

## ARTICLE

FIREARMS REGULATION IN THE EUROPEAN UNION:  
STRIKING A DELICATE BALANCE BETWEEN SINGLE  
MARKET AND SECURITY*Niels F. Kirst\**

I.	INTRODUCTION.....	857
II.	THE EUROPEAN UNION'S LEGISLATIVE HISTORY ON FIREARMS REGULATION.....	859
A.	Council Directive 91/477/EEC - The Promotion of Free Movement and the Need to Ensure Internal Security.....	861
1.	The Way Leading to the First Directive on Firearms Regulation in the European Union.....	862
2.	The Categorization of Firearms in the Directive .....	863
3.	The Legislative Process for Adopting the Directive .....	863
4.	The Wider Implications of the Directive .....	865
B.	Council Directive 2008/51/EC – Tackling Illicit Firearms Trade in the European Community .....	865
1.	The Way Leading to the Directive .....	866
2.	The Substantive Changes of the Directive .....	867
3.	The Wider Ramifications of the Directive.....	869
C.	Council Directive 2017/853 – The European Agenda on Security in the Aftermath of the Paris and Copenhagen Terrorist Attacks.....	870
1.	The Way Leading to the Directive .....	871

---

\* Ph.D. Candidate in European Law at Dublin City University (DCU). The Author would like to thank Nickolas Ask for the initial thought of comparing C-482/17 with *Lopez*, and for his comments and suggestions in the process of writing this Article.

	2. The Substantive Changes of the Directive .....	872
	3. The Legislative Backdrop of the Directive.....	874
	4. The Litigation Consequences of the Directive	
	875	
	D. Conclusion .....	876
III.	DISCUSSION ON CZECH REPUBLIC V PARLIAMENT AND COUNCIL – CHALLENGE OF THE FIREARMS DIRECTIVE AT THE COURT OF JUSTICE OF THE EUROPEAN UNION .....	878
	A. Background of the Case .....	879
	B. More Unity in Gun Ownership Requirements? The CJEU’s Decision on the Legality of the Revised European Firearms Directive in C-482/17 .....	881
	1. First Plea: Breach of the Principle of Conferral of Powers.....	881
	2. Second Plea: Breach of the Principle of Proportionality .....	883
	3. Third Plea: Breach of the Principle of Legal Certainty and of the Protection of Legitimate Expectations.....	885
	4. Fourth Plea: Breach of the Principle of Non- Discrimination .....	886
	C. Comment on the Judgement of the CJEU in Czech Republic v Parliament and Council.....	887
IV.	COMPARISON TO UNITED STATES V LOPEZ – CHALLENGE OF THE GUNFREE SCHOOL ZONE ACT AT THE UNITED STATES SUPREME COURT .....	888
	A. The Background of United States v Lopez.....	889
	B. Why is United States v Lopez Pertinent to Czech Republic v Parliament and Council?.....	890
	C. Comparing Both Judgements .....	891
	1. The Respective Standard of Review .....	891
	2. Lack of Expressed Findings in <i>Lopez</i> or the Lacking Impact Assessment in <i>Czech Republic v</i> <i>Parliament and Council</i> .....	893
	3. The Right to Property in the Respective Legal Orders .....	894
	4. The Argument of National Urgency .....	895
	5. The Federalization of Criminal Law .....	896

6. The Need to Set a Limit to the Federal Legislative Competence .....	897
V. CONCLUSION.....	898

### I. INTRODUCTION

My dear compatriots, as I speak, terrorist attacks of unprecedented proportions are underway in the Paris area. There are dozens killed, there are many injured. It is a horror.<sup>1</sup>

Francois Holland, President of the French Republic on November 14, 2015. The day of the Paris terrorist attacks, the deadliest to occur in France since the end of World War II.

The terrorist attacks in Paris and Copenhagen of 2015 brought anxiety and shock to Europe. Despite the social and emotional consequences for the citizens of the European Union, the political and legal consequences on the European legislative level are occupying the Court of Justice of the European Union (hereinafter “CJEU” or “the Court”) today.<sup>2</sup> The terrorist attacks lead to a tightening of the firearms legislation in the European Union.<sup>3</sup> Namely, Directive 2017/853, which governs the firearm legislation in the European Union, is a direct far-reaching implication and consequence of the terrorist attacks of 2015. This Directive tightens the firearms regime in the European Union and sets the common floor of firearms regulation for all Member States of the European Union. This article discusses the implications of this latest Directive on firearms possession in the European Union.

While in the United States, the right to bear arms is enshrined in the US Constitution,<sup>4</sup> the citizens of the Member States of the European Union have no similar rights. The legislation of firearms is a topic that is vastly differently treated in the United States and in the European Union. Whereas in the European Union, the societal and cultural history of firearms is characterized by regulation and disarmament since the middle of the 20th century

---

1. François Hollande, President, Fr., *French President Hollande’s Televised Address*, THOMSON REUTERS (Nov. 13, 2015), <https://www.reuters.com/article/us-france-shooting-hollande-address-idUSKCN0T302N20151114> [<https://perma.cc/8J6P-R7UG>].

2. Case C-482/17, *Czech v. Eur. Parl. & Council of the Eur. Union*, 2019 E.C.R. I-1035.

3. *The European Agenda on Security*, at 17, COM (2015) 185 final (Apr. 28, 2015) [hereinafter *The European Agenda*].

4. U.S. CONST. amend. II.

after two World Wars disrupted the continent,<sup>5</sup> the United States have a history of civil defense and the constitutional right to bear arms.<sup>6</sup> On both sides of the Atlantic, the topic of firearms legislation inflames heated debate among firearms enthusiasts, pacifists, and even legal scholars.

This Article will discuss the wider question of firearms regulation by analyzing the firearms legislation of the European Union. This article analyses the three consecutive Firearms Directives, which have been enacted over time by the EU legislature, the legal challenge of the Firearms Directive at the CJEU, and the comparative perspective of firearms regulation in the European Union and the United States. This article aims to take an objective viewpoint and spare any emotionally heated policy argument. The debate to which degree firearms legislation influences crimes such as homicide, robbery or terrorist acts, shall and cannot be discussed in the limited space of this article. Instead, the focal point will be the legal debate about firearms regulation in a federal system and the legislative competence exercised by the federal lawmaker.

This article aims to give an overview of the legislation of firearms in the European Union. The structure of the article is as follows. In Part II, the three consecutive Firearms Directives of the European Union shall be discussed on a historical and legal basis.<sup>7</sup> Identifying the crucial aspects of the different legislative's waves in the area of firearms regulation. In Part III, the judicial proceedings in front of the CJEU in case *C-482/17 (Czech Republic v Parliament and Council)* shall be discussed, since it determined whether the CJEU is willing to guide the EU on a continuous federal path in view of a tightened regime on civilian firearms possession. In this proceeding, the Czech Republic contended the newest version of the Firearms Directive of the EU on the Union's legislative competence. In Part IV, a consideration of the Supreme Court of the

---

5. See generally ALEXIS HERACLIDES, *SECURITY AND CO-OPERATION IN EUROPE: THE HUMAN DIMENSION, 1972 - 1992* (1993).

6. Lawrence Delbert Cress, *An Armed Community: The Origins and Meaning of the Right to Bear Arms*, 71 J. AM. HIST. 22, 22-23 (1984).

7. Council Directive 91/477/EEC of 18 Jun. 1991 on Control of the Acquisition and Possession of Weapons; Council Directive 2008/51/EC, of the European Parliament and of the Council of 21 May 2008 Amending Council Directive 91/477/EEC; Council Directive 2017/853, of the European Parliament and of the Council of May 17 2017 Amending Council Directive 91/477/EEC.

United States (hereinafter “SCOTUS” or “USSC”) *Lopez* decision in light of the judicial proceedings at the CJEU shall be made. A comparison between both cases can be highly fruitful to derive a comparative understanding of the exercise of a federal competence to regulate firearms. Specifically, to compare the stance, the highest court of the respective legal system took in their respective landmark judgments regarding the competence of the federal lawmaker to regulate firearms.

## II. THE EUROPEAN UNION'S LEGISLATIVE HISTORY ON FIREARMS REGULATION

The impetus of change has caught on in every sphere of Community activity. There will be a single market for everything from transport to energy to spin-off products from scientific advances. The result, already percolating through, will be a wider choice for consumers.<sup>8</sup>

Jaques Delors, President of the European Commission on January 17, 1989, in an address given to the European Parliament. Reiterating the new competence of the European Communities in enacting legislation on interstate commerce.

The European Union derived its competence to deal with the federal regulation of firearms via the establishment of the single market in Europe. The single market was the most important and ambitious project of the European Union with widest implications for consumers and ramifications in nearly every policy area. The United Kingdom's European Commissioner Lord Arthur Cockfield initiated the process to implement a single market in the EU. He proposed, as Commissioner for Internal Market and Services under Jaques Delors, a White Paper in 1985, identifying 300 measures to be addressed in order to complete a single market.<sup>9</sup> The White Paper was well received by Jaques Delors and led to the adoption of the Single European Act (hereinafter “the SEA”), a revolutionary treaty revision that reformed the decision-making mechanisms of the European Economic Community (hereinafter “the EEC”).<sup>10</sup> In

---

8. Jaques Delors, President, Eur. Comm'n, Address Given by Jacques Delors to the European Parliament (Jan. 17, 1989).

9. *Comm'n of the Eur. Communities White Paper on Completing the Internal Market*, at 15, COM (85) 310 final (June 14, 1985).

10. JOSEPH WEILER, *THE CONSTITUTION OF EUROPE : DO THE NEW CLOTHES HAVE AN EMPEROR?* 63 - 66 (1999).

particular, the SEA established Article 100a, which gave the European Union the competence to legislate in all kinds of policy areas with the aim to provide a frictionless single market in Europe.<sup>11</sup> Eventually, one of these newly derived competences was the competence to regulate firearms trade in the single market. Federal firearms legislation in the European Union progressed simultaneously with European integration, and it may well be described as a consequence of European integration.

The history of European legislation of firearms starts with the White Paper on the Single Market in 1985, in which a measure for the approximation of firearms legislation was first mentioned by the European Commission (hereinafter “the Commission”). The following first Directive from 1991 on the approximation of laws in the area of firearms legislation was mainly driven by the implementation of the agenda of the SEA from 1986 and the implementation of the Schengen Agreement from 1985.<sup>12</sup> This Directive falls into the phase of European Integration, in which the European Union constituted an intergovernmental body called the European Communities.<sup>13</sup>

The second step of harmonization in the area of firearms was driven by the implementation of the UN Protocol against the Illicit Manufacturing of and Trafficking in Firearms from 2001,<sup>14</sup> which resulted in the amending of the first Directive in 2008. At the time of the second step of firearms harmonization, the European Communities had become the European Community by the Maastricht Treaty and subsequently had gained more competences.<sup>15</sup> The latest step in the harmonization of European firearms legislation had its impetus in the terrorist attacks in Paris and Copenhagen of 2015, which prompted the Commission to bring forward a new legislative proposal, which resulted in the

---

11. *Id.* at 66 - 72.

12. Kristin Ashley Tessman, *A Bright Day for the Black Market: Why Council Directive 2008/51/EC Will Lose the Battle Against Illicit Firearm Trade in the European Union*, 38 GA. J. INT'L & COMP. L. 237, 247-48 (2009).

13. The Treaty Establishing a Single Council and a Single Commission of the European Communities art. 1, Apr. 8, 1965, 1967 O.J. (152) 2.

