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Judicial Review in the Digital Era: Safeguarding the Rule of Law Through Added Safeguards?*

ANNEGRET ENGEL

1. *Introduction*

The EU system of judicial review offers a variety of routes to challenge the legality of legislative acts[1]. The most commonly used ones are the direct route of bringing an action for annulment under Article 263 TFEU and the indirect route of having a national court refer a question for a preliminary ruling under Article 267 TFEU[2]. In both cases, the Court of Justice of the European Union (CJEU) will review the contested act and decide what action, if any, should be taken. If a challenge is well founded, Article 264 TFEU requires the CJEU to declare the challenged act void in part or in its entirety. However, the CJEU may decide, in the interest of legal certainty, that the relevant effects of the act shall remain intact until new legislation has entered into force.

Where a challenge is successful, this inevitably causes a legislative void that will obtain for a certain time, which will be characterised by significant uncertainty, even if some legal effects are to be maintained during that period. This is further exacerbated by the fact that it generally takes a long time before the judicial remedies are exhausted and the legislative procedures are completed. As will be shown, this is particularly problematic in the digital sphere, where the combination of under-regulation and fast technological progress makes timely solutions crucial for the protection of the rule of law[3]. One way to provide such a solution, which will be presented here, could be through judicial review, making use of the mechanism of added safeguards to avoid the delays that will otherwise result from the interaction between the EU institutions in the shaping of legislation.

Effective judicial review already contributes significantly in other ways to the maintenance of the rule of law[4], in the digital sphere as elsewhere. In fact, as has been observed, there cannot be a strong rule of law without substantial judicial review[5], ensuring, inter alia, the adequate applica-

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tion of the principle of proportionality as recognised in Article 52(1) of the EU Charter of Fundamental Rights (the "Charter"). This article will focus on a particular aspect of judicial review as an essential parameter for safeguarding the rule of law in the EU.

It will first provide a brief overview of the EU Digital Single Market and the main challenges faced by the EU legislator in establishing a regulatory framework for the internet and online activities. The limitations presented in that context will lead on to the second part, where the new approach taken by the CJEU in its landmark *Ligue des droits humains* ruling[6] will be analysed. As will be shown, instead of invalidating the challenged act, the CJEU chose to assume a quasi-legislative role by adding safeguards to it. The third part of the article will evaluate the anticipated effects of that judgment on the rule of law in the EU Digital Single Market and beyond. It will be argued that a certain level of flexibility can indeed be beneficial to more recent legislation in the field of digitalisation, thus ensuring the protection of the rule of law in the longer term. In the fourth part, the *Ligue des droits humains* judgment will be discussed in the broader context of the EU's endeavours to ensure more timely justice through judicial review. Finally, some concluding remarks will be made regarding the effects of that judgment.

2. *The EU Digital Single Market*

In previous decades, the internet was notoriously under-regulated by the EU legislator[7]. One reason for this neglect could be the challenges that the fast-developing, globally accessible and partially anonymous digital space posed for regulation, traceability and enforcement – challenges unknown to the analogue sphere[8]. Another reason could be that the deregulatory mechanisms of the internal market had seemed sufficient in earlier decades and were assumed to be adequate for the emerging digital sphere as well. More recently, however, the shift towards an increasingly regulatory approach in the internal market[9] and the realisation that an internet where economic considerations are given free rein will be unsustainable in the long term unless fundamental rights apply[10] have combined to make the Commission focus on increasing regulation in the digital sphere as well[11].

As is clear from its communications such as the Declaration on European Digital Rights and Principles[12] and the Declaration for the Future of the Internet[13], the Commission envisages the creation of a level playing-field in the digital sphere, similarly to in the offline world[14]. Its vision is thus to make the internet a fair and secure place for businesses and users alike[15]. One of the cornerstones of a fair and secure digital space is arguably the protection of personal data. According to Article 8 of the Charter, personal data «must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis»[16].

