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Michele Graziadei - Riccardo De Caria

THE «CONSTITUTIONAL TRADITIONS COMMON TO THE MEMBER STATES» IN THE CASE-LAW OF THE EUROPEAN COURT OF JUSTICE: JUDICIAL DIALOGUE AT ITS FINEST

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THE «CONSTITUTIONAL TRADITIONS COMMON TO THE MEMBER STATES» IN THE CASE-LAW OF THE EUROPEAN COURT OF JUSTICE: JUDICIAL DIALOGUE AT ITS FINEST

MICHELE GRAZIADEI - RICCARDO DE CARIA (*)

CONTENTS: 1. Common constitutional traditions: the present dimensions of the theme. — 2. Theoretical and empirical issues on the table. — 3. Facts and figures. — 4. The CJEU's case law on CCTS: between reference and deference to the European Court of Human Rights. — 5. Conclusion: judicial dialogue at its finest.

1. This article deals with a theme that has yet to receive all the attention it deserves, namely the uses of the references to the «constitutional traditions common to the Member States» (as the wording of art. 6(3) TEU and the Charter of Fundamental Rights of the European Union, Preamble and art. 52 put it), or to «common constitutional traditions» (as they are often shortened: CCTS) in the jurisprudence of the European Court of Justice (CJEU: the acronym refers hereinafter only to the Court of Justice, and encompasses also the former European Court of Justice, ECJ).

Although the topic has been studied by some of the most brilliant legal minds in Europe, one would look in vain for a major work that stands out as a standard reference. We will not review the literature in

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(*) This work is the result of a joint effort. Michele Graziadei is mostly responsible for drafting paragraphs 1 and 2, while paragraphs 3 and 4 were mostly written by Riccardo de Caria. We wish to thank the participants in the seminar held at the Collegio Carlo Alberto, Turin, 27 April 2017, for sharing their reflections on the theme of this paper (Vittoria Barsotti, Marta Cartabia, Sabino Cassese, Mario Comba, Jeffrey Jowell, and Paolo Passaglia). Thanks to Prof. Giuliano Amato, Fernanda Nicola, and Sabrina Praduroux for their comments on a previous version of the text. Responsibility for any errors or omissions lies with the authors only. The authors took notice of legal developments up to the end of August 2017.

this short piece, as our main focus of enquiry is the jurisprudence of the CJEU on this topic. Helpful as the literature on the subject is, we still hope to show that much more still can and needs to be done to have a better understanding of this area of the law, which is open to new scholarly investigations, even more so in light of the most recent socio-political trends. Our belief in this possibility is anchored to the significant remarks by Marta Cartabia: «Unlike other aspects of European integration, the "Europe of Rights" has always been presented and perceived as a result of an existent common constitutional tradition, as opposed to a political bargain» (1).

The following analysis and comments move from the study of the case law of the European Court of Justice (CJEU) (2), beginning with the famous Judgment of 17th December 1970, *Internationale Handelsgesellschaft*, 11-70, EU:C:1970:114, where the expression under consideration was first used to justify the assertion that Community law would enjoy primacy even over fundamental principles enshrined in national constitutions. As the CJEU put it in that judgment, this was warranted because: «[...] respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community» (*Internationale Handelsgesellschaft*, § 4).

In other words, Community law and institutions would be bound to protect fundamental rights, as enshrined in the various constitutional traditions and insofar as a common denominator could be derived from them, therefore national authorities (notably German ones) should not worry about Community law trumping national fundamental rights: this would just not happen, and the CJEU with that judgment intended to be very clear about that.

Almost 50 years down the road, we have the occasion to look back at nearly five decades of case law on the issue, considering that it

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(1) M. CARTABIA, *A Pluralistic Europe of Rights*, in, *The European Court of Justice and the Autonomy of the Member States*, edited by H.W. Micklitz and B. De Witte, Cambridge, Antwerp, Portland, Intersentia, 2012, 259.

(2) The sample we have examined (described below, paragraph 3) includes only judgements and orders by the Court of Justice of the European Union. We have not investigated cases from the General Court. We have adopted the standard ECLI citation method every time a ruling was quoted or mentioned for the first time: the following references appear in shortened form.

remains highly relevant to the development of EU law ([3]). We aim to explore two points in particular, which are our main research questions. Primarily, whether the Court tends to make reference to CCTs simply as a rather supple «source of inspiration» (and not as an autonomous source of fundamental rights) ([4]) in the protection of fundamental rights, or rather whether it draws on those traditions going into an extended search into the single national traditions (and if so, which are the ones that influence the development of the EU more regularly). A second, related point concerns the fundamental rights in connection to which the CCT clause has been referenced more frequently.

The historical origins of the reference to constitutional traditions common to Member States in the jurisprudence of the CJEU have been investigated in depth most recently by Bill Davies ([5]). At the very beginning of the story, before the crystallisation of the doctrine into the present formula, the expression «constitutional ideas» of Member States was also aired.

The genealogy of the doctrine is located at the intersection between national constitutional laws and EC law. The search for the constitutional traditions common to the Member States by the CJEU was a way to both assert the autonomy of Community order, and to confirm its dialogic position vis à vis the laws of the Member States, including their constitutional laws. It was a response to the challenge first raised by the German Federal administrative court in *Internationale Handelsgesellschaft* to question the legitimacy of the EU legal order on the basis of the German constitutional order, that is of its fundamental rights and the principles of the national constitutional structure.

The CJEU met the challenge by pulling the constitutional traditions common to the Member States out of the proverbial hat. This was a crucial, strategic turn made to forestall objections raised against EC law

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([3]) K. LENAERTS, *La vie après l'avis: Exploring the principle of mutual (yet not blind) trust*, 54 *Common Market Law Review* (2017), 805.

([4]) As Professor Sabino Cassese put it in the above-mentioned seminar. See now: S. CASSESE, *The «constitutional traditions common to the Member States» of the European Union*, in this issue of *Riv. trim. dir. pubbl.* (no. 4, 2017).

