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Ericsson, Angelica

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LUND UNIVERSITY

PO Box 117  
221 00 Lund  
+46 46-222 00 00

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# STRUCTURAL GUARANTEES

## – the Union’s Last Best Hope against National Arbitrariness

Angelica Ericsson\*

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*The Union and its governance arrangements are a work in progress. It does not, however, imply an acceptance of the arbitrary or the inconsistent as the inevitable price of flexibility.*<sup>1</sup>

### 1. STRUCTURAL GUARANTEES AS A ‘NEW’ JUDICIAL STANDARD

In line with current tendencies of ‘new governance’, this article will introduce a novel judicial tool which strikes a balance between the respect for national assessments and the effective implementation of Union law.<sup>2</sup> The ‘new governance’-values of flexibility and decentralisation do not necessarily have to imply a failure of supranational governance. They may, if coupled with appropriate procedural innovations, rather produce a new form of governance which does not suffer from the shortcomings of traditional techniques of legislative command-and-control.<sup>3</sup>

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\* Graduated as a law student from the University of Lund in October 2009, currently a trainee at the Court of Justice of the European Union. This article is an adaptation of her master thesis “Structural guarantees for the State Aid Field – The Community’s Last Best Hope against National Arbitrariness”. Special thanks go to Jörgen Hettne, for inspiration and invaluable feed-back, and to Xavier Groussot, for unfailing support and encouragement.

<sup>1</sup> Shaw, J., “Relating Constitutionalism, and Flexibility in the European Union”, p. 338; in De Búrca, G. and Scott, J. (Eds.), *Constitutional change in the EU – From Uniformity to Flexibility?*, Hart Publishing, 2000.

<sup>2</sup> The master thesis on which this article is based concerned Community law. Even if this body of legal norms is referred to as Union law after the 1<sup>st</sup> December 2009, references will sporadically be made to Community law, where this is appropriate.

<sup>3</sup> Scott, J., “Flexibility, “Proceduralization”, and Environmental Governance”, p. 272; in De Búrca, G. and Scott, J. (Eds.), *Constitutional change in the EU – From Uniformity to Flexibility?*

This article argues that the abovementioned balance can be struck through the demands of structural guarantees; administrative safeguards, which weed out arbitrary national decision-making. The provision of transparent and accessible legislation, administrative procedures based on objective criteria, as well as the access to effective judicial review are all specific examples of structural guarantees. Together they create a system of checks to prevent discretion from turning into arbitrariness.<sup>4</sup> All of these demands are ultimately emanating from the principle of the rule of law. They are not concerned with assessments of individual cases, but rather ensure the soundness of the legal system's inbuilt administrative structures. That is to say that, instead of (or as well as) reviewing a specific national measure on the basis of Union substantive standards, it is the surrounding administrative procedures which are reviewed against Union standards. Structural guarantees-requirements have proved to be a much needed complement to already existing legal tools of judicial review, such as that of proportionality. Such administrative safeguards are, as will be illustrated through the course of this article, particularly needed in areas where the Member States of the EU have been granted a wide margin of discretion.

Unfortunately, the structural guarantees have represented somewhat of an elusive 'non-concept'. Demands for structural guarantees can, certainly, not be found in any of the founding Treaties, nor are they explicitly mentioned in any secondary legislation produced by the EU. Moreover, they are very sparsely mentioned in legal doctrine. If at all mentioned, the demands for such administrative guarantees are brushed over under labels such as "the proceduralization of proportionality",<sup>5</sup> or "the public law element of proportionality".<sup>6</sup> Such labels can be rather misleading, bearing in mind that the structural guarantees-requirements work as a legal safety-net for cases where a proportionality review has, itself, been crippled. Most likely, this lack of a conceptual consensus is the result of the European Court of Justice's<sup>7</sup> own unwillingness to put a label on the development of the use of structural guarantees – a development, which the Court is, itself, spearheading. It is worth mentioning at this point that the actual phrase 'structural guarantee' has, as of yet, never appeared in a single judgement from the ECJ.

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<sup>4</sup> The reader should be advised that the underlying ambition of this article is to give an introduction to the functioning of structural guarantees, rather than to provide a conclusive catalogue of various specific demands. A number of examples will certainly be given throughout the article, to be able to establish the concept, but the list of demands is not to be regarded as exhaustive. The demand for consistent legislation is, for instance, one which would fit well into the family of structural guarantees, although it will not be treated in this article.

<sup>5</sup> Barnard, C., *The Substantive Law of the EU, The Four Freedoms*, second edition, Oxford University Press, 2007, p. 85 ff.

<sup>6</sup> Tridimas, T., *The General Principles of EC Law*, second edition, Oxford University Press, 2006, p. 194.

<sup>7</sup> Court of Justice of the European Union (hereafter ECJ).

Nevertheless, through this article, I attempt to firmly establish the existence, nature and function of the demands for structural guarantees. The use of structural guarantees, as a tool of judicial review, is legitimised through their umbilical cord to the rule of law. Different emanations of the rule of law; exemplified by the principle of equality, effectiveness, as well as other general principles of Union law (GPUL), are presented to give a comprehensive overview of the substantive content of the structural guarantees. As the function of the structural guarantees-requirements in judicial review is, inevitably, linked to the function of GPUL in general, the latter is used as a starting-point for the examination of the former. To continue the probe into the specific function of structural guarantees, the particular importance of this judicial tool, in situations of high Member State discretion, is accentuated. Furthermore, the use of these demands will be amply illuminated through examples of their appearance in the case law of the ECJ.

## 2. A UNION BUILT ON THE RULE OF LAW

To justify the use of structural guarantees in judicial review, one would be advised to start at one of the founding pillars of the Union's legal order; the principle of the rule of law. This principle has a dual function within the EU. It has both been used to justify the primacy of the Union legal order, being of a *sui generis* character with its own system of rights and general principles. But the rule of law has, in a more traditional sense, fostered proceduralization, prime aim of which is to counter arbitrariness.<sup>8</sup> The demands for structural guarantees accurately respond to the prominently procedural aspect of the rule of law, all the while being anchored in the more substantial aspects of the EU conception of the rule of law. The following sections aim to give a comprehensive overview of these different building blocks which together justify this 'new' judicial standard.

### 2.1 The procedural requirements of the rule of law

The rule of law, although being far from a non-controversial principle, is one which primarily has emerged to prevent arbitrariness, discrimination and denial of justice. This fundamental principle expresses an aspiration to control public power, and thereby to prevent abuse of such power.<sup>9</sup> The rule of law voices a

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<sup>8</sup> For further discussion on the dual use of this principle, see the research report *Les Principes Fondateurs de l'Union Européenne* from Institut de recherche européenne en droit économique (Toulouse), 2004, p. 168 ff.

<sup>9</sup> Wennerström, E., *The Rule of Law and the European Union*, Iustus Förlag, 2007, p. 54.

concern induced by the development of the welfare state.<sup>10</sup> The importance of formalistic procedural guarantees, traditionally flowing from this principle, therefore seems to grow in tandem with the growth of the welfare state, and with the increased discretion given to public powers.

Arbitrariness is the abuse of discretionary decision-making power, and should not be confused with the mere 'use' of discretion or legal prerogatives.<sup>11</sup> The principle aim of the rule of law is not to eliminate wide discretionary powers, but rather to control the exercise of such powers through law.<sup>12</sup> In relation to the discretion given through EU directives, the ECJ stated its *VNO*-judgment<sup>13</sup> that a national court should ensure that the national authority has not stepped out of the bounds of its margin of discretion, without thereby evaluating the discretionary choices as such.<sup>14</sup>

The ECJ is the institution which has spear-headed the development of the application of the rule of law and it was the very first to proclaim the (then) European Community to be a community which is based on the rule of law.<sup>15</sup> The omnipotence of this principle was recently confirmed in the *Kadi* judgment,<sup>16</sup> in which the ECJ repeatedly affirmed the rule of law within the Community legal order, in quite an exceptional manner.<sup>17</sup> Over the years, the ECJ has proven to endorse a substantive vision of procedural justice, rather than a mere formal version of the rule of law. By recognizing the GPUL as expressing fundamental legal values shared throughout the Union,<sup>18</sup> the rule of law has indeed come to reach far beyond mere formal requirements.<sup>19</sup>

Substantive conception as it might have become, the rule of law should continue to be viewed as an enabler of rights and not a creator of such. The principle in itself does not confer any human rights on individuals. The rule of law instead ensures the efficiency and legal certainty of the judicial system.<sup>20</sup> It, hence, provides a more generic protection for the individual, by ensuring that

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<sup>10</sup> *Ibid.* p. 89 f.