14. G.A. Res. 55/255, annex, Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the U.N. Convention Against Transnational Organized Crime, at art. 2 (June 8, 2001).

15. Treaty on European Union, Council of the Eur. Communities & Comm'n of the Eur. Communities, art. A-B, Feb. 7, 1992, 1992 O.J. (C 191) 1.

most recent Directive of 2017. The final legislation in the area of firearms was adopted under the framework of the Lisbon Treaty,<sup>16</sup> which is the legal framework of the European Union as we know it today. The Lisbon Treaty gives the European Union wide competences to legislate in many policy areas.<sup>17</sup> As described, the harmonization of firearms legislation finds its *raison d'être* in the single market of the EU and the area without border controls, which the EU provides for its citizens (the Schengen Agreement). We shall approach the existing legislation in a chronological order to gain an overview of the existing framework.

*A. Council Directive 91/477/EEC - The Promotion of Free Movement and the Need to Ensure Internal Security*

With the SEA of 1986, then the European Communities committed itself to the establishment of a single market in Europe.<sup>18</sup> The SEA might be one of the most underestimated treaty revisions of the European Union.<sup>19</sup> With the shift towards majority voting in the Council of the European Union (hereinafter “the Council”) and the envisaged enactment of the single market by 1992,<sup>20</sup> the SEA was the impetus for the European Union as it exists today.<sup>21</sup> Further, the accord on the Schengen Agreement in 1985, from five of the ten Member States at that time, made it necessary to establish a secure area within the common borders.<sup>22</sup> This is clearly formulated in Directive 91/477/EEC: “[t]he total abolition of controls and formalities at intra-Community frontiers entails the fulfillment of certain fundamental conditions.”<sup>23</sup> Since there would be no border controls between the Member States, it was vital to ensure that the Member States adhere to the same minimum

---

16. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1.

17. See generally Jürgen Bast, *New Categories of Acts after the Lisbon Reform: Dynamics of Parliamentarization in EU Law*, 49 COMMON MARKET L. REV. (2012).

18. Single European Act sec II, June 29, 1987, 1987 O.J. (L 169) 1.

19. JOSEPH WEILER, *THE CONSTITUTION OF EUROPE: “DO THE NEW CLOTHES HAVE AN EMPEROR?” AND OTHER ESSAYS ON EUROPEAN INTEGRATION* 65 (1999).

20. *Comm'n of the Eur. Communities White Paper on Completing the Internal Market*, *supra* note 9, at 4.

21. Christina Eigel, *Internal Security in an Open Market: The European Union Addresses the Need for Community Gun Control*, 18 B.C. INT'L & COMP. L. REV. 429, 430 (1995).

22. Tessman, *supra* note 12, at 248-49.

23. Council Directive 91/477/EEC, *supra* note 7, Recital 3.

standards of firearms regulation. “[T]he abolition of controls on the safety of objects transported and on persons entails, among other things, the approximation of weapon legislation.”<sup>24</sup> The single market and the envisaged borderless travel area (the Schengen Agreement), therefore, made it necessary to find common ground on a firearms regime in the European Communities. In fact, “[a]rticles 77-90 of the Schengen Agreement dealt specifically with the harmonization of national firearms and ammunition legislation.”<sup>25</sup> However, since the Schengen Agreement was a treaty outside the European Communities, and only later implemented under the umbrella of the European Union, a mirroring legislation within the European Communities had to be created.

#### 1. The Way Leading to the First Directive on Firearms Regulation in the European Union

Already in 1985, the Commission’s White Paper on the completion of the single market by 1992 announced a proposal on the harmonization of Member States’ firearms legislation.<sup>26</sup> Interestingly, “[t]he purpose of the legislation was not to increase the control of firearms, but rather to harmonize gun control standards [...]”.<sup>27</sup> Member States had different regimes that governed firearms in their territory. However, the aim of the Directive was essentially to provide minimum standards for the acquisition and possession of firearms within the European Communities.<sup>28</sup> The single market and the Schengen Agreement with its borderless travel possibilities for individuals also increased the likelihood of firearm smuggling and trafficking by criminals.<sup>29</sup> Finally, the Commission drafted a proposal for the Directive in 1987, within the process of establishing the internal market. This proposal was accepted by the Council in 1991, after a process of intensive discussion between Council, Commission, and the European Parliament (hereinafter “the Parliament”).<sup>30</sup>

---

24. *Id.*

25. Tesson, *supra* note 12, at 249.

26. *Comm’n of the Eur. Communities White Paper on Completing the Internal Market*, *supra* note 9, at 15.

27. Eigel, *supra* note 21, at 431.

28. Council Directive 91/477/EEC, *supra* note 7, art. 15(4).

29. *Id.*

30. Eigel, *supra* note 21, at 430-31.



## 2. The Categorization of Firearms in the Directive

The Directive of 1992 establishes a categorization of firearms in four categories (A) prohibited weapons; (B) weapons subject to authorization; (C) weapons subject to declaration; and (D) other weapons.<sup>31</sup> All kinds of military firearms would fall under category A, and are therefore prohibited.<sup>32</sup> Firearms, such as semi-automatic firearms, would fall in category B, and are, therefore, subject to authorization from the Member States authority.<sup>33</sup> Firearms in category C, such as less dangerous firearms, must be declared to the Member States authority.<sup>34</sup> A lighthouse achievement by the Directive was certainly the European Firearms Certificate (today the European Firearms Pass), which functions as a community-wide weapon pass and must be carried by the weapon holder when traveling to another Member State.<sup>35</sup> Directive 91/477/EEC explains: “[p]assing from one Member State to another while in possession of a weapon should, in principle, be prohibited ; whereas a derogation therefrom is acceptable only if a procedure is adopted that enables Member States to be notified that a firearm is to be brought into their territory.”<sup>36</sup>

## 3. The Legislative Process for Adopting the Directive

The procedure for adopting the Directive was characterized by consensus building in the Council. “The United Kingdom, [...] was greatly concerned about the ability of sportsmen to carry guns freely across internal borders without prior permission.”<sup>37</sup> This issue could be solved with the European Firearms Certificate. Having said that, the Parliament in its role as an advisory body at that time was involved in the process. “The parliament approved the amended proposal, but also sought to clarify and tighten the requirements.”<sup>38</sup> However, not all recommendations of the Parliament had been adopted by the Commission.<sup>39</sup> The Council of

---

31. Council Directive 91/477/EEC, *supra* note 7, annex I.

32. *Id.*

33. Eigel, *supra* note 21, at 434.

34. *Id.* at 435 - 36.

35. *Id.* at 435.

36. Council Directive 91/477/EEC, *supra* note 7, at Recital 6.

37. Eigel, *supra* note 21, at 434.

38. *Id.* at 436.

39. *Id.*

the European Communities adopted the Directive, after consultation of the Parliament, on June 18, 1991.<sup>40</sup> “The Member States had until January 1, 1993, to pass all legislation and regulations necessary to implement the Directive.”<sup>41</sup> Despite minor national modifications and adjustments, the regimes of the already participating Member States were in compliance with the Directive.<sup>42</sup> Only Finland and the Czech Republic, when they respectively joined the European Union in 1995 and 2004 had to substantially redraft new firearms legislation to comply with the EU standard.<sup>43</sup> “Finland, in contrast, did not pass any legislation regulating firearms until 1998 – only after Directive 91/477/EEC took effect. Finland established only the minimum requirements for compliance with the EU Directive on harmonization.”<sup>44</sup>

The legal basis for the Directive was Article 100 A of the EEC Treaty, which allowed for the approximation of laws, which are necessary for the establishment and functioning of the internal market.<sup>45</sup> This article, an achievement of the SEA, can be compared to the Commerce Clause in the United States federal legal system since it provides the legislature with a wide competence to adopt federal laws regulation all kinds of interstate commerce. In the EU legal system, interstate commerce is built upon the principle of mutual recognition.<sup>46</sup> The Member States would recognize other Member States’ standards on certain categories of goods and, therefore, provide frictionless full access to their markets.<sup>47</sup> Notably, the Directive already includes and envisages the idea of “[*m*]utual confidence in the field of protection of the safety of persons which these rules will generate between Member States [...]”<sup>48</sup> This is the concept that was further revisited and embraced

---

40. *Id.* at 437.

41. *Id.*

42. *Id.*

43. HE 183/1997 Hallituksen esitys Eduskunnalle ampuma-aselainsäädännön ja laiksi poliisilain 23 §:n sekä laiksi poliisin henkilökäytöstä annetun lain 19 ja 20 §:n muuttamisesta (Finnish Parliament ed., 1997); Act No. 119/2002 Coll., on Firearms and Ammunition § 119/2002 (Parliament of the Czech. ed., 2002).

44. Tessman, *supra* note 12, at 247.

45. Single European Act, *supra* note 18, art. 100a.

46. See generally CHRISTINE JANSSENS, THE PRINCIPLE OF MUTUAL RECOGNITION IN EU LAW (2013).

47. *Id.* Part I.

48. Council Directive 91/477/EEC, *supra* note 7, at Recital 5.

by the CJEU in the concept of *mutual trust* between the Member States.<sup>49</sup>

#### 4. The Wider Implications of the Directive

There were direct impacts and consequences by this first Directive on firearms trade and possession in the European Union. Scientific studies yield that already the harmonization by Directive 91/477/EEC leads to a significant decrease of firearm suicide and homicide in the particular Member States like Austria.<sup>50</sup> Finally, it is important to notice that the creation of the single market and the Schengen Agreement required a common security standard within the borders. Therefore, a common minimum standard on the acquisition and possession of firearms had to be established, which, in turn, would create mutual confidence between the Member States. As Tessman writes, “[t]he 1991 Directive, [...], embodied a compromise between Member State concerns arising from the abolition of internal-frontiers controls and the need to control the acquisition and possession of firearms among the Member States.”<sup>51</sup> In this sense, the Directive established a common floor for firearms legislation in the European Union, which the Member States were required to implement and to abide by.

#### B. Council Directive 2008/51/EC – Tackling Illicit Firearms Trade in the European Community

The next major achievement in the process of a unified firearms legislation in the European Union was Directive 2008/51/EC, which amended Directive 91/477/EEC.<sup>52</sup> This Directive falls into a different phase of European integration. The European Communities had become the European Community

---

49. See generally Koen Lenaerts, *La vie après l’avis: Exploring the Principle of Mutual (Yet Not Blind) Trust*, 54 COMMON MKT. L. REV. 805 (2017).

50. Nestor D. Kapusta et al., *Firearm Legislation Reform in the European Union: Impact on Firearm Availability, Firearm Suicide and Homicide Rates in Austria*, 191 BRITISH J. PSYCHIATRY 253, 257 (2007).