A key concern of the EU legislator in this context, given the eminently transboundary nature of the digital sphere, is to promote European values externally, as stipulated in Articles 3(5) and 21 TEU[17]. For this reason, the Commission pursues an «open, but proactive international approach»[18]. One context in which both the creation of a level playing-field and the promotion of Europe-

an values are highly relevant is the transfer of data to third countries. Prominent legislation in this area includes the Passenger Name Record (PNR) Directive[19], which will be further discussed below, and the General Data Protection Regulation (GDPR)[20], under which data may be transferred to a third country only if it has an adequate level of data protection. Even so, there still appears to be insufficient protection of fundamental rights in the digital sphere[21]. In fact, the legislative process often seems to be two steps behind the most recent technological developments.

The slowness of the legislative process contributes to the above-mentioned uncertainty gap that arises whenever an EU legal act is declared void, and so does the slowness of any judicial procedures that may be necessary. This creates problems for the necessary enforcement mechanisms and undermines the principle of legitimate expectations in the digital sphere. One case in point is the *Schrems* saga, in which a private litigant challenged the social-media platform Facebook's transfer of personal data to the United States and had to wait for seven years after making his initial complaint until the second of two judgments was delivered[22]. While additional safeguards were eventually put in place under the new EU–US Trans-Atlantic Data Privacy Framework[23], this is emblematic of the patience required of private litigants before their action can be successful[24]. Although the legal maxim "justice delayed is justice denied" was coined – for good reason – long before anyone had even imagined the internet, such delays may have a particularly deleterious effect in the digital sphere, where time seems to move faster and hence the delay between the emergence of a new technology and the implementation of appropriate regulation and enforcement seems so much longer.

3. *Added safeguards in Ligue des droits humains*

Against this backdrop, *Ligue des droits humains*[25] is considered a landmark case for judicial review in the EU Digital Single Market and beyond. It concerned the PNR Directive on «the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime», which provides, in particular, for the transfer and processing of PNR data regarding extra-EU flights[26]. The PNR system had previously been reviewed by the CJEU in *Opinion 1/15*[27], following a request from the European Parliament which questioned the compatibility of PNR data transfers under the EU–Canada Agreement (CETA)[28] with the data-protection rights granted by EU law (Article 16 TFEU and Articles 7, 8 and 52(1) of the Charter). While *Opinion 1/15* did not directly concern the PNR Directive, it nevertheless raised similar doubts about the compatibility of that Directive with fundamental rights.

The reference for a preliminary ruling in *Ligue des droits humains* was made by the Belgian Constitutional Court. The dispute before that court opposed the Ligue des droits humains, a human-rights organisation, and the Belgian Council of Ministers. Essentially, the Ligue des droits humains relied on two pleas in law. First, it claimed that the contested measure – or its transposition into national law – interfered with

the rights to respect for private life and the protection of personal data and thus did not comply with Article 52(1) of the Charter and the principle of proportionality[29]. Second, it argued that the extension of the PNR system to intra-EU transport operations had the effect of indirectly restoring internal border control, in breach of the free movement of persons[30]. The Belgian Council of Ministers, however, claimed that the first plea was inadmissible and stressed that it considered data processing to be an essential, and proportionate, tool in the fight against terrorism and serious crime[31].

In its judgment, the CJEU acknowledged that «the PNR Directive entails undeniably serious interferences with the rights guaranteed in Articles 7 and 8 of the Charter, in so far, inter alia, as it seeks to introduce a surveillance regime that is continuous, untargeted and systematic, including the automated assessment of the personal data of everyone using air transport services»[32]. Further, the CJEU noted that the use of AI technology «may deprive the data subjects also of their right to an effective judicial remedy enshrined in Article 47 of the Charter»[33]. However, the CJEU noted that «an EU act must be interpreted, as far as possible, in such a way as not to affect its validity», pointing out that «if the wording of secondary EU legislation is open to more than one interpretation, preference should be given to the interpretation which renders the provision consistent with primary law rather than to the interpretation which leads to its being incompatible with primary law»[34]. While this statement seems to set the tone for the CJEU's later reasoning underpinning its ultimate decision not to declare the directive invalid, it also clearly represents a break with an earlier approach reflected, for instance, in the CJEU's finding that a similar violation of fundamental rights was sufficient to declare the invalidity of the contested Data Retention Directive[35] in joined cases *Digital Rights Ireland* and *Seitlinger and Others*[36].