<sup>11</sup> Ibañez, A., *The Administrative Supervision and Enforcement of EC Law: Powers, Procedures and Limits*, Hart Publishing, 1999, p. 240.

<sup>12</sup> Wade, H.W.R., and Forsyth, C. F., *Administrative Law*, seventh edition, Clarendon Press, 1994, p. 379.

<sup>13</sup> Case 51/76 *VNO* [1977] ECR 113.

<sup>14</sup> *Ibid.* para. 29.

<sup>15</sup> Case 294/83 *Les Verts v. Parliament* [1986] ECR 1339, para. 23 and Opinion 1/91 *EEA* [1991] ECR 6097.

<sup>16</sup> Cases C-402 and 415/05 P *Kadi and Al Barakaat v. Commission* [2008] ECR I-6351.

<sup>17</sup> *Ibid.* paras 81, 285, 288 and 316.

<sup>18</sup> The ECJ expressly referred to GPUL as having 'constitutional status' for the first time in Case C-101/08 *Audiolux* [2009] n.y.r., para. 63, and this was subsequently confirmed in Case C-174/08 *NCC Construction Danmark* [2009] n.y.r., paras 42 and 45.

<sup>19</sup> Tridimas, T., *The General Principles of EC Law*, p. 548 f.

<sup>20</sup> Fernandez Esteban, M. L., *The Rule of Law in the European Constitution*, Kluwer Law international, 1999, p. 100.

the legal system as a whole has the capacity and inclination to deliver on such individual rights.<sup>21</sup> Because, as Leanerts and Corthaut put it:

“A legal order stuffed with legal norms which promise a reality the citizen cannot enjoy in practice, eventually loses all credibility.”<sup>22</sup>

The principles of equality and effectiveness, along with other general principles of Union law, all constitute particular expressions of the all-important rule of law. As such, they provide the substantial back-bone of the development of structural guarantees against arbitrariness, and the requirements of each will be briefly presented below.

## 2.2 Potent requirements of equality

The principles of equality and non-discrimination are of particular importance since it has served as the moral fibre for the creation of many structural guarantees. The ECJ has used this principle to erect several requirements and it has been described as one of the most influential principles in restricting the Member States' freedom to organize their national legal orders.<sup>23</sup>

The essence of the principle of equality boils down to that ‘like cases should be treated equal and unlike cases should be treated differently, unless objectively justified’. When a distinction is made without an objectively established justification, it has long since been deemed to be “arbitrary, discriminatory and illegal”.<sup>24</sup> The equality test can be viewed as a two-part test; first, an objective comparison has to be carried out between the entities who will be affected by the contested measure, and second (if a *prima facie* discrimination has occurred), the justification put forward by the responsible authority has to be based on objective grounds.<sup>25</sup> For a measure to be viewed as arbitrary, it has to fail both of these objectivity tests.<sup>26</sup> The demand for structural guarantees promotes equality as such guarantees reveal a lack of objectivity in both parts of this test.

Article 2 of the Treaty on the European Union now proclaims the principle of equality to be one of the principles on which the Union is founded, and the principle has been given a whole chapter in the Charter of Fundamental Rights (CFR).<sup>27</sup> Even if the Treaty establishing the European Community (TEC) was

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<sup>21</sup> Wennerström, E., *The Rule of Law and the European Union*, p. 40.

<sup>22</sup> Leanerts, K. and Corthaut, T., “Of birds and hedges: the role of primacy in invoking norms of EU law” 31 (2006) E.L. Rev., p. 288 f.

<sup>23</sup> Reichel, J., *God Förvaltning i EU och Sverige*, Jure Förlag, 2006, p. 180 and 250.

<sup>24</sup> Case 8/57 *Hauts Fourneaux et Acières Belges v. High Authority* [1958] ECR 245.

<sup>25</sup> See discussions in Craig, P., *EU Administrative Law*, Oxford University Press, 2006, p. 580 ff.

<sup>26</sup> See e.g. Case 106/81 *Julius Kind* [1982] ECR 2885, para. 22.

<sup>27</sup> Chapter III CFR.

not as explicit, the ECJ has with abundance shown its acceptance of the principle as a fundamental one, which reaches beyond any specific enunciation in a treaty.<sup>28</sup> As the principle of equality is further and further fleshed out in various statutes of Union law and directly applied by the ECJ, the principle itself can appear to have been fading into the background.<sup>29</sup> It is, however, still a very potent principle which readily renders itself to create new requirements for the Member States. The principle of equality as a formal conception has been used to develop a structural safety net; generously allowing for several different policy decisions, but weeding out arbitrary ones.<sup>30</sup>

Through the requirements of objectivity, this principle effectively restrains the possible policy choices open to any given administration. It has consistently been used to regulate Union policy choices, but eventually the ECJ came to also review national measures against the fundamental principle of equal treatment.<sup>31</sup> It should be noted that the ECJ shows greater deference to Member State discretion in certain areas, such as taxation and social security, where the judicial review of equality draws near to a bare test of arbitrariness.<sup>32</sup> The principle of equality has, however, retained more regulatory power when faced with wide discretion held by national administrative authorities, than that of the Union institutions.<sup>33</sup>

The principle of equality works in tandem with the prominent principle of proportionality, in judicial review of national measures. They have been used as the main tools to distinguish unlawful impediments to free movement, from the lawful ones.<sup>34</sup> Together, the two principles contribute to a fair application of law; and thereby advance the rule of law.<sup>35</sup> It should be noted that equality and the prohibition of arbitrariness do have independent values. Proportionality on the other hand does not possess such a value, but is merely a balancing

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<sup>28</sup> Various examples of this would be in Case 1/72 *Frilli v. Belgium* [1972] ECR 457, para. 19, Case 152/73 *Sotgiu* [1974] ECR 153, para. 4, Cases 117/76 and 16/77 *Ruckdeschel* [1977] ECR 1753, para. 7, Cases 124/76 and 20/77 *Moulin & Huileries* [1977] ECR 1795, para. 16, subsequently confirmed in Case 245/81 *Edeka v. Germany* [1982] ECR 2745, para. 11, and yet again established in Case 168/82 *ECSC v. Ferriere Sant'Anna* [1983] ECR 1681, para.16.

<sup>29</sup> Jans, J., de Lange, R., Prechal, S., Widdershoven, R., *Europeanisation of Public Law*, p. 125.

<sup>30</sup> *Ibid.* p. 125. and Tridimas, T., *The General Principles of EC Law*, p. 62.

<sup>31</sup> The first time this happened was in Case 201–202/85 *Klensch* [1986] ECR 3477, paras 9–10, which was later confirmed in Case 313/99 *Gerard Mulligan* [2002] ECR I-5719, paras 35–36.

<sup>32</sup> Jans, J., de Lange, R., Prechal, S., Widdershoven, R., *Europeanisation of Public Law*, p. 138 f.

<sup>33</sup> Case C-167/97 *Seymore-Smith* [1999] ECR I-623, para. 75, see also the comparative conclusion about the review of Community policy decisions reached in Jans, J., de Lange, R., Prechal, S., Widdershoven, R., *Europeanisation of Public Law*, p. 139.

<sup>34</sup> Tridimas, T., *The General Principles of EC Law*, p. 196.

<sup>35</sup> Wennerström, E., *The Rule of Law and the European Union*, p. 127.

of values.<sup>36</sup> Tridimas further differentiated these co-working principles by considering equality to be one of participation, and proportionality to be one of merits.<sup>37</sup> He also characterized their relationship as an inverted one, declaring that the less the ECJ relies on equality, the more it will rely on proportionality.<sup>38</sup> It will be argued, in this article, that when the scales instead shift to the effect that the proportionality review is restricted, the use of structural guarantees are required to secure equality and the rule of law (see further in section 4).

### 2.3 Requirements of effectiveness – the rule of union law

To ensure that the rule of law will prevail throughout the European Union, it is imperative that claims based on Union law are being effectively addressed by national courts and administrative bodies. With the progressing articulation of a substantive regulation of the internal market (the substantive aspect of the rule of Union law), more attention needs to be turned towards procedural structures and practices at national levels (the procedural aspect of the rule of Union law).<sup>39</sup> In this respect, the reliance on structural guarantees acts as important complementary judicial benchmark to secure the procedural aspect of the rule of law even in cases where the substantial aspect of the rule of law, in the case at hand, is confined to a bare minimum.

