5 September 2025, https://ec.europa.eu / commission/ presscorner/api/files/document/print/en/ip_25_1992/IP_25_1992_EN.pdf, retrieved 2026-01-16.

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previously also addressed media pluralism and abuse of dominance by limiting media providers' access to essential information under Article 102 of the TFEU, as well as anticompetitive agreements tying copyrights to broadcasting rights in breach of Article 101 thereof.[171] In addition, merger control from a competition law perspective is relevant for media pluralism albeit the merging of media houses are also subject to assessment under the EFMA.[172]

Since the entry into force of the DMA, providers of VLOPs which are designated as gatekeepers pursuant to Articles 2 and 3 thereof, must ensure end-users access by informed consent on fair terms. According to Article 5(2) of the DMA, the gatekeeper must not combine, or cross use, personal data collected from the core platform service in order to provide another service, such as marketing of commercial offers, without informed consent from the end-user. In that connection, the European Commission, which oversees the gatekeepers, has invalidated a business model used by Meta and Apple where the end-users must either consent to the terms or pay for accessing a very limited service (the consent or pay model).[173] According to the commission, the services provided if end-users pay for not receiving targeted advertising are not equivalent to the services obtained if personal data are freely given away and cross-used by the platform providers to target commercial offers.[174] Meta has, therefore, introduced a third option, namely consent to share less personal data and accept less tailored commercial offers to get the full service without payment. It remains to be seen to what extent consent to cross-use of personal data can be accepted under the GDPR and, hence, be captured by the DMA. Similarly, agreements restricting access to news reporting may be deemed anti-competitive.

V. **Conclusions**

In hindsight, it must be said that Jean Monnet's scepticism regarding the ability of politics to unite countries and his belief in trade as a uniting

[171] Joined Cases C-241/91 P and 242/91 P, Magill supra note 82; Judgment of the ECJ of 4 October 2011, in Joined Cases Football Association Premier League Ltd and Others v QC Leisure and Others (C-403/08) and Karen Murphy v Media Protection Services Ltd (C-429/08), EU:C:2011:631.

[172] See recital 70 of the preamble to the EFMA.

[173] See as to the decisions 23 April 2025 here https://ec.europa.eu/commission/presscorner/api/files/ document/print/en/ip_25_1085/IP_25_1085_EN.pdf, retrieved 2026-01-16.

[174] See further regarding the requirements, European Data Protection Board Opinion 08/24 on Valid Consent in the Context of Consent or Pay Model Implemented by Large Online Platforms, ps://www.edpb.europa.eu/system/files /2024-04/edpb_opinion_202408_consentorpay_en.pdf, retrieved 2026-01-16.

force was well founded. Indeed, the framework for economic integration provided by the Treaty of Rome laid a solid foundation for European unification. If it had been left to popular vote and political opportunism the EU would not have existed. True, the European Parliament has been given increasing powers with virtually each revision of primary law to anchor supranational decision making in the will of the people of Europe. And the democratic element in the Union's separation of powers, now goes far beyond popular representation in the European Parliament and the representation of national governments. But the EU largely remains a *sui generis* polity without the characteristics of a democracy. Furthermore, the Union has limited formal powers to ensure that Member States retain a democratic form of governance, although only democratic states in Europe can join the Union. Nonetheless, under current circumstances, there is a strong will at both national and supranational level to protect democratic processes through more coordination and collaboration.

In late 2025, efforts to protect the European way of life were consolidated in the Democracy Shield. Based on the Union's powers to establish and maintain an internal market and the requirement pursuant to the Lisbon revision in 2009 to take fundamental rights recognised in the EU-Charter into consideration, the regulation of media and platform services within the Union has become an important way to promote the ability of voters to form well-founded opinions. Primarily the requirement to safeguard freedom of expression and information enshrined in Article 11 of the EU Charter, is formative for the repression of disinformation and FIMI. Whereas media freedom and pluralism along the lines of the right to receive and impart information and ideas promote a rich information base, there is a need to ensure that fact-checked editorial materials do not disappear in an overwhelming media flow organised by platforms. Schematically, a distinction needs to be made between media and platform service providers insofar as providers of online interfaces do not produce the content stored at the platforms.

Under the EMFA, all kinds of media service providers, including providers of television and radio broadcasts, on-demand audiovisual media services, audio podcasts and press publications, are entitled to exercise their economic activities to the extent that limitations are necessary in order to safeguard other Union rights and interests including repression of disinformation. When it comes to political advertising, the TTPA establishes mechanisms to ensure transparency regarding the nature, origin and financing of the kind of media content concerned. A main goal of the TTPA is to reduce the risk of influence campaigns from third countries. Although platform providers often meet the definition of a political advertisement publisher, they are exempted from liability under the TTPA if the ad is hosted without

consideration. However, the DSA contains related rules regarding the liability of platform providers. Conversely, particularly the extensive obligations for providers of VLOPs and VLOSEs under the DSA, are complemented by tailored rules set out in both the EMFA and the TTPA. Hence, to understand the Democracy Shield with regard to informed opinion formation, it is necessary to read the normative frameworks for media service providers and platform providers together without confusing the roles and responsibilities of the different market participants. Moreover, the systems for public and private enforcement of the legal regimes are coordinated, and the Shield consists in practice largely of collaboration between public law entities.

When it comes to VLOPs and VLOSEs, the Union speaks with one voice through the European Commission. In addition to monitoring compliance with the DSA, the Commission can invoke competition law to combat anticompetitive behaviour in the form of violations of fundamental rights. Insofar as providers of VLOPs and VLOSEs have their main establishments in third countries, the distinction between regulation of the internal market and external trade policy collapses.

In the big picture, the Union's limited powers to protect democratic processes, combined with the requirement to always respect and reconcile fundamental rights and interests, result in a reinterpretation of the notion of democracy with repercussions for the Member States' form of governance. Whereas democracy has traditionally been understood in terms of representative popular sovereignty, and the rule of law has appeared to be the rule of the legislature, democracy is now conditioned on the rule of law in terms of legal norms which are aligned with fundamental rights. Indeed, the Democracy Shield is just as important for preventing domestic erosion of values as it is for the protection of informed opinions against destructive influences from third countries.

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Dr. Claes Granmar was appointed as a senior lecturer at Stockholm University, Faculty of Law in 2012, and has been an associate professor in European Law there since 2017. Dr. Granmar defended his thesis at the Euruopean University Institute (EUI) in Florence, Italy, in 2010, where he is also an alumnus. During the academic years 2017-2018 and 2018-2019 he was a visiting fellow at the Institute for European and Comparative Law (IECL) at Oxford University. As a member of the Senior Common Room of the Lady Margereth Hall College he also became an alumnus of Oxford University. Moreover, in 2019 Dr. Granmar was an Honorary Fellow of

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Saint George and The New Dragon: the fight of the European Union against disinformation sponsored by foreign states

San Jorge y El Nuevo Dragón: la lucha de la Unión Europea contra la desinformación patrocinada por estados extranjeros

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Summary: I. Introduction.—II. The paper war.—III. The real war. 1. On the EU's response to disinformation campaigns in a context of growing rivalry and foreign hostility. 2. On the possible responses of the EU to disinformation campaigns in a war context.—IV. Conclusion.—V. References.

Abstract: In recent years, disinformation orchestrated by foreign states, particularly Russia, has become a major threat to the fundamental rights of EU citizens, as well as to the vital interests of Member States and the Union itself. In this paper, we have studied the EU's fight against disinformation campaigns orchestrated by third countries. We have seen how it has moved from weak policies and measures to the adoption of robust and rigorous policies and measures, including a system of sanctions against individuals, companies and the media. We also ask ourselves whether the EU could resort to self-defence in the face of disinformation campaigns that amount to armed attacks, and what form such a response might take. We conclude that, although this would be possible in theory, in practice it would be difficult to find cases in which the EU itself suffers disinformation campaigns equivalent to armed attacks without affecting Member States, and it would therefore be difficult to imagine a possible response from the EU.

Keywords: disinformation, European Union, FIMI, human rights, self-defence.

Resumen: *En los últimos años la desinformación orquestada por Estados extranjeros, en particular Rusia, se ha convertido en una amenaza importantísima contra los derechos fundamentales de los ciudadanos de la UE, así como a los intereses vitales de los Estados Miembros y de la propia Unión. En este trabajo hemos estudiado la lucha de la UE contra las campañas de desinformación orquestadas por terceros Estados. Hemos visto cómo se ha pasado de unas políticas*

y unas medidas débiles, a la adopción de políticas y medidas sólidas y rigurosas, incluyendo un régimen sancionador a individuos, empresas y medios de comunicación. Nos preguntamos también por la posibilidad de que la UE recurra a la legítima defensa ante campañas de desinformación que equivalgan a ataques armados y las modalidades en que podría manifestarse esa respuesta. Y llegamos a la conclusión que, aunque en teoría ello sería posible, en la práctica será difícil encontrar casos en los que la UE sufra campañas de desinformación equivalentes a ataques armados en sí misma, sin que afectara a los Estados Miembros y, por tanto, sería difícil imaginar la posible respuesta de la UE.

Palabras clave: *desinformación, Unión Europea, FIMI, derechos humanos, legítima defensa.*

I. **Introduction**

The use of false information is inherent in the human condition and has historically been used to manipulate public opinion for political, economic or even military purposes[1]. Today, however, the technological revolution that has taken place around the world has multiplied its danger and scope, making it a serious global risk[2] when it takes on the characteristics of "disinformation campaigns". For us, this new form of "information disorder"[3] can be defined as "[...] the orchestrated dissemination of untrue news or data through any type of communication channel, whether traditional —printed press, radio, television— or horizontal —social networks, etc.— with the intention of gaining an economic, social or strategic advantage or harming rivals, be they individuals, societies, institutions or states"[4]. In this article, I will focus on the international relations and geopolitical landscape, and more specifically on the European Union's (EU) ongoing battle against the disinformation campaigns that it and its Member States are increasingly exposed to from abroad, to the point where it has become almost a plague.

Indeed, the seriousness of the threats cannot be underestimated, as they can often affect the exercise of several fundamental rights that form the basis of our European democracies[5]. For example, the right to free and fair elections, when the disinformation is intended to favour or harm a particular candidate, thereby altering the foreseeable expected result[6]. In other cases, when disinformation relates to a person —in particular political and

[1] Ángel Badillo and Félix Arteaga, «*El impacto estratégico* de la *desinformación en España*», *Informe IBERIFIER*, Febrero 2024 (2024): 9. https://media.realinstitutoelcano.org/wp-content/uploads/2024/04/informe-iberifier-el-impacto-estratagico-de-la-desinformacion-en-espana.pdf. See also: Centro Criptológico Nacional, Ministerio de Defensa, «Desinformación en el ciberespacio», BP/13 (2019): 5. https://www.ccn-cert.cni.es/es/pdf/informes-de-ciberseguridad-ccn-cert/informes-ccn-cert-buenas-practicas-bp/3549-ccn-cert-bp-13-desinformacion-en-el-ciberespacio/file.html.

[2] Chengcheng Shao *et al.*, «The spread of low-credibility content by social bots», *Nature Communications* 9, 4787 (2018): 2. https://doi.org/10.1038/s41467-018-06930-7

[3] Claire Wardle and Hossein Derakhshan, «Information disorder. Toward an interdisciplinary framework for research and policymaking», Council of Europe (2017). https://edoc.coe.int/en/media/7495-information-disorder-toward-an-interdisciplinary-framework-for-research-and-policy-making.html.

[4] Carlos Espaliú-Berdud, «Use of Disinformation as a Weapon in Contemporary International Relations: Accountability for Russian Actions Against States and International Organizations», *Profesional De La información* 32 (4) (2023): 5. https://doi.org/10.3145/epi.2023.jul.02.

[5] In this line see, among others: James Pamment, «The EU's Role in Fighting Disinformation: Taking Back the Initiative», *Policy File*, Carnegie Endowment for International Peace — US (2020): 5-6. https://carnegieendowment.org/files/Pamment_-_Future_Threats.pdf.

[6] See, among others, Article 25 of the International Covenant on Civil and Political Rights; Article 3 of the Protocol No. 1, of the European Convention on Human Rights

public figures and journalists— and is intended to harm that person's reputation, it may affect the right to be free from unlawful attacks on one's honour and reputation[7]. Or, if the disinformation is sometimes targeted at particular groups in society —such as women, migrants or certain ethnic groups— and is intended to incite violence, discrimination or hostility, it may violate the right to non-discrimination[8]. Moreover, it also can affect the right to privacy, when personal data is misused with illegal purposes[9].

However, in that regard, it should be noted that the scope and danger of disinformation campaigns have increased due to the difficulty democratic societies face in legally tackling these hostile acts, compared to more clearly offensive behaviours such as armed attacks, terrorist acts, and computer attacks or hacking[10]. Indeed, it is difficult to combat disinformation without at the same time attacking the very principles of democratic States and societies —as we have seen above— such as freedom of expression and opinion, which underpin the fundamental individual rights of nationals and foreigners. As it is firmly rooted in the jurisprudence of the European Court of Human Rights (ECtHR), "freedom of expression, [...] constitutes one of the essential foundations of a democratic society and one of the primary conditions for its progress"[11]. This conception lies so much at the

(ECHR); Articles 39 and 40 of the Charter of Fundamental Rights of the European Union; Articles 10 (3) and 14 (3) of the Treaty on European Union (TEU).

[7] See, among others, Article 17 of the International Covenant on Civil and Political Rights; Article 8 of the ECHR; Articles 1 and 7 of the Charter of Fundamental Rights of the European Union.

[8] See, among others, International Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of All Forms of Discrimination Against Women; Convention on the Rights of Persons with Disabilities; Article 2 of the Convention on the Rights of the Child; Articles 2(1) and 26, of the International Covenant on Civil and Political Rights; Article 2 (2) of the International Covenant on Economic, Social and Cultural Rights; Article 14 of the ECHR and Article 1 to its Protocol No. 12; Articles 21 and 23 of the Charter of Fundamental Rights of the European Union. For a study of the rights that can be affected by disinformation campaigns, see: Gobierno de España. Presidencia del Gobierno. «Lucha contra las campañas de desinformación en el ámbito de la seguridad nacional. Propuestas de la sociedad civil» (2022): 87-90.

[9] The right to privacy is embodied, among others legal instruments, in Article 8 of the ECHR and Article 17 of the International Covenant on Civil and Political Rights.

[10] In this sense, see: Presidencia del Gobierno. «Lucha contra las campañas de desinformación en el ámbito de la seguridad nacional. Propuestas de la sociedad civil», p. 10. To assess how different types of governments (democratic or authoritarian) and international organisations approach the fight against online disinformation, see the comparative research design made by: Samuel,Cipers, Trisha Meyer and Jonas Lefevere, «Government Responses to Online Disinformation Unpacked», *Internet Policy Review*, vol. 12, no. 4 (2023): 1-19. DOI: 10.14763/2023.4.1736.

[11] European Court of Human Rights. *Case of Castells v. Spain*. 11798/85, Judgment (Merits and Just Satisfaction), Chamber, 23 April 1992. ECLI:CE:ECHR:1992:0423JUD001179885, par. 42.

heart of European democracies than, according to the Court of Justice of the European Union in a case in which the Court had to examine the right of an official of the European Commission itself to criticize the EU bodies, the authorities cannot silence opinions, even if they are contrary to the official view[12]. In this vein, to illustrate the difficulties faced by public authorities in the fight against online disinformation, it is worth noting that, according to a decision by the ECtHR, Article 10 of the European Convention on Human Rights (ECHR), which is also part of EU law, and that recognizes the right to freedom of expression,

> "[...] does not prohibit discussion or dissemination of information received even if it is strongly suspected that this information might not be truthful. To suggest otherwise would deprive persons of the right to express their views and opinions about statements made in the mass media and would thus place an unreasonable restriction on the freedom of expression set forth in Article 10 of the Convention"[13].

In addition to possible violations of these individual rights, disinformation campaigns orchestrated by foreign States amount to interference in the internal affairs[14] of EU Member States and the EU itself and there is a tendency to consider them as an element of hybrid war and therefore to amount to a violation of the prohibition of the use of force in international society contained in article 2.4 of the UN Charter. For example, in the 2022 New Strategic Concept of the North Atlantic Treaty Organization (NATO), it is emphasized that authoritarian actors:

> "[…] interfere in our democratic processes and institutions and target the security of our citizens through hybrid tactics, both directly and

[12] Court of Justice of the European Union. Judgment of the Court of 6 March 2001, *Bernard Connolly v European Commission*, Case C-274/99 P. ECLI:EU:C:2001:127, para. 43.

[13] European Court of Human Rights. *Case of Salov v. Ukraine***,** 65518/01, Judgment, 6 September 2005. ECLI:CE:ECHR:2005:0906JUD006551801, para. 113. For a development of this matter, see: European Parliament. «The fight against disinformation and the right to freedom of expression». Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies PE 695.445 – July 2021.https://www.europarl.europa.eu/RegData/etudes/STUD/2021/695445/IPOL_STU(2021)695445_EN.pdf; Jan Kudrna, «The possibilities of combating so-called disinformation in the context of the European Union legal framework and of constitutional guarantees of freedom of expression in the European Union Member States», *International Comparative Jurisprudence (Online)* 8.2 (2022): 138–151. https://doi.org/10.13165/j.icj.2022.12.002.

[14] On the possibility to consider influence operations as a violation of State's sovereignty, see: Duncan Hollis, «The Influence of War; The War for Influence», *Temple International and Comparative Law Journal* 32, no. 1 (Spring 2018): 39. https://sites.temple.edu/ticlj/files/2018/10/32.1_Article-5_Hollis.pdf.

> through proxies. They conduct malicious activities in cyberspace and space, promote disinformation campaigns, instrumentalise migration, manipulate energy supplies and employ economic coercion”[15].

NATO had already in 2016 set forth that it could invoke Article 5 of the Washington Treaty in the presence of hybrid warfare, “[...] where a broad, complex, and adaptive combination of conventional and non-conventional means, and overt and covert military, paramilitary, and civilian measures, are employed in a highly integrated design by state and non-state actors to achieve their objectives [...]”[16].

In the same line, for example, the German «White Paper on Security Policy and the Future of the Bundeswehr 2016» states that: “[...] A special challenge for open and pluralistic societies is the use of digital communication to influence public opinion, for example through hidden attempts to sway discussions on social media and by manipulating information on news portals. This approach has already gained special significance as an element of hybrid warfare”[17]. And it added that: “[...] Hybrid tactics blur the boundaries between war and peace and can also constitute a breach of the general ban on the use of force. The roles of aggressor and conflict party are deliberately obscured. The intention is to delay or completely prevent an immediate and decisive response by the state under attack and the international community”[18].

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[15] See: North Atlantic Treaty Organization. «2022 Strategic Concept. Adopted by Heads of State and Government at the NATO Summit in Madrid, 29 June 2022» (2022), (7). https://www.nato.int/strategic-concept/.

[16] “72. We have taken steps to ensure our ability to effectively address the challenges posed by hybrid warfare, where a broad, complex, and adaptive combination of conventional and non-conventional means, and overt and covert military, paramilitary, and civilian measures, are employed in a highly integrated design by state and non-state actors to achieve their objectives. Responding to this challenge, we have adopted a strategy and actionable implementation plans on NATO’s role in countering hybrid warfare. The primary responsibility to respond to hybrid threats or attacks rests with the targeted nation. NATO is prepared to assist an Ally at any stage of a hybrid campaign. The Alliance and Allies will be prepared to counter hybrid warfare as part of collective defence. The Council could decide to invoke Article 5 of the Washington Treaty. The Alliance is committed to effective cooperation and coordination with partners and relevant international organisations, in particular the EU, as agreed, in efforts to counter hybrid warfare”. North Atlantic Treaty Organization. «Warsaw Summit Communiqué, Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Warsaw 8-9 July 2016» (2016), North Atlantic Treaty Organization. «Warsaw Summit Communiqué, Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Warsaw 8-9 July 2016» (2016), (par.72). https://www.nato.int/cps/en/natohq/official_texts_133169.htm

[17] Government of the Federal Republic of Germany. «White Paper on Security Policy and the Futures of the Bundeswehr» (2016): 37. https://www.bundeswehr.de/resource/blob/4800140/fe103a80d8576b2cd7a135a5a8a86dde/download-white-paper-2016-data.pdf.

[18] *Ibid.*, p. 39.

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In the same vein, the Spanish National Security Strategy unequivocally states that: "Disinformation campaigns have a clear impact on national security […]"[19]. Similarly, the US National Security Strategy of October 2022, underlined that "[...] we are responding to the ever-evolving ways in which authoritarians seek to subvert the global order, notably by weaponizing information to undermine democracies and polarize societies"[20].

In light of the serious threats to the core assets of Member States and the EU itself, including the fundamental rights of their citizens, this article examines the EU's policies and measures to combat disinformation promoted by foreign States. This analysis will allow us to evaluate the effectiveness of the measures implemented thus far in addressing current issues, while also addressing significant new questions of international law that may arise in future.

A possible future consideration is whether international organisations should be permitted to use self-defence in response to a disinformation campaign, whether alone or in conjunction with other factors, if it is deemed to constitute an armed attack[21]. This is one of the conditions set out in Article 51 of the UN Charter that would allow for the use of self-defence. To begin the discussion, I would like to express my belief that the question of whether a disinformation campaign should be considered equivalent to an armed attack should depend on the damage caused. While Article 3 of UN General Assembly Resolution 3314 ("Definition of Aggression") [22] —which is considered a synonym of "armed attacks" in international law— provides examples of such actions, including invasion, occupation of territory, bombardment and blockade of coasts or ports, Article 4 states that this list is not exhaustive. This means that the Security Council could deem other actions to constitute an armed attack. It is true that there has recently been a regrettable tendency towards self-serving laxity in setting the minimum threshold for considering an action to be an armed attack[23], given the serious consequences that the determination of an act of aggression can entail. Nevertheless, bearing in mind the necessary prudence in this field, as demonstrated by the ICJ in its case

[19] Government of Spain. «National Security Strategy» (2021): 60. https://www.dsn.gob.es/sites/default/files/documents/ESN2021%20EN.pdf.

[20] United States of America. «National Security Strategy», October. 2022 (2022): 17-18.

[21] On the necessity of being in presence of an armed attack and not only in presence of an use of force to have recourse to self-defence according to Article 51 of the UN Charter, see: Olivier Corten, «Discours de guerre, guerre de discours», *Revue interdisciplinaire d'études juridiques,* 2023/1 Volume 90 (2023): 155-176. https://doi-org.ezproxy-prd.bodleian.ox.ac.uk/10.3917/riej.090.0155.

[22] UN General Assembly, Resolution 3314 (XXIX), «Definition of Aggression», A/RES/3314(XXIX), 14 December 1974.

[23] On that point, see: Corten, «Discours de guerre, guerre de discours»: 163-167.

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law, I believe the threshold should be set according to the scale of the damage caused. For example, we can consider successful disinformation campaigns that aim to promote genocide, civil war or civil strife.

The opportunity to conduct this research becomes clear when we read the foreword to the third European External Action Service (EEAS) report on foreign information manipulation and interference threats (FIMI) by the EU High Representative for Foreign Affairs and Security Policy: "Our information space has become a geopolitical battleground. From the data gathered by the EEAS, last year over eighty countries and over two hundred organisations were the targets of attacks from foreign information manipulation and interference or 'FIMI'"[24]. Furthermore, High Representative Kallas argued that: "Foreign actors use FIMI to manipulate public opinion, fuel polarisation, and interfere with democratic processes within the EU and worldwide. The aim is to destabilise our societies, damage our democracies, drive wedges between us and our partners and undermine the EU's global standing"[25]. She also suggested that: "FIMI is not merely a tool for disseminating deceptive narratives. It is an integral part of military operations used by foreign states to lay the way for kinetic action on the ground"[26]. And she concluded that: "FIMI is a major security threat to the EU"[27]. As is clear from the words of High Representative Kallas, the EU is of the opinion that disinformation campaigns can be part of hybrid tactics and thus part of warfare[28].

To address these important issues concerning the present and future of our democracies[29], our article will have an introduction and three additional sections. The second will be devoted to examining the policies and measures adopted by the EU at the beginning of the disinformation threat crisis,

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[24] European External Action Service. «The 3rd EEAS Report on Foreign Information Manipulation and Interference Threats", Foreword by High Representative/Vicepresident Kaja Kallas» (2025). https://www.eeas.europa.eu/sites/default/files/documents/2025/EEAS-3nd-ThreatReport-March-2025-05-Digital-HD.pdf.

[25] *Ibid*.

[26] *Ibid*.

[27] *Ibid*.

[28] In this vein, see also: Björnstjern Baade, «Fake News and International Law», *European journal of international law* 29.4 (2018): 1358. ; Suárez-Serrano, Chema, «From bullets to fake news: Disinformation as a weapon of mass distraction. What solutions does international law provide?»,. *Spanish yearbook of international law*, v. 24 (2020): 140. https://www.sybil.es/sybil/article/view/149.http://www.ejil.org/article.php?article=2924&issue=146; Chema Suárez-Serrano, «From bullets to fake news: Disinformation as a weapon of mass distraction. What solutions does international law provide?»,. *Spanish yearbook of international law*, v. 24 (2020): 140. https://www.sybil.es/sybil/article/view/149.

[29] In this sense, see: Matthias Kachelmann and Wulf Reiners, «The European Union's Governance Approach to Tackling Disinformation – Protection of Democracy, Foreign Influence, and the Quest for Digital Sovereignty», *L'Europe En Formation*, November 13 (2023): 36. https://doi.org/10.3917/eufor.396.0011.

which can be characterised as a weak response. I have called this period “the paper war”. In the third section, we will look at the period in which the EU is already taking strong measures to counter FIMI operations including disinformation campaigns. I have called this period “the real war”. Finally, we will draw our conclusions.

II. **The paper war**

Disinformation campaigns originating from Russia and targeting the EU and its Member States were already being detected at the beginning of 2015. At that time, the EU began to express concern about disinformation campaigns sponsored by third countries[30], even though Russia was the more active player in those years[31]. More recently, Chinese-sponsored disinformation campaigns against European States and their allies have become increasingly frequent[32], mainly since the COVID-19 pandemic[33].

However, in the early days of the online communication revolution, when awareness of the threat posed by disinformation was just beginning to emerge, no policies or actions had yet been developed specifically to combat disinformation campaigns orchestrated by third countries[34]. This is un-

[30] In this sense, see also: *Ibid*., p. 22.

[31] On the involvement of various Russian agencies in the preparation and use of disinformation campaigns to destabilise Western States, see: Ramon Loik and Victor Madeira, «European Union Strategy and Capabilities to Counter Hostile Influence Operations»: 250, in: Holger Mölder, Vladimir Sazonov, Archil Chochia, Tanel Kerikmäe (eds) «The Russian Federation in Global Knowledge Warfare. Contributions to International Relations» (Springer, Cham 2021:247–264). https://doi.org/10.1007/978-3-030-73955-3_13. For more information on the relevance of disinformation in Russian military doctrine, see: Lucas Proto, Paula Lamoso-González and Luis Bouza García, «The Great FIMI Pivot: How the EU’s Fight Against Disinformation Is Being Reframed by the European External Action Service», *Media and Communication (Lisboa)*, vol. 13 (2025): 2. https://doi.org/10.17645/mac.9474.

[32] NATO Parliamentary Assembly. Preliminary Draft Report Committee on Democracy and Security (CDS) Sub-Committee on Resilience and Civil Security (CDS-RCS), March 2005, p. 7. https://www.nato-pa.int/download-file?filename=/sites/default/files/2025-04/11%20CDSRCS%2025%20E%20-%20CHINESE%20DISINFORMATION%20-%20TEITELBAUM%20REPORT.pdf. In this regard, see also: Pamment, «The EU’s Role in Fighting Disinformation: Taking Back the Initiative», p. 3.

[33] European External Action Service. «1st EEAS Report on Foreign Information Manipulation and Interference Threats. Towards a framework for networked defence. February 2023». https://www.eeas.europa.eu/eeas/1st-eeas-report-foreign-information-manipulation-and-interference-threats_en.

[34] Before we proceed with our explanation of the issue and the EU’s reaction to FIMI operations, it should be noted that individual countries are primarily responsible for combatting disinformation from foreign States as security is their own responsibility. The EU has not yet been granted primary competence in this matter. Furthermore, it is important to emphasise that

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derstandable given that the profiles of disinformation and FIMI were not yet well-defined. In fact, as Nicolas Hénin set forth, "FIMI overlaps to a considerable extent with disinformation but some nuances need to be brought: not all disinformation is FIMI, and FIMI is not only disinformation"[35]. Having already explained in the introduction what we mean by "disinformation", it is now time to define the term "FIMI". In this regard, it is useful to recall that, for the EEAS, which is a very relevant actor for the purposes of this article, as far as, according to its own words "[…] has taken a leading role in addressing this challenge […]"[36]. FIMI

> "describes a mostly non-illegal pattern of behaviour that threatens or has the potential to negatively impact values, procedures, and political processes. Such activity is manipulative in character, conducted in an intentional and coordinated manner. Actors of such activity can be state or non-state actors, including their proxies inside and outside of their own territory"[37].

Therefore, "FIMI" is a strategic framework that describes complex, organised and hostile campaigns, typically carried out by foreign actors, and is a relatively new concept[38]. Meanwhile, disinformation is a type of content that may be part of an FIMI campaign, but it can also exist in isolation or domestically, and it is a more traditional concept.

Moreover, according to the European Union Agency for Cybersecurity (ENISA) and the EEAS, "The concept of FIMI puts emphasis on manipula-

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this phenomenon affects many different areas. Not only does it affect hybrid threats, but it also affects the digital single market, media regulation in the EU and its Member States. Therefore, the regulation of disinformation is based on a broad and complex EU regulatory framework that predates the recent surge in this phenomenon, as it has been already underlined (Carlos Espaliú Berdud, «Legal and Criminal Prosecution of Disinformation in Spain in the Context of the European Union», *El Profesional de la información*, vol. 31, no. 3 (2022): 4. https://doi.org/10.3145/epi.2022.may.22; Raquel Seijas, «Las soluciones europeas a la desinformación y su riesgo de impacto en los derechos fundamentales», *IDP, Revista de internet, derecho y política*, n. 31 (2020): 3. https://raco.cat/index.php/IDP/article/view/373664/467277.

[35] Nicolas Hénin, «FIMI: Towards a European Redefinition of Foreign Interference», April 2023. EU DisinfoLab: 4. https://www.disinfo.eu/wp-content/uploads/2023/04/20230412_FIMI-FS-FINAL.pdf.

[36] European External Action Service. «Information Integrity and Countering Foreign Information Manipulation & Interference (FIMI)». Strategic Communication. 14 March 2025. https://www.eeas.europa.eu/eeas/information-integrity-and-countering-foreign-information-manipulation-interference-fimi_en#104621.

[37] European External Action Service (EEAS), February 2023, «1st EEAS Report on Foreign Information Manipulation and Interference Threats»: 25. https://www.eeas.europa.eu/eeas/1st-eeas-report-foreign-information-manipulation-and-interference-threats_en.

[38] In that sense see: Proto, Lamoso-González and Bouza García, «The Great FIMI Pivot: How the EU's Fight Against Disinformation»…, p. 3.

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tive behaviour as the main indicator of an attack instead of content and its truthfulness. From this perspective, the manipulation of the information environment is only one aspect of FIMI, although a prominent one"[39].Thus, while there are differences between "disinformation" and "FIMI", these almost disappear when referring to "disinformation campaigns orchestrated by foreign States" rather than simply "disinformation". For the purposes of this article, we will treat "FIMI" likewise, as almost interchangeable with "disinformation campaigns sponsored by foreign States".

Returning to the EU's initial fight against disinformation in general and, later, more specifically against disinformation sponsored by third countries, when the importance of this specific phenomenon was already fully understood, let us remember that the European Council invited the High Representative to develop an action plan on strategic communication, in collaboration with the Member States and EU institutions. This resulted in the creation of the East StratCom Task Force, which has been operational since September 2015 and forms part of the Information Analysis and Strategic Communications Division of the EEAS[40]. Since then, the Task Force's main goal has been to develop communication tools and information campaigns that offer a clearer explanation of EU policies in Eastern European countries. These campaigns are intended to counter the effects of Russian propaganda against the EU. Secondly, the Task Force seeks to bolster the media landscape in the region[41]. Over the years, we have witnessed the expansion of this task force's remit, which now encompasses not only the threat of disinformation from Russia, but also that from China[42]. Indeed, since 2018, the East StratCom Task Force has closely tracked the trajectory of China's overt and covert online propaganda campaigns, first attempting to shape the perception of the Chinese diaspora and then trying to discredit dissidents and the Hong Kong protest movement[43].

[39] European Union Agency for Cybersecurity, & European Union External Action Service. «Foreign information manipulation interference (FIMI) and cybersecurity—Threat landscape» (2022): 7.

[40] European Council. «Conclusions of the Meeting of 19 and 20 March 2015, Document EUCO 11/15 CO EUR 1 CONCL 1». Brussels, 20 March, point. 13.

[41] On the work of the East StratCom Task Force, see: Alessia D'Andrea, Giorgia Fusacchia and Arianna D'Ulizia «Policy Review: Countering Disinformation in the Digital Age — Policies and Initiatives to Safeguard Democracy in Europe» *Information Polity*, vol. 30, no. 1 (2025): 85-86. https://doi.org/10.1177/15701255251318900.

[42] On this issue, see: EUvsDisinfo, «To challenge Russia's ongoing disinformation campaigns: Eight years of EUvsDisinfo. EUvsDisinfo» (2023). https://euvsdisinfo.eu/to-challenge-russias-ongoing-disinformation-campaigns-eight-years-of-euvsdisinfo/.

[43] EUvsDisinfo. Jacob Wallis and Albert Zhang, «The Chinese Communist Party's information operations to shape international perception of its regime in Xinjiang» (2022). https://

A few months after the East StratCom Task Force was set up, the EU Global Strategy (2016) also referred to strategic communication as a means of providing "rapid, factual rebuttals of disinformation"[44].

Furthermore, in June 2017, the European Parliament began considering the need to adopt legal instruments to address disinformation and the spread of false content[45].

Some months afterward, in January 2018, the European Commission set up a High-Level Expert Group (HLEG) to advise on policy initiatives to combat fake news and disinformation spread online, which was very important for the development of EU action in this area[46]. Its final report, published on 12 March 2018, examined best practices in light of fundamental principles and the appropriate responses derived from them, and proposes a multi-dimensional approach to this issue to the European Commission[47]. In fact, the HLEG recommended a self-regulatory approach as a first step. This approach would be based on a clearly defined multi-stakeholder engagement process framed within a binding roadmap for implementation. The aim would be to include all stakeholders in future actions, emphasise the need for self-regulation and focus on a set of short— and medium-term actions[48]. After evaluating the effectiveness and efficiency of these measures in 2019, in a second step, the Commission should reconsider the matter with a view to deciding whether to consider further measures in the future, including regulatory or co-regulatory interventions, competition instruments, or mechanisms to ensure continuous monitoring and evaluation of self-regulatory measures[49].The report also recommended a number of additional measures, such as promoting media literacy among the population,

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euvsdisinfo.eu/the-chinese-communist-partys-information-operations-to-shape-international-perception-of-its-regime-in-xinjiang/.

[44] European External Action Service (EEAS), «*Shared vision, common action – A stronger Europe – A global strategy for the European Union's foreign and security policy*», Publications Office (2016). https://data.europa.eu/doi/10.2871/9875.

[45] European Parliament. European Parliament resolution of 15 June 2017 on online platforms and the digital single market (2016/2276(INI)).

[46] In that sense, see: Carlos Espaliú Berdud, «Legal and Criminal Prosecution of Disinformation in Spain in the Context of the European Union», *Profesional de la información* 31 (3) (2022): 4. https://doi.org/10.3145/epi.2022.may.22.

[47] Andrea Renda, «The Legal Framework to Address 'Fake News': Possible Policy Actions at the EU Level», *Policy File*, Centre for European Policy Studies (2018): 21. https://www.europarl.europa.eu/RegData/etudes/IDAN/2018/619013/IPOL_IDA(2018)619013_EN.pdf.

[48] See, Madeleine De Cock Buning, «A multi-dimensional approach to disinformation : report of the independent High level Group on fake news and online disinformation», Luxembourg : Publications Office of the European Union (2018): 35. https://hdl.handle.net/1814/70297.

[49] *Ibid*.

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developing tools to empower consumers and journalists in dealing with the phenomenon of disinformation, and protecting the diversity and sustainability of European media.

Moreover, the HLEG's report recommended the development of a code of principles for online platforms and social media to adopt. This code would include the need for transparency when explaining how algorithms select news items to present. With regard to monitoring the implementation of the proposed measures, the report recommended establishing a multilateral coalition of stakeholders to ensure all agreed measures are implemented, monitored and reviewed regularly[50]. However, no official control or monitoring system was envisaged. In addition, it is interesting to note the complete lack of recommendations to EU authorities regarding the adoption of binding legal rules for member States[51].

In response to these suggestions, the European Commission and the High Representative of the European Union for Foreign Affairs and Security Policy developed the Action Plan against Disinformation in March 2018, which was approved by the European Council in December of that year[52]. The plan acknowledges the necessity of political commitment and coordinated action among EU institutions, Member States, civil society, and private entities, especially online platforms[53]. This unified action should be based on four pillars: i) improving the capacity of EU institutions to detect, analyse and expose disinformation, ii) strengthening coordinated and joint responses to disinformation, iii) mobilising the private sector to tackle disinformation and iv) raising awareness and enhancing societal resilience.

Following the implementation of the 2018 action plan, the EU's Rapid Alert System was set up to facilitate the exchange of information and coor-

[50] *Ibid*.

[51] Claire Wardle et al., «Seis puntos claves del informe sobre desinformación del grupo de expertos de la Comisión Europea», Maldita, 12 marzo 2018. https://maldita.es/maldita/20180312/seis-puntos-claves-del-informe-sobre-desinformacion-del-grupo-de-expertos-de-la-comision-europea.

[52] European Commission and High Representative of the Union for Foreign Affairs and Security Policy. Joint Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions. «Action Plan against Disinformation». Brussels, 5 December 2018 JOIN(2018) 36 final. Regarding the conception of the plan, see: Francisco Fonseca-Morillo, «Prólogo: La Europa que protege, de la teoría a la práctica gracias al pensamiento crítico y la alfabetización digital», *Revista de estilos de aprendizaje*, v. 13, n. 26 (2020): 2. https://doi.org/10.55777/rea.v13i26.2593.

[53] On the role of online platform in the implementation of the plan, see: Paolo Cavaliere, «From Journalistic Ethics to Fact-Checking Practices: Defining the Standards of Content Governance in the Fight against Disinformation», *The Journal of Media Law*, vol. 12, no. 2 (2020): 133-165, https://doi.org/10.1080/17577632.2020.1869486.

dinate responses to disinformation campaigns between EU institutions and Member States. The system is based on open-source information and draws on the expertise of academia, fact-checkers, online platforms and international partners. Its primary aim is to combat disinformation campaigns that interfere with or undermine European democratic processes. It focuses on two categories of phenomena: (a) campaigns originating from or supported by foreign actors, and (b) campaigns seeking to influence national or European elections[54].

Similarly, in April 2018, the European Commission proposed a code of practice to encourage private organisations, particularly online platforms, to help combat disinformation[55]. This code implied self-regulatory rules which private operators were encouraged to voluntarily accept in order to help the European Commission achieve its objectives. These rules set out a wide range of commitments, including transparency in political advertising, closing false accounts and preventing disinformation providers from monetising their content. The Code of Practice was made available for signature by the main operators in this field and, by mid-2021, many of these (including Facebook, Google, Microsoft, Mozilla, TikTok and Twitter) had signed it [56].

However, we must also acknowledge that the Covid-19 pandemic was accompanied by powerful disinformation campaigns that further obscured the aforementioned situation. In a joint communication in June 2020, for example, the European Commission and the High Representative of the EU warned that some foreign actors and certain third countries —particularly Russia and China— had undertaken disinformation campaigns concerning the virus in the EU, its surroundings and on a global scale, with the aim of undermining democratic debate and exacerbating social polarisation[57]. Together with the deteriorating geopolitical and international relations landscape, this fact made it clear to European authorities that they needed to

[54] On the rapid alert system and its implementation, see: D'Andrea, Fusacchia and D'Ulizia , «Policy Review: Countering Disinformation in the Digital Age — Policies and Initiatives to Safeguard Democracy in Europe»…, pp. 82–91. See also: Proto, Lamoso-González and Bouza García, «The Great FIMI Pivot: How the EU's Fight Against Disinformation»…, p. 9.

[55] European Commission. Code of Practice on Disinformation (2018). https://digital-strategy.ec.europa.eu/en/library/2018-code-practice-disinformation.

[56] European Commission. «Code of Practice on disinformation: Commission welcomes new prospective signatories and calls for strong and timely revision». Press Release 1st October 2021. https://ec.europa.eu/commission/presscorner/detail/en/ip_21_4945.

[57] European Commission and the High Representative of the Union for Foreign Affairs and Security Policy. Joint Communication to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions. «Tackling COVID-19 disinformation — Getting the facts right». Brussels 10 June 2020. JOIN(2020) 8 final. https://eur-lex.europa.eu/legal-content/IT-EN/TXT/?uri=CELEX%3A52020JC0008.

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strengthen their policies against disinformation, particularly that originating from foreign powers[58].

In this vein, an Action Plan for European Democracy was adopted in December 2020. This emphasised existing approaches to disinformation and reaffirmed the need for the EU to systematically utilise the full range of available tools to counter foreign interference and influence operations, thereby preserving and strengthening democratic life. The Action Plan also highlights the importance of further developing these tools, particularly by imposing sanctions on those responsible[59].

When it comes to assessing its effectiveness, the absence of legal commitments and robust rules in the 2018 Code of Practice was noted in the European Commission's initial evaluation report on the implementation and effectiveness of the Code of Practice on Disinformation in 2020[60]. Indeed, alongside the Commission's perception of the ineffectiveness of the 2018 Code of Practice on Disinformation, it is interesting to note that the literature on this topic also reflects widespread scepticism about the effectiveness of self-regulatory institutions in general, and press councils in particular — a scepticism that is shared by journalists themselves[61]. Consequently, many have called for stricter measures to be implemented through hard law instruments at both national and EU levels[62].

Thus, a reform process of the 2018 Code was undertaken, involving its signatories together with some new entities. A new instrument was then drafted and published on 16 June 2022 under the name "Strengthened 2022 Code of Practice on Disinformation"[63], which is still in force today.

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[58] In that sense, see, for instance: Petros Iosifidis, Nicholas Nicoli, «European Policy Strategies in Combating Digital Disinformation», *Digital Democracy, Social Media and Disinformation*, 1st ed., vol. 1, Routledge (2021): 61. https://doi.org/10.4324/9780429318481-7.

[59] European Commission. Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions. «On the European democracy action plan». Brussels, 3 December 2020 COM(2020) 790 final: 21. EUR-Lex — 52020DC0790 — EN — EUR-Lex.

[60] European Commission. «Commission Staff Working Document. Assessment of the Code of Practice on Disinformation — Achievements and areas for further improvement, SWD(2020) 180 final», Brussels, 10 September 2020. https://digital-strategy.ec.europa.eu/en/library/assessment-code-practice-disinformation-achievements-and-areas-further-improvement.

[61] Cavaliere, «From Journalistic Ethics to Fact-Checking Practices: Defining the Standards of Content Governance in the Fight against Disinformation»…, p. 149.

[62] Anna Kobernjuk, Agnes Kasper, «Normativity in the EU's Approach towards Disinformation», *TalTech Journal of European Studies*, vol. 11, no. 1 (2021): 186-195. https://doi.org/10.2478/bjes-2021-0011.

[63] European Commission. «The 2022 Code of Practice on Disinformation». https://digital-strategy.ec.europa.eu/en/policies/code-practice-disinformation.

The Strengthened Code addresses the shortcomings of the previous code by setting out more robust and detailed commitments and measures based on operational lessons learned in recent years[64]. These lessons included the impact of the pandemic and Russia's use of disinformation for military purposes in its plan to invade Ukraine.

It was the use of disinformation as a weapon in Russia's war effort during its invasion of Ukraine in 2022 that finally prompted EU authorities to change their policy[65] towards a more regulatory approach. While almost all EU institutions tried to contribute to the fight against disinformation[66], they also emphasised geopolitical considerations, thereby granting a prominent role to the EEAS[67]. For instance, the Strategic Security and Defence Compass adopted by the Council of the European Union it clearly underlines that Russia threatens the European order when it comes to the security and protection of European citizens, not only through armed aggression, but also using information manipulation campaigns[68].