51. Tessman, *supra* note 12, at 252.

52. Parliament & Council, Directive 2008/51/EC of the European Parliament and of the Council amending Council Directive 91/477/EEC on control of the acquisition and possession of weapons § 2008/51/EC (European Union ed., Official Journal of the European Union 2008).

with the signing of the Maastricht Treaty in 1992.<sup>53</sup> The Maastricht Treaty reformed and amended the Treaties establishing the European Communities.<sup>54</sup> It renamed the European Economic Community to European Community to reflect its expanded competences beyond economic matters.<sup>55</sup> The Maastricht Treaty provided the European Community with more competences in fields such as citizenship law or external relations with third states.<sup>56</sup> It established the European Community as a hybrid international actor, reflecting a number of tensions built into the roots of the Treaty.<sup>57</sup> One consequence was that the Commission was able to sign treaties of the United Nations as a regional economic integration organization.<sup>58</sup> The Commission exercised this new competence by – inter alia – signing the United Nations Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts, Components and Ammunition.<sup>59</sup> With the accession to the UN Protocol, the European Community had to amend the Directive 91/477/EEC to comply with the content of the protocol.<sup>60</sup>

### 1. The Way Leading to the Directive

The impetus for this intra-EU reform on firearms legislation came from the outside, as “[t]he United Nations adopted a resolution in 2001 establishing the United Nations Convention against Transnational Organized Crime (Organized Crime Convention).”<sup>61</sup> Consequently, “[t]he UN General Assembly adopted a resolution, [...], to supplement this Convention with the Protocol Against the Illicit Manufacturing of and Trafficking in

---

53. Treaty on European Union, *supra* note 15, at art. A.

54. *See generally* Trevor C. Hartley, *Constitutional and Institutional Aspects of the Maastricht Agreement*, 42 INT’L COMP. L. Q. (1993).

55. *Id.*

56. Treaty on European Union, *supra* note 15, at art. 20(1); *see generally* Michael Smith, *Still Rooted in Maastricht: EU External Relations as a ‘Third-Generation Hybrid’*, 34 J. EUR. INTEGRATION 699 (2012).

57. Smith, *supra* note 56, at 699.

58. *See, e.g.*, CHARLOTTE BRETHERTON & JOHN VOGLER, *THE EUROPEAN UNION AS A GLOBAL ACTOR* (2d ed. 2005).

59. G.A. Res. 55/255, *supra* note 12, art. 1.

60. Directive 2008/51, of the European Parliament and of the Council of 21 May 2008 Amending Council Directive 91/477/EEC on Control of the Acquisition and Possession of Weapons, Recital 3 § 2008/51/EC, 2008/51/EC, O.J. (L 179) 5.

61. Tesson, *supra* note 12, at 250.

Firearms, Their Parts and Components and Ammunition (UN Protocol).<sup>62</sup> In January 2002, the Commission on behalf of the European Community signed the Protocol. The Commission inferred the competence to sign the Protocol from its internal market competence, by the implied external powers doctrine developed by the CJEU.<sup>63</sup> Following the European Communities declaration: “[t]he Protocol [...] shall apply, with regard to the competences transferred to the Union, to the territories in which the Treaty on the Functioning of the European Union is applied and under the conditions laid down in that Treaty.”<sup>64</sup> Since the Directive 91/477/EEC did not fulfill all requirements of the UN Protocol, the Commission proposed an amendment to the Directive. A proposal to amend Directive 91/477/EEC was drafted by the Commission in 2006.<sup>65</sup> Interestingly, Member States with huge arm exporting corporations in the EU, such as Germany and the United Kingdom, have not ratified the UN Protocol until today,<sup>66</sup> however, they are bound by the EU Directive, which implements the UN Protocol.

## 2. The Substantive Changes of the Directive

The improved functioning of the European Firearms Pass and the enhanced exchange of information between the Member States are the two major objectives of the new Directive from an intra-EU perspective. As acknowledged in Directive 2008/51/EC, the European Firearms Pass “functions in a satisfactory way.”<sup>67</sup> However, there was room for improvement in terms of hunters and marksmen, as the Commission pointed out.<sup>68</sup> The Directive further points to the enhanced exchange of information between Member States to combat illicit trafficking and manufacturing of

---

62. *Id.*

63. See generally Smith, *supra* note 56.

64. Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, July 11, 2001, 2326 U.N.T.S. 208 [hereinafter Protocol Against Illicit Manufacturing].

65. Tessman, *supra* note 12, at 250.

66. Protocol Against Illicit Manufacturing, *supra* note 64.

67. Directive 2008/51/EC of the European Parliament and of the Council of 21 May 2008, *supra* note 7, Recital 14.

68. European Commission, Evaluation of Council Directive 91/477/EC of 18 June 1991, as amended by Directive 2008/51/EC of 21 May 2008, on Control of the Acquisition and Possession of Weapons at 18, COM (2015) 751 final.

firearms, which is envisaged under the new Directive.<sup>69</sup> From the external perspective, the new Directive had to comply with the newly signed UN Protocol. The Directive further provides that “[t]he accession of the Community to the Protocol requires amendments to certain provisions of Directive 91/477/EEC.”<sup>70</sup> The Protocol’s main objective is the decrease of the illicit manufacturing and trafficking of arms.<sup>71</sup> Therefore, “[t]he 2008 amendments expand the scope of Directive 91/477/EEC, now addressing such issues as illicit manufacturing and trafficking.”<sup>72</sup>

First, the Directive 2008/51/EC now also includes the notion of convertible firearms, which had been a prevalent concern for national police authorities. The Directive states in this regard, “[p]olice intelligence evidence shows an increase in the use of converted weapons within the Community. It is therefore essential to ensure that such convertible weapons are brought within the definition of a firearm [...]”<sup>73</sup> This measure transposes the requirements from the UN Protocol into Community law. Moreover, it “[p]rovides for a more comprehensive regulatory response to illicit manufacturing, as converted weapons are easily ‘re-manufactured’ from readily available firearm component parts.”<sup>74</sup> Second, the Directive also calls for the marking of firearms directly after manufacturing. The Directive further clarifies, “[t]he Protocol establishes an obligation to mark weapons at the time of manufacture [...]”<sup>75</sup> By this measure, the Directive aims to get a grip on the illicit manufacturing of firearms. “If a firearm is not marked, the Member State must ensure that the firearm is deactivated.”<sup>76</sup> In the area of enhanced cooperation, the Directive called for a *computerized data-filling system* to which authorized authorities are granted access and the setting up of a contact group

---

69. Directive 2008/51/EC of the European Parliament and of the Council of 21 May 2008, *supra* note 7, Recital 15.

70. *Id.* Recital 3.

71. Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, *supra* note, 14.

72. Tessman, *supra* note 12, at 255.

73. Directive 2008/51/EC of the European Parliament and of the Council of 21 May 2008, *supra* note 7, Recital 4.

74. Tessman, *supra* note 12, at 256.

75. Directive 2008/51/EC of the European Parliament and of the Council of 21 May 2008, *supra* note 7, Recital 7.

76. Tessman, *supra* note 12, at 256-57.

for the exchange of information among the Member States.<sup>77</sup> Finally, the Directive brought new minimum requirements in relation to entities involved in firearm sales of transfer and persons who are eligible to acquire a firearm.<sup>78</sup> The legal basis for the Directive did not change, as the Commission still used the approximation of laws Article, at that time the re-named Article 95 of the TEC Treaty.<sup>79</sup>

### 3. The Wider Ramifications of the Directive

The new Directive brought major changes and a tightening of firearms regulation in the European Community. Visibly, the minimum requirements of firearm legislation in the Community had been heightened. Therefore, the process of adopting the Directive in the Council was marked by intensive discussions between the Member States. “Austria and Finland abstained from voting in the Council during the adoption of the Firearms Directive 2008/51/EC, as it tightened the gun control law and imposed the introduction of a national register of firearms.”<sup>80</sup> Especially for Austria, which has many firearm holders, the implementation of Directive 2008/51/EC proved to be an administrative and legal challenge.<sup>81</sup> Due to the co-decision procedure adopted pursuant to the Maastricht Treaty, the Directive had to be also adopted by the Parliament. Remarkably, some members of the Parliament wanted to push further in the regulation of illicit firearms.<sup>82</sup> However, opposition in the Council and in the Parliament stopped this process, and the Directive was adopted with minor amendments in the first reading in the Parliament.<sup>83</sup>

The success or failure of the amended Directive, in light of the market for illicit firearms, is strongly debated. Scholars argue that the Directive was a failure with regard to illicit firearms trafficking, since the European Community lacked the competences to

---

77. *Id.* at 261.

78. *Id.* at 247.

79. Treaty of Nice, Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts art. 95, Oct. 3, 2001, 2001 O.J. (C80) 1.

80. Brigitte Pircher, *Member States' Opposition in the Council of the European Union and its Impacts on the Implementation of Directives*, 46 OZP 1, 5 (2017).

81. *Id.*

82. Tesson, *supra* note 10, at 259.

83. Eur. Parl. Doc. (COM C6-0081/2006) (2006).

efficiently tackle the issue of illicit firearms trade.<sup>84</sup> As Tessman writes, “[t]he complex political nature of the European Union [at that time] may render a single, effective legislative response unattainable.”<sup>85</sup> In conclusion, the Directive significantly heightened the floor of firearms legislation in the European Union. Thus, bringing the firearms legislation in the European Union towards a more unified standard, and therefore, enhancing the intra-EU trade of firearms.

*C. Council Directive 2017/853 – The European Agenda on Security in the Aftermath of the Paris and Copenhagen Terrorist Attacks*

The last legislative act in the area of firearms legislation by the European Union is Council Directive 2017/853, which amended the two previous Directives. The most crucial aspect of the Directive, preventing and fighting terrorist attacks in the EU, is directly visible at the beginning of the Directive. “Certain aspects of Directive 97/477/EEC need to be further improved in a proportionate way, in order to address the misuse of firearms for criminal purposes, and considering *recent terrorist acts*.”<sup>86</sup> In contrast to its two predecessors, Directive 2017/853 was prompted by terrorist acts in the Member States, namely in Paris and Copenhagen.<sup>87</sup> Both attacks had been carried out, respectively, by illicitly reactivated firearms and illicitly acquired firearms.<sup>88</sup> The Communication by the Commission on “The European Agenda

---

84. Tessman, *supra* note 12, at 238.

85. *Id.* at 264.

86. Directive 2017/853 of the European Parliament and of the Council of 17 May 2017 and Amending Council Directive 91/477/EEC on Control of the Acquisition and Possession of Weapons, Recital 2, 2017 O.J. (L 137/22) (EC) [hereinafter Amending Directive].

87. Communication from the Commission to the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *supra* note 3, at 17.

88. Jason Burke, *Military Grade Firearms Increasingly Available to Terrorists in Europe* - Report, *GUARDIAN* (Apr. 18, 2018), <https://www.theguardian.com/world/2018/apr/18/arms-race-criminal-gangs-helping-terrorists-get-weapons-report-warns> [perma.cc/5ZTF-UEHB]; Peter Krogh Andersen, *Terrorangreb i København: Gerningsvåben stammer fra et hjemmøveri*, DR (Feb. 8, 2015), <https://www.dr.dk/nyheder/indland/terrorangreb-i-koebenhavn-gerningsvaaben-stammer-fra-et-hjemmeroeveri> [perma.cc/K24M-873V]; *Policy-makers and citizens criticize the proposed revision of the European Firearms Directive*, EUROPEAN FEDERATION OF ASSOCIATIONS FOR HUNTING & CONSERVATION (2016) [hereinafter FACE]



on Security' points out, "[r]ecent terrorist attacks have focused attention on how organized criminals are able to access and trade firearms in Europe, even military grade firearms, in large numbers."<sup>89</sup> The new Directive falls into the latest legal framework of European integration, the Lisbon Treaty, which created the European Union as it is known today since 2009.<sup>90</sup> The Lisbon Treaty, as a highly ambitious treaty, gives the EU wide competences in many policy areas and enhances the power of the federal lawmaker.