As is clear from the above, the CJEU took a rather negative view of the contested directive. To justify the balancing act it undertook to avoid declaring it invalid, it referred again and again to the principle of proportionality as an essential element of its ruling. In fact, a quick search yields 41 hits for "proportionate" or "proportionality" in the judgment, and those instances appear throughout the text rather than in one specific section of it. Another key expression in this context, "fundamental rights", appears 53 times. This indicates that the CJEU was aware of the magnitude of the case and the effects its ruling might have in the long term. To justify its decision, the CJEU acknowledged, in particular, that the directive's security purposes «undoubtedly constitute objectives of general interest of the European Union that are capable of justifying even serious interferences with [...] fundamental rights»[37].

Hence, instead of declaring the PNR Directive invalid, the CJEU took on a quasi-legislative function by imposing a variety of additional safeguards on the application of that directive. For example, the CJEU laid down that the competent authorities are required to «ensure the lawfulness of the automated processing [of PNR data], in particular its non-discriminatory nature, as well as that of the individual review»[38]. These safeguards are firmly placed by the CJEU within the Member States' responsibility «to ensure that the application of the system established by the PNR Direc-

tive is effectively limited to combating serious crime and that that system does not extend to offences that amount to ordinary crime»[39]. Some commentators have already voiced scepticism about how this might work in practical terms[40], predicting further legal battles at national and EU level[41]. The European Data Protection Board in fact deems it «likely» that Member States' current processing of PNR data does not comply with the interpretation made by the CJEU in its judgment, as it «significantly narrows the ways in which Member States may process PNR data», meaning that «PNR systems across the EU may continue to interfere disproportionately with the fundamental rights of data subjects every day»[42].

In more abstract terms, and from a theoretical perspective, it is also interesting to consider what effects the CJEU's judgment in *Ligue des droits humains* may have on the wider rule of law in the EU, particularly but not only with regard to the Digital Single Market.

3.1. *Effects on the rule of law in the EU*

First and foremost, it has to be noted that *Ligue des droits humains* confirms a recent trend that the judicial review of EU legislative acts is becoming more intense. Particularly in cases concerning serious interferences with fundamental rights, the CJEU of late seems to employ a stricter proportionality test and to have reduced the – traditionally wide – margin of discretion left to Member States[43]. However, this does not in itself guarantee a higher level of protection either for fundamental rights or for the rule of law. As argued by Alberto Miglio, «it would be naïve to assume that upholding the legality of the PNR Directive leads to better law enforcement»[44]. Hence it is necessary to analyse the possible longer-term effects of *Ligue des droits humains*.

On the one hand, it could be argued that any legislation not meeting certain minimum standards of EU law and fundamental rights should be declared invalid and that this is therefore what should have happened to the contested PNR Directive in this case. The CJEU's failure to do this could undermine basic judicial principles of EU law as established in its own case-law, such as the principle of legal certainty and that of the protection of legitimate expectations[45]. If unfit legislation remains intact, albeit with judicial conditions imposed upon it, this might ultimately lead to a weakening of the rule of law, not only with regard to the predictability of judicial outcomes, but even more with regard to the protection of the interests of stakeholders subject to enforcement processes. In addition, it is not inconceivable that national courts and administrative authorities could refuse, for a variety of practical or even political reasons, to implement decisions where the CJEU imposes such conditions[46]. This would endanger the entire system of judicial co-operation as well as undermining the CJEU's supremacy[47].