The conflict therefore moved from the domain of words to that of actions, which resulted in the implementation of much more stringent measures. Initial European policies in this field were indeed strongly criticised by many experts, including Pamment, who characterised the EU's policy on disinformation as follows:

> "[...] by a lack of terminological clarity, unclear and untested legal foundations, a weak evidence base, an unreliable political mandate, and a variety of instruments that have developed in an organic rather than a systematic manner. The limited successes the EU has achieved so far –in terms of the creation of instruments such as the Code of practice on Disinformation, the Action Plan Against Disinformation, the East StratCom Task Force, and the Rapid Alert System– have been hard earned" [69].

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[64] In that direction, see: Iosifidis, Nicoli, «European Policy Strategies in Combating Digital Disinformation»…, p. 61.

[65] For more information on the EU's evolving stance on foreign intervention through disinformation, see: Loik, Madeira, «European Union Strategy and Capabilities to Counter Hostile Influence Operations»…, p. 248.

[66] In this sense, see: Kachelmann, Reiners, «The European Union's Governance Approach to Tackling Disinformation – Protection of Democracy, Foreign Influence, and the Quest for Digital Sovereignty»…, p. 27.

[67] Proto, Lamoso-González and Bouza García, «The Great FIMI Pivot: How the EU's Fight Against Disinformation»…, p. 1.

[68] Council of the European Union (2022). «A Strategic Compass for Security and Defence. For a European Union that protects its citizens, values and interests and contributes to international peace and security»: 5.

[69] Pamment, «The EU's Role in Fighting Disinformation: Taking Back the Initiative»..., p. 5. In this regard, see also: Loik, Madeira, «. European Union Strategy and Capabilities to Counter Hostile Influence Operations»…,, p. 252.

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III. **The real war**

1. *On the EU's response to disinformation campaigns in a context of growing rivalry and foreign hostility*

In the previous section, we observed a change in the EU's hard law policies aimed at combatting disinformation. This was prompted by the ineffectiveness of earlier measures and the growing seriousness of the threat posed by disinformation campaigns. This threat was particularly evident during the pandemic and in recent attacks from Russia, which became especially apparent when Russia invaded Ukraine. Nevertheless, it should be noted that a similar trend can be seen among the EU's Member States and, more broadly, in Western States[70].

One manifestation of this change in EU's policies is the 2022 Strengthened Code of Practice on Disinformation. As previously mentioned, this includes improvements on the 2018 version, particularly with regard to control and oversight mechanisms. As these features are now closer to hard law, we analyse them in this section. In this regard, it should be noted that rigour and transparency were sought by establishing two specific bodies. Firstly, a Transparency Centre has been set up to provide an overview of the implementation of the Code's measures and to make the process more transparent[71]. At the same time, a Task Force comprising representatives of the signatories, the European Regulators Group for Audiovisual Media Services (ERGA), the European Digital Media Observatory (EDMO) and the EEAS has been established[72]. The Commission is chairing this group.

Furthermore, with regard to the monitoring framework, it should be noted that the new Code incorporates service-level indicators to measure its implementation in member States and the EU. It also contains a clear commitment to establishing structural indicators to measure the Code's overall impact on misinformation[73]. In this context, it was anticipated that the signatories would provide the Commission with the first baseline reports on their implementation of the Code in early 2023. Thereafter, large online

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[70] With regard to NATO countries, see: North Atlantic Treaty Organization Parliamentary Assembly. Policy Recommendations adopted in 2025 178 SESA 25 E | 13 October 2025. Taking NATO Deterrence and Defence to the Next Level at The Hague Summit Declaration 496*, (2025): 10. https://www.nato-pa.int/download-file?filename=/sites/default/files/2025-10/2025%20-%20NATO%20PA%20POLICY%20RECOMMENDATIONS.pdf

[71] European Commission. «The 2022 Code of Practice on Disinformation»…, Commitments 34-36.

[72] *Ibid.*, Commitment 37.

[73] *Ibid.,* Commitments 40-42.

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platforms, as defined in the Digital Services Act (DSA)[74], were to report every six months, while other signatories were to report annually.

As we can observe, the Strengthened Code forms part of a broader regulatory framework, alongside legislation on transparency and targeting of political advertising and the DSA. Regarding the former, the European Parliament and the Council recently adopted a new regulation in 2024 which aims to counter information manipulation and foreign interference[75]. For example, to avoid external influences, the provision of advertising services to sponsors from third countries is prohibited during the three months preceding an EU election or referendum[76]. It is interesting to note that Article 25 provides for penalties for sponsors or political advertising service providers who breach their main obligations, amounting to up to 6% of the sponsor's or political advertising service provider's total annual revenue or budget, or 6% of their worldwide turnover in the preceding financial year[77]. The Regulation has been fully operational since October 2025, as set out in Article 30, and therefore none of the fines mentioned have been imposed.

On the other hand, on 13 February 2025, the Commission endorsed the official integration of the 2022 Strengthen Code of Practice on Disinformation into the framework of the DSA and its conversion into a Code of Conduct[78]. After integration, compliance with the Code will be considered an appropriate risk mitigation measure for signatories designated as very large online platforms (VLOPs) and very large online search engines (VLOSEs) under the DSA. The Code will thus become an important and significant reference point for determining compliance with the DSA. Compliance with the obligations under the Code will also be part of the annual independent review to which these platforms are subject under the DSA.

Regarding the DSA, it should be noted that it imposes significant obligations on large online platforms and search engines. As announced earlier, the Regulation classifies platforms or search engines with more than 45

[74] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) (Text with EEA relevance), PE/30/2022/REV/1, *OJ L 277,* 27 October 2022, Article 33.

[75] Regulation (EU) 2024/900 of the European Parliament and of the Council of 13 March 2024 on the transparency and targeting of political advertising (Text with EEA relevance), PE/90/2023/REV/1 *OJ L,* 2024/900, 20 March 2024. *http://data.europa.eu/eli/reg/2024/900/oj*

[76] *Ibid.,* Article 5.

[77] *Ibid.,* Article 25.

[78] Commission of the European Union. «Commission endorses the integration of the voluntary Code of Practice on Disinformation into the Digital Services Act». Press Release of 13 February 2025. https://digital-strategy.ec.europa.eu/en/news/commission-endorses-integration-voluntary-code-practice-disinformation-digital-services-act.

million users per month in the EU as VLOPs or VLOSEs[79]. These companies must, among other things, report criminal offences, have user-friendly terms and conditions, be transparent about advertising, recommendation systems or content moderation decisions, and demonstrate a proactive profile in looking for systemic risks associated with their services in terms of illegal content, public safety, fundamental rights, etc[80]. Importantly, in case of non-compliance with the key obligations included in its articles, fines of up to 6% of the annual worldwide turnover or temporary suspension of the service can be imposed[81]. In view of the possible adoption of decisions under Articles 73 and 74 of the Regulation regarding the conduct of very large online platforms or search engines suspected by the Commission of infringing any of the Regulation's provisions, it should be noted that, as of November 2025, the Commission had opened a total of 10 infringement procedures, but had not yet imposed any penalties[82]. Nevertheless, in four cases, the Commission has preliminarily found that four online platforms have violated the obligations contained in the DSA, which is a preliminary step before fines are imposed. First, on 15 May 2025, the Commission announced that it had informed the social media and online video platform TikTok of its preliminary view that it does not fulfil the DSA's obligation to publish an advertisement repository[83]. Second, on 18 June 2025, the Commission found preliminarily that AliExpress, the global online retail marketplace owned by the Alibaba Group, was in breach of its obligation to assess and mitigate risks related to the dissemination of illegal products under the DSA[84]. Third, on 28th July 2025, the Commission found Temu in breach of the obligation under the DSA to properly assess the risks of illegal products

[79] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) (Text with EEA relevance), PE/30/2022/REV/1, *OJ L 277,* 27 October 2022, Article 33.

[80] *Ibid.,* Articles 34-43.

[81] *Ibid.,* Articles 52, 73-74 and 76. On the more robust measures imposed on VLOP and VLOSE under the DSA, see, for example: Kachelmann, Reiners, «The European Union's Governance Approach to Tackling Disinformation – Protection of Democracy, Foreign Influence, and the Quest for Digital Sovereignty»…, p. 30.

[82] In this regard, see: European Commission. Supervision of the designated very large online platforms and search engines under DSA, https://digital-strategy.ec.europa.eu/en/policies/list-designated-vlops-and-vloses.

[83] European Commission. Press Release of 15th May 2025. «Commission preliminarily finds TikTok's ad repository in breach of the Digital Services Act». https://ec.europa.eu/commission/presscorner/detail/en/ip_25_1223.

[84] European Commission. Press Release of 18th June 2025. «Commission accepts commitments offered by AliExpress under the Digital Services Act and takes further action on illegal products». https://ec.europa.eu/commission/presscorner/detail/en/ip_25_1551.

being disseminated on its marketplace[85]. Finally, on 24 October 2025, the Commission preliminarily found both TikTok and Meta were in breach of their obligation to grant researchers adequate access to public data under the DSA and also that Meta was in breach of its obligations to provide users simple mechanisms to notify illegal content, as well as to allow them to effectively challenge content moderation decisions[86].

Returning to the activation of more specific measures and policies established by the EU against FIMI and foreign actors behind disinformation campaigns, the adoption of the 2022 Strategic Security and Defence Compass by the Council of the European Union can be considered a turning point. It paved the way for stronger policies and measures within the scope of the Common Foreign and Security Policy (CFSP). As set out in the text, the Council announced the creation of an EU Hybrid Toolbox to detect and respond to a broad range of hybrid threats. Among these possible measures was the development of a specific "[…] EU toolbox to address and counter foreign information manipulation and interference […]"[87]. According to the EEAS, the Toolbox takes a whole-of-society approach based on four pillars: situational awareness, building resilience, disruption and regulation, and external action[88].

Another step in this direction was taken on 7 February 2023 when the High Representative and Vice-President of the European Union announced the creation of an Information Sharing and Analysis Centre (ISAC) at the EEAS conference on foreign manipulation and interference in the information sphere. The centre's mission is to facilitate the sharing of information, experience, expertise, and analysis between all stakeholders regarding the causes, incidents, and threats of foreign manipulation and interference in the information sphere[89].

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[85] European Commission. Press Release of 28th July 2025. «Commission preliminarily finds Temu in breach of the Digital Services Act in relation to illegal products on its platform». https://ec.europa.eu/commission/presscorner/detail/en/ip_25_1913.

[86] European Commission. Press Release of 24 October 2025. «Commission preliminarily finds TikTok and Meta in breach of their transparency obligations under the Digital Services Act». https://ec.europa.eu/commission/presscorner/detail/en/ip_25_2503.

[87] Council of the European Union (2022). «A Strategic Compass for Security and Defence. For a European Union that protects its citizens, values and interests and contributes to international peace and security»: 22.

[88] European External Action Service. «Information Integrity and Countering Foreign Information Manipulation & Interference (FIMI)». «EEAS responses to Foreign Information Manipulation and Interference (FIMI)». Strategic Communication. 14 March 2025.

[89] Foreign Information Manipulation and Interference (FIMI) – Information Sharing and Analysis Centre (ISAC). https://fimi-isac.org/index.html. On the creation of this new centre against FIMI, see, for example: Proto, Lamoso-González and Bouza García, «The Great FIMI Pivot: How the EU's Fight Against Disinformation»…, p. 9.

However, of all the policies and measures adopted by the EU against disinformation campaigns orchestrated by foreign countries, the sanctions regime is the most notable. It was established by the Council of the EU through Decision (CFSP) 2024/2643 on 8 October 2024[90]. This was in response to the growing number of hybrid activities targeting the Union and its Member States, which had already been condemned by the EU and its institutions in previous months[91], as mentioned above. In accordance with that instrument, restrictive measures should be imposed on individuals, organisations or bodies responsible for, involved in the implementation of, or providing support for the aforementioned actions or policies of the Government of the Russian Federation[92]. These sanctions should consist of a prohibition on the entry into and transit through the territory of Member States of the individuals listed in the subsequent instruments, and the freezing of funds and economic resources belonging to those individuals or legal persons listed in those instruments[93]. Indeed, within the framework created by Decision (CFSP) 2024/2643, additional instruments have been introduced to develop and specify the initial provisions, as well as to establish the names of the individuals and institutions subject to sanctions[94]. On 20 May 2025, the EU expanded the sanctions regime to include assets related to Russia's destabilising activities, such as vessels, aircraft, real estate, and physical elements of digital and communications networks. It also covered transactions by credit and financial institutions, as well as entities providing cryptocurrency services. More people and institutions were also added to the list of those previously sanctioned[95]. As a result of this sanctions regime, 47 individuals and 15 entities are currently sanctioned[96]. These in-

[90] Council Decision (CFSP) 2024/2643 of 8 October 2024 concerning restrictive measures in view of Russia's destabilising activities, ST/8742/2024/INIT, *OJ L,* 2024/2643, 9 October 2024. *ELI: http://data.europa.eu/eli/dec/2024/2643/oj.*

[91] *Ibid*., recitals 10–15.

[92] *Ibid*., recital 16.

[93] *Ibid*., Articles 1 and 2.

[94] Council Implementing Regulation (EU) 2024/3188 of 16 December 2024 implementing Regulation (EU) 2024/2642 concerning restrictive measures in view of Russia's destabilizing activities, ST/15799/2024/INIT, *OJ L,* 2024/3188, 16 December 2024. *ELI: http://data.europa.eu/eli/reg_impl/2024/3188/oj*

[95] See: Council Decision (CFSP) 2025/963 of 20 May 2025 amending Decision (CFSP) 2024/2643 concerning restrictive measures in view of Russia's destabilising activities, ST/8424/2025/INIT, *OJ L,* 2025/963, 20 May 2025, ELI: http://data.europa.eu/eli/dec/2025/963/oj. And Council Decision (CFSP) 2025/966 of 20 May 2025 amending Decision (CFSP) 2024/2643 concerning restrictive measures in view of Russia's destabilising activities, ST/5953/2025/INIT, *OJ L,* 2025/966, 20 May 2025, ELI: http://data.europa.eu/eli/dec/2025/966/oj.

[96] Council of the European Union. «EU sanctions against Russia». https://www.consilium.europa.eu/en/policies/sanctions-against-russia/#hybrid.

clude individuals disseminating pro-Russian propaganda in Ukraine, individuals involved in activities aimed at undermining the democratic political processes in Estonia and Germany, and individuals involved in the so-called 'Doppelgänger' campaign[97] — the Russian disinformation campaign aimed at undermining support for Ukraine following the invasion.

Furthermore, since Russia's invasion of Ukraine in 2022, the Council of the European Union[98] has suspended the broadcasting licences of several Kremlin-backed outlets that disseminate disinformation, as part of the measures included in the FIMI "toolbox". The Russian government had exploited these outlets to manipulate information and spread misinformation about its military aggression against Ukraine. This includes propaganda aimed at destabilising countries bordering Russia and EU Member States. The broadcasting ban currently applies to 27 media outlets[99].

In this regard, it is important to note that the Court of Justice of the European Union has confirmed the legal basis for the sanctions imposed by the Council. Indeed, in its judgment of 27 July 2022, the General Court dismissed Russia Today France's application to annul the Council's acts. Russia Today France, one of the suspended media outlets, sought to annul the contested acts on the grounds that its rights to defence, freedom of expression and information, and freedom to conduct business had been infringed. The applicant also alleged an infringement of the principle of non-discrimination. Furthermore, it questioned the Council's competence to adopt the contested measures. However, the General Court dismissed RT France's application against the Council of the EU's restrictive measures, which prohibited the broadcasting of RT France's content within the EU's territory. The Court confirmed that the Council had acted within its powers under the CFSP and that the measures responded to an urgent situation involving a serious threat to public order and security within the EU. The Court considered the restrictions on fundamental rights, including the right to defence, freedom of expression and freedom to conduct business, to be valid as they were provided for by law, proportionate and pursued legitimate objectives, such as protecting democratic debate from disinformation campaigns promoted by State-controlled Russian media outlets. The Court also rejected the existence

[97] *Ibid*.

[98] See: Council Regulation (EU) 2022/350 of 1 March 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, *OJ L* 65, 2 March 2022, pp. 1-4 and Council Decision (CFSP) 2022/351 of 1 March 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, *OJ* L 65, 2 March 2022, pp. 5-7.

[99] Council of the European Union. «EU sanctions against Russia. Bans on media outlets». https://www.consilium.europa.eu/en/policies/sanctions-against-russia/#hybrid.

of discrimination on the grounds of nationality, since the difference in treatment was based on the media being controlled by a third country that was acting as an aggressor, and not on the nationality of its owners[100].

2. *On the possible responses of the EU to disinformation campaigns in a war context*

So far, we have examined how the EU has gradually strengthened its measures and policies against disinformation campaigns in recent years. And in the previous section, we analysed the EU's reactions to the use of disinformation to destabilise it or its Member States in a context of open rivalry or hostility with Russia, which is what has actually happened since the invasion of Ukraine in 2022. A similar situation arose when evidence of Russian interference in the 2016 United States elections through disinformation campaigns and cyberattacks was presented in a report by the US Senate Select Committee on Intelligence[101]. In response to this interference, the Obama administration took action against Russia, for example by imposing sanctions on Russian individuals and companies, expelling Russian government personnel, and closing certain Russian diplomatic properties on US territory[102].

In the context of international law, the responses of both the US and the EU could be considered countermeasures, for they violate previous obligations, but do not incur international responsibility, as they have been adopted in response to previous violations by Russia. In this regard, it is worth noting that the possibility of international organisations having recourse to countermeasures is currently widely accepted, as acknowledged by the International Law Commission (ILC) in its 2011 Draft Articles on the Responsibility of International Organisations. The Commission also set out the circumstances in which international organisations can resort to countermeasures, essentially mirroring the rights of States[103].

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[100] See: General Court. Judgment of the General Court (Grand Chamber), 27 July 2022, *RT France, v Council of the European Union,* Case Case T-125/22. ECLI:EU:T:2022:483. See also: Court of Justice of the European Union. Press Release No 132/22 Luxembourg, 27 July 2022. «The Grand Chamber of the General Court dismisses RT France's application for annulment of acts of the Council, adopted following the outbreak of the war in Ukraine, temporarily prohibiting that organisation from broadcasting content». https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-07/cp220132en.pdf.

[101] United States of America Senate. U.S. Senate Select Committee on Intelligence, «Russian active measure campaigns and interference in the 2016 U.S. Election», 2020.

[102] *Ibid.,* vol. III, pp. 181, 194-195.

[103] See articles 22 and 51-57 of the «International Law Commission Draft articles on the responsibility of international organizations, with commentaries, 2011». Report of the Com-

However, in view of Russia's growing animosity, we must now take a step forward and place ourselves in a context of a possible future war. In that regard, we must ask ourselves how the EU would react to disinformation campaigns orchestrated by foreign powers that amount to actual armed attacks, either alone or in combination with other elements[104]. As an alternative, we could consider whether the EU has the right to self-defence in the event of a disinformation campaign that could constitute an armed attack, either alone or in conjunction with other aggressive elements, as required in Article 51 of the United Nations Charter. In this regard, we should start by noting that, from the perspective of international law, the possibility of international organisations resorting to self-defence is not currently considered problematic in principle, even though Article 51 of the United Nations Charter only refers to States in this context. Indeed, as was the case with countermeasures, the 2011 ILC Draft Articles on the Responsibility of International Organisations recognise that self-defence can preclude wrongfulness in the case of international organisations[105]. Similarly, it is noticeable that the current state of international law has made clear progress in relation to other aspects of self-defence compared to the situation when the United Nations Charter was adopted. Consider, for example, the possibility of resorting to self-defence in the event of a large-scale attack carried out by a non-State actor, such as a terrorist organisation. Indeed, it seems that a precedent is emerging in favour of States exercising self-defence in such circumstances, given the recent practice to major attacks[106].

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mission to the General Assembly on the work of its sixty-third session. *Yearbook of the International Law Commission, 2011, vol. II, Part Two*. Document United Nations A/CN.4/SER.A/2011/Add.1 (Part 2), pp. 71-72 and 92-96.

[104] For example, to support our statement, we can point out that a document published in 2022 by a group of civil society experts established by the Spanish Government's Department of National Security states that: " Una campaña organizada de desinformación puede constituir, dependiendo de su alcance, naturaleza y efectos, una violación de los principios de soberanía o de no intervención, o una amenaza, un uso de la fuerza, un ataque armado o una agresión contraria al Derecho Internacional". (An organised disinformation campaign may, depending on its scope, nature and effects, constitute a violation of the principles of sovereignty or non-intervention, or a threat, use of force, armed attack or aggression contrary to international law) (translation is ours). See: Gobierno de España. Presidencia del Gobierno. « Lucha contra las campañas de desinformación en el ámbito de la seguridad nacional. Propuestas de la sociedad civil »…, p. 79.

[105] See, «International Law Commission Draft articles on the responsibility of international organizations, with commentaries, 2011»…, Article 21, p. 71.

[106] In this sense, see: Carlos Espaliú Berdud, «The EU Response to the Paris Terrorist Attacks and the Reshaping of the Right of Self-Defence in International Law», *Spanish Yearbook of International Law* 20 (December) (2016): 206-207. https://www.sybil.es/sybil/article/view/1391.

On the other hand, a very important precedent regarding the possibility of the EU resorting to self-defence in the context of international responsibility is the military and financial aid that the international organisation has been providing to Ukraine since the Russian invasion. In addition to imposing sanctions, the EU has used various mechanisms to provide Ukraine with weapons, training and financial aid so that it can defend itself against Russian aggression. However, probably to avoid being considered a direct participant in the conflict, the EU has never stated that all this aid was provided as part of Ukraine's exercise of collective self-defence[107]. Indeed, in terms of providing weapons, the Council decided in its Council Decision (CFSP) 2022/338 of 28 February 2022 to supply Ukraine with military equipment and platforms designed to deliver lethal force[108]. Since then, it has adopted several decisions with the same aim[109]. Moreover, by its Decision (CFSP) 2022/1968 of 17 October 2022, the Council set up an Euro-

[107] In that sense, see also: Marko Svicevic, «European Union Military Missions and the War in Ukraine: Moving beyond the Jus Ad Bellum Framework», *Polish Review of International and European Law (Online)*, vol. 13, no. 1, (2024): 108-109. https://doi.org/10.21697/2024.13.1.04.

[108] Council Decision (CFSP) 2022/338 of 28 February 2022 on an assistance measure under the European Peace Facility for the supply to the Ukrainian Armed Forces of military equipment, and platforms, designed to deliver lethal force, *OJ* L 60, 28 February 2022, pp. 1-4. For a study of the military aid to Ukraine by the EU from the point of view of arm control, see: Tomas Hamilton, «Defending Ukraine with EU Weapons: Arms Control Law in Times of Crisis», *European Law Open* 1, no. 3 (2022): 635-659. https://doi.org/10.1017/elo.2022.35.

[109] Council Decision (CFSP) 2022/471 of 23 March 2022 amending Decision (CFSP) 2022/338 on an assistance measure under the European Peace Facility for the supply to the Ukrainian Armed Forces of military equipment, and platforms, designed to deliver lethal force (*OJ* L 96, 24 March 2022, p. 43); Council Decision (CFSP) 2022/636 of 13 April 2022 amending Decision (CFSP) 2022/338 on an assistance measure under the European Peace Facility for the supply to the Ukrainian Armed Forces of military equipment, and platforms, designed to deliver lethal force (*OJ* L 117, 19 April 2022, p. 34); Council of the European Union. Council Decision (CFSP) 2022/809 of 23 May 2022 amending Decision (CFSP) 2022/338 on an assistance measure under the European Peace Facility for the supply to the Ukrainian Armed Forces of military equipment, and platforms, designed to deliver lethal force (OJ L 145, 24 May 2022, p. 40); Council Decision (CFSP) 2022/1285 of 21 July 2022 amending Decision (CFSP) 2022/338 on an assistance measure under the European Peace Facility for the supply to the Ukrainian Armed Forces of military equipment, and platforms, designed to deliver lethal force (*OJ* L 195, 22 July 2022, p. 93); Council Decision (CFSP) 2022/1971 of 17 October 2022 amending Decision (CFSP) 2022/338 on an assistance measure under the European Peace Facility for the supply to the Ukrainian Armed Forces of military equipment, and platforms, designed to deliver lethal forcé, *OJ* L 270, 18 October 2022, pp. 95–96; Council Decision (CFSP) 2022/2245 of 14 November 2022 on an assistance measure under the European Peace Facility to support the Ukrainian Armed Forces trained by the European Union Military Assistance Mission in support of Ukraine with military equipment, and platforms, designed to deliver lethal force, *OJ* L 294, 15 November 2022, pp. 25–28; Council Decision (CFSP) 2023/927 of 5 May 2023 on an assistance measure under the

pean Union Military Assistance Mission in support of Ukraine (EUMAM Ukraine)[110]. The mission, which was officially established on 17 October 2022, aimed to enhance the military capabilities of the Ukrainian Armed Forces, enabling them to defend Ukraine's territorial integrity and sovereignty within its internationally recognised borders and protect the civilian population. EUMAM Ukraine has a non-executive mandate to provide individual, collective, and specialised training to members of the Ukrainian Armed Forces in multiple locations within EU member States. And by its Decision (CFSP) 2024/2876 of 8 November 2024, the Council extended the mission until 15 November 2026[111].

Could the assistance provided by the EU be considered equivalent to the use of force, as Russia might interpret it? To our purposes, the criteria provided by the International Court of Justice in the 1986 *Nicaragua* case would be useful. On that occasion, the Court was asked to determine whether the US's actions in providing assistance to the *contras* should be considered a use of force, despite this potentially being considered legitimate. The Court said that:

> "In the view of the Court, while the arming and training of the *contras* can certainly be said to involve the threat or use of force against Nicaragua, this is not necessarily so in respect of al1 the assistance given by the United States Government. In particular, the Court considers that the mere supply of funds to the *contras*, while undoubtedly an act of intervention in the interna1 affairs of Nicaragua, as will be explained below, does not in itself amount to a use of force" [112].

Therefore, even though the case in question was a non-international conflict, the criteria established by the Court can be applied to the case of EU assistance to Ukraine, considering that these actions could constitute an use of force[113]. However, the legitimacy of the EU's probable use of force

European Peace Facility to support the Ukrainian Armed Forces through the provision of ammunition, *OJ* L 123, 8.5.2023, pp. 27–31.

[110] Council Decision (CFSP) 2022/1968 of 17 October 2022 on a European Union Military Assistance Mission in support of Ukraine (EUMAM Ukraine), *OJ* L 270, 18.10.2022, pp. 85-91.

[111] Council Decision (CFSP) 2024/2876 of 8 November 2024 amending Decision (CFSP) 2022/1968 on a European Union Military Assistance Mission in support of Ukraine (EUMAM Ukraine), *OJ* L, 2024/2876, 11 November 2024.

[112] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986*, pp. 118-119, paragraph 228.

[113] In that line, see also: Aurora Rasi, «Providing Weapons to Ukraine: The First Exercise of Collective Self-Defence by the European Union?», *European papers (Online. periodico)* 9.1 (2024): 421. On that point, see also: Araceli Mangas Martín, «Guerra en Ucrania: perspectiva jurídico-internacional», *Actualidad Jurídica Uría Menéndez*, 60

depends on whether it is justified by Ukraine's request for assistance in exercising its right to self-defence, as was also implied in the Court's judgment in 1986[114].

Another closely related, yet distinct, question is whether the EU could be held internationally responsible for the actions of the Ukrainian armed forces during the war. In this case, we believe that the criteria set out in Article 7 of the ILC's Draft Articles on the International Responsibility of International Organisations should apply. According to this provision, the conduct of an organ of an international organisation that is placed at the disposal of another international organisation (or, in this case, a State) may be considered an act of that State if it exercises effective control over the act in question. If the EU's international responsibility for possible unlawful acts committed by the Ukrainian army were to be clarified, the provisions of Article 15 of the same draft would also have to be applied. Let us recall that the text states the following:

> "Article 15. Direction and control exercised over the commission of an internationally wrongful act an international organization which directs and controls a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for that act if: (a) the former organization does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that organization".

Another question is whether the EU's actions, such as supplying weapons and training Ukrainian troops, could constitute an armed attack in themselves[115].While this analysis is not strictly necessary in this instance, we should consider the damage caused and its impact on the fundamental interests of the victim, whether they are a State or an international organisation, in order to distinguish between the simple use of force and an armed

(2022): 17. https://www.uria.com/documentos/publicaciones/8189/documento/ajum60art.pdf?id=13167&forceDownload=true.

[114] In that sense, for example: Michael Schmitt, «Providing arms and materiel to Ukraine: neutrality, Co-belligerency, and the use of force», *Article of war,* Lieber Institute, West Point, 7 March 2022 (2022). https://lieber.westpoint.edu/ukraine-neutrality-co-belligerency-use-of-force/. Araceli Mangas Martín also considers the legitimacy of EU assistance to Ukraine in the context of Ukraine's right to self-defence, see: Mangas Martín, «Guerra en Ucrania: perspectiva jurídico-internacional»…, p. 17.

[115] In this sense, it is also useful to recall that, in the *Nicaragua* case of 1986, the Court did not qualify the support, training and financing of the Contras as equivalent to an armed attack that could lead to Nicaragua taking action in self-defence. In that sense, see: Corten «Discours de guerre, guerre de discours»…, p. 162.

attack, as mentioned in the introduction. Disinformation campaigns may cause such significant damage in future that they could be considered equivalent to an armed attack in the context of Article 51 of the United Nations Charter[116].

Now that we have established that the EU could invoke self-defence in response to disinformation campaigns, either alone[117] or in conjunction with other kinetic or military elements if the violation amounts to an armed attack, we should examine the circumstances in which this could be invoked in more detail.

We have just witnessed an instance in which the EU has likely exercised collective self-defence by providing assistance to a State under attack. However, when it comes to resorting to self-defence in the face of disinformation campaigns sponsored by third States —when considered in themselves or alongside other factors as an armed attack— the question arises: What kind of measures could the EU take in such a case? What legal form could the invocation of the EU's right to exercise self-defence take?

In terms of the measures that the EU could take, it should first be noted that the Union itself is unable to use military force to defend the territory of its Member States. According to Article 4(2) TEU, the EU must respect the "essential State functions" of Member States, including "ensuring territorial integrity, maintaining law and order, and safeguarding national security". Therefore, national security remains the sole responsibility of each Member State[118], and

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[116] Indeed, as Olivier Corten put it, with the concept of hybrid wars: "[…] manifestement, les seuils qui constituent l'essence du jus contra bellum sont mis sous pression […]". See: *Ibid*., p. 167.

[117] In the document published in 2022 by a group of civil society experts created by the Department of National Security of the Government of Spain, it is put forward that: "La acción contra las campañas de desinformación podrá implicar el ejercicio del derecho a la legítima defensa individual y colectiva en los términos y condiciones prescritos en el art. 51 de la Carta de Naciones Unidas y conforme a los acuerdos suscritos en materia de asistencia mutua en el Tratado de la Unión Europea y en el marco de la Organización del Tratado del Atlántico Norte". (Action against disinformation campaigns may involve the exercise of the right to individual and collective self-defence under the terms and conditions set out in Article 51 of the United Nations Charter and in accordance with the agreements on mutual assistance signed in the Treaty on European Union and within the framework of the North Atlantic Treaty Organisation) (the translation is ours). See: Gobierno de España. Presidencia del Gobierno. «Lucha contra las campañas de desinformación en el ámbito de la seguridad nacional. Propuestas de la sociedad civil»…, pp. 78-79.

[118] In that sense, see: Marcus Klamert, «Article 4 TEU», in Manuel Kellerbauer, Marcus Klamert, and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (New York, 2019; online edn, Oxford Academic): 45. https://doi.org/10.1093/oso/9780198759393.003.7.

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common defence is not yet an EU competence[119]. As Thomas Ramopoulos put it: "Common defence would require a qualitatively different level of integration going beyond what is currently provided in the text of the Treaties. Such a level of deeper integration could for example entail integrated armed forces of the Union"[120]. Should Member States decide to adopt a common defence policy within the EU, this would need to be implemented via the standard Treaty reform process outlined in Articles 48(2)-(5) TEU, since amending Article 4(2) TEU is not feasible through the simplified procedure[121]. In summary, if the EU were to be attacked, it could resort to measures implying the use of force, though not amounting to an armed attack[122].

Secondly, when analysing the legal form that the invocation of the EU's right to self-defence could take, it should be noted that this event has not been anticipated. This means that there is no specific procedure for the EU to follow in order to declare its intention to invoke self-defence. Conversely, it is difficult to envisage a disinformation campaign orchestrated by foreign powers that would exclusively target the EU and constitute a genuine armed attack. If such a campaign were to occur, it would likely impact the interests of the EU and its Member States simultaneously. In this case, the Member States could invoke the procedures set out in Article 42(7) of the TEU and, of course, those of Article 5 of the NATO Treaty if they aro also part of this other organisation[123]. Article 42 (7) TEU establishes a clause of mutual assistance, obliging all Member States to defend any Member State that is subject to aggression. Therefore, in my opinion, if there is no provision in the founding treaties for the Union itself to invoke self-defence, it could take measures involving the use of force as part of a Common Security and Defence Policy (CSDP) military mission, in accordance with Articles 42(1) and 43(1) of the TEU[124]. This would be analogous to

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[119] See: Thomas Ramopoulos, «Article 42 TEU», in Manuel Kellerbauer, Marcus Klamert, and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (New York, 2019; online edn, Oxford Academic), paragraph 14. https://doi.org/10.1093/oso/9780198759393.003.53.

[120] *Ibid.,* paragraph 15.

[121] In that sense see: *Ibid*., paragraph 16.

[122] Another question is whether the EU could resort to non-military actions that would be equivalent to an armed attack due to the damage they could cause, and thus exercise its legitimate right to self-defence against such actions, such as large-scale disinformation campaigns. While the possibility remains open, I understand that it would still be a truly far-fetched case, given how difficult it is to imagine the EU carrying out a disinformation campaign against a foreign state that has previously used that weapon against it.

[123] If a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster, it can also invoke the solidarity clause included in Article 222 of the Treaty on the Functioning of the European Union.

[124] Regarding the possibility to use the force in military operations of the EU, Sven Biscop and Jo Coelmont set forth that: "The Treaty wording makes clear that this certainly in-

the Military Assistance Mission in Support of Ukraine (EUMAM Ukraine), established by Council Decision (CFSP) 2022/1968 on 17 October 2022. According to Article 42(4) TEU, such a decision would require unanimous approval by the Council of the EU. In that regard, Vladimir Kmec is right to point out that: "The EU has never used its CSDP to contain an open conflict or to act urgently to stop violence" [125]. However, given the return of insecurity that humanity is experiencing, particularly in Europe with the aggression that Russia has already demonstrated, it cannot be denied that in the future these operations will demonstrate more muscle than they have so far[126].

IV. **Conclusion**

Gradually, States and international organisations around the world have been affected by disinformation campaigns. These perverse information disorders seriously affect the fundamental rights of citizens, while at the same time potentially damaging important public interests. Disinformation campaigns sponsored by foreign States, which are being used as elements of warfare, are particularly dangerous. In this paper, we have focused on the EU's (Saint George) fight against this new dragon.

The EU has been fighting this modern plague of disinformation for a decade, particularly that promoted by third countries, with various actors, policies, media and actions, as this dragon has many heads and can only be defeated through a multidimensional effort involving public and private actors, as well as the population.

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cludes operations at the high end of the spectrum of violence, i.e. combat operations". See: Sven Biscop and Jo Coelmont, «A Strategy for CSDP Europe's Ambitions as a Global Security Provider.» Egmont Institute (2010): 22. https://www.egmontinstitute.be/a-strategy-for-csdp-europes-ambitions-as-a-global-security-provider/

[125] Vladimir Kmec, «CSDP Machinery and Peacebuilding», *EU Missions and Peacebuilding*, 1st ed., vol. 1, Routledge (2022): 56. In that line, see also: Katarina Engberg, *The EU and Military Operations : A Comparative Analysis*. 1st ed., Routledge (2014): 181-185.

[126] According to Oleksandr Danyluk: "In parallel with the continuation of the military intervention in Ukraine, Russia has intensified its non-military aggression in western countries, using the entire spectrum of covert actions: from supporting political proxies and propaganda, to the formation of paramilitary organisations and conducting sabotage actions against critical infrastructure" (Oleksandr V. Danylyuk, «How to Resist Russia's Covert War Against the West», *International Center for Defence and Security*, Commentary, 26 June 2025 (2925). https://icds.ee/en/how-to-resist-russias-covert-war-against-the-west/) and also: "To a large extent, what Russia is using against the west today, it tried against Ukraine before the start of covert military aggression in Crimea and the Donbas in 2014, and the full-scale invasion in 2022. The Ukrainian experience should, therefore, be carefully studied" (*ibid.)*.

However, in this fight, we have identified two stages, simply to provide greater clarity to our presentation and to highlight the evolution that has taken place as the phenomenon has become better understood and its dimensions and dangers have grown.

In the first stage, which began back in 2015 when the EU gradually became aware of this problem, soft policies and measures were implemented, promoting a self-regulatory approach by private actors involved in disinformation in general, in line with the trends of the time and the recommendations of the high-level expert group on disinformation that appeared in 2018. We have called this first stage the "paper war". As a result of these soft policies, the EU Code of Practice on Disinformation was drawn up in 2018, which essentially left the leading role in this area to the major online platforms, without establishing strict control measures or possible sanctions for non-compliance with the obligations contained in the Code.

However, given the ineffectiveness of these initial soft policies and measures, and in light of the growing awareness of the danger posed by disinformation campaigns sponsored by foreign powers, as amply demonstrated by the COVID pandemic and the invasion of Ukraine, the EU began to adopt tougher and more severe policies and measures. We have called this second phase the "real war".

An example of measures in this new era is the reform of the 2018 Code of Practice on Disinformation, which was renamed the "Strengthened 2022 Code of Practice on Disinformation". The new reformed code includes stricter control and sanctioning mechanisms, with the involvement of EU bodies and a greater role for the European Commission. Of particular note is the relationship between the new code and hard law instruments such as the Regulation (EU) 2022/2065 of 19 October 2022 on a Single Market For Digital Services and the Regulation (EU) 2024/900 of 13 March 2024 on the transparency and targeting of political advertising. The interrelation with these hard law instruments now makes it possible to impose heavy fines on large online platforms that have not complied with their legal obligations under this regulatory framework. For the time being, although numerous sanctioning proceedings have already been initiated, no fines have been imposed.

Alongside this, it is worth highlighting a series of more specific measures and policies established by the EU against FIMI and foreign actors behind disinformation campaigns, following the adoption of the Strategic Security and Defence Compass in 2022 by the Council of the European Union. This compass paved the way for stronger policies and measures in the field of the CFSP. As set out in the text, the Council announced the creation of a variety of EU hybrid tools designed to detect and respond to different types of hybrid threat. For instance, a specific "toolbox" was to be set up for FIMI.

The sanctions regime established by the Council of the EU through Decision (CFSP) 2024/2643 on 8 October 2024 is the most relevant of these new policies and measures. In accordance with this instrument, restrictive measures should be imposed on individuals, organisations, or bodies responsible for, involved in implementing, or providing support for the actions or policies of the Government of the Russian Federation in this context. These sanctions consist of a prohibition on entering and transiting through the territory of Member States, as well as the freezing of funds and economic resources belonging to individuals and legal persons found responsible. To date, 47 individuals and 15 entities have been sanctioned under this framework.

Moreover, since the invasion of Ukraine, the Council of the European Union has suspended the broadcasting licenses of 27 Kremlin-backed media outlets that disseminate disinformation, as part of the measures included in the FIMI "toolbox".

By projecting this set of measures that the EU has been adopting against Russian individuals and entities under the international responsibility regime of public international law, we can consider them as countermeasures, insofar as they respond to previous unlawful acts.

In addition, to gain a comprehensive understanding of the measures that the EU can take against States behind disinformation campaigns, we asked ourselves whether the international organisation could use force in response. Starting from the premise that a disinformation campaign can cause significant damage to its target, we concluded that it could be considered equivalent to the use of force, or even armed attacks if the damage were extremely serious. Therefore, we concluded that the EU could use force through CSDP missions in response to such campaigns. However, since the EU has no competence in the area of Member State territorial defence, we believe it could not invoke self-defence in response to a large-scale disinformation campaign affecting it. While such a situation is not easily foreseeable, it is more likely that disinformation campaigns will be associated with armed attacks on the territory of Member States in future, as occurred in Ukraine. In such a case, Member States could invoke the mutual assistance clause in Article 42(7) TEU to resort to self-defence.

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Preaching norms, perverting law, and trading arms: Palestine as a litmus test for "normative power Europe"

Predicando normas, pervirtiendo el derecho y comerciando armas: Palestina como prueba del poder normativo europeo

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Summary: I. Introduction.—II. Is the EU a Normative Power? 1. NPE: A brief history of the term. 2. The EU as a "unique normative actor", multiple criticisms and the case of Palestine.—III. Normative power and legal subalternity. 1. Arms sales: from failure to prevent to complicity? 2. Business as usual: the duty not to recognize, not to aid or assist.—IV. Conclusions.

Abstract: "Europe lost its soul in Gaza," Josep Borrell remarked, capturing a profound moral and normative crisis in the EU's self-image as "Normative Power Europe". This article argues that Gaza operates as a revealer: it exposes the collision between the EU's proclaimed commitments to human rights, democracy, and the rule of law, and its external practices that sustain a partner implicated in mass atrocities. Focusing on arms transfers and EU —Israel economic relations, the article demonstrates how legal obligations— triggered by the International Court of Justice's 2024 finding of a plausible and imminent risk of genocide in Gaza and its advisory opinion declaring Israel's presence in the OPT a violation of peremptory norms, particularly the right to self-determination—are not merely ignored. Rather, they are narrowed, reinterpreted, and redeployed through discursive and institutional practices that reproduce what Imseis terms "legal subalternity": Palestinians are formally recognized as rights-holders while structurally denied the protections those rights entail. This widening gap between norms and action erodes EU credibility, particularly across the Global South/Global majority, and reframes the EU from a toothless bystander into a complicit actor.

Keywords: Palestine/Israel, EU, Normative Power, Genocide, Legal Subalternity.

Resumen: *«Europa ha perdido su alma en Gaza», señaló Josep Borrell, señalando una profunda crisis moral y normativa en la autoimagen de la UE como «Potencia Normativa Europa». Este artículo sostiene que Gaza funciona como un revelador: expone la colisión entre los compromisos proclamados por la UE con los derechos humanos, la democracia y el Estado de derecho, y sus prácticas externas que sostienen a un socio implicado en atrocidades masivas. Al centrarse en las transferencias de armas y en las relaciones económicas UE —Israel, el artículo muestra cómo las obligaciones jurídicas— activadas por la constatación de la Corte Internacional de Justicia en 2024 de un riesgo plausible e inminente de genocidio en Gaza y por su opinión consultiva que declara que la presencia de Israel en el TPO vulnera normas imperativas, en particular el derecho a la autodeterminación —no son simplemente ignoradas. Más bien, son restringidas, reinterpretadas y reutilizadas mediante prácticas discursivas e institucionales que reproducen lo que Imseis denomina «subalternidad jurídica»: los palestinos son reconocidos formalmente como titulares de derechos mientras se les niegan estructuralmente las protecciones que esos derechos conllevan. Esta brecha creciente entre normas y acción erosiona la credibilidad de la UE, especialmente en el Sur Global/mayoría global, y reconfigura a la Unión de un espectador desdentado a un actor cómplice.*

Palabras claves: *Palestina/Israel, UE, Poder Normativo, Genocidio, Subalternidad Jurídica.*

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I. **Introduction**

"Europe lost its soul in Gaza", exclaimed Josep Borrell, the former High Representative of the Union for Foreign Affairs and Security Policy.[1] The Europe he was referring to is the European Union (EU), which also lost "the ability to embody the values we proclaim".[2] The conceptualization of Europe as a *sui generis* regional organization— distinguished by its unparalleled commitment to norms and values both internally and in its external action— has shaped not only the discourse of European elites, or, in the word of Diez constructed "an identity of the EU against an image of others in the 'outside world'",[3] but has played a pivotal role in shaping the field of EU foreign policy studies.[4] The concept of "Normative Power Europe" (NPE), first coined by Ian Manners in 2002, portrays the EU as "a normative power of an ideational nature characterized by common principles".[5] Those core values include democracy, human rights and the rule of law.

NPE and the conceptualization of the EU as unique normative actor have faced sustained critique, emphasizing the Union's inconsistency in upholding these values and, at times, their marginalization in favor of economic or geopolitical interests. No case illustrates the limits of this theoretical framework more starkly than Palestine. If the close relationship built between the EU and Israel over decades served as an example on the limits of the theoretical conceptualization of the EU as a unique normative actor, the ongoing genocide in Gaza has shattered this narrative by exposing how legal commitments can be reconstructed, narrowed, and selectively redeployed to justify political inaction or even complicity in mass atrocities.