### 1. The Way Leading to the Directive

The Commission acknowledged weaknesses in the two earlier Directives in the REFIT Report from 2015.<sup>91</sup> In its report, the Commission lamented the absence of disaggregated data on firearms circulating in the European Union, as well as the lack of comparable data on trends in criminal acts involving firearms in the European Union.<sup>92</sup> The REFIT report also underlined that the implementing process by the Member States has demonstrated several inconsistencies and also revealed its very limited impact to counter illicit firearms trafficking in the European Union.<sup>93</sup> This corresponds to Member States' experiences, which have shown that the implementation of the Directives concerning firearm minimum standards has proven to be an obstacle in certain Member States, which have a high number of firearms fluctuating in the society.<sup>94</sup> The implementation of the measures, as well as the immediate threat of terrorist acts committed with illicit firearms, prompted the Commission to draft a new legislative intervention in the area of firearms legislation.<sup>95</sup>

---

89. *The European Agenda*, *supra* note 3, at 17.

90. Treaty of Lisbon, *supra* note 16, art. 6.

91. TECHNOLIS ET AL., EUROPEAN COMMISSION EVALUATION OF THE FIREARMS DIRECTIVE - FINAL REPORT (European Commission Directorate-General for Enterprise and Industry ed., Dec. 2014).

92. Christian Ponti, *An Appraisal of the European Union Legal Framework on Illicit Firearms Trafficking after Directive 2017/853/EU*, 4 RIVISTA DI STUDI E RICERCHE SULLA CRIMINALITÀ ORGANIZZATA 13, 20-21 (2018).

93. *Id.* at 21.

94. Pircher, *supra* note 80, at 5.

95. Ponti, *supra* note 92, at 22.

## 2. The Substantive Changes of the Directive

With the two aforementioned objectives, this ambitious Directive has a strong focus on security.<sup>96</sup> Nevertheless, the legal basis for the Directive remained Article 114 of the TFEU, the renamed Article 95. With the aim of providing the means for the approximation of laws to achieve the objectives of the single market.<sup>97</sup> The strong security focus of the Directive, drafted on the legal basis of achieving a frictionless market, might raise concerns on whether the wide scope of the Directive is overzealous. That being said, the Directive explains, “[i]n accordance with the principle of proportionality, [...], this Directive does not go beyond what is necessary in order to achieve those objectives.”<sup>98</sup> Further, the respect for the principle of subsidiarity, which is a fundamental principle of EU lawmaking, is acknowledged in the same paragraph, pointing out that “[t]he objectives of this Directive cannot be sufficiently achieved by the Member States, [...]”<sup>99</sup> With this hedging against possible accusations of not respecting the principles of lawmaking in the European Union, the Commission wisely took into account possible confrontational caveats by critical Member States.

In terms of its content, the Directive moves the ‘most dangerous’ semi-automatic firearms from category B (firearms subject to authorization) to category A. These firearms will not be allowed to be held by private persons, even if they have been permanently deactivated.<sup>100</sup> Further, the Directive “[a]ims [...] to better harmonize Member States’ legislation on the marking of firearms which, [...], was lacking in uniformity and facilitated criminals in illegally trading weapons parts or illicitly reactivating firearms.”<sup>101</sup> An even more important point in this tightened approach is the possibility of the Commission to adopt implementing acts, which are binding on the Member States and self-executive.<sup>102</sup> By this measure, the Commission aims to achieve

---

96. *Id.* at 22-23.

97. Treaty of Lisbon, *supra* note 16, art. 114. at 94-95.

98. Amending Directive, *supra* note 86, at Recital 33.

99. *Id.*

100. Ponti, *supra* note 92, at 24.

101. *Id.*

102. Jürgen Bast, *New Categories of Acts after the Lisbon Reform: Dynamics of Parliamentarization in EU Law*, 49 COMMON MKT. L. REV. 885, 908 (2012).

a true common standard in the field of marking of firearms, since implementation in the Member States has proven difficult. Whereas before certain standards of marking of firearms in the different Member States deviated, the new Directive aims to harmonize even at the lower levels of Member States' administration.<sup>103</sup> This shift of competences is clearly acknowledged in the new Directive.<sup>104</sup>

Another point of concern was the reactivation of firearms since this technique has been used to acquire firearms for the terrorist attacks in Paris.<sup>105</sup> The Commission addressed that point in the new Firearms Directive.<sup>106</sup> Consequently, Directive 2017/853 sets out a very comprehensive regulation of converted firearms. "National registers must keep records of deactivated firearms and their owners."<sup>107</sup> Deactivated firearms are now within the scope of the Firearms Directive, as they must be classified as category C firearms (firearms and weapons subject to declaration).<sup>108</sup> Further, "[t]he European Commission has prepared a proposal package that sets out rigorous and harmonized standards criteria how Member States shall include in their National Firearms Acts the deactivation criteria for firearms to become unfit for use as a firearms."<sup>109</sup> This was a small legislative step but attached with high administrative cost for the Member States since deactivated, and even acoustic firearms have to be accurately tracked under the new Directive.<sup>110</sup>

---

103. Parliament and Council Regulation 182/2011 of Feb. 16 2011, Laying Down the Rules and General Principles Concerning Mechanisms for Control by Member States of the Commission's Exercise of Implementing Powers 2011 O.J.( L 55) 13.

104. "In order to ensure uniform conditions for the implementation of this Directive, implementing powers should be conferred on the Commission." Amending Directive, *supra* note 86, Recital 30.

105. Burke, *supra* note 88.

106. "The European Commission's package of measure to tighten firearms control also includes an implementing regulation laying down common minimum standards for the deactivation of firearms, which make re-activation much more difficult in case of deactivated firearms." Csaba Szabó, *Examination of the Need for a Directive to Strengthen the Control Over Possession of Firearms Envisaged by the European Commission in the Context of New Types of Security Challenges Affecting the European Union*, 13 HADMÉRNÖK 3, 486, 492 (2018).

107. Ponti, *supra* note 92, at 28.

108. Amending Directive, *supra* note 86, at 37.

109. Szabó, *supra* note 106, at 492.

110. Amending Directive, *supra* note 86, at 37-8.

### 3. The Legislative Backdrop of the Directive

From the start, the Directive was under critics by many stakeholders. From a policy-making point of view, strong criticisms have been raised with regard to lacking impact assessment before drafting the proposal of the new Directive.<sup>111</sup> Instead, the EU lawmaker took into account the REFIT report. The report was not specifically intended as assessment in light of a new legislative reform but rather as a general audit of the impact of the Directive.<sup>112</sup> Further, critics in the Parliament focused on the subsidiarity principle of the EU, which is enshrined in Article 5(3) of the Treaty on European Union (hereinafter “TEU”).<sup>113</sup> “[M]EPs rejected the Commission’s proposal recalling the subsidiarity principle, which enables Member States to adopt legislation tailored to national requirements.”<sup>114</sup> While the precedent Directives on firearms legislation faced critics by stakeholders, Council Directive 2017/853 was under immense criticism from many sides.<sup>115</sup>

During the legislative process of adopting the Directive, many members of national parliaments and of the EU Parliament were under pressure from lobbying organizations. This has been highlighted especially in the Czech Republic, in which arms producers opposed the Directive.<sup>116</sup> Social science “[r]esearch showed that opinions are shared among the members of parliament, the government and interest groups regarding the implementation of this Directive in Czech legislation, [...]”<sup>117</sup> Czech firearm producers had a lot at stake with the implementation of the Directive. Namely, Czech firearms producers such as Česká zbrojovka or Sellier & Bellot are likely to be affected by the tightened approach towards firearm possession and

---

111. See FACE, *supra* note 88.

112. Parliament & Council, Directive 2008/51/EC of the European Parliament and of the Council amending Council Directive 91/477/EEC on control of the acquisition and possession of weapons see Article 17. 2008.

113. See FACE, *supra* note 88.

114. *Id.*

115. *Id.*

116. Katerina Bočková et al., *Lobbying Activities in Relation to the Implementation of EU Directive 91/477/EEC on Control and Acquisition of Weapons*, 6 FORUM SCIENTIAE OECONOMIA 91, 98 (2018).

117. *Id.* at 91.

manufacturing.<sup>118</sup> Therefore, they opposed the Directive via industry associations, a process widely popular in EU lawmaking.<sup>119</sup> Nevertheless, the Directive was accepted by the Parliament on March 14, 2017, and adopted in the Council on April 25, 2017, against the rejections from the Czech Republic, Poland, and Luxembourg.<sup>120</sup> Interestingly, Poland and the Czech Republic regarded the Directive as too strict in its legislative approach towards firearms, whereas Luxembourg rejected the Directive as it considered as too weak to efficiently tackle the possession of illicit firearms.<sup>121</sup>

#### 4. The Litigation Consequences of the Directive

In 2017, after the Directive was adopted in the Council, the Czech Republic—as being an outvoted Member State—decided to bring a case in front of the CJEU, claiming the invalidity of the relevant Directive. “[t]he Government of the Czech Republic instructed the Minister of the Interior to submit an analysis of the legislative impact of Directive 91/477/EEC to the Government [...]. This analysis was also prepared taking into account the proceedings of the Czech action at the Court of Justice of the European Union regarding the invalidity of this Directive.”<sup>122</sup> The critic was shared by Poland, which rejected the Directive alongside the Czech Republic in the Council.<sup>123</sup> Pursuant to Poland, “[t]he new solutions are excessive, too harsh and not always rational.”<sup>124</sup> Subsequently, Poland intervened on the side of the Czech Republic at the CJEU. Notably, the current Polish government is at the same

---

118. *Sellier & Bellot (Company profile)*, European Foundation for the Improvement of Living and Working Conditions (Eurofund)(2020).

119. Bočková, et al., *supra* note 116, at 98.

120. Press Release, Ministry of the Interior and Administration of The Republic of Poland, *A Reponse to a Multiple Petition Regarding a Case by Republic of Poland to European Tribunal of Justice Against European Parliament Directive 91/477/EEC On the Control of the Acquisition and Possession of Weapons* (Oct. 6, 2017).

121. Aline Robert, *EU States Reach Difficult Compromise on Firearms*, EURACTIV FRANCE (Dec. 21, 2016) <https://www.euractiv.com/section/security/news/eu-states-reach-difficult-compromise-on-firearms/> [<https://perma.cc/NAQ2-Y7ZB>].

122. Bočková, et al., *supra* note 116, at 99.

123. Press Release, *supra* note 120.

124. *Id.*

time in an ongoing judicial battle with the European Union regarding its overhaul of the national judiciary.<sup>125</sup>

#### D. Conclusion

European harmonization in the field of firearms legislation has come from a minimum-standard approach, given the initial implementation of the single market, to a restrictive standard, comprehensively covering all kinds of “*portable barreled weapons that expel projectiles by the action of a combustible propellant.*”<sup>126</sup> The history of harmonization in the field of firearms in the European Union is a history that finds many precedents in other policy fields, such as the regulation of tobacco or consumer products. The Union is inevitably on its way to “lay the foundations of an ever-closer union among the peoples of Europe.”<sup>127</sup> This ever-closer union requires harmonization of legislation in various fields. Among them, the alignment of firearms regulation in the Member States. The legislative history of the regulation of firearms has to be seen through the lens of the expanding of competences of the Union via the subsequent treaty revisions. Therefore, the history of progression in firearms regulation is a history of European integration.