On the other hand, *Ligue des droits humains* could also help to strengthen the rule of law in the long term. In particular, the addition of safeguards might have positive effects on the PNR Directive that the EU legislator would have needed much longer to achieve. This would be a way to escape the legislative void that may arise if a contested measure is annulled either

in part or in its entirety. In fact, as noted above, although it is common practice to prescribe that the effects of such a measure will remain intact until it is replaced by new legislation[48], there always remains a certain level of legal uncertainty during such a transition, even disregarding the fact that any new legislation can again be subjected to judicial review, in a theoretically endless cycle between the judiciary and the legislator. For this reason, it could be argued that the new approach of adding safeguards would be beneficial in that it provides the flexibility required for the CJEU to actively shape legislation *ad hoc* and in a more "organic" way.

For the time being, *Ligue des droits humains* nevertheless creates some degree of legal uncertainty, not only with regard to national enforcement as referred to above but also with regard to the possibility of future judicial review in this area. It remains to be seen whether the CJEU will actively amend contested legislation in future cases or whether judicial review will revert to the binary choice between validation and invalidation. The third option – of adding safeguards – that *Ligue des droits humains* has pioneered could be seen either as a last resort or as a new standard for proportionality review of legislation, at least in the digital field. In any case, it is clear that this judgment broadens the spectrum of judicial powers by adding new ones that are significantly different from those pertaining to the law-making function of the judiciary within a deregulatory framework[49] and that require some form of response from the legislator.

3.2. *Dialogue between legislator and judiciary*

Assuming that there is such a response from the legislator, it is to be expected that this new approach will lead to dialogues behind the scenes between the judiciary and the legislative bodies of the EU in order for one to legitimise the decisions taken by the other. Indeed, there are already signs of this. In December 2022, the Commission presented a proposal for a regulation on the collection and transfer of advance passenger information, referring to *Ligue des droits humains* in its explanatory memorandum[50]. While references to the CJEU's case-law are not unusual in legislative proposals, this one goes much further in that it is suggested that the legislator should explicitly subject itself to the limits and safeguards established by the judiciary, thus not only acknowledging the effects of the ruling but actually codifying the CJEU's interpretation.

However, the dialogue between the legislator and the judiciary may not always be this explicit, with direct references being made to case-law and legislation. In fact, it could also take more subtle forms. Further, it is not necessary to see this dialogue as having been initiated by the CJEU in *Ligue des droits humains*. Rather, that judgment can be seen as just another contribution to an existing dialogue which may have been prompted, at least in part, by the current trends initiated by the legislator. This is in fact already apparent in recent legislation in the digital field, where the Charter plays an increasingly prominent role in regulation[51]. For example, while the GDPR (which was adopted in 2016) mentions the Charter only seven times in its main body of

text, the recent Digital Services Act (DSA)[52] mentions it on 36 occasions. This obviously suggests a much more substantial function for the Charter, and hence a much more prominent role for the judiciary.

Against this backdrop, it is unsurprising that the CJEU should engage in a much more in-depth proportionality review to ensure that a higher standard of protection is applied, in line with the most recent legislative agenda. Indeed, *Ligue des droits humains* is not the first judgment where a more substantive appraisal of fundamental rights is made in a proportionality review. For example, a similar tendency can be seen in *Poland v. Parliament and Council*, where the CJEU held, with regard to Directive 2019/790 on copyright and related rights[53], that

> the legislation which entails an interference with fundamental rights must lay down clear and precise rules governing the scope and application of the measure in question and imposing minimum safeguards, so that the persons whose exercise of those rights is limited have sufficient guarantees to protect them effectively against the risk of abuse[54].

In a similar vein as in *Ligue des droits humains*, the CJEU also found in *Poland v. Parliament and Council* that it is the duty of the Member States to transpose and implement EU laws in such a way as to ensure the consistency of their national laws with EU law and to avoid conflict with fundamental rights or other general principles of EU law[55].