([5]) B. DAVIES, Internationale Handelsgesellschaft *and the miscalculation at the inception of the ECJ's human rights jurisprudence*, in *EU Law Stories, Contextual and Critical Histories of European Jurisprudence*, edited by B. Davies and F. Nicola, Cambridge, Cambridge University Press, 2017, 157 ff.

in the name of the defence of the constitutional norms of the Member States. The move was ultimately successful (6). It produced both enhanced legitimacy of EC Law and better acceptance of the jurisprudence of the CJEU by the Member States. Ultimately, it paved the way to the EU Charter of Fundamental Rights, a text which has now the same binding force of the Treaties (although the EU so far has not acceded to the ECHR, and perhaps it never will), and that pays due homage to the notion in question, both in the Preamble, and in art. 52.4. «In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions».

The movement leading to the Charter was accompanied by a subtle change in the provisions of the Treaties concerning this matter (7).

The Preamble of the Treaty of Maastricht, which established the Union in 1992, contains a sentence confirming the attachment of the Member States to: «the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law». Article F of the same Treaty recites that the Union: «[...] shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy». The second paragraph of art. F is the forerunner of the text of art. 6(3) TUE, and thus contains a reference to the constitutional traditions that are common to the Member States. The Treaty of Amsterdam modifies this article

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(6) B. DAVIES, *op. cit.*, 155, holds that *Internationales Handelsgeselschaft* was the fruit of «a strategic miscalculation on the part of the European Court of Justice», which led to a strong national reaction (the German Constitutional Court's *Solange* decision). This miscalculation by the CJEU was the fruit of «a fundamental disconnect between the court, its ambitions and the reception by the Member States» (*ibid.*). Although we share this evaluation of the decision, it is still true that it triggered a dynamic that eventually produced the results hilighted in the text. Although, as we stress above, the tension underlying this line of cases is not exhausted, the tones have changed. See Second Senate of the Federal Constitutional Court reference for a preliminary ruling concerning the Public Sector Purchase Programme (PSPP) of the European Central Bank (ECB) of the 18th of August 2017: BVerfG, *Beschluss des Zweiten Senats* vom 18. Juli 2017 – 2 BvR 859/15 – Rn. (1-137), commented by M. GOLDMANN, *Summer of Love: Karlsruhe Refers the QE Case to Luxembourg*, Verfassungsblog, last checked on the 29th of August 2017.

(7) G. AMATO, *Libertà, democrazia, stato di diritto* (typescript on file with the authors, 2017).

by providing that the Union pays respect to the national identity of the Member States, without further qualifications. The text of art. F in its new version has also a new paragraph one, highlight and absorb the democratic principle: «The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States». Finally, the Treaty of Lisbon, through the transition represented by the failed Treaty on the Constitution of Europe, incorporates in its art. 6 the reference to the European charter of human rights and to the European Convention for the protection of Human rights and fundamental freedoms, but also introduces a new art. 2: «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, tolerance, justice, solidarity and equality between women and men prevail».

The reference here is no more to «principles», as in the previous versions of the Treaty, but rather to «values». There is no clear explanation for this new language, which now must be read together with the continuing reference to the «principles» mentioned in art. 6 of the same Treaty. Nonetheless, the reference to democracy and the rule of law as «values» reflects the awareness that, at this point, the Union clearly has ends which are no more merely economic.

The tension between the European level and the national level in any case is not completely exhausted. The CJEU has moved beyond the statement contained in *Internationale Handelsgesellschaft*, § 3, according to which: «[...] the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the Constitution of that state or the principles of a national constitutional structure».

It is by now clear that the Treaty imposes to the Court the need to be sensitive to the «constitutional identity» ([8]) of the Member States in

([8]) On this topic, e.g. A. SAIZ ARNAIZ and C. ALCOBERRO LLIVINA (eds.), *National Constitutional Identity and European Integration*, Cambridge, Antwerp, Intersentia, 2013. For an interesting perspective, different from the one adopted in this work, see A. JR GOLIA, *Counter-Limits beyond Europe. The Calvo Doctrine in Latin America and its Value from a Comparative Law Perspective*, forthcoming in *Annuario di diritto comparato*, 2018.

terms of fundamental values. As the Judgment of 14 October 2004, *Omega*, C-36/02, EU:C:2004:614, shows, this means that certain fundamental values enshrined in national constitutions may be invoked, for example, to set limits to fundamental freedom protected under the Treaties, even though they may play out differently in the various Member States:

«37 It is not indispensable in that respect for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected. [...]

39 In this case, it should be noted, first, that, according to the referring court, the prohibition on the commercial exploitation of games involving the simulation of acts of violence against persons, in particular the representation of acts of homicide, corresponds to the level of protection of human dignity which the national constitution seeks to guarantee in the territory of the Federal Republic of Germany. It should also be noted that, by prohibiting only the variant of the laser game the object of which is to fire on human targets and thus 'play at killing' people, the contested order did not go beyond what is necessary in order to attain the objective pursued by the competent national authorities.

40 In those circumstances, the order of 14 September 1994 cannot be regarded as a measure unjustifiably undermining the freedom to provide services».

This introduces a certain degree of pluralism in the jurisprudence of the Court, and in its dialogue with the national Courts. This pluralism is now guaranteed by the notion of 'constitutional identity' of the Member States, which was first introduced in the Treaty on European Union, in then-Article F para. 2, to acknowledge that the Union was based on the Member States ([9]). Art. 4(2) of the Lisbon

([9]) The Treaty of Amsterdam renumbered Article F as Article 6, while the Treaty of Lisbon rephrased Article 6, moving the CCT provision in paragraph 3; as recalled above, CCTS are also mentioned in the Nice Charter, in the Preamble and in Article 52. The first stages of this evolution were recalled by the CJEU in several judgments: among others, in Judgment of 15 December 1995, *Bosman*, C-415/93, EU:C:1995:463, paragraph 79; Judgment of 6 March 2001, *Connolly*, C-274/99 P, EU:C:2001:127, paragraph 38; Judgment of 22 October 2002, *Roquette Frères*, C-94/00, EU:C:2002:603, paragraph 24; and Judgment of 12 June 2003, *Schmidberger*, C-112/00, EU:C:2003:333, paragraph 72; see also Judgment of 24 April 2012, *Kamberaj*, C-571/10,

Treaty articulates this idea adding new dimensions to it: «The Union shall respect [the Member States'] national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions [...]».