Even with mounting evidence that Israel's conduct in Gaza meets the legal definition of Genocide[6] —as would be detailed in this article— the

[1] RTVE.es, "Borrell, sobre el asesinato de seis periodistas en Gaza: 'No es un accidente. Sabían dónde estaban y fueron a por ellos,'" RTVE, August 26, 2025 (accessed 11 December 2025), https://www.rtve.es/noticias/20250826/borrell-asesinato-seis-periodistas-gaza-no-accidente-fueron-por-ellos/16707143.shtm

[2] RTVE.es, *op. cit*.

[3] Thomas Diez, "Constructing the Self and Changing Others: Reconsidering 'Normative Power Europe,'" *Millennium: Journal of International Studies* 33, no. 3 (2005): 613-636.

[4] Thomas Diez and Michelle Pace, "Normative Power Europe and Conflict Transformation", in *Normative Power Europe*, ed. Richard Whitman (London: Palgrave Macmillan, 2011), 210–225; Victoria Rodríguez-Prieto, "La noción de potencia normativa europea y su incidencia en la doctrina española," *Comillas Journal of International Relations* 16 (2019): 75-86.

[5] Ian Manners, "Normative Power Europe: A Contradiction in Terms?" *Journal of Common Market Studies* 40, no. 2 (2002): 235-258, p. 239.

[6] For a partial review of authoritative reports on genocide in Gaza see Sonia Boulos, "Smokescreen Recognition: How 'Statehood' Can Mask Complicity and Contain Decolonization," *Security in Context*, September 26, 2025, https://www.securityincontext.com/posts/

EU and EU Member States (EUMS) have continued to export weapons to Israel and provide funding for Israeli entities. However, as Michelle Pace has argued, the EU's complicity in Israel's flagrant violation of human rights, and most recently genocide, is not new. In Pace's words, for the EU to "regain its moral responsibility", it must go beyond halting weapons exports, and "call out Israel for its gross and systematic violations of Palestinian rights since its illegal occupation of the West Bank, including East Jerusalem, and the Gaza Strip".[7] In analyzing the broader implications of Israel's violations of international norms for the EU, Daniela Huber criticizes the EU's shifting stance—from initially affirming the fundamental principle of international law prohibiting the acquisition of territory by force, which required Israel's immediate withdrawal from the Arab lands occupied in 1967, to endorsing the "land for peace" paradigm. This shift marks a clear retreat from international law, further compounded by the absence of accountability for Israel's ongoing violations of core legal norms.[8] As Raffaella Del Sarto has argued, the EU's harsh critique of Israel's settlement project did not prevent the EU–Israel economic relations from improving steadily.[9] The language of "constructive engagement with Israel" has been used to downplay the EU's failure to apply *ex post* conditionality, such as suspending commercial agreements with Israel due to human rights violations. As Del Sarto's critique goes "[c]arrots have rarely been dangled, but rather are normally simply given to Israel".[10] According to official data published by the European Commission, currently, Israel is the EU's third-biggest trading partner in the Mediterranean region, after Morocco and Algeria. The EU is Israel's biggest trading partner, accounting for 32% of Israel's total trade in goods with the world in 2024. 34.2% of Israel's imports came from the EU while, and 28.8% of the country's exports went to

smokescreen-recognition-how-statehood-can-mask-complicity-and-contain-decolonization; see also section III (a) of this article.

[7] Michele Pace, "The EU Must Regain Its Moral Responsibility," *Qantara.de*, September 12, 2024, accessed December 17, 2025, https://qantara.de/en/article/europe-and-gaza-eu-must-regain-its-moral-responsibility

[8] Daniela Huber, "Israel/Palestine and the Normative Power of the 'Global South'", *IAI Commentaries* (Istituto Affari Internazionali), March 22, 2024, accessed December 17, 2025, https://www.iai.it/en/pubblicazioni/c05/israelpalestine-and-normative-power-global-south

[9] Raffaella A. Del Sarto, "Defining Borders and People in the Borderlands: EU Policies, Israeli Prerogatives and the Palestinians," *Journal of Common Market Studies* 52, no. 2 (2014): 200-216.

[10] Nathalie Tocci, "Firm in Rhetoric, Compromising in Reality: The EU in the Israeli–Palestinian Conflict," *Ethnopolitics* (formerly *Global Review of Ethnopolitics*) 8, nos. 3-4 (2009): 387-401, 395.

the EU. Total trade in goods between the EU and Israel in 2024 amounted to €42.6 billion.[11]

In this sense, the genocide in Gaza has functioned as a "revealer", not only of EU inconsistency or what is often described as "double standards", but of a deeper juridical pattern: the production of a Palestinian exception sustained through what Imseis terms "international legal subalternity". The term subaltern, in its modern critical-theoretical sense, is most often traced to Antonio Gramsci's work. Gramsci developed a nuanced conception of subalternity to interrogate the relations between dominant and subordinate groups and the historically contingent processes through which political power is constituted, articulated, institutionalized, reproduced, and transformed within hegemonic formations. As Green notes, "the intricacies of subalternity can be understood in dialectical relation to the complexity of hegemony".[12] Applied to international law, subalternity entails that subaltern subjects —here, Palestinians— may be formally recognized as rights-holders while being structurally denied the protections those rights are meant to secure.[13] To understand how this form of legal subalternity is constituted, we must adopt "an approach that critically interrogates how and at what points in Palestine's modern history its position in the international system was superseded and compromised in legal terms."[14]

Focusing on arms trade and EU–Israel economic relations, this article attempts to illustrate how legal obligations triggered by the 2024 findings of the International Court of Justice (ICJ) of plausible and imminent risk of genocide in Gaza in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip*[15] and by the ICJ's 2024 Advisory Opinion on "The Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jeru-

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[11] European Commission, "EU Trade Relations with Israel: Facts, Figures and Latest Developments," *EU Trade Relationships by Country/Region*, accessed December 18, 2025, https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/israel_en

[12] Marcus E. Green, "Race, Class, and Religion: Gramsci's Conception of Subalternity", in *The Political Philosophies of Antonio Gramsci and B. R. Ambedkar: Itineraries of Dalits and Subalterns*, ed. by Cosimo Zene (New York: Routledge, 2013), 116-17.

[13] Ardi Imseis, *The United Nations and the Question of Palestine: Rule by Law and the Structure of International Legal Subalternity* (Cambridge: Cambridge University Press, 2023).

[14] Ardi Imseis, *The United Nations and the Question of Palestine,* 5.

[15] Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Request for the Indication of Provisional Measures: Order of 26 January 2024. https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-00-en.pdf

salem" (2024 Advisory Opinion),[16] are not simply ignored or violated. Rather, the Palestine exception shows how EU institutions and member states reconstruct the law through discursive manipulations to excuse inaction, deny protection, and ultimately enable genocidal violence. The article contains two main Parts. In the first part we critically explore the conceptualization of the EU as a unique normative actor, highlighting the critique of notions such as NPE and their applicability to the Palestine question. In the second part we focus on arm exports and EU–Israel economic relations to demonstrate how the law itself is used discursively to create a Palestinian exception, a paradigmatic space, where legal principles are cited rhetorically and reconstructed with one aim, to suspend their applicability.

II. **Is the EU a Normative Power?**

1. *NPE: A brief history of the term*

Efforts to conceptualize and evaluate the identity and the nature of the EU and, above all, the role it plays in international relations have dominated the research agenda on the EU's foreign policy. One of the most widely used and, to a large extent, most applauded approaches —often becoming a recurring discursive mantra— is *Normative Power Europe*, introduced by Manners in 2002. Indeed, some innovative academic concepts emerged in the post-Cold War period, particularly after the approval of the Maastricht Treaty, which fostered the debate on the new role that the EU was expected to play in the global context.[17] An important antecedent to NPE emerged in the 1970s with François Duchêne's concept of Europe as a "civilian power." Duchêne, a key adviser to Jean Monnet, drew inspiration from foreign policies of Scandinavian countries.[18] Lacking hard instruments of foreign policy, these countries projected a values-based model of governance, thereby acquiring a capacity for influence. In its European application, the concept emphasized the EU's ability to leverage economic instruments to achieve political objectives, particularly through democratic conditionality in its relations with authoritarian regimes —most notably with the Greek dictatorship. In contrast, scholars such as Hedley Bull ar-

[16] *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* (AO), No. 186, International Court of Justice, July 19, 2024.

[17] Richard G. Whitman, *From civilian power to superpower? The international identity of the European Union* (Basingstoke: MacMillan, 1998).

[18] François Duchêne, "Europe's role in world peace" in *Europe tomorrow sixteen European look ahead*, : ed Red Mayne (London: Fontana, 1972), 32-47.

gued that in the absence of military capabilities, a power could not truly be considered as such, not even as a *sui generis* or civilian power, as was often claimed in relation to the EU.[19]

To overcome these diatribes, Ian Manners coined a new concept in 2002, the "Normative Power Europe" in his seminal article "*Normative Power Europe: A Contradiction in Terms*?. In it, Manners argued that the EU is "a normative power of an ideational nature characterized by common principles".[20] Among these principles are freedom, democracy, human rights and the rule of law.[21] Furthermore, four additional norms embedded in the EU's constitutional framework and practices can be identified: social solidarity, anti-discrimination and minority protection, sustainable development, and good governance. These normative elements are not only foundational internally but are also projected externally, shaping international relations and influencing the architecture of the international system. In this way, the EU seeks to contribute, in the words of former High Representative Javier Solana, "to the global common good."[22]

Indeed, human rights and international law norms are formally embedded in the Union's constitutional framework. The Treaty on European Union (TEU) incorporates a clear commitment to respect international law and the fundamental norms of the global order.[23] Article 3(5) TEU mandates that, in its relations with the world, the Union "shall contribute to … the strict observance and the development of international law". Article 21(1) TEU goes further, stating that the EU's external action "shall be guided by the principles which have inspired its own creation … and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity … and respect for the principles of the United Nations Charter and international law". Article 21(2)(b) reinforces this normative posture, pledging that the Union will "consolidate and support … the principles of international law" in its external policies.

According to Manners, this projection occurs through a range of strategies: contagion, or unintended diffusion; informational diffusion, resulting

[19] Hedley Bull, "Civilian Power Europe: A contradiction in terms", *Journal of Common Market Studies* 21, n.º 2, (1982):149-170.

[20] Ian Manners, "Normative Power Europe: a contradiction in terms?", *Journal of Common Market Studies* 40, n.º 2 (2002): 235-258, 239.

[21] Manners, "Normative Power Europe: A Contradiction in Terms?", 242.

[22] Daniel Hardwick, "Is the EU a Normative Power?", *E-International Relations*, 3/12/2011, accessed 11/12/2025. https://www.e-ir.info/2011/09/03/is-the-eu-a-normative-power/

[23] Consolidated version of the Treaty on European Union — TITLE V: GENERAL PROVISIONS ON THE UNION'S EXTERNAL ACTION AND SPECIFIC PROVISIONS ON THE COMMON FOREIGN AND SECURITY POLICY — Chapter 1: General provisions on the Union's external action — Article 21 *Official Journal* 115, 09/05/2008 P. 0028-0029 https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12008M021

from deliberate communication through declarations and initiatives, primarily by the European Commission; procedural diffusion via the institutionalization of relations with third parties; transfer based on incentives and sanctions to ensure compliance with desired standards; overt diffusion, stemming from the EU's physical presence in relevant contexts; and the cultural filter, which involves the learning and adaptation of norms by third parties.[24] These strategies ultimately rely on "persuasion, argumentation and the acquisition of prestige or embarrassment"[25]. Arguably, these norms are constitutive of the EU as "a hybrid polity and as part of its international identity in world politics".[26] The notion of the EU as a "normative power" moves beyond traditional approaches that seek to understand the Union in terms of what is does, focusing instead on what is it, mainly a norm changer[27] that "seeks to promote a different regulation in accordance with its own regulatory model".[28]

Manners identified three principles that ought to guide the EU's promotion of its substantive values: "living by example," "being reasonable," and "doing least harm." [29] Years later, Manners emphasized the importance of consistency and coherence in advancing these norms. If actions taken to promote certain values contradict those very principles, the effectiveness of the EU's normative projection is diminished, and its capacity to act as a normative power is correspondingly weakened.[30] Likewise, if the EU fails to uphold these principles domestically,[31]or because sovereignty or self-interest takes precedence over normative commitments,[32] or because some EUMS call these values into question,[33] the Union's ability to project its norms beyond its borders is significantly reduced.

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[24] Manners, "Normative Power Europe: A Contradiction in Terms?", 244.

[25] Ian Manners. "The European Union's normative power: critical perspectives and perspectives on the critical", in *Normative power Europe*, ed Richard G. Whitman (Basingstoke: MacMillan, 2011), 226-247, 235.

[26] Ian Manners, "The Constitutive Nature of Values, Images and Principles in the European Union," in *Values and Principles in European Union Foreign Policy*, ed. Sonia Lucarelli and Ian Manners (London: Routledge, 2006), 19-41, 32.

[27] Manners, "Normative Power Europe: A Contradiction in Terms?".

[28] Rodríguez-Prieto, "La noción de potencia normativa europea y su incidencia en la doctrina española", 76 (traducción nuestra).

[29] Ian Manners. "The normative ethics of the European Union", *International Affairs* 84, n.º. 1, (2008): 45-60, 46.

[30] Manners "The European Union's normative power: critical perspectives…", 233.

[31] Laurent Cohen-Tanugi, "Europe as an international normative power: State of play and future perspectives". *Revue Européenne du Droit*, vol.3, n.º2 (2021): 91-97.

[32] Hardwick, "Is the EU a Normative Power?".

[33] David Cadier, "European structural power on the wane? EU foreign policy between external and internal challenges", *IE Mediterranean yearbook* (2019): 32-37, 37.

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NPE has become a central theoretical framework in the field of European studies, and it is often used as a main catalyst of academic debates on the international role of the EU[34]. Traditionally, academic works on NPE have focused on the EU's international role and how it diffuses its norms to other political actors outside the Union[35]. Most recently, NPE is being invoked to study how EUMS themselves are challenging the core values of the EU, as identified by NPE[36].

2. *The EU as a "unique normative actor", multiple criticisms and the case of Palestine*

NPE and the conceptualization of the EU as unique normative actor have faced sustained critique, emphasizing its Eurocentric exceptionality and the Union's inconsistency in upholding these values and, at times, their marginalization in favor of economic or geopolitical interests.[37] Others, like Diez and Pace argue that NPE "is a discursive construction rather than an

[34] Rodríguez-Prieto, "La noción de potencia normativa europea y su incidencia en la doctrina española".

[35] Manners, "Normative Power Europe: A Contradiction in Terms?"; Manners, "The European Union's normative power: critical perspectives…"; Rodríguez-Prieto, "La noción de potencia normativa europea y su incidencia en la doctrina española,"; Anne Jenichen, "The politics of normative power Europe: norm entrepreneurs and contestation in the making of EU external human rights policy", *Journal of Common Market Studies*, v. 60, n. 5, (2022): 1299-1315.

[36] See, for example, Martijn Mos, "Conflicted Normative Power Europe: The European Union and Sexual Minority Rights," Journal of Contemporary European Research 9, n.º 1 (2013): 78-93, https://doi.org/10.30950/jcer.v9i1.410; Dominik Heidrich y Karolina Choina, "The Impact of the Dispute over the Rule of Law in Poland on the Status of Normative Power Europe," Athenaeum. Polskie Studia Politologiczne 84, n.º 4 (2024): 190-210, https://doi.org/10.15804/athena.2024.84.11; Sonia Boulos, Gracia Abad-Quintanal, María Mayo-Cubero y Susana de Sousa Ferreira, "Constructing 'Normative Power Europe': A Critical Analysis of the Human Rights Narratives in Spanish Media Discourses on the European Union," Profesional de la información 32, n.º 4 (2023): e320407, https://doi.org/10.3145/epi.2023.jul.07.

[37] Hubert Zimmermann, "Realist Power Europe? The EU in the Negotiations about China's and Russia's WTO Accession," *Journal of Common Market Studies* 45, no. 4 (2007): 813-832. Jennifer L. Erickson, "Market Imperative Meets Normative Power: Human Rights and European Arms Transfer Policy," *European Journal of International Relations* 19, no. 2 (2013): 209-234. Hiski Haukkala, "The European Union as a Regional Normative Hegemon: The Case of European Neighbourhood Policy," *Europe-Asia Studies* 60, no. 9 (2008): 1601–1622. R. Daniel Kelemen and David Vogel, "Trading Places: The Role of the United States and the European Union in International Environmental Politics," *Comparative Political Stu*dies 43, no. 4 (2010): 427-456. Mark A. Pollack, "Living in a Material World: A Critique of 'Normative Power Europe'" (SSRN Scholarly Paper No. 1623002, 2020), https://ssrn.com/abstract=1623002 EEAS. *Critically assess and analyze the notion that the EU is a normative power*, 24 November 2016. https://www.eeas.europa.eu/node/15687_en

objective fact".[38] Put differently, the power of NPE "rests in the identity it provides for the EU and the changes it imposes on others, partly through its hegemonic status".[39] It is "first and foremost a discourse in which EU actors themselves construct themselves as 'model citizens'".[40] Diez contends that "the narrative of 'normative power Europe' constructs the EU's identity as well as the identity of the EU's others in ways which allow EU actors to disregard their own shortcomings unless a degree of self-reflexivity is inserted".[41] He further emphasizes that the articulation of identities is always infused with power. Whether the construction of a particular identity is problematic depends on the context in which it is viewed. In the case of NPE, the content of the norms is, in principle, positive, as it envisions a more peaceful and cosmopolitan world. Nevertheless, if these norms are projected without self-reflection, "the identity construction that they entail allows the continued violation of the norms within the EU".[42]

Some scholars argue that the EU's tendency to ignore or downplay human rights violations in certain countries while emphasizing violations in others suggests that its actions are not driven exclusively, or even primarily, by a commitment to universal norms. Instead, they may be influenced by strategic interests. Others contend that the EU's material interests often underpin its normative policies. For instance, Kelemen and Vogel argue that the EU's environmental leadership is motivated not only by genuine concern for the environment but also by economic considerations.[43]

In analyzing the enlargement of the Union, its neighborhood policies or inter-regionalism, critical scholarship has increasingly scrutinized the EU as a neo-imperial force, challenging conventional narratives of its global role. Zielonka's "neomedieval empire", Hettne and Söderbaum's "soft imperialism", Del Sarto's "normative empire," Hansen's "colonial geopolitical turn" and Pace and Roccu's work highlight how the EU sustains empire-like governance while presenting itself as a distinctive and normative actor[44]. In his analysis of the EU's European Neighbourhood and Eastern

[38] Diez and Pace, "Normative Power Europe and Conflict Transformation", 210.

[39] Diez and Pace, "Normative Power Europe and Conflict Transformation", 210.

[40] Diez and Pace, "Normative Power Europe and Conflict Transformation", 211.

[41] Diez, "Constructing the Self and Changing Others…", 627.

[42] Diez, "Constructing the Self and Changing Others…", 632.

[43] Kelemen and Vogel, "Trading Places: The Role of the United States and the European Union in International Environmental Politics".

[44] Jan Zielonka, *Europe as Empire: The Nature of the Enlarged European Union* (Oxford: Oxford University Press 2006). Jan Zielonka, "Europe's new civilizing missions: The EU's normative power discourse", *Journal of Political Ideologies* 18, n.º 1 (2013): 35-55. Raffaella Del Sarto, "Normative empire Europe: The European Union, its borderlands, and the 'arab spring'", *Journal of Common Market Studies* 54(2), (2016): 215-232. Michelle Pace

Partnership policies, Browning demonstrates why portraying the EU's post-cold war foreign policy as idealistic does not withstand scrutiny, arguing instead that it has reconfigured colonial logics under the language of reform, resilience, and partnership.[45]

With the failure of the Oslo process and the EU's marginal and often contradictory role, an important portion of critical analyses of NPE has focused on its relations with Israel, the Palestinians, and the peace process.[46] These analyses range from debates over whether the EU possesses any real capacity to influence the parties,[47] or whether its influence is inherently limited,[48] to critiques of the discourse surrounding shared values and observations that the EU has failed as a peacebuilder in the conflict.[49] Indeed,

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and Roberto Roccu, "Imperial Pasts in the EU's Approach to the Mediterranean", *Interventions, International Journal of Postcolonial Studies* 22, n.º 6 (2020): 671-685. Bjorn Hettne and Fredrik Söderbaum, "Civilian Power or soft imperialism? The EU as a global actor and the role of Interregionalism", *European Foreign Affairs Review,* 10 (4), (2005): 535-552. Peo Hansen, "The Return of the Repressed: The Colonial History of the EU's Geopolitical Turn", *Journal of Common Market Studies,* Vol. 63. n.º 5 (2025): 1420-1437.

[45] Christopher S. Browning, "Geostrategies, Geopolitics and Ontological Security in the Eastern Neigbourhood", *Political Geography* 62, (2018): 106–115. Julian Pänke, "The Fallout of the EU's Normative Imperialism in the Eastern Neighborhood", *Problems of Post-Communism*, 62(6), (2015): 350-363. Itxaso Domínguez de Olazábal, "The European Union's Neighbourhood Policy and the Unacknowledged Mediterranean Color Line", *The Journal of Race, Ethnicity, and Politics* (2025): 1-22. Yannis A. Stivachtis. "The 'Civilizing' Empire: The European Union and the MENA Neighborhood", *Athens Journal of Mediterranean Studies*, Vol. 4, No. 2 (2018): 91-106.

[46] Guy Harpaz and Asaf Shamis, "Normative Power Europe and the State of Israel: An illegitimate EUtopia?", *Journal of Common Market Studies*, 48(3), (2010): 579-616. Sharon Pardo, *Normative power Europe meets Israel: Perceptions and realities* (Lanham, MD: Lexington Books, 2015).

[47] Dimitris Bouris, "The Limits of Normative Power Europe: Evaluating the Third Pillar of the Euro-Mediterranean Partnership", *Political Perspectives*, Vol. 5, No. 2, (2011): 80–106. Raffaella Del Sarto, "Defining Borders and People in the Borderlands: EU Policies, Israeli Prerogatives and the Palestinians", *Journal of Common Market Studies,* Vol. 52, No. 2, (2014) 200–216. Thomas Diez and Michelle Pace, op.cit, 2011. Neve Gordon and Sharon Pardo, "Normative Power Europe Meets the Israeli-Palestinian Conflict", *Asia-Europe Journal*, Vol. 13, No. 3, (2015) 265–274. Neve Gordon and Sharon Pardo, "Normative Power Europe and the Power of the Local", *Journal of Common Market Studies*, Vol. 53, No. 2 (2015): 416-427.

[48] Anders Persson, "Shaping discourse and setting examples: Normative power Europe can work in the Israeli-Palestinian conflict", *Journal of Common Market Studies*, 55(6), (2017): 1415-1431. Andres Persson, "EU differentiation" as a case of "normative power Europe" (NPE) in the Israeli-Palestinian conflict", *Journal of European Integration*, 40(2), (2018): 193-208.

[49] Dimitris Bouris, *The European Union and Occupied Palestinian Territories: State-building without a state* (Abingdon: Routledge, 2014). Rory Miller, *Inglorious Disarray: Europe, Israel and the Palestinians since 1967* (New York: Columbia University Press, 2011). Michelle Pace, "The Construction of EU Normative Power and the Middle East 'Conflict' … 16 Years on", *Journal of Common Market Studies*, 62(3), (2024): 868-884. Ian Manners, "Theorizing normative power in European Union-Israeli/Palestinian relations: Focus of this special issue", *Middle East Critique*, 27(4) (2018): 321-334.

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Palestine has become a touchstone for NPE, exposing double standards and racial and civilizational biases. Comparing the EU's unequal actions in Ukraine and Palestine, Huber characterizes this dynamic as "organized hypocrisy and a logic of coloniality."[50] The EU's retreat from international law continues to manifest itself in various aspects of its policy toward Palestine and Israel.

The complex division of competences between the EU and EUMS is important when distinguishing the EU's responsibility from that of individual Member States. In particular, the EU's "normative control" over EUMS' actions in specific contexts often plays a decisive role. [51] However, the formal division of competences does not always correspond to how EUMS implement EU rules in their international activities—or whether, for instance, they merely act as agents of the Union, exercising competences that the EU itself cannot assert within a state-centric international system.[52]

The critique of the EU's engagement with the Palestinian question has a long trajectory and includes multiple instances of a purposeful retreat from international law. For example, in 2003, the UN General Assembly (UNGA) adopted resolution ES-10/14 to request the ICJ for an advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory.[53] The resolution passed with a vote of 90 in favor, 8 against, and 74 abstentions; all EUMS abstained.[54] In 2004, the ICJ delivered its advisory opinion, concluding that Israel's construction of the wall in the Occupied Palestinian Territory (OPT), including East Jerusalem, violates international law —mainly the prohibition of the acquisition of territory by force and the right to self-determination of the Palestinian people—, and ordered Israel to cease construction, dismantle the wall, and make reparations for all damages caused. In its conclusions it also noted that all States are un-

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[50] Daniela Huber, "Organized Hypocrisy and the Logic of Coloniality. Explaining the EU's Divergent Response to Grave Violations of International Law in Russia/Ukraine and Israel/Palestine", *Journal of Common Market Studies*, 63(5) (2025): 1638-1660.

[51] Cristina Contartese, "Competence-Based Approach, Normative Control, and the International Responsibility of the EU and Its Member States", *International Organizations Law Review,* vol.17, no. 2 (2020): 418-455.

[52] Gleider Hernández and Ramses A. Wessel, *Expert Legal Opinion on the Implications for the European Union of the July 2024 International Court of Justice Advisory Opinion regarding the Policies and Practices of Israel in the Occupied Palestinian Territory*, European Parliament, 19 June 2025.

[53] United Nations General Assembly, "Illegal Israeli Actions in Occupied East Jerusalem and the Rest of the Occupied Palestinian Territory," Resolution ES-10/14, UN Doc. A/RES/ES-10/14 (12 December 2003), adopted 8 December 2003, https://documents.un.org/access.nsf/get?DS=A/RES/ES-10/14&Lang=E&OpenAgent

[54] United Nations General Assembly, *Official Records*, Tenth Emergency Special Session, 23rd Plenary Meeting, Verbatim Record, UN Doc. A/ES-10/PV.23 (8 December 2003).

der an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining it. Likewise, it called upon States parties to the Fourth Geneva Convention to ensure compliance by Israel with international humanitarian law as embodied in that Convention.[55] However, rather than exerting pressure on Israel to uphold fundamental principles of international law, the launch of the European Neighborhood Policy (ENP) in 2004 marked a significant deepening of EU-Israel relations. This was formalized through the adoption of a specific Action Plan in December 2004, which provided a framework for closer integration, economic cooperation, and political dialogue. Notably, it was the first ENP instrument to be approved by the European Commission.[56]

Another clear division emerged in 2012 when Palestine applied for non-member observer status at the United Nations. While the EU officially supported this recognition as consistent with its long-standing commitment to a two-state solution and the right of Palestinians to self-determination, twelve EUMS abstained, and one voted against.[57] The retreat from international law continued with the subsequent attempts of the EU Foreign Affairs Council to dissuade Palestine from signing the Rome Statute for the International Criminal Court (ICC) to shield Israel from accountability.[58] Palestine acceded to the Rome Statute in January 2015. By means of a declaration under Article 12(3) of the Statute, the Government of Palestine accepted *ad hoc* ICC jurisdiction retroactively from June 13, 2014. This move sparked strong opposition from multiple sides, primarily Israel and its supporters, including many European actors. For example, Germany, objected to the participation of Palestine, arguing that it did not meet the conditions of a state party[59]. The EU High Representative, Federica Mogherini, was very cautious in assessing the step taken by Palestine, underlining that "the EU has consistently called for both parties to refrain from any unilateral actions… and has called on the Palestinian leadership to use its international

[55] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, International Court of Justice, General List No. 131, July 9, 2004, https://www.icj-cij.org/node/103742

[56] European Commission. "European Neighbourhood Policy: the First Action Plans." Press release IP/04/1453. Brussels, 9 December 2004. https://ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_04_1453/IP_04_1453_EN.pdf

[57] United Nations General Assembly, Status of Palestine in the United Nations, Res. A/RES/67/19 (29 November 2012).

[58] Daniela Huber, "Israel/Palestine and the Normative Power of the 'Global South'".

[59] Stefan Talmon, "For Germany the "State of Palestine" is not a State Party of the Rome Statute of the International Criminal Court", *GPIL – German Practice in International Law*, 22 September 2021, accessed 11 December 2025 https://gpil.jura.uni-bonn.de/2021/09/for-germany-the-state-of-palestine-is-not-a-state-party-of-the-rome-statute-of-the-international-criminal-court/ DOI: 10.17176/20220627-172724-0

status constructively and not to weaken efforts by partners to bring the parties back to the negotiating table".[60] In 2020, when prosecutor Bensouda requested a ruling from the Pre-Trial Chamber on the ICC's territorial jurisdiction in Palestine, some EUMS including Austria, Czechia, Hungary, Germany, came to Israel's defense by submitting amicus curie arguing that the ICC has no jurisdiction.[61]

In 2022, when the UNGA requested an advisory opinion from the ICJ on "Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem" most of EUMS either opposed the request or abstained.[62] Germany voted against the draft resolution of the UNGA,[63] while Italy[64], Hungary[65] and Czechia[66] contested the ICJ's jurisdiction in their written statements to the court, despite the fact that Israel's apocalyptic violence in Gaza was being broadcast in real time. This retreat from international law persisted even amid a growing consensus regarding the genocidal nature of Israel's recent military offensive in Gaza. Moreover, several states have vehemently opposed the ICC's efforts to hold Israeli officials —namely Prime Minister Netanyahu and Defense Minister Gallant— accountable for war crimes and crimes against humanity committed in Gaza. Chief ICC Prosecutor Karim Khan's initial application for arrest warrants, filed in May 2024, was met with strong

[60] European Parliament, "Answer given by High Representative/Vice-President Mogherini on behalf of the Commission," *Answer to Question No E-000110/15* (E-000110/2015(ASW)), 17 March 2015

[61] 'Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine'. No. ICC-01/18 (5.02.21). Available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01165.PDF

[62] In the vote on Resolution 77/247 in the General Assembly on 30 December 2022, the EU Member States voted: 7 in favor, 9 against and 11 abstentions.

[63] GPIL – German Practice in International Law, "Germany Opposes Request for ICJ Advisory Opinion on Israel's Policies and Practices in the Occupied Palestinian Territory But Also Rejects Israel's Reaction," *GPIL*, February 2024, accessed December 17, 2025, https://shorturl.at/NPqu6

[64] Written Statement of Italy, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion Proceedings, International Court of Justice, Document No. 186-20230725-WRI-07-00-EN, July 25, 2023, https://api.icj-cij.org/sites/default/files/case-related/186/186-20230725-wri-07-00-en.pdf

[65] Written Statement of Hungary, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion Proceedings, International Court of Justice, Document No. 186-20230725-WRI-16-00-EN (July 25, 2023), https://api.icj-cij.org/sites/default/files/case-related/186/186-20230725-wri-16-00-en.pd

[66] Written Statement of the United Kingdom, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion Proceedings, International Court of Justice, Document No. 186-20230725-WRI-29-00-EN (July 25, 2023), https://api.icj-cij.org/sites/default/files/case-related/186/186-20230725-wri-29-00-en.pdf

opposition from several European states. Germany,[67] Czechia[68], Hungary[69] submitted briefs to the ICC opposing its jurisdiction and the issuance of arrest warrants against Israeli officials. France indicated that it would not arrest the Israeli Prime Minister or members of his government, citing respect for their immunity.[70] These objections stand in sharp contrast to France's previous positions on ICC jurisdiction and accountability processes —most notably the support for the issuance of an arrest warrant against Russian President Vladimir Putin in 2023.[71]

III. **Normative power and legal subalternity**

1. *Arms sales: from failure to prevent to complicity?*

In indicating a series of provisional measures in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip*, the ICJ determined that the risk of genocide in Gaza was "plausible" and that there existed a "real and imminent risk" of irreparable harm to the rights of Palestinians protected under the Convention.[72] The Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) establishes a clear duty to prevent genocide.[73] As the Court held in the *Bosnian Genocide* case, the duty to prevent requires States Parties to employ all means reasonably available to them to avert

[67] Observations Pursuant to Rule 103(1) of the Rules of Procedure and Evidence-Federal Republic of Germany (6.08.2024). Available at https://www.icc-cpi.int/court-record/icc-01/18-307-corr

[68] Written observations as amicus curiae under rule 103 — Czech Republic (6.08.2024). Available at https://www.icc-cpi.int/court-record/icc-01/18-294

[69] Amicus curiae observations of Hungary pursuant to Rule 103 (6.08.2024). Available at https://www.icc-cpi.int/court-record/icc-01/18-296

[70] Article 98 of the Rome Statute states that the court "will not give effect to a request for surrender under which the requested State would have to act inconsistently with its obligations under international law with respect to the immunity of a State (...) unless the court has previously obtained the cooperation of that third State for the waiver of immunity.".

[71] Thomas Obel Hansen, "State Objections to the ICC Prosecutor's Request for Arrest Warrants in the Palestine Investigation", *EJIL: Talk!*, May 27, 2024, https://www.ejiltalk.org/stateobjections-to-the-icc-prosecutors-request-for-arrest-warrants-in-the-palestine-investigation/.

[72] Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Request for the Indication of Provisional Measures: Order of 26 January 2024. https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-00-en.pdf

[73] Orna Ben-Naftali, "The Obligations to Prevent and to Punish Genocide," in *The UN Genocide Convention: A Commentary*, ed. Paola Gaeta (Oxford: Oxford University Press, 2009), 27-57.

genocide, even where the actors in question are not under their direct control.[74] This duty arises the moment a state knows, or should have known, of a serious risk that genocide will be committed. In these cases, responsibility is incurred if States manifestly fail to take all measures within its power to prevent genocide when such measures might have contributed to preventing it. In assessing whether a state has discharged this duty, the ICJ emphasized that a crucial factor is the state's capacity to influence the actors likely to commit, or already committing, genocide. Importantly, the Court clarified that such capacity must be assessed against legal criteria, since states may only act within the limits permitted by international law. [75]

The Court also drew a distinction between the obligation to prevent genocide under Article 1 of the Convention and complicity in genocide under Article 3(e). Complicity "requires that some positive action has been taken to furnish aid or assistance to the perpetrators of the genocide"[76], whereas the violation of the obligation to prevent "results from mere failure to adopt and implement suitable measures to prevent genocide from being committed."[77] The ICJ has equated complicity in genocide with Article 16 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, which reflects a rule of customary international law.[78] According to Articles 16, "[a] State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and (b) The act would be internationally wrongful if committed by that State".[79] In its commentary on this provision, the International Law Commission clarified that a State may incur responsibility if it:

> [P]rovides material aid to a State that uses the aid to commit human rights violations. In this respect, the General Assembly has called on Member States in a number of cases to refrain from supplying arms and other military assistance to countries found to be committing serious human rights violations.[80]

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[74] Bosnian Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), [2007] ICJ Rep 595, para. 166.

[75] Id, para. 430 https://www.icj-cij.org/sites/default/files/case-related/91/091-20070226-JUD-01-00-EN.pdf

[76] Id, para. 432.

[77] *Ibid*.

[78] *Ibid*, para 420.

[79] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001), in Report of the International Law Commission on the work of its fifty-third session (23 April–1 June and 2 July–10 August 2001), UN Doc. A/56/10 (2001), chap. IV.E, pp. 31–143.

[80] *Ibid*, 67.

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By affirming the plausibility of genocide in Gaza, the ICJ has placed all States Parties on notice. Consequently, the continued supply of arms to Israel is not only a breach of the obligation to prevent genocide under Article 1 but may well amount to complicity in genocide under Article 3(e). This legal framework has been reinforced by a series of authoritative reports that have concluded that Israel's offensive in Gaza meets the legal definition of genocide. Among those are the reports issued by the UN Special Rapporteur Francesca Albanese. Her March 2024 report, Anatomy of a Genocide, explicitly concluded that Israel's conduct in Gaza meets the threshold of genocide.[81] This conclusion was subsequently developed by Albanese in a comprehensive analyses that situate the genocide in Gaza within a longer settler-colonial trajectory[82] and examine the "economy" and corporate infrastructures enabling mass violence,[83] and, most recently frame the genocide in as "a collective crime".[84] Likewise, in its March 13, 2025 report, the UN Independent International Commission of Inquiry on the Occupied Palestinian Territory and Israel (ICI) issued detailed findings supporting this conclusion. In its report, the ICI documented the systematic use of sexual, reproductive, and other gender-based violence by Israeli security forces since October 7, 2023, including the targeting and destruction of reproductive-health infrastructure (for example, Gaza's main IVF facility). The ICI reached the conclusion that Israel has destroyed "in part the reproductive capacity of the Palestinians in Gaza as a group, including by imposing measures intended to prevent births, one of the categories of genocidal acts in the Rome Statute and the Genocide Convention"[85], and that such actions amount to "deliberately inflicting conditions of life calculated to bring about the physical destruction of Palestinians as a group".[86] In its

[81] Francesca Albanese, *Anatomy of a Genocide*. UN HRC, 55th session, A/HRC/55/73 (March 2024). https://docs.un.org/en/A/HRC/55/73

[82] Francesca Albanese, *Genocide as Colonial Erasure*. UN GA, 79th session, A/79/384 (October 1, 2024). https://docs.un.org/en/A/79/384

[83] Francesca Albanese, *From Economy of Occupation to Economy of Genocide*. UN HRC, 59th session, A/HRC/59/23 (June 16, 2025). https://docs.un.org/en/A/HRC/59/23

[84] United Nations Office of the High Commissioner for Human Rights (OHCHR), A/80/492: "*Gaza Genocide: a collective crime*" – Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, advance unedited version, October 20, 2025, accessed December 17. https://www.ohchr.org/en/documents/country-reports/a80492-gaza-genocide-collective-crime-report-special-rapporteur-situation

[85] Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel. "*More than a Human Can Bear": Israel's Systematic Use of Sexual, Reproductive and Other Forms of Gender-Based Violence since 7 October 2023*. A/HRC/58/CRP.6 (March 13, 2025). https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/sessions-regular/session58/a-hrc-58-crp-6.pdf

[86] *Ibid*.

latest finding of 16 September 2025, ICI concluded that there are reasonable grounds to believe that Israel has committed acts defined in the Genocide Convention. Specifically, the Commission found that Israeli authorities and security forces have carried out four of the five genocidal acts: (1) killing members of the Palestinian group; (2) causing serious bodily or mental harm; (3) deliberately inflicting living conditions calculated to bring about the physical destruction of the group, in whole or in part; and (4) imposing measures intended to prevent births within the group. More importantly, ICI also found evidence of genocidal intent on the part of senior Israeli officials, including explicit statements by leaders such as Prime Minister Benjamin Netanyahu and others. Based on the totality of the conduct of Israel (military operations, blockades, displacement, humanitarian deprivation) the ICI reached the conclusion that the only reasonable inference is that these acts were carried out with the specific intent to destroy Palestinians in Gaza, in whole or in part.[87]

International human rights organizations too reached a similar conclusion. In its December 2024 report "You Feel Like You Are Subhuman": Israel's Genocide Against Palestinians in Gaza, Amnesty International (AI) reached the conclusion that Israel was committing a genocide, with its military offensive involving killing, causing serious bodily or mental harm, and deliberately inflicting on Palestinians in Gaza conditions of life calculated to bring about their physical destruction in whole or in part. AI also emphasized that these acts were carried out with the specific intent to destroy Palestinians in Gaza.[88] In its December 2024 investigation "Extermination and Acts of Genocide", Human Rights Watch (HRW) also concluded that Israel's deliberate deprivation of water, electricity, and other essentials amounts to the imposition of conditions of life designed to make survival impossible for Palestinians in Gaza. HRW stressed that such measures not only constitute the crime against humanity of extermination but also fall within the legal definition of genocide.[89] The systematic analysis of data collected by Forensic Architecture since the start of Israel's military onslaught on Gaza in October 2023 —including data relating to attacks on ci-

[87] United Nations Human Rights Council. Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, Including East Jerusalem, and Israel. A/HRC/60/CRP.3. September 2025. https://www.un.org/unispal/wp-content/uploads/2025/09/a-hrc-60-crp-3.pdf

[88] Amnesty International, "You Feel Like You Are Subhuman": Israel's Genocide Against Palestinians in Gaza. London, December 5, 2024. https://www.amnesty.org/en/documents/mde15/8668/2024/en/

[89] Human Rights Watch, *Extermination and Acts of Genocide: Israel Deliberately Depriving Palestinians in Gaza of Water*. New York, December 19, 2024. https://www.hrw.org/news/2024/12/19/israels-crime-extermination-acts-genocide-gaza

vilians and civilian infrastructure by the Israeli military— reveals the near-total destruction of civilian life in Gaza. The patterns identified in Israel's military conduct point to a systematic and organized campaign aimed at destroying life, the conditions necessary for life, and life-sustaining infrastructure.[90] Palestinian human rights organizations also continue to provide a detailed first-hand documentation of genocidal devastation in Gaza, including the comprehensive 2025 synthesis Voices of the Genocide.[91] Even Israeli human rights organizations, including B'Tselem[92] and Physicians for Human Rights-Israel,[93] have now likewise concluded that Israel is committing genocide in Gaza.

Given the EU's extensive trade relations with Israel, including arms exports by several EUMS, both the Union and its Member States possess, in the Court's terms, the "capacity to influence effectively" Israeli actions. As Nathalie Tocci highlights, "The EU is Israel's largest market, a market that, due to geographic proximity, cannot be realistically replaced by Israel's main ally, the USA. Hence, the EU potentially enjoys significant economic leverage vis-a-vis Israel".[94] Furthermore, the continued supply of weapons by EUMS could constitute complicity in genocide. In June 2024, a group of UN experts warned that the "transfer of weapons and ammunition to Israel may constitute serious violations of human rights and international humanitarian laws and risk State complicity in international crimes, possibly including genocide".[95] A similar call was issued by the ICI in its September 2025 report urging States to "take steps to ensure the prevention of conduct that may amount to an act of genocide under the Genocide Convention, including the transfer of weapons that are used or likely to be used by Israel to commit genocidal acts".[96]

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[90] Forensic Architecture. *Report: A Spatial Analysis of the Israeli Military's Conduct in Gaza since October 2023*. London, October 15, 2024. https://forensic-architecture.org/investigation/a-cartography-of-genocide

[91] Palestinian Centre for Human Rights (PCHR), *Voices of the Genocide* (Gaza: PCHR, August 28, 2025). https://pchrgaza.org/wp-content/uploads/2025/08/Voices-of-the-Genocide-EN-1.pdf

[92] B'Tselem, *Our Genocide* (Jerusalem: B'Tselem, July 2025). https://www.btselem.org/publications/202507_our_genocide

[93] Physicians for Human Rights–Israel, *Genocide in Gaza* (Tel Aviv: PHRI, July 28, 2025). https://www.phr.org.il/en/genocide-in-gaza-eng/?pr=20812

[94] Nathalie Tocci, "Firm in Rhetoric, Compromising in Reality", 390.

[95] United Nations Office of the High Commissioner for Human Rights (OHCHR), "States and Companies Must End Arms Transfers to Israel Immediately or Risk Responsibility for Human Rights Violations: UN Experts," press release, June 20, 2024, https://www.ohchr.org/en/press-releases/2024/06/states-and-companies-must-end-arms-transfers-israel

[96] United Nations Human Rights Council. Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, Including East Jerusalem, and Is-

This obligation should be interpreted in a broader sense, beyond the genocidal violence in Gaza. In its June 2024 Advisory Opinion, the ICJ declared Israel's continued presence in the OPT unlawful, finding violations of the Palestinian right to self-determination, the prohibition of territorial acquisition by force, and multiple obligations under international humanitarian and human rights law, including the prohibition on racial segregation and apartheid. [97] Because these norms constitute *jus cogens*, they give rise to obligations *erga omnes*. As the ICJ has emphasized, all states have a legal interest in their enforcement and are specifically obliged not to aid or assist in maintaining such an unlawful situation.[98] In September 2024, the UNGA adopted resolution ES-10/24 on the ICJ's opinion; 12 EUMS abstained, 2 voted against, and 13 in favor.[99] The resolution translated the obligation not to recognize, aid or assist into concrete measures, calling upon States to cease the "provision or transfer of arms, munitions and related equipment to Israel […] in all cases where there are reasonable grounds to suspect that they may be used in the Occupied Palestinian Territory."[100] Likewise, the ICI highlighted the convergence between the ICJ's provisional measures in the genocide case and the Advisory Opinion on the illegal presence of Israel in the OPT, that putt all States on notice that Israel "may be or is committing internationally wrongful acts" in both Gaza and the West Bank; continued assistance thus risks rendering them complicit in such acts.[101] It reiterated this obligation

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rael. A/HRC/60/CRP.3. September 2025, p. 70 https://www.un.org/unispal/wp-content/uploads/2025/09/a-hrc-60-crp-3.pdf

[97] International Court of Justice. Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem (Advisory Opinion), ICJ Case No. 186, ICJ Reports, July 19, 2024. https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-00-en.pdf

[98] Sonia Boulos, "New Legal Avenues for a Decolonising Agenda: The International Court of Justice and the Israeli Occupation of Palestinian Territories," *Journal of Holy Land and Palestine Studies* 24, no. 2 (2025): 133–157.