The principle of effectiveness is a highly instrumental principle born out of the specific need to maintain the rule of Union law. It has not, as of yet, been approved by the Member States through a Treaty blessing.<sup>40</sup> Instead, Article 10 TEC (now Article 4(3) TEU), being the only Treaty provision which deals generally with Union and national powers, has been the stepping stone for the development of the principle of effectiveness.<sup>41</sup> Albeit not creating any new duties in and of itself, this potent provision has been used to give extensive effect to other Union law duties, as well as creating unforeseen consequences of such duties.<sup>42</sup> Since the ECJ has neither the capacity nor the competence to take

<sup>36</sup> Jans, J., de Lange, R., Prechal, S., Widdershoven, Rob, *Europeanisation of Public Law*, p. 143.

<sup>37</sup> Tridimas, T., *The General Principles of EC Law*, p. 551.

<sup>38</sup> *Ibid.* p. 196.

<sup>39</sup> Accetto, M. and Zleptnig, S., “The Principle of Effectiveness: Rethinking Its Role in Community Law”, 11 (2005) EPL, p. 380.

<sup>40</sup> Ross, M., “Effectiveness in the European Legal Order(s): beyond Supremacy to Constitutional Proportionality?”, 31 (2006) E.L. Rev. p. 480.

<sup>41</sup> Lang, J. T., “The Duties of Cooperation of National Authorities and Courts under Article 10 E.C.: Two more reflections.”, 26 (2001) E.L. Rev., p. 86 and 88. See also Van Gerven, W. in the Report of the XIX F.I.D.E. Congress, Helsinki 1–3 June 2000, p. 9 ff.

<sup>42</sup> Lang, J. T., “The Duties of Cooperation of National Authorities and Courts under Article 10 E.C.: Two more reflections”, p. 91, see also Ross, M., “Effectiveness in the European Legal Order(s): beyond Supremacy to Constitutional Proportionality?”, p. 481; where he concludes



on the mantle of an effective centralized system of judicial enforcement, the Court has developed various requirements based on the principle of effectiveness to ensure compliance with Union law within its decentralized system of enforcement.<sup>43</sup> In view of the ECJ's creative approach, Ross nominated effectiveness as the current driver of constitutional evolution.<sup>44</sup>

The principle of effectiveness dictates both the point at which Union law should trump national law and to which extent the latter should have to adjust to the former.<sup>45</sup> Generally speaking, the principle of effectiveness dictates a prevalence of applicable Union law over national law, whenever there appears to be a lack of consistency between the two.<sup>46</sup>

Traditionally, the ECJ has shown a certain amount of deference towards national procedural autonomy, but the Court's approach towards national procedural law has turned increasingly invasive over the years.<sup>47</sup> Substantial national differences, in the protection awarded to litigants wishing to enforce Union rights, are highly undesirable when venturing to create an integrated legal order.<sup>48</sup> The existence of a Union competence to regulate national procedural law has been debated,<sup>49</sup> but in the 1990's, the ECJ offered a handful of seminal judgments where the principle of effective judicial protection,<sup>50</sup> combined with Article 10 TEC and the concept of *effet utile*, were used to significantly chip away at the national procedural autonomy. In these cases, the principle of effectiveness created positive obligations for the national courts, obligations which were tied to strict conditions.<sup>51</sup>

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that in Cases C-6 and 9/90 *Francoovich and Bonifaci v. Italy* [1991] ECR I-5357, the "demands of effectiveness transmuted an absent requirement into an inherent one".

<sup>43</sup> Eliantonio, M., *Europeanisation of Administrative Justice?* Europa Law Publishing, 2009, p. 6 and 8.

<sup>44</sup> Ross, M., "Effectiveness in the European Legal Order(s): beyond Supremacy to Constitutional Proportionality?", p. 477.

<sup>45</sup> *Ibid.* p. 495.

<sup>46</sup> Leanerts, K. and Corthaut, T., "Of birds and hedges: the role of primacy in invoking norms of EU law", 31 (2006) E.L. Rev., p. 290; where they state that "to the extent that a national measure is inconsistent with EC law, it cannot be allowed to apply over EC law".

<sup>47</sup> Tulibacka, M., "Europeanization of civil procedures: In search of a coherent approach", 46 (2009) CMLRev., p. 1528 ff.

<sup>48</sup> Jans, J., de Lange, R., Prechal, S., Widdershoven, R., *Europeanisation of Public Law*, p. 58.

<sup>49</sup> The more convincing view, however, seems to be that of the former ECJ judge Kakouris. He has insisted that the principle of national procedural autonomy has been a temporary solution in the advent of Community regulation, one which was never intended to create an area of national sovereignty. See further in Reichel, J, *God Förvaltning i EU och Sverige*, p. 122–123.

<sup>50</sup> See further in section 2.4.

<sup>51</sup> Jans, J., de Lange, R., Prechal, S., Widdershoven, R., *Europeanisation of Public Law*, p. 51 f; referring primarily to Case C-213/89 *Factortame* [1990] ECR I-2433, Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen and Soest* [1991] ECR I-415 and Case C-465/93 *Atlanta* [1995] ECR I-3761.

The enforcement of Union law is largely dependent on the compliance by national courts; they are the only institutions who have the competence to effectively review national law for compatibility with Union law standards. The national judges have thereby been assigned the role of *juge de droit commun*.<sup>52</sup> To ensure wide cohesion, the ECJ has introduced both an instrumental and a protective function of enforcement. The instrumental function demands that national enforcement of Union law must fulfil requirements of equivalence, effectiveness, dissuasiveness and proportionality. The protective one, on the other hand, demands that Member States comply with fundamental rights, Treaty freedoms and the general principles of Union law in their enforcement.<sup>53</sup> The demands for structural guarantees are merely the minimum requirements of effectiveness of Union law.

#### 2.4 Channelling various general principles of union law

When the ECJ proclaimed the Community to be based on the rule of law, it did not refer exclusively to law laid down in Treaty provisions and secondary legislation. The ECJ has, over the years, led a remarkable crusade in the name of the rule of law, where it has deemed certain principles of law to be sufficiently important and adequately recognised throughout the Union, that they have been dubbed GPUL.<sup>54</sup> The GPUL have become a force to be reckoned with and they are said to form an integral part of the ECJ's methodology, as well as expressing important constitutional values.<sup>55</sup> Their enforceability, however, have at times been hampered by a lack of pre-specified exact content. One needs to isolate sufficiently precise demands, flowing from the GPUL, for them to be effectively justiciable at the national level.<sup>56</sup> The structural guarantees draw their legitimacy from such GPUL and channel them into concrete demands. A selection of those GPUL, which have proven the most pertinent in creating demands for structural guarantees, will briefly be presented in this section.

The principle of **effective judicial protection** has proved to be a potent complement to the well-established tools of 'equivalence and effectiveness' when

<sup>52</sup> Lenaerts, K., "The rule of law and the coherence of the judicial system of the European Union", 44 (2007) CMLRev., p. 1645.

<sup>53</sup> Jans, J., de Lange, R., Prechal, S., Widdershoven, R., *Europeanisation of Public Law*, p. 201 and 206 ff.

<sup>54</sup> For further enlightenment on how these various GPUL are 'distilled' from common national legal traditions see Tridimas, T., *The General Principles of EC Law*, p. 17–29, Groussot, X., *General Principles of Community Law*, Europa Law Publishing, 2006, p. 43–58, and Opinion of AG Léger in Case C-87/01 P *Commission v. CEMR* [2003] ECR I-7617, paras 41–43.

<sup>55</sup> Tridimas, T., *The General Principles of EC Law*, p. 548.

<sup>56</sup> See references to French case law, where the lack of precision impeded the use of GPUL as basis for judicial review, in Groussot, X., *General Principles of Community Law*, p. 364.

reviewing national standards of judicial protection, and has strongly contributed to a common European standard in this field.<sup>57</sup> An effective judicial protection demands that an individual is to be given the opportunity to enforce, before a court of law, all the rights conferred on her by Union law. This GPUL was first expressed and recognised in *Johnston*.<sup>58</sup> For a national procedural structure to truly conform with this principle, it has to offer the individual, wishing to enforce her rights, both access to a court and effective remedies.<sup>59</sup> The right of access to a court, and that of an effective remedy, have been incorporated in Article 47 CFR. Concerning this time-honoured human right, the European Court of Human Rights has clarified that even administrative decisions based in a wide margin of appreciation should be reviewable before a court,<sup>60</sup> and that a State is not entitled to withdraw certain specific areas from judicial review.<sup>61</sup> Reconnecting the concept of judicial protection with that of the all-important rule of law, it has been said that they go hand in hand; you simply can't have one without the other.<sup>62</sup>

**Good administration**, as a principle, has been lurking in the shadows, growing in importance along with the expansion of national administrations, and only very hesitantly been given operative legal effect. It is now enshrined in the Article 41 of CFR,<sup>63</sup> as well as recognised in the case law of the ECJ. The principle of good administration can be understood as both a material concept, encompassing questions of fairness, equal treatment and proportionality, but it can also be viewed as a more concrete procedural tool, aiming to regulate the decision making procedure.<sup>64</sup> The latter view is certainly the most relevant one in an examination of the development of structural guarantees, in particular since it has proven far more successful to raise procedural flaws before a Union court, than material ones.<sup>65</sup> A good administrative procedure secures the protection of the individual from an adversely effecting decision, formed in violation of constitutional rights. Furthermore, the principle ensures that objectively well-founded decisions are adopted, which will gain greater public respect; an element which will hopefully lead to fewer challenges and hence promote legal

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<sup>57</sup> Eliantonio, M., *Europeanisation of Administrative Justice?*, p. 10 ff.