A number of theoretical and empirical questions remain open at this point. They concern the relationships and the interactions between the various elements mentioned above on several dimensions.

2. From the theoretical point of view, a first issue to raise concerns the relationship between «the constitutional principles common to the Member States», which are recognised as general principles of EU law, and the other sources mentioned in Art. 6 TUE. This relationship is not clarified by the article in question, and remains very much open, being linked to the role of the general principles of law in the EU order. Takis Tridimas notes in this respect that: «One might have thought that, given the binding effect of the Charter and the proliferation of EU legislation, there would be less need to rely on unwritten general principles of law. This is however not the case» ([10]).

He contends that the CJEU reliance on arguments based on the general principles of law is to be read in the light of their functions: «They synergize the fundamental constitutional underpinnings of the EU which are grounded on liberal democracy, serving as the facilitators of outcomes that cannot readily be determined by concrete rules, triggering constitutional dialogue, and even serving as the exponents of judicial empathy. Furthermore, they serve as an assertion of judicial independence» ([11]).

The constitutional traditions common to the member States appear to share these functions. Their role is multifarious, ranging from being a tool to interpret existing EU law, to, possibly, a self-standing ground of review.

A second question is linked to the notion of «constitutional identity». This poses a new challenge to the approach followed by the CJEU, by advancing the idea that to ground EU law on the basis of the

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EU:C:2012:233, paragraph 60; and Judgment of 6 October 2016, *Paoletti*, C-218/15, EU:C:2016:748, paragraph 25.

([10]) T. TRIDIMAS, *The general principles of law: who needs them?*, in *Cahiers de droit européen* (2015), 421.

([11]) T. TRIDIMAS, *op. loc. cit.*

constitutional traditions common to the Member States may not be enough to secure the legitimacy of the EU from the point of view of the Member States in crucial instances.

An objection of this kind was raised in the BVerfG reference for a preliminary ruling in the *Gauweiler* case, concerning the legitimacy of the European Central Bank OMT program (Judgment of 16 June 2015, *Gauweiler and Others v. Deutscher Bundestag*, C-62/14, EU:C:2015:400). As the order for reference states, while the Court of Justice is the competent authority to interpret EU law, the German FCC retains the right to determine «the inviolable core content of the constitutional identity and to review whether the act interferes with this core». The German constitutional court thus claimed to have the final say on the legality of the OMT programme within the German legal order. The CJEU did not take any position on the FCC's reserve power, but simply stated that preliminary rulings are binding on the national courts (*Gauweiler*, § 16), thus avoiding a possible ground of conflict.

This was a wise choice, yet the reference to the notion of constitutional identity as a way to assert the primacy of the national order of values over the European one, or over the way these values are upheld at the European level, is still potentially disruptive. As a form of intangible patrimony, which is «integration proof» ([12]), it is the classical last ditch defence against the harmonising efforts that are sometimes carried out through the elaboration of the notion of constitutional traditions common to the Member States. Yet, the generality of the idea leaves the door open to a much more fine-grained approach to the fundamental questions raised by the notion of constitutional

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([12]) This is the language of BVerfG, Order of the Second Senate of 15 December 2015 – 2 BvR 2735/14 – para. 1-126 (henceforth: *Identity review order decision*), at 49: «Die [...] für integrationsfest erklärten Schutzgüter dulden auch keine Relativierung im Einzelfall [...]». The quote is from the second decision of the FCC dealing with the European arrest warrant. The Court stresses the absolute character of the protection of constitutional identity granted to the right to dignity, that under the German Constitution is held to be an absolute right, not to be relativized by any case-by-case-balancing against countervailing interests. In this case, the right to dignity demanded the respect of «minimum guarantees of the rights of the accused in criminal trials» (cf. §§ 52, 56, 59, 76, 83 f., 107). The decision is commented from different angles by E. URÍA GAVILÁN, *Solange III? The German Federal Constitutional Court Strikes Again. European Papers*, in *European Forum*, Highlight of 16 April 2016, 367-368; M. HONG, *Human Dignity and Constitutional Identity: The Solange-III-Decision of the German Constitutional Court*, VerfassungsBlog, 2016/2/18 (last checked on the 29th of August 2017).

identity (13), and to explore which coordination mechanism may be found to reach more satisfactory results for all the players in the field (14).

The reference to the constitutional traditions common to the Member States is — in other words — in a dialectical relationship with the notion of constitutional identity (15). But the notion of «constitutional identity» is not self-evident either. If the CJEU reference to the constitutional traditions of the Member States is often somewhat apodictic, the same can be said of the reference at the a national level to the constitutional identity of the State. Is it not true that such identity is by and large shared with the other Member States? Is it not true that comparative law has a substantial role to play in clarifying this

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(13) See Joined Cases C-404 & 609/15 PPU, *Pál Aranyosi and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen*, judgment of the Court of Justice (Grand Chamber) of 5 April 2016, EU:C:2016:198. G. ANAGNOSTARAS, *Mutual confidence is not blind trust! Fundamental rights protection and the execution of the European arrest warrant: Aranyosi and Caldararu*', in 53 *Common Market Law Review* (2016), 1675 ff., rightly considers this judgment as an implicit answer by the CJEU to the approach advanced by the FCC in the *Identity review order decision* mentioned in the previous footnote. The judgment makes clear that the CJEU is very sensitive to the concerns that the FCC voices about the application of EU law and its effects on the national constitutional requirements (much more than it proved to be only a few years earlier in its Judgment of 26th February 2013, *Melloni*, C-399/11, EU:C:2013:107, where it simply (re)stated, at § 59, that «[i]t is settled case-law that, by virtue of the principle of primacy of EU law, which is an essential feature of the EU legal order [...], rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that State (see, to that effect, inter alia, Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, paragraph 3, and Case C-409/06 *Winner Wetten* [2010] ECR I-8015, paragraph 61)»).

(14) A. SAIZ ARNAIZ and C. ALCOBERRO LLIVINA (eds.), *National Constitutional Identity and European Integration*, *supra* note 8.