[99] AG res 10/24. Advisory opinion of the International Court of Justice on the legal consequences arising from Israel's policies and practices in the Occupied Palestinian Territory, including East Jerusalem, and from the illegality of Israel's continued presence in the Occupied Palestinian Territory (adopted on 18 September 2024)

[100] United Nations General Assembly. Advisory Opinion of the International Court of Justice on the Legal Consequences Arising from Israel's Policies and Practices in the Occupied Palestinian Territory, Including East Jerusalem, and from the Illegality of Israel's Continued Presence in the Occupied Palestinian Territory. A/ES-10/L.31/Rev.1. September 18, 2024. https://docs.un.org/en/A/RES/ES-10/24

[101] United Nations Independent International Commission of Inquiry on the Occupied Palestinian Territory, Including East Jerusalem, and Israel. Legal Analysis and Recommendations on Implementation of the International Court of Justice Advisory Opinion, Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Ter-

in a subsequent report by highlighting the duty to "[c]ease aiding or assisting in the commission of violations of international law, including by reviewing all relationships with Israel, such as trade, aid and assistance and arms transfers, and ending direct and indirect financial support for illegal settlements."[102]

The ICJ's legal framework must be read in conjunction with other legal obligations that States have under international law treaties, including the Arms Trade Treaty (ATT), adopted in 2013.[103] The EU has long portrayed itself as a champion of the ATT. Because certain aspects of the ATT fall within the exclusive competence of the EU in the realm of common commercial policy, or they affect the internal market rules for the transfer of conventional arms and explosives, EUMS had to require the Council's authorization to sign and ratify it. Article 6(3) of the ATT prohibits authorizing arms transfers where the exporting State "has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party." Furthermore, even if the export is not prohibited under Article 6, Article 7 requires an exporting State Party, prior to authorization of the export of conventional arms, to assess the potential that these arms or items could be used to "commit or facilitate a serious violation of international humanitarian law" or to "commit or facilitate a serious violation of international human rights law". States also must consider measures that mitigate the identified risks (Article 7(2)). In the end, the State needs to determine whether an overriding risk exists that one or more of the negative consequences laid out above will occur. In that case, the export shall not be authorized (Article7(3)).

Like any decision that falls within the realm of the Common Foreign and Security Policy (CFSP), arms export policies are beyond the control of the Court of Justice of the European Union (CJEU) and the European Commission has no powers of enforcement. Moreover, Article 346 of the Treaty

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ritory, Including East Jerusalem. October 18, 2024, para. 23. https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/coiopt/2024-10-18-COI-position-paper_co-israel.pdf

[102] United Nations General Assembly, Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, Note by the Secretary-General, Eightieth Session, Agenda Item 72 (Promotion and Protection of Human Rights), UN Doc. A/80/ 337, 2025, para. 90, https://www.un.org/unispal/document/report-of-coi-14aug25/

[103] United Nations, Arms Trade Treaty, opened for signature April 2, 2013, entered into force December 24, 2014, 3013 U.N.T.S. 269. https://treaties.un.org/doc/Treaties/2013/04/20130410%2012-01%20PM/Ch_XXVI_08.pdf

on the Functioning of the European Union exempts member states from disclosing information that affects their security interests or essential interests that are connected to the production of and trade in arms, which further limits oversight.[104] In an attempt to harmonize external arms exports, in 2008, the EU adopted Common Position 2008/944/CFSP (CP) with the aim of establishing rules for all EUMS.[105] Since the adoption of the CP, EUMS have been legally obligated to deny export licenses if there is a clear risk that exported military equipment might be used in serious violations of international human rights or humanitarian law, including genocide. The CP stipulates a set of criteria that EUMS must apply when assessing export licenses summarized as follows: 1) EUMS must deny a license if the export would breach binding international duties or political commitments (e.g., UN/EU embargoes, ban on exporting anti-personnel landmines, etc.); 2) EUMS must deny a license if there is *a clear risk* the equipment could be used for internal repression (e.g., torture, arbitrary killings, arbitrary detentions). EUMS must apply heightened scrutiny to countries flagged for serious rights violations by the competent bodies of the UN, the EU or the Council of Europe. EUMS must also deny a license if there is a *clear risk* of use in serious violations of international humanitarian law; 3) EUMS must deny a license if the export would provoke or prolong armed conflict or aggravate existing tensions or conflicts within the recipient state; 4) EUMS must deny a license if there is a *clear risk* the recipient State would use the export aggressively against another state or to assert territorial claims by force; 5) EUMS must *take into account* whether exports could harm the defense and security interests of the exporting State, other EUMS, and allied countries. This consideration cannot override the human-rights and regional-stability criteria; 6) EUMS must *take into account* the buyer's record regarding terrorism/organized crime, compliance with international law, and commitment to non-proliferation, arms control, and disarmament; 7) EUMS must *assess* the risk the items could be diverted internally or re-exported under unacceptable conditions; and 8) EUMS must *take into account* whether the export is compatible with the recipient's capacity to absorb and sustain it, and whether it would lead to excessive diversion of human/economic resources into armaments.

Although the CP is legally binding, the language used such, as "take into account", leaves latitude for States. Bonaiuti and Bortolotti argue that

[104] Treaty on the Functioning of the European Union [2012] OJ C326/47, art 346.

[105] Chiara Bonaiuti and Luca Bortolotti, "A Vanishing Normative Power? The Changing Dynamics of EU Arms Exports: Trade, Geopolitics and Ethics from the First Gulf War to the War in Ukraine", *The International Spectator* 60, no. 4 (2025): 156-175. https://doi.org/10.1080/03932729.2025.2555801

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this model resulted in "vague formulations and a tendency to harmonise at the lowest common denominator."[106] The second criterion is of a special interest in analyzing arms exports to Israel. This criterion does not refer to all arms exports, but only to those where there is a "clear risk" that the exported arms might be used for internal repression or in violation of International Humanitarian Law (IHL). Additionally, the ban is limited to specific categories of arms, such as small arms and light weapons or other instruments of repression. It is worth mentioning that in the first review process of the CP that took place in 2011, a proposal to include surveillance technologies to the military control list did not achieve consensus among EUMS.[107] Finally, the ban applies only if the "clear risk" test is met. It is not surprising then that the interpretation of the CP can vary significantly among EUMS, "resulting in controversial debates and special national paths".[108] This has led to the development of the User's Guide, which provides guidance for national authorities on how to interpret and apply the eight criteria.[109] However, this instrument proved its limited potential in monitoring arms sale, as Wisotzki and Mutschler highlight, "at the end of the day, a risk assessment is completely in the hands of the national governments, and there is no accepted European benchmark against which it could be assessed."[110] A study conducted by Chiara Bonaiuti found that the adoption of CP and particularly its second criteria did not translate into a decrease in arms exports to countries with poor human rights records. On the contrary, exports to these countries increased between 2008 and 2016.[111]

In the case of Israel, even after the ICJ indicated provisional measures in the genocide proceedings, the EU failed to adopt a unified policy on arms exports to Israel. Rather than coordinating a collective suspension or embargo through the Council of the EU, the Union deferred the decision to individual Member States. This failure resulted in fragmented responses: Slovenia was the first to implement a complete ban on all weapons trade including import, export and transit.[112] Italy imposed a total suspension of

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[106] Bonaiuti and Bortolotti, "*A Vanishing Normative Power?,* 6.

[107] Simone Wisotzki and Max Mutschler, "No Common Position! European Arms Export Control in Crisis," *Zeitschrift für Friedens— und Konfliktforschung* 10, no. 2 (2022): 273-293, 279.

[108] Wisotzki and Mutschler, "No Common Position!", 279.

[109] Wisotzki and Mutschler, "No Common Position!".

[110] Wisotzki and Mutschler, "No Common Position!", 280

[111] Chiara Bonaiuti, "Arms Transfers and Human Rights: Assessing the Impact and Enforcement of the EU Common Position on Arms Exports in a Multilevel Analysis," *European Security* 31, no. 3 (2022): 365-386.

[112] Newsweek, "Map of countries that have stopped weapons exports to Israel," *Newsweek*, September 24, 2025, https://www.newsweek.com/map-countries-weapons-exports-israel-2110947

new arms exports to Israel in October 2024.[113] Belgium's response was marked by internal fragmentation: the French-speaking Wallonia region has banned arms exports since 2009, and in 2025 a Belgian court ordered the Flanders region to halt all transits of military equipment to Israel.[114] Spain officially suspended all arms exports to Israel after October 7, 2023, though evidence of continued transactions sparked political controversy.[115] France, which has not exported major arms to Israel since 1998, stated it does not deliver arms for fighting in Gaza; however, reports indicate that between October 2023 and April 2025, France supplied $10 million worth of military goods, including 15 million bombs, grenades, missiles, and artillery.[116] The Netherlands halted F-35 fighter jet parts exports to Israel in February 2024 after a court found a "clear risk" of international humanitarian law violations,[117] though other arms transfers continued with €12.1 million in permits granted in 2023.[118] A December 2024 court ruling rejected a full arms ban, maintaining the Netherlands' position of conditional restrictions rather than a complete embargo.[119] Germany, the second-largest arms supplier to Israel after the U.S., continued exports until August 2025, when Chancellor Merz announced a temporary halt on military equipment that could be used in Gaza.[120]

Beyond the debates on the lack of enforceability of the CP by EU institutions, a less explored aspect is how the CP and other international law instrument become a site where international law is not simply ignored but *distorted* to produce or perpetuate legal subalternity. Germany is a clear Example. It avows a unique "reason of state" commitment to Israel's security, rooted in

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[113] Stockholm International Peace Research Institute, "How top arms exporters have responded to the war in Gaza: 2025 update," *SIPRI Commentary*, September 30, 2025, https://www.sipri.org/commentary/topical-backgrounder/2025/how-top-arms-exporters-have-responded-war-gaza-2025-update

[114] Newsweek, "Map of countries that have stopped weapons exports to Israel".

[115] The Guardian, "Spain scraps €6.6m arms order from Israeli company after outcry," *The Guardian*, April 24, 2025, https://www.theguardian.com/world/2025/apr/24/spain-scraps-arms-order-from-israeli-company-after-outcry

[116] Stockholm International Peace Research Institute, "How top arms exporters have responded to the war in Gaza: 2025 update."

[117] León Castellanos-Jankiewicz, "Dutch Court Halts F-35 Aircraft Deliveries for Israel: A 'Clear Risk' of Abuse," *Verfassungsblog*, February 14, 2024.

[118] Stop Wapenhandel, "Dutch arms exports to Israel in 2023," *Stop Wapenhandel*, April 2024, https://stopwapenhandel.org/dutch-arms-exports-to-israel-in-2023/.

[119] Alia Shoaib, "Map of countries that have stopped weapons exports to Israel", *Newsweek*, 8 August 2025. https://www.newsweek.com/map-countries-weapons-exports-israel-2110947

[120] Stockholm International Peace Research Institute, "How top arms exporters have responded to the war in Gaza: 2025 update"; Newsweek, "Map of countries that have stopped weapons exports to Israel,"

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Germany's historical responsibility after the Holocaust.[121] In an October 2023 Bundestag address, Chancellor Scholz reaffirmed that "Israel has the right, enshrined in international law, to defend itself and its citizens" against Hamas's attacks, declaring that "there is only one place for Germany at this time, and that is by Israel's side" —epitomizing the doctrine that "Israel's security is part of Germany's raison d'état".[122] This absolutist narrative on Israel's right to self-defense is offered without engagement with the legal limitations attached to this right —mainly necessity, proportionality— and the extent to which it applies to an occupying power engaged in an unlawful occupation.[123] In the German discourse, a decontextualized self-defense becomes a totalizing category, a shield against scrutiny. Criticism based on international law principles is reframed as an assault on Israel's existence, and because of Germany's history, as an assault on Germany's own moral identity.

On 1 March 2024, Nicaragua instituted proceedings against Germany before the ICJ, alleging violations of the Genocide Convention, IHL, and other norms of general international law in the OPT, particularly Gaza. Nicaragua argued that by providing political, financial, and military support to Israel and by suspending funding to the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), Germany was facilitating Israel's commission of genocide and failing to fulfill its obligation to ensure respect for IHL.[124] Beyond procedural arguments on the lack of jurisdiction, during the hearing on the indication of provisional measures, Germany relied heavily on a single distinction between "war weapons" (Kriegswaffen) and "other military equipment" (sonstige Rüstungsgüter). War weapons are high-lethality items such as combat aircraft, tanks, automatic weapons, certain ammunition, and essential components. "Other military equipment" is a much broader category that can include protective gear, communications devices, camouflage paint, and subordinate parts. Germany further argued that because "war weapons" carry inherently higher risks, they face more stringent controls (including multiple licensing

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[121] Federal Government of Germany. *Policy statement by Olaf Scholz on the situation in Israel*. Press and Information Office of the Federal Government. (2023, October 12).

[122] Facebook, Policy statement by Olaf Scholz, Chancellor of the Federal Republic of Germany and Member of the German Bundestag, on the situation in Israel 12 October 2023. Thursday, 12 October 2023 in Berlin

[123] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America*), Merits, Judgment, I.C.J. Reports 1986, 14 (June 27, 1986); see also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.

[124] *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany)*, Application Instituting Proceedings filed by the Republic of Nicaragua, International Court of Justice, March 1, 2024, https://www.icj-cij.org/case/193/institution-proceedings

steps), whereas "other military equipment," though still licensable, covers many lower-intensity or supportive items. On that basis, Germany emphasized that since 7 October 2023, its licensing practice has overwhelmingly concerned the second category: 98% of licenses granted were for "other military equipment," and only four export licenses involved "war weapons" in that period. This was presented as evidence that post-October 2023 exports were largely not for the most dangerous weaponry.[125]

The so called "weapons of war" are regulated under the German Basic Law and the War Weapons Control Act, which mandate authorization for all exports of items classified as such. By contrast, "other military equipment" —including certain munitions, targeting systems, and software— falls under the more permissive Foreign Trade and Payments Act and its implementing ordinance. These regulations operate on the assumption of general freedom of trade, subject to possible restrictions for specific goods, with export approvals granted by a different national authority under less stringent conditions.[126] This distinction obscures the role that so-called non-combat weapons and equipment play in enabling flagrant violations of international law. For example, during the oral hearings, Germany—when referring to the approval of export licenses for approximately 500,000 rounds of ammunition in November 2023 and an additional 1,000 rounds approved in early 2024 —argued that these licenses concerned training ammunition allegedly unsuitable for combat operations. Similarly, Germany contended that a slip ring sold to Israel for installation in a radar system could not plausibly be used to commit war crimes.[127]

The risk assessments embedded in such arguments reveal how structural forms of colonial violence —often conceptualized as "slow" violence woven into the fabric of everyday life— remain discursively and legally invisible. International humanitarian law includes prohibitions specifically designed to safeguard human dignity, not merely to prevent death or physical destruction. Article 27 of the Fourth Geneva Convention, for example, guarantees respect for the person, honor, family rights, and protection against degrading treatment. Systematic assaults on human dignity are central to the lived reality of prolonged occupation intertwined with an apart-

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[125] *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany)*, Verbatim Record of the Public Sitting held on April 9, 2024, at 10 a.m., Peace Palace, President Salam presiding, International Court of Justice, 2024, https://www.icj-cij.org/case/193/oral-proceedings

[126] Kristoffer Burck and Vera Strobel, "A Hands-Off Approach to International Law: The Frankfurt Administrative Court's Stance on Arms Exports to Israel," *VerfBlog*, accessed December 18, 2025, https://verfassungsblog.de/a-hands-off-approach-to-international-law-the-frankfurt-administrative-court's-stance-on-arms-exports-to-israel

[127] *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany)*, Verbatim Record of the Public Sitting held on April 9.

heid regime, in which pervasive surveillance and intensified population-control measures erode dignity and perpetuate suffering.[128] Thus, while training ammunition may not immediately kill or maim, it enhances Israel's capacity to sustain systems of control over Palestinians, just as equipment such as daylight observation binoculars does.

Another legal strategy employed by Germany involved narrowing the scope of obligations contained in Common Article 1 of the 1949 Geneva Conventions, which provides: "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances."[129] Germany contended that this article merely establishes an obligation to *prevent* IHL violations, comparable to the external dimension of the Genocide Convention. Accordingly, because a State's liability for failing to prevent genocide, or for aiding and assisting genocide, can be established only once genocide has in fact occurred, the same logic applies to obligations arising under the Geneva Conventions. Germany's insistence that Israel's responsibility for violations of the Genocide Convention and IHL has yet to be established —despite mounting evidence, including findings by UN experts and the ICJ's advisory opinions— is, in itself, highly revealing. Against this reading of Common Article 1, Parisa Zangeneh argues that the provision is not merely preventative, "[r]ather, it states expressly that it imposes an obligation on High Contracting Parties to respect and to ensure respect for the Conventions in all circumstances."[130] Similarly, the International Committee of the Red Cross has interpreted the article more expansively maintaining that the duty to ensure respect "constitutes a general duty of due diligence to prevent and repress breaches of the Conventions by private persons over which a State exercises authority, including persons in occupied territory".[131]As Zangeneh argues, this narrow reading

[128] Michael Lynk, *Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967*, UN Human Rights Council, 49th sess., UN Doc. A/HRC/49/87 (March 21, 2022).

[129] Geneva Conventions of 12 August 1949, Common Article 1 ("The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances"), 75 U.N.T.S. 31 (Geneva Convention I); 75 U.N.T.S. 85 (Geneva Convention II); 75 U.N.T.S. 135 (Geneva Convention III); 75 U.N.T.S. 287 (Geneva Convention IV), August 12, 1949.

[130] Parisa Zangeneh, "The ICJ's Insufficient Engagement with Germany's Interpretation of the External Dimension of Common Article 1 in the Nicaragua v. Germany Proceedings," *Opinio Juris* (blog), September 25, 2024, accessed December 18, 2025, https://opiniojuris.org/2024/09/25/the-icjs-insufficient-engagement-with-germanys-interpretation-of-the-external-dimension-of-common-article-1-in-the-nicaragua-v-germany-proceedings/

[131] International Committee of the Red Cross (ICRC), *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Geneva, 12 August 1949, Commentary of 2016, Article 1 ("Respect for the Convention"), accessed December 18, 2025, https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-1/commentary/2016.

forecloses the possibility of establishing Germany's international legal responsibility for failing to exercise due diligence to ensure that arms sales to Israel by individuals and entities within its jurisdiction do not contribute to violations of international law.[132]

Needless to say, that in November 2025, Germany lifted the suspension on the issuance of certain arms export licenses to Israel, a move that was described by AI "reckless, unlawful and sends entirely the wrong message to Israel: that it can continue committing genocide, war crimes, and apartheid against Palestinians".[133] A June 2025 disclosure by the German Bundestag regarding the scale of military support to Israel suggests that Germany approved export licenses for military equipment totaling at least €233,763,796 following its appearance before the ICJ.[134]

2. *Business as usual: the duty not to recognize, not to aid or assist*

As mentioned earlier, in the 2024 Advisory Opinion, the ICJ declared Israel's continued presence in the OPT unlawful, citing violations of the Palestinian right to self-determination, the prohibition on acquiring territory by force, and multiple obligations under international humanitarian and human rights law, including the prohibition on racial segregation and apartheid. As these norms constitute *jus cogens* norms, they give rise to obligations *erga omnes*.[135] The Court emphasized that all States have a legal interest in their enforcement and are specifically obligated not to aid or assist in maintaining such an unlawful situation. The measures States must adopt include non-recognition of Israel's unlawful presence in the OPT; no aid or assistance in maintaining the unlawful situation; an ensuring the removal of impediments to Palestinian self-determination. The ICJ further stressed the duty to distinguish between Israel and the OPT in all dealings with the former, including abstaining from concluding treaties with Israel

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[132] Parisa Zangeneh, "The ICJ's Insufficient Engagement with Germany's Interpretation of the External Dimension of Common Article 1 in the Nicaragua v. Germany Proceedings".

[133] Amnesty International, "Germany: Resumption of Arms Transfers to Israel Reckless, Unlawful and Risks Complicity in Israel's International Crimes," press release, November 24, 2025, https://www.amnesty.org/en/latest/news/2025/11/germany-arms-transfers-to-israel-reckless-unlawful-and-risks-complicity-in-israels-international-crimes/

[134] Adil Ahmad Haque, "The Fall and Rise of German Arms Exports to Israel: Questions for the International Court of Justice," *Just Security*, June 13, 2025, accessed December 18, 2025, https://www.justsecurity.org/88249/the-fall-and-rise-of-german-arms-exports-to-israel-questions-for-the-international-court-of-justice/

[135] Sonia Boulos, "New Legal Avenues for a Decolonising Agenda: The International Court of Justice and the Israeli Occupation of Palestinian Territories," *Journal of Holy Land and Palestine Studies* 24, no. 2 (2025): 133-157.

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that purport to include the OPT; avoiding economic or trade relations that entrench Israeli presence in the OPT; and preventing investments that sustain the illegal situation. The ICJ made it clear that the duty of non-recognition specified above also applies to international organizations.[136]

In a memo sent to the former High Representative of EU for Foreign Affairs and Security Policy, Josep Borrell, on possible implications of the 2024 Advisory Opinion for the EU, Frank Hoffmeister, the director of the EU foreign service's legal department, argued that "EU law requires labelling indicating that foodstuffs originate in the West Bank and settlements,"[137] but "it is a matter of further political appreciation whether to revisit the EU's policy vis-à-vis the import of goods from the settlements."[138] This legal position stirred controversy among international law legal scholars, labeling it "legally flawed, politically damaging, and morally compromised."[139]

The EU–Israel Association Agreement, which entered into force in 2000 and regulates bilateral trade as well as Israel's participation in EU programs such as Horizon Europe, includes a human rights clause (Article 2) stating that respect for human rights and democratic principles is an essential element of the agreement. It took a livestreamed genocidal war to prompt an ultimately unsuccessful attempt to implement this clause, despite Israel's documented violations of IHL, international human rights law, and the Palestinians' right to self-determination—violations long recognized by the UN and affirmed in the 2004 Wall Advisory Opinion.[140]

Ex post conditionality is rarely invoked by EU institutions. As Al Tamimi highlights that "[h]uman rights clauses are rather aspirational, offering the EU a negotiation tool with other States".[141] Their effectiveness in protecting the human rights of individuals at risk from violations committed by actors other than the EU remains highly questionable.[142] For example, in the Mugraby

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136 Para 280.

137 The Intercept, "EU Bends Rules to Allow Trade with Israeli Settlements," *The Intercept*, October 23, 2024, accessed December 18, 2025, https://theintercept.com/2024/10/23/eu-israel-settlements-trade-gaza

138 Id.

139 Id.

140 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, International Court of Justice, General List No. 131, July 9, 2004, https://www.icj-cij.org/node/103742

141 Yussef Al Tamimi, "Implications of the ICJ Advisory Opinion for the EU-Israel Association Agreement," *EJIL: Talk!* (blog), July 30, 2024, accessed December 18, 2025, https://www.ejiltalk.org/implications-of-the-icj-advisory-opinion-for-the-eu-israel-association-agreement

142 Lorand Bartels, "The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects," *European Journal of International Law* 25, no. 4 (November 2014): 1071-1091.

case, the CJEU dismissed an action by a Lebanese human-rights lawyer seeking (i) a declaration that the Council and Commission unlawfully failed to act on his request for measures against Lebanon over alleged violations of his fundamental rights and the EU–Lebanon Association Agreement, and (ii) damages for harm caused by that inaction. The General Court found his claim manifestly unfounded. On appeal, the CJEU upheld the decision emphasizing that by "using the words 'may take', the parties to the Association Agreement indicated clearly and unequivocally that each of them had a right, and not an obligation, to take such appropriate measures."[143] Furthermore, even if measures are to be taken against any State, priority is given to less disruptive measures, as reflected in Article 79(2) of The EU-Israel Association Agreement. According to the latter, if Israel fails to meet its human rights obligations, the EU may adopt appropriate measures after informing the Association Council and seeking a mutually acceptable solution, except in urgent cases. In choosing such measures, priority must be given to those that least disrupt the functioning of the Agreement.

Article 83 of the Association Agreement and its Protocol 5 define the territory lawfully covered by the agreement, i.e. the State of Israel as recognized internationally within the 1967 borders. Therefore, the EU does not apply preferential treatment to Israeli products that are processed entirely or substantially in Israeli settlements in the OPT.[144] In 2005, the EU reached a "technical arrangement" with Israel requiring Israeli export certificates to include production locality to help EU customs identify and deny preferential treatment for settlements' goods. This measure has had limited impact as many settlement companies re-registered within Israel without relocating.[145]

In *the Firma Brita GmbH* case, the CJEU had the opportunity to examine the denial of preferential treatment to products originating from Israeli settlements in the OPT. Brita GmbH, a company based in Germany, imported carbonated water coolers, accessories and syrups manufactured by an Israeli supplier whose production site was in an Israeli settlement in West Bank. The CJEU ruled that the customs authorities of the importing EUMS may refuse to grant the preferential treatment provided for under the Association Agreement where the goods concerned originate in settlements in the West Bank. How-

[143] *Muhamad Mugraby v Council of the European Union and European Commission*, Case C-581/11 P, Order of the Court (Fifth Chamber), 12 July 2012, ECLI:EU:C:2012:466, para 70, accessed December 18, 2025, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62011CJ0581

[144] Nathalie Tocci, "Firm in Rhetoric, Compromising in Reality: The EU in the Israeli–Palestinian Conflict".

[145] Nathalie Tocci, "Firm in Rhetoric, Compromising in Reality: The EU in the Israeli–Palestinian Conflict".

ever, the legal reasoning of the CJEU was far from reaffirming key international law principles binding on the EU when dealing with Israel. Instead of focusing on the duty of non-recognition and non-assistance in maintaining flagrant violations of international, such as those identified by the ICJ in its Wall Advisory Opinion of 2004, the CJEU resorted to the law of treaties and constructed the issues as a question of treaty-interpretation. The CJEU assumed that Israel and the OPT constitute two separate economic entities. Therefore, products originating from the West Bank cannot benefit from EU–Israel Association Agreement preferential tariffs because that agreement applies only to the territory of the State of Israel, while the West Bank and Gaza are covered by a separate EU agreement with the Palestinian Liberation Organization (PLO). Consequently, treating West Bank goods as "Israeli" would limit the effectiveness of the EU-PLO Agreement by preventing Palestinian customs authorities from exercising their competence, thereby conferring rights and imposing duties on a third party without its consent in violation of the legal principle *pacta tertiis nec nocent nec prosunt*.[146] In effect, the CJEU opted for treaty law principles to avoid reaffirming Palestinian rights.

In an "Interpretive Notice" from 2015 on the indication of origin of goods from the territories occupied by Israel since June 1967, the EU reaffirmed that it "does not recognize Israel's sovereignty over the territories occupied by Israel since June 1967, namely the Golan Heights, the Gaza Strip and the West Bank, including East Jerusalem, and does not consider them to be part of Israel's territory."[147] The notice considered the use of the label 'product from Israel' in relation to products originating from settlements in the OPT as "incorrect and misleading". Therefore, it required the use of the expression "Israeli settlement" or similar expression to distinguish such products from Palestinian products originating from the OPT. This requirement was framed as a consumer protection measure:

> [I]ndication of origin becomes mandatory when, as regards food, the omission of that information would mislead the consumer as to the true origin of the product,14 and, as regards all other goods, when information is omitted that is material, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.[148]

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[146] *Brita GmbH v. Hauptzollamt Hamburg-Hafen*, Case C-386/08, Judgment of the Court (Fourth Chamber), 25 February 2010, ECLI:EU:C:2010:91, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62008CJ0386

[147] European Commission, *Interpretative Notice on Indication of Origin of Goods from the Territories Occupied by Israel since June 1967*, C(2015) 7834 final (Brussels, November 11, 2015), p. 1, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52015XC1112(01)

[148] *Ibid*, p. 4.

Put differently, the duty of non-recognition is reduced to a matter of consumer information, leaving it to individuals to decide whether to purchase products linked to an illegal occupation. The ICJ's 2024 Advisory Opinion renders this reasoning —and that in the Brita case— obsolete insofar as both evade the complex legal obligations inherent in non-recognition and non-assistance. The CJEU previously held in the *Air Transport Association of America* case that under Article 3(5) of TEU, the EU must promote the strict observance and development of international law. Accordingly, when adopting acts, it is obliged to comply fully with international law, including customary international law.[149] In the case of economic relations with Israel, this entails, as the ICI has emphasized, a duty of full compliance with the obligations of international law, as articulated in the ICJ's 2024 Advisory Opinion. Those obligations include the duty not only to distinguish, in any dealings with Israel, between the territory of Israel and the OPT (non-recognition), but also the duty to "cease all financial, trade, investment and economic relations with Israel that maintain the unlawful occupation or contribute to maintaining it."[150] Therefore, a failure to prohibit the market access of settlement products allows those goods to remain commercially profitable, thereby further entrenching the occupation, even where no preferential treatment is accorded. By contrast, the EU adopted a ban in 2014 in response to Russia's illegal annexation of Crimea, prohibiting the import of goods from Crimea and Sevastopol.[151] Subsequently, the EU introduced an additional ban on new investments in Crimea or Sevastopol, including acquisitions of real estate and participation in entities there. It also prohibited the export of certain goods and technologies for use in key sectors such as transport, telecommunications, energy, and the prospection, exploration, and production of oil, gas, and mineral resources, and banned services directly related to tourism activities.[152]

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[149] *Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change*, Case C-366/10, Judgment of the Court (Grand Chamber), 21 December 2011, ECLI:EU:C:2011:864, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62010CJ0366

[150] United Nations General Assembly, Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, Note by the Secretary-General, Eightieth Session, Agenda Item 72 (Promotion and Protection of Human Rights), UN Doc. A/80/ 337, 2025, para. 90, https://www.un.org/unispal/document/report-of-coi-14aug25/

[151] Council Regulation (EU) 692/2014 of 23 June 2014 Concerning Restrictions on the Import into the Union of Goods Originating in Crimea or Sevastopol, in Response to the Illegal Annexation of Crimea and Sevastopol [2014] OJ L183/9.

[152] Council Regulation (EU) 1351/2014 of 18 December 2014 Amending Regulation (EU) 692/2014 Concerning Restrictive Measures in Response to the Illegal Annexation of Crimea and Sevastopol [2014] OJ L365/46 arts 2(a)-(e).

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Beyond using legal language that perpetuate the legal subalternity of Palestinians, a key feature of the EU's legal discourse is built around the fictious separation between Israel's economy inside the Green Line and the Israeli economy in West Bank and other occupied Arab territories. As Gordon and Pardo highlight, by establishing the fiction that Israel has two separate economies, the EU grants itself "normative justification to continue business as usual with Israel."[153] This fiction allows the EU to minimize the scope of its obligation to prevent trade and investment relations that entrench the illegal situation created by Israel in the OPT. This specific obligation is broader in scope and more indirect than the regulation of economic or trade relations with Israel that are specifically linked to the OPT. It has significant implications for relations with Israeli businesses and state-owned enterprises —almost all of which operate in settlements— as well as for the procurement of arms and military equipment from Israeli companies, insofar as such equipment is tested and used in the OPT.[154] As Al Tamimi highlights, separating legal trade relations with Israeli businesses from links to the illegal occupation is difficult. Examples include cooperation with Israel's national water company, which expropriates water from Palestinian springs in the West Bank; the country's largest supermarket chain, which operates in illegal settlements; and an irrigation firm implicated in settlement-related activities.[155]

The duty to prevent trade and investment relations that entrench the Israeli occupation and Apartheid regime is most salient in relation to companies and businesses that supply materials and equipment enabling the construction and expansion of settlements and related infrastructure; provide surveillance, identification, and security technologies for settlements, checkpoints, and associated systems; supply equipment used in house demolitions and the destruction of agricultural land and livelihoods; deliver services, utilities, transport, and security support to settlement-based enterprises; engage in banking and financial operations that facilitate settlement expansion and commercial activity; exploit natural resources —particularly land and water— for business purposes; engage in environmentally harmful practices in the OPT; engage in economic practices that entrench Palestinian market dependency and disadvantage Palestinian enterprises through

[153] Neve Gordon and Sharon Pardo, "Normative Power Europe and the Power of the Local", 423.

[154] Al Tamimi, "Implications of the ICJ Advisory Opinion for the EU-Israel Association Agreement".

[155] *Ibid*.

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movement restrictions and administrative or legal constraints.[156] Such activities significantly contribute to the consolidation of Israel's unlawful occupation and the apartheid regime imposed on Palestinians. Ralph Wilde argues that because the economic aspects of Israel's presence in the OPT are deeply intertwined with the broader Israeli economy, all economic and trade relations with Israel inevitably risk entrenching the illegal Israeli occupation of the OPT.[157]

In May 2025, the Council, at the High Representative's initiative, opened a review of Article 2 of the EU–Israel Association Agreement —the "essential elements" clause tying this mutual relationship to respect for human rights and democratic principles— after a clear ministerial majority backed the move amid mounting concern over Gaza.[158] The European External Action Service transmitted its analysis to member states in June, concluding there were "indications", that Israel was in breach of its Article 2 obligations, with reference to impediments to humanitarian access and conduct of hostilities affecting civilians.[159] Note the language: decades of rigorous UN and ICJ documentation of flagrant violations of international law are reduced to mere "indications" relating to obstructing humanitarian assistance. Non-assistance is reduced again to the question of whether Israel still deserves tariff privileges. The severity of the violations—the genocide in Gaza, the denial of self-determination, the apartheid structure —do not translate into the reorientation of economic relations that the law actually requires. Once again, Palestinians remain legally subaltern.

While civil-society actors pressed for immediate suspension of the agreement, EU institutions initially favored intensified "engagement" and incremental leverage rather than abrogation.[160] By September 2025, the

[156] Diakonia International Humanitarian Law Centre, *Responsibility of Third States and International Organisations Emanating from the Findings of the ICJ's Advisory Opinion of 19 July 2024* (October 2024), accessed 6 February 2026.

[157] Ralph Wilde, *Illegality of Israel's Presence in the Palestinian Gaza Strip and West Bank, including East Jerusalem, in the Light of the 2024 Occupied Palestinian Territory Advisory Opinion of the International Court of Justice, and Consequences for Third States and the European Union: Legal Opinion* (London: Faculty of Laws, University College London, University of London, December 1, 2024), https://www.ucl.ac.uk/laws/sites/laws/files/ralph_wilde_icj_opt_ao_thirdstateseu_legal_opinion.pdf

[158] European Parliamentary Research Service, "Review of the EU–Israel Association Agreement (At a Glance, 772892)," June 4, 2025, https://www.europarl.europa.eu/RegData/etudes/ATAG/2025/772892/EPRS_ATA(2025)772892_EN.pdf (accessed November 10, 2025).

[159] Euronews, "EU Review Indicates Israel Breached Human Rights in Gaza," June 20, 2025, https://www.euronews.com/my-europe/2025/06/20/eu-review-indicates-israel-breached-human-rights-in-gaza (accessed November 10, 2025);

[160] Amnesty International, "EU/Israel: Review of the EU's Relations with Israel Welcome but Devastatingly Late," May 2025, https://www.amnesty.org/en/latest/news/2025/05/

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Commission proposed suspending the agreement's preferential trade concessions —effectively removing tariff preferences on an estimated €5.8 billion of Israeli exports— yet even this minimalistic measure lacked sufficient support in Council.[161]

IV. Conclusions

If Gaza has functioned as a "revealer," it is because it has forced the EU's normative self-description into direct collision with the material realities of its external action when faced with a partner implicated in mass atrocities. What Gaza exposes is not merely inconsistency, but a structural pattern in which legal commitments are discursively and institutionally reconstructed, transforming legal obligations into options and rendering protection contingent. The Palestinian question —framed against the EU's close ties with Israel and its colonial project— has become a litmus test for the claims associated with "Normative Power Europe". The Palestinian 'exception' to NPE, we argue, does more than highlight internal EU divisions over elementary requirements of international law; it reveals how these divisions have produced paralysis and, over time, an accumulation of inconsistencies that has profoundly eroded the EU's reputation and credibility, particularly across the Global South/Global majority, where European inaction and selective invocation of international law have been widely noted.[162]

Most importantly, by focusing on arms transfers and EU-Israel economic relations, this article explores how legal obligations —triggered by the ICJ's 2024 findings of a plausible and imminent risk of genocide in Gaza and its 2024 advisory opinion— can be reinterpreted and operationalized in ways that reproduce Palestinian legal subalternity. In this sense, legality does not merely fail to protect; it can be reconstructed to sustain and to normalize colonial projects and systemic oppression. The implications of this reconstruction extend beyond the immediate context of EU–Israel relations, shaping how the EU is perceived by those to whom it has long presented itself as a partner.

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eu-israel-review-of-the-eus-relations-with-israel-welcome-devastatingly-late/ (accessed November 10, 2025)

[161] European Commission, "Commission Proposes Suspension of Trade Concessions with Israel," press release, September 17, 2025, https://ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_25_2112/IP_25_2112_EN.pdf (accessed November 10, 2025)

[162] David Lynch. When Soft Power is Spent: Gaza, Ukraine, and Europeans' Standing in the Arab World. European Council on Foreign Relations (ECFR), 2024 (accessed 11 Dec 2025) https://ecfr.eu/article/when-soft-power-is-spent-gaza-ukraine-and-europeans-standing-in-the-arab-world/.

Once perceived as a "toothless tiger" lacking meaningful hard-power instruments, the EU now appears not as an underpowered bystander but as a complicit actor, even a villain. This marks a dramatic reversal for a polity that has long presented itself as a paradigmatic normative power.[163] The widening gap between proclaimed norms and enacted policy is increasingly understood not as weakness but as deliberate choice —one with identifiable beneficiaries and foreseeable victims.

That reversal is inseparable from a broader shift in the global intelligibility of Palestine itself. As the framing of the issue changes, so too do the standards against which external actors, especially those claiming normative authority, are judged. As Baconi argues, 7 October 2023 marked a paradigmatic rupture in the terms through which Palestine is publicly discussed. For decades, the Palestinian question was framed as a conflict to be managed rather than a structure of colonial domination to be dismantled. Yet genocide has compelled a broader confrontation with realities Palestinians have long named: settler colonialism, the ongoing Nakba, and Israeli apartheid. This rupture is not merely rhetorical; it signals a substantive shift in global political understanding. Discourses of decolonization and accountability now circulate in arenas previously confined to the diplomatic lexicon of the 'peace process' and the two-state solution. Justice, in this register, requires dismantling the structures that made subjugation possible.[164]

This raises a fundamental question about the EU's capacity to act in accordance with its own legal and ethical claims: What role can the EU credibly play when it has repeatedly failed to align its actions with its professed commitments —while reproducing older colonial vocabularies and practices? These failures have particularly acute consequences in the EU's southern neighborhood, where European policy is judged not by aspirational texts but by what is tolerated, enabled, and financed. The result is a widening legitimacy deficit that rhetorical recalibration alone cannot repair. The normative rhetoric cultivated over decades no longer persuades societies that have witnessed, day after day, the EU's incoherence, obstruction, and complicity as the genocide in Gaza unfolded.

In 2024, amid mass killing, favorable perceptions of the EU among Palestinians reportedly dropped by roughly thirty points, reaching their lowest

[163] Christian Achrainer; Michelle Pace "Paralyzed into Irrelevance: How Divisions on Palestine Eroded the EU's Normative Claims", Bawader/Commentary, Arab Reform Initiative, 27 June 2025 (accessed 11 Dec 2025) https://www.arab-reform.net/publication/paralyzed-into-irrelevance-how-divisions-on-palestine-eroded-the-eus-normative-claims/

[164] Tareq Baconi. The world radicalized by the Gaza genocide. *Comentary, Al-Shabaka*, December 2025.

level since such polling began.[165] The double standards, inconsistency, and legal maneuvering of the EU and its Member States have once again laid bare Palestine's subaltern position. In this light, Giovanni Giolitti's aphorism seems grimly apt: "Law is interpreted for friends and applied to enemies."[166]

Sobre los autores

Sonia Boulos es doctora en Ciencias Jurídicas (JSD) por la University of Notre Dame (EE. UU.). Es profesora titular de Derecho Internacional de los Derechos Humanos en la Universidad Nebrija, donde además dirige el Grupo de Investigación SEGERICO sobre Seguridad, Gestión de Riesgos y Conflicto. Es coeditora de la revista académica Palestine-Israel Review. Ha publicado diversos trabajos académicos en revistas de referencia, en los que analiza la cuestión palestina desde la perspectiva del derecho internacional.

Isaías Barreñada Bajo es doctor en Ciencias Políticas (Estudios internacionales) (2004) por la Universidad Complutense de Madrid. Es profesor de Relaciones Internacionales en la Facultad de Ciencias Políticas y Sociología de la UCM e investigador adscrito al Instituto Complutense de Estudios Internacionales (ICEI). Es codirector del Grupo de Investigación Complutense sobre el Magreb y Oriente medio. Autor de varias obras sobre política exterior española y sobre la cuestión palestina.

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[165] *Opinion polls. Image and perceptions of the EU in Palestine*. EU neighbors South; Gallup. Fieldwork 2025.

[166] Giovanni Giolitti (attributed), "Le leggi si applicano ai nemici e si interpretano per gli amici," quoted in Jens Petersen, ed., *Storia e Critica: Die italienische Zeitgeschichte im Spiegel der Tages– und Wochenpresse*, nos. 69-72 (Rome: Deutsches Historisches Institut in Rom, 1996), 36.

Isaías Barreñada Bajo holds a doctorate in Political Sciences (International Studies) (2004) from the Complutense University of Madrid. He is a lecturer of International Relations at the Faculty of Political Sciences and Sociology of the UCM and a researcher attached to the Complutense Institute of International Studies (ICEI). He is co-director of the Complutense Research Group on the Maghreb and the Middle East. Author of several works on Spanish foreign policy and the Palestinian question.

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Jurisprudencia

Crónica de la Jurisprudencia del Tribunal de Justicia de la Unión Europea Segundo semestre de 2025

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 (REDUE) del Consejo General del Poder Judicial (España)

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Resumen: Esta *Crónica* analiza los hitos más sobresalientes de la jurisprudencia del Tribunal de Justicia en el segundo semestre de 2025. El reto más difícil del cronista es la selección de unas 30 sentencias de unas 500 resoluciones dictadas por el Tribunal de Justicia en el período analizado. Esta limitada selección supone, de hecho, no poder prestar la atención que merece el Tribunal General que pasa prácticamente desapercibido. En la primera parte se abordan varios asuntos que tienen su origen en otros tribunales nacionales y otros Estados distintos de España, a cuya situación particular se dedica la segunda parte. En la parte general se analiza la respuesta prejudicial del Tribunal General en materia de IVA que inaugura este procedimiento de desconcentración en la gestión de litigios. También se observa cómo el Tribunal de Justicia ha continuado su jurisprudencia sobre los efectos de la ciudadanía de la Unión como límite a las legislaciones nacionales contrarias a las parejas de personas del mismo sexo. Resulta de interés la delimitación de competencias de la Unión Europea en lo que se refiere a la armonización del salario mínimo. Las demás cuestiones abordadas son prácticas y tienen que ver con las obligaciones de los operadores de internet en la publicación de datos personales; el tiempo de trabjo de jueces y fiscales; la indemnización de los daños psíquicos en el caso de las víctimas de delitos; la liberalización de las comunicaciones electrónicas; y otras cuestiones propias del ámbito tributario como las medidas cautelares, las pruebas en materia tributaria o la libre circulación de capitales en el mercado único y en el Espacio Económico Europeo. La segunda parte de la *Crónica* intenta dar cuenta de las sentencias del Tribunal de Justicia relacionadas con el Derecho español y que agrupo siguiendo la división de nuestras jurisdicciones. En el ámbito de la jurisdicción penal resulta de interés la doctrina relativa al *non bis in idem* en el espacio de libertad, seguridad y justicia. En el ámbito de la jurisdicción civil el Tribunal de Justicia continúa con su particular saga sobre la responsabilidad del Banco Santander como consecuencia de la resolución del Banco Popular y otras cuestiones sobre cláusulas abusivas, indemnización por pérdida de una mascota que había sido facturada en un viaje de avión, sobre marcas o sobre aplicación privada del Derecho de la competencia. En el ámbito contencioso-administrativo el Tribunal de Justicia ha resuelto que las deducciones fiscales de un fondo de comercio del impuesto de sociedades no son ayudas de Estado; se ha pronunciado sobre los límites de la lucha contra las ludopatías en el mercado europeo y el alcance de la evaluación de impacto ambiental en materia de parques eólicos, el valor en aduana de las mercancías o sobre la legislación ferroviaria europea y su aplicación en el sistema institucional español. En el marco de la jurisdicción social, el Tribunal de Justicia interpreta el concepto de tiempo de trabajo en el caso de desplazamiento de los trabajadores. Por último y a modo de ejemplo comentaré una sentencia sobre las correcciones financieras a España por la indebida gestión por Andalucía y Cataluña del Fondo agrícola que se re-

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fiere muy ampliamente al alcance de la casación ante el Tribunal de Justicia de las sentencias dictadas en instancia por el Tribunal General.