<sup>58</sup> Case 222/84 *Johnston* [1986] ECR 1651, paras 18–19.

<sup>59</sup> Jans, J., de Lange, R., Prechal, S., Widdershoven, R., *Europeanisation of Public Law*, p. 241.

<sup>60</sup> *Hasan & Chaush v. Bulgaria* (309854/96) ECHR (26 October 2000) paras 100–104, see also *Skärby v. Sweden* (12258/86) ECHR (12 April 1990) para. 28.

<sup>61</sup> *Golder v. United Kingdom* (4451/70) ECHR (21 February 1975), para. 35.

<sup>62</sup> See “Editorial comments: The rule of law as the backbone of the EU”, 44 (2007) CMLRev., p. 875.

<sup>63</sup> This particular expression of the right is, however, limited and only enforceable towards Union institutions.

<sup>64</sup> Reichel, J., *God Förvaltning i EU och Sverige*, p. 257 f.

<sup>65</sup> Hettne, J., “Gemenskapsdomstolarnas rättskontroll och allmänna förvaltningsrättsliga principer”, 2 (2002) ERT, p. 239.

certainty.<sup>66</sup> The general court<sup>67</sup> has indeed used the principle of sound administration to enforce demands of diligent and impartial treatment against the administrative authorities of the Union.<sup>68</sup> The principle as such has subsequently also received recognition by the ECJ.<sup>69</sup> Thus, the principle has reached a certain level of maturity and it seems to only be a matter of time before the European citizens will be able to invoke this principle against the national administrations as well.

The principle of **transparency** is somewhat of a newcomer among general principles. However, as such, it is one with an important potential for the erection of structural guarantees as judicial benchmarks. Although transparency has not yet been officially recognised by the ECJ to be one of the GPUL, it has been described as a budding principle of Community law, the components of which had reached different stages of maturity, but together represented an important judicial tool, far from being just a 'fashionable word'.<sup>70</sup> AG Bot recently claimed that transparency is "becoming one of the visible marks of democracy".<sup>71</sup> The status of this principle has continued to be reinforced through Treaty amendments and enacted secondary legislation, as well as through the inclusion in the CFR.<sup>72</sup> The principle encompasses, for example, the rather well-established duty to give reasons and the right to access documents. Inadequate reasoning would fundamentally counter the principle of transparency. A deficient reasoning would prevent the individual concerned, the reviewing court and the public at large from examining whether an administrative decision has a sound legal basis and if particular arguments are well-founded.<sup>73</sup> Access to documents can be seen as the quintessential aspect of transparency, although not standing alone among new goals set out by the Union in its strife for increased openness and accessibility.<sup>74</sup> Lenaerts has made a convincing argument that the status of transparency as a GPUL can no longer be denied.<sup>75</sup> Even

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<sup>66</sup> *Ibid.*, p. 239 f.

<sup>67</sup> Formerly known as the Court of first instance of the European Communities.

<sup>68</sup> Case T-54/99 *max.mobil v. Commission* [2002] ECR II-313, para. 48, and Case T-211/02 *Tideland Signal v. Commission* [2002] ECR II-3781, para. 37.

<sup>69</sup> Case C-170/02 P *Schlüsselverlag v. Commission* [2003] ECR I-9889, para. 29.

<sup>70</sup> Vesterdorf, B., "Transparency – Not Just a Vogue Word", *FILJ* (1999) p. 902 and 925.

<sup>71</sup> Opinion of AG Bot in pending Cases C-203/08, *Betfair*, and C-258/08, *Ladbroke's*, para. 170.

<sup>72</sup> Article 255 TEC was introduced through the ToA, and provides a strong legal basis for transparency, Regulation 1049/2001 and the Directive 2000/52/EC both demand increased transparency, and the principle is given solid recognition in both Article 41 and 42 of the CFR.

<sup>73</sup> Cases T-371 and 394/94 *British Airways et al. v. Commission* [1998] ECR II-2405, para. 280.

<sup>74</sup> Additional aspects of transparency are e.g. clarity of procedures, clear drafting and publication/notification of legislation and decisions. See further Prechal, S., and de Leeuw, M., "Dimensions of Transparency: The Building Blocks for a New Legal Principle?", 1 (2007) *RevEAL*, p. 51.

<sup>75</sup> Lenaerts, K., "In the Union we Trust: Trust-enhancing principles of Community Law", 41 (2004) *CMLRev.*, p. 321 f.

though the justiciability of most of the manifestations of this emerging principle seems to be restricted to actions against Union institutions, the principle often works in tandem with other GPUL and, in so doing, tends to reach beyond such confinements. An illustrative example would be when in *Coname*,<sup>76</sup> the ECJ viewed the non-compliance with transparency-demands to constitute a violation on the principle of equal treatment.<sup>77</sup> Transparency is of particular importance as a component of the structural guarantees. Not only has it, much like the structural guarantees themselves, a decidedly procedural focal point, but the principle has, moreover, been seen as a helpful means to ensure that the Member States respect their Union law obligations.<sup>78</sup> This double purpose of ensuring procedural rights of individuals, while at the same time securing Member State compliance, rings equally true for the demand of structural guarantees.

### 3. THE FUNCTION OF A JUDICIAL REVIEW BASED ON LEGAL PRINCIPLES

As the demands for structural guarantees generally stem from the legal requirements posed by GPUL, the function of the former is entirely dependent on that of the latter. Since the structural guarantees are judicial tools tailored for the review of national measures though, the function of the GPUL will be presented exclusively in its relation to national measures.<sup>79</sup> Three different dimensions of this function will be explored in turn; the range of national measures which can come under review, the invocability of the GPUL before a national court and the intensity of review required by Union law.

#### 3.1 Scope of review

The majority of the GPUL discussed in this essay have been codified in the CFR, which seemingly has specified the justiciable reach of these principles. Article 51(1) CFR explicitly states that the provisions of the Charter are enforceable against a Member State only when the latter implements Union

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<sup>76</sup> Case C-231/03 *Coname* [2005] ECR I-7287, paras 17–18.

<sup>77</sup> See Prechal, S., and de Leeuw, M., “Dimensions of Transparency: The Building Blocks for a New Legal Principle?”, p. 57 ff. for further discussion on the corollary between equality and transparency.

<sup>78</sup> Craig, P., *EU Administrative Law*, p. 350.

<sup>79</sup> Even if the judicial reviews, of both Union and national measures, are based in the same GPUL, the demands for structural guarantees only appears in relation to national measures. Framed, as they are, by administrative structures which the Union have very limited legislative power to alter, unlike the Union administrative structures themselves.

law. One would be advised not to read a restriction of ECJ jurisprudence into this Charter provision. On the contrary, two subsequent explanatory memoranda have referred to the Court's case law when interpreting the scope of the Charter *vis-à-vis* Member States as encompassing situations when the State acts in the "context" of Union law,<sup>80</sup> alternatively in the "scope of Union law".<sup>81</sup> The case law traditionally determining this scope has been championed by *Cinéthèque*,<sup>82</sup> *Demirel*<sup>83</sup> and *Caballero*.<sup>84</sup>

The scope of review based on Union law seems to have expanded even further through *Karner*,<sup>85</sup> with its vagueness practically giving the ECJ universal jurisdiction on fundamental rights.<sup>86</sup> Already through earlier cases such as *ERT*<sup>87</sup> and *Familiapress*,<sup>88</sup> the possible scope of review was significantly widened in the interest of bringing fundamental rights into the frame of reference.<sup>89</sup> Regardless of whether a national measure is taken in the process of implementing Union law or not, the moment it impinges on the effectiveness of Union law it will fall within the Union legal context.<sup>90</sup> The national measure would likewise be drawn into the context of Union law if it fails to respect the common standard of protection for fundamental rights.<sup>91</sup> For further reference, AG Sharpston has provided a helpful categorisation of circumstances in which a national measure falls within the context of Union law in her Opinion in *Bartsch*.<sup>92</sup>

### 3.2 Collateral nature of the review

Even if many expressions of GPUL lack direct invocability before a national court, the ECJ has over the recent years been increasingly using them as judicial standards in collateral reviews; albeit in the guise of proportionality reviews. In such cases, a Treaty provision with direct effect (such as a fundamental freedom) is used as the primary head of review, but the reviewed national measure

<sup>80</sup> Charte 4473/00, Convent 49, Explanations Relating to the Charter of Fundamental Rights, 11 October 2000, para. 46.