As of today, some scholars argue for an even tighter approach to firearms legislation, given the shortcomings of the current legislation and future security threats.<sup>128</sup> Ponti notes, that “[n]otwithstanding this undeniable process, the EU still lacks a legislative policy to fight all aspects of IFT [Illicit Firearms Trafficking] comprehensively. In particular, it would be desirable to introduce further legislative intervention with the purpose of effectively harmonizing Member States’ substantive criminal law

---

125. Niels Kirst, *The Independence of Judges in Polish’s Courts: the CJEU Judgement in Commission v Poland (C-192/18)*, DUBLIN CITY UNIVERSITY BREXIT INSTITUTE (Nov. 19, 2019), <http://dcubrexitinstitute.eu/2019/11/the-independence-of-judges-in-polishs-courts-the-cjeu-judgement-in-commission-v-poland-c-192-18/> [perma.cc/ZB2H-T9LX].

126. Parliament & Council, Directive 2017/853 of the European Parliament and of the Council amending Council Directive 91/477/EEC on control of the acquisition and possession of weapons see Article 1. 2017.

127. Consolidated Version of the Treaty on European Union Preamble, 2010 O.J. C 83/01, at 16.

128. Doris Kiendl, Security Issues in the European Union in the Light of Current Developments (A. V. Akulshina ed., Scientific Advisor 2019).

on IFT (common definitions on offences and penalties), [...].”<sup>129</sup> Other scholars point to the risk of harming other Union objectives by over-harmonizing in the field of firearms regulation. “It should be noted that the regulation may adversely affect the conditions of competition both within the internal market and the international market in a number of professional and economic fields closely linked to the legal possession of firearms (pushing back the online trade; weapons-related cultural heritage; historical weapon collection; research in connection with firearms; paid hunting).”<sup>130</sup> In conclusion, there is no prevailing opinion on the future of firearms legislation in the European Union, while the majority agree with the aims already achieved by the three consecutive Directives, and some minority voices criticize an over-harmonization.

The following Part III of this Article analyses the CJEU’s judgement in *Czech Republic v Parliament and Council (C-482/17)*. Beforehand, as a measure to enhance the overview of the previous firearms legislation in the European Union and to highlight the differences between the three consecutive Directives, the following table is proposed:

---

129. Ponti, *supra* note 92, at 31.

130. Szabó, *supra* note 106, at 493.

Table 1: Schematic overview of the different aspects of the three consecutive Directives on firearms regulation in the European Union

	<b>Stage of European Integration</b>	<b>Main reason for the legislative amendment</b>	<b>Legal basis for the Directive</b>	<b>Procedure of adopting the Directive</b>	<b>Main objective of the Directive</b>
<b>Directive 91/477/EEC</b>	European Communities	Establishment of the Single Market and the Schengen Agreement	Article 100 A TEC (Internal Market competence)	Cooperation procedure (opinion by the European Parliament)	Mutual confidence in security among the Member States
<b>Directive 2008/51/EC</b>	European Community	Signing of the UN Protocol	Article 95 (1) EC Treaty (Internal Market competence)	Co-decision procedure (vote in the European Parliament)	Implementing the UN Protocol against the Illicit Manufacturing of and Trafficking in Firearms
<b>Directive 2017/853</b>	European Union	Terrorist attacks in Paris and Copenhagen	Article 114 TFEU (Internal Market competence)	Ordinary legislative procedure (vote in the European Parliament)	Tighten the grip on illicit firearms ownership in the European Union

### *III. DISCUSSION ON CZECH REPUBLIC V PARLIAMENT AND COUNCIL – CHALLENGE OF THE FIREARMS DIRECTIVE AT THE COURT OF JUSTICE OF THE EUROPEAN UNION*

First (an obvious point): firearms are intrinsically dangerous goods. They give rise to safety concerns not only for their users but for the wider public. That is why the legislature has introduced [...] provisions that restrict the possession and acquisition of such weapons.<sup>131</sup>

Advocate General Sharpston in her Opinion in *Czech Republic v Parliament and Council*. Rebutting the argument of the Czech Republic that the European Union may only regulate in the internal market regarding the safety of the user of products.

131. See Case C-482/17, *supra* note 2.



After having described the history of firearms legislation on the European level, Part III of the article provides an overview of the Case *Czech Republic v Parliament and Council (C-482/17)*. In this case, the Czech Republic contested the legal basis of the latest version of the Firearms Directive. The question, which the CJEU quintessentially had to answer was if Article 114 TFEU provides for the competence to enact security legislation of the EU.

#### A. Background of the Case

On December 3, 2019, the CJEU gave its final verdict on the so-called Czech firearms case.<sup>132</sup> In this judgment, which gives guidance on the lawmaking in the European Union, the CJEU touched on many principles of EU law and refined their meaning. The European legislature used its mandate for the single market to amend the previous Firearms Directive 2008/51/EC<sup>133</sup> and Council Directive 91/477/EEC,<sup>134</sup> in the aftermath of terrorist attacks in Paris<sup>135</sup> and Copenhagen.<sup>136</sup> The initial proposal of the Commission gained steam under the Dutch presidency of the Council in 2016. Finally, the Directive underwent the Trialogue process before being approved according to the co-decision procedure by the Parliament and the Council. The Parliament approved the amended Directive on March 14, 2017, while the Council followed suit on April 25, 2017, with only the Czech Republic, Poland and Luxembourg disagreeing. While Poland voted against the Directive, due to stringent norms, Luxembourg voted against the Directive since it wanted a stronger regulation of firearms.<sup>137</sup> Critical voices on political participation and accountability accompanied the legislative process of the Directive.<sup>138</sup>

There is a specific prehistory to the case. After the terrorist attacks in Paris and Copenhagen, the Juncker Commission decided to tighten the gun laws in the European Union.<sup>139</sup> This was met by

---

132. *Id.* art. 5.

133. Directive 2008/51/EC, *supra* note 7.

134. *See* Council Directive 91/477/EEC, *supra* note 7.

135. *See* Hollande, *supra* note 1.

136. *See* Andersen, *supra* note 88.

137. Robert, *supra* note 121.

138. *See* FACE, *supra* note 88.

139. DG HOME, Agreement on Commission Proposal to Increase Citizens' Security (Directorate General Migration and Home Affairs) (Dec. 21, 2016).

much skepticism on the Czech side.<sup>140</sup> The Czech Republic's gun laws differed tremendously from those of most other Member States of the European Union. The history of liberal gun possession in the Czech Republic stretches back to the 18th century.<sup>141</sup> Further, the Czech Republic had a flourishing armament industry.<sup>142</sup> The Czech Republic had specifically harsh aversion towards the Directive since civilian firearm ownership has a long tradition in the Czech Republic,<sup>143</sup> and the Czech government, as well as Czech civil society groups, feared severe consequences for the Czech economy and the Czech cultural heritage.<sup>144</sup> Therefore, the Czech Republic had a great interest to oppose the Directive, supported by the fact that the Czech Republic is the seventh-largest post-war arm exporter in the world.<sup>145</sup>

After being outvoted in Parliament and Council, the Czech Government decided to challenge the Directive at the CJEU.<sup>146</sup> The Czech Republic alleged a breach of the principle of conferral of powers (Article 5(2) TEU), of the principle of proportionality (Article 5(4) TEU), of the principle of legal certainty and protection of legitimate expectations and finally, of the principle of non-discrimination.<sup>147</sup> The Czech Republic, supported by Poland and Hungary in its claim, fired full blast to protect its political interest in front of the CJEU.<sup>148</sup> The case is interesting for three reasons. First, the case deals with the question of legal basis under Article 114 TFEU and has therefore gained significant attention from EU lawyers. Second, it is yet another case in which the Czech Republic

---

140. Euractive, *EU Gun Control Push Undermines Trust in EU, Czech Minister Claims*, EURACTIVE (Aug. 10, 2017) <https://www.euractiv.com/section/politics/news/eu-gun-control-push-undermines-trust-in-eu-czech-minister-claims/> [<https://perma.cc/5YYV-7DZA>].

141. David W. Cerny, Jan Lopaka, and Gabriela Baczynska, *Gun Culture in the Czech Republic*, REUTERS (June 9, 2016), <https://widerimage.reuters.com/story/gun-culture-in-the-czech-republic> [<https://perma.cc/PT5A-RRHK>].

142. Martin Hrobsky, *The Defense Industry in the Czech Republic*, CZECH RADIO (Nov. 28, 2002), <https://www.radio.cz/en/section/economic/the-defense-industry-in-the-czech-republic> [<https://perma.cc/5QLR-AGTG>].

143. Cerny, *supra* note 142.

144. Euractive 2017, *supra* note 140.

145. Martin Armstrong, *The World's Biggest Postwar Arms Exporters*, STATISTA (2018) <https://www.statista.com/chart/13205/the-worlds-biggest-postwar-arms-exporters/> [<https://perma.cc/6SXT-WEPE>].

146. Euractive 2017, *supra* note 140. Case C – 482/17, *supra* note 2, para. 2.

147. Case C – 482/17, *supra* note 2, para. 20.

148. *Id.*, para. 16.

is acting jointly with Hungary and the Republic of Poland (which intervened to support the Czech Republic) to defend their common interest.<sup>149</sup> Oppositely, France and the Commission intervened to support the Council and the Parliament. Third, Directive 2017/853, which was contested by the Czech Republic, amended Directive 91/477, which was the first legislative measure setting a minimum standard regarding civilian firearms acquisition and possession in the European Union.

On April 11, 2019, AG Sharpston opined that the claims by the Czech Republic are unsubstantial and that the CJEU should uphold the Directive as it stands.<sup>150</sup> The most important precedents for this case were the respective claims on the legal basis against the tobacco Directives from tobacco manufactures (see *British American Tobacco*<sup>151</sup> and *Philip Morris Brands*<sup>152</sup>). The trade, sale, and possession of tobacco in the single market is situated in a field between health protection and commerce, whereas, the sale, trade, and possession of firearms are situated in a field between security and commerce. The critical question the CJEU had to answer was, if Article 114 TFEU is an appropriate legal basis for measures which in large parts tighten security standards of firearm possession, or if this impinges of the national sovereignty of the Member States to regulate firearms.

*B. More Unity in Gun Ownership Requirements? The CJEU's Decision on the Legality of the Revised European Firearms Directive in C-482/17*<sup>153</sup>

1. First Plea: Breach of the Principle of Conferral of Powers

In its first plea, the Czech Republic alleged a breach of the principle of conferral of powers by the European legislature. The

---

149. See, e.g., Case C-715/17, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=219670&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=2197421> [<https://perma.cc/QY45-6ZAQ>].

150. Case C - 482/17, *supra* note 2.

151. Case C-491/01, *The Queen v. Sec'y of State for Health, ex parte British American Tobacco (Investments) Ltd. & Imperial Tobacco Ltd.*, 2002 E.C.R. I-11453.

152. Case C - 547/14, *Philip Morris Brands SARL et al. v. Sec'y of State for Health*, 2016.

153. Parts of the following analysis derive from an earlier analysis of the case published here, Niels Kirst, *Conferred Powers, Proportionality and Non-discrimination in the*

baseline of this argument was that the aims of the new Directive diverted significantly from the aims of the earlier Directives on Firearms of 2008 and 2017. Therefore, Article 114 TFEU ceased to constitute an appropriate legal basis. The Czech Republic submitted that an amended Directive should not lead to new objectives which derogate from the original legal basis.<sup>154</sup> By implementing the fight against terrorism within the new Directive, the European legislature infringed on this principle and thus could not base its competence on the internal market pursuant to Article 114 TFEU.