Palabras clave: Jurisprudencia, Derecho de la Unión Europea, Tribunal de Justicia de la Unión Europea, Derecho español, Cuestión prejudicial europea.

Abstract: *This Chronicle analyses the most outstanding milestones of the case-law of the Court of Justice in the second half of 2025. The most difficult challenge for the chronicler is the selection of some 30 judgments from around 500 judgments delivered by the Court of Justice in the period under review. That limited selection means, in fact, that the attention of the General Court, which goes almost unnoticed, cannot be paid. The first part deals with a number of cases originating in national courts and States other than Spain, the particular situation of which is dealt with in the second part. The general part analyses the General Court's preliminary ruling on VAT, which initiates this deconcentration procedure in dispute management. It is also noted that the Court has continued its case-law on equal treatment between persons irrespective of racial or ethnic origin; the effects of EU citizenship as a limit to national laws against same-sex couples; the consistency of an award on sport arbitration with the principles and provisions of EU law which form part of EU public policy; and the delimitation of the competences of the European Union with regard to the harmonisation of the minimum wage. The other issues addressed are practical and relate to the application of social advantages to prosecutors, and by extension to judges; compensation for psychological damage in the case of victims of crime, and other tax issues such as precautionary measures, tax evidence or the free movement of capital within the internal market and the European Economic Area. The second part of the Chronicle tries to give an account of the judgments of the Court of Justice related to Spanish law and that it grouped together following the division of jurisdictions in Spain. In the area of criminal jurisdiction, the doctrine of non bis in idem in the area of freedom, security and justice is of interest. In the area of civil jurisdiction, the Court continues with its particular saga on the liability of Banco Santander as a result of the resolution of Banco Popular and other questions on unfair terms, compensation for the loss of a pet of airline passengers, on trademarks or on the private enforcement of competition law. In the area of administrative litigation, the Court of Justice has ruled that tax deductions from corporate tax do not constitute State aid; has commented on the limits of the fight against gambling diseases in the European market and the scope of the environmental impact assessment for wind farms, or on European railway legislation and its application in the Spanish organisational system. Finally, in the context of social jurisdiction, the Court of Justice interprets the concept of working time in the case of the posting of workers. Finally, and by way of example, I comment on a judgment on the financial corrections to Spain for the mismanagement by Andalusia and Catalonia of the Agricultural Fund, which refers very broadly to the scope of the appeal before the Court of Justice of the judgments delivered at first instance by the General Court.*

Keywords: *Case-law, European Union law, Court of Justice of the European Union, Spanish law, Question referred for a preliminary ruling.*

I. Introducción

La integración europea puede caracterizarse por la evolutiva ampliación de competencias y por un compromiso más intenso en la protección de los derechos fundamentales. De hecho, la última etapa de la jurisprudencia del Tribunal de Justicia, a partir de la entrada en vigor del Tratado de Lisboa el 1 de diciembre de 2009, se ha centrado, especialmente, en la interpretación de la Carta de los derechos fundamentales de la Unión. Los logros de esta etapa se han visto oscurecidos hasta ahora por no haberse adherido la Unión Europea al Convenio Europeo de Derechos Humanos, tal como prevé el artículo 6.2 del Tratado de la Unión Europea.

El compromiso de España con la protección de los derechos fundamentales se ha manifestado con la entrada en vigor del Protocolo 16 del Convenio Europeo de Derechos Humanos de manera que, desde el 1 de noviembre de 2025, tanto el Tribunal Constitucional como el Tribunal Supremo pueden elevar consultas vinculantes sobre la interpretación de los derechos fundamentales al Tribunal Europeo de Derechos Humanos.

Hasta ahora solo 25 de los 47 Estados parte en el Convenio Europeo de Derechos Humanos han ratificado este Protocolo y se echa de menos que no lo hayan hecho por el momento Alemania o Italia en la Unión Europea ni el Reino Unido.

El Protocolo 16 pretende, como señala su preámbulo, «la ampliación de la competencia del Tribunal para emitir opiniones consultivas [que] reforzará la interacción entre el Tribunal y las autoridades nacionales, y consolidará así la puesta en práctica del Convenio, conforme al principio de subsidiariedad».

En realidad, se está dotando al sistema europeo de protección de derechos humanos de un mecanismo prejudicial que tendrá efectos análogos a los del reenvío prejudicial del Derecho de la Unión Europea. Creo que esta vía jurisdiccional producirá a medio y largo plazo una revolución extraordinaria y una mejora en la garantía de los derechos fundamentales para cuya interpretación los jueces españoles tenemos como referencia la Constitución, la Carta y el Convenio.

Por eso ha sido un paso muy importante para España la ratificación de este Protocolo y, sin lugar a dudas, la interpretación coordinada de la Constitución, de la Carta y del Convenio Europeo de Derechos Humanos cobra una nueva dimensión especialmente prometedora para una mayor garantía de los derechos de los ciudadanos en todas las jurisdicciones.

En todo caso, el Tribunal de Justicia sigue confirmando con contundencia el alcance del principio de primacía del Derecho de la Unión en relación con el nombramiento de los magistrados del Tribunal Supremo y del Tribunal Constitucional de Polonia. Lo ha hecho a través de dos sentencias, una

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por vía prejudicial y la otra como consecuencia de un recurso por incumplimiento presentado por la Comisión Europea contra Polonia.

En su *sentencia AW „T"*, C-225/22, el Tribunal de Justicia le contesta al Tribunal de Apelación de Cracovia, en un litigio en el que se cuestionaba la decisión del Tribunal Supremo polaco, cuya Sala de enjuiciamiento había sido considerada ilegítima tanto por el Tribunal Europeo de Derechos Humanos (sentencia de 8 de noviembre de 2021, Dolińska-Ficek y Ozimek c. Polonia, CE:ECHR:2021:1108JUD004986819) como por el Tribunal de Justicia de la Unión Europea (sentencia de 21 de diciembre de 2023, Krajowa Rada Sądownictwa (Continuidad en el desempeño del cargo de juez), C-718/21, EU:C:2023:1015).

Pues bien, el Tribunal de Justicia considera, en primer lugar, que «el artículo 19 TUE, apartado 1, párrafo segundo, a la luz del artículo 47 de la Carta, y el principio de primacía del Derecho de la Unión deben interpretarse en el sentido de que se oponen a la normativa de un Estado miembro y a la jurisprudencia del tribunal constitucional de este que implican que un juez nacional tenga obligación de atenerse a una resolución dictada por la sala de un órgano jurisdiccional superior cuando, basándose en una resolución del Tribunal de Justicia, dicho juez nacional constate que uno o varios jueces que forman parte de la referida sala no cumplen las exigencias de independencia, imparcialidad y establecimiento previo por la ley, a los efectos de dicha disposición, y cuando, además, el Derecho nacional le impida a dicho juez comprobar, basándose en los mismos elementos que se habían tenido en cuenta en la resolución del Tribunal de Justicia, la regularidad de la composición de la citada sala».

Y a continuación, el Tribunal de Justicia considera que la primacía del Derecho de la Unión debe ser garantizada por el Tribunal de Apelación de Cracovia que debe reputar la sentencia del Tribunal Supremo nula y sin efecto sin que se lo impidan los principios de cosa juzgada y de seguridad jurídica.

En segundo lugar, la *sentencia Comisión / Polonia (control ultra vires de la jurisprudencia del Tribunal de Justicia y primacía)*, C-448/23, de la Gran Sala constata el incumplimiento del Derecho de la Unión Europea como consecuencia de dos sentencias del Tribunal Constitucional polaco del 14 de julio de 2021 y del 7 de octubre de 2021 y por el nombramiento de tres de sus magistrados en 2015 y de su presidenta en 2016.

El Tribunal Constitucional polaco consideró en la sentencia de 14 de julio de 2021 que el Tribunal de Justicia había actuado *ultra vires* de sus competencias al adoptar el auto, de 8 de abril de 2020, Comisión / Polonia, C-791/19 R, EU:C:2020:277, que obligaba a suspender la aplicación de disposiciones legislativas relativas a medidas disciplinarias contra jueces. Era, por tanto y a juicio del Tribunal Constitucional, una actuación contraria a la Constitución polaca.

En la sentencia de 7 de octubre de 2021 el Tribunal Constitucional polaco declara contrarios a la Constitución, en primer lugar, el artículo 1, apartados primero y segundo, en relación con el artículo 4.3 TUE, porque los órganos de la Unión habían actuado al margen de las competencias atribuidas, al no asegurar que la Constitución fuese la norma suprema y al no poder actuar Polonia como Estado soberano; también es contrario a la Constitución, en segundo lugar, el artículo 19.1.2 TUE en la medida en que confiere a los tribunales nacionales ordinarios la competencia para inaplicar la Constitución de Polonia o para fundamentar sus decisiones que hubiesen sido anuladas por el Tribunal Constitucional; y, en tercer lugar, es contrario a la Constitución el artículo 19.1.2 en relación con el artículo 2 TUE, en cuanto que atribuye a la jurisdicción ordinaria el control de la legalidad del nombramiento de los jueces polacos.

En cuanto al nombramiento de los magistrados y de la presidenta del Tribunal Constitucional, el Parlamento polaco en su séptima legislatura había elegido a tres magistrados del Tribunal Constitucional; no obstante, en la octava legislatura, sin haber tomado posesión los elegidos, el Parlamento polaco eligió a otros tres nuevos magistrados que fueron nombrados por el presidente de la República y que tomaron posesión. Sobre tal nombramiento se había pronunciado el Tribunal Europeo de Derechos Humanos que consideró, en la sentencia de 7 de mayo de 2021, Xero Flor c. Polonia, CE:ECHR:2021:0507JUD000490718, que vulneraba el derecho a un tribunal establecido por la ley, por el hecho de que formaba parte del Tribunal Constitucional que enjuiciaba el litigio uno de los magistrados nombrados en la octava legislatura. Del mismo modo, la elección de la presidenta del Tribunal Constitucional se produjo con la contribución decisiva de los tres nuevos jueces.

Pues bien, el Tribunal de Justicia constata el incumplimiento en los tres supuestos denunciados por la Comisión Europea porque, en primer lugar, el Derecho de la Unión se aplica a todas las autoridades nacionales, incluidas las autoridades judiciales; es decir, el Derecho de la Unión obliga también al Tribunal Constitucional polaco.

En segundo lugar, a juicio del Tribunal de Justicia, la interpretación del Tribunal Constitucional polaco no puede oponerse a la interpretación que corresponde en exclusiva al Tribunal de Justicia para proporcionar a los jueces nacionales la interpretación definitiva y vinculante del Derecho de la Unión. Y esto determina la infracción del Derecho de la Unión.

En tercer lugar, el Tribunal de Justicia subraya su competencia para adoptar medidas cautelares que salvaguarden el derecho a una protección judicial efectiva ante un tribunal independiente en Polonia, tal como lo reconoce el artículo 19.1.2 TUE. Esta constatación supone que el Tribunal Constitucional polaco ha incumplido el Derecho de la Unión.

En cuarto lugar, el Tribunal de Justicia recuerda que cuando una jurisdicción nacional considere que la interpretación de una disposición de Derecho primario, hecha por el Tribunal de Justicia, desconozca las exigencias del artículo 4.2 TUE no puede válidamente decidir que el Tribunal de Justicia ha adoptado una decisión que desborda la esfera de su competencia ni rechazar su aplicación, sino que, en su caso, debería plantear una cuestión prejudicial para que sea el Tribunal de Justicia quien interprete qué incidencia puede tener en ese caso la identidad nacional del Estado que resulte inherente a sus estructuras fundamentales políticas y constitucionales (apartado 232).

En quinto lugar, el Tribunal de Justicia, apoyándose expresamente en la jurisprudencia del Tribunal Europeo de Derechos Humanos, constata que Polonia había incumplido sus obligaciones, derivadas del artículo 19.1.2 TUE, en la medida en que el Tribunal Constitucional no respondía a las exigencias de un tribunal independiente e imparcial, establecido por la ley, dadas las irregularidades en el nombramiento de tres de sus miembros. Y el mismo incumplimiento constata el Tribunal de Justicia sobre el nombramiento irregular de la presidenta del Tribunal Constitucional.

En definitiva, se trata de una sentencia demoledora que constata el incumplimiento por Polonia, por su Tribunal Constitucional, del Derecho de la Unión.

Debe subrayarse, no obstante, que en el recurso por incumplimiento se produce una aceptación expresa de tal incumplimiento por parte del Gobierno polaco: inicialmente se opone pero ya en la fase de dúplica, cuando soplan nuevos aires de respeto al Estado de Derecho, admite los motivos esgrimidos por la Comisión Europea (apartado 82; y apartados 99, 142, 159 y 259).

Con la habitual advertencia del carácter limitado de esta *Crónica*, la despliego en una primera parte general sobre los desarrollo del Derecho de la Unión por la jurisprudencia del Tribunal de Justicia y, ya en la segunda parte, con un intento de alcanzar una cierta exhaustividad, abordo las cuestiones más relevantes de la jurisprudencia del Tribunal de Justicia en la interpretación y aplicación del Derecho de la Unión en España.

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

En esta parte general es preciso recordar como un hito la primera respuesta de una cuestión prejudicial por el Tribunal General. Las otras sentencias relevantes se refieren a cuestiones como la discriminación étnica, el alcance del estatuto de la ciudadanía de la Unión en las legislaciones res-

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trictivas del matrimonio de las parejas del mismo sexo, el alcance del orden público europeo en el arbitraje deportivo, los límites que impone el Tratado constitutivo a la armonización en materia de salarios mínimos, la aplicación de la jornada de trabajo a jueces y fiscales, la indemnización de las víctimas de delitos, la liberalización de las comunicaciones electrónicas y, en fin, la interpretación de la armonización fiscal.

1. *La primera cuestión prejudicial que responde el Tribunal General con la sentencia* Gotek

El 9 de julio de 2025 es la fecha en la que el Tribunal General dicta la *sentencia Gotek*, T-534/24, la primera que responde una cuestión prejudicial y que en este caso había planteado desde Croacia el Tribunal de lo Contencioso-Administrativo de Osijek.

El 1 de octubre de 2024 había entrado en vigor la modificación de la competencia de los Tribunales de la Unión en materia prejudicial que atribuye al Tribunal General la respuesta en estas seis materias: el sistema común del impuesto sobre el valor añadido; los impuestos especiales; el código aduanero; la clasificación arancelaria de las mercancías en la nomenclatura combinada; la compensación y asistencia a los pasajeros en caso de denegación de embarque o de retraso o cancelación de los servicios de transporte; y el régimen de comercio de derechos de emisión de gases de efecto invernadero.

En la *sentencia Gotek* el Tribunal General interpreta la Directiva 2008/118/CE relativa al régimen general de los impuestos especiales en un caso en el que, de conformidad con el Derecho croata, se prevé el devengo de impuestos especiales sobre la base de una entrega ficticia de productos petrolíferos sujetos a impuestos especiales y que figura en facturas falsas. Los impuestos especiales se exigieron por el registro en la contabilidad de acontecimientos económicos sobre la base de facturas falsas, pese a que los productos energéticos sujetos a impuestos especiales no se habían puesto en circulación ni se habían entregado.

A juicio del Tribunal General, la Directiva 2008/118 establece cuatro supuestos de «despacho a consumo» de un producto sujeto a impuestos especiales, supuestos que se enumeran de manera exhaustiva y, fuera de los cuales, no puede considerarse que el producto haya sido despachado a consumo.

Por tanto y aun cuando las autoridades tributarias croatas invocaban su interés legítimo en adoptar las medidas adecuadas para proteger sus intereses financieros, el Tribunal General confirma que la lucha contra el fraude, la evasión fiscal y los eventuales abusos es un objetivo perseguido por la Directiva 2008/118, y llega a la conclusión de que la legislación croata que

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prevé el devengo de impuestos especiales sobre la base de una entrega ficticia de productos sujetos a impuestos especiales y que figura en facturas falsas es contraria al Derecho de la Unión.

Así pues, para la historia queda que el 9 de julio de 2025 el Tribunal General se estrenaba en la *sentencia Gotek* en la contestación de una cuestión prejudicial. Obviamente, la sentencia no parece que suponga una revolución jurisprudencial pero el objetivo de la reforma es liberar de trabajo al Tribunal de Justicia especialmente lastrado por la carga judicial.

2. *La discriminación por razón del origen étnico*

El Tribunal de Justicia en la formación de Gran Sala ha pronunciado la *sentencia Slagelse Almennyttige Boligselskab, Afdeling Schackenborgvænge*, C-417/23, referida a los planes de vivienda pública en barrios de dos ciudades danesas, Slagelse y Copenhague, calificados por la legislación como «zonas de gueto severo» y actualmente como «zonas en transformación», que están integrados mayoritariamente por «inmigrantes procedentes de países no occidentales y sus descendientes».

Estos planes reducían la vivienda pública, facilitaban la cesión a particulares y exigían a los inquilinos que para poder quedarse en sus viviendas tras tal cesión tuviesen unos niveles de renta y no hubiesen cometido una infracción penal en los últimos seis meses.

En cinco litigios relativos a la resolución de los contratos de arrendamiento de las viviendas, en tres casos de nacionales daneses, el Tribunal de Apelación de la Región Este le pide al Tribunal de Justicia que interprete la Directiva 2000/43/CE relativa a la aplicación del principio de igualdad de trato de las personas independientemente de su origen racial o étnico. Según revela en su Conclusiones la abogada general Tamara Ćapeta (ECLI:EU:C:2025:98), litigios similares se habían planteado ante otros tribunales daneses que suspendieron sus procedimientos a la espera de la respuesta del Tribunal de Justicia.

El Tribunal de Justicia examina, en primer lugar, si es aplicable la Directiva 2000/43/CE y comprueba que una actividad de arrendamiento de un bien inmueble realizada por una persona jurídica está comprendida en el concepto de «servicio», en el sentido del artículo 4.1 de la Directiva 2006/123 de servicios.

Argumenta el Tribunal de Justicia que, si bien la Directiva no se aplica a los «servicios sociales», en el caso del sistema danés la puesta a disposición de viviendas a cambio de una remuneración tiene naturaleza de actividad económica y, por tanto, no se encuadra en los «servicios sociales» relativos a la vivienda social.

En segundo lugar, el Tribunal de Justicia examina si se ha producido una discriminación directa. A tal efecto, el Tribunal de Justicia comprueba que, según su jurisprudencia, el concepto de «origen étnico» proviene de la idea de que los grupos sociales se identifican en especial por una comunidad de nacionalidad, de fe religiosa, de lengua, de origen cultural y tradicional y de entorno de vida.

De hecho, acogiendo la jurisprudencia del Tribunal Europeo de Derechos Humanos y de acuerdo con la Convención Internacional sobre la Eliminación de todas las Formas de Discriminación Racial, el Tribunal de Justicia llega a la conclusión de que la discriminación basada en el origen étnico de una persona es una forma de discriminación racial.

En fin, a juicio del Tribunal de Justicia, aun cuando ni el criterio de la nacionalidad de una persona ni el del país de su nacimiento sean, por sí solos, suficientes para servir de base a tal presunción de pertenencia a un grupo étnico, tanto uno como otro pueden tomarse en consideración, en conjunción con otros elementos, para apreciar la existencia de una discriminación directa basada en el «origen étnico», en el sentido de la Directiva 2000/43.

En este sentido, la categoría de «inmigrantes procedentes de países no occidentales y sus descendientes» a la que se refiere la Ley danesa de vivienda pública incluye a quienes no sean nacionales de Estados miembros de la Unión, Andorra, Islandia, Liechtenstein, Mónaco, Noruega, el Reino Unido de Gran Bretaña e Irlanda del Norte, San Marino, Suiza, el Estado de la Ciudad del Vaticano, Canadá, Estados Unidos, Australia y Nueva Zelanda. Y esto permitiría sospechar la existencia de una discriminación por razones étnicas.

Además, el Tribunal de Justicia comprueba si la diferencia de trato basada en el origen étnico tiene como efecto que determinadas personas sean tratadas de manera menos favorable que otras que se encuentran en una situación comparable. A tal efecto recuerda que en el caso concreto los residentes de las zonas de transformación parecen enfrentarse a un mayor riesgo de resolución anticipada de sus contratos de arrendamiento, mientras que los residentes de zonas de vivienda vulnerables, que se caracterizan por una situación socioeconómica problemática cuando menos análoga a la existente en las zonas de transformación, no están expuestos a tal riesgo.

Por último, el Tribunal de Justicia recuerda que en el caso de presunción de discriminación directa la carga de la prueba recae en el arrendador, en este caso el Ministerio de Asuntos Sociales, Vivienda y Tercera Edad.

A esta misma conclusión había llegado la abogada general Tamara Ćapeta para la que «una situación como la creada por la Ley de Vivienda

Pública en Dinamarca constituye una discriminación directa y no indirecta» (apartado 171).

No obstante, el Tribunal de Justicia examina, subsidiariamente, una eventual discriminación indirecta, es decir, si una disposición, criterio o práctica aparentemente neutros sitúan a personas de un origen racial o étnico concreto en desventaja particular con respecto a otras personas, salvo que dicha disposición, criterio o práctica pueda justificarse objetivamente con una finalidad legítima y los medios para la consecución de esta finalidad sean adecuados y necesarios.

El Tribunal de Justicia admite que la cohesión social y la integración pueden constituir razones imperiosas de interés general que justifiquen la adopción de estas medidas. Pero a continuación recuerda que en las zonas de vivienda vulnerables se hace frente a tales problemas, en su caso, con otros medios destinados a garantizar la cohesión social.

Y también el Tribunal de Justicia parece encontrar un límite insalvable para justificar las medidas de las autoridades danesas dada la interpretación que acoge del Tribunal Europeo de Derechos Humanos por lo que puntualiza en términos muy elocuentes: «cualquier persona que esté expuesta al riesgo de ser víctima de la lesión grave del derecho al respeto del domicilio que supone perder una vivienda debe, en principio, poder interesar el examen, por un tribunal independiente, de la proporcionalidad de tal medida a la luz de los principios pertinentes que se derivan del citado artículo 8 [CEDH]. Para apreciar la proporcionalidad de una medida de desalojo, han de tenerse en cuenta, en particular, las siguientes consideraciones. Si el domicilio se ha establecido legalmente, se vería mermada la legitimidad de cualquier medida de desalojo y, a la inversa, si se ha establecido ilegalmente, la persona de que se trate se halla en una posición menos sólida. Por otra parte, si no hay disponible un alojamiento de sustitución, la injerencia es más grave que si hay uno disponible, cuya idoneidad o no debe valorarse atendiendo, en concreto, a las necesidades particulares del individuo afectado».

Y concluye el Tribunal de Justicia: «el hecho de que, en el sistema danés de vivienda pública, las autoridades nacionales asuman la responsabilidad de realojar a las personas cuyos contratos de arrendamiento se resuelvan anticipadamente puede constituir uno de los elementos que corresponde al órgano jurisdiccional remitente tomar en consideración, entre otros, en el examen de la proporcionalidad de la normativa [danesa]».

Se trata de una cuestión muy compleja que prudentemente el Tribunal de Justicia prefiere examinar en todas sus aristas porque no hay duda de que la legislación danesa pretende resolver una cuestión muy preocupante y en la que los distintos aspectos, incluido el de la discriminación étnica, no resultan tan claros como a primera vista parece.

3. *El matrimonio de personas del mismo sexo que sean ciudadanas de la Unión*

La Gran Sala del Tribunal de Justicia adoptó la *sentencia Cupriak-Trojan y Trojan / Wojewoda Mazowiecki*, C-713/23, en respuesta a una cuestión prejudicial remitida por el Tribunal Supremo polaco de lo Contencioso-Administrativo sobre los derechos de dos ciudadanos de la Unión, Jakub Cupriak-Trojan y Mateusz Trojan, el primero con doble nacionalidad alemana y polaca; y el otro polaco, que habían contraído matrimonio en Berlín en 2018.

Les denegaron en el Registro civil polaco la transcripción del certificado del matrimonio contraído en Alemania para lo que las autoridades polacas se basaban en que el Derecho polaco no permite los matrimonios entre personas del mismo sexo, por lo que la transcripción del certificado de matrimonio extranjero violaría los principios fundamentales del ordenamiento jurídico de la República de Polonia.

Los tribunales polacos confirmaron la denegación y en casación, el Tribunal Supremo acude al Tribunal de Justicia preguntándole, tal como lo reformula el Tribunal en Luxemburgo, si los artículos 20 y 21.1 TFUE, en relación con los artículos 7 y 21.1 de la Carta, se oponen a la normativa de Polonia que, habida cuenta de que su Derecho no autoriza el matrimonio entre personas del mismo sexo, no permite reconocer el matrimonio entre dos nacionales del mismo sexo contraído legalmente en el ejercicio de su libertad de circulación y de residencia en Alemania, en el cual han desarrollado o consolidado una vida familiar, ni permite transcribir el certificado de matrimonio en el Registro Civil polaco.

En primer lugar, el Tribunal de Justicia se refiere al alcance del estatuto de la ciudadanía de la Unión en relación con los miembros de su familia que son nacionales de un tercer país. Para responder, el Tribunal de Justicia cita la sentencia de 5 de junio de 2018, Coman y otros, C-673/16, EU:C:2018:385, y puntualiza: «cuando, con ocasión de la residencia efectiva del ciudadano de la Unión en un Estado miembro distinto de aquel del que es nacional, en virtud y con observancia de los requisitos establecidos en la Directiva 2004/38, se desarrolla o se consolida una convivencia familiar en ese Estado miembro, el efecto útil de los derechos que el artículo 21 TFUE, apartado 1, confiere al ciudadano de la Unión de que se trate exige que la convivencia familiar que este ciudadano ha mantenido en dicho Estado miembro pueda continuar a su regreso al Estado miembro del que es nacional, lo que implica, en particular, la obligación para este último de conceder un derecho de residencia derivado al miembro de la familia en cuestión, nacional de un tercer país».

En segundo lugar, el Tribunal de Justicia aborda el supuesto del litigio, es decir, dos ciudadanos de la Unión que llevan una vida común en Alema-

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nia y que han contraído matrimonio con arreglo al Derecho alemán. A tal efecto, el Tribunal de Justicia subraya: «el efecto útil de los derechos que el artículo 21 TFUE, apartado 1, confiere a esos ciudadanos exige, **con mayor motivo**, que dichos ciudadanos puedan continuar en el Estado miembro del que son originarios la vida familiar que han desarrollado o consolidado en el Estado miembro de acogida, en particular mediante el matrimonio».

En tercer lugar, el Tribunal de Justicia ofrece un razonamiento muy poderoso sobre el alcance de la regulación europea: en el estado actual del Derecho de la Unión, las normas relativas al matrimonio son competencia de los Estados miembros, competencia que el Derecho de la Unión no puede restringir por lo que los Estados miembros disponen de la libertad de contemplar o no el matrimonio entre personas del mismo sexo en su Derecho nacional.

Ahora bien, aunque el Tribunal de Justicia admite que pueden establecerse restricciones y cabe tener en cuenta la identidad nacional y el orden público, llega a la conclusión de que, a falta de reconocimiento del matrimonio que dos ciudadanos de la Unión del mismo sexo han contraído con arreglo al Derecho de Alemania en el que esos ciudadanos han ejercido su libertad de circulación y de residencia, debido a que el Derecho de Polonia del que son nacionales, y en el que dichos ciudadanos desean continuar su vida privada y familiar, no autoriza el matrimonio entre personas del mismo sexo, es contrario a los derechos fundamentales que el artículo 7 de la Carta garantiza a las parejas formadas por personas del mismo sexo.

En cuarto lugar, los artículos 20 y 21.1 TFUE y los artículos 7 y 21.1 de la Carta tienen efecto directo, es decir, «son suficientes por sí solos y no deben ser precisados por disposiciones del Derecho de la Unión o del Derecho nacional para conferir a los particulares derechos invocables como tales».

4. *Los límites de orden público de la Unión al arbitraje deportivo*

La Gran Sala se ha pronunciado en la *sentencia Royal Football Club Seraing*, C-600/23, sobre los límites que impone el orden público del Derecho de la Unión a la aplicación en la Unión Europea de las resoluciones de los órganos arbitrales deportivos, en este caso del Tribunal de Arbitraje del Deporte (TAS) con sede en Suiza y bajo el control de los tribunales helvéticos.

El Tribunal de Justicia hace un repaso muy interesante de los principios esenciales del Derecho de la Unión.

En primer lugar, con estilo lapidario recuerda su jurisprudencia conforme a la cual: «La Unión es una Unión de Derecho, en la que el derecho a la tutela judicial efectiva reviste una importancia capital como garante de la protección del conjunto de los derechos que el Derecho de la Unión confiere a los justiciables» (apartado 69).

En segundo lugar, el Tribunal de Justicia exige que sean aplicables los derechos y libertades de la Unión, es decir, «El reconocimiento del derecho a la tutela judicial efectiva garantizado en el artículo 47 de la Carta, en un caso concreto, presupone, en particular, que la persona que lo invoque se ampare en derechos o libertades garantizados por el Derecho de la Unión» (apartado 71).

En tercer lugar, el Tribunal de Justicia no formula objeciones a la autonomía de las partes ni al arbitraje deportivo, de manera que «el ordenamiento jurídico instaurado por los Tratados no se opone, por principio, a que los particulares que forman parte de ese ordenamiento jurídico a consecuencia del ejercicio de una actividad económica en el territorio de la Unión sometan a un mecanismo de arbitraje las controversias que, en el contexto de dicho ejercicio, puedan enfrentarlos» (apartado 78).

No obstante y en cuarto lugar, el Tribunal de Justicia, invocando para ello la jurisprudencia del Tribunal de Estrasburgo, establece un límite que formula en estos términos: «desde el momento en que el mecanismo de arbitraje establecido o designado por un convenio de esa naturaleza esté llamado a aplicarse en todo o en una parte del territorio de la Unión, en controversias vinculadas al ejercicio de una actividad económica en dicho territorio, ese mecanismo debe concebirse y aplicarse de tal forma que garantice, por una parte, su compatibilidad con los principios que estructuran la configuración jurisdiccional de la Unión y, por otra parte, el respeto efectivo del orden público de la Unión» (apartado 82).

En quinto lugar, el Tribunal de Justicia identifica este orden público y considera que está integrado, por ejemplo, por los artículos 101 y 102 TFUE, es decir, la regulación de la Unión en materia de libre competencia, y por las libertades económicas fundamentales, la libre circulación de los trabajadores, la libre prestación de servicios y la libre circulación de capitales (artículos 45, 56 y 63 TFUE).

Por eso concluye el Tribunal de Justicia que, aun cuando el Derecho nacional no lo prevea, los tribunales belgas deben ejercer el control del laudo con el orden público de la Unión si no se llevó a cabo ese control por el tribunal suizo.

Es decir, el Tribunal de Justicia interpreta que el artículo 19.1.2 TUE, en relación con el artículo 267 TFUE y el artículo 47 de la Carta, se opone a que “se atribuya fuerza de cosa juzgada a un laudo del TAS, en el territorio de un Estado miembro, en las relaciones entre las partes de la controversia en cuyo contexto se dictó ese laudo, en caso de que esa controversia esté relacionada con la práctica de un deporte como actividad económica en el territorio de la Unión y de que la conformidad de dicho laudo con los principios y las disposiciones que forman parte del orden público de la Unión no haya sido controlada previamente, de manera efectiva, por un ór-

gano jurisdiccional de ese Estado miembro facultado para remitirse al Tribunal de Justicia con carácter prejudicial".

5. *La competencia de la Unión en materia de la armonización de los salarios mínimos adecuados*

Dinamarca, apoyada por Suecia, impugnó la 'constitucionalidad' de la Directiva (UE) 2022/2041 sobre unos salarios mínimos adecuados en la Unión Europea.

La impugnación se basaba, fundamentalmente, en la vulneración del reparto de competencias entre la Unión Europea y los Estados miembros en las materias reguladas por la Directiva y, en definitiva, Dinamarca aducía la falta de base jurídica en los Tratados constitutivos para adoptarla.

La primera conclusión del Tribunal de Justicia es que «del examen de la finalidad y del contenido de la Directiva impugnada se desprende que esta ha establecido, en particular, un marco para la fijación de salarios mínimos adecuados con el fin de mejorar las condiciones de vida y de trabajo en la Unión. Por consiguiente, esta Directiva está comprendida a primera vista en una o varias de las materias enumeradas en el artículo 153 TFUE, apartado 1, entre las que figuran las "condiciones de trabajo" mencionadas en la letra b) de dicha disposición, además de referirse a la materia de las "remuneraciones", lo cual podría estar comprendido en la exclusión de competencia prevista en el artículo 153 TFUE, apartado 5, relativa a las "remuneraciones"».

Ahora bien, el Tribunal de Justicia interpreta que en el estado actual del Derecho de la Unión se ha considerado adecuado «excluir la fijación de la cuantía de las remuneraciones de una armonización con arreglo a los artículos 151 TFUE y siguientes».

Es preciso subrayar que el Tribunal de Justicia constata que «en virtud de su artículo 51, apartado 2, la Carta no amplía el ámbito de aplicación del Derecho de la Unión más allá de las competencias de la Unión ni crea ninguna competencia o misión nuevas para la Unión ni modifica las competencias y misiones definidas en los Tratados».

Por esa razón el Tribunal de Justicia anula parte del artículo 5 de la Directiva, referido al procedimiento de fijación de salarios mínimos legales adecuados, es decir, anula dos frases: «incluidos los elementos a que se refiere el apartado 2» de los artículos 5.1 y 5.2 de la Directiva y «siempre que la aplicación de ese mecanismo no dé lugar a una disminución del salario mínimo legal» del artículo 5.3 de la Directiva.

En definitiva, el Tribunal de Justicia impone un límite claro que había sido traspasado indebidamente por la Directiva que, por lo demás y salvo en esta cuestión tan particular, es válida en los demás elementos.

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6. *Las obligaciones de los operadores de Internet en la publicación de datos personales sensibles*

La Gran Sala se ha pronunciado en la *sentencia Russmedia Digital*, C-492/23, sobre las obligaciones de un prestador de servicios de la sociedad de la información, una empresa rumana que publica anuncios de compraventa y de servicios.

En el litigio, que se ventilaba ante el Tribunal Superior de Cluj, una persona no identificada publicó un anuncio falso y lesivo de otra persona que ofrecía servicios sexuales; aun cuando Russmedia retiró el anuncio, este había sido copiado en otras páginas web. La persona afectada reclamaba a Russmedia una indemnización por el tratamiento ilícito de sus datos personales y por la vulneración de su derecho a la imagen, al honor y a la intimidad.

El Tribunal de Justicia interpreta tanto el Reglamento General de Protección de Datos (RGPD) como la Directiva sobre el comercio electrónico y establece que las disposiciones de la Directiva no deben interferir en el régimen del Reglamento.

En primer lugar, la Gran Sala recuerda que su jurisprudencia establece un concepto amplio de «responsable del tratamiento», es decir, la persona física o jurídica, autoridad pública, servicio u otro organismo que, solo o junto con otros, determina los fines y medios del tratamiento de datos personales. Este concepto pretende, de conformidad con el RGPD, garantizar una protección eficaz de las libertades y de los derechos fundamentales de las personas físicas y un elevado nivel de protección del derecho de toda persona a la protección de los datos personales que le conciernan.

En el caso concreto el Tribunal de Justicia deduce que la empresa Russmedia es responsable del tratamiento de los datos personales contenidos en el anuncio publicado en el mercado en línea al haber influido, en consideración a sus propios fines, en la publicación en Internet de sus datos personales, participando de ese modo en la determinación de los fines de dicha publicación y, por tanto, del tratamiento controvertido.

En segundo lugar, el Tribunal de Justicia determina cuáles son las tres obligaciones precisas que se aplican a la responsable del tratamiento, Russmedia, a saber, identificar los anuncios que contengan datos sensibles, verificar si el usuario anunciante es la persona cuyos datos sensibles figuran en el anuncio y, de no ser así, denegar su publicación, a menos que dicho usuario anunciante pueda demostrar que el interesado ha dado su consentimiento explícito para que los datos en cuestión se publiquen en ese mercado en línea.

Por último, el Tribunal de Justicia considera que Russmedia, es decir, el operador de un mercado en línea, como responsable del tratamiento de los

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datos personales contenidos en anuncios publicados en su mercado en línea, está obligado a aplicar medidas de seguridad técnicas y organizativas apropiadas para impedir que anuncios que se hayan publicado en ese mercado y que contengan datos sensibles sean copiados e ilícitamente publicados en otros sitios web.

7. *El tiempo de trabajo de jueces y fiscales (refuerzos y guardias)*

Tanto los jueces como los fiscales tienen un estatuto especial que a veces plantea problemas en cuanto a su desempeño laboral y a sus derechos sociales. El Tribunal de Justicia se ha pronunciado sobre el tiempo de trabajo respecto de los refuerzos de los jueces y de las guardias de los fiscales.

La *sentencia Tribunal de Distrito de Galaţi*, C-272/24, tiene su origen en una cuestión prejudicial del Tribunal de Apelación de Bucarest sobre la Directiva 2003/88/CE relativa a determinados aspectos de la ordenación del tiempo de trabajo. Se planteaba si la compensación de las horas extraordinarias con tiempo de descanso era conforme con la Directiva.

El Tribunal de Justicia recuerda su jurisprudencia sobre la independencia económica de los jueces y, en particular, señala que «una medida legislativa que, como excepción a la normativa nacional y en circunstancias de falta de personal, prevé que la carga de trabajo adicional de un juez derivada de la realización de tareas vinculadas a una plaza de juez vacante en un órgano jurisdiccional sea objeto no de una remuneración económica sino de la concesión de un descanso compensatorio, [debe] cumplir una serie de requisitos para que pueda considerarse que respeta el principio de independencia judicial».

En primer lugar, tal medida debe estar prevista por la ley y, además, las modalidades de retribución de los jueces, introducidas por tal medida, deben ser objetivas, previsibles y transparentes.

En segundo lugar, debe estar justificada por un objetivo de interés general, como las exigencias imperativas de supresión de un déficit público excesivo, en el sentido del artículo 126.1 TFUE.

En tercer lugar, debe ser proporcionada, es decir, debe ser adecuada para garantizar la realización del objetivo de interés general perseguido, limitarse a lo estrictamente necesario para alcanzar ese objetivo y no ser desproporcionada respecto a él, lo que implica ponderar la importancia de este último y la gravedad de la injerencia en el principio de independencia judicial.

En cuarto lugar, debe respetar el principio de independencia económica, es decir, «la preservación de la independencia de los jueces exige que, a pesar de que se les aplique una medida de restricción presupuestaria, y aun cuando tal medida esté vinculada a la existencia de una grave crisis

económica, social y financiera, el nivel de la retribución de los jueces esté siempre en consonancia con la importancia de las funciones que desempeñan, a fin de que queden protegidos frente a injerencias o presiones externas que puedan poner en peligro su independencia a la hora de juzgar o que puedan influir en sus decisiones».

Por último, tal medida debe poder ser objeto de un control judicial efectivo.

Ahora bien, el Tribunal de Justicia no parece ver un impedimento a la regulación aplicable a los jueces a la vista de todos los datos aportados, en particular el *Cuadro de indicadores de la justicia en la Unión de 2024* de la Comisión Europea, conforme al cual un juez rumano percibía, al inicio de su carrera, un salario medio equivalente a 2,9 veces el salario bruto medio anual en Rumanía.

En la *sentencia Ramavić*, C-373/24, el Tribunal de Justicia se refiere a la consideración de las guardias de los fiscales como tiempo de trabajo.

Ante el Tribunal Municipal croata de Pula una fiscal solicitaba el pago de las horas prestadas durante períodos de guardia en su lugar de trabajo y durante períodos de guardia en régimen de disponibilidad no presencial.

El Tribunal de Justicia interpreta la Directiva 2003/88/CE sobre ordenación del tiempo de trabajo y la Directiva 89/391/CEE relativa a la mejora de la seguridad y de la salud de los trabajadores en el trabajo.

La primera cuestión que contesta es si a los fiscales se les aplican estas dos Directiva. El Tribunal de Justicia es directo y responde afirmativamente en la medida en que los fiscales responden al concepto autónomo de trabajador conforme al cual «la característica esencial de la relación laboral radica en la circunstancia de que una persona realice, durante cierto tiempo, en favor de otra y bajo la dirección de esta, determinadas prestaciones a cambio de las cuales percibe una retribución. Se deriva de lo anterior que la relación laboral supone que se dé una relación de subordinación entre el trabajador y su empresario, cuya existencia debe apreciarse en cada caso concreto, en función del conjunto de hechos y circunstancias que caractericen a las relaciones existentes entre las partes».

La segunda cuestión tiene que ver con la aplicación de la Directiva 89/391/CEE para promover la mejora de la seguridad y de la salud de los trabajadores en el trabajo.

El Tribunal de Justicia recuerda, por una parte, que esta Directiva no es de aplicación cuando se opongan a ello de manera concluyente las particularidades inherentes a determinadas actividades específicas de la función pública, por ejemplo, en las fuerzas armadas o la policía, o a determinadas actividades específicas en los servicios de protección civil; aunque la propia Directiva precisa que, en tal caso, la seguridad y la salud de los trabajadores deberán quedar aseguradas en la medida de lo posible, habida cuenta de

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los objetivos de la Directiva. Y, por otra parte, el Tribunal de Justicia considera que «cuando las actividades de los fiscales se ejercen en condiciones normales, pueden estar sujetas a una planificación del tiempo de trabajo que respete las exigencias impuestas por la Directiva 2003/88».

La tercera cuestión se refiere al concepto de tiempo de trabajo y su aplicación a las guardias, tal como se regula en la Directiva 2003/88/CE sobre la ordenación del tiempo de trabajo.

Por una parte, las guardias realizadas en el lugar de trabajo deben considerase tiempo de trabajo dado que «el trabajador, que ha de permanecer en su lugar de trabajo a disposición inmediata del empresario, debe permanecer alejado de su entorno social y familiar y goza de poca libertad para administrar el tiempo durante el cual no se requieren sus servicios profesionales».

Por otra parte, las guardias en régimen de disponibilidad no presencial, «deben calificarse igualmente, en su totalidad, de "tiempo de trabajo" en el sentido de la Directiva 2003/88 cuando, habida cuenta de la incidencia objetiva y considerable de las limitaciones impuestas al trabajador en lo que atañe a la posibilidad de dedicarse a sus intereses personales y sociales, se distingue de un período durante el cual el trabajador solo debe estar a disposición de su empresario para que este pueda ponerse en contacto con él».

De hecho, el Tribunal de Justicia llega a la conclusión de que la fiscal croata que solicitaba el abono de las guardias está obligada, durante todos sus períodos de guardia, a estar preparada, en todo momento, para realizar tareas y funciones equivalentes a las que realiza durante las horas normales de trabajo en el lugar de trabajo; es decir, parece que esta no puede efectivamente, durante un período de guardia, alejarse de su lugar de trabajo o, durante un período de guardia en régimen de disponibilidad no presencial, alejarse de su domicilio, y dedicarse a sus propios intereses.

8. *La indemnización justa y adecuada de las víctimas de delitos (daños físicos y psíquicos)*

Con la *sentencia Criminal Injuries Compensation Tribunal y otros*, C-284/24, el Tribunal de Justicia responde a la High Court irlandesa que le había planteado una cuestión relativa a una persona, nacida en España y residente en Irlanda, que había sido víctima de una agresión criminal violenta cometida por un grupo de personas delante de su domicilio en Dublín.

La duda del tribunal superior irlandés se refería a la interpretación de la Directiva 2004/80/CE sobre indemnización a las víctimas de delitos que exige que las legislaciones nacionales aseguren a las víctimas una indemnización justa y adecuada.

En este caso y conforme al Derecho irlandés, la víctima tenía derecho a 645,65 euros por una lesión grave en un ojo que le había causado una discapacidad visual permanente que el tribunal de instancia desglosaba así: 44,20 euros por la sustitución de su permiso de conducción, 339 euros por la sustitución de sus gafas, 28,82 euros por la compra de medicamentos, 100 euros en concepto de gastos de hospitalización y 133,63 euros por gastos de desplazamiento.

El Tribunal de Justicia recuerda su jurisprudencia anterior sobre la Directiva 2004/80 y explica que, para poder calificarse de «justa y adecuada», una indemnización debe ser fijada teniendo en cuenta la gravedad de las consecuencias que para las víctimas tiene el delito cometido y, por lo tanto, debe suponer una contribución adecuada a la reparación del daño material y moral sufrido.