If this trend towards a more active judiciary continues – in the digital area and beyond – there are other recent legislative acts that, if legally challenged and found wanting, may remain intact but have amendments made or safeguards added to them by the CJEU. Examples from the digital sphere include the above-mentioned DSA, the Digital Markets Act (DMA)[56], the proposed Artificial Intelligence Act (AI Act)[57] and the proposed regulation on crypto-currencies (MiCA)[58]. This would certainly appear to be appropriate given the individual characteristics of the Digital Single Market as outlined above and, as a result, would contribute to more rapid regulatory progress in an attempt to catch up with the technological advances of the digital era.

4. *Timely justice*

As outlined above, the temporal aspect of rulings has also played a part in the broader context of procedural reform to judicial review in the EU. In November 2022, the CJEU requested an amendment to Protocol No 3 of its Statute[59], to the effect of delegating certain preliminary references on specific topics[60] to the General Court[61]. If approved, this will constitute the final step in a reform of the EU's judicial framework, after the transfer in 2019 of jurisdiction in certain disputes to the General Court (from the dissolved Civil Service Tribunal)[62] and the increase in 2019 of the number of judges at the General Court[63].

The reform aims to reduce the workload of the CJEU, so that it will be able to deliver more timely judgments and hence provide greater legal certainty. It can be argued that the exact same aim was pursued by the CJEU when it decided to directly amend the PNR Directive in *Ligue des droits humains*, taking a more pro-active approach. In fact, the procedural reform may allow the CJEU to carry out even more detailed proportional-

ity reviews in future cases and to give even closer consideration to the adequate protection of fundamental rights, particularly in the digital area. From this perspective, the CJEU's ruling in *Ligue des droits humains* can therefore be seen as part and parcel of its wider endeavour to tackle the challenges inherent in its quest to protect the rule of law.

5. *Concluding remarks*

At a general level, the CJEU's judgment in *Ligue des droits humains* constitutes a landmark ruling when it comes to judicial review. As has been shown, the new approach reflected by that judgment, if it persists, will have significant effects for the Digital Single Market and beyond. In adding safeguards to, and thus directly amending, the PNR Directive, the CJEU essentially assumed a legislative function as part of its judicial capacity. In the long term, this could lead to more intense judicial review at the EU level.

Despite the legal uncertainty that presently obtains at the initial stage when it comes to the peculiarities of law enforcement at the national level, the CJEU's decision seems adequate, considering the fast-paced digital environment and the declared aim of the EU to regulate the internet in the light of fundamental-rights standards. Against this backdrop, lengthy legislative and judicial procedures would be counter-productive, which is why this rather *ad hoc* mechanism of added safeguards can be justified in the interest of timely justice.

The *Ligue des droits humains* ruling also confirms a broader trend of – partially invisible – dialogue between the legislative bodies and the judiciary regarding the appraisal of fundamental rights. This can be observed in direct references as well as in more abstract confirmation between the institutions of principles established by the "other side". In particular, the Commission has already made reference to *Ligue des droits humains* in a legislative proposal, thus legitimising the CJEU's decision. To this should be added that the increased intensity of judicial review in the digital area is in line with the broader political agenda there.

When it comes to the actual subject matter of the PNR Directive, however, it remains to be seen how the CJEU's concrete amendments to that directive will be dealt with at the national level and whether or not this will lead to an actual strengthening of the rule of law. As regards future cases and the continued use of such added safeguards, what could also be problematic is the extent to which such judicial amendments can be made, given the resulting risk of creating unnecessary legal uncertainties at the very expense of the rule of law.

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[1] See, e.g., A. H. Türk, *Judicial Review in EU Law*, Edward Elgar Publishing, Cheltenham, 2009, and A. Arnull, *Judicial Review in the European Union*, in A. Arnull, D. Chalmers (eds.), *The Oxford Handbook of European Union Law*, Oxford, Oxford University Press, 2015, pp. 376-402.