<sup>81</sup> CONV 828/03, Updated Explanations Relating to the text of the Charter of Fundamental Rights, 9 July 2003, paras 46–47.

<sup>82</sup> Cases 60 and 61/84 *Cinéthèque* [1985] ECR 2618.

<sup>83</sup> Case 12/86 *Demirel* [1987] ECR 3719.

<sup>84</sup> Case C-442/00 *Caballero* [2002] ECR I-11915.

<sup>85</sup> Case C-71/02 *Karner* [2004] ECR I-3025, para. 49.

<sup>86</sup> Tridimas, T., *The General Principles of EC Law*, p. 336.

<sup>87</sup> Case C-260/89 *ERT* [1991] ECR I-2925.

<sup>88</sup> Case C-368/95 *Familiapress* [1997] ECR I-3689.

<sup>89</sup> Groussot, X., *General Principles of Community Law*, p. 280.

<sup>90</sup> Reichel, J., *God Förvaltning i EU och Sverige*, p. 208 f.

<sup>91</sup> *Ibid.* p. 224.

<sup>92</sup> AG Sharpston's Opinion in Case C-427/06 *Bartsch* [2008] ECR I-7245, para. 69.

is then benchmarked against incidental standards such as the GPUL. Tridimas called this tendency a prevalence of ‘the public law element of proportionality’.<sup>93</sup> The resulting form of review can most certainly be traced back to the principles of rule of law and effectiveness, as means to control national public power. Furthermore, this multi-faceted review accurately depicts the highly developed interdependence between procedural and substantive law in the area of administrative decision-making processes.<sup>94</sup>

The GPUL are to be invoked against a national measure through ‘legality review’, which has in doctrine been referred to as a particular type of direct effect.<sup>95</sup> The generality and open-endedness of many GPUL make them, only with great difficulty, apt to be granted direct effect in the traditional sense. The original trademark mantras of direct effect; the demands that a Union provision must be ‘unconditional and sufficiently precise’, seem to have turned obsolete. The ECJ has in both *Kraaijeveld*,<sup>96</sup> *Mangold*<sup>97</sup> and recently in *Küçükdeveci*<sup>98</sup> implicitly endorsed the earlier mentioned judgment in *VNO*,<sup>99</sup> and moved the focus of review of national measures towards ‘legality’; i.e. compliance with Union law requirements as a package deal.<sup>100</sup> As AG Mischo once noted, a Union provision does indeed not stand alone, but is inseparable from norms, which it must itself comply with, including the GPUL.<sup>101</sup> Even if a certain provision of Union law gives the national authority a ‘genuine discretion’ in complying with its obligations under European law, and this provision thereby impossibly can be ascribed with direct effect, the use of such discretion by the national authority may still be condemned for violating fundamental rights and other GPUL.<sup>102</sup>

### 3.3 Intensity of the review

The Union courts are viewed as the sole arbiters of the legal meaning expressed in the Treaties. As such, they determine the applicable legal standards and generally indulge in the substitution of judgements on questions of law. However, there is also a broad recognition that in particularly technical or economically

<sup>93</sup> Tridimas, T., *The General Principles of EC Law*, p. 194.

<sup>94</sup> Schwarze, J., *European Administrative Law*, Sweet & Maxwell, 2006, p. 1173 f.

<sup>95</sup> Jans, J., de Lange, R., Prechal, S., Widdershoven, R., *Europeanisation of Public Law*, p. 69.

<sup>96</sup> Case C-72/95 *Kraaijeveld* [1996] ECR I-5403.

<sup>97</sup> Case C-114/04 *Mangold* [2005] ECR I-9981.

<sup>98</sup> Case C-555/07 *Küçükdeveci* [2010] n.y.r.

<sup>99</sup> Case 51/76 *VNO* [1977] ECR 113.

<sup>100</sup> Jans, J., de Lange, R., Prechal, S., Widdershoven, R., *Europeanisation of Public Law*, p. 71.

<sup>101</sup> AG Mischo’s Opinion in Cases C-20 and 64/00 *Booker Aquaculture* [2003] ECR I-7411, para. 58.

<sup>102</sup> Jans, J., de Lange, R., Prechal, S., Widdershoven, R., *Europeanisation of Public Law*, p. 66 ff.

complex areas, the intensity of review by a generalist court ought not to be as intrusive.<sup>103</sup> Furthermore, where the ECJ has recognised the existence of a ‘jurisdictional discretion’ to establish the fulfilment of certain conditions, which need to be based on complex economic or social assessments, this has forcibly had a relaxing effect on the standard of review of such administrative assessments.<sup>104</sup> In such cases, the ECJ has tended to favour a marginal review, restricting the judicial review to the control of manifest errors, misuse of power and other clear transgressions of the given discretion.<sup>105</sup> As a rule, however, the reduced intensity of the substantial review is generally compensated by a firm control of procedural rights and administrative soundness.<sup>106</sup>

Moreover, the degree of intensity of review required of national courts by Union law also depend on the subject matter at hand, and, in particular, on the directive or regulation governing that particular area.<sup>107</sup> Where no specific rules are expressed for the area in question, only a legality review seems to be required of the national courts. The national courts are thereby not forced, nor advised for that matter, to substitute their own judgment on merit for that of the national authority under review.<sup>108</sup> It should additionally be noted that when some discretion has been awarded to the Member States in the application and implementation of Union law, other judicial standards than the Union ones might legitimately apply, as long as the use of this other standard does not impede the general conformity with Union law.<sup>109</sup> The national judiciary is merely obliged to use the Union standard in a subsidiary and corrective manner; as a minimum judicial standard.<sup>110</sup>

The standard of review used for national measures has long been stricter than that of Union measures, since the judiciary, in addition to protecting the rights of private parties, has to consider the over-arching objective of market integration when reviewing national measures against GPUL.<sup>111</sup> The ECJ’s judgment in *Upjohn*<sup>112</sup> seems to mark a turning-point in the jurisprudence though; seemingly levelling out the intensity of these two forms of judicial review. This tendency leaves the national court free to indulge in a mere marginal review of national measures, when they have been based on complex

<sup>103</sup> Craig, P., *EU Administrative Law*, p. 437.

<sup>104</sup> *Ibid.* p. 433 f and 440 ff.

<sup>105</sup> *Ibid.* p. 441; using Case 98/78 *Racke* [1979] ECR 69 as an illustrating example.

<sup>106</sup> Hettne, J., *Rättsprinciper som styrmedel*, Norstedts Juridik, 2008, p. 117.

<sup>107</sup> Jans, J., de Lange, R., Prechal, S., Widdershoven, R., *Europeanisation of Public Law*, p. 90 ff.

<sup>108</sup> *Ibid.* p. 93 f.

<sup>109</sup> Besselink, L., “Entrapped by the Maximun Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union” 35 (1998) CMLRev., p. 631.

<sup>110</sup> Reichel, J., *God Förvaltning i EU och Sverige*, p. 543 f.

<sup>111</sup> Tridimas, T., *The General Principles of EC Law*, second edition, p. 548.

<sup>112</sup> Case C-120/97 *Upjohn* [1999] ECR I-223.



assessment and the exercise of broad discretion.<sup>113</sup> As developed above, however, the current notion of a marginal review, infused with GPUL, might very well be more intensive than the initial conception of a marginal review.<sup>114</sup>

#### 4. STRUCTURAL GUARANTEES STEPPING UP WHERE PROPORTIONALITY FALLS SHORT

The function of, and in particular the relationships between, the various Union tools of review go to the core of this article. The inverse relationship between proportionality and equality has already been discussed above.<sup>115</sup> This section will aim to establish that the structural guarantees are of a crucial instrumental importance in those cases where a proportionality review has been emasculated. Generally speaking, for a national measure to be compatible with Union law, it has to pass both the hurdles of structural guarantees as well as that of proportionality.<sup>116</sup> The question of appropriate Union demands in judicial reviews, however, becomes more delicate in cases where the Member States are allowed a larger amount of discretion. In such cases, the proportionality review is thwarted and needs the support of a safety net based on the rule of law. Structural minimum requirements provide a more adaptable judicial tool than non-discrimination itself. Furthermore, the demands for structural guarantees are less invasive than the proportionality standard and hence potentially more tolerable by the Member States.