El Tribunal de Justicia invoca el artículo 3.1 de la Carta para afirmar que la integridad de la persona comprende tanto la vertiente física como la psíquica.

Por tanto y en este caso, el Tribunal de Justicia comprueba que la agresión criminal violenta sufrida puede tener consecuencias graves, materializadas tanto en un daño material como en un daño moral, en particular debido al dolor y al sufrimiento padecidos, lo cual debe reflejarse en el importe concedido.

Concluye el Tribunal de Justicia que la legislación irlandesa, tan rácana en el reconocimiento de la indemnización por daños psíquicos, es contraria a la Directiva.

9. *La progresiva liberalización de las comunicaciones electrónicas: la imposición de obligaciones a las empresas dominantes*

La *sentencia Lolach*, C-19/23, nos ilustra sobre el alcance de las obligaciones de las empresas de comunicaciones dominantes.

Desde Alemania el Tribunal Contencioso-administrativo de Colonia le pregunta al Tribunal de Justicia por la interpretación de la Directiva (UE) 2018/1972 que aprueba el código europeo de las comunicaciones electrónicas en lo que se refiere a la obligación que el organismo alemán regulador del sector de las comunicaciones electrónicas (BNetzA) impone a la empresa Telekom Deutschland de conceder a otros operadores el acceso a determinados activos de obra civil.

La Directiva se refiere a las obligaciones de acceso que se pueden imponer a empresas con peso significativo en el mercado y el artículo 71 describe la obligación de acceso a la obra civil en estos términos: «una autoridad nacional de reglamentación podrá imponer a las empresas la obligación de satisfacer las solicitudes razonables de acceso y de uso de obra civil, incluidos, pero sin limitarse a ellos, edificios o accesos a edificios, hilos de edificios incluido el cableado, antenas, torres y otras estructuras de soporte, postes, mástiles, conductos, tuberías, cámaras de inspección, bocas de inspección y arma-

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rios, en situaciones en las que tras haber considerado el análisis del mercado, la autoridad nacional de reglamentación llegue a la conclusión de que la denegación de acceso o el acceso otorgado en virtud de términos y condiciones no razonables de efecto análogo obstaculizarían el desarrollo de un mercado competitivo sostenible y no responderían al interés del usuario final».

El Tribunal de Justicia reformula la cuestión y se propone saber si, conforme al artículo 72 de la Directiva 2018/1972, la autoridad nacional de reglamentación debe examinar únicamente si la no imposición de esta obligación obstaculizaría el desarrollo de un mercado competitivo sostenible o no respondería al interés del usuario final, o si puede tener en cuenta los demás objetivos enumerados en el artículo 3 de la Directiva.

A tal efecto, el Tribunal de Justicia observa cómo en la Directiva las obligaciones de acceso impuestas a las empresas con peso significativo en el mercado persiguen los objetivos enumerados en su artículo 3; es decir, por una parte, la intervención reguladora *ex ante* pretende beneficiar a los usuarios finales, haciendo que los mercados minoristas sean realmente competitivos con carácter sostenible; pero, por otra parte, otro de los objetivos del legislador de la Unión es reducir progresivamente esta intervención, conforme avance el desarrollo de la competencia en los mercados, para conseguir, en último término, que las comunicaciones electrónicas se rijan tan solo por el Derecho de la competencia.

Por eso, en su respuesta el Tribunal de Justicia considera que los criterios de imposición de una obligación de acceso relativos al «desarrollo de un mercado competitivo sostenible» y al «interés del usuario final» tienen carácter acumulativo.

Este es el criterio que apuntaba en su Conclusiones referidas a este mismo supuesto (ECLI:EU:C:2025:359) el Abogado General Manuel Campos para quien: “las obligaciones de acceso a las que alude el artículo 72, apartado 2, del CECE podrían, de suyo, justificarse por los objetivos del artículo 3” (apartado 48).

Por tanto, a juicio del Tribunal de Justicia, “una autoridad nacional de reglamentación no puede limitarse a declarar que una medida basada en el artículo 72 de la Directiva 2018/1972 es proporcionada y necesaria para promover la competencia y los intereses de los usuarios finales, sino que debe apreciar si tal es el caso a la luz del conjunto de objetivos contemplados en el artículo 3 de esa Directiva”.

10. *La interpretación de la armonización fiscal*

La armonización de las legislaciones fiscales en la Unión Europea justifica una amplia jurisprudencia del Tribunal de Justicia que sirve de referen-

cia para los tribunales nacionales en un ámbito tan especializado y de tanta trascendencia.

El caso del Impuesto sobre el Valor Añadido (IVA) es muy significativo como se encarga de explicarlo el Tribunal de Justicia en relación con dos aspectos transversales como las medidas cautelares y la prueba. Asimismo, doy cuenta de dos asuntos sobre la libre circulación de capitales y los impuestos directos aplicables que afectan, por una parte al mercado interior europeo aplicable a los 27 Estos miembros (en este caso, entre Portugal y España), y, por otra parte, al Espacio Económico Europeo (EEE) (en el caso concreto entre Alemania y Liechtenstein), que supone una ampliación a Noruega, Islandia y Liechtenstein —y por vía convencional a Suiza—, de las libertades económicas fundamentales y de la armonización legislativa del mercado de la Unión.

a) La tutela judicial efectiva en la adopción de las medidas cautelares

El Tribunal de Justicia ha adoptado la *sentencia Ati-19*, C-605/23, donde aborda el efecto directo del derecho a la tutela judicial efectiva tal como lo reconoce el artículo 47 de la Carta y lo aplica en materia tributaria, más en particular en el IVA, a la hora de adoptar medidas judiciales cautelares.

El litigio había llegado a un tribunal contencioso-administrativo búlgaro en un litigio que enfrentaba a Ati-19, una mercantil que gestiona establecimientos de comida rápida, con la Agencia tributaria de Bulgaria, que había sido inspeccionada por inspectores de incógnito que habían comprobado que en uno de sus establecimientos no se daba el tique de venta y que también habían constatado, ahora identificados como inspectores, que ese día se habían registrado ventas por unos 167 euros, mientras que el efectivo que se encontraba en dicha caja ascendía a unos 293 euros.

A la vista de estas circunstancias las autoridades fiscales búlgaras sancionaron a la empresa con una multa de unos 500 euros y precintaron el local.

El Tribunal búlgaro tenía dudas sobre el alcance de las medidas cautelares que podía adoptar y le planteó al Tribunal de Justicia si la legislación procesal nacional podía limitar el enjuiciamiento cautelar judicial únicamente a la existencia de perjuicios graves o difícilmente reparables que una ejecución provisional podría causar.

El Tribunal de Justicia comprueba que en este caso era aplicable la Directiva 2006/112/CE relativa al sistema común del impuesto sobre el valor añadido y, por tanto, también resultaba de aplicación la Carta, en particular, su artículo 47 sobre tutela judicial efectiva. De hecho, el Tribunal de Justicia vuelve a recordar: «las disposiciones del artículo 47 de la Carta tienen efecto directo».

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En primer lugar, el Tribunal de Justicia reconoce que «el principio de interpretación conforme del Derecho nacional con el Derecho de la Unión exige que los órganos jurisdiccionales nacionales, respetando, en particular, la prohibición de interpretación *contra legem* del Derecho nacional, hagan todo lo que sea de su competencia, tomando en consideración la totalidad de su Derecho interno y aplicando los métodos de interpretación reconocidos por este, a fin de garantizar la plena efectividad de la disposición del Derecho de la Unión de que se trate y alcanzar una solución conforme con el objetivo perseguido por esta».

Y, en segundo lugar, también recuerda el Tribunal de Justicia, el principio de primacía del Derecho de la Unión significa que «cuando no resulte posible interpretar la normativa nacional conforme a las exigencias del Derecho de la Unión, el órgano jurisdiccional nacional encargado de aplicar, en el ámbito de su competencia, las disposiciones de dicho Derecho está obligado, como órgano de un Estado miembro, a garantizar la plena eficacia de tales disposiciones, dejando inaplicada si fuera necesario, y por su propia iniciativa, cualquier disposición del Derecho nacional contraria a una disposición del Derecho de la Unión con efecto directo en el litigio de que conoce».

Esto quiere decir, en el caso enjuiciado, que el juez búlgaro debe estar facultado para adoptar medidas provisionales que garanticen la plena eficacia de la resolución judicial que deba recaer acerca de la existencia y el alcance de los derechos invocados sobre la base del Derecho de la Unión.

Más en particular y en materia tributaria, el Tribunal de Justicia puntualiza que «las medidas adoptadas en virtud del artículo 273 de la Directiva del IVA no deben ir más allá de lo que sea necesario para alcanzar los objetivos contemplados en ese artículo 273 y no deben cuestionar la neutralidad del IVA ni vulnerar los derechos fundamentales reconocidos por la Carta, entre ellos, en particular, la libertad de empresa».

b) Las pruebas de la entrega intracomunitaria de bienes para la exención del IVA

La *sentencia FLO VENEER*, C-639/24, se refiere a los elementos de prueba de la existencia de una entrega intracomunitaria a los efectos del IVA. En respuesta a una cuestión prejudicial de un tribunal croata que conocía de un litigio sobre la exención del IVA que enfrentaba a una empresa maderera croata que había vendido troncos de roble a una empresa establecida en Eslovenia, el Tribunal de Justicia interpreta la legislación europea que aplica una presunción pero no enumera de manera exhaustiva los elementos de prueba necesarios para acreditar la existencia de una entrega intracomunitaria a efectos del IVA.

El Tribunal de Justicia considera que el artículo 138.1 de la Directiva 2006/112/CE del IVA no supedita la concesión de las exenciones que establece al hecho de que el vendedor disponga de elementos de prueba específicos.

De acuerdo con el Reglamento de Ejecución de aplicación de la Directiva, la presunción se estableció con el fin de facilitar la práctica de la prueba respecto de la exención relativa a las entregas intracomunitarias, y ello en interés de las empresas y de las administraciones tributarias, sin excluir, no obstante, la posibilidad de presentar pruebas distintas de las establecidas a efectos de dicha presunción.

Los requisitos formales no pueden poner en tela de juicio el derecho del vendedor a la exención del IVA si se cumplen los requisitos materiales de una entrega intracomunitaria.

El principio de neutralidad fiscal exige que se conceda la exención del IVA si se cumplen los requisitos materiales, aun cuando los sujetos pasivos hayan omitido determinados requisitos formales.

A juicio del Tribunal de Justicia, solo existen dos supuestos en los que el incumplimiento de un requisito formal puede conllevar la pérdida del derecho a la exención del IVA. Por una parte, un sujeto pasivo que ha participado deliberadamente en un fraude fiscal y ha puesto en peligro el funcionamiento del sistema común del IVA no puede invocar el principio de neutralidad fiscal a efectos de la exención del IVA. Por otra parte, el incumplimiento de un requisito formal puede llevar a que se deniegue la exención del IVA en caso de que dicho incumplimiento tenga como efecto impedir la aportación de la prueba cierta de que se han cumplido los requisitos materiales.

Por tanto, a efectos de la exención del IVA, las autoridades tributarias deben tener debidamente en cuenta todos los elementos que obren en su poder, a fin de examinar si dichos documentos pueden justificar, en su caso, la existencia verosímil de una entrega intracomunitaria efectiva.

c) Impuestos y libre circulación de capitales en el mercado único y en el Espacio Económico Europeo

Traigo a colación dos sentencias que tratan de los límites que impone la libertad de capitales al poder tributario de las autoridades nacionales: en un caso se refiere al mercado único europeo, que se extiende a Portugal y España, y en el otro afecta al Espacio Económico Europeo, que implica a Alemania y Liechtenstein.

Por una parte, la *sentencia Santander Renta Variable España Pensiones*, C-525/24, versa sobre el Fondo de Pensiones Santander con residencia fiscal en España que había percibido dividendos por participaciones en

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sociedades residentes en Portugal que fueron gravados con el 25% del impuesto de sociedades y fueron objeto de retención. El Fondo de pensiones invocaba un convenio para evitar la doble imposición, celebrado entre España y Portugal, y solicitaba que la retención fuese solo de 15%.

El Tribunal de Justicia interpreta el artículo 63.1 TFUE que prohíbe las restricciones a los movimientos de capitales lo que incluye las que pueden disuadir de realizar inversiones en la Unión Europea.

El carácter disuasorio de las medidas puede referirse no solo a los requisitos materiales para poder disfrutar de una ventaja fiscal, sino también a las pruebas que a tal fin deben aportar los contribuyentes no residentes.

Del examen de la legislación fiscal portuguesa resulta que los fondos de pensiones no residentes están sujetos, para poder acogerse a la exención del impuesto sobre sociedades o para obtener su reembolso, a cargas administrativas a las que no están sujetos los fondos de pensiones residentes lo que constituye una discriminación contraria a la libre circulación de capitales.

Sin embargo, la necesidad de garantizar la eficacia de los controles fiscales y de la recaudación eficaz del impuesto constituyen razones imperiosas de interés general que pueden justificar una restricción a la libre circulación de capitales, siempre que sea adecuada para garantizar, de forma coherente y sistemática, la realización de dichos objetivos y no vaya más allá de lo necesario para alcanzarlos.

El Tribunal de Justicia admite que para acogerse a la exención del impuesto sobre sociedades o para obtener su devolución, el fondo de pensiones no residente debe presentar una declaración confirmada y certificada por las autoridades encargadas de su supervisión en su Estado miembro de residencia que acredite, en primer lugar, que garantiza exclusivamente el pago de prestaciones de jubilación por vejez o invalidez, supervivencia, prejubilación o jubilación anticipada, prestaciones sanitarias posteriores al empleo y, cuando sean complementarios y accesorios a estas prestaciones, la concesión de subsidios por defunción; en segundo lugar, que está gestionado por fondos de pensiones de empleo a los que se aplica la Directiva 2003/41 y, en tercer lugar, que es el beneficiario efectivo de los rendimientos.

El Tribunal de Justicia distingue dos supuestos: la exención inmediata de la retención en la fuente correspondiente al impuesto sobre sociedades y la consiguiente devolución de la retención practicada en la fuente.

Por lo que se refiere a la exención de la retención, el Tribunal de Justicia considera que para acogerse a la exención debe acreditarse el cumplimiento de los requisitos establecidos en la legislación portuguesa ante la entidad que tiene la obligación de practicar dicha retención en la fuente, antes de la fecha de puesta a disposición de los rendimientos a los fondos de pensiones no residentes. Las entidades que tienen la obligación de practicar

la retención en la fuente son sociedades residentes portuguesas de las que los fondos de pensiones no residentes poseen participaciones y son las que deben poder verificar que el fondo de pensiones *Santander* cumple los requisitos materiales de exención de la retención en la fuente.

En cuanto a la devolución de la retención, la exigencia de presentar una declaración emitida por las autoridades españolas encargadas de la supervisión del fondo de pensiones no residente, como único medio de prueba, excede de lo necesario para alcanzar los objetivos perseguidos porque la Administración tributaria portuguesa puede utilizar los mecanismos de asistencia mutua existentes entre las autoridades de los Estados miembros, que son suficientes para permitir que el Estado miembro de origen de los dividendos efectúe un control de la veracidad de los elementos aportados por los fondos de pensiones no residentes que soliciten la devolución de la retención en origen.

Por otra parte, la *sentencia Familienstiftung*, C-142/24, aborda la cuestión de los efectos de la fiscalidad en la libre circulación de capitales en el Espacio Económico Europeo.

Un tribunal alemán le plantea al Tribunal de Justicia si cabe la discriminación de las fundaciones familiares a los efectos del impuesto de donaciones por el hecho de que no estén constituidas en Alemania sino, en este caso, en Liechtenstein, que forma parte del Espacio Económico Europeo (EEE).

El Tribunal de Justicia razona que, si bien las restricciones a la libre circulación de capitales entre nacionales de Estados del EEE deben apreciarse a la luz del artículo 40 y del anexo XII de dicho Acuerdo, estas disposiciones revisten el mismo alcance jurídico que lo dispuesto en el artículo 63 TFUE.

El trato fiscal dispensado a las donaciones, ya sean estas cantidades de dinero, bienes inmuebles o bienes muebles, está comprendido en el ámbito de aplicación de las disposiciones del Tratado FUE relativas a los movimientos de capitales, salvo en los casos en que sus elementos constitutivos se encuentren situados en el interior de un solo Estado miembro.

El Tribunal de Justicia constata la existencia de una restricción a la libre circulación de capitales pero las diferencias de trato permitidas no deben constituir un medio de discriminación arbitraria ni una restricción encubierta y solo pueden autorizarse si afectan a situaciones que no sean objetivamente comparables o, en caso contrario, resulten justificadas por razones imperiosas de interés general y sean proporcionadas a dicho objetivo, lo que implica que sean adecuadas para garantizar, de forma coherente y sistemática, la realización del objetivo que persiguen y no vayan más allá de lo necesario para alcanzar dicho objetivo.

Por una parte, el Tribunal de Justicia considera que, por lo que se refiere a la tributación alemana por la transmisión a una fundación familiar de los bienes de la persona residente que constituye dicha fundación, la situa-

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ción de las fundaciones residentes es objetivamente comparable con la de las fundaciones no residentes.

Por otra parte, el Tribunal de Justicia constata que, al prever que únicamente se puedan beneficiar de la ventaja del privilegio de los grupos impositivos las fundaciones familiares residentes, que quedan sujetas posteriormente al impuesto sucesorio sustitutivo, la configuración de dicha ventaja refleja una lógica simétrica, ya que esa ventaja tiene como contrapartida, por lo que se refiere al mismo contribuyente y a la misma tributación, un gravamen fiscal determinado.

En fin, el Tribunal de Justicia se refiere a la legislación alemana que aplica a las fundaciones residentes un impuesto sustitutivo sobre las sucesiones que se devenga por intervalos de treinta años computados desde la fecha de la primera transmisión patrimonial. Por lo que, dado que Alemania no tiene potestad impositiva sobre las fundaciones familiares no residentes, limitar la concesión de un grupo impositivo más favorable a situaciones en las que la transmisión de bienes a una fundación familiar puede dar lugar a una tributación posterior en virtud del impuesto sucesorio sustitutivo se manifiesta proporcionado al objetivo de reducir la carga fiscal que recae sobre una sucesión que comprende patrimonio transmitido entre parientes cercanos.

III. Segunda parte. La jurisprudencia europea provocada desde España y sus efectos

El Tribunal de Justicia ha abordado en numerosas sentencias las cuestiones planteadas por los jueces españoles de todas las jurisdicciones. En efecto, desde la jurisdicción penal el Tribunal de Justicia se pronuncia sobre el alcance del principio *non bis in idem* en el enjuiciamiento de actos terroristas en Francia y en España. La jurisdicción civil ha seguido plantando al Tribunal de Justicia numerosas cuestiones sobre la responsabilidad del Banco Santander como consecuencia de la resolución del Banco Popular; también los tribunales civiles y mercantiles han recibido respuestas del Tribunal de Justicia en lo que se refiere a la aplicación privada del Derecho de la competencia, la buena fe en materia de marcas y las tendencias de la moda en los dibujos y diseños comunitarios, el control de las cláusulas abusivas en los procesos monitorios y la indemnización de las mascotas facturadas como equipaje en los vuelos comerciales. Para la jurisdicción contencioso-administrativa ha sido relevante la actividad del Tribunal de Justicia en relación con la legislación de lucha contra las ludopatías, la evaluación del impacto ambiental y los parques eólicos, el valor en aduana de las mercancías o la legislación ferroviaria europea. La jurisdicción social se ha visto atendida en la determinación del tiempo de trabajo cuando los tra-

bajadores tienen que desplazarse. En fin, en un asunto referido a la gestión del Fondo agrícola en Andalucía y Cataluña el Tribunal de Justicia delimita claramente el alcance de la casación contra las sentencias dictadas en instancia por el Tribunal General.

1. *La jurisdicción penal y el non bis in idem en los enjuiciamientos de terroristas en Francia y en España*

La *sentencia MSIG*, C-802/23, aborda la cuestión de la colaboración judicial en materia de terrorismo. El litigio tiene su origen en el enjuiciamiento de una terrorista (la etarra Soledad Iparraguirre, alias *Duquesa*) que había sido juzgada y condenada en Francia y que ahora era juzgada por la Audiencia Nacional donde se la acusaba de ser la autora de un atentado terrorista perpetrado en Oviedo el 21 de julio de 1997.

La Sala de lo Penal de la Audiencia Nacional remitió a Luxemburgo una cuestión prejudicial donde le pedía al Tribunal de Justicia que aclarase «si, en el presente caso y según las circunstancias descritas y las razones fácticas y jurídicas que se tienen en cuenta y que dan lugar a las distintas condenas en Francia a [Soledad Iparaguirre] se produce una situación de "bis in ídem" del art 50 de la CDFUE y art. 54 del CAAS, en relación con la acusación que se mantiene contra ella en España en el presente procedimiento, por tratarse "de los mismos hechos", según el alcance que la jurisprudencia europea otorga a este concepto».

La etarra ya había sido absuelta previamente por la Audiencia Nacional pero, no obstante, fue corregida por el Tribunal Supremo. De hecho, una de los tres magistrados formula voto particular en contra del planteamiento de la cuestión prejudicial en la medida en que, a su juicio, «no es necesario y además introduce hipótesis que no deben resolverse en este momento en el procedimiento principal, pendiente de dictarse nueva sentencia, al haberse anulado la anterior por el Tribunal Supremo».

En su respuesta el Tribunal de Justicia determina el alcance de su enjuiciamiento referido al principio *non bis in idem* y explica así su tarea de delimitar el concepto de «los mismos hechos»: «es pertinente, a este respecto, no la cuestión de si los elementos constitutivos de los delitos objeto de las sentencias francesas eran idénticos o no, sino la de si los hechos imputados a la persona de que se trata en el contexto de dichas sentencias y del proceso penal principal se refieren a la misma conducta. Cuando se trate de una misma conducta, realizada por la misma persona, que haya tenido lugar en el mismo marco temporal, debe comprobarse si los hechos por los que esa persona fue inicialmente condenada y los que son objeto del proceso penal posterior son idénticos o esencialmente los mismos».

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Por tanto, el Tribunal de Justicia puntualiza: «con el fin de valorar la identidad de los hechos de que se trata, el órgano jurisdiccional remitente no debe tomar en consideración únicamente los hechos expuestos en el fallo de las sentencias firmes dictadas en Francia y en la parte dispositiva de los escritos de acusación elaborados por las autoridades francesas competentes, sino también los hechos expuestos en los fundamentos de dichas sentencias y aquellos que fueron objeto del procedimiento de instrucción, pero que no se recogieron en los escritos de acusación, así como toda la información pertinente sobre los hechos materiales objeto del o de los procesos penales anteriores tramitados en Francia y concluidos mediante una resolución firme».

2. *Las cuestiones procedentes de la jurisdicción civil*

Desde la jurisdicción civil han ido llegando al Tribunal de Justicia numerosas cuestiones que tienen gran interés y que se han resuelto en este segundo semestre de 2025. Es lo que ha ocurrido con el caso de la responsabilidad del Banco Santander como consecuencia de la resolución del Banco Popular; pero también sobre la acción de indemnización por vulneración de las normas europeas de la competencia, en materia de marcas, el efecto de las cláusulas abusivas en el control judicial en el proceso monitorio o, en fin, la indemnización debida a los pasajeros de vuelos comerciales por pérdida de las mascotas facturadas.

a) La saga de la resolución bancaria del Banco Popular y la responsabilidad del Banco Santander

El alcance de la responsabilidad del Banco Santander como consecuencia de la resolución del Banco Popular el 7 de junio de 2017 acordada por la Comisión Europea y que permitió la venta del negocio al Banco Santander ha exigido la interpretación de la Directiva 2014/59/UE por la que se establece un marco para la recuperación y la resolución de entidades de crédito y empresas de servicios de inversión.

Conviene recordar los hitos esenciales de esta saga de la jurisprudencia del Tribunal de Justicia.

En primer lugar, la sentencia de 5 de mayo de 2022, Banco Santander (Resolución bancaria Banco Popular), C-410/20, EU:C:2022:351, interpreta que la normativa europea impide que, con posterioridad a la amortización total de las acciones decidida en el marco de la resolución de una entidad bancaria, puedan ejercitarse contra esta entidad o contra su sucesor legal acciones de responsabilidad por la información contenida en el folleto que

debe publicarse, en particular, en caso de oferta pública de valores y acciones de nulidad del contrato de suscripción de acciones.

En segundo lugar, la sentencia de 5 de septiembre de 2024, Banco Santander (Resolución bancaria Banco Popular II), C-775/22, C-779/22 y C-794/22, EU:C:2024:679, trataba de contratos de suscripción de obligaciones subordinadas convertidas en acciones del Banco Popular antes de la resolución de este banco. También en este caso la Directiva 2014/59 impide que, con posterioridad a la amortización total de las acciones del capital social de una entidad de crédito objeto de un procedimiento de resolución, quienes hubieran adquirido instrumentos de capital que, en el marco de ese procedimiento, fueran convertidos en acciones de esa entidad de crédito, las cuales, posteriormente, fueron transmitidas a otra entidad de crédito, ejerciten contra esa última entidad una acción de nulidad.

Y en 2025 se producen estos dos episodios de esta *saga del Banco Popular-Banco Santander*: una sentencia y un auto de 11 de septiembre de 2025.

La *sentencia D. E. / Banco Santander (Resolución bancaria Banco Popular III)*, C-687/23, responde un reenvío prejudicial de la Sala Civil del Tribunal Supremo en un litigio que tiene su origen en la suscripción en 2009 por un particular de bonos subordinados canjeables por obligaciones subordinadas emitidos por Banco Popular que, en 2015, fueron objeto de canje obligatorio por acciones de Banco Popular. El particular interpuso en 2016 una acción de nulidad de la adquisición de los bonos subordinados convertibles por vicio del consentimiento y pedía la restitución de lo invertido, más los intereses. Como aclara desde el principio la AG Ćapeta, en que «el litigio principal se inició antes de que tuviera lugar la resolución bancaria».

La propia Abogada General croata Tamara Ćapeta lo explica en sus Conclusiones: «la limitación del derecho a la tutela judicial efectiva de los derechos de los inversores basados en la legislación de la Unión no puede justificarse por el objetivo de mantener la estabilidad financiera en una situación en la que el procedimiento judicial para proteger un derecho derivado de la legislación de la Unión fue iniciado antes y con independencia de una decisión de resolución» (apartado 91).

Y es esta línea la que acoge el Tribunal de Justicia teniendo en cuenta el derecho a la tutela judicial efectiva (artículo 47 de la Carta) para llegar a la conclusión de que no es la misma situación la de quienes ejercitaron las acciones judiciales antes o después de la resolución de la entidad financiera.

Si la acción judicial se ejercitó después de la resolución, habrá de estarse a lo que dice la jurisprudencia de las dos primeras sentencias, es decir, procedería decretar la terminación de los procedimientos judiciales; en cambio, si la acción judicial se ejercitó antes de la resolución, tal como re-

suelve esta *sentencia Banco Santander* (*Resolución Banco Popular III*), podría prosperar.

O por decirlo, como hace el Tribunal de Justicia, la Directiva 2014/59 no se opone a que «los derechos derivados de una acción de nulidad de un contrato de suscripción de bonos subordinados convertidos en acciones y de una acción de responsabilidad, basadas en el incumplimiento de los requisitos de información que impone la Directiva 2004/39, se consideren incluidos en la categoría de obligaciones o reclamaciones "vencidas" o pasivos "ya devengados" en el momento de la resolución de la entidad de crédito de que se trate, en el sentido de los artículos 53, apartado 3, y 60, apartado 2, párrafo primero, letra b), de la Directiva 2014/59, cuando esas acciones se hayan ejercitado antes de la amortización total de las acciones del capital social de la referida entidad de crédito en el marco de un procedimiento de resolución».

A partir de ahora la fecha de 7 de junio de 2017 será determinante para enjuiciar estas reclamaciones frente al Banco Santander como consecuencia de las subordinadas del Banco Popular: las demandas posteriores a esa fecha están condenadas al fracaso; las demandas anteriores podrían prosperar.

La saga de la resolución bancaria del Banco Popular y la responsabilidad del Banco Santander tiene su continuidad en el *auto Juan Antonio y María Consuelo / Banco Santander (Resolución bancaria del Banco Popular IV)*, C-447/23.

Esta cuarta «entrega» de la saga de la resolución bancaria del Banco Popular la resuelve el Tribunal de Justicia respondiendo el reenvío prejudicial del Juzgado de Primera Instancia e Instrucción núm. 3 de Santa Coloma de Farners (Girona).

Pues bien, las acciones contra el Banco Santander se habían iniciado el 28 de julio de 2021, es decir, mucho después de la resolución del Banco Popular que se produjo en 2017.

Por eso el auto se remite a las *sentencias I* y *II* en el sentido de que «[la Directiva 2014/59/UE por la que se establece un marco para la recuperación y la resolución de entidades de crédito y empresas de servicios de inversión] se opone [a que] con posterioridad a la amortización total de las acciones del capital social de una entidad de crédito o de una empresa de servicios de inversión objeto de un procedimiento de resolución, quienes hayan adquirido acciones antes del inicio de tal procedimiento ejerciten esas acciones judiciales».

Finalmente, el Tribunal de Justicia constata que la Directiva 2014/59/UE constituye una excepción justificada a los derechos consagrados por la Directiva 2003/71/CE sobre el folleto que debe publicarse en caso de oferta pública o admisión a cotización de valores en que se fundaban las acciones de nulidad y de responsabilidad y por la Directiva 2004/109/CE sobre la ar-

monización de los requisitos de transparencia relativos a la información sobre los emisores cuyos valores se admiten a negociación en un mercado regulado.

Por eso concluye el Tribunal de Justicia en este auto que la Directiva 2003/71 o la Directiva 2004/109 podrían cuestionar toda la valoración en la que se basa la decisión de resolución y, por lo tanto, podrían frustrar tanto el propio procedimiento de resolución como los objetivos perseguidos por la Directiva 2014/59.

b) La prescripción de la acción de indemnización en el Derecho de la competencia

El plazo de prescripción de la acción de indemnización por infracción del Derecho de la competencia empieza a contar cuando es firme la resolución de la Comisión Nacional de los Mercados y de la Competencia (CNMC): así lo interpreta el Tribunal de Justicia en la *sentencia Nissan Iberia*, C-21/24.

A requerimiento del Juez de lo Mercantil núm. 1 de Zaragoza, el Tribunal de Justicia se pronuncia sobre la manera de contar el plazo de prescripción de la acción de daños (en este caso la comúnmente denominada *follow-on damages action* o acción consecutiva o derivada) en el Derecho español y funda en las decisiones de la CNMC que aplica administrativamente el Derecho europeo de la competencia (arts. 101 y 102 TFUE).

Así reformula la cuestión el Tribunal de Justicia en relación con el caso: «si CP, que se considera perjudicado por una infracción del Derecho de la competencia, declarada por una resolución de la CNMC que se publicó en el sitio de Internet de esta autoridad el 15 de septiembre de 2015 y adquirió firmeza a raíz de una sentencia del Tribunal Supremo dictada en 2021, puede solicitar la reparación de los daños y perjuicios que se le han ocasionado o si la acción por daños que ejercitó en marzo de 2023 ha prescrito».

El Tribunal de Justicia recuerda su jurisprudencia sobre el efecto directo de los artículos 101 y 102 TFUE y, por lo que se refiere al cómputo de la prescripción, subraya: «el ejercicio del derecho a reclamar el resarcimiento del perjuicio sufrido como consecuencia de una infracción del Derecho de la competencia resultaría prácticamente imposible o excesivamente difícil si los plazos de prescripción aplicables a las acciones por daños por infracciones del Derecho de la competencia empezaran a correr antes de que hubiera cesado la infracción y de que la persona perjudicada tuviera conocimiento o hubiera podido razonablemente tener conocimiento de la información indispensable para ejercitar su acción por daños».

De acuerdo con el Tribunal de Justicia, «el requisito relativo al conocimiento de la información indispensable para el ejercicio de una acción por

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daños a raíz de una resolución de una autoridad nacional de competencia no solo exige que dicha resolución adquiera firmeza, sino también que esa información indispensable que resulte de la resolución firme se haya hecho pública de manera adecuada».

Asimismo, el Tribunal de Justicia constata que en España se llevó a cabo un trasposición tardía de la Directiva 2014/104/UE relativa a determinadas normas por las que se rigen las acciones por daños por infracciones del Derecho de la competencia: «el Real Decreto-ley 9/2017, por el que se transpuso la Directiva 2014/104, entró en vigor el 27 de mayo de 2017, a saber, unos cinco meses después de que expirase el plazo de transposición».

Conforme a la argumentación del Tribunal de Justicia, CP ejercitó la acción por daños en marzo de 2023 a raíz de una resolución de la CNMC adoptada el 23 de julio de 2015, que se publicó en el sitio de Internet de dicha autoridad el 15 de septiembre de 2015 y que adquirió firmeza por lo que respecta a Nissan mediante una sentencia del Tribunal Supremo dictada en 2021.

Por tanto, concluye el Tribunal de Justicia que en la fecha de expiración del plazo de transposición de la Directiva 2014/104, el 27 de diciembre de 2016, no solo no había expirado el plazo de prescripción, sino que ni siquiera había comenzado a correr. Esto supone la aplicación no ya de los artículos 101 y 102 TFUE sino de los plazos de prescripción fijados en la Directiva que establece un plazo mínimo de la acción por daños de cinco años.

En consecuencia, el Tribunal de Justicia interpreta: «el artículo 101 TFUE, leído a la luz del principio de efectividad, y el artículo 10, apartado 2, de la Directiva 2014/104 deben interpretarse en el sentido de que se oponen a una normativa nacional, tal como es interpretada por los órganos jurisdiccionales nacionales competentes, según la cual, a efectos de la determinación del momento a partir del que comienza a correr el plazo de prescripción aplicable a las acciones por daños por infracciones de las normas sobre competencia ejercitadas a raíz de una resolución de la autoridad nacional de competencia por la que se declara la existencia de una infracción de esas normas, puede considerarse que la persona que se estima perjudicada ha tenido conocimiento de la información indispensable que le permite ejercitar la acción por daños antes de que dicha resolución sea firme».

c) Los competidores de mala fe en las marcas y las tendencias de la moda en los dibujos y modelos comunitarios

El Tribunal de Justicia ha respondido dos cuestiones prejudiciales planteadas por el Juzgado de lo Mercantil núm. 1 de Alicante en relación con las marcas y respecto de los dibujos y modelos comunitarios.

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La *sentencia Sánchez Romero Carvajal Jabugo / Embutidos Monells*, C-322/24, contesta la cuestión prejudicial referida a un litigio que enfrentaba al titular de la marca de la Unión 5J Cinco Jotas con otra empresa de embutidos que con mala fe pretendía el uso de la marca 5M.

La cuestión versa sobre la interpretación del Reglamento (UE) 2017/1001 sobre la marca de la Unión Europea y de la Directiva (UE) 2015/2436 relativa a la aproximación de las legislaciones de los Estados miembros en materia de marcas.

El Tribunal de Justicia precisa en su sentencia que es aplicable en este caso la Directiva 2008/95, aun cuando había sido derogada por la Directiva (UE) 2015/2436, dado que "las solicitudes de registro de las marcas controvertidas se presentaron el 31 de octubre de 2011 y el 26 de enero de 2012".

La interpretación del Tribunal de Justicia se basa, fundamentalmente, en que "si la causa que sirve de base a la fundamentación de la acción de nulidad consiste en la mala fe del titular de la marca posterior al presentar la solicitud de registro de dicha marca, este último no puede, para frustrar dicha acción, invocar válidamente la prescripción por tolerancia".

Y finalmente la respuesta que le da el Tribunal de Justicia al Juzgado de lo Mercantil alicantino es la siguiente: «el artículo 9, apartado 1, de la Directiva 2008/95 debe interpretarse en el sentido de que el titular de una marca anterior que ha indicado en un requerimiento extrajudicial, dirigido al titular de una marca posterior y que tiene por objeto que se cese en el uso de esta última, una fecha límite para el ejercicio de una acción de nulidad de tal marca, que coincide con la finalización del período de prescripción de cinco años consecutivos establecido en dicho artículo 9, apartado 1, puede solicitar, después de la fecha indicada, la nulidad sobre la base de la mala fe del titular de la marca posterior al presentar la solicitud de registro de esta, aun cuando, en el momento del requerimiento, el titular de la marca anterior dispusiera de todos los elementos necesarios para considerar que esa solicitud de registro se había efectuado de mala fe».

En este sentido, el Tribunal de Justicia subraya las consecuencias: «la mala fe del titular de una marca al presentar la solicitud de registro de dicha marca perjudica el desarrollo de una competencia sana, puesto que refleja la intención de ese titular de menoscabar, de un modo no conforme con las prácticas leales, los intereses de terceros o de obtener, sin tener siquiera la mira puesta en un tercero en particular, un derecho exclusivo con fines diferentes a los correspondientes a las funciones de una marca».

La *sentencia Deity Shoes*, C-323/24, interpreta el Reglamento (CE) n.º 6/2002 sobre los dibujos y modelos comunitarios que se definen como la apariencia de la totalidad o de una parte de un producto, que se derive de las características especiales de, en particular, línea, configuración, color, forma, textura o material del producto en sí o de su ornamentación.

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En este caso se trata de un litigio entre tres empresas de calzado que pretendían la anulación recíproca de los modelos basados en los diferentes componentes del calzado, como el color, el material y la ubicación de las hebillas, cordones y otros elementos ornamentales.

El Tribunal de Justicia dicta una sentencia que determina el alcance de la protección basada en los requisitos de novedad y de carácter singular.

En primer lugar, el Tribunal de Justicia considera que basta con que concurran la novedad y el carácter singular sin que se exija demostrar que hay un grado mínimo de diseño. Y esto es así porque interpreta el Tribunal de Justicia, pensando precisamente en el calzado, que «cuando la libertad del autor está restringida por un número elevado de características de apariencia del producto o de la parte del producto en cuestión dictadas exclusivamente por la función técnica de ese producto o de esa parte del producto, la concurrencia de diferencias menores entre los dibujos o modelos en conflicto puede bastar para producir una impresión general distinta en el usuario informado».

En segundo lugar, el Tribunal de Justicia aborda el efecto que tienen las tendencias de la moda. A tal efecto recuerda que «la propia esencia de la moda consiste en que no perdura y en que evoluciona, precisamente, en función de innovaciones tanto visuales como tecnológicas».

Asimismo, el Tribunal de Justicia recuerda su jurisprudencia conforme a la cual «para poder considerar que un dibujo o modelo posee carácter singular, la impresión general que produce en los usuarios informados debe diferir de la producida en tales usuarios no por una combinación de características aisladas, basadas en varios dibujos o modelos anteriores, sino por dibujos o modelos anteriores, individualmente considerados».

Esto significa, en definitiva, que «las tendencias de la moda no limitan el grado de libertad del autor de modo que diferencias menores entre uno o varios dibujos o modelos anteriores y el dibujo o modelo de que se trate puedan ser suficientes para que este produzca una impresión general distinta en el usuario informado de la producida por los primeros».

d) El control de las cláusulas abusivas en los procesos monitorios

La *sentencia Investcapital*, C-509/24, tiene su origen en Gran Canaria, en el Juzgado de Primera Instancia e Instrucción de Arucas, que cuestionó, ante el Tribunal de Justicia y a la vista de la Directiva 93/13/CEE sobre las cláusulas abusivas en los contratos celebrados con consumidores, la configuración del proceso monitorio previsto en el artículo 812 LEC para obtener el pago de una deuda dineraria de cualquier importe, líquida, determinada, vencida y exigible.

El litigio versa sobre la reclamación de 1.234,01 euros de un crédito cedido por un banco, de los cuales 229,17 euros correspondían al principal,

38,73 euros a los intereses ordinarios, 39,68 euros a los intereses de demora y 921,15 euros a gastos y a comisiones.

De acuerdo con el artículo 815.3 LEC, la letrada de la Administración de Justicia dio cuenta al juez para que examinara el posible carácter abusivo de las cláusulas que constituían el fundamento de la petición de proceso monitorio.

El juez canario tenía dudas de que tanto el control judicial como la falta de participación del consumidor en el proceso monitorio fuesen conformes con la Directiva sobre cláusulas abusivas.

Por lo que se refiere al procedimiento del control judicial, el Tribunal de Justicia recuerda su jurisprudencia según la cual el artículo 6.1 de la Directiva «obliga a los Estados miembros a garantizar que las cláusulas contractuales abusivas no vinculen al consumidor, sin que este deba interponer una demanda u obtener una sentencia que confirme el carácter abusivo de dichas cláusulas».

Esto supone que el proceso monitorio español no es contrario a la Directiva, sin perjuicio de que el profesional tenga la posibilidad de iniciar otro procedimiento judicial para reclamar al consumidor el importe del crédito excluido por ese juez, siempre que este consumidor pueda obtener, en otros procedimientos judiciales, la declaración de nulidad de la cláusula contractual considerada abusiva.

En cuanto a la falta de participación del consumidor en el examen del eventual abuso, el Tribunal de Justicia tampoco la reputa contraria a la Directiva en la medida en que «el hecho de que el artículo 815, apartado 3, de la LEC no prevea la participación del consumidor en el control del carácter abusivo de una cláusula contractual que pueda fundamentar la petición de proceso monitorio, sino que confiera al juez que conoce del asunto la facultad de proponer un requerimiento de pago por un importe del crédito invocado reducido en la cuantía derivada de la aplicación de una cláusula considerada abusiva, no afecta al derecho de defensa de los consumidores ni, en particular, al principio de contradicción».

Por tanto, la regulación vigente del proceso monitorio español pasa el examen del Tribunal de Justicia y resulta conforme a la Directiva sobre cláusulas abusivas.

e) La indemnización por pérdida de una mascota facturada en un avión comercial

La *sentencia Felicísima / Iberia*, C-218/24, se refiere al alcance de la indemnización por pérdida de animales de compañía que sean facturados como equipaje en un avión de transporte de pasajeros.

En un vuelo de Iberia de Buenos Aires a Barcelona a dos pasajeras, que la anonimización del Cendoj bautiza como Hortensia y Remedios y que el Tribunal de Justicia gusta en llamar solo a una de ellas Felicísima, les per-

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dieron uno de los tres animales de compañía que habían facturado: una perra de raza mestiza, tricolor, que había nacido en 2011 que debía viajar en bodega, en un trasportín y de nombre Rubia —según el auto recogido en el Cendoj, aunque parece ser que su nombre real era Mona—. En el aeropuerto de Ezeiza la perra se escapó del trasportín, se puso a correr por las inmediaciones de la aeronave, como pudo ver Remedios, la madre de Felicísima/Hortensia desde el avión, y no pudieron recuperarla, a pesar de una intensa campaña en las redes sociales.

Felicísima reclamó ante el Juzgado de lo Mercantil núm. 4 de Madrid una indemnización de 5.000 euros por daños morales y ante las dudas sobre si, a efectos de indemnización, se incluyen en el equipaje a las mascotas y animales de compañía, la juez planteó en su auto de 8 de marzo de 2024 la cuestión prejudicial.

El Tribunal de Justicia interpreta el artículo 17.2 del Convenio de Montreal para la Unificación de Ciertas Reglas para el Transporte Aéreo Internacional de 1999, del que es parte la Unión Europea, en el sentido de que el transportista es responsable del daño causado en caso de destrucción, pérdida o avería del equipaje facturado por la sola razón de que el hecho que causó la destrucción, pérdida o avería se haya producido a bordo de la aeronave o durante cualquier período en que el equipaje facturado se hallase bajo la custodia del transportista.

El Tribunal de Justicia interpreta que «a efectos de una operación de transporte aéreo, un animal de compañía está comprendido en el concepto de "equipaje" y la indemnización del daño derivado de la pérdida de este, con motivo de tal operación, está sujeta al régimen de responsabilidad previsto para el equipaje».

En el artículo 22.2 del Convenio de Montreal permite que el pasajero haga una declaración especial del valor al entregar el equipaje facturado al transportista lo que, a juicio del Tribunal de Justicia, «confirma que el límite de responsabilidad del transportista aéreo por el daño resultante de la pérdida del equipaje es, a falta de declaración especial del valor de la entrega de este en el lugar de destino, un límite absoluto que comprende tanto el daño moral como el material».

Felicísima no había hecho declaración especial alguna del valor de sus tres mascotas al facturarlas.

Así pues, en este caso se aplica, según el Tribunal de Justicia, un límite de la indemnización de 1.131 DEG por pasajero. Los derechos especiales de giro (DEG), que es la unidad contable establecida por el Fondo Monetario Internacional (FMI), equivalen a 1,17 euros, por lo que el máximo de la indemnización, al no haber hecho declaración especial alguna, son 1.323,27 euros, muy lejos, ciertamente, de los 5.000 euros por el extravío de Rubia o, según otras fuentes, de Mona.