(15) SeeV. CONSTANTINESCO, *La Conciliation Entre la Primauté du Droit de l'Union Européenne et l'Identité Nationale des Etats Membres: Mission Impossible ou Espoir Raisonné?*, in *Common European Legal Thinking. Essays in Honour of Albrecht Weber*, edited by H.-J. Blanke, P. Cruz Villalón, T. Klein, J. Ziller, Springer, Berlin, 2015, 104: «Si la primauté, telle qu'initialement conçue par la Cour de justice, revêt un caractère absolu (tout le droit de l'Union l'emporte sur tout le droit interne contraire), le fait que la réalisation concrète de la primauté dépende aujourd'hui d'une multiplicité d'instances vient incontestablement la relativiser. Témoin de cette évolution, la notion d'*identité nationale* que l'on peut considérer comme un infléchissement à la primauté du droit de l'Union»; see also the truly enriching reflections by O. POLLICINO, *Della sopravvivenza delle tradizioni costituzionali comuni alla Carta di Nizza: ovvero del mancato avverarsi di una (cronaca di una) morte annunciata*, in *Dir. Ue*, 2016, 253.

aspect? ([16]) These are questions that must find answers, possibly not apodictic ones. It may well be that the view articulated by the BVerfG in its own *Gauweiler* ruling ([17]) is misconceived, at least from the point of view of the adherence of the German State to the ECHR and to other international instruments, for example. All too often identities, like traditions, are conceived in a monolithic way, while they are not, as a comparative approach to their study shows ([18]).

From an empirical point of view, there are several important questions relating to the main theme: How does the Court arrive at the conclusion that a certain norm is part of the common constitutional traditions of the Member States? What weight has the comparison of the laws of the Member States in this respect? How to identify new, emerging constitutional traditions? Is it useful to try to provide a practical guide to the traditions which are already accepted as «common to the member States»? What about traditions which have been considered, but that are not common to the Member States? And how, at Member State level, is the reference to this common patrimony by the CJEU received?

3. To probe into these questions, we elaborated a sample of CJEU documents through a first search performed in the Eur-Lex database, updated on 10 July 2017 using the search string «constitutional traditions common to the Member States». This singled out precisely 100 rulings by the CJEU containing the pertinent expression, *i.e.* 92 judgments and 8 orders. There is a linguistic issue to consider in the selection of this sample. In the English versions of the European documents reviewed, there are four occurrences of the expression «common constitutional traditions» instead of the one used by the Treaty. No such variations appear in the Italian text of the pertinent documents. Hence the sample was selected by working on the Italian version of the documents in the first place. Many more references to the same concept can be found in other documents, in particular in the opinions by the Advocate Generals (167). Reviewing all of them would

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([16]) K. LENAERTS, *The European Court of Justice and the Comparative Law Method*, in *Eur. Rev. Private law* (2017), 297.

([17]) BVerfG, Judgment of the Second Senate of 21 June 2016 - 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 BvE 13/13.

([18]) See S. CASSESE, *Fine della solitudine delle corti costituzionali, ovvero il dilemma del porcospino*, in *Ars Interpretandi*, 2015, 21 ff.; M. GRAZIADEI, *Comparative Law, Legal History and the Holistic Approach to Legal Cultures*, in 3 *ZeUP* 531 (1999).

have gone beyond the purposes of this work. Surely this shows that this is a fruitful area of investigation. In particular, it would be very interesting to try to assess to what extent the opinions making more references to CCTseventually influenced the Court of Justice.

Out of the 100 rulings examined to prepare this paper, there are 92 judgments and 8 orders that mention the expression in question. As for the 92 judgments, 68 are rendered on references for a preliminary ruling, while the rest concern different proceedings.

A first criterion adopted to categorise the rulings, on top of the two research questions identified under paragraph 1, is the chronological one. As mentioned, above the notion was first introduced by the CJEU in *Internationale Handelsgesellschaft*. After that decision, it appeared in 1974 in *Nold*, 4-73, EU:C:1974:51, and then five years later, in 1979, in *Hauer*, 44/79, EU:C:1979:290. After *Hauer*, it was briefly mentioned in the Judgment of 26th June 1980, *National Panasonic*, 136/79, EU:C:1980:169. So in the first decade (1970-1980), there are only four judgments referring to the notion we are discussing (including the forerunner of 1970).

After this first period, we find two references in 1986 and 1987 (the important cases *Johnston* and *Heylens*, respectively), and then a peak of five in 1989 (totalling 6 in the 1980's).

The Single European Act, in force since 1 July 1987, evokes the idea in its Preamble, which shows a commitment of the signatories «[...] to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter notably freedom equality and social justice».

Contrary to a reasonable expectation one might have, the Maastricht Treaty (signed on 7th February 1992, and in force since 1st November 1993), that, as recalled above, introduced a reference to the CCTsin the TEU, was not a turning point. We find one case (Judgment of 18th June 1991, *Elliniki Radiophonia Tiléorassi* [*ERT*], C-260/89, EU:C:1991:254) in 1991, two in 1992, none in 1993, and then only one or two cases per year until 1998 (no case again is recorded in 1999). The new wording of the Treaty on European Union, now explicitly referencing the notion of CCTS, was first referenced in the famous *Bosman* judgment delivered in 1995.

Numbers rose instead in the 2000's. In that decade we located 48

out of the 92 total judgments, with a peak of 22 rulings between 2006 and 2008; together with 7 out of 8 orders, which totals 55 out of 100.

In the current decade, the pace has slowed: after 4 cases in 2010 and 5 in both 2011 and 2012, there have been 2 cases every year so far in the period from 2013 to 2017 (this it adds up to 25, on top of the only one order of 2010).

Moving on to the two points indicated in the first paragraph above, first of all, as far as originating countries are concerned, twenty rulings originated from Germany, sixteen from Italy, eleven from Belgium, nine from the UK, seven from Austria, six from Austria and France each, five from the Netherlands, three each from Spain and Ireland, two each from Bulgaria, Greece, and Sweden, and finally one each from the Czech Republic, Portugal, Malta, Luxembourg, Latvia, and Hungary. These numbers should be interpreted in the light of the well-known fact that the Courts of some Member States resort more often to the preliminary reference procedure under Article 267 TFEU (and its predecessors) than others.