[2] See, e.g., M. Broberg, N. Fenger, *Preliminary References to the European Court of Justice*, Oxford, Oxford University Press, 2014; see also C. Lacchi, *Multilevel judicial protection in the EU and preliminary references*, in «Common Market Law Review», 53(3), 2016, pp. 679-707.

[3] This is also called "rule of law anxiety"; see discussion in X. Groussot *et al.*, *Towards General Principles 2.0: the Application of General Principles of EU Law in the Digital Society*, in U. Bernitz, X. Groussot, J. Paju, J., S. de Vries (eds.), *General Principles of EU Law and the Digital Legal Order*, Milano, Wolters Kluwer, 2020, pp. 425-451.

[4] On the broader concept of the rule of law, see, e.g., L. Pech, *A Union Founded on the Rule of Law: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law*, in «European Constitutional Law Review», 6, n. 3, 2010, pp. 359-396.

[5] A. Engel, X. Groussot, *Making the Rule of Law Great Again: The Building of the Digital Rule of Law in the European Union*, in A. Engel, X. Groussot, G.T. Petursson (eds.), *New Directions in Digitalisation: Perspectives from EU Competition Law and the Charter of Fundamental Rights*, Springer Nature International (forthcoming).

[6] Judgment of 21 June 2022 in case C-817/19, *Ligue des droits humains*, EU:C:2022:491.

[7] See, e.g., T. Berg, *www.wildwest.gov: The Impact of the Internet on State Power to Enforce the Law*, in «Brigham Young University Law Review», n. 4, 2000, pp. 1305-1362, or S. Shipchandler, *The Wild Wild Web: Non-Regulation as the Answer to the Regulatory Question*, in «Cornell International Law Journal», 33, n. 2, 2000, pp. 435-463.

[8] See, e.g., *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Protecting Fundamental Rights in the Digital Age*, 2021 Annual Report on the Application of the EU Charter of Fundamental Rights.

[9] See U. Sadl et al., *Route 66: The Mutations of the Internal Market through the Prism of Citation Networks* (unpublished, on file with the author). See also E. Celeste, *Digital Constitutionalism: The Role of Internet Bills of Rights*, London, Routledge, 2023.

[10] See also K. Karppinen, O. Puukko, *Four Discourses of Digital Rights: Promises and Problems of Rights-Based Politics*, in «Journal of Information Policy», 10, n. 1, 2020, pp. 304-328.

[11] See also speech by the European Commission's Executive Vice-President Margrethe Vestager at the Council's High-level Presidency Conference: *A Europe of Rights and Values in the Digital Decade*, 8 December 2020.

[12] European Declaration on Digital Rights and Principles for the Digital Decade, proposed by the European Commission, published on 26 January 2022.

[13] Signed by the EU, the United States and more than 60 other international partners, published on 28 April 2022.

[14] See also *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2030 Digital Compass: the European Way for the Digital Decade*, COM(2021) 118 final.

[15] See also A. Engel, X. Groussot, *The EU's Digital Package: Striking a Balance for Fundamental Rights in the proposed DSA and DMA Regulations*, in M. Bergström, V. Mitsilegas (eds.), *EU Law in the Digital Age*, Hart Publishing (forthcoming).

[16] See also Article 16 TFEU. Regarding the concept of processing of personal data, see, e.g., judgment of 6 November 2003 in case C-101/01, *Lindqvist*, EU:C:2003:596, and judgment of 13 May 2014 in case C-131/12, *Google Spain and Google*, EU:C:2014:317. Regarding the issue of consent given by a user of a particular website to the storage of or access to personal data, see, e.g., judgment of 1 October 2019 in case C-673/17, *Planet49*, EU:C:2019:801.

[17] This is known as the "Brussels effect"; see A. Bradford, *The Brussels Effect*, in «Northwestern University Law Review», 107, n.1, 2012, pp. 1-67, and, more recently, A. Bradford, *The Brussels Effect: How the European Union Rules the World*, Oxford, Oxford University Press, 2020.