##### 4.1 The problem of national discretion

National discretion in the implementation and enforcement of law is unavoidable and even necessary in the decentralised system of the European Union and such discretion has, indeed, been shown considerable deference where appropriate. Nevertheless, the Union's concern with unchecked national discretion has a long history. The ECJ has, early on, stated that a national criterion, which leaves the domestic authorities an excessive discretionary power, would not conform with the system of guarantees introduced by Union rules. The excessive discretion would create an ever-present risk of differences in treatment.<sup>117</sup>

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<sup>113</sup> *Ibid.* paras 34–37.

<sup>114</sup> *Ibid.* See in particular para. 36.

<sup>115</sup> See section 2.2.

<sup>116</sup> Hettne, J., *Rättsprinciper som styrmedel*, p. 133.

<sup>117</sup> Ibáñez, A., *The Administrative Supervision and Enforcement of EC Law: Powers, Procedures and Limits*, p. 219 f; referring to Case 39/70 *Fleischkontor* [1971] ECR 49, paras 4–5, and Cases 205–215/82 *Deutsche Milchkontor* [1983] ECR 2633, para. 22.

The Union has vested national courts with the responsibility to ensure that the national legislature, as well as administrative authorities, comply with their Union law obligations and stay within the bounds of any discretion they may have been granted.<sup>118</sup> Furthermore, it was made abundantly clear in the *Sotgiu* case<sup>119</sup> that the national courts must abstain from using national labels and categorisations in their assessments, since such legal designation are left to the unencumbered discretion of the national legislator.<sup>120</sup> The national court must, throughout the course of its control, pay heed to the interpretative monopoly of the ECJ.<sup>121</sup> It all boils down to the rule of law, and in this case Union law. If national discretion is left unfettered, and not honed down by the rule of law, it is bound to warp into arbitrariness.

#### 4.2 Deference to national discretion

A proportionality review, in general being one of the most useful tools of integration available to a *juge du droit commun*, becomes non-functional in areas of legitimate Member State discretion. Judicial review based on proportionality is usually a strict one, but the jurisprudence showcases a considerable amount of deference to the plethora of national values within the Union.<sup>122</sup> Generally speaking, the intensity of the proportionality review is lower in instances when Member States have been allowed greater discretion. It has been stated that the proportionality principle hinges on the question of who is to decide the level of protection presumably hindering the free movements within the internal market.<sup>123</sup> In the limited cases where the Union recognises that the level of protection should be left to Member State discretion, the Union practically renounces the right to review the proportionality *stricto sensu* of the chosen level of protection.<sup>124</sup> In for example *Läämä*,<sup>125</sup> the ECJ found that there were ‘overriding reasons of public interest’ present concerning the negative effects of gambling and refrained from any proportionality review in the narrow sense, showing significant deference to the “national authorities’ power of assessment”.<sup>126</sup> The high level of deference to national discretion in the politically sensitive area of gambling was recently confirmed in *Liga Portuguesa*.<sup>127</sup>

<sup>118</sup> Jans, J., de Lange, R., Prechal, S., Widdershoven, R., *Europeanisation of Public Law*, p. 67.

<sup>119</sup> Case 152/73 *Sotgiu* [1974] ECR 153.

<sup>120</sup> *Ibid.* para. 5.

<sup>121</sup> Craig, P., *EU Administrative Law*, p. 555.

<sup>122</sup> Craig, P., *EU Administrative Law*, p. 715.

<sup>123</sup> Jans, J., de Lange, R., Prechal, S., Widdershoven, R., *Europeanisation of Public Law*, p. 158.

<sup>124</sup> *Ibid.*, p. 158 f.

<sup>125</sup> Case C-124/97 *Läämä* [1999] ECR I-6067.

<sup>126</sup> *Ibid.* para. 35.

<sup>127</sup> Case C-42/07 *Liga Portuguesa* [2009] n.y.r., paras 57–59.

Policy areas involving great administrative complexity serve as further examples of where considerable deference has been given to national discretion. A clear example of this is given through the ECJ's judgment in *Albany*,<sup>128</sup> a case about pension rights. The facts of the case exemplify a situation of conferred public power, which could have risked being condemned under Article 86(1) for creating a conflict of interest (as developed below in section 5).<sup>129</sup> However, in view of the high level of complexity involved in the delegated administrative task, the ECJ recognised that it might not be desirable, or even feasible, for the Member State to delegate this particular public power to an entity completely detached from the specific market at hand.<sup>130</sup> Instead of striking down on this arrangement on grounds of proportionality, the ECJ instead chose to merely assure itself of the existence of structural guarantees such as an effective judicial review.<sup>131</sup> In his annotation of the case, Gyselen declared that the ECJ took a rather deferential attitude on both issues of proportionality and burden of proof.<sup>132</sup> Indeed, the Court used the very lowest threshold of structural guarantees; barely ensuring the possibility of a low intensity judicial review which would verify that the administrative powers had not been used in an arbitrary manner.

#### 4.3 Avoiding unrestrained deference

Some of the judgments leaving the ECJ in recent years have indeed shown a tendency towards larger deference to national discretion. For this development to avoid being distorted into deference towards national arbitrariness, one might argue that it needs to be accompanied by a greater exigency for the provision of structural guarantees.

Regardless of the tendencies of deference to national discretion, it would be a fallacy to claim that the Union allows for peninsulas of completely untouchable national sovereignty. For instance, the somewhat extraordinary circum-

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<sup>128</sup> Case C-67/96 *Albany* [1999] ECR I-5751.

<sup>129</sup> Indeed, AG Jacobs found that the arrangements allowed the private entity (the pension fund bestowed with the administrative function) to "itself [determine] the scope of its statutory monopoly", filling the part of both "judge and party", something which he deemed caused "an obvious conflict of interest". See Opinion of AG Jacobs in Case C-67/96 *Albany* [1999] ECR I-5751, paras 448, 450 and 453.

<sup>130</sup> Case C-67/96 *Albany* [1999] ECR I-5751, paras 119–120.

<sup>131</sup> *Ibid.* para. 121.

<sup>132</sup> Gyselen, L., "Case C-67/96, *Albany v. Stichting Bedrijfspensioenfonds Textielindustrie*; Joined Cases C-115–117/97, *Brentjens' Handelsonderneming v. Stichting Bedrijfspensioenfonds voor de handel in bouwmaterialen*; and Case C-219/97, *Drijvende Bokken v. Stichting Bedrijfspensioenfonds voor de vervoer- en havenbedrijven*. Judgments of the Full Court of 21 September 1999, not yet reported." 37 (2000) CMLRev., p. 447.

stances of *Schmidberger*<sup>133</sup> seem to have compelled the ECJ to resort to a complete balancing of interests based on proportionality. The same form of balancing of interests appear to have been invoked in the controversial *Laval* case,<sup>134</sup> even if the right to take collective action, according to Article 137(5) TEC (now Article 153(5) TFEU), is supposed to be an area of regulation reserved for the national legislator. However, as will be developed below, a closer look at the *Laval* judgment shows signs of considerations going beyond a traditional proportionality review, instead relying on the absence of structural guarantees.

A high discretion has traditionally been granted to national authorities in shaping public services, but Szyszczak has concluded that much of this discretionary freedom is illusory. Although a Member State's definition of a public service obligation can technically only be subject to marginal review of 'manifest error', she points to the plethora of other obligations created through Union law, such as that of transparency in the entrustment of the public service mission.<sup>135</sup> This assertion being made prior to the ECJ's ruling in *Altmark*,<sup>136</sup> one can only note, at this point, that the discretionary freedom has been even further restricted since Szyszczak's evaluation of current state of affairs.