The CJEU, first, generally discussed the appropriate legal basis for adopting a Directive or a Regulation.<sup>155</sup> Highlighting that new legislation might have several purposes. However, the predominant purpose determines the appropriate legal basis of the new legislation. Second, the CJEU broached on the adequate use of Article 114 TFEU,<sup>156</sup> by assessing that the fight against international terrorism is an objective of general interest for the European Union (in analogy health was identified as general interest in *British American Tobacco and Imperial Tobacco*).<sup>157</sup> Subsequently, the CJEU had to decide, if the safety and prevention of terrorist attacks had become the predominant purpose of the amended Directive and, if therefore, the legal basis of Article 114 TFEU ceased to apply.

The Czech Republic argued that the 2017 Directive should be analyzed in isolation from the two earlier acts. In contrary, Parliament and Council argued that the amended Directive has to be analyzed in light of the two earlier Directives.<sup>158</sup> The CJEU stated that an amended Directive must always be assessed in light of its earlier versions. Therefore, Directive 91/477 and the amendments by the new Directive serve as benchmark regarding the adequate legal basis. By discussion Directive 91/477 and the amendments of the contested Directive, the CJEU assessed that by “adjusting the

---

*Czech Firearm Case*, BREXIT INSTITUTE, (Jan. 14, 2020), <http://dcubrexitinstitute.eu/2020/01/conferred-powers-proportionality-and-non-discrimination-in-the-czech-firearm-case/> [https://perma.cc/UR6V-RXKU].

154. Case C – 482/17, *supra* note 2, paras. 21 - 24.

155. Case C – 482/17, *supra* note 2, paras. 31 - 33.

156. Case C – 482/17, *supra* note 2, paras. 34 - 40.

157. Case C-58/08, *The Queen, on the Application of Vodafone Ltd. and Others v. Sec'y of State for Bus., Enterprise and Reg. Reform*, 2010 E.C.R. I-04999.

158. Case C – 482/17, *supra* note 2, paras. 41 - 45.

balance between the free movement of goods and security guarantees, [t]he European Union legislature merely adopted the rule on the possession and acquisition of firearms set out in Directive 91/477 to *changes in circumstances*. [emphasis added].<sup>159</sup> This change to circumstances is a core competence of the European Union legislature in its task of safeguarding the general interests recognized by the Treaty (see also the precedent of *Vodafone and Others*<sup>160</sup>).<sup>161</sup>

By pointing to an earlier decision regarding the Firearms Directive in *Buhagiar and Others*,<sup>162</sup> the CJEU found that the predominant purpose of the measures read in conjunction with the earlier Directive was still “the free movement of goods, approximation of laws, regulations and administrative provisions of the Member States, whilst circumscribing that freedom with safety guarantees that are suited to the nature of the goods at issue.”<sup>163</sup> The CJEU found that firearms are inherently dangerous goods, not only for the user itself (as the Czech Republic argued in the oral hearing)<sup>164</sup> but also for fellow citizens, therefore, safety, as general interest recognized by the Treaty, can form an ancillary purpose of a Directive under Article 114 TFEU. Thus, the Czech Republic’s first plea was unfounded.

## 2. Second Plea: Breach of the Principle of Proportionality

In its second plea, the Czech Republic alleged that the European legislature did not had sufficient information at its disposal when it drafted the Directive. Therefore, it was incapable of assessing the proportionality of the Directive.<sup>165</sup> This argument was based upon the fact that the Commission failed to conduct an impact assessment before drafting the Directive. In an interinstitutional agreement with the Parliament under Article 295 TFEU, the Commission pledged to carry out an impact assessment. However, when the Commission drafted the Directive,

---

159. Case C – 482/17, *supra* note 2, para. 53.

160. Case C-58/08, *The Queen, on the Application of Vodafone Ltd. and Others v. Sec’y of State for Bus., Enterprise and Reg. Reform*, 2010 E.C.R. I-04999.

161. Case C-482/17, *supra* note 2, para. 38.

162. Case C-267/16, *Albert Buhagiar and Others v. Minister for Just., O.J. C 260*.

163. Case C – 482/17, *supra* note 2, para. 59. C-482/17, *Czech Republic v European Parliament and Council of the European Union*, para. 59.

164. Case C – 482/17, *supra* note 2, para. 53.

165. Case C – 482/17, *supra* note 2, paras. 65 - 73.

it lacked time for an impact assessment and instead relied on the REFIT evaluation,<sup>166</sup> which was carried out as a general review mechanism.

First, the CJEU highlighted a broad discretion which the EU legislature has in evaluating and assessing legislative measures.<sup>167</sup> Further, the CJEU followed the Opinion of the AG that a pledge to carry out an impact assessment in an interinstitutional agreement under Article 295 TFEU is a non-binding commitment.<sup>168</sup> This is an interesting finding by the Court which may have seminal consequences for future lawmaking. The CJEU reasoned that the lack of an impact assessment could not automatically lead to an infringement of the principle of proportionality. Instead, the availability of existing information could be sufficient to have a meaningful assessment of the principle of proportionality.<sup>169</sup> After assessing the different studies (among them the REFIT evaluation), which the EU legislature took into account, the CJEU found that the richness of those studies was sufficient for the legislature to make a meaningful assessment of the proportionality of the new measures.<sup>170</sup>

In the second part of its second plea, the Czech Republic contested singular articles of the new Directive. Allegedly, these articles failed the proportionality test of the European Union. The Czech Republic claimed that they could have been achieved by less restrictive means.<sup>171</sup> Specifically, the complete prohibition of semi-automatic firearms, as well as the stricter requirements for deactivated and antique firearms, were criticized.<sup>172</sup> Technical details of the measures which the Czech Republic contested can be found in the judgement.<sup>173</sup>

First, the CJEU clarified, that the judicial review of the proportionality of legislative acts is limited. The CJEU is not in the position to substitute the EU legislature assessment by its own.<sup>174</sup> Instead, the Court can only assess whether the legislature

---

166. *Technopolis et al.*, *supra* note 79.

167. Case C-482/17, *supra* note 2, paras. 76-81.

168. *Id.* para. 82.

169. *Id.* para. 85.

170. *Id.* paras. 87 - 92.

171. *Id.* paras. 95 - 101.

172. *Id.* paras. 120, 127.

173. *Id.* paras. 102 - 104.

174. *Id.* para. 118.

'manifestly exceeded' its broad discretion.<sup>175</sup> Assessing the technical details of the new prohibitions of certain types of semi-automatic firearms, the CJEU concluded that 'those institutions [the Council and the Parliament] do not appear to have exceeded their broad discretion' by these prohibitions.<sup>176</sup> The CJEU found the same regarding the proportionality of the new measures concerning deactivated and antique firearms.<sup>177</sup> The benchmark of 'manifestly inappropriate in relation to the objectives' is a high bar to reach for new legislation to be deemed unproportioned. Therefore, under the CJEU's limited power and capacity of review, the Court declared the new measures to pass the proportionality test.

Lastly, the Czech Republic alleged that the contested Directive interfered with the right to property as enshrined in Article 17 of the Charter of Fundamental Rights (hereinafter "the Charter").<sup>178</sup> The CJEU found that Article 17 of the Charter is not an absolute right and may be restricted by limitations which accord to the general interests recognized by the EU or the need to protect the rights and freedoms of others<sup>179</sup> (in regard to the 'right to property' see also a comment on SEGRO,<sup>180</sup> in which the CJEU extensively discussed Article 17 of the Charter). The CJEU found the evidence brought forward by the Czech Republic insufficient to prove a disproportionate interference with the right to property. Moreover, the CJEU concluded that a ban on semi-automatic firearms for safety reasons is in the general interest, which is also recognized in the last sentence of Article 17 (1) of the Charter. In consequence, the Czech Republic's second plea failed.

### 3. Third Plea: Breach of the Principle of Legal Certainty and of the Protection of Legitimate Expectations

In its third plea, the Czech Republic alleged that specific measures of the new Directive impinged on the principle of legal

---

175. *Id.* para. 119.

176. *Id.* para. 126.

177. *Id.* para. 131.

178. *Id.* para. 132.

179. *Id.* para. 134.

180. See generally Xavier Groussot et al., *SEGRO and its Aftermath: Between Economic Freedoms, Property Rights and the 'Essence of the Rule of Law'*, 2 NORDIC J. EUR. L. 69 (2019).

certainty and legitimate legal expectations.<sup>181</sup> Specifically, the time requirements of the new Directive would lead to a retroactive application. Further, the process of entering into force of the Directive lead to unattainable expectations on the part of individuals.

Regarding the plea of lacking legal certainty, the CJEU rebutted the argument by the Czech Republic. The Court highlighted that the classification of firearms in the new Directive is clear and precise, and does, therefore, not lead to a retroactive application.<sup>182</sup> Regarding the plea of unattainable legitimate expectations of individuals, the CJEU highlighted that the EU legislature fulfilled its requirement by publishing the contested Directive in the Official Journal of the EU in a timely manner. This allowed individuals to know at which point the new rules will come into force, and until when they could buy which kinds of firearms.<sup>183</sup>

#### 4. Fourth Plea: Breach of the Principle of Non-Discrimination

In its fourth plea, the Czech Republic alleged that the *Swiss exception* clause (Article 6(6) of the contested Directive), which allows Swiss militia soldiers to keep their semi-automatic firearms after completing their service with the Swiss army, constitutes discrimination against other individuals.<sup>184</sup> Why was the Directive pertinent for Switzerland while it is not part of the European Union? This was due to the fact that the Directive is pertinent to all Member States of the Schengen area, among them Switzerland. The CJEU first recalled the principle of non-discrimination in European Union law as requiring that “comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified.”<sup>185</sup> The CJEU found that the Swiss Confederation and the other Member States are not comparable regarding the subject matter of that derogation. The Swiss Confederation “[h]as the proven experience and ability to trace and monitor persons and weapons concerned, which gives reason to assume that the public security

---

181. Case C - 482/17, *supra* note 2, paras. 140 - 143.

182. *Id.* paras. 149 - 151.

183. *Id.* paras. 153 - 156.

184. *Id.* paras. 159 - 161.

185. *Id.* para. 164.



and safety objectives” will be achieved.<sup>186</sup> Moreover, the Czech Republic failed to bring evidence forward that there are other states within the Schengen area which that have the same system of mandatory subscription and transfer of military firearms in place as the Swiss Confederation. Hence, the CJEU also rejected the last plea of the Czech Republic.<sup>187</sup>

C. *Comment on the Judgement of the CJEU in Czech Republic v Parliament and Council*

*Czech Republic v Parliament and Council* is a detailed and comprehensive judgment which touches upon many principles of European Union law. It ends the legal challenge between the Czech Republic and the European Union. The tactic of exhausting legal remedies after being outvoted in the Council has a long tradition in the European Union legal order (see, for example, *Spain v Parliament and Council*<sup>188</sup>). This was also in the Czech Firearms the recurring storyline. The Czech Republic took legal actions after it had been outvoted in the Council, and its MEPs had not been heard in the Parliament. The judicial route is a preferred route for Member State’s governments thereafter. However, the question of firearms regulation is highly political. Therefore, a legal discussion on the substance might not be the right tool to address the issue.