More importantly, it appears that, out of the 100 documents reviewed, only one case, *Hauer*, contains an analysis of the wording of the constitutions of three Member States (Germany, Italy, and Ireland) to verify whether a certain principle is in fact a CCT. The only case that gets close to *Hauer* (although without mentioning specific constitutions) is a Judgment of 11th January 2000, *Netherlands and Gerard van der Wal v Commission*, C-174-189/98 P, EU:C:2000:1, which is a rare, if not unique, «negative» case: indeed, in § 17 the Court states that a certain principle cannot «be deduced from the constitutional traditions common to the Member States».

In virtually all the other cases, the CJEU just states that a particular principle is stemming from the CCTS without more, almost as it were a matter of fact ([19]): *Hauer* dates back to the very first line of cases, so if one exceptions exists, it is by now rather remote, and is definitely not connected to a hypothetical more recent shift towards more in-depth

([19]) As was mentioned above, this work does not deal with the opinions of advocate generals, however it seems appropriate here to mention two equally rare Opinions that (even though very briefly and only in footnotes) explicitly review Member States' constitutions in order to assess whether a common principle can be derived from them, *i.e.* Opinion of Advocate General Kokott of 14 October 2004, *Berlusconi et a.*, C-387-391-403/02, EU:C:2004:624, footnote 129; and Opinion of Advocate General Szpunar of 4 February 2016, *Rendón Marín*, C-165/14, and *CS*, C-304/14, EU:C:2016:75, footnote 118).

analyses, which is then a disproved hypothesis. In other words, the «source of inspiration» approach of the first rulings has been maintained throughout the almost fifty years since its inception. In this scenario, the question concerning whose constitutions are considered for the assessment becomes inevitably moot.

The other important criterion chosen to categorise the pertinent cases is to which fundamental right the CCT clause is related. Out of the 100 cases identified, 27 resorted to the CCT clause with regard to the right to effective judicial protection ([20]) concern the respect of judicial defence rights, while four (Judgment of 6 September 2012, *Trade Agency*, C-619/10, EU:C:2012:531; Judgment of 25 January 2007, *Salzgitter Mannesmann*, C-411/04 P, EU:C:2007:54; Judgment of 2 May 2006, *Eurofood*, C-341/04, EU:C:2006:281; Judgment of 26 June 2007, *Ordre des barreaux francophones et germanophone*, C-305/05, EU:C:2007:383) concern the right to a fair trial. To summarize, more than one third of the cases (36 out of 100) mention the CCT clause to deal with the protection of fundamental rights before courts.

Similarly, five cases (the Judgment of 14th February 2012, *Toshiba*, C-17/10, EU:C:2012:72; the Judgment of 28th April 2011, *El Dridi*, C-61/11 PPU, EU:C:2011:268; the Judgment of 11th March 2008, *Rüdiger Jager*, C-420/06, EU:C:2008:152; the Judgment of 3rd May 2005, *Berlusconi et a.*, C-387-391-403/02, EU:C:2005:270; the Judgment of 8th March 2007, *Campina*, C-45/06, EU:C:2007:154) concern the principle of retroactive application of the more lenient penalty; and three more (the Judgment of 3rd June 2008, *Intertanko*, C-308/06, EU:C:2008:312; the Judgment of 3rd May 2007, *Advocaten voor de Wereld*, C-303/05, EU:C:2007:261; the Judgment of 12th December 1996, *Criminal proceedings against X.*, C-74-129/95, EU:C:1996:491) are instead related to

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([20]) Among others, the most relevant are the Judgment of 27th June 2013, *Agrokonsulting*, C-93/12, EU:C:2013:432; the Judgment of 13th March 2007, *Unibet*, C-432/05, EU:C:2007:163; the Judgment of 3rd September 2008, *Kadi*, C-402/05, EU:C:2008:461; the Judgment of 1st April 2004, *Commission v. Jego-Quéré*, C-263/02, EU:C:2004:210; Judgment of 15th October 1987, *Heylens and Others*, 222/86, EU:C:1987:442; and the Judgment of 15th May 1986, *Johnston*, 222/84, EU:C:1986:206. On a closely related matter, five more the Judgment of 2nd April 2009, *Gambazzi*, C-394/07, EU:C:2009:219; the Judgment of 7th January 2004, *Aalborg Portland*, C-204-205-211-213-217-219/00 P, EU:C:2004:6; thr Judgment of 17th October 1989, *Dow Benelux*, C-85/87, EU:C:1989:379; the Judgment of 17th October 1989, *Dow Chemical Ibérica*, 97-98-99/87, EU:C:1989:380; the Judgment of 21st September 1989, *Hoechst*, 46/87-227/88, EU:C:1989:337.

the principle of the legality of criminal offences and penalties (*nullum crimen, nulla poena sine lege*). The second largest group of cases is thus the one that mentions the CCT clause in connection with the protection of fundamental rights in the field of criminal procedure.

The other cases to mention concern other fundamental rights: four cases (the Judgment of 10th July 2003, *Aquacultur*, C-20-64/00, EU:C:2003:397; the Judgment of 11th July 1989, *Schräder*, 265/87, EU:C:1989:303; *Hauer*; and *Nold*) concern the right to property; three (*Connolly*; *Schmidberger*; and the Judgment of 25th March 2004, *Herbert Karner Industrie-Auktionen*, C-71/02, EU:C:2004:181) involve freedom of expression; two (the Judgment of 14th March 2017, *Achbita*, C-157/15, EU:C:2017:203; and the Judgment of 14th March 2017, *Bougnaoui*, C-188/15, EU:C:2017:204) involve freedom of conscience and religion; and the last two cover the principle of non-discrimination (the Judgment of 19th April 2016, *Dansk Industri*, C-441/14, EU:C:2016:278, on grounds of age; and the Judgment of 10th May 2011, *Römer*, C-147/08, EU:C:2011:286, on grounds of sexual orientation).

The remaining 45 cases cannot be purposefully categorized, because their only mention of the CCT clause is perfunctory: typically, it is included in the reconstruction of the legal context of the case together with citations to other sources, with no impact at all on the reasoning leading to the outcome of the ruling (21). To be sure, however, the vast majority of the 55 cases that we categorized also mention CCTs only once, in sentences that seem to be rather ornamental.