Demands for various structural guarantees have proven to be useful when high discretion is allowed. A judicial solution to maintain the rule of Union law has been to examine the national structures and uphold minimum demands of transparency, good administration and effective judicial protection. Consistent with the aforementioned Opinion of AG Bot, such requirements as those of transparency become essential when reviewing an area where the Member States are given a broad discretion.<sup>137</sup> Alongside the more general demands for transparent and accessible legislation, access to judicial review and reasonable administrative procedures based on objective criteria,<sup>138</sup> the obligation to state reasons has been considered to be especially important where the decision-making authority has a large discretionary power. This is so since the statement of reasons in such cases is the prime source for the review of the authorities' use of discretion; the only way to detect and prevent arbitrariness.<sup>139</sup>

<sup>133</sup> Case C-112/00 *Schmidberger* [2003] ECR I-5659, para. 81.

<sup>134</sup> Case C-341/05 *Laval* [2007] ECR I-11767, see further in section 5.

<sup>135</sup> Szyszczak, E., "Public Service Provision in Competitive Markets", 21 (2001) Y.E.L., p. 77.

<sup>136</sup> A ruling, the implications of which, will be thoroughly discussed below.

<sup>137</sup> Opinion of AG Bot in pending Cases C-203/08, *Betfair*, and C-258/08, *Ladbroke's*, para. 170.

<sup>138</sup> See e.g. Case C-567/07, *Servatius* [2009] n.y.r., para. 35 and case-law cited therein.

<sup>139</sup> Hettne, J., "Gemenskapsdomstolarnas rättskontroll och allmänna förvaltningsrättsliga principer", p. 250 f.

## 5. SOME EXAMPLES OF THE ECJ'S USE OF STRUCTURAL GUARANTEES

Although not using this label, the ECJ has called for the use of structural guarantees as minimum standards in the review of complex national regulations and administrative systems on numerous occasions and in various regulatory fields. One can discern a trend of guided intensified review, which hinges on the existence of structural guarantees, in cases where the normal proportionality review is not advisable. A sample of such cases will be presented below. The aim of this presentation is to accentuate the emerging function of structural guarantees as a guarantor against national arbitrariness.

The judgement in *Garage Molenheide*<sup>140</sup> is one example of when the national court, which normally is left free to apply the proportionality test of national measures, was given detailed guidance. The failure to provide for access to judicial review was to be condemned, and the national court was obliged to deem the national measure under review as being disproportionate. This shows the function of structural guarantees as a strictly applicable 'pre-test' which is to be mandatorily applied by the national courts.

One particular area of relevance concerns the general prohibition of public distortion of competition.<sup>141</sup> Dealing within an area of the exertion of national public power, Union demands for good administration and the rule of law are obviously needed. To avoid arbitrariness in the national administration, the legal order has to be invested with certain structural guarantees to comply with Union law. Two cases concerning a conflict of interest being induced by a delegation of public power serve as relevant examples of when structural guarantees have proven useful as a judicial tool. The importance of the *ERT* case<sup>142</sup> has already been accentuated in regards to the scope of review based on GPUL,<sup>143</sup> but this seminal judgement also illustrates the obligation of the Member States to keep national measures free from structural seeds of arbitrariness. In essence, the ECJ concluded that the coupling of exclusive rights, both to transmit and retransmit television broadcastings, was incompatible with Community law, when liable to create an abusive behaviour by the monopoly holder.<sup>144</sup> In other words, a mere probability of induced abuse is enough for the granting of exclu-

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<sup>140</sup> Cases C-286/94, 340 and 401/95, and 47/96 *Garage Molenheide* [1997] ECR I-3123, para. 64.

<sup>141</sup> For further enlightenment on the basis and functioning of this prohibition, see Slot, P., "Rättsutlåtande om betydelsen av EG:statsstödsregler och konkurrensrätt för svensk bostadsmarknad och hyreslagstiftning", *EU, allmännyttan och hyrorna, Bilagor*, SOU 2008:38, p. 56 ff.

<sup>142</sup> Case C-260/89 *ERT* [1991] ECR I-2925.

<sup>143</sup> See section 3.1.

<sup>144</sup> Case C-260/89 *ERT* [1991] ECR I-2925, para. 37.

sive rights to be condemnable in the light of Union law.<sup>145</sup> In line with the function of structural guarantees, this part of the *ERT* judgment examines the structural propensity for arbitrariness. For a Member State to escape condemnation, when a conflict of interest has been created by the public authority, arbitrariness must accordingly be prevented through the implementation of structural guarantees. In a recent judgment from the ECJ, *MOTOE*,<sup>146</sup> particular administrative powers had yet again been granted without providing adequate structural guarantees, something that became subject to the condemnation of the Court. In this case, an organisation had been given the administrative power to limit access to a market in which it itself operated.<sup>147</sup> What ultimately tipped the judicial scales to the detriment of this administrative delegation was the systematic lack of safeguards against arbitrariness. The Grand Chamber of the ECJ put particular focus on the fact that the administrative power had been transferred without being subject to “restrictions, obligations and review”.<sup>148</sup>

Turning our focus towards cases involving regulatory areas where Member States have been granted a high level of discretion; being the most important venue for the demands for structural guarantees. The organisations of two major Swedish monopolies have been reviewed in the light of structural guarantees; ‘Systembolaget’ in *Franzén*<sup>149</sup> and ‘Apoteket’ in *Hanner*.<sup>150</sup> The ECJ elevated in both of these highly enlightening cases the existence of structural guarantees as being the critical element for the monopoly’s compatibility with the common market. The lack of a proper proportionality assessment seems to explain this reliance on structural guarantees, being a last attempt from the Union’s judiciary to ensure non-discrimination by requiring that potential arbitrariness is warded off.

In the *Franzén*-judgment, the ECJ did not see fit to examine whether Systembolaget in actual terms was indulging in discriminatory practices counter to Community law, but rather looked at the inherent structural compatibility of the regulatory framework surrounding the monopoly.<sup>151</sup> The rules governing the existence and operation of the retail monopoly were examined against Article 31 TEC (now Article 37 TFEU), and the effect on intra-Community trade by auxiliary national provisions were separately subjected to the condemna-

<sup>145</sup> Slot, P., “Rättsutlåtande om betydelsen av EG:statsstödsregler och konkurrensrätt för svensk bostadsmarknad och hyreslagstiftning”, *EU, allmännyttan och hyrorna, Bilagor*, SOU 2008:38, p. 74.

<sup>146</sup> Case C-49/07 *MOTOE* [2008] ECR I-4863.

<sup>147</sup> *Ibid.* para. 51.

<sup>148</sup> *Ibid.* paras 52–53.

<sup>149</sup> Case C-189/95 *Franzén* [1997] ECR I-5909.

<sup>150</sup> Case C-438/02 *Hanner* [2005] ECR I-4551.

<sup>151</sup> Case C-189/95 *Franzén* [1997] ECR I-5909, para. 31.

tion of the Court under Article 28 TEC (now Article 34 TFEU).<sup>152</sup> The fact that the Swedish authorities had introduced specific structural guarantees, in relation to the functioning of Systembolaget, prior to the accession to the EU, seems to have saved this statutory monopoly from being condemned by the ECJ. By referring to *Manghera*,<sup>153</sup> the ECJ confirmed that the monopoly merely had to be adjusted, in order to comply with Community law, not abolished.<sup>154</sup> The adjustments required by Article 31 TEC seem to equal the adoption of certain imperative structural guarantees. In its judgment, the ECJ put decisive weight on these guarantees; in length developing on the objective criteria set out in advance in the purchase plan of Systembolaget, the non-discriminatory nature of the selection process of products to be sold, the obligation for a negative decision to be accompanied with explicit reasons as well as being challengeable before an independent body of appeal.<sup>155</sup>

The challenges of Swedish retail monopolies continued as the ECJ a few years later was faced with the *Hanner* case, and yet again chose to put decisive weight on the existence of structural guarantees. Apoteket had not, as had been the case with Systembolaget, been invested with structural guarantees to exclude discriminatory effects on Community trade. The Grand Chamber of the ECJ ended up finding the organisation of Apoteket to be incompatible with Community law, just as its Advocate General had. But unlike AG Legér, the Court reached this conclusion on grounds of lacking structural guarantees rather than by a proportionality assessment accounting for actual effects on trade. Tenaciously referring to *Franzén*, the ECJ examined if the organisation of Apoteket excluded possible discrimination through for example a transparent selection system based on objective criteria, subject to independent review.<sup>156</sup> Finding that such “structural safeguards” against discrimination were lacking, the current organisation of Apoteket was, thence, proclaimed incompatible with Community law.<sup>157</sup>

In the abovementioned cases about the free movement of goods in relation to national retail monopolies, the ECJ displayed a quite extraordinary straightforwardness in its preference for the use of structural guarantees. However, the Court has in recent years shown that, when needed, structural guarantees can be successfully employed in the defence of other fundamental freedoms as well. The prime example of this selective use of structural guarantees as a judicial standard is the *Laval* case,<sup>158</sup> and especially so when viewed in contrast with its

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<sup>152</sup> Case C-189/95 *Franzén* [1997] ECR I-5909, paras 35–36.