Por último y por si alguien dudara de su sensibilidad, el Tribunal de Justicia subraya que la protección del bienestar de los animales constituye un objetivo de interés general reconocido por la Unión, sin que en este caso le impida incluir en el concepto de equipaje a la dichosa perrita.

3. *Las cuestiones de la jurisdicción contencioso-administrativa*

En el ámbito del Derecho público español, la jurisdicción contencioso-administrativa ha requerido la interpretación del Tribunal de Justicia sobre los límites de la protección frente a las ludopatías y el mercando europeo, el alcance de la obligación de impacto ambiental y el valor en aduana. También resulta de interés para los tribunales contencioso-administrativos la interpretación que por vía del recurso por incumplimiento ha hecho el Tribunal de Justicia de la legislación ferroviaria europea o de la Directiva sobre aguas residuales urbanas en España; o, en fin, a través del recurso de anulación, de las deducciones fiscales en el impuesto de sociedades que habían sido conceptuadas erróneamente por la Comisión Europea como ayudas de Estado.

a) La lucha contra las ludopatías en el contexto del mercado europeo

La *sentencia Anesar-CV*, C-718/23 a C-721/23 y C-60/24, se refiere a la protección de los consumidores frente a los juegos de azar en el marco del mercado único.

La Asociación de Empresarios de Salones de Juego y Recreativos de la Comunidad Valenciana y numerosas empresas del sector de los juegos de azar interpusieron cinco recursos contencioso-administrativos para anular la reglamentación autonómica valenciana sobre juegos de azar.

La Sala de lo Contencioso-administrativo de Valencia planteó al Tribunal de Justicia varias cuestiones prejudiciales referidas a la conformidad con el Derecho de la Unión de la normativa valenciana, por una parte, en cuanto que somete únicamente a los establecimientos de juego privados, y no a los públicos, a determinadas obligaciones en materia de juego y de prevención de la ludopatía; y, por otra parte, en lo que respecta al régimen de distancias mínimas de 500 metros entre salones de juegos y de 850 metros de separación de los centros educativos.

Respecto de la primera cuestión, el Tribunal de Justicia la inadmite al considerar que el tribunal valenciano «no define el concepto de "establecimientos públicos de juego", no proporciona el marco jurídico nacional aplicable a dichos establecimientos ni expone las restricciones eventualmente aplicables a estos».

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En efecto, el Tribunal de Justicia le reprocha a la Sala de lo Contencioso-administrativo que no haya explicado en el auto de planteamiento el marco fáctico y normativo del litigio ni los motivos de la elección de las disposiciones del Derecho de la Unión cuya interpretación solicita y su relación con la normativa autonómica aplicable.

En cuanto a la otra cuestión, el Tribunal de Justicia llega a la conclusión de que las distancias exigidas por la legislación valenciana «pueden admitirse como medidas excepcionales expresamente previstas por el Tratado FUE o justificadas por razones imperiosas de interés general, [si] son adecuadas para garantizar la consecución de los objetivos perseguidos y no van más allá de lo necesario para alcanzarlos».

En primer lugar, el Tribunal de Justicia constata que la exigencia de distancias «puede hacer menos atractivo o incluso imposible el ejercicio de la libertad garantizada por el artículo 49 TFUE, dado que limitan la capacidad de las empresas de prestar determinados servicios de juego como actividad económica en la comunidad autónoma de que se trata o impiden a los operadores que ya prestan tales servicios rentabilizar su inversión». Es decir, con estas restricciones queda afectada una libertad económica fundamental.

En segundo lugar, el Tribunal de Justicia recuerda que en el Derecho de la Unión se admiten «restricciones justificadas por razones de orden público, de seguridad pública o de salud pública» y, además, «la jurisprudencia ha admitido una serie de razones imperiosas de interés general, como los objetivos de protección de los consumidores, de lucha contra el fraude y de prevención tanto de la incitación a los ciudadanos al gasto excesivo en juego como de la aparición de perturbaciones en el orden social en general, que también pueden justificar las restricciones».

A tal efecto, el Tribunal de Justicia constata que «la normativa en materia de juegos de azar se cuenta entre los ámbitos en los que se dan considerables divergencias morales, religiosas y culturales entre los Estados miembros. A falta de una armonización en la materia a nivel de la Unión, los Estados miembros gozan de una amplia facultad de apreciación por lo que respecta a la elección del nivel de protección de los consumidores y del orden social que consideren más adecuado».

Así pues, el Tribunal de Justicia llega a la conclusión de que «en vista de la particularidad de la situación relacionada con el juego, tales objetivos son perseguidos por la normativa [valenciana] y pueden constituir razones imperiosas de interés general capaces de justificar restricciones de libertades fundamentales como las que son objeto de los litigios principales, siempre que sean efectivamente perseguidos por las medidas controvertidas».

Por último, el Tribunal de Justicia se refiere al principio de proporcionalidad, es decir, «si estas restricciones son adecuadas para garanti-

zar la consecución de los objetivos perseguidos y no van más allá de lo necesario para alcanzarlos, asegurándose, en particular, de que la normativa nacional objeto de los litigios principales responde verdaderamente al empeño de alcanzar dichos objetivos de forma congruente y sistemática».

Después de un examen de las distintas medidas, el Tribunal de Justicia llega a la conclusión de que las previstas por la legislación valenciana no son desproporcionadas.

En suma, el Tribunal de Justicia considera que la regulación valenciana está justificada y es proporcionada al imponer a los operadores del sector del juego estas restricciones: las distancias mínimas que deben respetarse entre los salones de juego y los locales de apuestas y determinados centros educativos, y entre algunos de los propios establecimientos de juego; la limitación temporal de la explotación de las máquinas tragaperras denominadas «de tipo B» o de las máquinas recreativas con premio instaladas en establecimientos del sector de la hostelería; y la moratoria para la concesión de nuevas licencias o autorizaciones de explotación de establecimientos de juego.

b) La evaluación de impacto ambiental de los parques eólicos y el incumplimiento de la Directiva de aguas residuales urbanas

El Tribunal de Justicia, a requerimiento de la Sala de lo Contencioso-administrativo del Tribunal Superior de Justicia de Galicia, interpreta en la *sentencia Petón do Lobo*, C-461/24, la Directiva 2011/92/UE relativa a la evaluación de las repercusiones de determinados proyectos públicos y privados sobre el medio ambiente (Directiva EIA) en lo que se refiere al alcance de la obligación de consultar a las autoridades regionales y locales y al público interesado en la instalación de parques eólicos.

En realidad, existía una discrepancia entre el criterio mantenido por la Sala de lo Contencioso-administrativo de La Coruña, partidaria de exigir que cuando se adoptasen nuevos informes decisivos posteriores a la consulta pública fuesen objeto de un nuevo trámite (TSJ Galicia, Sala C-A, sentencia de 21 de enero de 2022, ECLI:ES:TSJGAL:2022:551, ponente: Fernández López), y la jurisprudencia del Tribunal Supremo (Sala 3.ª, Sección 5.ª, sentencia de 21 de diciembre de 2023, ECLI:ES:TS:2023:5708, Huet de Sande), que había desautorizado tal solución y conforme a la cual la Directiva EIA ofrece a los Estados miembros diversas opciones procedimentales sobre el momento en que debe procederse a informar al público interesado y a consultar a las autoridades que pudieran estar interesadas en el proyecto debido a sus responsabilidades medioambientales específicas o a sus competencias locales o regionales.

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El Tribunal de Justicia considera que la Directiva EIA exige que la consulta al público se produzca en una fase temprana y, en todo caso, antes de que se adopte una decisión en relación con la autorización de los proyectos.

A juicio del Tribunal de Justicia, «esa participación debe ser efectiva, lo que implica que el público interesado no solo debe poder expresarse de manera útil y completa sobre el proyecto de que se trate y sobre sus repercusiones medioambientales, sino que también debe poder hacerlo en un momento en el que estén abiertas todas las opciones».

Ahora bien, el Tribunal de Justicia confirma que el alcance de la Directiva EIA es limitado de tal modo que «los Estados miembros pueden optar por que la consulta a las autoridades que puedan estar interesadas en el proyecto debido a sus responsabilidades medioambientales específicas o a sus competencias locales o regionales, por una parte, y al público interesado, por otra, se realice simultáneamente, sin que este último tenga derecho a formular posteriormente, ante la autoridad o las autoridades competentes para autorizar dicho proyecto, sus observaciones y opiniones sobre los dictámenes emitidos en este contexto por las autoridades consultadas».

De manera que el Tribunal de Justicia, aun cuando no descarta que los informes subsiguientes a la consulta pública, puedan ser objeto del trámite de audiencia, también reconoce que tal solución podría resultar excesivamente gravosa para las administraciones nacionales afectadas y podría prolongar el procedimiento, lo que no sería compatible con el objetivo de una toma de decisiones eficiente.

En este caso se ha producido un verdadero y enriquecedor diálogo de los tribunales sobre una cuestión de gran interés práctico.

También en el ámbito ambiental, el Tribunal de Justicia ha declarado el incumplimiento de la Directiva 91/271/CEE de aguas residuales urbanas en la *sentencia Comisión / España (cálculo del equivalente habitante)*, C-433/23.

Es descorazonador que una norma como la Directiva 91/271/CEE, cuyo último plazo de transposición terminó en 2005, no se aplique en tan numerosos e importantes núcleos urbanos de toda España. El Tribunal de Justicia toma como fecha crítica para constatar el incumplimiento el 13 de abril de 2020.

Sin embargo, en Canarias, por ejemplo, numerosas poblaciones no cuentan con sistemas colectores para las aguas residuales urbanas; en otras ciudades, incluida San Sebastián-Donostia, las aguas residuales urbanas que entran en los sistemas colectores no eran objeto, antes de verterse, de un tratamiento secundario o de un proceso equivalente; en fin, en ciudades como Mérida el tratamiento de las aguas residuales que se vierten en zonas sensibles no son objeto de un tratamiento más riguroso.

La falta de ejecución de esta sentencia podría desembocar en multas coercitivas. Por eso debemos confiar en la diligencia de las autoridades españolas para poner remedio a deficiencias esenciales en materia medioambiental.

c) El valor en aduana de las mercancías procedentes de terceros países

En dos sentencias de la misma Sala y con la misma fecha el Tribunal de Justicia contesta sendas cuestiones prejudiciales planteadas por la Sala Tercera del Tribunal Supremo en dos litigios sobre el valor en aduana de las mercancías importadas en la Unión Europea; unas procedentes de Cuba y otras procedentes de países asiáticos.

En la *sentencia Compañía de Distribución Integral Logista*, C-348/24, las cuestiones se referían a la importación de puros cubanos. La Corporación Habanos había vendido en una primera transmisión cigarros puros a Altadis y se encargaba de transportar el producto desde Cuba hasta el depósito aduanero en Agoncillo, La Rioja, donde Logista, en su condición de consignataria, los introducía. En una segunda transmisión Altadis los vendía a Logista para su posterior venta en Ceuta y Melilla, es decir, fuera del territorio aduanero de la Unión.

La Agencia tributaria consideraba que el valor en aduana debía calcularse de conformidad con la segunda transmisión y consideraba que no cabía aplicar las preferencias arancelarias por haber transcurrido más de dos años desde la expedición del certificado de origen de las mercancías.

En la *sentencia Grupo Massimo Dutti*, C-500/24, se planteaba la importación de artículos de moda procedentes de países asiáticos que vendían la mercancía primero a una mercantil suiza que, luego, revendía las mercancías a Massimo Dutti.

La Agencia tributaria consideraba que el valor en aduana debía calcularse aplicando el precio de la segunda venta.

En dos sentencias muy similares el Tribunal de Justicia considera que «cuando unas mercancías han sido objeto de dos ventas antes de su introducción en el territorio aduanero de la Unión, para una vez allí o bien ser incluidas en el régimen de depósito aduanero, o bien ser despachadas a libre práctica, no es posible estimar que la primera venta ha sido concluida para la exportación de esas mercancías con destino al territorio aduanero de la Unión si, en el momento de esa primera venta, lo único acreditado era que dichas mercancías estaban destinadas a ser introducidas en ese territorio, sin que se hubiera determinado aún el lugar de comercialización final de aquellas».

Ahora bien, en el caso de la *sentencia Compañía de Distribución Integral Logista*, el Tribunal de Justicia también le contesta al Tribunal Su-

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premo sobre la aplicación de un régimen preferencial en el sentido de que las autoridades aduaneras no están obligadas a aceptar una prueba de origen más allá de los plazos fijados a tal fin.

d) El cumplimiento por España de la legislación ferroviaria europea

No se trata de una sentencia que responda una cuestión prejudicial sino que la *sentencia Comisión / España (Independencia de gestión del administrador de infraestructuras ferroviaria)*, C-250/24, desestima un recurso por incumplimiento contra España por el que la Comisión Europea pretendía que se declarase que incumplía varias obligaciones derivadas de la Directiva 2012/34/UE por la que se establece un espacio ferroviario europeo único.

El primer incumplimiento se refiere a la autonomía de gestión respecto del Estado de las tres entidades públicas empresariales ADIF (Administrador de Infraestructuras Ferroviarias), ADIF-Alta Velocidad y RENFE-Operadora.

El Tribunal de Justicia determina el alcance de la independencia de tales organismos y, en particular, considera que, a fin de preservar la independencia del administrador de infraestructuras, es preciso que la facultad para nombrar y cesar a los miembros de su consejo de administración esté estrictamente regulada por la ley y que la autoridad competente esté obligada a adoptar las decisiones de nombramiento y cese de dichos miembros sobre la base de criterios objetivos, clara y taxativamente enumerados, y verificables.

A juicio del Tribunal de Justicia, la Comisión Europea no había probado la existencia del incumplimiento alegado.

El segundo incumplimiento que le reprocha la Comisión a España tiene que ver con el establecimiento por la legislación española de un sistema de fijación de los cánones ferroviarios.

Tampoco en este caso la Comisión Europea probó, a juicio del Tribunal de Justicia, apropiadamente el incumplimiento alegado.

Y, en tercer lugar, el incumplimiento que le imputaba la Comisión a España tenía que ver con la obligación de incentivar a los administradores de infraestructuras para que redujesen los costes de la puesta a disposición de infraestructura y, acumulativamente, la cuantía de los cánones de acceso.

Sin embargo, el Tribunal de Justicia también lo desestima en la medida en que el objeto de este incumplimiento no se recogía en el dictamen motivado previo a la interposición del recurso ante el Tribunal de Justicia.

e) Las ayudas de Estado y las deducciones en el impuesto de sociedades

Se trae a colación en el ámbito contencioso-administrativo una sentencia relativa a las deducciones del impuesto de sociedades en los términos

que las interpretan el Tribunal General y el Tribunal de Justicia frente a la decisión de la Comisión Europea que las reputaba ayudas de Estado.

La *sentencia Comisión / España (participaciones indirectas)*, C-776/23 P a C-780/23 P, desestima el recurso de casación de la Comisión Europea y confirma cinco sentencias del Tribunal General de 27 de septiembre de 2023, España/Comisión (T-826/14, EU:T:2023:582) (asunto C-776/23 P); Banco Santander y otros/Comisión (T-12/15, T-158/15 y T-258/15, EU:T:2023:583) (asunto C-777/23 P); Sociedad General de Aguas de Barcelona/Comisión (T-253/15, EU:T:2023:585) (asunto C-778/23 P); Telefónica e Iberdrola/Comisión (T-256/15 y T-260/15, EU:T:2023:586) (asunto C-779/23 P), y Ferrovial y otros/Comisión (T-252/15 y T-257/15, EU:T:2023:584) (asunto C-780/23 P).

El Tribunal General había anulado la Decisión (UE) 2015/314 de la Comisión, de 15 de octubre de 2014, relativa a la ayuda estatal ejecutada por España en lo que se refiere al régimen relativo a la amortización fiscal del fondo de comercio financiero para la adquisición de participaciones extranjeras.

La Comisión Europea había considerado en 2014 que el artículo 12.5 del Texto Refundido de la Ley del Impuesto de Sociedades, introducido en 2001, era una ayuda de Estado y era incompatible con el mercado común y obligaba a su devolución y al Estado español a su recuperación.

El Tribunal General anuló la Decisión en 2023 porque no se trataba de una ayuda nueva y porque, en relación con las beneficiarias, se habían vulnerado los principios de protección de confianza legítima, de *estoppel* (o de los actos propios) y de seguridad jurídica.

La sentencia del Tribunal de Justicia es bastante críptica y está formulada en unos términos oraculares difícilmente comprensibles. Pero el resultado es claro, confirma la sentencia de instancia y comprueba que la Comisión Europea no acertó a la hora de aplicar el régimen europeo de ayudas al impuesto de sociedades español.

4. *Las cuestiones de la jurisdicción social: los desplazamientos de trabajadores como tiempo de trabajo*

La *sentencia STAS — IV / VAERSA*, C-110/24, interpreta que el desplazamiento de los trabajadores al tajo debe computarse como tiempo de trabajo.

La Sala de lo Social del TSJ de la Comunidad Valenciana acudió en vía prejudicial al Tribunal de Justicia en un conflicto colectivo planteado por un sindicato contra la empresa pública Valenciana d'Estratègies i Recursos per a la Sostenibilitat Ambiental, S. A. (VAERSA).

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El litigio se refería únicamente a si el tiempo del trayecto de vuelta de los trabajadores de biodiversidad desde la reserva en la que realizan sus trabajos hasta la base fijada por VAERSA debía computarse como «tiempo de trabajo» en el sentido la Directiva 2003/88 relativa a la ordenación del tiempo de trabajo.

El Tribunal de Justicia recuerda que esta Directiva se basa en dos conceptos: el «tiempo de trabajo», definido como «todo período durante el cual el trabajador permanezca en el trabajo, a disposición del empresario y en ejercicio de su actividad o de sus funciones»; y el «período de descanso» que define la Directiva como «todo período que no sea tiempo de trabajo».

El primer elemento del tiempo de trabajo es que el trabajador debe estar en ejercicio de su actividad o de sus funciones, por lo que "durante su tiempo de desplazamiento entre sus domicilios y los centros de sus clientes, los trabajadores deben considerarse en ejercicio de sus actividades o de sus funciones, puesto que tales desplazamientos son el instrumento necesario para ejecutar prestaciones técnicas por parte de esos trabajadores en los centros de esos clientes".

Por tanto y en este caso, a juicio del Tribunal de Justicia, «las condiciones relativas al desplazamiento de los trabajadores de biodiversidad afectados vienen definidas por su empresario, que designa, en particular, el medio de transporte empleado para ese desplazamiento, el punto de partida y de regreso de este, la hora de salida de dicho desplazamiento y el destino, a saber, un tajo».

El segundo elemento del tiempo de trabajo es que el trabajador debe estar a disposición del empresario durante ese tiempo.

Por eso, a juicio del Tribunal de Justicia, «el factor determinante es el hecho de que el trabajador está obligado a estar físicamente presente en el lugar que determine el empresario y a permanecer a disposición de este para poder realizar de manera inmediata las prestaciones adecuadas en caso de necesidad».

Por eso puntualiza que no sería tiempo de trabajo en el sentido de la Directiva 2003/88 cuando los trabajadores tienen la posibilidad de gestionar su tiempo sin limitaciones significativas y dedicarse a sus asuntos personales.

Y el tercer elemento del tiempo de trabajo es que el trabajador deba permanecer en el trabajo en el período considerado.

Ahora bien, de acuerdo con la jurisprudencia del Tribunal de Justicia, «si un trabajador que ya no tiene centro de trabajo fijo ejerce sus funciones durante el desplazamiento hacia o desde un cliente, debe considerarse que este trabajador permanece igualmente en el trabajo durante ese trayecto».

Por tanto, «toda vez que los desplazamientos son consustanciales a la condición de trabajador que carece de centro de trabajo fijo o habitual, el centro de trabajo de estos trabajadores no puede reducirse a los lugares de

intervención física de estos trabajadores en los centros de los clientes de su empresario».

Por eso y en este caso el Tribunal de Justicia constata que los trabajadores afectados deben considerarse sin centro de trabajo fijo y en ejercicio de su actividad o de sus funciones durante los desplazamientos que efectúan desde la base hasta el tajo en cuestión y desde este hasta la base.

En suma, el Tribunal de Justicia interpreta que durante esos desplazamientos, dichos trabajadores permanecen en el trabajo.

En fin, concluye el Tribunal de Justicia con esta interpretación de la Directiva: «el tiempo dedicado a los trayectos de ida y vuelta que los trabajadores tienen la obligación de realizar, juntos, a una hora fijada por su empresario y con un vehículo perteneciente a este, para desplazarse desde un lugar concreto, determinado por dicho empresario, hasta el lugar en el que se realiza la prestación característica prevista en el contrato de trabajo celebrado entre esos trabajadores y ese empresario debe considerarse "tiempo de trabajo"».

Termino el apartado de las cuestiones prejudiciales en el ámbito social con el *auto Vedrón*, C-403/25, por el que el Tribunal de Justicia inadmite el reenvío de un juez de lo Social alicantino en una cuestión referida al principio de igualdad y al complemento de la pensión de jubilación por razón de la maternidad.

La inadmisión se basa en que el juez alicantino no explica el contexto jurídico nacional y lo dice claramente el Tribunal de Justicia: «el auto de remisión no contiene una descripción suficientemente precisa del marco jurídico nacional en el que se inscribe el litigio del que conoce el órgano jurisdiccional nacional. Por un lado, existe incertidumbre sobre la versión de la LGSS aplicable en el litigio principal. Así, el órgano jurisdiccional remitente se refiere tanto a la antigua LGSS, que era aplicable en la fecha en que el demandante se jubiló, como a la LGSS modificada, aplicable en la fecha de la solicitud del demandante».

No hay duda de que el juez alicantino conoce bien ese marco legislativo pero no lo explica apropiadamente y hace una pregunta muy genérica.

Por otra parte, tampoco el reenvío prejudicial determina cuál es el Derecho de la Unión aplicable. En este caso las preguntas se referían al valor de la igualdad, tal como se reconoce en el artículo 2 TUE, y a la Carta cuando, como bien sabe el juez alicantino, hay Directivas aplicables al caso concreto. En este sentido, el Tribunal de Justicia subraya: «en lo tocante a la interpretación del artículo 2 TUE, a tenor del cual la Unión Europea se fundamenta, entre otros valores, en el valor de la igualdad, el órgano jurisdiccional remitente se limita a realizar consideraciones de orden general, sin exponer la relación que a su juicio existe entre dicho artículo 2 TUE y la normativa nacional aplicable en el litigio principal, de suerte que el Tri-

bunal de Justicia no está en condiciones de apreciar si la interpretación de dicha disposición es necesaria para que dicho órgano jurisdiccional pueda resolver». Y por lo que se refiere a la Carta, también señala el Tribunal de Justicia que «las disposiciones de esta se dirigen a los Estados miembros únicamente cuando apliquen el Derecho de la Unión».

El único consuelo de este defectuoso planteamiento de la cuestión prejudicial es que, como dice el auto comentado, «el órgano jurisdiccional remitente conserva la facultad de plantear una nueva petición de decisión prejudicial proporcionando al Tribunal de Justicia la totalidad de los elementos que permitan a este pronunciarse».

5. *Los límites de la casación contra sentencias en instancia del Tribunal General*

La *sentencia España / Comisión*, C-729/23 P, constituye un ejemplo muy elocuente de los límites de la casación de las sentencias del Tribunal General ante el Tribunal de Justicia.

La sentencia se refiere a la reducción que hace la Comisión Europea a España por importe de 5.010.303,63 euros de las subvenciones del Fondo Europeo Agrícola de Garantía (FEAGA) para el ganado bovino gestionadas en Cataluña y Andalucía.

La corrección financiera se justificaba por deficiencias en la gestión administrativa, es decir, en el marco de tres controles clave relativos a la exactitud del cálculo de la ayuda, incluida la aplicación de sanciones administrativas, a la calidad y al número exigido de los controles sobre el terreno.

Como dice el Tribunal de Justicia en esta sentencia, «los Estados miembros juegan un papel principal en la liquidación de las cuentas del FEAGA, ya que deben garantizar que dicho Fondo financie únicamente intervenciones realizadas conforme a las disposiciones del Derecho de la Unión».

Pero también recuerda que para probar la existencia de una infracción de las normas de la Unión, no corresponde a la Comisión demostrar de forma exhaustiva la insuficiencia de los controles efectuados por las administraciones nacionales ni la irregularidad de las cifras transmitidas por estas, sino aportar un elemento de prueba de la duda seria y razonable que alberga con respecto a los citados controles o cifras.

En instancia, el Tribunal General había desestimado el recurso de anulación y España interpuso, con ninguna fortuna, el recurso de casación.

En primer lugar, el Tribunal de Justicia recuerda el alcance limitado de la casación, lo que sería equivalente a nuestra apelación, y reconoce que en casación la competencia del Tribunal de Justicia está limitada al examen de la apreciación por el Tribunal General de los motivos que se debatieron ante él.

En segundo lugar y frente a la impugnación basada en la falta de motivación de la sentencia de instancia, el Tribunal de Justicia recuerda, de nuevo y en términos que nos son muy familiares en los tribunales de apelación españoles, los límites de su enjuiciamiento: «no cumple los requisitos de motivación establecidos en dichas disposiciones el recurso de casación que se limita a repetir o a reproducir literalmente los motivos y las alegaciones formulados ante el Tribunal General. En efecto, tal recurso de casación es, en realidad, una demanda destinada a obtener un mero reexamen de la presentada ante el Tribunal General, lo cual excede de la competencia del Tribunal de Justicia».

Por último, el Tribunal de Justicia se pronuncia sobre el concepto de «animal potencialmente subvencionable» (APS) y lo interpreta como «un animal que, *a priori*, podría potencialmente cumplir los criterios de admisibilidad para recibir ayuda en virtud del régimen de ayuda por animales». Y lo identifica en este tipo de ayuda asociada voluntaria con todos los animales que figuran en la base de datos del Estado miembro establecida a efectos de la solicitud de ayuda por animales o de la solicitud de pago.

Dice el Tribunal de Justicia: «Esta base de datos informatizada ofrece el nivel de garantía y funcionamiento necesario para la adecuada gestión de los regímenes de ayuda o medidas de ayuda de que se trate con respecto a cada animal. Así, los animales que no están registrados en la base de datos no son considerados APS y tampoco son potencialmente admisibles para el pago de la ayuda».

No obstante, los motivos alegados por España no fueron muy efectivos y no convencieron al Tribunal de Justicia de que había que revocar la sentencia en instancia del Tribunal General.

España deberá devolver los cinco millones de euros y las responsables últimas serán, en este caso, las Comunidades Autónomas de Andalucía y Cataluña por los deficientes controles establecidos en este tipo de ayudas agrícolas.

IV. **Relación de las sentencias comentadas**

1. TJUE, sentencia de 26 de junio de 2025, Comisión / España (participaciones indirectas), C-776/23 P a C-780/23 P, ECLI:EU:C:2025:487 (ayudas de Estado y deducciones fiscales del fondo de comercio financiero resultante de adquisiciones indirectas).
2. TJUE, sentencia de 3 de julio de 2025, Ati-19 EOOD, C-605/23, ECLI:EU:C:2025:513 (tutela judicial efectiva y adopción de medidas cautelares).
3. TJUE (Gran Sala), sentencia de 1 de agosto de 2025, Royal Football Club Seraing, C-600/23, ECLI:EU:C:2025:617 (laudo del Tribunal Arbitral del Deporte y control de su conformidad con el orden público de la Unión).

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4. TJUE, sentencia de 1 de agosto de 2025, Petón do Lobo, C-461/24, ECLI:EU:C:2025:620 (evaluación de impacto medioambiental (EIA) y consultas al público).
5. TJUE, sentencia de 4 de septiembre de 2025, AW „T", C-225/22, ECLI:EU:C:2025:649 (independencia de órganos judiciales superiores y primacía del Derecho de la UE).
6. TJUE, sentencia de 4 de septiembre de 2025, Nissan Iberia, C-21/24, ECLI:EU:C:2025:659 (prescripción de la acción por daños por violación del derecho de la competencia).
7. TJUE, sentencia de 11 de septiembre de 2025, D. E. / Banco Santander (Resolución bancaria Banco Popular III), C-687/23, ECLI:EU:C:2025:687.
8. TJUE, sentencia de 11 de septiembre de 2025, MSIG, C-802/23, ECLI:EU:C:2025:688 (*non bis in idem* en España después de condena por tribunal francés).
9. TJUE, auto de 11 de septiembre de 2025, Juan Antonio y María Consuelo / Banco Santander (Resolución bancaria del Banco Popular IV), C-447/23, ECLI:EU:C:2025:706.
10. TJUE, sentencia de 2 de octubre de 2025, Criminal Injuries Compensation Tribunal y otros, C-284/24, ECLI:EU:C:2025:741 (daños físicos y morales de las víctimas de delitos).
11. TJUE, sentencia de 9 de octubre de 2025, STAS — IV / VAERSA, C-110/24, ECLI:EU:C:2025:768 (tiempo de trabajo y desplazamiento al tajo).
12. TJUE, sentencia de 16 de octubre de 2025, Felicísima / Iberia, C-218/24, ECLI:EU:C:2025:794 (animales de compañía como equipaje facturado).
13. TJUE, sentencia de 16 de octubre de 2025, Anesar-CV, C-718/23 a C-721/23 y C-60/24, ECLI:EU:C:2025:797 (juegos de azar, protección de los consumidores y mercado único).
14. TJUE, sentencia de 30 de octubre de 2025, Ramavić, C-373/24, ECLI:EU:C:2025:842 (tiempo de trabajo y guardias de los fiscales).
15. TJUE, sentencia de 30 de octubre de 2025, Compañía de Distribución Integral Logista, C-348/24, ECLI:EU:C:2025:845 (importación de puros cubanos: ventas sucesivas y régimen preferencial).
16. TJUE, sentencia de 30 de octubre de 2025, Grupo Massimo Dutti, C-500/24, ECLI:EU:C:2025:846 (ventas sucesivas de mercancías asiáticas con destino en la UE).
17. TJUE (Gran Sala), sentencia de 11 de noviembre de 2025, Dinamarca / Parlamento y Consejo (salarios mínimos adecuados), C-19/23, ECLI:EU:C:2025:865.
18. TJUE, sentencia de 13 de noviembre de 2025, Familienstiftung, C-142/24, ECLI:EU:C:2025:873 (impuesto de donaciones y libre circulación de capitales en el Espacio Económico Europeo).
19. TJUE, sentencia de 13 de noviembre de 2025, Tribunal de Distrito de Galaţi, C-272/24, ECLI:EU:C:2025:874 (compensación económica y descansos por refuerzos de un juez).
20. TJUE, sentencia de 13 de noviembre de 2025, Comisión / España (independencia de gestión del administrador de infraestructuras ferroviarias), C-250/24, ECLI:EU:C:2025:885.

21. TJUE, sentencia de 13 de noviembre de 2025, FLO VENEER, C-639/24, ECLI:EU:C:2025:888 (prueba de la existencia de una entrega intracomunitaria en materia de IVA).
22. TJUE, sentencia de 20 de noviembre de 2025, Lolach, C-19/23, ECLI:EU:C:2025:901 (obligaciones de las empresas de comunicaciones dominantes).
23. TJUE (Gran Sala), sentencia de 25 de noviembre de 2025, Cupriak-Trojan y Trojan / Wojewoda Mazowiecki, C-713/23, ECLI:EU:C:2025:917 (parejas del mismo sexo y ciudadanos de la Unión).
24. TJUE, sentencia de 27 de noviembre de 2025, España / Comisión, C-729/23 P, ECLI:EU:C:2025:921 (correcciones financieras del fondo agrícola en Andalucía y Cataluña).
25. TJUE, sentencia de 27 de noviembre de 2025, Santander Renta Variable España Pensiones, Fondo de Pensiones, C-525/24, ECLI:EU:C:2025:922 (retenciones del impuesto de sociedades y libre circulación de capitales).
26. TJUE, sentencia de 27 de noviembre de 2025, Investcapital / M.H.S., C-509/24, ECLI:EU:C:2025:924 (cláusulas abusivas y proceso monitorio).
27. TJUE (Gran Sala), sentencia de 2 de diciembre de 2025, Russmedia Digital y Inform Media Press, C-492/23, ECLI:EU:C:2025:935 (obligaciones de los operadores en línea y la publicación de datos sensibles).
28. TJUE, auto de 8 de diciembre de 2025, Vedrón, C-403/25, ECLI:EU:C:2025:970 (inadmisibilidad de cuestión prejudicial).
29. TJUE (Gran Sala), sentencia de 18 de diciembre de 2025, Comisión / Polonia (control *ultra vires* de la jurisprudencia del Tribunal de Justicia y primacía), C-448/23, ECLI:EU:C:2025:975.
30. TJUE, sentencia de 18 de diciembre de 2025, Comisión / España (incumplimiento de la Directiva de aguas residuales urbanas), C-433/23, ECLI:EU:C:2025:981.
31. TJUE, sentencia de 18 de diciembre de 2025, Deity Shoes, C-323/24, ECLI:EU:C:2025:983 (modelos comunitarios de zapatos y moda).
32. TJUE (Gran Sala), sentencia de 18 de diciembre de 2025, Slagelse Almennyttige Boligselskab, Afdeling Schackenborgvænge, C-417/23, ECLI:EU:C:2025:1017 (colonias de viviendas en barrios de inmigrantes en Slagelse y Copenhague).
33. TGUE, sentencia de 9 de julio de 2025, Gotek, T-534/24, ECLI:EU:T:2025:682 (impuestos especiales y facturas falsas).

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Crónica

Actualidad institucional y económica de España en el marco de la Unión Europea (febrero de 2026)

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Resumen: El segundo semestre de 2025 ha estado marcado por una combinación de ajustes institucionales y desafíos económicos que han condicionado el funcionamiento y las prioridades de la Unión Europea, con implicaciones directas para España. En un contexto de tensiones geopolíticas persistentes y de creciente fragmentación del entorno económico internacional, la Unión ha debido gestionar simultáneamente debates estratégicos de largo alcance y expedientes de carácter inmediato.

Desde el punto de vista institucional, el periodo ha reflejado una Unión en fase de adaptación. La presidencia danesa del Consejo, el Discurso sobre el Estado de la Unión, el Consejo Europeo de diciembre y los avances en el proceso de ampliación han puesto de manifiesto la necesidad de reforzar la cohesión interna y la capacidad de decisión en un entorno cada vez más complejo. Determinados dosieres, como el acuerdo UE-Mercosur, han evidenciado las dificultades para construir consensos en políticas de alto impacto, convirtiéndose en indicadores del estado real de la integración europea.

En el ámbito económico, la segunda mitad de 2025 ha estado condicionada por la evolución del contexto macroeconómico, la orientación de la política monetaria del Banco Central Europeo y el papel estructural de la energía en la competitividad

y la estabilidad económica. A estos elementos se han sumado debates relevantes sobre comercio internacional, integración de los mercados financieros (incluido el avance del euro digital), sostenibilidad regulatoria, política industrial, políticas sociales con impacto económico y las primeras discusiones sobre el Marco Financiero Plurianual 2028-2034.

En conjunto, el semestre ha configurado una agenda europea densa y transversal, en la que las dinámicas institucionales y económicas han estado estrechamente interrelacionadas. La evolución de estos procesos ha tenido una incidencia directa en las posiciones y los intereses de España dentro de la Unión, en un momento en el que las decisiones adoptadas a nivel europeo condicionan de forma creciente las políticas económicas nacionales y el margen de actuación futura.

Palabras clave: Integración económica europea, Política monetaria del BCE, Energía y mercado energético europeo, Comercio internacional y tensiones comerciales, Euro digital, Marco Financiero Plurianual 2028-2034.

Abstract: *The second half of 2025 has been characterised by a combination of institutional adjustments and economic challenges shaping the priorities and functioning of the European Union, with direct implications for Spain. Against a backdrop of persistent geopolitical tensions and increasing fragmentation of the global economic environment, the Union has had to manage both long-term strategic debates and high-impact dossiers requiring immediate political attention.*

From an institutional perspective, the period has reflected a Union in a phase of adaptation. The Danish Presidency of the Council, the State of the Union address, the December European Council and developments in the enlargement process have highlighted the need to strengthen internal cohesion and decision-making capacity in an increasingly complex environment. Certain dossiers, such as the EU–Mercosur agreement, have exposed the difficulties involved in building consensus on high-impact policies, acting as indicators of the current state of European integration.

On the economic front, the second half of 2025 has been shaped by the evolution of the macroeconomic environment, the stance of the European Central Bank's monetary policy and the structural role of energy in competitiveness and economic stability. These developments have been accompanied by debates on international trade, financial market integration (including progress on the digital euro), regulatory sustainability, industrial policy, social policies with economic impact and the initial discussions on the 2028–2034 Multiannual Financial Framework.

Overall, the semester has produced a dense and cross-cutting European agenda in which institutional and economic dynamics have been closely interconnected. The evolution of these processes has directly affected Spain's positions and interests within the Union, at a time when European-level decisions increasingly shape national economic policies and future policy space.

Keywords: *European economic integration, ECB monetary policy, European energy market, International trade and trade tensions, Digital euro, 2028-2034 Multiannual Financial Framework.*

I. El estado de la integración

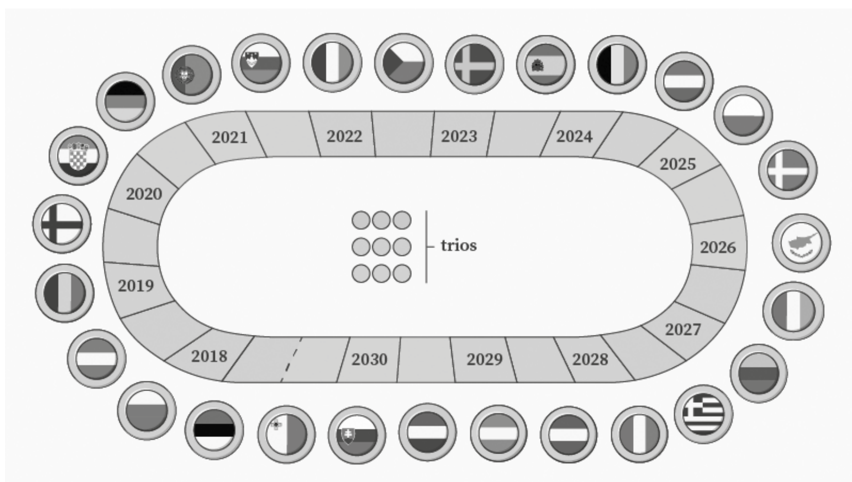
1. *Presidencia danesa del Consejo de la Unión Europea*

Desde el 1 de julio de 2025, Dinamarca ha asumido la presidencia rotatoria del Consejo de la Unión Europea y ha enmarcado su semestre en una doble prioridad: reforzar la seguridad europea y mejorar la competitividad del proyecto comunitario sin abandonar la agenda climática. Este planteamiento ha reflejado una lectura pragmática del momento: la Unión ha tenido que gestionar simultáneamente el impacto de la guerra en Ucrania, la presión geoeconómica global y la necesidad de consolidar políticas internas de crecimiento y resiliencia.

El programa de la presidencia ha detallado líneas de acción y un método de trabajo orientado a «resultados posibles», priorizando expedientes capaces de generar acuerdos en el Consejo y favoreciendo la continuidad de iniciativas ya encauzadas. Esta lógica ha tenido importancia institucional: en un Parlamento Europeo más fragmentado, la presidencia del Consejo ha funcionado como mecanismo de ordenación de la agenda y de reducción del riesgo de bloqueo en los procesos legislativos más sensibles (Ver más en: https://danish-presidency.consilium.europa.eu/en/programme-for-the-danish-eu-presidency/programme-of-the-danish-eu-presidency/).

Durante el semestre, Dinamarca ha tenido que equilibrar prioridades potencialmente tensionadas: por un lado, avanzar en seguridad (incluida la dimensión industrial y estratégica) y, por otro, sostener una agenda económica centrada en competitividad y mercado único. Este equilibrio ha sido relevante para el estado de la integración porque ha mostrado la creciente interdependencia entre ámbitos que antes se trataban por separado: defensa, industria, comercio y autonomía estratégica han tendido a converger en la agenda del Consejo (Ver más en: https://epthinktank.eu/2025/07/02/priority-dossiers-under-the-danish-eu-council-presidency/).

Para España, el semestre bajo presidencia danesa ha sido especialmente significativo por el énfasis en competitividad y seguridad, dos áreas en las que los Estados miembros han buscado reforzar la coherencia de acción de la UE. La presidencia ha facilitado un marco en el que la coordinación intergubernamental ha ganado visibilidad, al tiempo que se ha intentado preservar el método comunitario mediante la continuidad de los principales expedientes legislativos.



Fuente: https://www.consilium.europa.eu/en/council-eu/presidency-council-eu/

Asimismo, la presidencia danesa ha puesto énfasis en la dimensión externa de la acción europea, subrayando que la credibilidad de la UE como actor global depende en gran medida de su coherencia interna. Esta visión ha servido de marco para debates posteriores sobre ampliación, comercio y seguridad energética, que han marcado buena parte de la agenda institucional del semestre (Ver más en: https://www.consilium.europa.eu/en/council-eu/presidency-council-eu/).

2. *El Discurso sobre el Estado de la Unión de 2025 y las prioridades estratégicas*

El Discurso sobre el Estado de la Unión (SOTEU) de septiembre de 2025 ha constituido uno de los hitos políticos del semestre, al ofrecer una lectura de situación y un marco de prioridades para la agenda europea del otoño. La presidenta de la Comisión ha articulado el discurso alrededor de la necesidad de combinar competitividad, seguridad, transición climática y cohesión social, reforzando la idea de que la integración europea debe ofrecer resultados tangibles en un entorno internacional más competitivo. (Ver más en: https://ec.europa.eu/commission/presscorner/detail/ov/SPEECH_25_2053).

Más allá del contenido político, el SOTEU ha sido relevante por su traducción en líneas de acción e iniciativas asociadas, que han servido como

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referencia para debates posteriores en el Consejo y el Parlamento. En términos institucionales, el discurso ha funcionado como "programa de trabajo" para el tramo final del año, reforzando el vínculo entre prioridades estratégicas y tramitación concreta de expedientes durante el último trimestre (Ver más en: https://commission.europa.eu/strategy-and-policy/state-union/state-union-2025_en).

Uno de los ejes más repetidos en la agenda derivada del SOTEU ha sido el refuerzo del mercado único y la reducción de fragmentación regulatoria, conectando competitividad interna con autonomía estratégica. Esta orientación ha sido particularmente pertinente en el segundo semestre de 2025 porque ha reaparecido como justificación transversal en debates de comercio, industria, defensa industrial y política económica, y ha permitido a la Comisión enmarcar medidas diversas bajo una narrativa de "capacidad europea" frente a la competencia global (Ver más en: https://ec.europa.eu/commission/presscorner/api/files/document/print/en/speech_25_2053/SPEECH_25_2053_EN.pdf).

Desde la perspectiva de España, el SOTEU ha sido una referencia útil para conectar prioridades europeas con debates nacionales sobre competitividad, transición energética e inserción exterior. Además, el hecho de disponer de un texto oficial completo ha permitido anclar con precisión los elementos programáticos a los que se han referido posteriormente instituciones y medios, evitando que el debate político se reduzca a interpretaciones parciales.

3. *El Consejo Europeo de diciembre de 2025*

El Consejo Europeo del 18 de diciembre de 2025 ha cerrado el semestre institucional y ha concentrado las grandes líneas políticas de la Unión para el cambio de año. Sus conclusiones han abordado de forma central la guerra en Ucrania, la seguridad y defensa europeas, la ampliación y los principales retos estratégicos y presupuestarios del futuro inmediato, mostrando la continuidad de los asuntos estructurales que han condicionado la integración durante 2025.

El documento de conclusiones ha sido particularmente relevante para la crónica porque ha fijado por escrito los compromisos políticos y las orientaciones comunes, y ha permitido identificar qué asuntos han quedado abiertos para 2026. En términos de integración, el Consejo Europeo ha vuelto a evidenciar que la UE ha seguido operando bajo una lógica de «gestión de crisis» combinada con ambiciones de largo plazo, especialmente en seguridad, ampliación y resiliencia económica.

En materia de Ucrania y seguridad, el Consejo ha reafirmado la continuidad del apoyo europeo, conectándolo con la necesidad de fortalecer capa-

cidades europeas y mantener la cohesión del bloque ante la presión geopolítica. Esta formulación ha reforzado una tendencia visible durante el segundo semestre: la seguridad ya no se ha tratado como un capítulo aislado, sino como un eje que atraviesa comercio, industria, energía y presupuestos, con implicaciones directas para la arquitectura de la integración (Ver más en: https://www.consilium.europa.eu/en/press/press-releases/2025/12/19/european-council-conclusions-18-december-2025/).