4. As mentioned above, then, most of the times CCTs are used at best as a «source of inspiration». In almost half of the cases, the reference to CCTs is not even inspirational, it is only a passing reference, almost a perfunctory invocation, with no particular significance. This relates to a more general problem, that is, the case-law of the Court does not disclose in very clear terms which are the arguments to consider a specific right as an integral part of the CCTs.

As far as the former group of cases is concerned, usually older cases are referenced in newer ones. Therefore, if one goes back to the origins, one could expect to find a deeper analysis with regard to the

(21) For a recent instance of this see: Judgment of 16 July 2015, *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*, C-83/14, EU:C:2015:480, paragraph 3.

CCTS evoked, but this is not the case: such in-depth analysis is almost always missing.

The plausible explanation is that what the CJEU typically does is to rely on the European Convention on Human Rights (ECHR), and on its enforcement by the Court of Strasbourg. Even though some anticipations can be traced back to previous rulings ([22]), this approach was «officially» inaugurated with the *Nold* judgment:

> 12. [In the applicant's complaint, a decision by the Commission in the field of competition law] is said to violate [...] a right akin to a proprietary right, as well as its right to the free pursuit of business activity, as protected by the Grundgesetz of the Federal Republic of Germany and by the Constitutions of other Member States and various international treaties, including in particular the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and the Protocol to that Convention of 20 March 1952.
>
> 13. As the Court has already stated, fundamental rights form an integral part of the general principles of law, the observance of which it ensures.
>
> In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the Constitutions of those States.
>
> Similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law.

After *Nold*, and after the first case (the Judgment of 28th October 1975, *Rutili*, 36-75, EU:C:1975:137, paragraph 32 ([23])) explicitly referencing the provisions of the ECHR (although not mentioning CCTS),

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([22]) In particular, usually the case mentioned is Judgment of 12 November 1969, *Stauder*, 29/69, EU:C:1969:57, paragraph 7.

([23]) «Taken as a whole, these limitations placed on the powers of Member States in respect of control of aliens are a specific manifestation of the more general principle, enshrined in Articles 8, 9, 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 and ratified by all the Member States, and in Article 2 of Protocol No 4 of the same Convention, signed in Strasbourg on 16 September 1963, which provide, in identical terms, that no restrictions in the interests of national security or public safety shall be placed on the rights secured by the above-quoted Articles other than such as are necessary for the protection of those interests "in a democratic society"».

came the *Joint Declaration by the European Parliament, the Council and the Commission concerning the Protection of Fundamental Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms* ([24]). With this declaration the three institutions stressed «[...] the prime importance they attach to the protection of fundamental rights, as derived in particular from the constitutions of the Member States and the European Convention for the Protection of Human Rights and Fundamental Freedom», committing «[i]n the exercise of their powers and in pursuance of the aims of the European Communities to respect and continue to respect these rights.».

The *Joint Declaration* was referenced in the next relevant case by the CJEU, *Hauer*, as a reaffirmation of its own «conception» in *Internationale Handelsgesellschaft* and *Nold*. As was recalled, this is the case with the deepest analysis of the actual existence of a common constitutional tradition in the field of the right to property.

The trend towards deferring to the ECHR system, and in particular to the European Court of Human Rights (ECtHR), to determine what constitutional traditions are common to European States, was then set in stone in *Johnston*. Paragraph 18 of that judgement is one of the most frequently cited by the CJEU when referencing to the Court of Strasbourg in relation to CCTS:

> «18. The Requirement of judicial control [...] reflects a general principle of law which underlies the constitutional traditions common to the Member States. That principle is also laid down in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950. As the European Parliament, Council and Commission recognized in their Joint Declaration of 5 April 1977 [...] and as the Court has recognized in its decisions, the principles on which that Convention is based must be taken into consideration in Community law».

This statement was confirmed the following year in *Heylens*, holding that the right to a judicial remedy against decisions of national authorities: «reflects a general principle of Community law which underlies the constitutional traditions common to the Member States and has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms» (§ 14).

([24]) Official Journal C 103, 27/04/1977 P. 0001 - 0002.

Two years later, the same principle was reformulated again in three judgments, *Hoechst*, *Dow Benelux* and *Dow Chemical Ibérica*:

«13. The Court has consistently held that fundamental rights are an integral part of the general principles of law the observance of which the Court ensures, in accordance with constitutional traditions common to the Member States, and the international treaties on which the Member States have collaborated or of which they are signatories (see in particular, the judgment of 14th May 1974 in Case 4/73 Nold v Commission ((1974)) ECR 491). The European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (hereinafter referred to as «the European Convention on Human Rights») is of particular significance in that regard (see, in particular, the judgment of 15 May 1986 in Case 222/84 Johnston v Chief Constable of the Royal Ulster Constabulary ((1986)) ECR 1651)» ([25]).

The progeny of these three cases (and of the previous ones already mentioned) is a very long list of variations on the theme. The most frequently referenced are *ERT* (paragraphs 41 ff.) ([26]), which was delivered before the signature of the Maastricht Treaty, and then the Judgment of 3rd December 1992, *Oleificio Borelli*, C-97/91, EU:C:1992:491, paragraph 14; the Judgment of 11th January 2001, *Siples*, C-226/99, EU:C:2001:14, paragraph 17; *Connolly*, paragraphs 37 ff.; the Judgment of 25th July 2002, *Unión de Pequeños Agricultores*, C-50/00 P, EU:C:2002:462, paragraph 39; *Roquette Frères*, paragraphs 23 ff.; *Schmidberger*, paragraphs 69 ff.; *Omega*, paragraph 33; *Berlusconi et a.*, paragraph 67; the Judgment of 22nd November 2005, *Mangold*, C-144/04, EU:C:2005:709, paragraph 74; *Unibet*, paragraph 37. Deference to the ECtHR was also reaffirmed in the important Judgment in *Kadi I* (paragraphs 283 and 335), and in other two recent ones, *Bougnaoui* (paragraph 29), as well as in the famous *Achbita* (paragraph 27).

([25]) This citation is from the former case; § 24 of *Dow Benelux* and 10 of *Dow Chemical Ibérica* have the same wording.