The contested Directive places more emphasis on security requirements for legal firearms holders in the European Union. Further, the contested Directive prohibits the possession of semi-automatic firearms within the European single market by civilians. The pleas of the Czech Republic focused on the outer limits of Article 114 TFEU. Is this Article suitable for tightening of firearms possession, or does it fall into the area of judicial cooperation in criminal matters and must, therefore, be adopted under Article 84 TFEU? This was the question the Court essentially had to answer. From the tobacco advertising case-law of the CJEU, it is known that Article 114 TFEU can be interpreted broadly. In this case, the CJEU followed its earlier line of reasoning by allowing security as an

---

186. *Id.* para. 166.

187. *Id.* paras. 167 - 168.

188. Case C-146/13, Kingdom of Spain v. Eur. Parl. & Council of the Eur. Union, 2015 E.C.R. I-3.

objective of a Directive, which was adopted in the single market under the competence of Article 114 TFEU.

By this judgement, the CJEU affirmed the federal legislative competence of the European Union to lower the ceiling of firearm possession in the European Union. Firearms are goods that are sold and purchased on the internal market; therefore, the EU is the adequate body to regulate, and the internal market competence is sufficient to harmonize the possession of firearms in the EU. As a result, Member States have to converge and adjust in their firearm regulations (if they not already did). Some Member States already have a higher bar of firearms possessions as the one purported by the Directive, other as the Czech Republic now have to change their national laws accordingly. The political consequence of this judgement is that also in highly political fields, such as firearms regulation, Member States have to abide by the qualified consensus in the Council. In conclusion, the CJEU upheld the federal competence in opposition to national defiance. In the following Part IV of the article, the present case (*Czech Republic v Parliament and Council*) will be compared to SCOTUS's *United States v Lopez* decision.

#### *IV. COMPARISON TO UNITED STATES V LOPEZ – CHALLENGE OF THE GUNFREE SCHOOL ZONE ACT AT THE UNITED STATES SUPREME COURT*

But, so long as Congress' authority is limited to those powers enumerated in the Constitution, and so long as those enumerated powers are interpreted as having judicially enforceable outer limits, congressional legislation under the Commerce Clause always will engender "legal uncertainty."<sup>189</sup>

Chief Justice William H. Rehnquist in his majority opinion in *United States v Lopez*. Stressing that federal powers under the Commerce Clause have an outer limit.

In Part IV of the article, the proceedings in front of the CJEU in *Czech Republic v Parliament and Council (C-482/17)* will be

---

<sup>189</sup>. *United States v. Lopez*, 514 U.S. 549, 551 (1995).

compared to the *Lopez* case law of SCOTUS. From a comparative viewpoint, the case SCOTUS *Lopez*<sup>190</sup> can give some guidance on the federal competence to regulate firearms in a similar federal legal system. In this landmark judgment, the US Supreme Court found that a ban on firearms in schools cannot be regulated on a federal level by using Article I, Section 8, Clause 3 of the US Constitution, known as the Commerce Clause. Compared to the United States, the CJEU was more willing to give leeway to Article 114 TFEU (the comparable Article in the EU legal system to the Commerce Clause) to regulate the use of firearms in the Member States.

*Lopez* is a highly interesting SCOTUS decision in many regards. First, it concerns a case of firearms legislation in which the federal law was invoked to prosecute firearms possession. Second, the case discusses the intensity of judicial scrutiny by the Supreme Court when Congress enacts laws. Finally, it marks a limitation of the federal powers of lawmaking under the Commerce Clause at a time at which most law scholars in the United States thought that there are literally no restrictions on the legislative mandate of the Congress under the Commerce Clause.<sup>191</sup> It is a case about federalism, its powers, limits, and its influence on firearms legislation. Therefore, it is highly logical to compare this case to *Czech Republic v Parliament and Council* since both cases fundamentally question the power of federal lawmaking in the area of firearms legislation.

#### A. *The Background of United States v Lopez*

The case concerned Alfonso Lopez, which brought a gun to his school on March 12, 1992, to sell it to another pupil in view of the gun being used in a gang fight.<sup>192</sup> After his conduct was exposed, he was charged violating the GunFree School Zone Act of 1990. A federal criminal law enacted under the Commerce Clause. Lopez challenged the constitutionality of this act in the Court of Appeals for the Fifth Circuit, the Texas district court. In an astonishing judgment the court found that section 922 of the act “[i]n the full

---

190. *Id.*

191. Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 675 (1995).

192. Molly E. Homan, Comment, *United States v. Lopez: The Supreme Court Guns Down the Commerce Clause*, 73 DENV. U. L. REV. 237, 237 (1995).

reach of its terms, is invalid as beyond the power of Congress under the Commerce Clause.”<sup>193</sup> The Court of Appeals found, “[t]hat Congress failed to show, through legislative findings or legislative history, how gun possession in a school zone affects interstate commerce.”<sup>194</sup> The US government filed a petition to SCOTUS for a review of the district court’s decision. In sweeping judgment, SCOTUS held that the Commerce Clause is limited, and the aggregated effect of carrying handguns in a school environment was not sufficiently linked to interstate commerce. This decision was groundbreaking in the way that it was the first case since 1937 and the New Deal legislation in which the Supreme Court held that Congress had exceeded its power to legislate under the Commerce Clause.

*B. Why is United States v Lopez Pertinent to Czech Republic v Parliament and Council?*

Why is it appropriate to compare this case with the decision of the CJEU in *Czech Republic v Parliament and Council*? Article 114 TFEU is a suitable comparator to the US Commerce Clause. The similarities between both articles have been acknowledged by numerous authors on both sides of the Atlantic, “[t]he Commerce Clause resembles Article 114 TFEU, the provision granting the legislator of the European Union power to adopt harmonizing acts in relation to the internal market.”<sup>195</sup> Therefore, it is reasonable to compare both cases. In both cases, a federal law on firearms possession (Directive 2017/853; the GunFree School Zone Act) was enacted by the federal lawmaker (Parliament and Council; Congress). In both cases the federal lawmaker used its internal market competence to enact the law (Article 114 TFEU; the Commerce Clause), and this competence was subsequently challenged in front of the apex courts of the respective legal system (CJEU; SCOTUS). Moreover, in both cases, the respective apex courts then had to decide if the federal legislative body overstepped its competence by enacting firearms regulation under the cloak of inter-state commerce.

---

193. *United States v. Lopez*, 2 F.3d 1342, 1367-68 (5th Cir. 1993), *aff’d*, 514 U.S. 549 (1995).

194. Homan, *supra* note 192, at 264.

195. Lena Boucon, E.U. Free Movement Law and the Powers Retained by Member States (Dec. 12, 2014) (Eur. U. Inst.) at 21.

Of course, the differences between both cases should not be overlooked. While in *Lopez*, an individual applicant challenges the constitutionality of a federal criminal act, in *Czech Republic v Parliament and Council*, a Member State challenges the constitutionality of a federal Directive of firearms possession. However, these differences are in view of the Author not too differential to spare the beneficial use of a thorough comparison of both cases.

### C. Comparing Both Judgements

#### 1. The Respective Standard of Review

According to the case-law of the Supreme Court concerning the judicial review of legislative acts under the Commerce Clause before *Lopez*, the Supreme Court would exercise a rational basis review. This is a limited review under which the SCOTUS would not go into depth when analyzing congressional powers under the Commerce Clause. “Traditionally, under ‘rational basis’ review, if the court perceives any plausible reason for congressional action, the inquiry ends.”<sup>196</sup> It is not upon SCOTUS’s competence to imagine a better way how the legislature could have enacted a specific act. “The judiciary’s ability to imagine a better, more perfect solution does not render a law irrational.”<sup>197</sup> The CJEU’s judicial review on acts adopted under Article 114 TFEU seems similar but distinct. It is also not under the CJEU’s power to read something into the law and to imagine a better way how the legislature could have enacted a specific Regulation or Directive. “[t]he criterion to be applied is not whether a measure adopted in such an area was the only or the best possible measure, since its legality can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue.”<sup>198</sup> Neither it is upon the CJEU to carry out its own impact assessment. “[a]s regards the subject matter of the judicial review to be carried out by the Court, it is important to note that [...] it is not for the Court to substitute its own assessment for that of the EU legislature.”<sup>199</sup> The standard of

---

196. Homan, *supra* note 192, at 277.

197. *Id.* at 278.

198. Case C - 482/17, *supra* note 2.

199. *Id.* para. 118.

review at the CJEU is instead whether the legislature *manifestly exceeded* its broad discretion in view of the objectives pursued with the legislative act. “[i]t is for the Court to determine whether the EU legislature manifestly exceeded its broad discretion with regard to the complex assessments and evaluations it was called upon to conduct in the present case, by opting for measures that were manifestly inappropriate with regard to the objective pursued.”<sup>200</sup>

The difference in the standard of review by both courts comes to light when it comes to the findings of the lawmaker. Historically, findings played no significant part in SCOTUS’s standard of review under the Commerce Clause. However, *Lopez* seemed to have changed that. “Since findings bear no significance under typical rational basis review, and since the *Lopez* Court suggested that Congress include findings, it seems the Court raised the standard of review to something more than rational basis.”<sup>201</sup> Homan even argues that thus SCOTUS significantly raised its standard of review. CJEU acknowledged in earlier case-law that the findings of the lawmaker play a part when assessing the discretion of the lawmaker in a specific case. “[T]he EU legislature’s broad discretion, which implies limited judicial review of its exercise, applies not only to the nature and scope of the measures to be taken but also, to some extent, to the finding of the basic facts.”<sup>202</sup> Therefore, the CJEU took into account the findings which were provided by the legislative branch to the CJEU. “It follows that the institutions must at the very least be able to produce and set out clearly and unequivocally the basic facts which had to be taken into account as the basis of the contested measures of the act and on which the exercise of their discretion depended.”<sup>203</sup> It, therefore, might not be a full fact and findings analysis, which the CJEU carries out as its standard of review. However, the CJEU scrutinizes the findings if they complement the argumentation of the legislature. Similarly, an emphasis on the legislative duty to provide findings can be inferred from *Lopez*. “Now, under the reasoning of *Lopez*, the Court will look not to what Congress might have thought, but

---

200. *Id.* para. 119.

201. Homan, *supra* note 192, at 278.

202. Case C - 482/17, *supra* note 2, para. 78.

203. *Id.* para. 81.

demand findings expressing what Congress did reason.”<sup>204</sup> Therefore, SCOTUS’s standard of review under the Commerce Clause shifted with *Lopez* towards a standard of review, which is exercised by the CJEU.

2. Lack of Expressed Findings in *Lopez* or the Lacking Impact Assessment in *Czech Republic v Parliament and Council*

In *Czech Republic v Parliament and Council*, the Czech Republic argued that the EU lawmaker had not adhered to its own standards. Namely, to conduct an impact assessment to evaluate potential needs and the necessity of a new Directive in the field of firearms legislation. Analogically, SCOTUS lamented the lack of expressed congressional findings in *Lopez*. “The Court did not mandate these findings, and the validity of the GunFree School Zone Act did not turn on the presence or absence of findings, but the *Lopez* Court certainly educated Congress on what role findings play.”<sup>205</sup> In both cases, the courts affirmed that the federal lawmaker is not necessarily obliged to include findings into the legislation of what impact that legislation would have on interstate commerce. But, it was in *Lopez* a potentially decisive factor that Congress did not provide adequate findings in regard to the impact of the act on interstate commerce.<sup>206</sup> As Deborah Jones Merritt notes, “[a]lthough the Supreme Court refused to require congressional findings or a legislative history as a prerequisite to sustaining a statute under the Commerce Clause, the lack of congressional attention undoubtedly contributed to the Court’s decision.”<sup>207</sup>

In *Czech Republic v Parliament and Council*, the CJEU found that an interinstitutional agreement that pledges an impact assessment is not binding for the federal lawmaker and that, therefore, this cannot be the sole ground to strike down a Directive. In fact, the CJEU was content with the REFIT report, which the Commission produced as an adequate finding in regard to the impact of the Directive on the single market. Also, the Directive, unlike the GunFree School Zone Act, mentions the findings from previous studies on the impact of gun possession. While “[t]he

---

204. Homan, *supra* note 192, at 278.

205. *Id.* at 277.