El Consejo Europeo también ha aportado una base política para los debates sobre ampliación y reforma interna, al reconocer que el horizonte de adhesiones exige preparación institucional y presupuestaria. Para España, este cierre de semestre ha tenido interés porque ha proyectado hacia 2026 el vínculo entre ampliación, cohesión y capacidad financiera de la Unión, un debate en el que los Estados miembros han buscado posicionarse con antelación (Ver más en: https://www.consilium.europa.eu/en/meetings/european-council/2025/12/18/).

4. *La ampliación de la Unión Europea: Ucrania, Moldavia y los Balcanes Occidentales*

La ampliación ha adquirido una actualidad específica en el segundo semestre de 2025 por un hecho institucional concreto: en noviembre de 2025, la Comisión Europea ha publicado el Paquete de Ampliación 2025, que ha evaluado avances y desafíos de los socios de ampliación y ha reactivado el debate político sobre el ritmo y las condiciones del proceso. Este paquete ha servido como referencia para gobiernos, Parlamento y medios, y ha vuelto a situar la ampliación como un eje estratégico del proyecto europeo (Ver más en: https://enlargement.ec.europa.eu/news/2025-enlargement-package-shows-progress-towards-eu-membership-key-enlargement-partners-2025-11-04_en).

Ucrania ha seguido siendo el caso más determinante y ha estado inevitablemente condicionado por la guerra con Rusia. En el plano institucional, el debate de ampliación durante el semestre ha reflejado un equilibrio delicado: por un lado, el impulso geopolítico para acercar a Ucrania a la UE y, por otro, la insistencia en mantener el carácter meritocrático y condicional del proceso. Esta tensión ha tenido consecuencias para la integración interna, al reabrir preguntas sobre capacidad de absorción, funcionamiento institucional y sostenibilidad presupuestaria de una Unión potencialmente ampliada (Ver más en: https://enlargement.ec.europa.eu/enlargement-policy/strategy-and-reports_en).

El paquete de 2025 ha permitido también introducir un elemento comparado entre candidatos, destacando ritmos diferentes y señalando a algunos

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países como «más avanzados» en el proceso. Este tipo de valoración ha tenido impacto político porque ha condicionado expectativas y ha alimentado debates sobre credibilidad y equidad en la política de ampliación. Reuters, por ejemplo, ha recogido valoraciones concretas derivadas del paquete, útiles para contextualizar cómo el debate se ha proyectado en la esfera pública europea durante el otoño (Ver más en: https://www.reuters.com/world/europe/eu-says-montenegro-is-most-advanced-country-join-bloc-2025-11-04/).

Finalmente, el Consejo Europeo de diciembre ha vuelto a integrar la ampliación en el cierre político del año, vinculándola a la preparación interna de la Unión y a la necesidad de sostener coherencia institucional ante un eventual ensanchamiento. Este encaje ha sido relevante para España, que ha tendido a combinar una visión favorable a la ampliación con la defensa de un proceso riguroso y ordenado, consciente de sus efectos sobre cohesión, políticas comunes y arquitectura financiera.

5. *Gobernabilidad, fragmentación política y equilibrio institucional*

Durante el segundo semestre de 2025, la fragmentación política derivada de las elecciones europeas de 2024 ha comenzado a traducirse en dificultades operativas concretas en el funcionamiento de las instituciones de la Unión. Tras el verano, se ha hecho más visible la complejidad para articular mayorías estables en el Parlamento Europeo, especialmente en expedientes sensibles que han requerido amplios consensos interinstitucionales.

Este contexto ha obligado a la Comisión Europea a recalibrar su estrategia política, priorizando iniciativas con mayor viabilidad parlamentaria y recurriendo con mayor frecuencia a acuerdos parciales o soluciones técnicas. La gobernabilidad institucional ha adquirido así un carácter más pragmático, en el que la ambición integradora se ha visto condicionada por la necesidad de preservar la continuidad del proceso decisorio.

El semestre ha estado marcado también por episodios que han puesto a prueba la estabilidad política de la Comisión. En octubre de 2025, se han producido nuevos desafíos políticos y debates públicos sobre el liderazgo del Ejecutivo comunitario, reflejando un clima institucional más tensionado y contribuyendo a situar la gobernabilidad como un asunto de actualidad en la crónica semestral (Ver más en: https://www.reuters.com/world/eus-von-der-leyen-confronts-fresh-no-confidence-challenges-2025-10-06/).

Como consecuencia de estas dinámicas, el Consejo de la Unión Europea ha reforzado su papel como espacio central de negociación política. Buena parte de los avances del semestre se han producido por la vía intergubernamental, lo que ha reabierto el debate sobre el equilibrio entre método comunitario e intergubernamental en una Unión más fragmentada.

6. *Estado de Derecho y condicionalidad: un factor estructural de fondo*

El Estado de Derecho ha mantenido su presencia en la agenda europea durante el segundo semestre de 2025, fundamentalmente como consecuencia de la publicación en julio del Informe sobre el Estado de Derecho 2025 por parte de la Comisión Europea. Este documento ha proporcionado una base actualizada para evaluar la situación en los Estados miembros y ha servido como referencia para debates posteriores en el Parlamento y el Consejo (Ver más en: https://ec.europa.eu/commission/presscorner/detail/en/ip_25_1742).

Aunque el tema no ha dominado la agenda mediática, su relevancia ha aumentado por su vinculación con otros procesos clave del semestre, en particular la ampliación y las discusiones preliminares sobre el futuro marco financiero plurianual. La coherencia interna de la Unión ha sido presentada como un requisito indispensable para sostener la credibilidad externa del proyecto europeo.

Durante el otoño, el Parlamento Europeo ha reactivado el debate político en torno a la aplicación de los mecanismos de condicionalidad, con especial atención a situaciones consideradas persistentes. Estas discusiones han evidenciado que el Estado de Derecho sigue siendo un elemento de fricción estructural dentro de la UE, incluso cuando no se traduce en crisis abiertas (Ver más en: https://www.europarl.europa.eu/news/en/press-room/20251120IPR31492/parliament-sounds-the-alarm-over-hungary-s-deepening-rule-of-law-crisis).

Desde la perspectiva de la integración, el semestre ha confirmado que el Estado de Derecho actúa como variable transversal, condicionando debates sobre ampliación, presupuesto y gobernanza institucional.

7. *Defensa europea y autonomía estratégica*

La defensa europea ha adquirido una relevancia específica durante el segundo semestre de 2025 como resultado de avances legislativos concretos y de un contexto geopolítico marcado por la persistencia de la guerra en Ucrania. En noviembre, el Parlamento Europeo ha aprobado un nuevo programa destinado a reforzar la industria europea de defensa, y en diciembre el Consejo ha dado su aprobación final, completando el proceso legislativo.

Este hito ha sido significativo porque ha consolidado la dimensión industrial de la política de defensa europea, reforzando la idea de autonomía estratégica en un ámbito tradicionalmente sensible para la soberanía nacional. La cooperación en defensa ha sido presentada como una necesidad

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práctica más que como un proyecto político abstracto, vinculada a la capacidad de respuesta y a la resiliencia del bloque (Ver más en: https://www.consilium.europa.eu/en/press/press-releases/2025/12/08/european-defence-industry-programme-council-gives-final-approval/).

El semestre ha puesto de manifiesto, no obstante, los límites de la integración en este ámbito. La ausencia de reformas de los Tratados y las diferencias entre Estados miembros en materia de financiación y control político han seguido condicionando el alcance de los avances. Aun así, la inclusión recurrente de la defensa en la agenda del Consejo Europeo ha confirmado su consolidación como uno de los ejes centrales del debate sobre el futuro de la integración.

8. *Relaciones exteriores y comercio: el acuerdo UE–Mercosur y la negociación interna*

El acuerdo de asociación entre la Unión Europea y el Mercosur ha sido uno de los expedientes más ilustrativos del estado de la integración durante el segundo semestre de 2025. Más allá de su dimensión comercial, el debate en torno al acuerdo ha puesto de manifiesto las dificultades internas de la UE para construir consensos en un dossier con implicaciones económicas, sociales y medioambientales significativas.

Durante el otoño, la Comisión Europea intensificó los contactos diplomáticos con los Estados miembros para desbloquear un acuerdo considerado estratégico en un contexto de creciente competencia geoeconómica global. El acuerdo ha sido defendido como un instrumento para diversificar mercados, reforzar cadenas de valor y consolidar la presencia europea en América Latina, una región de especial interés para España y otros Estados miembros.

Sin embargo, el avance del acuerdo ha seguido condicionado por las reticencias de varios gobiernos, especialmente en relación con el impacto sobre el sector agrícola y las garantías medioambientales. En este contexto, Italia ha desempeñado un papel particularmente relevante, al mantener una posición de cautela que ha funcionado como bloqueo político de facto durante buena parte del semestre (Ver más en: https://www.euronews.com/my-europe/2025/12/17/signing-the-eu-mercosur-deal-now-is-premature-italys-pm-meloni-says).

Las negociaciones con Italia y otros Estados reticentes han ilustrado el funcionamiento real de la política comercial común: más allá de las competencias formales de la Comisión, la aprobación de acuerdos de gran alcance sigue dependiendo de complejos equilibrios internos. Durante el semestre, se han explorado fórmulas de compromiso, incluidas salvaguardias agríco-

las y compromisos adicionales en materia de sostenibilidad, con el objetivo de preservar el apoyo político necesario sin reabrir formalmente el texto del acuerdo.

Desde una perspectiva geopolítica, el debate sobre Mercosur ha evidenciado la tensión entre la ambición global de la UE y sus limitaciones internas. En un contexto en el que Estados Unidos y China han intensificado el uso del comercio como herramienta estratégica, la dificultad para cerrar el acuerdo ha sido interpretada por algunos analistas como un síntoma de las vulnerabilidades internas del proyecto europeo.

España ha mantenido una posición claramente favorable al acuerdo, subrayando tanto su dimensión económica como su valor estratégico para reforzar las relaciones birregionales. Al cierre de 2025, el expediente ha quedado abierto y condicionado por la negociación interna entre Estados miembros, convirtiéndose en un caso paradigmático de los retos de la integración europea en materia de acción exterior (Ver más en: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mercosur_en).

II. **Cuestiones generales de la actualidad económica**

1. *Contexto macroeconómico general de la Unión Europea*

Durante el segundo semestre de 2025, la economía de la Unión Europea ha continuado moviéndose en un escenario de crecimiento moderado, con diferencias significativas entre Estados miembros y con una elevada sensibilidad a factores externos. Tras la desaceleración observada en fases anteriores, los datos del semestre han apuntado a una estabilización gradual de la actividad, aunque sin una recuperación homogénea ni especialmente robusta.

La evolución macroeconómica ha estado condicionada por varios elementos simultáneos: el endurecimiento monetario acumulado en años anteriores, la persistencia de tensiones geopolíticas, especialmente la guerra en Ucrania, y un entorno comercial internacional más fragmentado. En este contexto, la UE ha tratado de equilibrar la contención de la inflación con la necesidad de no lastrar excesivamente la actividad económica y el empleo.

Durante el semestre, las instituciones europeas han insistido en la resiliencia de la economía comunitaria, destacando la capacidad de absorción de shocks externos y el papel estabilizador de políticas adoptadas en años anteriores, como los mecanismos de apoyo energético o los instrumentos financieros comunes. Sin embargo, el discurso institucional ha reconocido de

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forma explícita que los márgenes de maniobra fiscal y monetaria son más estrechos que en fases previas.

Para España, este contexto ha tenido una doble lectura: por un lado, una evolución relativamente favorable en comparación con algunos socios; por otro, una elevada exposición a factores externos (energía, comercio y política monetaria) que han seguido condicionando el desempeño económico durante el segundo semestre (Ver más en: https://economy-finance.ec.europa.eu/economic-forecast-and-surveys/economic-forecasts_en).

2. *Política monetaria y Banco Central Europeo*

La política monetaria del Banco Central Europeo (BCE) ha tenido un carácter menos restrictivo y progresivamente más acomodaticio durante el segundo semestre de 2025, en continuidad con el giro iniciado en junio de 2024, cuando el BCE ha comenzado un ciclo de recortes de tipos. En este sentido, el debate del semestre no se ha centrado tanto en un nuevo endurecimiento, sino en hasta qué punto el BCE debía continuar recortando o, por el contrario, pausar para consolidar la desinflación y evitar riesgos de rebrotes, especialmente en componentes más persistentes como los servicios (Ver más en: https://global.morningstar.com/en-gb/economy/european-central-bank-holds-interest-rates-last-meeting-2025).

En el plano estrictamente operativo, el BCE ha mantenido en el tramo final del año una pausa en los tipos oficiales: tanto en octubre de 2025 cómo en diciembre de 2025 el Consejo de Gobierno ha decidido dejar sin cambios los tipos de interés, situando el tipo de la facilidad de depósito en el 2,00%, el de las operaciones principales de financiación en 2,15% y el de la facilidad marginal de crédito en 2,40%. Esta continuidad ha sido relevante porque ha consolidado un «punto de llegada» del ciclo de recortes previo y ha reforzado el mensaje de que el BCE consideraba que la trayectoria de la inflación era compatible con la estabilidad de precios en el medio plazo (Ver más en: https://www.ecb.europa.eu/press/pr/date/2025/html/ecb.mp251218~58b0e415a6.en.html).

El BCE ha justificado esta pausa señalando que la inflación estaba «en camino» de estabilizarse en torno al objetivo del 2% en el horizonte de proyección, y que la política monetaria debía seguir guiándose por los datos, evaluando tanto la inflación general como la subyacente y la transmisión de la política monetaria a la economía real. En la rueda de prensa de diciembre, la presidenta Lagarde ha reiterado este enfoque y ha insistido en que mantener los tipos sin cambios respondía a una evaluación actualizada de la inflación y de las condiciones financieras, en un contexto de crecimiento moderado y riesgos externos persistentes

La reunión de octubre ha sido especialmente ilustrativa para entender el tono del BCE en el semestre: el Consejo de Gobierno ha subrayado que la economía había seguido creciendo «pese a un entorno global desafiante» y que el mercado laboral y los balances privados habían aportado resiliencia; en ese marco, el BCE ha señalado explícitamente que los recortes previos de tipos ya estaban actuando como factor de apoyo. Esta formulación ha sido importante para interpretar el segundo semestre de 2025 como una fase de gestión prudente de la normalización a la baja, no como un retorno automático a una política expansiva agresiva.

En paralelo, el BCE ha continuado siguiendo de cerca las expectativas de inflación y su anclaje. Las cuentas de la reunión de octubre (publicadas en noviembre) han destacado que los indicadores de mercado de expectativas de inflación a medio plazo se han mantenido cerca del 2%, un elemento clave para justificar la pausa: si las expectativas permanecen ancladas y la inflación converge, el coste de seguir recortando rápidamente puede superar sus beneficios, sobre todo si persisten focos de inflación interna (Ver más en: https://www.ecb.europa.eu/press/accounts/2025/html/ecb.mg251127~dc88fc4bec.en.html).

A nivel de referencia cuantitativa, la evolución de los tipos oficiales durante 2024-2025 ha servido como marco para el análisis del semestre: tras los ajustes operativos de 2024 (incluida la modificación del «spread» entre tipos a partir de septiembre de 2024), el BCE ha situado la facilidad de depósito en niveles significativamente inferiores a los máximos del ciclo restrictivo, y en el segundo semestre de 2025 ha optado por consolidar esa posición sin cambios adicionales en las reuniones clave del otoño e invierno. Esto permite caracterizar el semestre como una fase de acomodación ya implementada y pausa de evaluación, más que como un ciclo activo de endurecimiento (Ver más en: https://www.ecb.europa.eu/stats/policy_and_exchange_rates/key_ecb_interest_rates/html/index.en.html).

Este marco ha tenido implicaciones directas para la economía real: la pausa del BCE ha convivido con el hecho de que los recortes previos han ido trasladándose gradualmente al coste de financiación, favoreciendo cierta normalización del crédito y sosteniendo componentes de demanda interna. Al cierre de 2025, varios análisis han destacado que la inflación había alcanzado el 2% en diciembre, reforzando expectativas de estabilidad de tipos en el corto plazo, aunque con cautelas por la persistencia de la inflación de servicios (Ver más en: https://www.ft.com/content/29853bf6-5a20-4bb7-9dbb-fe98ce76da3b).

Para España, el perfil de política monetaria ha sido relevante por su impacto sobre hogares endeudados, empresas intensivas en crédito y el mercado inmobiliario. A la vez, ha reforzado el debate sobre la coordinación entre política monetaria y política fiscal: con un BCE en modo «evalua-

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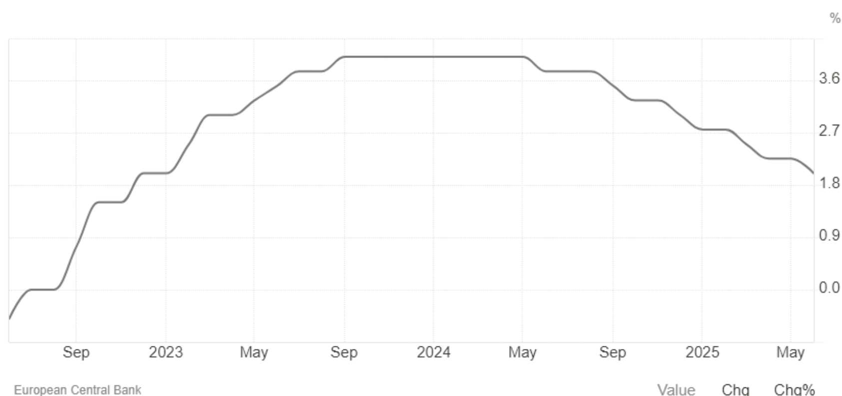
ción», el margen de acción para sostener crecimiento y competitividad ha tendido a desplazarse hacia reformas e instrumentos nacionales y europeos distintos del tipo de interés.



Fuente: https://tradingeconomics.com/euro-area/deposit-interest-rate

3. *Energía y mercado energético europeo: seguridad, precios y transición*

La política energética de la Unión Europea ha seguido siendo un eje central de la agenda económica por su vínculo directo con la competitividad, la inflación y la resiliencia estratégica. Aunque la fase más aguda de la crisis energética se ha moderado respecto a 2022-2023, el semestre ha confirmado que el mercado energético europeo continúa expuesto a riesgos externos (geopolítica, GNL, clima) y a vulnerabilidades internas (interconexiones, dependencia residual del gas y cuellos de botella de red).

En el plano de la seguridad de suministro, uno de los hechos más relevantes del semestre ha sido la constatación de que la UE ha entrado en el invierno 2025-2026 con niveles de almacenamiento elevados. La Comisión ha señalado que el sistema europeo de almacenamiento ha alcanzado alrededor del 83% a 1 de octubre de 2025 (aprox. 85 bcm), un nivel comparable a rangos previos a la crisis y equivalente a una parte significativa del consumo anual europeo (Ver más en: https://energy.ec.europa.eu/topics/energy-security/gas-storage_en).

Esta situación ha sido interpretada como un indicador de resiliencia del sistema europeo ante posibles disrupciones adicionales, especialmente en un contexto de reducción drástica del gas ruso por gasoducto desde 2022.

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En octubre, la Comisión ha comunicado que, incluso sin gas ruso por tubería, los escenarios analizados permitían terminar el invierno con niveles de almacenamiento que facilitarían el rellenado posterior, reforzando la narrativa de «preparación» para el invierno. (Ver más en: https://energy.ec.europa.eu/news/eu-prepared-winter-and-beyond-confirms-latest-report-european-transmission-system-operators-gas-2025-10-09_en).

El informe de ENTSOG sobre el invierno 2025/2026 ha aportado una base técnica adicional para describir el estado del sistema: ha contextualizado el punto de partida (83% a 1 de octubre) y ha recordado la lógica regulatoria del objetivo de llenado (con flexibilidad) como instrumento de seguridad energética. Este tipo de documento es especialmente útil para una crónica porque conecta regulación europea, condiciones de mercado y riesgos operativos del sistema (Ver más en: https://www.entsog.eu/sites/default/files/2025-10/ENTSOG%20Winter%20Supply%20Outlook%202025_26%20-%20With%20Summer%202026%20overview_0.pdf).

Aún con mayor estabilidad, el debate del semestre ha mantenido un foco claro: la UE ha tratado de evitar que la normalización del suministro se traduzca en complacencia. En este sentido, el segundo semestre ha mostrado que el gas sigue cumpliendo una función de «respaldo» en sistemas eléctricos con alta penetración de renovables variables, especialmente cuando episodios climáticos reducen la producción eólica o hidroeléctrica. La Agencia Internacional de la Energía ha subrayado en 2025 que estos episodios ilustran el papel de las centrales de gas para garantizar la seguridad de suministro eléctrico cuando aumentan las renovables (Ver más en: https://www.iea.org/reports/gas-market-report-q3-2025/executive-summary).

En paralelo, el semestre ha vuelto a poner sobre la mesa la tensión entre descarbonización y nueva infraestructura gasista. El debate sobre inversiones y riesgo de «activos varados» ha seguido presente en el discurso público europeo, especialmente por la divergencia entre previsiones de caída de demanda y planes de ampliación de capacidad de importación de GNL. Informaciones basadas en análisis de think tanks han alimentado esta discusión, señalando el riesgo de sobredimensionar infraestructura en un escenario de electrificación y crecimiento de renovables (Ver más en: https://www.reuters.com/business/energy/eu-gas-demand-set-fall-by-7-by-2030-ember-report-says-2025-06-16/).

Respecto al mercado eléctrico, el segundo semestre de 2025 ha continuado desarrollándose bajo el marco de la reforma del diseño del mercado eléctrico aprobada en 2024, cuyo objetivo ha sido reducir la dependencia de los precios eléctricos respecto al coste de los combustibles fósiles y promover contratos de largo plazo (PPAs, CfDs) para dar estabilidad a consumidores e industria. En la narrativa institucional, esta reforma ha sido clave para contener volatilidad y facilitar inversiones en renovables en un entorno

de precios inciertos (Ver más en: https://energy.ec.europa.eu/topics/markets-and-consumers/electricity-market-design_en).

Desde la óptica de integración, el semestre ha confirmado que la reforma del mercado eléctrico ha funcionado también como una pieza de política industrial: estabilizar precios y reforzar contratos a largo plazo se ha presentado como un requisito para sostener competitividad y acelerar inversiones. El Consejo de la UE ha sintetizado el sentido de la reforma en términos de protección a consumidores, estabilidad para empresas y aceleración de electricidad verde, lo que ha permitido articular un discurso común sobre el vínculo entre transición y competitividad (Ver más en: https://www.consilium.europa.eu/en/policies/electricity-market-reform/).

En cuanto a la transición energética, el semestre ha reforzado la lectura de que el principal cuello de botella no ha sido únicamente la ambición regulatoria, sino la capacidad material de despliegue: redes, permisos, almacenamiento y flexibilidad. En este contexto, la dimensión de seguridad energética ha seguido formando parte del debate climático europeo, especialmente en industrias intensivas en energía y en el diseño de instrumentos para sostener la inversión baja en carbono.

Para España, estos desarrollos han sido particularmente relevantes por tres motivos: (i) la elevada penetración de renovables y la necesidad de flexibilidad y redes; (ii) la importancia estratégica de las interconexiones para integrar mejor el mercado ibérico en el mercado europeo; y (iii) la sensibilidad de la competitividad industrial a los costes eléctricos. En conjunto, el segundo semestre de 2025 ha confirmado que la energía ha seguido siendo un determinante central de la política económica europea y un campo donde la integración del mercado interior se ha vuelto condición necesaria para sostener transición y competitividad.

4. *Comercio exterior y tensiones comerciales*

El comercio exterior ha seguido siendo un eje central de la política económica europea en la segunda mitad de 2025, en un contexto de fragmentación del orden comercial internacional y de uso creciente de instrumentos comerciales con fines estratégicos. La UE ha continuado presentándose como un actor favorable a un comercio abierto basado en reglas, pero ha reforzado al mismo tiempo una lógica más «defensiva» orientada a la protección del mercado interior, la reducción de dependencias y la respuesta a prácticas consideradas desleales.

En este marco, la Comisión ha destacado en julio su intensificación del uso de instrumentos de defensa comercial, señalando un volumen elevado de medidas en vigor y un número inusualmente alto de investigaciones re-

cientes. La comunicación institucional ha situado estas herramientas como parte del arsenal de la UE para «nivelar el terreno de juego» frente a subsidios, dumping y distorsiones, lo que ha reforzado una tendencia de fondo: la política comercial se ha integrado progresivamente en el debate de competitividad y autonomía estratégica (Ver más en: https://policy.trade.ec.europa.eu/news/commission-launches-record-number-trade-defence-investigations-2024-2025-07-28_en)

La Eurocámara también ha contribuido a consolidar este enfoque más asertivo. En septiembre, el Think Tank del Parlamento ha sistematizado el «toolbox» europeo (desde el control de inversiones hasta el instrumento anti-coerción o el reglamento de subvenciones extranjeras), subrayando que la UE ha ido llenando vacíos del derecho comercial internacional mediante instrumentos autónomos que buscan proteger sus intereses económicos y estratégicos. Este encuadre ha sido útil para interpretar el semestre: no se ha tratado solo de episodios puntuales, sino de una arquitectura creciente de política comercial y «seguridad económica» (Ver más en: https://epthinktank.eu/2025/09/18/understanding-the-eu-trade-defence-toolbox/).

La relación comercial con China ha continuado concentrando una parte importante de las tensiones. Además del trasfondo del conflicto en torno a los vehículos eléctricos, el semestre ha estado atravesado por una discusión más amplia sobre dependencias críticas y el riesgo de «coerción económica». Existe un aumento de la preocupación por restricciones chinas en materiales estratégicos (como tierras raras), y de la discusión europea sobre respuestas potenciales, incluidas herramientas como el instrumento anti-coerción (Ver más en: https://www.lemonde.fr/en/economy/article/2025/10/27/rare-earths-eu-threatens-retaliation-as-china-tightens-restrictions_6746813_19.html).

Este giro se ha formalizado políticamente en diciembre con el lanzamiento por la Comisión de nuevas iniciativas orientadas a reforzar la seguridad económica europea, incluyendo medidas vinculadas a materias primas y resiliencia industrial. El mensaje ha sido claro: mantener apertura comercial, pero dotarse de una doctrina y de herramientas más ágiles para anticipar y mitigar riesgos derivados de dependencias en sectores estratégicos (Ver más en: https://commission.europa.eu/news-and-media/news/new-measures-secure-raw-materials-and-strengthen-eus-economic-security-2025-12-03_en).

La prensa internacional ha interpretado este paquete como un paso hacia una doctrina más explícita de seguridad económica, con énfasis en materias primas, controles e instrumentos de defensa comercial. La Comisión está buscando acelerar y reforzar el uso de herramientas comerciales y de inversión para proteger cadenas de suministro críticas, en un contexto donde la UE se ha percibido vulnerable tanto a restricciones chinas como

a presiones arancelarias estadounidenses (Ver más en: https://www.reuters.com/world/china/eu-aims-improve-defences-against-economic-threats-such-china-export-curbs-2025-12-03/).

En paralelo, la dimensión transatlántica también ha marcado el semestre. A finales de julio, se llegó a un acuerdo UE-EE. UU. para evitar una escalada arancelaria, con un marco que ha buscado aportar previsibilidad en el comercio bilateral aunque bajo niveles de arancel más elevados que en periodos anteriores. Este episodio ha reforzado en la UE la percepción de que la política comercial estadounidense se ha vuelto más impredecible y ha contribuido a legitimar el discurso europeo sobre autonomía estratégica y diversificación (Ver más en: https://www.reuters.com/business/us-eu-avert-trade-war-with-15-tariff-deal-2025-07-28/).

En diciembre, llegó la resolución de un expediente chino sobre importaciones europeas de porcino con una reducción de aranceles en su fallo final, un desarrollo con impacto directo para exportadores europeos. Este caso ha tenido una lectura económica inmediata y una lectura política más amplia en el contexto de tensiones comerciales bilaterales. Para España, el asunto resulta especialmente significativo por el peso de sus exportaciones de porcino hacia el mercado chino, lo que ha conectado de forma natural la política comercial UE-China con intereses económicos nacionales (Ver más en: https://www.reuters.com/world/asia-pacific/china-cuts-eu-pork-tariffs-final-ruling-2025-12-16/).

En conjunto, la segunda mitad de 2025 ha confirmado una evolución estructural: la política comercial de la UE ha seguido siendo un instrumento de apertura, pero ha incorporado con más fuerza una lógica de protección del mercado interior, gestión de dependencias y respuesta a riesgos estratégicos. En este contexto, el comercio exterior se ha consolidado como un componente central de la agenda económica europea, estrechamente vinculado a competitividad, industria, seguridad y proyección internacional.

5. *Integración de los mercados financieros y euro digital*

La integración de los mercados financieros europeos ha vuelto a situarse en el centro de la agenda económica durante la segunda mitad de 2025, en un contexto marcado por la necesidad de movilizar inversión privada para sostener la competitividad, la transición verde y la transformación digital. La Comisión Europea ha reiterado que la fragmentación financiera sigue siendo uno de los principales obstáculos estructurales para el crecimiento económico de la Unión y para el aprovechamiento eficiente del ahorro europeo.

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En este marco, en diciembre la Comisión presentó un nuevo paquete legislativo destinado a profundizar la integración de los mercados financieros y a reforzar la convergencia supervisora. La iniciativa ha abordado cuestiones como la eliminación de barreras regulatorias transfronterizas, la mejora del acceso a financiación de las empresas —en particular pymes y empresas innovadoras— y el fortalecimiento del papel de los mercados de capitales como complemento al crédito bancario. Este lanzamiento ha supuesto un nuevo intento de relanzar la Unión de los Mercados de Capitales, tras avances limitados en etapas anteriores (Ver más en: https://ec.europa.eu/commission/presscorner/detail/en/ip_25_2893)

El debate institucional del semestre ha puesto de relieve un diagnóstico compartido: la UE dispone de elevados niveles de ahorro, pero carece de mecanismos suficientemente integrados para canalizarlos hacia inversión productiva a escala europea. A lo largo del otoño, varios Estados miembros y actores institucionales han subrayado que esta debilidad limita la capacidad de las empresas europeas para escalar, innovar y competir con firmas estadounidenses o asiáticas, especialmente en sectores intensivos en capital.

Paralelamente, el euro digital se ha consolidado como uno de los expedientes económicos y financieros más relevantes del semestre. En diciembre, el Consejo acordó su posición negociadora sobre la propuesta legislativa relativa al euro digital y al refuerzo del papel del efectivo, lo que ha permitido desbloquear el inicio de los trílogos con el Parlamento Europeo. Este paso ha marcado un hito institucional claro, al situar el proyecto en una fase decisiva del proceso legislativo (Ver más en: https://www.consilium.europa.eu/en/press/press-releases/2025/12/19/single-currency-council-agrees-position-on-the-digital-euro-and-on-strengthening-the-role-of-cash/)

Durante el semestre, el debate sobre el euro digital se ha centrado en cuestiones de diseño con implicaciones económicas y financieras significativas: la protección de la privacidad, el papel de los bancos comerciales en la intermediación, los límites a la tenencia y el riesgo de desintermediación bancaria. Las instituciones europeas han insistido en que el euro digital debe funcionar como complemento —y no como sustituto— del sistema financiero existente, preservando la estabilidad financiera y evitando efectos adversos en situaciones de tensión.

Desde una perspectiva más amplia, el euro digital ha sido presentado como una herramienta estratégica para preservar la soberanía monetaria europea en un entorno de creciente digitalización de los pagos y de expansión de soluciones privadas y extranjeras. En este sentido, el avance del expediente durante la segunda mitad de 2025 ha reforzado la idea de que la integración financiera y la innovación monetaria forman parte de un mismo

esfuerzo por dotar a la UE de mayor autonomía económica y capacidad de actuación.

6. *Normativa económica y agenda ESG*

La agenda regulatoria en materia de sostenibilidad empresarial ha entrado en una fase decisiva durante la segunda mitad de 2025, al desplazarse el foco desde la adopción normativa hacia la implementación práctica y los ajustes del marco ESG europeo. Tras la aprobación en años anteriores de instrumentos clave como la Directiva de Informes de Sostenibilidad (CSRD) y la Directiva de Diligencia Debida (CSDDD), el semestre ha estado marcado por un debate más pragmático sobre su impacto económico y su aplicabilidad real.

En noviembre, el Parlamento Europeo adoptó su posición negociadora sobre un paquete de simplificación de las obligaciones de sostenibilidad, orientado a reducir cargas administrativas sin cuestionar los objetivos fundamentales de transparencia y debida diligencia. Esta posición ha respondido a las preocupaciones expresadas por empresas y algunos Estados miembros sobre la complejidad del marco regulatorio y el riesgo de afectar a la competitividad, especialmente en el caso de empresas medianas (Ver más en: https://www.europarl.europa.eu/news/en/press-room/20251106IPR31296/sustainability-reporting-and-due-diligence-meps-back-simplification-changes).

El debate parlamentario ha puesto de manifiesto una tensión estructural que ha atravesado el semestre: cómo equilibrar ambición climática y social con viabilidad económica. Mientras que una parte de la Eurocámara ha defendido la necesidad de preservar la credibilidad internacional del modelo europeo de sostenibilidad, otros grupos han insistido en la conveniencia de introducir flexibilidades que permitan una aplicación gradual y proporcionada, evitando deslocalizaciones o desventajas competitivas frente a terceros países.

En diciembre, el Parlamento aprobó un paquete actualizado de normas de sostenibilidad, cerrando un paso institucional relevante en el proceso de ajuste del marco ESG. Este hito ha confirmado que la UE no está dando marcha atrás en su agenda de sostenibilidad, sino que está entrando en una fase de afinamiento regulatorio, con el objetivo de mejorar la eficacia de las normas y su aceptación por parte del tejido empresarial (Ver más en: https://www.europarl.europa.eu/news/en/press-room/20251211IPR32164/simplified-sustainability-reporting-and-due-diligence-rules-for-businesses).

La discusión ha trascendido el ámbito estrictamente institucional y ha generado una respuesta significativa en la sociedad civil y en los medios

internacionales. Diversas organizaciones ambientales y sociales han criticado los cambios aprobados, argumentando que podrían debilitar la capacidad de supervisión sobre las cadenas de valor globales. Esta reacción ha evidenciado que el marco ESG europeo no es solo una herramienta económica, sino también un elemento central del posicionamiento normativo y ético de la UE a nivel global (Ver más en: https://www.theguardian.com/world/2025/dec/16/green-groups-eu-betrayal-vote-reduce-oversight-firms).

Desde una perspectiva económica, el semestre ha confirmado que la sostenibilidad corporativa se ha convertido en un factor estructural del entorno empresarial europeo. Las obligaciones de reporte y de debida diligencia influyen ya en el acceso a financiación, en la relación con inversores y en la gestión de riesgos, y han pasado a formar parte del cálculo estratégico de las empresas. El cierre de 2025 ha dejado así un marco ESG consolidado, aunque sometido a ajustes, que seguirá condicionando la actividad económica y regulatoria en 2026.

7. *Política industrial y seguridad económica*

La política industrial europea ha ganado un peso creciente en la agenda económica a medida que la UE ha asumido que competitividad, transición y seguridad dependen cada vez más de insumos estratégicos (materias primas, componentes y capacidades industriales). En este marco, el semestre ha confirmado que la política económica europea se está desplazando hacia una lógica más explícita de gestión de dependencias y reducción de vulnerabilidades.

En diciembre, la Comisión presentó la iniciativa RESourceEU, un paquete de medidas destinado a asegurar el acceso a materias primas y a reforzar la seguridad económica de la UE. El anuncio no se ha limitado a un mensaje político general: ha buscado ordenar un conjunto de herramientas para diversificar proveedores, mejorar la resiliencia de cadenas de suministro y acelerar capacidades internas (incluyendo reciclaje, sustitución y desarrollo industrial asociado) (Ver más en: https://commission.europa.eu/news-and-media/news/new-measures-secure-raw-materials-and-strengthen-eus-economic-security-2025-12-03_en).

El contenido técnico del paquete ha permitido aterrizar el enfoque de la Comisión: no se trata solo de «comprar fuera», sino de reorganizar el modelo de abastecimiento con criterios de riesgo, y de introducir mecanismos que faciliten inversión y cooperación entre Estados miembros y sector privado. En términos económicos, el objetivo es reducir la probabilidad de cuellos de botella que afecten a la industria europea en sectores clave (au-

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tomoción, baterías, renovables, defensa, electrónica), donde la dependencia de un número reducido de proveedores puede traducirse en shocks de precio o interrupciones de suministro (Ver más en: https://single-market-economy.ec.europa.eu/document/download/01c448d6-dc93-40d7-9afe-4c2a-f448d00c_en).

Este impulso se ha entendido también como una respuesta al contexto internacional. La UE ha observado cómo ciertos países han utilizado restricciones a la exportación o control de materiales como herramienta geoeconómica. Por ello, la seguridad económica ha dejado de ser un concepto abstracto y se ha convertido en un marco operativo para justificar medidas industriales, comerciales y de inversión, manteniendo al mismo tiempo la narrativa de apertura y cooperación con socios «fiables».

La prensa económica ha interpretado este giro como un intento de acelerar capacidades internas —incluido el reciclaje— y de preparar instrumentos para responder con mayor rapidez a shocks en materiales críticos, en un entorno donde la competencia industrial global se ha intensificado. Estos análisis han reforzado el argumento de que la política industrial europea está entrando en una fase menos declarativa y más instrumental, orientada a resultados concretos en cadenas de valor estratégicas (Ver más en: https://www.ft.com/content/66dbc507-74e2-4d05-b1f1-b9dfbc8a5399).

En conjunto, el paquete RESourceEU ha funcionado como un hito útil para la crónica porque condensa varias tendencias económicas del semestre: la convergencia entre mercado interior y política industrial, la ampliación del concepto de competitividad hacia la resiliencia, y la consolidación de una agenda europea que busca reducir dependencias críticas sin abandonar por completo un enfoque de cooperación económica internacional.

8. *Políticas sociales con impacto económico*

Las políticas sociales han tenido una proyección económica clara durante la segunda mitad de 2025 a través del Semestre Europeo, que ha seguido funcionando como el principal marco de coordinación entre prioridades sociales y gobernanza económica. En este contexto, la Comisión ha insistido en que la cohesión social no es solo un objetivo normativo, sino un factor condicionante del crecimiento sostenible, la estabilidad macroeconómica y la resiliencia del mercado laboral.

Un hito institucional relevante se produjo en julio, cuando el Consejo de la Unión Europea adoptó las recomendaciones específicas por país correspondientes a 2025. Estas recomendaciones han servido de referencia durante el resto del semestre para orientar reformas nacionales y evaluar

avances en ámbitos como empleo, protección social y lucha contra la pobreza (Ver más en: https://www.consilium.europa.eu/en/press/press-releases/2025/07/08/european-semester-2025-council-adopts-country-specific-recommendations/).

En el plano sustantivo, el debate del semestre se ha concentrado en la implementación de la Recomendación sobre ingresos mínimos adecuados y en el refuerzo de instrumentos dirigidos a colectivos vulnerables. En septiembre, la Comisión y el Social Protection Committee publicaron el informe anual sobre ingresos mínimos, que ha evaluado el grado de aplicación de la recomendación de 2023 y ha puesto de relieve diferencias significativas entre Estados miembros en cobertura y suficiencia de las prestaciones (Ver más en: https://employment-social-affairs.ec.europa.eu/document/download/980db58d-2e30-4bef-8538-fe94dd0748e6_en?filename=2025.06614_Part+I_V3_EN.pdf).

Este informe ha tenido una lectura económica explícita: ha vinculado la adecuación de los ingresos mínimos con la capacidad de sostener la demanda interna, reducir la pobreza laboral y mejorar la participación en el mercado de trabajo. A lo largo del otoño, varios Estados miembros han utilizado estas conclusiones como base para ajustar o evaluar sus sistemas nacionales, integrando la dimensión social en debates más amplios sobre sostenibilidad fiscal y reformas estructurales.

En el caso de España, las recomendaciones y los informes europeos han conectado de forma directa con debates nacionales sobre el Ingreso Mínimo Vital y la Garantía Infantil Europea, situando estas políticas dentro del marco europeo de coordinación económica y social. Este encaje ha reforzado la idea de que las políticas sociales forman parte de la arquitectura económica de la Unión y no constituyen un ámbito separado o residual.

En conjunto, el semestre ha confirmado que la dimensión social ha seguido ganando peso dentro de la gobernanza económica europea. Lejos de limitarse a declaraciones programáticas, las recomendaciones, informes y evaluaciones publicados han contribuido a consolidar un enfoque en el que la protección social se concibe como un instrumento con efectos macroeconómicos, especialmente relevante en un contexto de crecimiento moderado y de presiones sobre la cohesión social.

9. *Fiscalidad verde y sostenibilidad presupuestaria*

El debate sobre el Marco Financiero Plurianual (MFP) 2028-2034 ha adquirido entidad propia en la segunda mitad de 2025, al pasar de referencias genéricas a hitos institucionales concretos. En julio, la Comisión presentó oficialmente el punto de partida del nuevo marco presupuestario, ac-

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tivando un proceso político que condicionará las prioridades económicas y de inversión de la UE en el próximo ciclo (Ver más en: https://commission.europa.eu/strategy-and-policy/eu-budget/long-term-eu-budget/eu-budget-2028-2034_en).

Tras ese lanzamiento, el semestre ha estado marcado por una acumulación de debates formales en Consejo y Parlamento que han ido perfilando los principales ejes de conflicto. Desde el inicio, la discusión ha girado en torno a la suficiencia del presupuesto para responder a nuevas prioridades (defensa, transición energética, ampliación y competitividad) frente a un marco financiero limitado y a posiciones nacionales divergentes sobre contribuciones y reasignación de partidas tradicionales.

En noviembre, el Parlamento Europeo cuestionó públicamente algunos de los elementos del rediseño presupuestario, especialmente en relación con agricultura y cohesión, alertando sobre el riesgo de que nuevas prioridades se financien a costa de políticas históricas con fuerte impacto territorial. Este posicionamiento ha tenido un claro contenido económico, al anticipar tensiones sobre inversión regional, apoyo al sector primario y equilibrio entre Estados miembros (Ver más en: https://www.reuters.com/business/environment/eu-lawmakers-challenge-eu-budget-plan-over-farming-regional-aid-2025-11-05/).

El debate se intensificó en diciembre con un nuevo intercambio político en el Consejo de Asuntos Generales, que abordó el estado de las negociaciones y permitió a los Estados miembros expresar sus líneas rojas y prioridades. Este tipo de reuniones, aunque no concluyentes, ha sido clave para entender el clima del semestre: un reconocimiento general de que el presupuesto debe adaptarse a un entorno más exigente, combinado con una fuerte resistencia a aumentos significativos de contribuciones nacionales (Ver más en: https://www.consilium.europa.eu/en/meetings/gac/2025/12/16/).

La discusión llegó también al Consejo Europeo de diciembre, donde el MFP fue tratado como parte del debate estratégico sobre el futuro de la Unión. Algunos Estados, entre ellos España, defendieron la necesidad de un presupuesto ambicioso que permita sostener inversión y cohesión en un contexto de transición y ampliación, subrayando la dimensión económica y política del marco financiero (Ver más en: https://www.lamoncloa.gob.es/lang/en/presidente/news/paginas/2025/20251219-european-council.aspx).

Desde una perspectiva económica, el semestre ha confirmado que el MFP 2028–2034 no es solo un instrumento contable, sino un marco estructurante de la política económica europea. Las decisiones que comienzan a perfilarse en 2025 condicionarán la capacidad de la UE para invertir, responder a crisis y sostener la convergencia entre Estados miembros en los próximos años. El cierre del semestre ha dejado claro que el debate presupuestario será uno de los ejes centrales de la agenda económica europea en 2026.

Sobre el autor

Pablo Rodríguez Talavera es un académico español especializado en finanzas y economía, actualmente desempeñándose como profesor en la Deusto Business School de la Universidad de Deusto y en la Cámarabilbao University Business School. Obtuvo una doble titulación en Administración y Dirección de Empresas e Ingeniería en Tecnologías Industriales por la Universidad de Deusto en 2017. Posteriormente, completó un Máster en Competitividad e Innovación en la misma institución además de un grado en Ciencia Política y de la Administración por la UNED.

En su rol docente, imparte asignaturas relacionadas con finanzas, economía y el panorama internacional en diversos programas académicos, incluyendo el Grado en Administración y Dirección de Empresas (ADE), el Doble Grado en ADE y Derecho, y el Doble Grado en Relaciones Internacionales y Derecho.

Además de su labor docente, realiza actualmente sus estudios de doctorado sobre los estados del bienestar a nivel regional, y colabora en la revista Cuadernos Europeos de Deusto, donde analiza los desarrollos más recientes en la integración europea y las cuestiones económicas pertinentes para España dentro del contexto comunitario.

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