([26]) See in particular this quote from § 42: «[...] where [national] rules do fall within the scope of Community law, and reference is made to the Court for a preliminary ruling, it must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with the fundamental rights the observance of which the Court ensures and which derive in particular from the European Convention on Human Rights».

Usually, references to the ECtHR are rather generic, but sometimes specific cases are cited as authorities by the CJEU. For instance, specific references appear in the following cases: *Criminal proceedings against X*, paragraph 25; *Netherlands and Gerard van der Wal v Commission*, paragraph 17; the Judgment of 28th March 2000, *Krombach*, C-7/98, EU:C:2000:164, paragraphs 39-40; *Connolly*, § 39; *Roquette Frères*, § 25; the Judgment of 20th May 2003, *Rechnungshof*, C-465/00, C-138-139/01, EU:C:2003:294, paragraphs 73-77 and 83; *Herbert Karner Industrie-Auktionen*, paragraph 51; the Judgment of 14th February 2008, *Varec*, C-450/06, EU:C:2008:91, paragraph 48 ([27]).

Interestingly, this dialogue seems to be bidirectional, particularly in more recent years. First of all, at least one judgment of the European Court of Human Right shows an inquiry into the actual existence of a CCT, that is vaguely reminiscent of the one carried out by the CJEU in *Hauer* (also concerning the protection of the right to property): no specific constitution is analysed explicitly, however the Court arrives at the conclusion that: «even where the texts in force employ expressions like "for the public use", *no common principle can be identified in the constitutions, legislation and case-law of the Contracting States that would warrant* understanding the notion of public interest as outlawing compulsory transfer between private parties» ([28]).

Beyond that, several ECtHR cases refer to CJEU rulings, or advocate generals' opinions, when illustrating relevant European and international law materials. The first most relevant case in this regard is arguably *Bosphorus* ([29]), which makes an effective summary of the CJEU's case law on fundamental rights, in relation to the ECHR and the ECtHR:

([27]) Some of them are mentioned (together with other cases with no reference to CCTS) in the ECtHR's judgment in *Bosphorus*, cited below (footnote 28), at footnote 8.

([28]) Judgment of 21 February 1986, *James and Others v. The United Kingdom*, 8793/79, CE:ECHR:1986:0221JUD000879379, paragraph 40 (emphasis added); in a particularly dialogue-oriented spirit, the judgment goes on to refer to a judgment by the Supreme Court of the United States cited by the parties in argument (*Hawaii Housing Authority v. Midkiff* 104 S.Ct.2321 [1984]). This case was also cited as precedent several years later in Judgment of 28 March 2017, *Volchkova and Mironov v. Russia*, 45668/05 and 2292/06, CE:ECHR:2017:0328JUD004566805, paragraph 109.

([29]) Judgment of 30 June 2005, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, 45036/98, CE:ECHR:2005:0630JUD004503698.

«73. While the founding treaties of the European Communities did not contain express provisions for the protection of human rights, the ECJ held as early as 1969 that fundamental rights were enshrined in the general principles of Community law protected by the ECJ [Stauder]. By the early 1970s the ECJ had confirmed that, in protecting such rights, it was inspired by the constitutional traditions of the member States [Internationale Handelsgesellschaft] and by the guidelines supplied by international human rights treaties on which the member States had collaborated or to which they were signatories [Nold]. The Convention's provisions were first explicitly referred to in 1975 [Rutili], and by 1979 its special significance amongst international treaties on the protection of human rights had been recognised by the ECJ [Hauer]. Thereafter the ECJ began to refer extensively to Convention provisions (sometimes where the Community legislation under its consideration had referred to the Convention) (30) and latterly to this Court's jurisprudence (31), the more recent ECJ judgments not prefacing such Convention references with an explanation of their relevance to Community law».

For years after *Bosphorus*, *Scoppola (No. 2)* (32) relied extensively on the CJEU's ruling in *Berlusconi et al.*, where: «the Court of Justice of the European Communities held that the principle of the retroactive application of the more lenient penalty formed part of the constitutional traditions common to the member States».

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(30) Here the ECtHR cites the following cases: *Hauer*, paragraph 17; Judgment of 10 July 1984, *Regina v. Kent Kirk*, 63/83, EU:C:1984:255, paragraph 22, where a periphrasis is used instead of the usual CCT formula, which let us to exclude this case from our selection: «[...] the principle that penal provisions may not have retroactive effect is one which is common to all the legal orders of the Member States and is enshrined in Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms as a fundamental right; it takes its place among the general principles of law whose observance is ensured by the Court of Justice»; *Johnston*, paragraph 18; *Hoechst*, paragraph 18; Judgment of 18 May 1989, *Commission of the European Communities v. the Federal Republic of Germany*, 249/86, EU:C:1989:204, paragraph 10 (according to which then-EEC acts had to «be interpreted in the light of the requirement [...] set out in [...] the Convention for the Protection of Human Rights and Fundamental Freedoms. That requirement is one of the fundamental rights which, according to the Court's settled case-law, restated in the preamble to the Single European Act, are recognized by Community law»; *ERT*, paragraph 45; *Bosman*, paragraph 79; and Judgment of 6 November 2003, *Bodil Lindqvist*, C-101/01, EU:C:2003:596, paragraph 90 (a less important case concerning freedom of expression).

(31) See above, footnote 26.

(32) Judgment of 17 September 2009, *Scoppola v. Italy (No. 2)*, 10249/03, CE:ECHR:2009:0917JUD001024903.

Finally, in 2016, *Avotiņš* ([33]) made again extensive references to the legal framework concerning the protection granted to «fundamental rights in European Union law», citing *Krombach*, paragraphs 25-27; the Judgment of 14th December 2006, *ASML*, C-283/05, EU:C:2006:787, paragraphs 26-27; and the Judgment of 22nd December 2010, *DEB*, C-279/09, EU:C:2010:811, paragraph 29, to pronounce on the intersection between recognition and enforcement of foreign decisions in civil and commercial matters and the protection of fundamental rights.