[18] European Commission, *A European Strategy for Data*, COM(2020) 66 final, p. 23; available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0066> (last accessed on 12 May 2023). See also C. Kunert, *The Internet and the Global Reach of EU Law*, in M. Cremona, J. Scott (eds.), *EU*

Law Beyond EU Borders: The Extraterritorial Reach of EU Law, Oxford, Oxford University Press, 2019.

[19] Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, OJ L 119, 4.5.2016, p. 132.

[20] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, p. 1.

[21] See, e.g., A. Renda, *Making the digital economy "fit for Europe"*, in «European Law Journal», 26, n. 5-6, 2020, pp. 345-354. This author argues that the current legislative framework at EU level is still «too sparse and uncoordinated» to achieve the EU's objectives.

[22] See judgment of 6 October 2015 in case C-362/14, *Schrems*, EU:C:2015:650 ("Schrems I"), and judgment of 16 July 2020 in case C-311/18, *Facebook Ireland and Schrems*, EU:C:2020:559 ("Schrems II").

[23] As announced in the joint statement by the European Commission and the United States on 25 March 2022, available at <https://ec.europa.eu/commission/presscorner/detail/es/ip_22_2087> (last accessed on 21 March 2023).

[24] See also M. Zalnieriute, *Data Transfers after Schrems II: The EU–US Disagreements over Data Privacy and National Security*, in «Vanderbilt Journal of Transnational Law», 55, n. 1, 2022, pp. 1-48.

[25] *Ligue des droits humains* cit.

[26] Article 1(1) of the PNR Directive.

[27] *Opinion 1/15* of 26 July 2017, EU:C:2017:592.

[28] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, OJ L 11, 14.1.2017, p. 23.

[29] *Ligue des droits humains* cit., p. 54.

[30] Ivi, p. 55.

[31] Ivi, p. 56.

[32] Ivi, p. 111.

[33] Ivi, p. 195.

[34] Ivi, p. 86 and case-law cited.

[35] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, OJ L 105, 13.4.2006, p. 54.

[36] Judgment of 8 April 2014 in joined cases C-293/12 and C-594/12, *Digital Rights Ireland and Seitlinger and Others*, EU:C:2014:238. See also the CJEU's reasoning in its judgment of 21 December 2016 in joined cases C-203/15 and C-698/15, *Tele2 Sverige*, EU:C:2016:970.

[37] *Ligue des droits humains* cit., p. 122.

[38] Ivi, p. 209.

[39] Ivi, p. 152.

[40] K. Irion, *Repairing the EU Passenger Name Record Directive: the ECJ's judgment in Ligue des droits humains (Case C-817/19)*, in «European Law Blog», <https://europeanlawblog.eu/2022/10/11/repairing-the-eu-passenger-name-record-directive-the-ecjs-judgment-in-ligue-des-droits-humains-case-c-817-19/>, 2022 (last accessed on 8 March 2023).

[41] C. Thönnes, *A Directive altered beyond recognition: On the Court of Justice of the European Union's PNR decision (C-817/19)*, in «Verfassungsblog», <https://verfassungsblog.de/pnr-recognition/>, 2022 (last accessed on 8 March 2023).

[42] European Data Protection Board, *Statement 5/2022 on the implications of the CJEU judgement C-817/19 regarding the implication of the Directive (EU) 2016/681 on the use of PNR in Member States*, adopted on 15 December 2022, <https://edpb.europa.eu/our-work-tools/our-documents/statements/statement-implications-cjeu-judgment-c-81719-use-pnr-member_en> (last accessed on 14 March 2023).

[43] D. Harvey, *The Constitutional Court of A More Mature Legal Order: Constitutional Review by the Court of Justice of the European Union*, Darwin College, Cambridge University (PhD thesis), 2019, pp. 231-262.