<sup>153</sup> Case 59/75 *Manghera* [1976] ECR 9.

<sup>154</sup> Case C-189/95 *Franzén* [1997] ECR I-5909, paras 38–40.

<sup>155</sup> Case C-189/95 *Franzén* [1997] ECR I-5909, paras 44–52.

<sup>156</sup> Case C-438/02 *Hanner* [2005] ECR I-4551, para. 39.

<sup>157</sup> *Ibid.* paras 43–44.

<sup>158</sup> Case C-341/05 *Laval* [2007] ECR I-11767.

‘twin’ case; *Viking Line*.<sup>159</sup> Both cases supposedly invoked a balancing between the right to take collective action and a Community freedom. But the existence, or rather non-existence, of structural guarantees only became an issue in *Laval*, something which seems to have affected the required intensity of review.

Once again, the compatibility of Swedish administrative structures with Community law was questioned, this time within the framework of the national organisation of the labour market. The Grand Chamber of the ECJ recognised that Directive 96/71 on Posted Workers, being invoked in *Laval*, entitles a Member State to extend certain national regulations to foreign service providers. But the collective agreement in question was deemed to go above and beyond the requirements listed in this directive. The collective actions taken by Swedish trade unions to force through an adherence to such a collective agreement were therefore regarded by the ECJ to be a restriction of the fundamental freedom to provide services, as enunciated in Article 49 TEC.<sup>160</sup> Just as in the, by then, freshly released judgment in *Viking Line*, the restriction of the fundamental freedom was set to be balanced against the fundamental right to take collective action.<sup>161</sup> However, a closer look at the *Laval* judgment shows significant considerations being made regarding the lack of structural guarantees in the Swedish system.<sup>162</sup> This inherent lack of transparency and foreseeability seems to have been the determining factor which compelled the ECJ to take matters into their own hands. Instead of leaving the traditional balancing act of a proportionality judgment in the hands of the national court, as was done in the otherwise very similar *Viking Line* case, the Court in *Laval* clearly declared the Swedish system to be incompatible with Community law.<sup>163</sup>

Another situation, where structural guarantees have been granted a pivotal role, is when a Member State chooses to apply positive action regarding gender discrimination. Article 141(4) TEC (now Article 157(4) TFEU) opened a window for national discretion regarding positive action in order to combat gender discrimination, which is imbedded in the social fabric of a society. The ECJ’s judgment in *Kalanke*<sup>164</sup> firmly laid down the premise that positive action of an automatic character may not be permissible under Community law.<sup>165</sup> In terms of structural guarantees, the automatic nature of the specific national legal pro-

<sup>159</sup> Case C-438/05 *Viking Line* [2007] ECR I-10779.

<sup>160</sup> Case C-341/05 *Laval* [2007] ECR I-11767, para. 99.

<sup>161</sup> *Ibid.* para. 105 and Case C-438/05 *Viking Line* [2007] ECR I-10779, para. 79.

<sup>162</sup> Case C-341/05 *Laval* [2007] ECR I-11767, para. 110; where the ECJ found the “national context characterised by a lack of provisions, of any kind, which are sufficiently precise and accessible that they do not render it impossible or excessively difficult in practice for [a foreign service provider] to determine the obligations with which it is required to comply as regards minimum pay” to be unjustifiable under Community law.

<sup>163</sup> *Ibid.* para. 121.

<sup>164</sup> Case C-450/93 *Kalanke* [1995] ECR I-3051.

<sup>165</sup> Groussot, X., *General Principles of Community Law*, p. 177.



vision prevented any objective equality assessment, and hence any guarantees of equal treatment and good administration. In *Marschall*,<sup>166</sup> yet another German legal provision for positive action was challenged against the principle of equality. But through the investment in structural guarantees, this provision managed to receive the blessing of the ECJ. The provision under review functioned in all relevant parts like the one at hand in *Kalanke*, with the exception for what the Court termed the ‘saving clause’.<sup>167</sup> This clause was deemed to provide a sufficient guarantee that candidatures would be subjected to an objective assessment, which would negate the automatic nature of the positive action.<sup>168</sup> The combined impression of these cases represents yet another confirmation of the role which structural guarantees can play in these kinds of politically, as well as judicially, sensitive assessments.

## 6. CONCLUDING REMARKS

Elusive, as the concept of structural guarantees might have been until this point, it, nevertheless, manages to capture important current legal trends; providing a judicial middle-ground between national autonomy and effective enforcement of Union law. In recent years, the workings of European integration have changed towards, what has commonly been called, ‘new modes of governance’. Bernard summarised ‘new governance’ as entailing “power-sharing, diversity and decentralisation, flexible instruments and a re-assertion of the primacy of political processes over legal ones”.<sup>169</sup> She continued to make the contention that these ‘new modes of governance’, substituting strict top-down harmonisation, are generally provoked as a response to two main issues. These issues, being complexity and lack of legitimacy, are increasingly felt concerns vis-à-vis administrative structures throughout the Union.<sup>170</sup> Both of these issues have been discussed, through the course of this article, as factors, which have, indeed, induced a greater deference to national discretion in certain policy areas.

As the opening citation of this article suggests, however, ‘new modes of governance’ do not have to (and should not!) imply a void of governance. It is important to ensure an effective implementation of Union law, even in policy areas, which, due to either complexity or lack of legitimacy, have been withdrawn from the Union hegemony. The rule of law can be used by Union, as

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<sup>166</sup> Case C-409/95 *Marschall* [1997] ECR I-6363.

<sup>167</sup> *Ibid.* para. 24.

<sup>168</sup> *Ibid.* para. 33.

<sup>169</sup> Bernard, N., “‘New Governance’ Approach to Economics, Social and Cultural Rights”, p. 247–267; in: Hervey, T., and Kenner, J., (Eds.), *Economic and Social Rights under the EU Charter of Fundamental Rights-A Legal Perspective*, Hart Publishing, 2003, p. 248.

<sup>170</sup> *Ibid.* p. 254 f.

well as national, courts, to prevent the increased margin of national discretion from turning into undesirable arbitrariness. By channelling different GPUL, tangible administrative demands can be crystallised, and used as minimum standards in judicial reviews of national measures. These standards must be applied in a strict fashion, since they serve as, nothing less than, the last outpost of the rule of law throughout the Union.

The demands for structural guarantees serve the aim of an effective implementation of Union law. However, even if these demands are to be used strictly in a judicial review, they represent the very lowest requirements of integration. Union law imposes both positive and negative obligations on the Member States.<sup>171</sup> The demands for structural guarantees act as minimum positive obligations, which work in a complementary and subsidiary fashion; only stepping up in areas virtually untouched by Union harmonisation. For obvious reasons, these demands do not impose as intrusive positive obligations as those which could have been forced through with legislative harmonisation, and should hence not be viewed as a new progressive tool of integration. The strictly applied minimum criteria of structural guarantees should only be seen as a supplement to other, more demanding, judicial tools of review. This limited pre-test of the national structures is strictly anchored in demands based on Union law, while the proportionality test can take in a wider range of factors, including specifically national concerns. These basic structural demands are ultimately called for when a higher Union standard, based on proportionality, equality or an expressed statutory demand can not be used to review the national measure at stake.

It should be noted that the EU does in fact not have the specific competence to regulate the public service or the administrative and organisational structures of the Member States. But as national administrative law is being increasingly affected by parameters set out by the ECJ, national public services are being dragged into the European integration process ‘through the backdoor’, case by case.<sup>172</sup> Structural guarantees are at times demanded through Union legislative acts, but the development has, for the abovementioned reasons, primarily been propelled by case law.

To conclude this exposé on structural guarantees, and their function as a judicial tool, all that remains to be said is that, although, probably being the Union’s last best hope against arbitrariness, these standards still suffer from the lack of clarity which they have been created to combat. For the national courts to be able to efficiently make use of the concept of structural guarantees, the demands have to be further clarified by the ECJ.

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<sup>171</sup> See the distinction made in Jans, J., de Lange, R., Prechal, S., Widdershoven, R., *Europeanisation of Public Law*. Europa Law Publishing, 2007, p. 52.

<sup>172</sup> Demmke, C., “Undefined Boundaries and Grey Areas: The Evolving Interaction Between the EU and National public Services” 2 (2002) Eipascope, p. 11.