5. The analysis shows that the CJEU almost never engages in an in-depth investigation of the actual existence of a CCT. The circumstance that the Nice Charter and the ECHR by definition enshrine such a common norm establishes a very strong presumption in this respect. As far as the empirical issue raised above, under paragraph 2, is concerned, namely how the Court usually determines that a certain principle or rule derives from the CCTs of the Member States, we have therefore a straightforward answer to the question. On the other hand, the case-law of the Court prior to the enactment of the Charter shows that a certain «tradition» can be considered part of that common patrimony even though it is represented only in a minority of constitutional texts. Thus, for example, in *Mangold*, the Court declared that the common constitutional traditions of the Member States upheld the prohibition of discrimination on grounds of age although, at the time, just two Member States, namely Finland and Portugal enacted this prohibition in their constitutions.

An important aspect to consider when assessing the use of the concept over time is that, when the CCT clause was first coined, the Member States were fewer than today. As a consequence, it was arguably much easier to determine whether certain constitutional traditions were common to the Member States or not by consulting their constitutions. At the time of *Internationale Handelsgesellschaft*, the Member States were still the original six. When *Hauer* was re-

([33]) Judgment of 23 May 2016, *Avotiņš v. Latvia*, 17502/07, CE:ECHR:2016:0523JUD001750207. Meanwhile, in Judgment of 4 March 2014, *Grande Stevens and Others v. Italy*, 18640/10 18647/10 18663/10 18668/10 18698/10, CE:ECHR:2014:0304JUD001864010, the Italian Government had argued that the EU recognised the existence of a CCT explicitly authorising: «[...] the use of a double penalty (administrative and criminal) in the context of the fight against illegal conduct on the financial markets [...], particularly in areas such as taxation, environmental policies and public safety» (*ibid*., § 216).

leased, on the 13th of December 1979, the three constitutions considered by the Court (the Italian, German, and Irish ones) represented one third of the Member States. As recalled above, in 2002 the Advocate General had to examine the constitutions of twenty-five Member states to conclude that the principle of the retroactive application of a more lenient penal law was common to the constitutional traditions of the Member States, with the British and Irish constitutional systems differing from the rest (34).

Whatever be the reasons, the undisputed fact remains that an in-depth analysis of national jurisdictions is lacking in most of the judgments that explore whether a certain constitutional tradition is common to the Member States. This choice owes much to the circumstance that the CJEU has chosen (or has found itself in the position of inevitably doing so) to defer to its Strasbourg counterpart in advancing on this ground. This is clearly a major contribution to the strengthening of the judicial dialogue between the two highest judicial institutions in Europe.

Arguably, our initial hypothesis that CCTS are a powerful counterpart to the notion of 'constitutional identity' is confirmed. If the latter may be used to protect and reaffirm a certain pluralism, which in some cases may coloured by a stronger sense of national sovereignty (albeit in a framework of loyal cooperation, mutual assistance and respect), references to the CCTS mostly go in the opposite direction, acting as a centripetal force. Therefore, framing the request of a preliminary reference by choosing to highlight one or the other theme is a gesture of some weight (35). A deeper analysis of this dynamic would require a deeper analysis of the role of national traditions in the making of the jurisprudence of the Court and of the use it makes of comparative arguments, a topic that is a rather formidable challenge (36).

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(34) *Berlusconi et al.*, C-387/02 (footnote 129); more recently, Advocate General Szpunar reviewed the Czech, Hungarian, Polish, Portuguese, Romanian and Slovak constitutions in *Secretary of State for the Home Department v CS*, C-304/14 (footnote 118).

(35) See M. BASSINI and O. POLLICINO, *The Opinion of Advocate General Bot in Taricco II: Seven «Deadly» Sins and a Modest Proposal*, Verfassungsblog, 2 August 2017, last checked on the 10th of August 2017.

(36) For two enlightening contribution on this: F. NICOLA, *National Legal Traditions at Work in the Jurisprudence of the Court of Justice of the European Union*, in 64 *Am. J. Comp. Law* 4 (2016), 865; K. LENAERTS and K. GUTMAN, *The Comparative Law Method and the European Court of Justice: Echoes Across the Atlantic, ibid*., 841.

From this perspective, it is probably not by accident that the CCTs usually feature in landmark cases, or in cases where the stakes are particularly high. *Bosman*, *Omega*, *Berlusconi et a.*, *Mangold*, *Unibet*, *Intertanko*, *Kadi*, the same *Internationale Handelsgesellschaft*, and most recently *Achbita* are illustrative of this point.

Advocate General Cruz Villalón advances this point in one of his Opinions. We may therefore conclude by borrowing some of his words in the landmark case concerning the legality of the OMT programme by the ECB (*Gauweiler*):

> «61. [...] I think it useful to recall that the Court of Justice has long worked with the category of 'constitutional traditions common' to the Member States when seeking guidelines on which to construct the system of values on which the Union is based. Specifically, the Court of Justice has given preference to those constitutional traditions when establishing a particular culture of rights, namely that of the Union. The Union has thus acquired the character, not just of a community governed by the rule of law, but also of a "community imbued with a constitutional culture". That common constitutional culture can be seen as part of the common identity of the Union, with the important consequence, to my mind, that the constitutional identity of each Member State, which of course is specific to the extent necessary, cannot be regarded, to state matters cautiously, as light years away from that common constitutional culture. Rather, a clearly understood, open, attitude to EU law should in the medium and long term give rise, as a principle, to basic convergence between the constitutional identity of the Union and that of each of the Member States» ([37]).

Very promisingly, the notion of constitutional identity is here applied to the Union itself. At least potentially, CCTs are therefore still an excellent candidate to help in bridging the gap between the Union's constitutional identity and the evolving constitutional identities of the Member States, and thus, as President Lenarts extrajudicially stated: «That openness, on the part of the CJEU, to the views of national courts and the ECtHR, not only makes possible cross-fertilization of ideas between those judicial actors, but also serves to prevent normative conflicts from arising».

Nonetheless, there are reasons to believe, that in this matter, as in

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([37]) Opinion of Advocate General Cruz Villalón of 14 January 2015, *Gauweiler*, C-62/14, EU:C:2015:7.

other matters concerning the ultimate basis of the EU — such as the principle of legality — the CJEU is not yet ready to lay bare before our eyes all that there is to know on the topic. We will have to wait and observe future developments.