[44] A. Miglio, *Ligue des droits humains: The Court of Justice confirms the validity of the Passenger Name Records Directive… and redrafts it*, in «EU law Live», 1 July 2022, <https://eulawlive.com/op-ed-ligue-des-droits-humains-the-court-of-justice-confirms-the-validity-of-the-passenger-name-records-directive-and-redrafts-it-by-alberto-miglio/> (last accessed on 21 March 2023).

[45] For an in-depth analysis of the principle of legal certainty and the CJEU's case-law, see J. Raitio, *The Principle of Legal Certainty in EC Law*, Springer Publishing, 2003.

[46] See, e.g., discussion in C. Rauchegger, A. Wallerman (eds.), *The eurosceptic challenge: national implementation and interpretation of EU law*, Oxford, Hart Publishing, 2019.

[47] See, e.g., regarding the *PSPP/Weiss* saga, A. Engel, J. Nowag, X. Groussot, *Is This Completely M.A.D.? Three Views on the Ruling of the German FCC on 5th May 2020*, in «Nordic Journal of European Law», 3, n. 1, 2020, pp. 128-150.

[48] See Article 264 TFEU.

[49] See discussion in X. Groussot, *Harmonization through Adjudication: New Trends and Challenges* (unpublished, on file with the author).

[50] Proposal for a Regulation of the European Parliament and of the Council on the collection and

transfer of advance passenger information for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, and amending Regulation (EU) 2019/818, COM(2022) 731 final.

51 See European Declaration on Digital Rights and Principles for the Digital Decade, proposed by the European Commission, published on 26 January 2022. Others have even advocated for a new Charter of Fundamental Rights in order to accommodate societal and technological changes, particularly in the digital sphere; see F. von Schirach, *Jeder Mensch*, Luchterhand Verlag, YouMoveEurope initiative, 2021; available at <https://you.wemove.eu/campaigns/fur-neue-grundrechte-in-europa> (last accessed on 12 May 2023).

52 Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), OJ L 277, 27.10.2022, p. 1.

53 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ L 130, 17.5.2019, p. 92.

54 Judgment of 26 April 2022 in case C-401/19, *Poland v. Parliament and Council*, EU:C:2022:297, p. 67.

55 *Poland v. Parliament and Council* cit., p. 99. See also the case-law cited there: judgment of 29 January 2008 in case C-275/06, *Productores de Música de España (Promusicae) v. Telefónica de España SAU*, EU:C:2008:54, p. 68.

56 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), OJ L 265, 12.10.2022, p. 1. For a brief overview, see, e.g., A. Engel, X., Groussot, *The Digital Markets Act: A New Era for Competition Law and Fundamental Rights in the EU Digital Single Market*, in «EU Law Live» (Long Read, Weekend Edition No. 117), 22 October 2022, <https://eulawlive.com/weekend-edition/weekend-edition-no117/> (last accessed on 12 May 2023).

57 Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union legislative acts, COM(2021) 206 final.

58 Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937, COM(2020) 593 final.

59 Request submitted by the CJEU pursuant to the second paragraph of Article 281 TFEU, with a view to amending Protocol No. 3 on the Statute of the Court of Justice of the European Union, available at <https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-12/demande_transfert_ddp_tribunal_en.pdf> (last accessed on 27 March 2023).

60 Specifically, cases regarding value added tax, excise duties, the Customs Code and the tariff classification of goods under the Combined Nomenclature, compensation and assistance to passengers, and the scheme for trading in emission allowances for greenhouse gases.

61 At present, the CJEU has a de facto monopoly when it comes to examining requests for a preliminary ruling made under Article 267 TFEU.

62 Regulation (EU, Euratom) 2016/1192 of the European Parliament and of the Council of 6 July 2016 on the transfer to the General Court of jurisdiction at first instance in disputes between the European Union and its servants, OJ L 200, 26.7.2016, p. 137.

63 By virtue of Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union, OJ L 341, 24.12.2015, p. 14.