206. Jones Merritt, *supra* note 191, at 697.

207. *Id.* at 698.

GunFree School Zone Act of 1990 contained no findings, and the Court refused to import findings from previous similar but distinct acts.”<sup>208</sup> In *Czech Republic v Parliament and Council*, the CJEU relied on findings regarding the earlier Directives and included the legislative history in its assessment. This is a decisive difference between both legislations in regard to the judicial review exercised by the relevant supreme court.

### 3. The Right to Property in the Respective Legal Orders

In both cases, the right to property played a crucial role. While the European Union respects the right to property in Article 17 of the Charter, the US places the right to property in the Second Amendment of the United States Constitution (hereinafter “the Constitution”). The Czech Republic invoked the right to property as a defense for firearms possession in the Czech Republic. In arguing, that the Directive may have a direct impact on firearm holders in the way that they are deprived of their property with the enactment of the Directive. Notably, the same argument was made in the United States. “Rhetoric in some lower court opinion explicitly opposed the GunFree School Zones Act as contrary to the right of private homeowners.”<sup>209</sup> Despite that the right to property was the decisive argument for SCOTUS judgment, it was definitely a factor in making the decision for *Lopez*. The CJEU, in contrary, noted that “[i]t follows that it has not been established, from the elements in the file before the Court, that the limitations placed by the contested directive on the exercise of the right to property recognised by the Charter, in particular with regard to the semi-automatic firearms [...], constitute a disproportionate interference with that right.”<sup>210</sup> Thus, there was not disproportionate circumvention of the right to property as recognized by the Charter with the provisions of the new Directive. It is sufficient to say that the right to property has indeed a much higher standing in terms of recognition as a fundamental right in the United States than in the European Union. This was reflected in the respective role the right to property played in *Lopez* and in *Czech Republic v Parliament and Council*.

---

208. Homan, *supra* note 192, at 277.

209. Jones Merritt, *supra* note 191, at 701.

210. Case C - 482/17, *supra* note 2, para. 138.



#### 4. The Argument of National Urgency

The majority opinion by Chief Justice Rehnquist in *Lopez* was also influenced by the lack of national necessity and urgency of the issue under scrutiny. Texas had a national law prohibiting firearms on school grounds, which was working well. Therefore the federal criminalization of firearms possession seemed superfluous. “Congress made no findings, and the Government made no argument in *Lopez*, that state and local officials were unable to enforce these laws.”<sup>211</sup> This situation was radically different in *Czech Republic v Parliament and Council*.<sup>212</sup> Notably, two terror attacks in Paris and Copenhagen led to the swift adoption of the Directive.<sup>213</sup> During these terror attacks, semi-automatic firearms were used<sup>214</sup>, the legislative response was the prohibition of civilian semi-automatic firearm possession in the European Union. National laws of the Member States seemed insufficient in regard to the regulation of semi-automatic firearms. The CJEU, therefore, potentially took into account the need for this new law, which was enacted during turbulent times in Europe. While a national emergency cannot be the absolute vindication for any law under any competence, it probably has influenced the CJEU in its decision making. Indeed, the French advocate emphasized in the court hearing the vindication of this legislation in light of the terror attacks which happened in Europe.<sup>215</sup> Eventually, this emotional argument beyond a black letter law analysis was well-received by the judges. Contrary, the US Government failed to find a reason for a national emergency in the case of the GunFree School Zone Act. “The Government’s failure to identify an urgent need to combat that problem, however, contributed to the majority’s rejection of congressional power.”<sup>216</sup>

---

211. Jones Merritt, *supra* note 191, at 703-04.

212. Case C - 482/17, *supra* note 2.

213. Hans von der Burchard & Ryan Heath, *EU takes aim at weapons tied to terror attacks*, POLITICO (Nov. 18, 2015), <https://www.politico.eu/article/eu-takes-aim-at-weapons-tied-to-terror-attacks-commission-schengen/> [<https://perma.cc/HG8R-QEKT>].

214. Andersen, *supra* note 88.

215. Case C - 482/17, *supra* note 2.

216. Jones Merritt, *supra* note 191, at 703-04.

## 5. The Federalization of Criminal Law

The GunFree School Zone Act was a federal criminal law enacted by Congress.<sup>217</sup> Whereas the Firearms Directive is not a criminal law. Instead, it is an act regulating the trade and possession of firearms in the European Union. The EU legislature cannot prescribe criminal penalties since this is a competence reserved for the Member States.<sup>218</sup> Ultimately, the European Union can only require Member States to enact effective, proportionate, and dissuasive penalties for individuals that infringe upon a Directive or Regulation.<sup>219</sup> The law enforcement, as well as the precise penalties, are however, in the hands of the Member State's police and judiciary. There is no powerful federal police force, such as the Federal Bureau of Investigation (FBI), in the European Union.<sup>220</sup> Only Europol could be compared in this regard. However, the competence and power of Europol are much more limited. The agency has no executive power, and its officials are not entitled to arrest suspects in the Member States.<sup>221</sup> Therefore, while the factor of federalization of criminal law influenced the decision in *Lopez*, it played no part in the decision-finding in *Czech Republic v Parliament and Council*. At the Supreme Court, the fact that the federal act was domiciled in the area of criminal law might have influenced the judges towards a negative decision. "The *Lopez* majority stressed that criminal law, like education, is a matter traditionally left to the states." By the act, there was further duplication of state and federal crimes in that area, since Texas already had in place an act which prohibited firearms around schools. The question left in *Lopez* is, why the federal prosecutor took the case when there was effective law enforcement on the state level.

---

217. Gun-Free School Zones Act § 921(a)(25) Crime Control Act of 1990 (1990).

218. VALSAMIS MITSILEGAS, ET AL., RESEARCH HANDBOOK ON EU CRIMINAL LAW (2016).

219. *Id.*

220. See generally Monica Den Boer & Willy Bruggeman, *Shifting Gear: Europol in the Contemporary Policing Era*, 3 POLITIQUE EUROPÉENNE (2007), <https://www.cairn.info/revue-politique-europeenne-2007-3-page-77.htm#> [<https://perma.cc/Z7D7-NKJE>].

221. *Id.*

## 6. The Need to Set a Limit to the Federal Legislative Competence

The Commerce Clause, as Article 114 TFEU, gives the federal lawmaker broad powers to legislate in the area of interstates commerce and the internal market. Potentially, there was a willingness at the Supreme Court to set a limit to these broad powers. “Before *Lopez*, many academics and lower court judges speculated that the Commerce Clause no longer imposed any limits on congressional action.”<sup>222</sup> The federal branch had legislated under the Commerce Clause without any restraint since 1937,<sup>223</sup> therefore, SCOTUS may have thought that approving the very feeble and weak arguments and justification by the Government would have eventually led to the perception that there are factually no restraints for Congress under the Commerce Clause. “The *Lopez* majority expressed grave concern that sustaining the GunFree School Zones Act under the Government’s rationales would render Congress’s commerce power completely unbounded.”<sup>224</sup> Oppositely, in *Czech Republic v Parliament and Council*, there was no need for the CJEU to make a point that there are limits under Article 114 TFEU. In fact, the EU had might had its *Lopez* moment already earlier. Respectively, in the case *Federal Republic of Germany v European Parliament and Council of the European Union*, the CJEU stroke down the tobacco advertising Directive for its wrong legal basis.<sup>225</sup> In *Germany v Parliament and Council*<sup>226</sup> the CJEU found that harmonization under Article 114 TFEU is not without limits, as regards a ban on advertising of tobacco products. In this case, the CJEU “[s]aid the directive should not have been adopted as an EU internal market directive aimed at removing market distortions. Germany and the producers argued it was a public health measure.”<sup>227</sup> In this case, the CJEU found that the EU legislature cannot rely on Article 114 TFEU “[s]imply because

---

222. Jones Merritt, *supra* note 191, at 703-04.

223. The last time SCOTUS limited congressional power under the Commerce Clause was during the New Deal Era, when the SCOTUS resisted against FDR’s political agenda. BRUCE A. ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 314 (1998).

224. Jones Merritt, *supra* note 191, at 712.

225. Case C-376/98, *Fed. Republic of Ger. v. Eur. Parl. & Council of the Eur. Union*, 2000 E.C.R. I-8534.

226. *Id.* at I-8533.

227. *European Court Overturns Ban on Tobacco Advertising*, *GUARDIAN* (Oct. 5, 2000), <https://www.theguardian.com/media/2000/oct/05/advertising> [<https://perma.cc/K88Q-MXU7>].

actual or potential divergences in national rules are found. It is only insofar as such disparities restrict interstate-trade in goods and/or services or imply an appreciable distortion of competition, and if harmonisation actually improves the establishment and functioning of the internal market, [...].”<sup>228</sup> While this case was between commerce and public health, it certainly is comparable to *Lopez* in the way the Court set a limit to the federal competences. In the United States, that had not been done since the New Deal legislation, and therefore, there was an apparent need for the SCOTUS to demonstrate the limits to the Commerce Clause. In the European Union, the Commission had already acknowledged the limits of Article 114 TFEU and, therefore, drafted any legislation very more thoroughly under Article 114 TFEU.

#### V. CONCLUSION

The final Part IV of this article has aimed to display an enriching comparison between the regulation of firearms in the EU and in the United States and its respective legal challenges at the relevant apex court. Demonstrating the comparisons and differences of *Czech Republic v Parliament and Council* and *Lopez*. While in *Czech Republic v Parliament and Council*, the CJEU held up the Firearms Directive under the single market competence. In *Lopez*, SCOTUS declared that the federal lawmaker had overstepped its competences by enacting the GunFree School Zone Act under the Commerce Clause. The comparison, however, underlines that in both systems, the federal lawmaker has a very wide discretion to enact firearms legislation under the single market competence. In the European Union, this competence derives from Article 114 TFEU, and in the United States from the Commerce Clause. As Cuyvers notes, “[a]fter all, as we know from the Commerce Clause in the US Constitution, almost anything can be said to affect the internal market, as almost all rules will have some (indirect) effect on cross-border-trade.”<sup>229</sup> The legislative and judicial future will demonstrate if both supreme courts will foster federalization by upholding the federal competence under

---

228. Christophe Hillion, *Tobacco Advertising: If You Must, You May*, 60 *CAMBRIDGE L.J.* 486, 488 (2001).

229. Armin Cuyvers, *The Legal Framework of the EU*, in *EAST AFRICAN COMMUNITY LAW* 121 (Emmanuel Ugirashebuja et al. eds., 2017).

the Commerce Clause/Article 114 TFEU, or if there will be a step back by placing more limits on this federal competence. Taking a step back, it can be said that the regime of firearms in the European Union and the United States may be substantially different. Specifically, in regard to the constitutional right to bear arms which exists in the United States but not in the European Union. However, the federal regulation of firearms may be very similar in regard to the federal competence to regulate and its judicial ramifications at the respective highest courts of both federal legal systems.

